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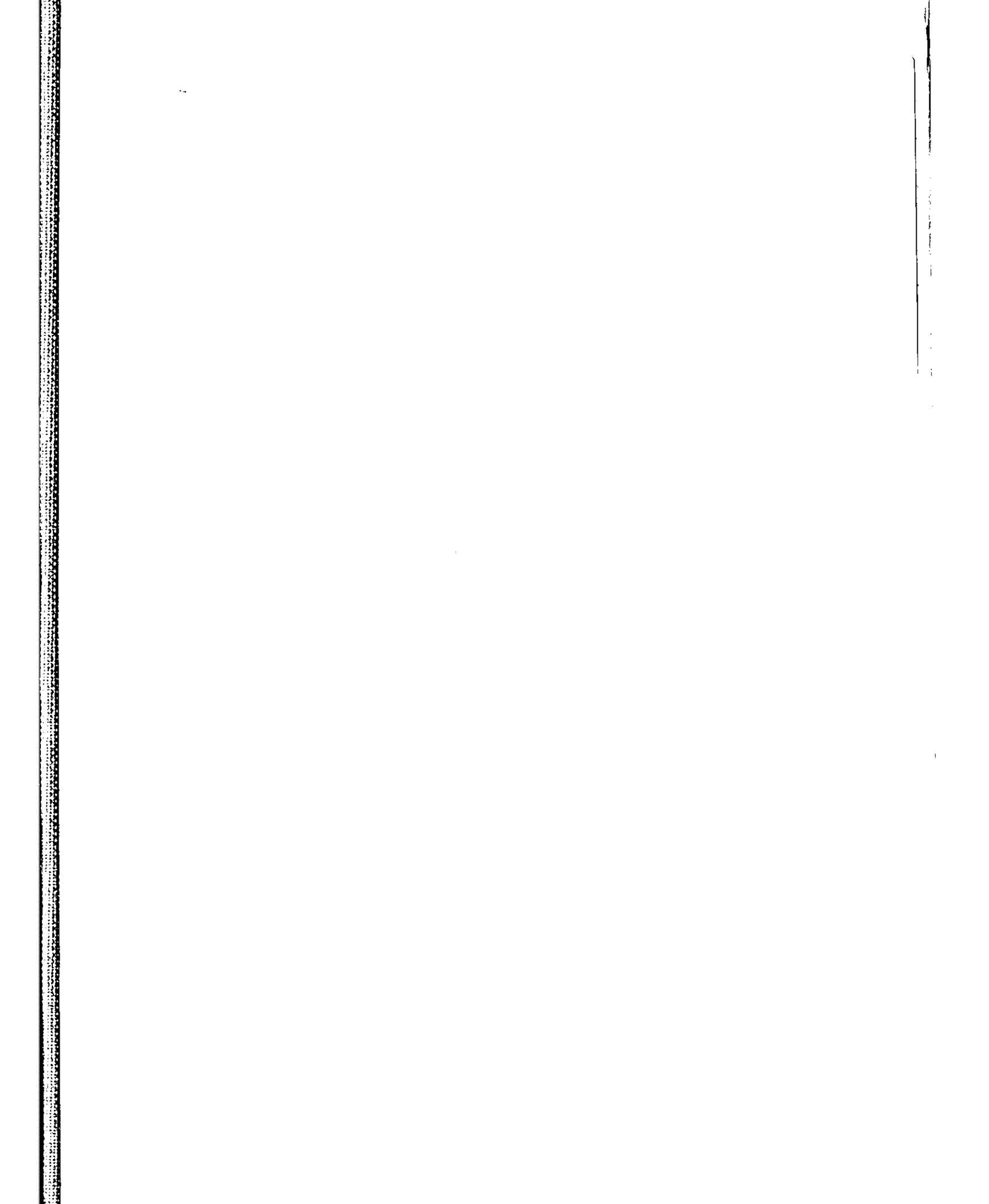
**IMMIGRATION DETENTION, TERRITORIALITY AND
HUMAN RIGHTS:
TOWARDS DESTABILIZATION OF SOVEREIGNTY'S
TERRITORIAL FRAME?**

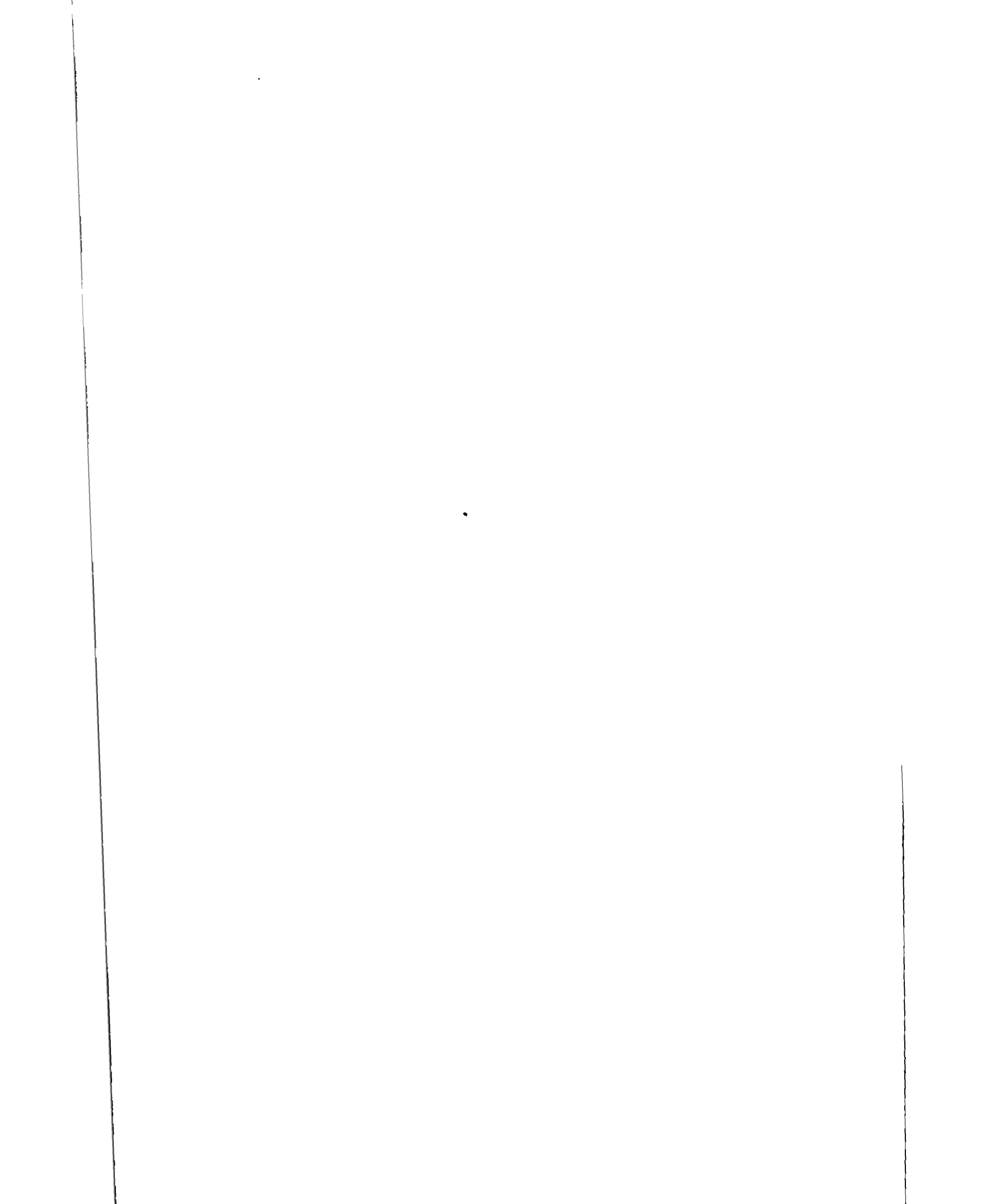
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Prof Neil Walker*

Thesis submitted with a view to obtaining the degree of
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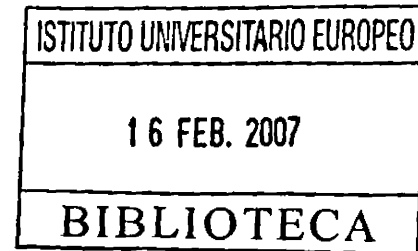






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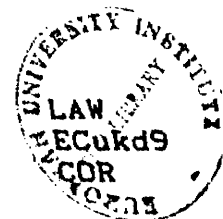
**IMMIGRATION DETENTION, TERRITORIALITY AND
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TERRITORIAL FRAME?**

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Florence, February 2006



CHAPTER 1 INTRODUCTION: IMMIGRATION DETENTION AND POLITICAL ORDER.....	6
1.1. INTRODUCTION.....	6
1.1.1 <i>Subject and scope of this study</i>	6
1.1.2 <i>Immigration detention as state practice within the EU</i>	11
1.1.2.2. The use of detention within the asylum system.....	16
1.1.2.3. Detention and removal.....	19
1.2. AIM OF THIS STUDY AND PLAN OF RESEARCH.....	27
1.3. CONTENT OF THIS STUDY.....	30
CHAPTER 2 SOVEREIGNTY, PEOPLE AND TERRITORY.....	36
2.1. INTRODUCTION.....	36
2.2. SOVEREIGNTY: LEGITIMISATION OF POLITICAL POWER WITHIN THE BODY POLITIC	40
2.2.1. <i>Development of the modern notion of sovereignty</i>	40
2.2.2. <i>The people as the source of legitimacy</i>	46
2.3. THE STATE, ITS TERRITORY AND IDENTITY: POLITICAL PARTICULARISM.....	50
2.3.1. <i>The sovereign claim to distinguish inside from outside</i>	50
2.3.2. <i>Emergence of territorial states and changing perceptions of allegiance and loyalty</i>	52
2.3.3. <i>Popular sovereignty and the discovery of the nation: inconsistent universalism</i>	56
2.3.4. <i>Nation and the territorially defined population as foundations of sovereignty</i>	62
2.4. CONCLUSIONS: BORDERS, VIOLENCE, AND SOVEREIGNTY'S CLAIMS.....	65
CHAPTER 3 LIMITS ON SOVEREIGN POWER.....	71
3.1. INTRODUCTION.....	71
3.2. CONSTITUTIONALISM AND THE RULE OF LAW.....	73
3.2.1. <i>The theory and practice of the limits on political power</i>	73
3.2.2. <i>The rule of law through institutional design and formal limits on government</i>	74

3.2.3. <i>Individual rights as material limits to political power</i>	76
3.2.4. <i>Judicial review, fundamental rights and the limits of the rule of law</i>	78
3.3. CITIZENSHIP, INDIVIDUAL RIGHTS AND TERRITORY	79
3.3.1. <i>Citizenship as an apparent paradox</i>	80
3.3.2. <i>National citizenship as a condition for access to universal rights</i>	87
3.3.3. <i>Citizenship's structuring role in a world of nation states</i>	89
3.4. INTERNATIONAL LAW AND VIOLENCE	92
3.4.1. <i>Sovereignty and international law</i>	92
3.4.2. <i>The national territorial state as the true and only subject of international law</i>	94
3.4.3. <i>Sorts of violence regulated by classical international law</i>	97
3.4.3.1. <i>Inter-state violence</i>	97
3.4.3.2. <i>Diplomatic protection and the treatment of minorities</i>	99
3.4.4. <i>International human rights</i>	104
3.5. CLOSING THE GAP: A MORE INCLUSIVE PROTECTION THROUGH HUMAN RIGHTS?	109
3.5.1. <i>Legitimacy and sovereignty</i>	109
3.5.2. <i>Identity and rights in the contemporary state: post-national citizenship</i>	111
3.5.3. <i>Sovereignty, territory, and individual rights</i>	120
3.5.3.1. <i>Territorial scope of human rights protection: Duties beyond borders?</i>	122
3.5.3.2. <i>Limits to the state's spatial powers</i>	131
3.6. CONCLUSIONS: A PARTICULARIST UNIVERSALISM?	134

CHAPTER 4 THE EXTENT OF THE RIGHT TO LEAVE..... 140

4.1. INTRODUCTION.....	140
4.2. <i>The right to leave in its historical context</i>	142
4.3. INTERNATIONAL LEGAL FRAMEWORK OF THE RIGHT TO LEAVE.....	152
4.3.1. <i>The right to leave as an international human right</i>	152
4.3.2. <i>Restrictions on the right to leave in the ECHR and the ICCPR</i>	153
4.4. CONCLUSIONS: THE RIGHT TO LEAVE AND THE VISIBILITY OF SOVEREIGNTY'S	
CONTENT	160

CHAPTER 5 THE RIGHT TO ENTER AND IMMIGRATION LAW

ENFORCEMENT	164
5.1. INTRODUCTION.....	164
5.2. DEVELOPMENT OF THE ASSUMPTION OF A SOVEREIGN RIGHT TO EXCLUDE.....	167
5.3. THE RIGHT TO ENTER AND REMAIN IN INTERNATIONAL LAW.....	179
5.3.1. <i>General limitations on the sovereign right to exclude</i>	180
5.3.2. <i>Refugee law and the prohibition of non-refoulement</i>	187
5.3.3. <i>Family rights and limits on immigration control</i>	199
5.4. THE EUROPEAN UNION, NATIONAL SOVEREIGNTY AND IMMIGRATION FROM THIRD COUNTRIES	205
5.4.1. <i>Freedom of movement within the EU</i>	206
5.4.2. <i>The Common Immigration and Asylum Policy</i>	210
5.5. REAFFIRMING SOVEREIGNTY: DEPORTATION AND DETENTION.....	218
5.5.1. <i>Deportation as administrative practice</i>	219
5.5.2. <i>Immigration detention, state power and territoriality</i>	226
5.6. CONCLUSIONS: FREEDOM OF MOVEMENT, SOVEREIGNTY AND RIGHTS IN A TERRITORIAL WORLD.....	232
5.6.1. <i>Freedom of movement and territoriality's implications</i>	232
5.6.2. <i>Territoriality and the asymmetry of international movement</i>	235
5.6.3. <i>Territoriality and limitations on the state's exclusionary powers</i>	240
5.6.4. <i>Maintaining the territorial order</i>	250

CHAPTER 6 IMMIGRATION DETENTION AND INTERNATIONAL

HUMAN RIGHTS	252
6.1. INTRODUCTION.....	252
6.2. PERSONAL LIBERTY AND ARBITRARINESS: UNIVERSAL HUMAN RIGHTS.....	255
6.2.1. <i>Scope and character of the right to personal liberty</i>	255
6.2.2. <i>Article 9 of the International Covenant of Civil and Political Rights</i>	256
6.2.2.1. <i>Prohibition of arbitrariness in Article 9 ICCPR</i>	258
6.2.2.2. <i>Procedural guarantees</i>	261
6.2.2.3. <i>Conditions of immigration detention and arbitrariness</i>	264
6.3. HUMAN RIGHTS AND DETENTION OF REFUGEES AND ASYLUM SEEKERS.....	265

6.4. REGIONAL DISCOURSE: THE COUNCIL OF EUROPE AND IMMIGRATION DETENTION	269
6.5. CONCLUSIONS: THE RIGHT TO PERSONAL LIBERTY AND SOVEREIGNTY'S FRAME	272

CHAPTER 7 IMMIGRATION DETENTION AND THE ECTHR: A LIMITED DISCOURSE?.....277

7.1. INTRODUCTION.....	277
7.2. LEGITIMATE AIMS OF IMMIGRATION DETENTION UNDER THE ECHR.....	278
7.3. THE PROHIBITION ON ARBITRARY DETENTION IN ARTICLE 5 ECHR.....	280
7.3.1. "Lawful" detention "in accordance with a procedure prescribed by law".....	280
7.3.2. Safeguards against arbitrary detention in Article 5 ECHR.....	283
7.4. IMMIGRATION DETENTION AND THE PROHIBITION OF ARBITRARINESS.....	289
7.4.1. General.....	289
7.4.2. Lack of predictability and inappropriateness as elements of arbitrariness.....	290
7.4.3. When do the prevention of illegal entry and securing expulsion justify detention?	293
7.5. PROPORTIONALITY AS A GENERAL PRINCIPLE EMBODIED IN THE ECHR.....	300
7.5.1. The concept of proportionality in the Strasbourg case law.....	300
7.5.2. The margin of appreciation and proportionality.....	307
7.5.3. Deprivation of liberty of persons of unsound mind, alcoholics and vagrants	308
7.6. CONCLUSIONS: IMMIGRATION DETENTION AS THE BLIND SPOT OF THE ECHR? ..	311

CHAPTER 8 CONCLUSIONS: DESTABILIZATION RIGHTS AND SOVEREIGNTY'S TERRITORIAL FRAME.....316

8.1. SOVEREIGNTY'S FRAME AND CONSTITUTIONALISM'S TERRITORIAL BLINDNESS..	316
8.1.1. Nationalism and the reification of territoriality: particularistic universalism	317
8.1.2. The territoriality of the modern rule of law and its territorial blind spot ..	320
8.1.3. Freedom of movement and the modern version of the rule of law	321
8.2. IMMIGRATION DETENTION AS THE LITMUS TEST OF THE TERRITORIAL ORDER.....	326
8.3. DESTABILIZATION RIGHTS AND IMMIGRATION DETENTION	328

BIBLIOGRAPHY.....	338
TABLE OF CASES.....	374

Chapter 1 Introduction: immigration detention and political order

1.1. INTRODUCTION

From a sociological point of view, camps or transit zones may present the institutionalisation of temporariness as a form of radical social exclusion and marginalisation in modern society and a conservation of borders as dividing lines.¹

1.1.1 Subject and scope of this study

All Member States of the European Union have provisions in their immigration legislation under which they can deprive foreigners of their liberty. The use of detention for immigration related purposes by these countries has greatly increased over the past few years.² Concerning asylum seekers this increase seems to be related to the extended use of accelerated procedures and preliminary border checks due to the implementation of the principles of safe third country, safe country of origin and the Council Regulation replacing the Dublin Convention.³ Concerning immigration in general it can be said that Member States perceive growing problems related to irregular immigration and one of their responses has been an increasing exercise of their powers to detain illegal immigrants.

The institutionalised practice of immigration detention has become an inherent part of a policy package that has as its main aims to deter future irregular migrants and to remove those already on national territory as fast and as effectively as possible. If these policies are criticised by NGO's or other social actors, Member States defend their

¹ Tóth (2006), p. 3.

² Kelly (2005), p. 2.

³ Council Regulation No 343/2003 of 18 February 2003, establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. OJ L 50/1, 25 February 2005.

detention policies with arguments bearing on the growing numbers of foreigners, the need to maintain the integrity of border controls and security related issues.

Detention of immigrants is seldom a transparent practice: information concerning detention facilities is often not made public and many of these facilities are located at isolated places. In addition, journalists are habitually denied access, allegedly in order to respect the privacy of the inmates but resulting in the absence of public control over the conditions, legality and procedures inside immigration detention centres.⁴ In 2004, an Italian journalist infiltrated in a detention centre in Sicily by acting as a Kurdish refugee and published an article on humiliating conditions that he had witnessed and experienced during his stay here.⁵ Instead of taking legal steps that might have resulted in the improvement of the conditions at the centre, the Italian state opened a case against the journalist on charges of presenting a false identity.⁶ After the Italian section of 'médecins sans frontières' published a critical report on the circumstances in various closed centres for migrants, the organisation was accused of disloyalty by the Italian government and denied entry to immigration detention centres.⁷

Numerous reports by NGO's in various countries describe instances of abuse of force by the police, lack of structures for adequate accommodation, illegal detention beyond the foreseen time limits, and the detrimental effects of detention on the mental health of immigration detainees.⁸ More often than not, these reports are confirmed by findings of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) during its visits to places where individuals are deprived of their liberty. Furthermore, detaining children in immigration detention

⁴ Tóth (2006), p. 8.

⁵ See Gatti (2005)

⁶ International Helsinki Federation for Human Rights (2006), p. 215. The same journalist had already been handed a suspended 20 days sentence on the same charges in 2004, as he had infiltrated a detention facility for immigrants in Milan in 2000.

⁷ See Statewatch (June 2004) The main violations that MSF found in this report pertained to limited contacts with the national health service; insufficient legal assistance; irregular use of psychiatric drugs; and excesses during interventions by guards. See Médecins Sans Frontiers (2004).

⁸ See for only a few examples: Amnesty International United Kingdom (2005); Amnesty International Italy (2005); Amnesty International Spain (2005); Aide aux Personnes déplacées et al. (2006); and Cimade (2004).

centres is becoming standard practice in many countries,⁹ contrary to international and domestic norms protecting children's rights.¹⁰

In addition to the lack of homogenous legislation on asylum and immigration in the Member States of the European Union, serious legal gaps as well as logistic and material problems exist with regard to the detention of non-citizens under immigration legislation. Immigrants are being accommodated in hotels or makeshift shelters for extended periods, and the lack of space in the reception centres is often compensated with accommodation in prisons. Schemes of legal assistance are often flawed, adequate medical structures absent, and the incidence of auto-mutilation and (attempted) suicides under the population in immigration detention is high.¹¹ The British press in particular regularly features reports about abuse at immigration detention centres, but also in other countries the public media increasingly publish evidence of unacceptable conditions in closed centres for immigrants, reflecting a growing concern in civil society about the practice of immigration detention.¹²

Under these circumstances, the detention of thousands of people in Europe, merely because they allegedly breach the state's territorial sovereignty, may easily be labelled as an anomaly for Western liberal democracies, especially when seen in the context and development of citizenship discourse, constitutionalism and human rights. However, it would be too easy to portray immigration detention solely like an incongruity for otherwise liberal regimes.

Instead, in this study I will argue that the practice of depriving unwanted foreigners of their liberty is a consequence of the territorial foundations of the global political system and their impact on constitutional discourse. Some forms of state violence have become so embedded in our understanding of the state and the structure of which it forms part of that they have remained insulated against the usual forms of legal correction and political control. Thus it seems natural that either nationality or the absence of state authorisation for presence on national territory can legitimately

⁹ Such as the United Kingdom, Ireland, Italy, the Netherlands, Latvia, Spain, Lithuania, Greece, Finland, France, Belgium and Poland. See Bolton (2006) and Gil-Robles (8 June 2005), p. 18.

¹⁰ Gil-Robles (15 February 2006), par. 254.

¹¹ Silove, Steel and Mollica (2001); and Pourgourides (1998)

¹² Allegations of ill-treatment of migrants suffering from psychiatric disorders in the closed centre of Vottem for irregular migrants, disclosed by guards of the centre, have recently prompted Amnesty International to call for an independent investigation. VRT News, Belgium (16 November 2006).

constitute a ground for discrimination and a possible reason for the use of various forms of state violence.

Before turning to the way in which I intend to address these issues in this study, I will attempt to bring to life the structural features of the practice of immigration detention in EU Member States in order to contextualise my subsequent discussion of the law and theory pertaining to immigration detention in later chapters. In this study, I will use the term immigration detention to designate the administrative decision to deprive an individual of his liberty for reasons that are directly linked to immigration policy. This entails that both irregular migrants and asylum seekers fall under the scope of this study. At certain points, the distinction between the two groups will be explicitly made, for example when the relevant legal norms are applicable to only one of the two categories or when the description of state practice requires the distinction. However, it is important to mention at the outset that the focus of this study will not be on the deprivation of liberty of either asylum seekers or irregular migrant as distinct categories, but on the administrative detention of individuals on account of the lack of state authorisation for their presence on national territory.

With regard to this focus on administrative detention, an important complication needs to be mentioned with regard to the detention of foreigners in the EU, which is the tendency towards increasing criminalisation of illegal entry or stay on national territory. A state that has defined these acts as criminal offences, can “detain, charge, convict and sentence to further detention under criminal law” irregular migrants and even applicants for asylum.¹³ Cyprus for example appears to have no closed centres for irregular migrants and asylum seekers in surveys that address immigration detention. However, irregular immigrants in Cyprus are detained in police custody while awaiting verification of identity.¹⁴ As illegal entry and stay are penal offences under Cypriot law, punishable up to two years in prison, detention is not an administrative measure, but a

¹³ Guild (2006). See for international law relating to deprivation of liberty as a criminal sanction on illegal entry: Pacurar (2003), pp. 9-10.

¹⁴ Foreigners that have been arrested for illegal entry or stay and then apply for asylum are detained for the duration of the sentence that is handed for their “offence”. If their applications are rejected they are kept in police cells, until they can be deported, which often takes a long time due to reluctance of the embassies of countries of origin to cooperate. See EU Foreigners in Prison Project, Country Report Cyprus, pp. 3 and 17.

penal one.¹⁵ Also in Germany, illegal entry and residence in certain cases constitute criminal offences, and subsequent penal detention takes priority over administrative detention pending removal.¹⁶

In various other Member States, although they do not necessarily define illegal stay and entry as criminal offences, the legal position of the foreign detainee who was initially apprehended on criminal charges is often unclear, due to the interaction between criminal proceedings with the administrative procedure of expulsion to leave the country.¹⁷ Although the increasing criminalisation of irregular migration is highly significant for the practice of detaining individuals as a response to a breach of the state's territorial sovereignty, for practical reasons concerning the length of this study, only the practice of administrative detention under immigration legislation will explicitly fall within its scope.

Another preliminary remark needs to be made about the terms "detention" and "deprivation of liberty", which are used interchangeably in this study. The line between deprivation of liberty or detention on the one hand and restrictions upon personal liberty on the other hand is not always easy to draw. The European Court of Human Rights has observed that in many cases, that difference is merely one of degree or intensity, not one of nature or substance, and that some borderline cases are a "matter of pure opinion".¹⁸ This court regards the cumulative impact of the restrictions, as well as the degree and intensity of each one separately, when deciding as to whether one can speak of *deprivation* of liberty, in which case other guarantees apply than in the case of restrictions on free movement.¹⁹

Especially in the area of migration law, the line between deprivation of liberty and restrictions upon free movement can be a blurred one. The most common

¹⁵ Ibid. p. 17-18. In additional complication of such an approach is that it is difficult to obtain precise numbers of the persons detained for these "offences", as they are grouped together with other offenders in the statistics. Recently, the Cypriot government has been reconsidering the criminalisation of illegal entry of irregular migrants (Commissioner for Human Rights, Follow-Up Report on Cyprus, 2006).

¹⁶ EU Foreigners in Prison Project. Country Report Germany pp. 41-42. Other countries that define irregular stay or entry under certain conditions as criminal offences that are punishable by prison sentences are Estonia; France; Greece; Ireland; Italy; Lithuania:

¹⁷ See for example EU Foreigners in Prison Project. Country Report Belgium, p. 19.

¹⁸ ECtHR, *Guzzardi v. Italy*, 6 November 1980, §93.

¹⁹ Ibid. par. 95. See also UNHCR (1999). Revised Guidelines on Applicable Criteria and Standards Relating to the detention of asylum seekers, Guideline 1.

distinction made in this regard is that between closed and open centres, the latter often referred to as reception centres where the individuals who are required to reside can leave at will or within reasonable limits.²⁰ These so-called open centres, generally housing applicants for asylum, will not be included in my analysis.²¹ Neither will I look at migrants that are subjected to mandatory residence requirements, as they are merely *restricted* in their personal liberty, just as those that are obliged to report frequently to the authorities. Only the practice of placing individuals in closed centres, or in any other narrowly confined location that they are not able to leave, including a ship, train or vehicle,²² will be the subject of my investigation.

Especially with regard to the situation of irregular migrants and asylum seekers that are kept in transit zones, such as the international zone of an airport, specific problems may arise with regard to the question whether one can define their situation as a deprivation of liberty. States have repeatedly argued that individuals who are held in these zones are not deprived of their liberty, either because they are free to leave at will, or because they are not yet present on the territory of the state in question. These issues will receive detailed attention in later chapters where the impact of international human rights law on practice of immigration detention is discussed, but in this introduction, transit zones will explicitly be included in my presentation of a general overview of the practice of immigration detention.

1.1.2 Immigration detention as state practice within the EU

A first difficulty that one encounters when attempting to present an overview of state practice in this field is to obtain reliable figures with regard to immigration detention.²³ Many governments do not have coherent systems of recording figures

²⁰ Guild (2006), p. 3.

²¹ See for an example the centres in the Spanish enclaves in Ceuta and Melilla, where migrants are free to leave during the day but need official permission if they want to leave for more than 24 hours. See European Parliament, Committee on Civil Liberties, Justice and Home Affairs (January 2006).

²² See UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention (28 December 1999).

²³ On the grounds of partially available data, Jesuit Refugee Service (2004) estimated that the number of immigration detainees in Europe may be in the 100.000 persons per year.

concerning immigration detention, especially when it comes to the duration of detention and the reasons for ending the detention. Even the total numbers of immigration detainees is often unknown to national governments themselves,²⁴ as different categories of persons or different places for detention fall under different regulations and authorities.²⁵ If states do keep statistics, they are notoriously reticent to make them available to the public.²⁶ This official haziness surrounding immigration detention is exacerbated by the fact that in many countries, not only media but also human rights

²⁴ In Austria, for example, reporting on administrative detention for immigration law purposes is extremely deficient (EU Foreigners in Prison Project, Country Report Austria, p. 24) In Greece, the lack of publication of any data by the Ministry of Public Order makes the calculation of the number of persons affected by administrative detention nearly impossible. (EU Foreigners in Prison Project, Country Report Greece, p. 21). In Malta, none of the NGO's involved, nor the ministry is able to provide reliable figures of the persons detained at any time. (EU Foreigners in Prison Project, Country Report Malta). In the United Kingdom, the Home Office only releases 'snapshot' figures that range from 1105 detained asylum seekers on a given day to 1515. Amnesty International has concluded that the Home Office quarterly statistics belie the true scale of detention and this organisation believes that thousands of people are detained every year (EU Foreigners in Prison Project, Country Report United Kingdom, p. 34). France records 25.828 persons that were detained under immigration legislation in 2004. However, persons kept in zones d'attente are not included in this number. Countries that detain relatively low persons under immigration legislation generally keep better statistics, such as Estonia that recorded 68 immigration detainees in the period from 10 March 2003 until 31 December 2005 (EU Foreigners in Prison Project, Country Report Estonia) and Ireland that records 946 persons detained under immigration legislation for 2004 (EU Foreigners in Prison Project, Country Report Ireland).

²⁵ See for example France where some of the administrative detention facilities fall under control of "Sécurité Public Regional", some under the border police and some others again under the Gendarmerie (EU Foreigners in Prison Project, Country Report France). In a federal state such as Germany these difficulties are compounded because the federal states each have different regulations.

²⁶ Guild (2006), p. 4. Some exceptions exist such as Belgium: according to the Office for Foreigners Affairs, 7.622 individuals have been detained during the year 2004 in closed centres for migrants (EU Foreigners in Prison Project, Country Report Belgium) and The Netherlands, reporting a total of 1952 irregular migrants detained at 31 December 2004 (Dienst Justitiële Inrichtingen at <http://www.dji.nl>). In Sweden, a daily average of 214 persons was detained in 2005 (EU Foreigners in Prison Project, Country Report Sweden). According to the Hungarian authorities, around 6000 foreigners a year are placed in detention (Commissioner of Human Rights, Follow-Up Report on Hungary, 2006, p. 19). In other countries, possible indicators of the numbers of immigration detainees are the places officially available for immigration detention: i.e. Germany: 2250; Finland: 40; Hungary: 640; Lithuania: 500; and Slovenia: 180 (See the respective Country Reports of the EU Foreigners in Prison Project); and the United Kingdom: around 2750 at the end of 2005 (Gil-Robles, 8 June 2005, p. 15.)

organisations are frequently denied access to places where migrants are kept in detention.²⁷

The factual information in the following paragraphs is to a large extent drawn from the “EU Foreign Prisoners Project”, an extensive study on foreigners in European prisons that was recently completed in cooperation with the EU.²⁸ The object of that project, encompassing all 25 Member States of the European Union, is to address the issue of social exclusion of prisoners who were detained in Europe outside their countries of origin. In addition to the various country reports of the EU Foreign Prisoners Project, I will make use of other sources of information such as the Council of Europe, various NGO’s and occasionally national governments.

Partly drawing on Elspeth Guild’s classification in her report for the European Parliament on a typology of different types of centres in Europe,²⁹ I will distinguish between three types of immigration detention in order to present structural features of state practice in this area. These are detention upon arrival; detention of individuals within the asylum system; and detention as a result of a decision to deport or expulse the foreigner.³⁰

²⁷ See Written questions E1104/05 and E1118/05 (23 March 2005) by MEPs H. Flautre and J. Muscat to the European Commission as regards the situation in Malta. 23 March 2005. See also the European Parliament Resolution on the situation with refugee camps in Malta of 6 April 2006, calling for unlimited access to the centres of the UN High Commissioner for refugees and competent NGO’s who were formerly denied access. Another example is France, where only CIMADE, an ecumenical care service that provides social and legal support has access to the administrative detention centres. Regular human rights organisations are also denied access to the zones d’attente. See EU Foreigners in Prison Project, Country Report France.

²⁸ See <http://www.foreignersinprison.eu>. Co-ordinated by Tilburg University, the Netherlands. The various country reports (publication to be expected in February 2007) that the contributors to the project have written will be referred to as “FPP-CR - name of the relevant state” throughout this study.

²⁹ Guild (2006).

³⁰ *Ibid*, p. 5.

1.1.2.1. Detention upon arrival

From southern Algeria to Malta, from the Island of Lampedusa to the Ukrainian border, and from the Canaries to Slovenia, camps of all types are now strung out like so many nets for migrants, with the common aim of impeding, if not blocking, their way into Europe.³¹

Most EU Member States are familiar with legislation that provides for detention of foreigners upon arrival in the state. Often, such detention is ordered by border guards and it is carried out in a so-called transit zone, which can be the international zone of an airport, or any other place located close to border crossings.³² Also regular prisons or centres specifically designed for immigrants are used.³³ Detention is thus used to prevent unauthorised entry, and serves to clarify the conditions for entry, including verification of identity. At times it is also justified by states with an appeal to health hazards or in order to implement readmission agreements.³⁴

Serious concerns have been expressed by NGO's and other political actors about detention upon arrival, as the legal position of the detainee is often unclear and not enough guarantees are applicable to the deprivation of liberty.³⁵ Insufficient access to legal aid appears to be structural, detainees are often not told of the reasons for their detention at all, or, when they are, not always in a language that they understand.³⁶

³¹ Rodier (2003).

³² In France, zones d'attente were introduced in 1992, and are defined as places where "the foreign national arriving in France [...] who is not authorised to enter French territory or who seeks asylum" will be detained "during the time strictly necessary for his leave, and, as an asylum seeker, for a check of his demand." There are more than 100 waiting zones facilities, most of them small rooms, for instance police stations, hotel rooms, administration offices, and are located near the borders, airports, harbours or railway stations. However, the great majority of those detained upon arrival in France are found in the waiting zone Roissy-Charles de Gaulle in Paris (FPP-CR-France).

³³ For example the so-called Grenshospitium in The Netherlands

³⁴ FPP-CR's-Czech Republic and Hungary.

³⁵ The French term for deprivation of liberty in these zones d'attente is 'retention', in which case lesser safeguards are applicable to the persons concerned than in the case of detention, as France maintains that these people are free to leave French territory. Judicial review of the detention takes place after 72 hours, instead of the 48 hours normally required by law in immigration detention cases (FPP-CR-France).

³⁶ See Jesuit Refugee Service (2004). Following its visit in 2002 to the Czech Republic, the CPT signalled serious shortcomings concerning the information provided for the detainees on their legal position and rights (CPT, 12 March 2004, pp. 20-29). Also with regard to the situation of the immigration detainee in

Furthermore, the conditions in these places are regularly below national constitutional and international legal standards as well.³⁷ The length of time that a migrant may spend in pre-admittance detention varies greatly from less than 24 hours to several weeks, even months, and only some states have the duration of this kind of detention limited by law.³⁸

The southern borders of the EU deserve special mention with regard to detention upon arrival. Large numbers of migrants who have been apprehended while attempting to reach mainland Europe are held on Malta, Lampedusa and the Canary Islands in what have been described as “internment camps of dubious legality where people are

Hungary, CPT expressed concern about access to information in a language that the foreigner could understand (CPT, 29 June 2006, pp. 24-25). In Latvia, the judicial review of the immigrant who is deprived of his liberty lacks the required effectiveness, as the rights of the persons concerned are not clearly defined and the right to legal assistance is difficult to exercise. Latvia provides no legal assistance or exemption of legal fees (EU Network of independent experts on Fundamental Rights, 2005, pp. 74-75). In Ireland, persons deprived of their liberty upon arrival are not informed of their right to bring legal proceedings against the detention, neither are they asked if they require legal assistance, nor are they informed that they can request it (Kelly, 2005, pp. 21-23). To these already significant problems, it can be added that many of the detention centres are far removed from anywhere, which makes contacts with lawyers even more difficult. See Gil-Robles (8 June 2005), p. 17 with regard to the United Kingdom.

³⁷ The INADS centre at Brussels Airport for persons that arrive without documentation and who are refused entry in Belgium territory (INADS) has been criticised several times by the CPT, in particular with regard to factual access to a lawyer and the lack of any activity for people that are kept in waiting zones for weeks, sometimes even months (See for the most recent report: CPT (20 April 2006). Also Germany has received criticism in this respect, especially regarding the situation in the transit zone at Frankfurt am Main Airport (CPT, 12 March 2003, p. 60.) With regard to the situation in the United Kingdom, HM Chief Inspector of Prisons observed that none of the short term holding facilities in Heathrow were fit to hold detainees overnight, although all held detainees overnight and sometimes detainees were held there for up to 36 hours. Detainees asking but failing to get legal advice and basic information about their detention formed a structural problem as well (HM Chief Inspector of Prisons, 2006b, p. 5. It can be added that many of the detention centres are far removed from anywhere, which makes contacts with lawyers even more difficult. See Gil-Robles (8 June 2005), p. 17 with regard to the United Kingdom.

³⁸ For example Ireland, where detention of people “refused to land” may not exceed 8 weeks. However, if those individuals bring legal proceedings to challenge the validity of the detention, the ‘clock is stopped’ on this 8 week period (Kelly 2005). But see also Hungary, which has a time limit for ‘detention for refusal’ of thirty days. However, if the authorities simply take a formal decision to expel the foreigner, the legal basis of the detention alters, and the foreigner can then remain legally in so-called aliens policing detention for a maximum of one year (FPP-CR-Hungary).

deprived of their freedom yet supposedly are not prisoners.”³⁹ These centres in particular have repeatedly been condemned on account of both the deplorable material conditions in which the detainees are held there, and their legality.⁴⁰

1.1.2.2. The use of detention within the asylum system

Regarding the detention of asylum seekers,⁴¹ state practice shows a diverse pattern. All European governments detain people in the asylum procedure, but the conditions, maximum duration and actual time spent in detention by an asylum seeker are widely differing in the various Member States. It is important to note that with regard to this type of detention, relevant EC law exists. Under Article 18(1) of Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, the Member States shall not hold a person in detention for the sole reason that he applied for asylum.⁴²

³⁹ European United Left/Nordic Green Left (May 2006), p. 11.

⁴⁰ The delegation of the European Parliament that visited the various Maltese administrative detention centres described the conditions as appalling, “*unacceptable for a civilised country and untenable in Europe which claims to be the home of human rights.*” (European Parliament, Committee on Civil Liberties, Justice and Home Affairs 30 March 2006, p. 9). See also the criticism expressed by the Spanish Ombudsman as regards the situation in Fuerteventura and Lanzarote, addressing overpopulation, inadequate facilities, hard conditions of life, secrecy and lack of transparency, lack of interpreters and lack of regular medical care (FPP-CR-Spain); and European United Left/Nordic Green Left (2005) with regard to the situation at Lampedusa. Regarding the centre in Lampedusa, the Council of Europe Commissioner of Human Rights noted that at times of large influxes, “*the congestion and overcrowding [...] defy imagination. The centre falls totally short of the minimum standards of space and hygiene needed to accommodate numbers beyond its official capacity in decent condition.*” (Gil-Robles, 14 December 2005, p. 38.)

⁴¹ It should be noted that detention upon arrival and detention of asylum seekers are not always separate categories as asylum seekers are often detained upon arrival in a state. See for example Poland, where asylum seekers are not detained, unless they apply for asylum while staying illegally on national territory, during border control while they have no right to enter, or when they attempt to cross borders contrary to the law (FPP-CR-Poland). Taking into account that few persons seeking international protection first await a decision on a visa application in their countries of origin, many asylum seekers will be detained upon arrival in Poland.

⁴² OJ L 326/23 of 13 December 2005. See also Article 7 of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the Member States (OJ L 31/18 of 6 February 2003), which provides that Member States are authorized to confine an applicant to a

Nevertheless, numerous countries detain asylum seekers without much further justification than the fact that they are asylum seekers, sometimes for a short time in order to determine the admissibility of the application,⁴³ often as part of a 'fast-track procedure', after which those not rejected on admissibility grounds, are transferred to open centres.⁴⁴ However, sometimes the detention of asylum seekers lasts longer and has almost become an inherent part of some stage,⁴⁵ or even the whole of the asylum procedure.⁴⁶ Concern has been voiced about this practice in particular as some feel that

particular place in accordance with their national law only "*when it proves necessary, for example for legal reasons or reasons of public order*".

⁴³ Or, as is the case in Czech Republic where all applicants for asylum are initially detained, in order to identify the individuals; to subject them to a medical check; and to initiate the asylum procedure (FPP-CR-Czech Republic). In Italy, asylum seekers may be detained for a maximum of thirty days in a so-called identification centre (Gil-Robles, 14 December 2005, p. 35).

⁴⁴ As in Portugal, where asylum seekers are detained until the authorities decide that they have legitimate grounds for asking for asylum, which takes an average of three days. Thereafter, those applying for asylum on legitimate grounds are transferred to open reception centres (FPP-CR-Portugal). Finland only detains asylum seekers after they have received a negative decision on their application (FPP-CR-Finland, p. 19) In Latvia, asylum seekers are detained if their identity is not confirmed, or if their claims have been rejected and they await expulsion (FPP-CR-Latvia).

⁴⁵ In Austria, asylum seekers may be detained prior to a first negative decision if a procedural notice is issued by the Federal Asylum Authority during the admissibility proceedings stating that the application is likely to be dismissed or rejected, while there is no appeal possible against such a notice (EU Network of independent experts 2005, p. 75-76).

⁴⁶ See for example Hungary where the detention of asylum seekers depends on "*accidental circumstances and arbitrary decisions of the authorities*". If the asylum seeker is able to file an application for asylum before he is apprehended by the border guards, he will not be detained. However, if the border guard apprehends him before he can do so, he will be detained and an alien policing procedure will be started against him before he can possibly submit an application for asylum. Although the pending expulsion will be suspended as soon as he submits an application, it will keep serving as the basis for continued detention (FPP-CR-Hungary, par. 3.5.). Malta has mandatory detention policy for asylum seekers and irregular migrants alike, but whereas for the latter group, the maximum length is 18 months, asylum seekers may not be detained for over 12 months. However, these limits are merely administrative practice, and are not laid down in any binding legislation (Commissioner of Human Rights, Follow-Up Report on Malta, 2006). In Greece, not all asylum seekers are detained, but those that file an application whilst in immigration detention (i.e. on the grounds of illegal entry or stay) remain in detention until a decision on their applications is given, or until the time limit of three months expires (FPP-CR- Greece). In the United Kingdom, the vast majority of those detained have applied for asylum at one stage or another (FPP-CR United Kingdom; and Gil-Robles, 8 June 2005).

“detention is resorted to on the basis that a bed is available in a detention centre,” rather than considering the “necessity, legality and appropriateness” of detaining asylum seekers.⁴⁷

Furthermore, widespread discrimination on the grounds of nationality exists, as some states routinely detain certain nationalities (or ethnic groups),⁴⁸ whereas others seldom or never end up in an immigration prison. Although some countries only allow for the detention of asylum seekers if it is ordered by a judicial authority,⁴⁹ in many other countries, the decision to detain is taken administratively.⁵⁰ In that case, extensive discretion often exists for individual immigration officers to decide about the detention of asylum seekers,⁵¹ and sometimes automatic judicial review is absent,⁵² or it can take a long time.⁵³ It should be noted that most countries’ legislation allows for the detainees themselves to contest the lawfulness of the detention through judicial review, habeas corpus proceedings or bail.⁵⁴ Nonetheless, even in such cases, the possibility of

⁴⁷ Amnesty International EU Office (2005). See also Jesuit Refugee Service (2004), p. 4.

⁴⁸ I.e. Roma in the United Kingdom. See Weber (2003).

⁴⁹ Estonia, Germany, and Sweden.

⁵⁰ Finland (where the decision to detain is taken by the police but needs to be reviewed by a judge within four days); France (where the decision to detain is taken by the préfet, and must be reviewed within 48 hours); Hungary (where the administrative decision to detain must be reviewed within five days); Latvia (where the administrative decision to detain pertains to a maximum period of ten days, and prolongation may only be given by a judge); Lithuania and Poland (where detention of more than 48 hours can only be ordered by a court, and where in the former country, the foreigners presence is mandatory during the Court’s hearing); The Netherlands; Belgium; Austria; Greece; the United Kingdom; Portugal; and Ireland (where asylum seekers that are detained must be brought before a judge as soon as practicable (Kelly, 2005, p. 29).

⁵¹ UNHCR Executive Committee (4 June 1999), p. 168. See Gil-Robles (8 June 2005) and Weber (2003) with regard to the situation in the United Kingdom.

⁵² Greece and the United Kingdom. If automatic judicial review is absent, the detention may be subject to periodical automatic administrative review as is the case in the latter country (Gil-Robles, 8 June 2005).

⁵³ In the Netherlands, automatic review by a court of the lawfulness of the detention is provided, but it can take up to 7 weeks until it actually takes place. See Baudoin (2004).

⁵⁴ With the important exception of Malta, where no proper form of judicial review exists, although there is the possibility to appeal to an administrative board, which can only order release in a limited number of circumstances (FPP-CR-Malta). In theory, the habeas corpus procedure from the criminal code is applicable, but has never been used (Gil-Robles, 12 February 2004). In the United Kingdom, immigration detainees can apply for bail.

effectively contesting one's detention is frequently non-existent due to the lack of information provided to the detainees, or insufficient access to legal aid.⁵⁵

In addition, the detention of refugees in particular may also prejudice their legal position as persons applying for international protection, as they are not always informed about the possibility of applying for asylum while in detention, and sometimes they are even impeded from access to the asylum system as a result of their detention.⁵⁶

1.1.2.3. Detention and removal

The last category that I will address is the detention as a result of a decision to deport or expel the foreigner.⁵⁷ If a third-country national⁵⁸ has been ordered to leave

⁵⁵ Often one encounters similar problems as were discussed above with regard to detention upon arrival, see in particular footnote 36. At times, the official regulations themselves provide well enough for the right of access to information about the reasons for detention and additional information about rights when held in detention, but in practice, detained asylum seekers are often not fully informed of their position and the full extent of their rights (See Kelly, 2005, p. 35; and Gil-Robles, 8 June 2005, p. 18).

⁵⁶ In France, for example, asylum application forms have to be completed in French since August 2004, and foreign nationals that apply for asylum while in administrative detention have to pay for an interpreter themselves. The result is that it is made very difficult for asylum seekers to claim for asylum while they are detained, as was observed by a European Parliamentary delegation that visited the administrative detention centre of Mesnil-Amelot, about 50% of the asylum applications that were filed by persons held there were immediately rejected on the grounds of technical shortcomings, while the content of the applications was not examined at all (European Parliament, Committee on Civil Liberties, Justice and Home Affairs, 22 March 2006). In Italy, in Lampedusa Temporary Holding Centre, almost no asylum claims are made, and migrants there are not given information about the possibilities to claim asylum open to them under Italian law. Besides, there are allegations that there have been consular authorities of third countries cooperating in identification procedures to determine migrants' nationalities, a situation that carries great risks for potential asylum seekers (European United Left/Nordic Green Left, 2005, p. 10). Furthermore, anyone failing to observe the rules on absence in the closed Italian identification centres for asylum seekers is regarded as having withdrawn his asylum application (Gil-Robles, 14 December 2005, p. 35. Amnesty International has expressed concern that the Greek authorities may be impeding refugees access to asylum through their inability to communicate in Greek, especially in border areas. In addition, persons have told Amnesty International that upon arrival in the places of detention, they had been persuaded to sign papers that they could not understand (Amnesty International, 12 October 2005; and CPT, 20 December 2006, p. 38)

⁵⁷ We have already seen that it is not always possible to make a watertight separation between detention upon arrival and detention within the asylum procedure. Similarly, detention as a result of the decision to

national territory, immigration legislation of most EU countries provides for the possibility of administrative detention.⁵⁹ In theory, this type of detention is neither a punishment, nor a means of directly coercing the foreigner leave the country, but it serves to safeguard removal, such as expulsion or deportation.⁶⁰ Thus, the sole fact of irregular residence does usually not provide a sufficient justification for detention in the EU Member States.⁶¹ Nevertheless, foreigners are frequently kept in detention for significant periods of time before their deportation is practically arranged.⁶² In addition, although various national laws require that detention is to be necessary (often with a view to public policy or national security interests),⁶³ in everyday practice, national authorities detain without due regard to the necessity and proportionality of the

expulse or deport can also affect asylum seekers if their claims have been rejected or declared inadmissible. In the United Kingdom for example, asylum seekers who were detained in 'fast track centres' and whose applications are rejected, can remain in detention until they are removed (FPP-CR-United Kingdom CR, p. 34).

⁵⁸ Detention of irregular migrants that are EU citizens should be highly exceptional practice according to EC law, only to be resorted to if they constitute a genuine threat to public policy. See ECJ, Case C-215/03, *Salah Oulane v. Minister voor Vreemdelingenzaken en Integratie*, 17 February 2005, par. 40-44.

⁵⁹ Such as (not exhaustive) Austria; Belgium; Denmark; Estonia; Finland; Czech Republic; France; Germany; Greece; Hungary; Latvia; Luxembourg; Poland; United Kingdom; Portugal (although it is unusual practice); Slovenia; and Sweden.

⁶⁰ See FPP-CR-Germany, p. 33. Nonetheless, there are countries that have provisions in their legislation that suggest the coercive nature of detention: in Ireland, the purpose of detention is to ensure that the person will co-operate in making arrangements, such as securing travel documents (FPP-CR-Ireland, p. 22).

⁶¹ Guild (2006), p. 5.

⁶² As is the case in Lithuania and the United Kingdom (EU Network of Independent Experts (2005), p. 73). With regard to Hungary, the Commissioner for Human Rights of the Council of Europe has expressed concern that irregular aliens are detained for up to 12 months on the sole ground that they have been found on Hungarian territory without a valid residence (Commissioner of Human Rights, Follow-Up Report on Hungary, 2006, p. 20). Hungary also has the possibility of enforcing detention even if the deportation order is suspended (FPP-CR-Hungary). In addition, some countries, such as Hungary and Germany provide for the possibility of detention in *preparation* of deportation procedures, therewith including verification of the identity of the foreigner and clarification of his residence status (FPP-CR's-Germany and Hungary).

⁶³ For example Sweden, where the legislation provides for detention if a decision to expel has been taken and the person is likely to abscond or engage in criminal activity (FPP-CR-Sweden).

detention, often as a result of wide discretionary powers conferred by them by domestic laws.⁶⁴

Even in judicial procedures where the legality of the detention is challenged, the question as to whether the administration has employed its discretionary powers in accordance with these otherwise important principles is often not addressed.⁶⁵ It remains to be seen whether this situation will change if Article 14 of the Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals becomes part of EC law.⁶⁶ According to this provision, immigration detention of third-country nationals, who are or will be subject to a return decision or a removal order, is only to be resorted to if there is a risk of absconding and where it would not be sufficient to apply less restrictive measures.

⁶⁴ UNHCR, Executive Committee of the High Commissioners Programme (4 June 1999). See Weber (2003) with regard to the situation in the United Kingdom. In the Netherlands, the public order criterion of Article 56(1) is interpreted so widely in policy guidelines that the required balance of interests almost always results in an outcome in favour of the executive (van Kalnouth, 1995b, p. 326). In addition, Article 56(2) of the Aliens Act 2000 provides for detention 'required by public order' on the sole ground that the necessary papers for removal are available.

⁶⁵ See for example Afdeling bestuursrechtspraak van de Raad van State, 6 September 2005, 200507112/1, JV 2005/452, where the highest administrative court in the Netherlands (Raad van State) ruled that it is not for the judge to assess whether less restrictive measures could have been applied in order to safeguard the aim of removal. In the United Kingdom, according to paragraph 16 of Schedule 2 to the Immigration Act 1971, a person may be detained under the authority of an immigration officer pending his removal. The House of Lords opinions that "'pending' in paragraph 16 means no more than 'until'. The word is being used as a preposition, not as an adjective. Paragraph 16 does not say that the removal must be "pending", still less that it must be 'impending'. So long as the Secretary of State remains intent upon removing the person and there is some prospect of achieving this, paragraph 16 authorises detention meanwhile." See House of Lords, *Regina v. Secretary of State for the Home Department (Respondent) ex parte Khadir (FC) (Appellant)*, 16 June 2005, [2005] UKHL 39, par. 32.

⁶⁶ European Commission (1 September 2005).

Many countries have the duration of this type of detention limited by law.⁶⁷ In this case, irregular migrants are released from administrative detention if expulsion has not been effected within the legal period for detention.⁶⁸ However, as they are often not able to leave the country, they remain illegally on its territory, and are apprehended and detained over again. As a result, in many countries, irregular migrants may spend very long periods in detention with small breaks of freedom that are followed by detention again.⁶⁹ This actual situation is neither apparent from legal provisions that lay down time limits, nor is it reflected in statistics that record the duration of detention.⁷⁰

Concerning the legal position of the immigration detainee who is to be expelled or deported, similar remarks can be made as were made with regard to the two types of detention discussed above.⁷¹ Often extensive administrative discretion exists with

⁶⁷ In Belgium, detention for removal is normally imposed for a maximum of two months, but it may be extended to five months. Further extension up to the absolute maximum of eight months is only permitted if it is necessary for the protection of public order or national security. In Czech Republic, irregular migrants can only be detained when an administrative decision on expulsion is imposed, but it is subject to a time limit of 180 days. In Estonia, if expulsion is not possible within the legal time limit to administrative detention of two months, an administrative court can prolong the detention for a maximum of up to four months (the average time of this type of detention is also 4 months in Estonia). In Finland, there is no time limit laid down in legislation, but the courts order release after three months. A French law passed on 26 November 2003 prolonged the maximum duration of administrative detention from 12 to 36 days. In Greece, if the foreigner is not expelled within three months, he must be released immediately. In Hungary, detention in preparation for expulsion may not last longer than 30 days, but detention in order to expulse is subject to a legal limit of twelve months. In Latvia, administrative detention may not exceed twenty months. In Malta, before 2005, there was no legal limit to the duration of the detention, and it was not unusual for persons to be detained for several years. A change in the law set a general time limit of 18 months, but in practice, release does not take place automatically after 18 months, and it may take many more months, even if this is against Maltese laws. In Poland and Slovenia, the total time spent in detention may not exceed twelve months. See FPP, the respective country reports.

⁶⁸ In Spain, if it is foreseeable that expulsion is not possible within the 40 day limit to the detention, the judge has to be notified immediately so that the detainee can be released.

⁶⁹ See for example Greece (FPP-CR-Greece, p. 21).

⁷⁰ A different situation, but with similar results, is the case of Belgium, where courts and tribunal have decided that whenever a detainee resists an attempt to actually remove him, the detention begins over new, and time previously spent in detention is not counted for the duration of the detention. (Jesuit Refugee Service, 2007). See also ECtHR, *Numba Kabongo c. Belgique* (inadmissible), 2 June 2005.

⁷¹ See in particular footnotes 36 and 50-55. Opondo and Harrell-Bond (1996) argue that the major difference that exists in the United Kingdom between the legal position of criminals and that of

regard to the decision to detain; countries that provide for periodical and automatic judicial review of the detention are the smaller part; and the possibility to appeal to a judicial authority against the deprivation of liberty, if provided for by law, is often difficult to exercise due to a lack of (understandable) information regarding the right to challenge the legality of the detention or insufficient access to legal aid for detainees.⁷² Often the basis for detention is not adequately explained, and at times, also the immigration status of the persons detained remains unclear to them.⁷³

I will conclude this overview of state practice with some brief observations regarding the conditions of detention with a view to deportation or expulsion.⁷⁴ The CPT has repeatedly held that “a prison is by definition not a place in which to detain someone who is neither convicted nor suspected of a criminal offence”⁷⁵ and has urged Contracting States to put an end to holding immigration detainees in ordinary law enforcement agency detention facilities.⁷⁶ Even so, many Member States keep detaining persons that are subject to a removal order in ordinary prisons or police custody facilities, sometimes as a result from a lack of available places in special centres, but often it is common policy.⁷⁷ Furthermore, persons subject to an expulsion order are at

immigration detainees is that the latter can be detained for an indefinite period of time without a judgment.

⁷² See CPT (21 July 2005), pp. 31-32; HM Chief Inspector of Prisons (2006a), pp. 25-26; Kelly (2005), pp. 40-42; and Gil-Robles (9 November 2005), p. 36.

⁷³ HM Chief Inspector of Prisons (2006a), p. 26.

⁷⁴ These observations are in many cases also applicable to the previous two categories of detention.

⁷⁵ See for example CPT (18 September 2003), par 69. Also the UN Working Group on Arbitrary Detention is of the opinion that custody should be effected in a public establishment specifically intended for this purpose. If this is for practical reasons not possible, immigration detainees should in any case be separated from persons who are imprisoned under criminal law (UN Commission on Human Rights, 28 December 1999).

⁷⁶ CPT (20 December 2006), p. 24.

⁷⁷ In Estonia, one expulsion centre opened in 2003 following a visit by the CPT. Detention in police cells for those to be expelled can only be resorted to for a maximum of thirty days (FPP-CR-Estonia, pp. 20-21.) Finland has one special custody unit for aliens as referred to in the Finnish aliens act with a capacity of 40 places. When the custody unit is full, an alien may exceptionally be placed in police detention premises, in which case the detention may not exceed four days. In France, there are 18 administrative detention centres and many more local facilities specifically designed for foreigners on which no information is available. However, foreigners who are under measures or procedures of removal may be detained with prisoners who are detained under criminal law. (FPP-CR-France). In Austria, detention for

times kept in transit zones. The latter situation calls for extra scrutiny as some states argue that in these situations it is not depriving individuals of their liberty at all.⁷⁸

Even in the case that special holding centres exist for immigration detainees, conditions are at times worse than in ordinary prisons,⁷⁹ with circumstances reminding of high security prisons and regulations that are not appropriate to the legal status of the inmates and the low security risk that they pose.⁸⁰ In addition, many of these centres

the purpose of removal is often practised in normal prisons (FPP-CR-Austria, p. 24). In Germany, special institutions for administrative detention under immigration legislation are to be found only in a few federal states. Most cases of administrative detention of foreigners is carried out in penitentiary institutions and prisons (FPP-CR-Germany p. 33). Greece has only a few administrative detention centres. Thus, every detention facility of police stations all over the country constitutes de facto institution for administrative detention, where a vast majority of the immigration detainees are held (FPP-CR-Greece, p. 19). In Ireland, solely ordinary prisons are used (Kelly 2005). Also Hungary resorts to immigration detention in ordinary prisons. In that case, however, the immigration detainees are kept separate from those that are held under criminal law (FPP-CR-Hungary). Latvia has one administrative detention facility, to which foreigners must be transferred if they have spent ten days in police detention facilities (FPP-CR-Latvia). Similarly, in Lithuania, foreigners can be kept in police facilities, but they must be transferred within 48 hours to the one centre for immigration detainees (FPP-CR-Lithuania). The Netherlands have special places for administrative detention, but detention is regularly carried out in police custody facilities or prisons (Baudoin, van de Burgt, Hendriksen 2002, pp. 211). In Sweden, special centres under the authority of the migration board exist for immigration detention. Placement in penitentiary institutions is only permitted only in the case of special circumstances (FPP-CR-Sweden, p. 17). In Portugal, irregular migrants may be placed in prisons with convicted prisoners or in transit zones of the international airport (FPP-CR-Portugal).

⁷⁸ Belgium for example, argues that in this case, the foreigners in question have no right of residence in Belgium, are subject to deportation orders issued by the Office for Foreigners and that by being placed in the transit zone, they are not being detained, but simply escorted to Belgium's border and are free to leave by catching a flight to their country of origin or a third country. See Amnesty International (1 September 2004).

⁷⁹ In Latvia and France, the rules concerning the detention of illegal immigrants are more restrictive than those applied to persons convicted for criminal offences (FPP-CR's-Latvia and France).

⁸⁰ See for example Travis (2005), reporting in the Guardian about a weapon commonly carried by prison officers in British removal centres, despite the fact that their use is banned in low security prisons. In some Austrian detention centres, detainees are only able to communicate with their visitors through a glass partitioning, which the European Committee for the Prevention of Torture did not deem in accordance with the low security risk of the persons detained (CPT, 21 July 2005, p. 32) In Germany, the CPT was alarmed by the existence of violent and inappropriate security measures that could be used in the immigration detention centre of Eissenhüttenstadt (CPT, 12 March 2003, p. 32.) The Council of

suffer from problems resulting from serious overpopulation, inadequate medical and hygienic care and limited possibilities for contact with the outside world.⁸¹ In view of these problems, it is to be welcomed that the proposed directive on common standards and procedures in Member States for returning illegally staying third-country

Europe Commissioner of Human Rights has called on the Maltese authorities to stop using military methods of searches of immigration detainees (Commissioner of Human Rights, Follow-Up Report on Malta, 2006, p. 12) and to abolish the practice of systematically handcuffing migrants when they are taken to and from the hospital (Gil-Robles, 12 February 2004, p. 8). In the Netherlands, the regulations for immigration detainees are comparable and sometimes identical to those applicable to persons who have been convicted of criminal offences. Van Kalmthout (2005a) argues that by subjecting the immigration detainee to restrictions that do not bear any relationship to the aim of the detention, the human rights of the immigration detainee are unnecessarily and disproportionately interfered with. It is significant that in the Netherlands, administrative courts are excluded by law (Articles 60 and 69 of the *Penitaire Beginselenwet*) from assessing the conditions and regulations applicable to immigration detention. See *Afdeling bestuursrechtspraak van de Raad van State*, 28 April 2005, 200410273/1, JV 2005/308. Nevertheless, there are also exceptions, see for example Finland, where detainees have access to better and more relaxed living conditions than normal prisoners and where the possibilities for receiving visits by friends and family are not limited (FPP-CR-Finland, pp. 20-21).

⁸¹ In Luxembourg, restrictions on the visits to immigration detainees are more severe than those applicable to normal prisoners (Gil-Robles, 8 July 2004, p. 11.) The CPT in its visit to the Czech Republic in 2002 criticised conditions of detention and was alarmed by allegations of ill-treatment and verbal abuse in some of the facilities (CPT, 12 March 2004, pp. 20-29). In Poland, the CPT observed that health care and psychological and psychiatric support for immigration detainees were not adequate. In addition, no regimes of activities appropriate to the detainees' legal status and the length of the stay were available (CPT, 2 March 2006, pp. 22-27). See CPT (20 December 2006), pp. 22, 31-39; and Amnesty International (5 October 2005) for documentation about very poor conditions and allegations of ill-treatment in the detention facilities for illegal migrants in Greece. In *Dougoz v. Greece* (ECtHR, 6 March 2001, par. 48), the Court in Strasbourg considered that the conditions of immigration detention at the Alexandras police headquarters and the Drapetsona detention centre, "*in particular the serious overcrowding and absence of sleeping facilities, combined with the inordinate length of the period during which the applicant was detained in such conditions*", amounted to degrading treatment contrary to Article 3 ECHR. The Commissioner for Human Rights of the Council of Europe called the conditions in the administrative holding centre for men under the Palais de Justice in Paris "*disastrous and unworthy of France*" and urged its closure because a place of this kind at the heart of the French judicial system was unacceptable (Gil-Robles, 15 February 2006, p. 62, and for similar criticism see also European Parliament, Committee on Civil Liberties, Justice and Home Affairs, 22 March 2006)

nationals⁸² lays down requirements regarding the conditions of temporary custody. According to Article 15 of the Proposal, immigration detainees shall, upon request, be allowed without delay to establish contact with legal representatives, family members and competent consular authorities as well as with relevant international and non-governmental organisations. In addition, it stipulates that temporary custody shall be carried out in specialised temporary custody facilities,⁸³ and that Member States shall ensure that international and non-governmental organisations have the possibility to visit temporary custody facilities in order to assess the adequacy of the temporary custody conditions.

⁸² Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals. European Commission (1 September 2005).

⁸³ Where a Member State cannot provide accommodation in a specialised temporary custody facility and has to resort to prison accommodation, it shall ensure that third-country nationals under temporary custody are permanently physically separated from ordinary prisoners (Article 15, par. 2).

1.2. AIM OF THIS STUDY AND PLAN OF RESEARCH

The aim of this study is threefold. First it argues that the particular development of sovereignty, neither a natural nor a self-evident notion but the result of historical contingencies, has led to a situation in which the use of force against outsiders is justified in a way which is fundamentally different from the way in which the use of force against insiders is scrutinised.

The second argument, strongly related to the first, posits that the contemporary application of human rights has not been able to formulate adequate answers to the use of force in the instances that the national state wishes to verify and enforce its sovereignty against those who have violated its material or symbolic boundaries. We will see that this so-called blind spot of human rights protection, which is nowhere more visible than in the contemporary practice of immigration detention, is due to an enduring perception of territoriality as a self-evident and innocent concept for the organisation of the global political system.

At the heart of this second argument is the premise that the concept of territory and the idea of rights are firmly linked and that the international legal discourse regards the jurisdictional content of sovereignty in a way that fundamentally differs from the way in which it considers its territorial frame. However, it is important to be aware from the outset that sovereignty's form and content are necessarily intertwined. Both play an equally significant role with regard to the definition of political community, although their relationship within the context of political organisation has varied over time.

Before the advent of the modern state, political power was based upon personal relations. After the Peace of Westphalia in 1648, this structure began to change slowly into a system where clearly demarcated and independent territorial units formed the basis for political power. The fact that the foundation of political power has over time shifted from the personal to the territorial does not entail that power over people has diminished in importance, nor does it mean that territory was politically insignificant before the emergence of the modern state. It means that at present, jurisdiction is exercised over individuals because of their presence in a certain territory instead of on account of their specific position in the body politic. In addition, the state uses its spatial powers to protect its territorial borders. The enormous growth of state power during the last few centuries has been accompanied with increasing demands for safeguards

against the state abusing its jurisdiction over people, resulting in a multifaceted system for the protection of individual liberties.

However, in this study I will argue that with regard to the state's spatial powers and sovereignty's territorial frame, a corresponding development through which the individual interests that are involved in it are accounted for, is lacking. This has led to what I call a "territorial blindness" on the part of constitutional principles in the domestic as well as in the international sphere.

The administrative detention of irregular migrants and asylum seekers is one of the ways in which European states protect their territories from unwanted immigration: in essence these states want to sustain the above-mentioned territorial blindness of systems of individual rights protection. However, immigration detention is special amongst the other instruments and policies by which these states try to stem the flows of migration. In the first place, it is special because deprivation of liberty is the sharpest technique by which the state protects that blindness. We will see that personal liberty and sovereignty are conceptually intertwined: the protection of the former is the reason for the existence of the latter. In societies based upon the rule of law there is no more serious interference with an individual's fundamental rights as depriving him of his liberty.

Secondly, immigration detention is not only a way in which states violently guard the territorial blind spots of individual rights protection, but as a practice itself it attempts to make ultimate use of these same blind spots. Thus, territorial blindness of the rule of law, a blindness that states seem only too eager to protect, has made the detention of thousands of people, simply because they crossed boundaries, not only possible but also commonplace.

The second argument thus presents the administrative detention of foreigners as a legal anomaly in societies that are otherwise based upon respect for the rule of law. However, this study will not merely portray immigration law enforcement in the form of detention as illiberal practices of liberal regimes, made possible by a structural feature of contemporary political organisation. In addition, it hopes to introduce a complementary but more hopeful approach by showing how the administrative detention of foreigners, however deplorable as contemporary political practice, may also provide opportunities to erase the artificial distinction in the modern version of the rule of law between the state's exercise of jurisdiction within a given body politic and the

territorial frame in which this power is exercised, and thus to deconstruct the narrow linkage between territoriality and personal rights.

Drawing on Roberto Unger's idea of "destabilization rights",⁸⁴ the third aim of this study is to argue that the capacity of the destitute, the refugee and the citizen of dictatorships, while interned by European states on European territory, to resort to traditional rule of law guarantees, however marginal such guarantees may be in their specific cases, has the potential to destabilize the institution of territorial sovereignty, and therewith it may in time strike at the conceptual innocence and perceived neutrality of territorial borders in constitutional discourse, domestically as well as internationally.

This study sets out with an investigation into the conceptual background of immigration detention from the perspective of the sovereignty paradigm. What is sovereignty (Chapter 2), and whether and how can it be limited (Chapter 3) are questions which will be dealt with in the first two Chapters. Subsequently, a general contextualisation of immigration detention will be provided by exploring the development and nature of the international legal framework regulating international freedom of movement (Chapters 4 and 5).

Thereafter, I will specifically deal with the limits that have been set to the use of immigration detention by human rights law. First, I will address the way in which these limits are formally given shape in various general human rights instruments (Chapter 6). Subsequently, I will analyse in depth how the European Court of Human Rights (ECtHR) as the constitutional court for Europe applies fundamental rights to cases of immigration detention (Chapter 7). These two Chapters intend to determine whether the limits that are set to the use of detention in immigration policy are satisfactory when regarded in the light of other contemporary discourses about limiting the violence potentially inherent in sovereignty. Where I find that this is not the case, I maintain that the reason for the fact that immigration detainees receive inadequate protection is related to the idea of territoriality. I argue that the problem is not so much territoriality in itself, but has to be sought in the fact that the territorial frame of sovereignty does not have the same history of being subjected to critical scrutiny as its jurisdictional content.

Although territorial sovereignty has so far remained largely immune to traditional forces of domestic and international correction, in the conclusions to this study (Chapter 8), I contend that the international human rights discourse has the

⁸⁴ Unger (1987). See also Sable and Simon (2004).

capacity to change the meaning of territorial borders and mitigate the exclusive effects of modern sovereignty. Paradoxically, the practice of immigration detention, instead of being only illiberal practice, may hand us the tools to transform the international legal order such as to make it into one that is more true to some of its underlying universalistic ideals.

1.3. CONTENT OF THIS STUDY

Deprivations of liberty on a massive scale constitute the ultimate example of the use of force by the state. Apart from a concrete manifestation of state violence, immigration detention camps are also an expression of the state's claim to determine where the boundary between 'inside' and 'outside' lies. Immigration detention is one of the possible outcomes of the conflict between the sovereign claim to determine that boundary and the individual's ideal of freedom of movement. Thus, apart from looking into how sovereignty has generally legitimised the use of force by the state over time, in Chapter 2, special attention will be paid to the inside/outside distinction that the modern notion of sovereignty has brought about by use of the concept of territoriality: the linkage of political power to clearly demarcated territory. Territoriality shaped the notions of nationality and nation state, of belonging and membership in a historically specific way. The result is that at the heart of the modern state we find the two conflicting forces of "the universalism of an egalitarian legal community and the particularism of a community united by historic destiny".⁸⁵ A thorough understanding of this tension is essential in order to comment on the practice of immigration detention.

In addition, Chapter 2 will discuss the external aspects of modern sovereignty in the Westphalian state system in order to contribute to a proper evaluation of legal norms dealing with international migration in later chapters (Chapters 4 and 5).

Thus, Chapter 2 addresses sovereignty's territorial form and its jurisdictional content within a given body politic, as well as its underlying tension between universalism and particularism. Chapter 3 weaves further upon these two lines. This Chapter treats the various ways that have been devised to limit the use of force by the state. Citizenship, constitutionalism and international human rights law are all

⁸⁵ See Habermas (1998), pp. 405-406.

discourses that intend to limit the use of force of the state internally. All of them are characterised by the same tension between a rights-based universalism and the political particularism that we discern at the heart of the modern state.

We will see that citizenship is the most problematic of these discourses when the use of force is employed in order to defend a certain inside/outside distinction, because in addition to protecting against sovereign power, citizenship strongly participates in sovereignty's claim to determine a certain inside from the outside. Constitutionalism as the theory and practice of the limits of power as a more general, inclusive discourse is also addressed.

International human rights as the most recent way of posing limits to state violence will receive particular attention in Chapter 3, since the *raison d'être* of modern human rights law is to overcome the particularism of traditional rule of law guarantees. However, we will see that also here the assumed naturalness and neutrality of the concept of territoriality poses limits to human rights' capacity to become truly universal guarantees for human dignity. In addition, Chapter 3 will briefly deal with the international law of war and humanitarian law. These areas of law receive attention because they also exemplify that the notion of territoriality is pivotal in international law and they exemplify its aim of maintaining the territorial order.

In Chapters 4 and 5, international freedom of movement is investigated. Where Chapters 2 and 3 can be seen as presenting the conceptual framework of these elements of contemporary political organisation that are fundamental to understanding immigration detention, Chapters 4 and 5 flesh out this framework in the particular direction of individual movement crossing international borders.

Chapter 4 addresses historical perspectives on the right to leave and the international legal framework regulating exit is analysed in detail. We will see that the right to leave is a right that the national state can no longer restrict, except for a few narrowly defined exceptions. In other words, sovereignty decreased in importance when it comes to matters concerning exit, a process that found its culmination in the codification of the right to leave in international law in the twentieth century.

Regarding the entrance of non-nationals, Chapter 5 shows that sovereignty has made a reverse development. This Chapter first traces the historic development of the common assumption that the entry and sojourn of foreign nationals are matters that fall largely within the sovereign discretion of the national state alone. Subsequently, it closely examines international legal exceptions to this assumption, such as flowing from

general international law, the prohibition of inhuman treatment, the international refugee regime and the right to family life. Chapter 5 will argue that, exempting the norm of non-refoulement flowing from the prohibition on inhuman treatment, all the legal exceptions to the state's exclusionary powers fit within a territorial image of political order. Instead of denouncing the way in which responsibility, rights and territory are linked, most rights bearing upon a right to enter or stay attempt to fix the inevitable gaps in such a system, and by doing so, they reinforce it. However, we will see that the application of the prohibition on inhuman or degrading treatment in the immigration context shows that territory and rights *can* be decoupled, if it were not for states' ever growing attempts to resort to extra-territorial measures of immigration control.

Chapter 5 pays specific attention to immigration law enforcement as well. A perception of the state's undeniable right to control aliens' entry into and residence in its territory surely must have an impact on the assumed appropriateness of the violence that is used to exercise such control, such as deportation and detention. We will see that deportation and detention are not merely the results of an exclusionary immigration policy, but that they constitute practices which possess a separate socio-political logic of their own.⁸⁶ Instead of just one of the many options available to national states, deportation and detention of unwanted foreigners are presented as the natural and singular response of the modern state to those who have violated its territorial sovereignty. This is reflected in the fact that the detention centre as an organizational structure to administer entry and deportation of foreigners increasingly prevails over other forms of administration in contemporary European societies.⁸⁷ We will see that the state practice of detention in particular constitutes the litmus test for the present regime governing cross-border movement and the unyielding impact of territoriality on the individual's life.

Chapters 4 and 5 taken together show that the regime regulating trans-national freedom of movement brings to light some striking ambiguities and inherent tensions in the international legal order. Chapters 2 to 5 will have made clear that most of these inconsistencies derive from two premises. The first is that the assumed naturalness of territorial borders has led to a conceptual distinction between the jurisdictional content

⁸⁶ De Genova and Peutz (forthcoming).

⁸⁷ Challenge (11 April 2006).

and the territorial form of sovereignty. As a result, international law, although it has increasingly conceded that the sovereign state's jurisdiction over people cannot be without limits, has so far simply refused to take account of the individual interests that are involved in territorial sovereignty.

However, it is important to bear in mind that the sharp distinction in international law between the jurisdictional aspect and the territorial aspect of sovereignty is artificial. Both aspects of sovereignty play an equally important role in the state's construction of political community; and ultimately it is the latter concept that is the rationale for most restrictions on fundamental rights of the individual.

The second premise is that the international order based on sovereign independent states does not only regulate the behaviour of states amongst each other, but it also functions as a mechanism to determine who belongs where. Territorial sovereignty in this system is a principle that allocates the responsibility for separate populations amongst distinct territorial units. The asymmetries within the international legal framework regulating the movement of individuals can only be understood when we take into account these two premises that underpin the international legal system.

The state's assertion of its territorial sovereignty leads to practices such as immigration detention. Chapters 6 and 7 will address the way in which international human rights discourse has constrained this specific instance of state violence resulting from a historically contingent conception of sovereignty. In Chapter 6, I sketch a broad outline of the human rights discourse regulating the administrative detention of irregular immigrants and asylum seekers. This Chapter gives an overview of various human rights instruments that are relevant for the practice of immigration detention. Case law concerning immigration detention of the Human Rights Committee under the Optional Protocol⁸⁸ of the 1966 International Covenant on Civil and Political Rights (ICCPR)⁸⁹ receives particular attention.

Chapter 7 treats the protection afforded by article 5 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in cases of immigration detention. It consists of a detailed analysis of the case law by the European Court of Human Rights (ECtHR) concerning Article 5 ECHR. In this Chapter, I will argue that in the ECtHR's case law on immigration detention, one can discern a serious

⁸⁸ See UNGA Res. 2200A (XX) of 16 December 1966

⁸⁹ 19 December 1966. 999 U.N.T.S. 171

lack in proportionality and as such the Court endorses detentions which are unnecessary and therefore in contradiction with the core of the protection of Article 5 ECHR. When compared to case law concerning the deprivation of liberty in other cases, serious inconsistencies can be identified in the ECtHR's approach to immigration detention. We will understand these inconsistencies once we are conscious of an obdurate and self-reinforcing notion of territorial sovereignty. I argue that the ECtHR in most of its case law dealing with immigration detention defers to international law's distinction between the state's exercise of jurisdiction over persons and the alleged neutral and pre-given territorial framework in which this jurisdiction is exercised. As a result, it is unwilling to address interferences with the right to personal liberty in immigration law in the same manner as it addresses interferences that occur in a purely domestic context where the territoriality of the modern state is not a factor to be reckoned with.

Thus, Chapter 7 argues that the main international mechanism for protecting human rights in the European context is characterised by a blind spot when it comes to limiting the state's power to resort to violence in the form of immigration detention. The discourse of human rights in this context proves to be a limited discourse. In the conclusions to this study in Chapter 8, I will conclude that international constitutional discourse in general suffers from a serious blindness whenever a state presents the exercise of power as being predominantly based on sovereignty's territorial frame. This blindness can be characterised as what Hilary Charlesworth in a different context has called a "silence within the law", which is not the same as a lacuna that can be filled with some "simple construction work".⁹⁰ Indeed, this territorial silence is integral to the whole structure of international (and domestic) law, "a critical element of its stability".⁹¹

However, I will argue that "a shift in its stabilisation"⁹² may be brought about by a new role for human rights, more in keeping with their proclaimed status as universal standards based on the dignity of the individual. I contend that in order for the system of human rights to function effectively, the nation state needs to be held responsible for the exercise of its power on account of its territorial sovereignty, instead of allowing it to present sovereignty's territorial frame as a predisposed and neutral given. By taking into account the individual interests that are involved in sovereignty's frame international

⁹⁰ Hilary Charlesworth with regard to international law's silence of women. Charlesworth (1999), p. 381

⁹¹ Ibid.

⁹² Korhonen (2002), p. 213. See also Charlesworth (1999).

human rights may become what Roberto Unger calls destabilization rights.⁹³ I will draw on the work of Charles Sabel and William Simon, who apply the idea of destabilization rights to public law litigation, in order to explain how the application human rights in immigration detention may induce a transformation of sovereignty's territorial frame in a process in which it must respond to what was previously an excluded stakeholder: the individual.⁹⁴

The fact that this process, as a result of its destabilizing impact on legal structures, have far-reaching political effects need not deter courts whose function it is also to provide individual with the protection of their fundamental rights. What Roberto Unger calls "the halo of reasoned authority and necessity upon the institutionalised structure of society"⁹⁵ should not deter lawyers from imagining alternative possibilities for organising that structure, quite the contrary. I will argue that the way in which constitutional courts such as the ECtHR apply fundamental rights in cases of immigration detention could help this process on its way.

⁹³ Unger (1987).

⁹⁴ See Sabel and Simon (1994), p. 1056

⁹⁵ Unger (1996), p. 96.

Chapter 2 Sovereignty, people and territory

2.1. INTRODUCTION

The discursive practice of sovereignty profoundly influences the way immigration is perceived and it strongly affects the question of the legitimacy of the instruments that the state uses to deal with unwanted immigrants. In the specific context of immigration detention, I believe that in certain respects sovereignty has become one of these discursive practices that Rob Walker so powerfully describes as having “turned an historical problematic into an ahistorical apology for the violence of the present.”⁹⁶ The practice of immigration detention, in its broader context of freedom of movement, is capable of bringing to light insights in the relation between the institution of territorial sovereignty and individual rights that normally remain concealed in commonly accepted notions about political power, political community and the organisation of the global state system.⁹⁷ As such, it may expose shortcomings in the modern version of the rule of law, embodied in the discourse of international human rights.

However, before I turn to these issues in later Chapters of this study, it is first necessary to understand sovereignty’s fundamental claims and their underlying assumptions. In this Chapter, I take a close look at the notion of sovereignty with the particular practice of immigration detention and its context of international migration in mind. This means that certain implications of sovereignty will not be touched upon at all, whereas other aspects will be emphasised. In this introduction, I explain why I deem an inquiry in the concept of sovereignty essential in order to comment upon immigration detention and I will indicate which of its aspects will receive particular attention in my analysis.

⁹⁶ Walker (1993), p. 31

⁹⁷ See Unger (1996) for a more general version of this argument about the relation between individual interests on the one hand and institutions on the other hand, and its implications on legal analysis.

The most common differentiation made within sovereignty's various functions is that between its external and internal aspects. Internally, the function of sovereignty is to ensure that there is no higher authority within the territorial limits of the state than the state itself – within its borders the state has exclusive and ultimate authority. In the course of history, such exclusive and ultimate authority came to entail both power over people and power over territory. Internal sovereignty is bound up with the state's monopoly on the legitimate use of force, as well as with its claim to determine what constitutes the boundary between 'inside' and 'outside'⁹⁸.

External or Westphalian sovereignty entails the exclusion of external authority from the territory of the state. We will see below that, although sovereignty was initially thought of as a concept to conceptualise and justify ultimate political authority within the state, it inevitably came to bear upon relations amongst states as well. The internal and external sovereign claims that the contemporary state makes with regard to people and territory – the monopoly on the use of violence; the determination of the boundary between inside and outside; and those related to the Westphalian structure that all states form part of – touch immediately upon immigration detention and its broader context of international movement of people.

In the first place, deprivations of liberty on a massive scale of asylum seekers or other immigrants clearly constitute the use of force by the state. Only states can legitimately resort to the imprisonment of individuals and in order to understand immigration detention, we need to understand the sovereign state's monopoly on the legitimate use of violence.

In the second place, we need to take into account the particular context in which this specific form of imprisonment takes place. In contemporary Europe, that is a context of an immigration policy which is focussed increasingly on the restriction of individual rights and which finds its justification in the language of crisis and threat. Sovereignty's claim to determine the inside from the outside is employed to portray migration mainly as a security issue, in response to which the use of force is assumed to be justified because "the process of demarcation of friends and enemies, delineation of boundaries of order versus disorder has been the prerogative of the sovereign state, provider of security within its boundaries and preserver of 'law and order'."⁹⁹

⁹⁸ Walker (2003), p 22; and Werner and Wilde (2001), p. 288.

⁹⁹ Aradau (December 2001).

Thus, national responses to international migration do not only illustrate the state's monopoly on the legitimate use of force, but perhaps even more importantly, they also exemplify the sovereign claim of the state to determine its boundaries. These boundaries can be concrete and tangible, such as territorial borders, but they can be implicit as well, contained as they are in concepts such as nationality and citizenship. Both sets of boundaries constitute the sphere where sovereignty's claim to distinguish the inside from the outside and the individual's ideal of freedom of movement conflict. Immigration detention is at once a concrete manifestation of this claim by the state, and a possible outcome of such a conflict between state and individual. We will see that the stance taken by the contemporary sovereign state with regard to immigration epitomizes that internal sovereignty is about the unity of the body politic and the definition of political community. The state uses both its territorial sovereignty and its jurisdiction over people in order to attain or maintain such unity.

However, we will not be able to understand the international legal regulation of international migration if we merely focus on the internal sovereign claims of the nation state. States do not exist in a vacuum, but they form part of a system of sovereign states and international migration engages precisely this system. Thus, the role and place of the notion of sovereignty within this system, as opposed to its mere internal functions, needs to be taken into account as well, in order to place the domestic practice of immigration detention in the wider context of international rules that regulate movement of people between states, as will be done later in this study (Chapters 4 and 5).

Above, I have briefly outlined these aspects of sovereignty that are relevant for achieving an adequate understanding of the contemporary practice of immigration detention. Accordingly, the following inquiry will pay particular attention to the following matters: the manner in which the use of force by the state has been legitimised; the way in which the modern state distinguishes between inside and outside by the use of concepts such as nation state, political community and identity; and the global structure of a territorial system of sovereign states in which these concepts operate. It should be mentioned at the outset that immigration detention and its context of international migration also show unambiguously that all aspects of sovereignty are interrelated and that conceptual separations between them do not always reflect reality.

Indeed, we will see in this study that sovereign states' responses to international migration exemplify that the actual content of sovereignty, i.e. jurisdiction over persons, is necessarily intertwined with the territorial frame in which it operates. In a similar

fashion, such responses illustrate that the internal and external aspects of sovereignty cannot be understood in isolation from each other. As all aspects of sovereignty are profoundly related to and mutually influence each other, it would not do justice to reality to classify their respective developments in distinct categories. For that reason, the structure of this Chapter does not accurately reflect the distinctions made above. Rather, I hope that by using these various aspects of sovereignty as red lines running through my inquiry of the sovereignty paradigm, they will bring out those aspects of our understanding of the modern state and the system that it forms part of that are essential in order to comment on the practice of immigration detention in contemporary European states in later Chapters of this study.

The structure of this Chapter is as follows. In Section 2.2., I give an overview of the development of the concept of sovereignty, as a legitimating discourse for ultimate political power within the body politic. The account of this development is divided in two parts. Section 2.2.1 treats the emergence of a theory of sovereignty against the historical background of gradual territorialisation of political organisation; and Section 2.2.2 addresses the theory of popular sovereignty. Subsequently, in Section 2.3., I deal with the manner in which the modern state has construed its understanding of inside and outside by using territory and identity. We will see that territorialisation, the process by which political authority came to be linked to clearly demarcated territorial units, influenced the way in which the modern state conceives of identity and political community.

Thus, Sections 2.2. and 2.3. make a division within the concept of sovereignty by treating respectively the way in which the exercise of power in a given body politic has been legitimised and the way in which understandings of inside and outside have been constructed. Nonetheless, as already mentioned, we will see that the historical processes that gave rise to these two aspects of sovereignty cannot be neatly separated as relating solely to the one or the other. On the one hand, it will become clear that the way in which the theory of popular sovereignty has legitimised political authority has strongly influenced the manner in which modern states have drawn their boundaries. On the other hand, we will see that the process of territorialisation facilitated the emergence of the very notion of sovereignty as legitimation of ultimate power within the body politic.

The conclusions to this Chapter in Section 2.4. will pay attention to the impact of both the development of the notion of sovereignty and the process of territorialisation

on the legitimacy of violence. The interrelatedness of all sovereignty's aspects is briefly reiterated with specific regard to national responses to international migration.

2.2. SOVEREIGNTY: LEGITIMISATION OF POLITICAL POWER WITHIN THE BODY POLITIC

2.2.1. Development of the modern notion of sovereignty

With regard to freedom of movement, Michael Walzer asserts that emigration and immigration are morally asymmetrical; arguing as he does that restraint on entry serves to protect a group of individuals who are committed to each other, whereas restrictions on exit imply replacing commitment with coercion.¹⁰⁰ It is only in Chapters 4 and 5 that questions regarding freedom of movement will be addressed, but the reason that I refer to Walzer's views here is that I find the last part of his statement intriguing. Does he mean to say that replacing commitment with coercion is not acceptable? Yet we don't seem to think that it is always objectionable that coercion by the state takes the place of commitment on the part of the individual if the latter is lacking: if we do not provide our children with the care that our society deems appropriate they may be separated from us, and if we refuse to pay taxes we could end up in prison. Although coercion may not be the only thing that state power is about, it is certainly a very important aspect of it.

"Ultimate violence may not be used frequently. There may be innumerable steps in its application, in the way of warnings and reprimands. But if all the warnings are disregarded, even in so slight a matter as paying a traffic ticket, the last thing that will happen is that a couple of cops show up at the door with handcuffs and a Black Maria. [...] In Western democracies, with their ideological emphasis on voluntary compliance with popularly legislated rules, this constant presence of official violence is underemphasized. It is all the more important to be aware of it. Violence is the ultimate foundation of any political order."¹⁰¹

Amongst other things, sovereignty entails a claim to hold a monopoly on the legitimate use of force. Some authors feel that the term "legitimate use of force" is a

¹⁰⁰ Walzer (1983), p. 39-40.

¹⁰¹ Berger (1963) p. 69.

contradiction in terms: "It seems contrary to common sense and logical precept that an institution should be able to project its moral injunctions through acts of brute force."¹⁰² Although the discussion of what constitutes legitimate political power has a much longer history, my analysis starts with the early emergence of sovereignty during the late middle ages. We will see that the manner in which men have since then attempted to legitimise the exercise of political power, thereby turning it into authority instead of mere force, have varied from appeals to religion and the natural order to the notion of the people. Many thinkers about sovereignty have included the use of force explicitly in their perception of political power, either on the grounds of *raison d'État*, or because in their theory subjects surrendered their right to self defence to the sovereign, whose task it then became to protect them, or because sovereignty is logically impossible without complete control and free disposal over the means of violence.

Thinking about sovereignty predated a world in which independent territorial units were the main building blocks for political life.¹⁰³ In medieval Europe, political power was not characterised by territoriality, but different territorial entities overlapped each other, and power structures were complex and hierarchical in varying degrees. Political power manifested itself in personal relations rather than with regard to territory, and these relations could be manifold. However, by the end of the fifteenth century, monarchical power had grown enormously in almost all of Europe at the expense of medieval institutions, such as feudalism, free city states and the church, the latter perhaps the most conspicuous of all medieval institutions. The role of the Reformation in the breakdown of the medieval order should not be underestimated, for before the Reformation Europe was perceived as a single community, even if only in theory: the *Res Publica Christiana* with its head as the agent of God.¹⁰⁴

The gradual consolidation of power and territory under a single and supreme ruler, especially in France, but also in Spain and England, changed modes of political thought and it provided the opportunity for the notion of sovereignty to re-emerge from Roman imperial law and from the theory of divine right.¹⁰⁵ In order to see how the notion of sovereignty was able to secure its fundamental place in political thought, it is instructive to take a brief look at the writings of Machiavelli, and not only because it

¹⁰² Hoffman (1988), p. 73.

¹⁰³ Murphy (1996), p. 82; Hinsley (1986), p. 21; and Werner and Wilde (2001), p. 289.

¹⁰⁴ Philpott (1997), p. 28-33.

¹⁰⁵ See Hinsley (1986) about earlier manifestations of sovereignty.

was mainly these writings that created the meaning that is still attached to the term state in political usage.¹⁰⁶

Machiavelli (1469-1527) was living exactly at the time when the medieval political order, defined by a hierarchy of authorities started to change slowly into to the modern decentralised system of independent political entities defined by territory. The move in Europe from the medieval to the modern was not smooth and peaceful – on the contrary, it was accompanied by civil wars and chaos caused by competing claims to political power. It is no coincidence that many thinkers about sovereignty have been preoccupied with political stability and the unity of the body politic. Machiavelli, although he did not develop a theory on sovereignty and merely hinted at the notion, was no exception. He was deeply disturbed by the particularly chaotic state Italy found itself in at the end of the fifteenth century; for although medieval institutions had broken down there was no power strong enough to unite the whole of Italy and bring order and stability to the region. According to Machiavelli, preservation and continuance of the state is the aim of politics. Every prince must seek to maintain his state and “a wise prince is guided above all by the dictates of necessity.”¹⁰⁷

“When the safety of one’s country wholly depends on the decision to be taken, no attention should be paid either to justice or injustice, to kindness or cruelty, or to its being praiseworthy or ignominious. On the contrary, every other consideration set aside, that alternative should be wholeheartedly adopted which will save the life and preserve the freedom of one’s country.”¹⁰⁸

Thus, it appears that Machiavelli perceived the polity as an abstract entity, and its ruler is placed outside and above the legal and moral framework that applies to the ruled. Linked to his perception of the ruler, is Machiavelli’s conception of the supreme importance of the legislator in a society. However, he never developed his belief in the omnipotent legislator into a general theory of sovereignty or absolutism. Although he was aware of the idea of the body politic as an instrument in the hands of the ruler in the interest of the political community, he did not conceive of a theory in which the prince

¹⁰⁶ Sabine (1941), p. 351; and Bobbio (1989), p. 57.

¹⁰⁷ Skinner (1981), p. 38.

¹⁰⁸ Machiavelli (1987), p. 515.

and the community were tied together in a body politic which itself would possess sovereign power.¹⁰⁹

Jean Bodin (1529-1596) was the first to make a systematic statement of the modern idea of sovereignty. He did so in his *Six Livres de la République* (1576), a work written in and clearly influenced by the disorder of a secularising France in the late sixteenth century. According to Bodin the existence of a sovereign power – ‘la puissance perpétuelle et absolue d’une république’ – is necessary in the interests of the community. Sovereignty for Bodin is indivisible and consists of an unlimited power to make law. However, his views on that limitless quality of sovereign power are not altogether clear. For although he states that sovereignty cannot be limited in function, time, or law, he also maintains that the sovereign is bound by divine and natural law, as well as by the fundamental and customary laws of the political community and the property rights of the citizens.¹¹⁰

For Bodin, government is not possible without sovereignty; without the existence of a sovereign power, there will just be anarchy. Sovereignty is the essence of the state; the latter cannot exist without the former. This led him to conclude that the character of the political community made it necessary that this power be legally recognised as sovereignty.¹¹¹ Thus, the existence of sovereign power does not need to be justified with an appeal to God, but rather it is explained by the nature of political community. Bodin distinguished between different forms of body politic, depending on where the sovereign power was located, but he himself preferred that form in which the sovereign power resided in one person, a monarchy.

The originality of Bodin consisted in his partial detachment of the notion of sovereignty from God, Pope, Emperor or King and by presenting it as a legal theory logically necessary in all political associations.¹¹² Although theories of sovereignty have evolved significantly since Bodin’s introduction of the concept, its rudimentary conceptual foundation has remained largely the same. We will see that contemporary sovereignty, just as it was for Bodin and subsequent theorists, is still concerned with the unity of the body politic.

¹⁰⁹ Hinsley (1986), p. 113.

¹¹⁰ Allen (1926), p. 56; Bobbio (1989), p. 93-94; and Hinsley (1986), p. 123.

¹¹¹ Hinsley (1986), p. 121; and Pot and Donner (1995), p. 15.

¹¹² Allen (1926), p. 59. But see also Engster (1996) for a contrary opinion.

In medieval Europe, political society was conceived as an order instituted by God, in which ruler and people were distinct from each other, each with their own position, rights and duties. The implications of this belief remained tangible even in the seventeenth century; there was little awareness of a conception of the ruler as the personification of the body politic, of the people as more than a collection of individuals, let alone of the idea that the body politic could in itself be a sovereign entity in which ruler and people were linked.¹¹³

The separateness of ruler and ruled in the thoughts of most men in this period caused them to think that sovereignty had to be vested in one and only one of the two. Thus, on the one hand, there were monarchists who used Bodin's theory of sovereignty to strengthen the theory of Divine Right. On the other hand, a thinker such as Johannes Althusius (1557-1638) insisted that sovereign power belonged exclusively to the people, basing his ideas on popular sovereignty equally upon the legislative foundations of sovereignty laid by Bodin.¹¹⁴ There were inherent contradictions in both positions, and writers such as Grotius (1583-1645), who in *De Jure Belli ac Pacis*, attempted to reconcile both positions in a single theory, were not successful.¹¹⁵ The notion of sovereignty did not attain logical coherence until Hobbes (1588-1679), using some elements already present in Bodin's legal theory, based it on radically new premises.

In *Leviathan*, written in 1651, Hobbes takes as a starting point for his theory of sovereignty a state of nature in which people are only driven by instincts of self-preservation and a will to power which is never satisfied. People have no natural rights and there would accordingly be war of all against all. This image of the state of nature was completely at odds with the portrayal of mankind in medieval Christendom.

Moreover, natural law had always been linked with God and normative concepts such as justice, while Hobbes regarded (human) nature as nothing else but a system of causes and effects. Since even the weakest can under circumstances be a threat to the life of the strongest, nobody can ever be safe in Hobbes' state of nature. As this means that everybody is equal in the state of nature – which is with Hobbes clearly not a normative statement – no one will enter into conditions of peace if not upon equal terms. Yet, even in the case that all would agree to respect each others 'rights'; it would

¹¹³ Hinsley (1986), p. 130.

¹¹⁴ London Fell (1999), p. 113.

¹¹⁵ Hinsley (1986), p. 139.

not be rational for the individual to keep such an agreement. Relations of power will always be temporary, a stable order is impossible. To establish such an order, a conscious choice is necessary, made by all, unconditionally and upon equal terms, to surrender completely their freedom to one power, the sovereign.

In the sovereign, the will of all is united; it is a supreme power whose only command is complete obedience, sanctioned with his complete and exclusive control over the means of violence. Only at the moment of surrender does a mere collection of individuals become a people; the multitude constitutes only the people by the will of the sovereign. There cannot be any distinction between state and society, just as the distinction between state and government is an illusion. If there is no state, there can be neither government, nor a society. Sovereignty is indivisible and unlimited. The multitude enters into a covenant with each other in which they agree to surrender to the sovereign, but the latter is not a party to it. For if he could be bound, the absolute power would lie elsewhere, and accordingly he would not be sovereign. Questions of legitimacy of government do not play a role for Hobbes at all – a government is a government by its capacity to govern and a tyranny is merely a government disliked. Whereas for Bodin sovereign power had meant the power to make law, for Hobbes it was to be understood as the exclusive control over coercive force:¹¹⁶

“In substance his theory amounted to identifying government with force; at least, the force must always be present in the background whether it has to be applied or not.”¹¹⁷

After the turmoil and civil wars of the sixteenth and seventeenth centuries, European monarchies were increasingly able to consolidate their powers and the idea of sovereign monarchical power became commonly accepted.¹¹⁸ Related to this was the conception of an independent territorial state system, for which the Peace of Westphalia provided the first formal step.¹¹⁹ The ruler was seen as the personification of the state, and in him was absorbed the personality of the people.

However, there was no writer in Europe who defended the absolutism of the sovereign power that was for Hobbes a logical consequence of the very idea of

¹¹⁶ Poggi (1990), p. 44. See also Sabine (1941), p. 468.

¹¹⁷ Hinsley (1986), p. 468.

¹¹⁸ Pot and Donner (1995), p. 21.

¹¹⁹ Murphy (1996), p. 86.

sovereignty. Defenders of Divine Right concurred that divine and natural law placed constraints on the sovereign ruler. A natural lawyer such as Pufendorf (1632-1694) insisted that even though to be sovereign meant to be absolute and supreme, sovereignty was not equivalent to absolutist power in relation to the society that was subjected to it.¹²⁰ The question was now how to reconcile the notion of sovereignty with the idea that the ruler is responsible to the community that he governs.

The notion of popular sovereignty was to provide the answer to this question. The idea that sovereignty rests with the people who have conferred it by means of a contract to the ruler was not a new one. Nonetheless, the clarity that Hobbes had given to the very notion of sovereignty combined with the wish of most thinkers to refute the absolutist implications of Hobbes' theory, made a new version of social contract theories unavoidable.

2.2.2. The people as the source of legitimacy

In his *Two Treatises of Government*, Locke (1632-1704) attempted to counter Hobbes' arguments for the logical necessity of political absolutism with a theory of constitutional government.¹²¹ In the first Treatise, the theory of Divine Right of Kings is rejected, whereas the second analyses why governments exist at all. Locke's thinking illustrates the approaching enlightenment: instead of a medieval fixation on the spiritual world, he thinks that the use of empirical experience and reason will learn and enable man to live a good life. Like Hobbes, he too takes the state of nature as a starting point for his theory of government

However, unlike Hobbes, Locke believed that in the state of nature, natural law governed, the content of which could be known by reason. If, in the state of nature, someone would transgress this law, entailing that no one ought to harm another, nor in his life, nor in his liberty or possessions, the inflicted party had a right to redress the injury, but only in a manner that was proportionate to the infraction. Only if natural law would be altogether ignored, would a situation comparable to Hobbes' state of nature be

¹²⁰ Hinsley (1986), p. 151.

¹²¹ Sabine (1941), p. 524.

brought about, but this would be an exceptional situation, no longer to be called the state of nature but the state of war.

Whereas medieval thinking had emphasised the duties of a mankind that was divided into a natural (divine) order, Locke instead accords a central place to the unity of mankind and sees natural law as a claim to inalienable rights inherent in each individual.¹²² Modernity marked a different way of thinking about power: legitimacy of power was no longer based on a divine or natural order, but on the assumed will of individuals. Locke argues that a government is necessary in order to guarantee individual rights and with this presumption, the limits of governmental power are simultaneously established. The state is created by a society of contracting individuals, but sovereignty remains with the people who have the right to revolt against a government, to which they have delegated their supreme power, if it fails to protect their rights. In order to make the idea of individual consent plausible, Locke resorted to a fiction, whereby every member of society gives his consent to be a member of the body politic by making use of its government or alternatively, by simply agreeing to be in its territory.

Locke's theory on sovereignty is also a theory on constitutional government – the theory of popular sovereignty explains the foundation for political power, but its important normative assumptions at the same time establish clear limits on the exercise of sovereign power. However, it is important to keep in mind that the question of the legitimisation of the foundation for political power is different from the question of the legality of its exercise. This Chapter deals only with the former question; theories of individual rights, the doctrine of government by law, and related concepts will be dealt with in Chapter 3.

The theory of popular sovereignty found a clear expression in the French and American Bills of Rights. However, revolutions were needed before these bills of rights were established, revolutions that would change thinking about the state and power radically and which would anchor the principle of popular sovereignty firmly in Western political thought and practice. But in the eighteenth century, established government still strongly resisted claims that the community was free to decide how

¹²² Pot and Donner (1995), p. 24; Sabine (1941), p. 525.

much power to give up to government and how much to retain for itself, and insisted that the Ruler, as the personification of the community, was the sovereign.¹²³

In *Du Contrat Social*, Rousseau (1712-1778) dismisses this absolutist interpretation and presents a radical new version of the concept of popular sovereignty. Rousseau in fact adopts Hobbes' absolutist implications of the notion of sovereignty, but transfers absolute power unconditionally and permanently to the people. In order to arrive at this position, Rousseau starts with the state of nature as well, but in contrast to the usual account of it, he reverses the situation completely by arguing that in the state of nature people were good and innocent. It was, according to him, civilisation with its constant appeal to reason that had spoiled mankind. In a sense, Rousseau breaks radically with the ideals of the enlightenment; not by progress and the use of reason will men find out how to live the good life, but they need to return to nature with which he means the common sentiments with regard to which people hardly differ at all.

Rousseau emphasised the importance of community, and he opposes the systematic individualism on which the theories of Hobbes and Locke were built. People do not really exist if not within a community, "for apart from society there would be no scale of values in terms of which to judge well-being."¹²⁴ The ideals of the enlightenment with their emphasis on the individual have created the kind of civilisation in which man cannot find his true self. A return to the liberty and equality of the state of nature is only possible when every man submits himself completely to the community. The state *is* the community, but as the people possess exclusive and omnipotent sovereignty that is inalienable, government is merely the executor of the general will of the community.

Whereas Locke had accorded the people a right of revolt under certain conditions – that is, in the case when the government had not kept the terms of the contract – for Rousseau such a construction is unthinkable because the government always has to respect the general will and can thus be dissolved at any moment should the community wish so. The 'volonté générale' is not the same as the sum of all individual wills, nor is it the will of the majority, for in both cases Rousseau's theory would equally be based on the individualism which he attacks. The general will of a community is a collective good, with its own life and destiny, which is not the same as

¹²³ Hinsley (1986), p. 152-153.

¹²⁴ Sabine (1941), p. 588.

the private interests of its members together.¹²⁵ Man becomes man only as a member of the community and accordingly it is unthinkable that rights can ever be exercised against the community but instead they are something to be enjoyed within it.

Since Rousseau's time the doctrine of popular sovereignty has frequently been restated. But it will be found that, while Rousseau's statement of it can be modified in detail, it cannot in essence be outdone. Since the American and French Revolutions toward the end of the eighteenth century it has sooner or later come to be the prevalent doctrine, at least in all the more advanced political societies."¹²⁶

Rousseau wanted to eradicate the distinction between state and community by extracting a unitary state personality out of the abstract notion of the general will, and the problem was that this left the people without a possibility for governance with actual power over them.¹²⁷ As a result, although his account of popular sovereignty has prevailed, the practical need for governance has made it necessary to accommodate it. Indeed, while the modern notion of sovereignty has created congruence between ruler and ruled, it has not been able to resolve the disparity between people and state. And although his problem has remained without a solution, there have been ways to deal with the tension between the principle of the executive state as merely the agent of the people's will and the reality that it has the potential to turn into Hobbes' absolute sovereign.

One of these is the abstract notion of the sovereign state, based on the constitutionalism that liberal democracies have resorted to, for if the popular will can only be expressed through representation, safeguards for the individual against the power of the executive and the danger of tyranny of the majority have to be built in. These safeguards, first embodied in constitutionalism and the discourse of citizenship, and later also in the international human rights regime, will be looked at in depth in the next Chapter that investigates formal and material limits to government. In concluding this Section, I want to emphasise that the modern notion of sovereignty distinguishes itself from all earlier notions on political authority by its very abstraction. The modern states distinguishes itself from earlier forms of political organisation in that factual

¹²⁵ *Ibid.* p. 588.

¹²⁶ Hinsley (1986), p. 154.

¹²⁷ Hinsley (1986), p. 155.

relations between individuals do no longer provide the basis for political authority; instead the abstract notion of the people and the concept of territoriality have assumed that role. The way in which these concepts relate to each other will be discussed in the next Section.

2.3. THE STATE, ITS TERRITORY AND IDENTITY: POLITICAL PARTICULARISM

2.3.1. The sovereign claim to distinguish inside from outside

“The present approach to the determination of ownership of territory is exclusive, partial and silencing. [...] Territorial boundaries have become barriers. They determine and identify those within and those without the boundary, based on a particular conception of sovereignty.”¹²⁸

In the previous two Sections, I have explored how a theory of sovereignty became a conceptual necessity in order to legitimise the state’s exercise of political authority within the body politic. Different theories on the source of sovereignty were addressed and we have seen that popular sovereignty has become the prevalent way in which to legitimise ultimate political power within the body politic. However, the important question of how the body politic is to be defined, which is a fundamental question when we take into account the unity with which sovereignty is ultimately concerned, has not been dealt with in the preceding Sections.

Sovereignty by its very nature draws a clear distinction between inside and outside.¹²⁹ Here we see the partial overlap between internal and external sovereignty, for in international relations, Westphalian sovereignty refers to the linkage of independent political authority to inviolable and sharply delimited space. The sovereign claims of each and every state operate in a global structure of mutually independent territorial units with supreme and exclusionary authority within their domain. Nonetheless, the internal sovereign claim of the modern state to distinguish between the inside and the outside is not only based on territorial boundaries, but in addition, it is deeply related to matters of identity and political community.

¹²⁸ McCorquodale (2001), pp. 145, 152.

¹²⁹ Giddens (1985), p. 88.

Therefore sovereignty's content (the state's exercise of jurisdiction over people) and its form (the fact that this jurisdiction is exercised within a territorial frame) are not separate notions that operate independently from each other. When focussing on the political significance of clearly delimited space in the discourse of sovereignty, the abstract concepts of nationality, citizenship and political community cannot be ignored. On the contrary: territorial boundaries that are in themselves no more than arbitrary and imaginary lines on the surface of the earth, acquire their meaning in precisely these concepts and the practices resulting from them; practices that are brought about both by the state's exercise of jurisdiction over people and the particular territorial frame in which this jurisdiction is exercised.

This Section will seek to understand the way in which sovereignty's claim to distinguish the inside from the outside is construed. It will become clear that sovereignty's two claims – to determine the boundary between inside and outside and to ultimate political authority – are inextricably linked to each other. The discourse of popular sovereignty legitimises political power by tying community, authority and territory together. I will argue that this particular conception of sovereignty, which effectively ties people to territory, is the result of specific historical processes that led to the structuring of the global political system in territorial nation states.

It should be borne in mind that my account on the formation of nation states is largely inspired by the experiences of some few Western European states, and there are many nation states which took shape in a very different fashion. However, precisely the experiences of the early nation states as France, England and Spain, have led to the formulation of durable concepts such as nationality, citizenship, and territoriality, which today are relevant to all nation states and the system they form part of.

In order to achieve an understanding of the way in which the modern state distinguishes between inside and outside, this Section is divided in three parts. Above, some attention has already been paid to the fact that, in the period stretching from the sixteenth until the eighteenth century, the idea of territoriality gained ground due to increasing power of the European monarchs. Apart from touching upon the context of this historical process of consolidation of exclusive territorial rule, Section 2.3.2. will describe how medieval ideas of allegiance, under the influence of changing ideas about the nature and location of sovereignty, transformed and acquired new significance in the concept of nationality. Subsequently, in Section 2.3.3. we will see how the interplay between territoriality and the notion of popular sovereignty led to the formation of

exclusive political identities. As theories of popular sovereignty fail to define what is meant with the concept of the people, the notion of territoriality and its accompanying notion of Westphalian sovereignty profoundly influenced the answer to this question. The result was that the universalistic ideals on which theories of popular sovereignty were based, translated into a particularistic practice. The tension between the universal and the particular has remained at the heart of the modern state, and its implications for the way in which the modern state distinguishes the inside from the outside is discussed in paragraph 2.3.4.

2.3.2. Emergence of territorial states and changing perceptions of allegiance and loyalty

In medieval Europe, the feudal system had determined the relation of people to territory. However, relations of authority, as command over loyalties, were based more on personal ties than on territorial considerations. Feudal concepts of fealty were not at all comparable to nationality in the modern sense, and social groups had complex and multiple relations to each other, some based on speech, some on religion and some on administrative loyalty. The governance of any such a group could depend on many different authorities and the idea of rule was certainly not determined by “a conception of permanent borders within which such rule applied and outside of which it did not apply.”¹³⁰ The overlap between (political) identities entailed that there was no clear or uniform mechanism by which to distinguish “us” from “them”, “inside from outside”. We have seen above that the medieval order characterised by pluralism under the umbrella of universal Christendom changed slowly because of the consolidation of monarchical power and the influence of the Reformation.

The process of state formation in Europe was exclusionist practice: before territorial boundaries hardened, attempts were already made by states to homogenise populations by expelling peoples, such as religious minorities whose allegiance one could not be sure of.¹³¹ Monarchs increasingly tried to reduce regional differences in their territories, fashioned distinctions between insiders and ‘aliens’, and encouraged the

¹³⁰ Caporaso (2000), p. 22.

¹³¹ Linklater (1998), p. 28.

use of standardised languages in order to create stronger loyalties between the inhabitants of their territories, something that was deemed necessary in order to engage their subjects in the waging of war against other emerging states.

The emerging territorial state struck the right balance between possession of the means of violence and capital accumulation so that this form of political organisation became the dominant one during the sixteenth and seventeenth centuries.¹³² Sovereign states survived because their size was ideal for the fighting of wars: they were large enough to withstand attack and small enough to enable administration from a central point.¹³³ Territory started to play a bigger role in political life, but initially the perception that relations of authority were decidedly personal, remained. This was only logical in view of the fact that sovereignty was seen as vested in the king. As the sovereign was the state, 'nationality' – better described as subjecthood – had implied allegiance to the King, not to a certain demarcated territory, and certainly not to a particular social group.

When the feudal order started to transform gradually into absolutism, everybody became, in addition to his status in the hierarchical feudal order, a subject of the King. In time, the doctrine of perpetual allegiance developed, entailing that none of his subjects could unilaterally renounce his obligations towards the King. Subjecthood was generally acquired by birth and could not be changed afterwards. As the will of the King was the source of allegiance, it was also the King who decided who would be conferred with subjecthood. Ideologies such as nationalism, alluding to a deeper relationship between people and territory, or other ideological convictions tying the notions of people and their state to each other in a more profound way were not yet conceivable. Formally, people were subjects by virtue of their being subjected to the sovereign, and not because they had a special relation with each other or with the territory in which they lived.

In practice, however, territorialisation led to a situation in which the people over whom the sovereign ruled were defined by virtue of their location within certain

¹³² Tilly (1992), pp. 30-31.

¹³³ Linklater (1998), p. 27. Of course there were many more factors influencing the establishment of the modern system of states. See Ruggie (1993), pp.152-166. However, I will not go into these: here it suffices to observe that the modern state system developed as the result of specific historical circumstances. See also Kaldor (1999), p. 11-20.

borders.¹³⁴ This situation became a structural aspect of political organisation after 1648, the year when the Peace of Westphalia, by establishing external sovereignty as a principle of international relations, ascribed to each territorial state the exclusive government of the population within its territory.¹³⁵

During the Enlightenment, earlier attitudes with regard to allegiance and political authority started to change. Due to changing perceptions about the location and nature of sovereignty, the object and foundation of allegiance altered. On the one hand, allegiance became a less stringent condition, for this duty, finding its source in the tie between sovereign and subject established at birth, "an implied, original and virtual allegiance, antecedently to any express promise",¹³⁶ was replaced by a notion that, as we saw above, deducted political obligations from consent or voluntary contract:

" 'Tis plain then, ...by the Law of right reason, that a Child is born a Subject of no Country, or Government. He is under his Fathers Tuition and Authority, till he come to the Age of Discretion; and then he is a Free-man. at Liberty what Government he will put himself under; what Body Politick he will unite himself to."¹³⁷

However, according to Locke, after an individual had consciously chosen to be a member of society, he could never again possess the liberty he would have had in a state of nature. Thus Locke's lifelong contract still implies perpetual allegiance. Later thinkers, such as Thomas Jefferson (1743-1826), extended the scope of Locke's initial voluntary choice to a choice on an ongoing basis. Unsurprisingly, it was precisely the American Revolution that challenged the principle of perpetual allegiance. This was not only caused by political problems that the Revolution brought about,¹³⁸ but it was also the result of the very ideals that inspired the Revolution.¹³⁹

¹³⁴ Philpott (1997), p. 19.

¹³⁵ Hindess (1998), p. 65.

¹³⁶ Blackstone (1865), p. 369.

¹³⁷ John Locke (1961), pp. 345-346.

¹³⁸ The doctrine of perpetual allegiance led eventually to war between Britain and America in 1812 as Britain had been stopping ships on the high seas to impress British born seamen, despite their claims of American citizenship. See Dowty (1987), p. 45.

¹³⁹ On the outbreak of the Revolution each inhabitant of America was given the choice whether he wanted to remain a British subject or become an American citizen. Plender (1972), p. 13.

As already mentioned, these Enlightenment ideals did not only challenge the foundation of the principle of allegiance, but they also changed its object. The idea that allegiance was owed to the kingdom instead of the King gained in importance, explainable by altering perceptions on the location of sovereignty. When sovereignty had passed from the King to the people, allegiance acquired a completely different meaning: it was replaced by the abstract notion of nationality, the bond expressing the fact of a person's belonging to a certain state.

*"La notion de nationalité, lien de droit public qui assujettit un individu à un Etat, a succédé à la vieille idée féodale d'allégeance, lien personnel unissant le souverain à son sujet."*¹⁴⁰

Nonetheless, even if the concept of nationality can be seen as the successor to the feudal notion of allegiance in the sense that they both unite the sovereign with its subjects, important distinctions between the two concepts make them otherwise disparate. Apart from changing ideas on the location and source of sovereignty, which altered perceptions of allegiance, the process of territorialisation led to a situation in which the individual's relation to the sovereign was factually determined by territory, and not longer by any personal attribute of the subject, as it had done in the feudal order. States were able to establish to a large degree exclusive control over their territories and the populations within it. The resulting internal sovereign claim corresponds with the state's external sovereignty in the Westphalian structure through which each territorial state was ascribed the exclusive government of the population within its territory. The concept of sovereignty, linking territory, political community and political power plays a fundamental role in the division of humanity into distinct national populations, with their own territories and states. The precise way in which the modern theory of sovereignty has merged these concepts together will be addressed below.

¹⁴⁰ Boulbes (1956), p. 16.

2.3.3. Popular sovereignty and the discovery of the nation: inconsistent universalism

The secularisation of political theory, combined with other, more practical circumstances, which resulted in the consolidation of exclusive territorial rule, led to perceptions of the state as a unified force, with supreme and exclusive authority over the population within a certain territory.¹⁴¹ The modern territorial state began to take shape, and with its emergence, identity became a clear matter of inside and outside:

“Legitimations of identity gave way to legitimations of difference, with difference here becoming a matter of absolute exclusions. The principle of identity embodied in Christian universalism was challenged by the principle of difference embodied in the emerging territorial state. This was perhaps not much more than a change in emphasis. But this change in emphasis had enormous repercussions. From then on, the principle of identity, the claim to universalism, was pursued within states.”¹⁴²

With the emergence of the territorial state, there came to be clear demarcations by which to differentiate, and those were not only territorial ones. The modern state, apart from claiming exclusive territorial jurisdiction, also asserts a specific national identity. Its borders are “inscribed both on maps and in the souls of citizens.”¹⁴³ Yet, it should be noted, the formation of the territorial state and the building of the nation were different, although convergent, processes.¹⁴⁴

How does nationalism – the idea that every nation should have its own state – relate to the Westphalian state system? Is nationalism, as some argue, solely the product of the struggle for state power: monarchs attempting to homogenise their populations in order to augment and facilitate their rule? Or, instead, is it only logical that pre-political communities – people related to each other by shared culture, language, and history – wish to choose their own sovereign?¹⁴⁵ In other words, do state and nation exist apart,

¹⁴¹ Plender (1972), p. 10.

¹⁴² Walker (1993), p. 117.

¹⁴³ Xenos (1996), p. 239.

¹⁴⁴ Habermas (1996), p. 283.

¹⁴⁵ Caporaso (2000), p. 3.

and is it possible to distinguish between the various collective bodies of human beings, which are called nations, on other grounds than common government¹⁴⁶

A different, although related, question is how nationalism and the political philosophy that accompanied the emergence of independent territorial states, relate to each other. At first sight they seem to contradict each other, for it is difficult to see how one can reconcile the universalistic ideals of eighteenth century enlightenment thinking – expressed in the theory of popular sovereignty – with the formation of exclusive political communities during that same era.

We will not find an answer to these questions in early liberal theory itself, for that failed to address the inconsistency between “universal man, which is its point of departure and the citizen or subject of a state, which is its point of arrival.”¹⁴⁷ For Hobbes the body politic is not a natural body, but it is created by men from the state of nature. Community does not pre-exist the body politic – indeed, we saw that in his theory, it is artificial to make a distinction between society and state: the idea of community is dependent on the notion of the sovereign power. But his theory leaves unanswered the question why particular communities exist instead of one universal community. This could be explained by the fact that Hobbes’ writings were occasioned by civil wars and internal chaos, and his Leviathan was a fiction to explain and justify the kind of political power that he deemed logically necessary in a given body politic as well as a practical necessity in his own country.

But also Locke fails to provide a satisfactory answer to the problem caused by territorial particularism in the face of universal humanity. While for Hobbes there is no community at all without the body politic, for Locke there exists a universal community of mankind in the state of nature, in which all men are free and equal: a moral statement flowing from natural law. We saw how Locke explained why men would want to make a contract with each other in order to opt out this state of nature but he does not clarify why this contract is not made between all members of the natural community of mankind instead of just between members of particular communities. Social contract theories failed to explain how, if pre-political humanity was one, anyone could be made sovereign if it were not with the universal consent of all humanity.¹⁴⁸

¹⁴⁶ Veit-Brause (1995), p. 63.

¹⁴⁷ Seth (1995), p. 44.

¹⁴⁸ Seth (1995), p. 48; and Linklater (1998), p. 105-106. Samuel Pufendorf was in this respect an exception among the early liberalists. According to him people have a natural right to create separate

Nevertheless, although nationalism and the theory of popular sovereignty – in fact, modern ideas concerning equality of mankind in general, seem to contradict each other, the two must somehow be connected. Nationalism is not some “primitive and tribal idea”, which survived despite modernity.¹⁴⁹ On the contrary, nationalism is modern, and wherever theories of popular sovereignty emerged, nationalism appeared. This tension at the heart of modernity cannot be explained by a simple cause but it is instead the result of the conflictive and ambiguous processes that led to the formation of the territorial state based on popular sovereignty.

The French Revolution and the radically new notion of citizenship to which it gave birth, illustrate these ambiguities very well. The revolution was inspired by the ideal of universal mankind, but the spreading of revolutionary ideals over Europe led to demands for national rights of people, not to claims concerning the universality of mankind.¹⁵⁰ If we look at the Declaration of the Rights of Man and Citizen, we see that it declares that the source of all sovereignty resides in the nation. Thus, all of a sudden, the concept of the people in the theory of popular sovereignty was defined as the nation. The struggle for control of state power was surely no longer a matter of Divine Right, but nor was it solely an issue of natural rights for the people: instead, it had shifted to the area of national identity.¹⁵¹ What had caused to the concept of the people to be translated in the notion of the nation?

Part of the answer to that question is to be found in the fact that political reformers inspired by enlightenment ideals were operating in a pre-existing territorial framework. They were rebelling against a monarch whose struggle for power had gradually led to the breakdown of the medieval Christian order and to the establishment of the territorial state. In this struggle, boundaries were gradually drawn,¹⁵² and attempts to homogenise populations were made, in order to secure loyalties. Extended periods of war, which had consolidated the territorial state during the sixteenth, seventeenth and

societies, for they need to associate only with those with whom they share special inclinations; where possible political boundaries should converge with an existing harmony of dispositions. See Linklater (1998), p. 51.

¹⁴⁹ Deudney (1996), p. 129. See also Seth (1995), p. 54; and Veit Brause (1995), p. 61.

¹⁵⁰ Kristeva (1991), p. 151.

¹⁵¹ Xenos (1996), p. 238.

¹⁵² Although it would take a long time before these boundaries actually hardened.

early eighteenth centuries, had sowed feelings of identity and patriotism.¹⁵³ All this had caused the Christian ideal of universal humankind to lose ground during the seventeenth century, and its revival in the eighteenth century did not take place in a vacuum, but in a certain political environment.

Thus, the ideals of popular sovereignty were elaborated upon in an emerging system of territoriality where political rule was defined by territory. They were unavoidably shaped by that very framework. If there had not been absolutist, centralised government on the scale that the territorial state provided, it is doubtful whether political philosophy would have developed as it did. But more importantly, territoriality was a fact by the time that ideas of popular sovereignty were brought into practice.

A brief look at France will illustrate the consequences of the fact that the political ideals had to be executed in the framework of the territorial state of which the boundaries had already been drawn before. Before the Revolution there was no other bond uniting Frenchmen with each other than their common allegiance to the monarch.¹⁵⁴ After the Revolution, governance became impersonal, based on abstract ideas of equality instead of based on the personal ties as it had always been. Two different processes were necessary in order to realise the ideal of equality. First, privilege and feudalism were abolished. Individual political equality, by the use of the concept of citizenship, was gradually realised, although important exceptions to this ideal did never disappear completely. Second, the different parts of the territorial entity that was France, formerly joined by personal chains of command that had been vertical, had to be integrated into the abstract idea of the body politic based on popular sovereignty.

A new idea was needed to imagine this new abstract idea of the body politic, governed by the people, just as a new political identity had to be devised to give expression to political equality. The nation became the all-compassing political entity that was the source of equality, and citizenship indicated membership in this political community. The people became the people by their transformation of subjects of the King to citizens of a nation. That a universalistic ethic came to be construed in the particularistic language of nation and national citizenship was caused by the fact that it

¹⁵³ Hough (2003), p. 8.

¹⁵⁴ Fitzsimmons (1993), p. 29

was not within a universal empire but within the territorial state that enlightenment ideals were politically translated.

We see the same mechanism at work in the concept of citizenship. In most accounts of citizenship, its rights and equality aspect is emphasised. However, it should not be overlooked that citizenship is not only a complex package of rights with which the free and equal individual is endowed, but that he is endowed with them precisely because of his membership in a certain polity. This aspect of citizenship has been called "the gatekeeper between humanity in general and communities of character."¹⁵⁵ The French Revolution merged the two aspects together, and in the same way as with regard to the concept of the nation, identity is thus constructed by "straddling the claims of the universal and the particular."¹⁵⁶

Also here, territoriality played a major role: the Treaties of Westphalia, long before modern ideas of equality became politically significant, firmly anchored the principle of sovereignty in 'international' relations, by establishing mutually independent territorial political units with supreme and exclusionary authority within their territories. The resulting division of 'humanity'¹⁵⁷ into distinct populations defined by territory was largely a fact at the time that the modern reformers brought their political ideals in practice.

So, it may be, as Julia Kristeva observes, regrettable to find the duality of man/citizen at the heart of the maximal demand for equality that the French Declaration of the Rights of Man and Citizen was.¹⁵⁸ However true this is in the light of later developments as we will see in Chapter 3, the drafters of the Declaration could not foresee the consequences which identification of the citizen with man could give rise to. Citizenship was intended to provide equality to all those subject to the power of the state, and the distinction between man and citizen in the eighteenth century did not pose the kind of problems that would arise in later times.¹⁵⁹

Practical circumstances, of which the organisation of political life on the basis of territoriality constitutes the most important, may explain the birth of a concept such as

¹⁵⁵ Kratochwil (1996), p. 182.

¹⁵⁶ Jarvis and Paolini (1995), p. 10.

¹⁵⁷ The term humanity is misleading in more than one sense in the context of modernity as the whole discourse was exclusively European.

¹⁵⁸ Kristeva (1991), p. 150.

¹⁵⁹ Ferrajoli (1996).

the nation, but they do not explain the importance that that concept subsequently acquired. Nationalism has proven to be a strong force. The romantic reaction against the enlightenment played a crucial role with regard to the importance that nationalism as an ideology gained in later times. But it has also been argued that it is liberal theory itself that makes the turn to nationalism possible, although at first sight this does not seem logical. For not only is there a tension between the universalistic ethic of early liberal theory and the particularistic attitude nationalism takes, but in addition it is difficult to see how the self-interested, rational individual on which theories of the modern state are based would want to fight and ultimately die for a political community called the nation.

In order to understand the appeal of nationalism we need to understand the very abstraction of the concept of popular sovereignty. The principle of order and legitimacy in pre-modern political entities, whether they were kingdoms, empires or city-states, was based on "inequality, difference and complementarity."¹⁶⁰ As already mentioned, in the medieval world all individuals had their own position, rights and duties, which unified them personally with the sovereign in an order instituted by God. The unity of the modern state is based on an opposite principle: individualism expressed in a contract based on equality. According to Arthur Melzer, this individualism and the concept of equality has led to the identification that is the root of all nationalisms.¹⁶¹

In addition, the spread of popular sovereignty, by introducing the abstract and intangible concept of the people, changed understandings of political community that are not self-evident.¹⁶² In the words of Bernard Yack, it has, on the one hand, led to the nationalisation of political community, exactly because liberal theory has no justification for the existence of territorial boundaries, boundaries that were a fact when liberal theory came about. As a consequence, it facilitates imaginations of a national community that is pre-political. Yack explains how on the other hand, theories of popular sovereignty have given rise to politicisation of national communities.¹⁶³ Sovereignty implies exclusionary control over territory, and popular sovereignty insists that this control be exercised by the people. The exclusiveness of territorial control in the concept of sovereignty in general, when applied to popular sovereignty in particular, means that there can only be one 'people' that controls a certain demarcated territory.

¹⁶⁰ Melzer (2000), pp. 126.

¹⁶¹ Melzer (2000), p. 125-126.

¹⁶² Yack (2001), p. 518

¹⁶³ Yack (2001), p. 523-530.

And although this concept of the people in liberal theory is certainly not a national community, the problem is, once again, that liberal theory does not show us how to define the concept of the people. Accordingly, it invites “assertions of national sovereignty by justifying the right of peoples to de-establish and reconstruct the authority of the state.”¹⁶⁴

I have argued in this Section that the interplay between territorialisation and liberal theory led to the formation of political identities that hold a large potential for political particularism. By the time that the Napoleonic Wars had swept over Europe, the abstract concepts of national citizenship, nation state and territoriality were established concepts in political thought. Independent sovereign territorial entities had become the building blocks for political life, their borders defined the identity of individuals, and their territorial integrity was seen as essential to prevent destruction and violence. Subsequent changes in the Westphalian system during the nineteenth and twentieth century were not so much caused by changes in its underlying premises, but more by alterations in emphasis, as we will see below.¹⁶⁵

The tension between the universal and the particular has remained at the heart of the modern state, and if anything it has become more acute in our present societies. Its implications for the way in which the contemporary discourse of sovereignty has distinguished the inside from the outside will be addressed in the next Section.

2.3.4. Nation and the territorially defined population as foundations of sovereignty

As the nineteenth century advanced, nationalism thus largely lost its early implications of individual freedom and rights. It was no longer about encouraging the integration of diverse populations and classes into one nation, based on the idea of an inclusive political community, as it had been for the French Revolutionaries. Instead, it became a tool for states’ exclusionist practices. The trend that accorded national identity, as a criterion by which to distinguish between “us” and “them”, unique importance was initiated by the reaction that took place against the Enlightenment. Romanticism placed emphasis on tradition, emotion and community. I already

¹⁶⁴ Yack (2001), p. 528.

¹⁶⁵ See Caporaso (2000), pp. 8-11.

discussed the thought of Rousseau with regard to the location and nature of sovereignty. The *volonté générale* is, as we saw, not a construct based on rationality and self-interest, but it is something that is inherent in the concept of community. The cosmopolitanism of the Enlightenment, according to Rousseau, was an empty promise, and ties that resulted from a common feeling of belonging were infinitely more important than abstract ideas of universal mankind. Hence, he warns of cosmopolitans “who seek far off in their books duties which they fail to accomplish nearby.”¹⁶⁶ For Rousseau, man becomes human by his membership in a community: “We begin properly to become men only after we have become citizens.”¹⁶⁷ Community in Rousseau’s sense is not necessarily the nation, but it is not difficult to see how his thoughts could be applied to the newly emerging idea of the nation, which was exactly what subsequent thinkers, such as Hegel (1770-1831) would do.

In Hegel’s philosophy there is no distinction between community, state and nation. The significant unit is neither the individual, nor just any group of individuals, but it is the nation. If for Rousseau sovereignty is expressed in the general will, for Hegel state sovereignty is the fundamental expression of the national will. If, up until contemporary times, nationality is the primary political identity, leaving all other loyalties and ties far behind, that trend was started by Hegel, by whom the state is continually represented as standing for the highest possible ethical value.¹⁶⁸ Increasing nationalism noticeably changed the role of the state: just as in Hegel’s philosophy the state became identified with the nation.

In addition, nationalism reinforced the “sovereign territorial ideal”.¹⁶⁹ By the end of the nineteenth century, sovereignty, territory and the identity of the political community had become inextricably linked. Cultural and “ethnic” homogeneity in a state was something to be aspired. It was nationalism that, if not exactly gave birth to, at least nourished “the intimate relationship between identities and borders”¹⁷⁰. People were bound to each other and their territory by virtue of their nationality.

In the period between the two world wars, national identity had become the highest political priority; states generally did not recognise any other identity or loyalty.

¹⁶⁶ Kristeva (1991), p. 143.

¹⁶⁷ Sabine (1941), p. 582.

¹⁶⁸ Sabine (1941), p. 639.

¹⁶⁹ Murphy (1996), p. 97.

¹⁷⁰ Lapid (2001), p. 10.

The national state had a monopoly control on violence, it was the highest court of appeal and it had an exclusive right of representation in the international sphere.¹⁷¹ The structural importance of clearly demarcated and inviolable territory, ruled by the nation as a discrete social unit, was strengthened by the Treaty of Versailles. People were defined by virtue of to which state they belonged. Political community became increasingly closed in upon itself, and more and more hostile to outsiders, due to nationalistic forces and new state structures that intensified the totalising project.¹⁷² These outsiders were not only people belonging to other states, but also those belying a different identity within the state.

It was however, not only nationalism that changed conceptions of the relationship between people, territory and state. After the First World War, many regimes proclaimed a collectivist ethic. Instead of the ethnic or cultural homogeneity the nationalists strive after, collectivism aims at social homogeneity. Collectivism maintains that the will of the individual coincides with the will of the state – the interests of the individual are identical to the interests of the state. In practice, this meant that the aspirations of the individual were completely subordinated to those of the state.

Although the Second World War made clear the dangers of unbridled nationalism, nationalism as an acceptable political ideology was not discarded, as was shown by decolonisation and the transformation of former USSR republics into nation states. The tendency to fuse the meanings of state and nation is evident up until today, and the perception of the territorial state as a “container of society”¹⁷³ is a persistent one. The territorial state is seen as the proper unit for organising political life, and “the categories through which we have attempted to pose questions about the political are precisely those that have been constructed in relation to the state.”¹⁷⁴ Thus, the exercise of citizenship has become inseparable from belonging to the nation: a very specific kind of membership in a territorially defined political community.¹⁷⁵ Territorial boundaries are to be guarded jealously and strictly, especially with regard to the movement of persons, because the territorially fixed population has become one of the foundations of the concept of sovereignty: “when the rules for differentiating between the inside and

¹⁷¹ Carr (1946), p. 228.

¹⁷² Linklater (1998), p. 4.

¹⁷³ Agnew and Corbridge (1995), pp. 82-92. See also Murphy (1996), p. 103; and Tully (1997), p. 187.

¹⁷⁴ Jarvis and Paolini (1995), p. 7.

¹⁷⁵ See Balibar (1988), p. 726; and Caporaso (2000), p. 22.

the outside become blurred and ambiguous, the foundations of sovereignty become shaky.”¹⁷⁶

Of course, in some areas there are exceptions to this fundamental place of the territorial nation state in politics, most notably the case in the European Union. Within the Union, Member States are limited in their use of territorial borders to maintain a strict divide between inside and outside. However, with regard to the Union’s external frontiers, no such movement away from a traditional conception of sovereignty can be discerned. The external frontiers of The EU have the long-established meaning that territorial boundaries have in distinguishing between “us” and “them”. They may even have reinforced the importance of such distinctions.¹⁷⁷ The fact that the EU in this sense is not as novel as some would like us to believe is perhaps illustrated best by the denial of EU citizenship for long term residents of the EU. Nationality, territory and community become increasingly decoupled for insiders, but for outsiders their linkage remains as strong as ever.

The successful elimination of internal frontiers will of course accentuate in a symbolic way (and in a very real sense too) the external frontiers of the Community [...] In one way, the more that these external borders are accentuated, the greater the sense of internal solidarity [...] in the very concept of European citizenship a distinction is created between the insider and the outsider that tugs at their common humanity.¹⁷⁸

2.4. CONCLUSIONS: BORDERS, VIOLENCE, AND SOVEREIGNTY’S CLAIMS

In this Chapter we have seen how territorialisation, “a historically specific, contradictory, and conflictual process rather than a pre-given, fixed, or natural condition”¹⁷⁹, has led to the current perception of sovereignty as a self-evident and natural abstraction that links state power, people and territory. Sovereignty, understood as the state’s claim to ultimate political authority within its territory is based on two

¹⁷⁶ Doty (1996), p. 122.

¹⁷⁷ See Balibar (2002); and Kostakopoulou and Thomas (2004), p. 6.

¹⁷⁸ Weiler (1992), pp. 65, 68.

¹⁷⁹ Brenner (1999), p. 12.

pillars: the state's asserted monopoly on the legitimate use of violence and its claim to determine the inside from the outside.

I have attempted to show that the question of the legitimacy of political power cannot be seen separate from the modern state's claim to determine its boundaries. On the one hand, the process of territorialisation facilitated the emergence of the abstract notion of sovereignty as legitimation of ultimate power within the body politic. On the other hand, the way in which the theory of popular sovereignty subsequently legitimised ultimate political authority within the body politic has in turn led to an exclusive ideal of political community. In addition, the territorial aspect of the modern state's claim to determine its boundaries cannot be understood properly when we fail to take into account the Westphalian structure in which each and every state necessarily operates.

However, the historical and factual link between all these aspects of sovereignty is often ignored, which in turn leads to a reification of territoriality as an organising principle for politics.¹⁸⁰ We will see later in this study that the result is the near immunisation of sovereignty's territorial frame against forces of political and legal correction. While the content of sovereignty has always been open to debate, contention and change from various perspectives over time, its territorial form has acquired a status of neutrality and innocence. Such self-evidence and uncritical acceptance of territoriality obscures the transformative possibilities in the concept of sovereignty as a whole, and the opportunities for change that may emerge from the relation between our thinking about "ideals and human interests and thinking about institutions".¹⁸¹ In order to make this argument at a later stage, this conclusion will first provide some further insights in the relation between the legitimacy of violence on the one hand, and the way in which the territorial state has distinguished between inside and outside on the other hand. After that, the interrelatedness of sovereignty's aspects in the specific context of international migration is briefly touched upon.

Charles Tilly aptly expresses the link between violence and the state, when he writes that the state made war while war made the state.¹⁸² Tilly refers to factual circumstances of armed conflict that caused the territorial state to become the dominant form of political organisation. However, we have also seen how the religious wars of

¹⁸⁰ Agnew and Corbridge (1995), p. 82. See also Walker (1993); and Anderson and Bigo (2002), p. 17.

¹⁸¹ Unger (1996), pp. 3-7.

¹⁸² Tilly (1992).

the seventeenth century gave a strong impulse to the theory of sovereignty as the foundation for ultimate political authority in the body politic. The notion of sovereignty was partly formulated as an answer to the violence that ravaged Europe. An essential feature of the consolidation of the European state system was that the state's monopoly on the use of force was vigorously institutionalised.¹⁸³ With the advent of popular sovereignty, one of the tasks of the modern state was to provide security, and one of the reasons why the modern state was successful in establishing its monopoly on the use of violence, was its very ability to provide citizens with security.

From then on, individuals had no longer the right to use force between each other. We have seen that most theorists on sovereignty were primarily concerned with its internal claims, but in international relations the concept came to bear upon the relations between states as well. Also the external aspect of exclusive territorial sovereignty, for which the Treaties of Westphalia provided the first step, was perceived as a necessity in order to prevent recurrence of the violence that had devastated Europe during the Thirty Years War.

The way in which the modern state distinguished, from then onwards, between inside and outside, by use of territorial boundaries and later by the assumption of a "necessary alignment between territory and identity, state and nation,"¹⁸⁴ influenced the question of legitimate violence profoundly. In fact, through the process of territorialisation, which was initiated by the monarchical consolidation of territorial rule in the fifteenth century, a new structure by which to distinguish between legitimate and illegitimate violence could materialise.

Before the modern state with its rigid link between clearly demarcated territory and political power came into existence, it was difficult to distinguish between war and mere crime within the widespread violence that Europe continually suffered. The absence of a clear mechanism to determine "us" from "them", due to the overlap between identity-based boundaries, made it impossible to make a distinction between those forms of violence that were legitimate and those that were not.¹⁸⁵ It was only when the territorial state had taken shape that distinctions of this kind could be made within the concept of violence. War was legitimate if it was waged by the authority that

¹⁸³ Hough (2003), p. 7.

¹⁸⁴ Campbell (1996), p. 171.

¹⁸⁵ Mansbach and Wilmer (2001), p. 56.

had the right of waging it: the state.¹⁸⁶ War was thus distinguished from mere crime by defining it as something that only sovereign states engaged in.¹⁸⁷ In nineteenth century conceptions of international law, the right of a state to wage war in order to settle disputes with other states was regarded as a fundamental aspect of that state's sovereignty.¹⁸⁸

These issues will receive further attention in the next Chapter, but for now it is important to see how the very process of territorialisation has shaped the norms delimiting legitimate from illegitimate violence, and thus cannot be seen separate from the exercise of political authority. In addition, the Peace of Westphalia made a sharp distinction possible between internal and external violences. Internal violence was regulated by the sovereign state alone, consistent with the idea of sovereignty as supreme legitimate authority over the population within a certain territory. Violence between states, on the other hand, was regulated by the articulation of international norms, which were again based on strong territorial assumptions as will be dealt with extensively in the next Chapter.

I have already mentioned that the lack of attention for the relation between the exercise of state power through political institutions and the clear spatial demarcation of the territory on which this power is exercised has led to a reification of the principle of territoriality.¹⁸⁹ If we look at early modern Europe, we see that in definitions of political authority, personal power relations preceded power that found its basis in territory. Nonetheless, at present, the linkage of political power to clearly demarcated territory is seen a natural way of organising the global political system and it has led to a framework where the legitimacy of violence is largely dependent on territorial demarcations. The result thereof is that the territorial form that sovereignty has assumed over the course of history is often perceived as separate from its jurisdictional content.

However, we have seen in this Chapter that such a distinction between content and form of sovereignty fails to do justice to reality. The territorial frame in which the modern state operates and the jurisdictional claims over persons that it makes within this frame do not make sense if analysed in isolation from each other. Indeed, the territorial basis of the state intends to "fix and enforce boundaries of identity so that the

¹⁸⁶ Rifaat (1979), p. 12.

¹⁸⁷ Van Creveld, (1991), p. 41.

¹⁸⁸ Brand (2002), p. 287; and Steiner and Alston (2000), p. 114.

¹⁸⁹ Agnew and Corbridge (1995), p. 82.

distinction between inside and outside [becomes] defensible.”¹⁹⁰ These boundaries of identity have everything to do with the unity of the body politic and the definition of the political community. The state uses both form and content of sovereignty to protect and maintain such unity and community. The vague and overlapping identities of medieval Europe gave rise violence, chaos and destruction, but we will see later in this study that the way in which the modern state perceives, construes, and protects political community gives rise to its own sorts of violence.

National responses to international migration exemplify that the Westphalian distinction between the state’s internal and external sovereign claims is blurred and similarly they illustrate the interrelatedness of the territorial frame and the jurisdictional content of sovereign power. The movement of people across borders engages the external sovereign claims of national states in a Westphalian structure that divides humanity in distinct and separate entities. At the same time, international migration engages the internal sovereign claims of the national state in a policy area where its identity-based boundaries and its territorial borders converge. A state who regards immigration as a threat, attempts to guard its territorial boundaries, *inter alia* with the use of military patrols to intercept illegal migrants at the border, and military police to carry out expulsions. Simultaneously, it establishes controls within society, ranging from obligatory language courses for foreigners to checks on ‘bogus’ marriages, to ensure that its identity remains unthreatened. Immigration is thus perceived as both a “resistant element to a secure identity on the inside” as well as a territorial “threat identified and located on the outside of the state through a discourse of danger that contains elements applicable to both.”¹⁹¹

In this study, I will argue that the doctrinal separation between the jurisdictional content and the territorial frame within the notion of sovereignty, resulting from the reification of territoriality as a neutral framework in which the abstract notion of sovereignty operates, has led to a structural blindness for the involvement of personal interests whenever the state bases its claims on the sovereignty’s territorial frame.

It is evident that such blindness is exacerbated whenever the very individuals who are affected by the state’s sovereign power are rendered invisible, either because they are far away and unknown or alternatively because they are very different from

¹⁹⁰ Mansbach and Wilmer (2001), p. 56. See also Newman (2001), p. 139 and 145.

¹⁹¹ Campbell (1996), p. 169. See also Balibar (1998), p. 220.

“us”. Indeed, we will see that the tension between the universal and the particular at the heart of the modern state is made more acute by a strict separation between form and content of sovereignty. The distinction between the state’s territorial framework and its resulting spatial powers on the one hand, and its jurisdiction over people within a certain territory on the other hand obscures the fact that constraints on individual behaviour and freedom are always motivated on account of the notion of political community and the unity of the body politic. Just as its jurisdictional content, the territorial frame of sovereignty has enormous repercussions for individual behaviour and freedom, as we will see in Chapters 4 and 5 that deal with international movement of individuals. However, before turning to the way in which both the external and internal sovereign claims of the national state influence questions of international migration, the next Chapter addresses constraints on the exercise of political power by the sovereign state, most of which are motivated precisely by the concept of individual freedom.

Chapter 3 Limits on sovereign power

3.1. INTRODUCTION

In the previous Chapter, I have investigated how the concept of sovereignty legitimised the state's exercise of political power within its territory. In the modern state, political power is expressed as a legitimate claim to a monopoly of violence, and coercion is a defining element in the construction of state and sovereignty.¹⁹² Due to the way in which it determined boundaries, and later also because it turned into popular sovereignty, sovereignty became a legitimate site of violence. However, that is not to say that it is an unproblematic site of violence. As a response to the growing power of the modern state and its particular notion of sovereignty, ways have been devised to circumscribe the power of the state to resort to its means of coercion. This has been done because, even though the modern notion of sovereignty attempts to attain congruence between ruler and ruled, it has not been able to resolve the disparity between people and state, a disparity that results from the very abstractness of the modern notion of sovereignty. Many of the limits on the power of the modern state result directly from this distinction between state and society: as it is the sovereign state that is in possession of the legitimate means of coercion, certain safeguards for the people are necessary. These safeguards, first embodied in so-called constitutionalism and the rule of law and the discourse of citizenship, and later also in the international human rights regime, will be the subject of this Chapter.

In this Chapter, I will argue that in the legal discourses that aim to limit state violence, we can discern both universality and particularity. The modern tension between the universal and the particular that we encounter in the very concept of the territorial nation state has not been extinguished in the instruments developed to protect against the sovereign power of that specific form of political organisation. In some of these discourses the balance tends to fall more towards an ideal of universality, whereas

¹⁹² Bobbio (1989), p. 75.

in others political particularism is explicitly emphasised. I will argue that the reification of the territorial form of sovereignty poses limits to the universality of all these discourses, including, and with particular emphasis on, the modern version of an international rule of law.

We will see in later Chapters of this study that the practice of immigration detention provides an outstanding example of the implications on the life of the individual of such immunisation of sovereignty's territoriality against domestic and international forms of legal correction. Immigration law and policy is one of the areas in which the tension between the universal and the particular is bound to come out most distinctly, as it is a field that is defined by the very distinction between "us" and "them".

In addition, as we saw in the concluding remarks of last Chapter, the field of immigration shows distinctly that the territorial form of sovereignty and its jurisdictional claims are intertwined, and that the state bases its claims on both aspects of sovereignty in order to preserve the unity of the state and protect its political community. Thus, in this Chapter, the tension between the universal and the particular as well as the conceptual division within sovereignty between its territorial form and its content will be recurrent themes in my investigation of the various instruments that have over time sought to protect the individual against the power of the modern state.

This Chapter is structured as follows. First, I address a general theory of constitutionalism and the rule of law in Section 3.2. Many of constitutionalism's fundamental guarantees have become institutionalised in the concept of citizenship, which will be dealt with in Section 3.3., where we will see that the process of territorialisation caused a political particularistic reality to triumph over citizenship's original universalistic ideals. After that, in Section 3.4., I investigate the way in which international law regulates state violence. In this Section, not only the protection of the individual against the sovereign power of the modern state will be addressed, but also the regulation of inter-state violence receives attention in order to understand territoriality's impact on international law as a discipline. Particular emphasis will be on the emergence of modern human rights law, as this relatively recent area of law emerged as an explicit attempt to overcome the traditional political particularism in the field of individual rights.

Section 3.5. explores the implications of modern human rights law for sovereignty's claim to distinguish the inside from the outside, a claim that is traditionally based, as we have seen in the previous Chapter, on territory and identity. In

Section 3.6., I will conclude that the notion of territoriality impedes the realisation of the self-proclaimed universality of human rights. In fact, just as they did with regard to citizenship, the territorial borders of the modern state have principally kept their role in delimiting the universality of fundamental rights.

3.2. CONSTITUTIONALISM AND THE RULE OF LAW

“In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on government; but experience has taught mankind the necessity of auxiliary protections.”¹⁹³

3.2.1. The theory and practice of the limits on political power

At no point in history has sovereignty meant absolute rule without accountability, and arbitrary use of power by the sovereign has never gone unchallenged. Certainly, it would have seemed strange to Bodin that the sovereign could be bound by law – for him that would have meant that the sovereign is bound by his own will, something he found inconceivable.¹⁹⁴ Nonetheless, we have seen that also in his theory, sovereign power is subject to limits, albeit not embodied by any human law, but incorporated in the law of God and nature. Even Hobbes’ sovereign is not absolute once it is appreciated that his power is only absolute if it is effective: he needs to provide his subjects with security: hence his monopoly on the means of violence.

We have seen that in the modern state, the foundation for the legitimacy of political power is provided by the idea of popular sovereignty. Popular sovereignty itself is based on ideals of individual liberty and equality. Consequently, not only the foundation, but also the exercise of political power has to be based on the same principles of liberty and equality. If government is necessary to guarantee each individual’s natural rights, it follows that, apart from an obligation to protect these rights against violations by other individuals, the state is obliged to protect these

¹⁹³ Madison, Hamilton and Jay (1987), p. 319-320.

¹⁹⁴ Allen (1967), p. 50.

principles also against the state itself. In order to render such protection effective, it is necessary to limit, as well as control, the powers of the state. In the modern state, this is achieved through constitutionalism's fundamental principles of limited government (governments only exist to serve specified ends) and the rule of law (they should only govern according to specific rules)¹⁹⁵.

Already before the modern state came into existence, there were theories about the limits to political power. However, compared with traditional constitutional doctrines, the constitutionalism of the modern state, based on popular sovereignty and each citizen's equality, is better capable of imposing effective and consistent limits on political power.¹⁹⁶ In modern constitutionalism, individual rights determine the limits, scope, and aim of governmental power, and the prohibition on the arbitrary use of power is shaped by the idea of equality. Modern constitutionalism poses the issue of limits to political power in terms of the relation between power and law.¹⁹⁷ By stipulating that the state itself is bound by the law – requiring that its powers be exercised in accordance with the law – constitutionalism and the doctrine of the rule of law intend to prevent the arbitrary use of power by the state.

3.2.2. The rule of law through institutional design and formal limits on government

Constitutionalism, as the theory and practice of the limits to political power, “finds its fullest expression in the constitution that establishes not just formal but also material limits to political power.”¹⁹⁸ As mentioned, modern constitutional ideals of limited government find their origin in the enlightenment era. In most states, their consolidation in law generally took place during the nineteenth century.¹⁹⁹ I will first pay attention to the formal limits which the rule of law places on the power of the modern state, after which I will investigate its material limits, embodied in theories of fundamental rights.

¹⁹⁵ Schochet (1979), p. 1. In the following paragraphs I will use the terms rule of law and constitutionalism interchangeably.

¹⁹⁶ Ibid. p. 3-4.

¹⁹⁷ See Bobbio (1989), p. 89.

¹⁹⁸ Ibid. p. 97.

¹⁹⁹ Ommeren (2003), p. 11; and Zoethout (2003), p. 69.

First of all, the rule of law prevents arbitrary use of state power through its requirement that the exercise of power by the state is in accordance with, and finds its formal basis in, the law. Ultimately, the legal basis for political power is to be found in the constitution, which “constitutes” the various branches of government, their tasks and the limits of their powers.²⁰⁰ With regard to the principle that power should solely be exercised in accordance with the law, the principle of equality compels these laws to consist of general rules, equally applicable to every citizen.

Secondly, inhibition of arbitrary exercise of state power is also achieved through rules of institutional design. John Locke argued in his Second Treatise that, as the supreme power of the people had to be delegated, it would be best for political power to be divided amongst several independent spheres of right in order to prevent abuse. This line of thought was developed further by Montesquieu (1689-1755), whose name is mostly associated with the idea of separation of powers, an idea he alleged to have discovered by a study of the English constitution.²⁰¹ Montesquieu was afraid that the despotism of the French monarchy, which in his eyes equalled law with the sovereign’s will, had so damaged the traditional constitution of France that freedom had become forever impossible.²⁰² For him, personal liberty was the most important value, and would be secured best if the legislative, executive and judiciary powers of the state were to be divided amongst different branches of government, which would then be able to control each other.

The idea of separation of powers was not a new one, but Montesquieu made it into a coherent legal system of checks and balances between the different parts of the constitution,²⁰³ a legal doctrine that is still a central feature of the contemporary Rechtsstaat. Each power is accorded its own status and tasks, but all powers are to a certain extent dependent on each other, which leads to a system of checks and balances in which the different branches can exercise a degree of control on each other. Different legal systems have differing systems of checks and balances, but essential to the doctrine of separation of powers is that restrictions on individual freedom can ultimately

²⁰⁰ Zoethout (2003), p. 60.

²⁰¹ Although at the time that Montesquieu was studying the English constitution the Civil Wars had destroyed the remnants of medieval mixed government and the Revolution in 1688 had settled Parliamentary supremacy. See Sabine (1941), p. 560.

²⁰² Sabine (1941), p. 552.

²⁰³ Sabine (1941), p. 558. See also Bobbio (1989), p. 96.

only be enacted by the legislature, that actions of the executive are bound by the rules which are laid down by the legislative, and the existence of an independent judiciary that ensures that the executive acts within the limits that are set by the legislature.

Judicial review of the exercise of political power is thus inherent to the idea of the separation of powers. However, as an independent judiciary takes such a central place in the theory of constitutionalism,²⁰⁴ I address judicial review by independent courts separately, as a third requirement of the Rechtsstaat. An independent judiciary is indispensable to ensure that the other requirements of the rule of law are actually put into practice. First, an independent judiciary is in the best position to make sure that action by the state is in accordance with the law, and in conformity with its legal basis.

Furthermore, in ensuring the fair application of the law and its strict enforcement, an independent judiciary guarantees the principle of equality. Most importantly of all, individual rights, which, as we will see below, pose material limits to the exercise of power, are only capable of bringing about such limits when they are effective. Individuals need to be able to secure the protection of their fundamental rights, which should occur at an altogether different plane as at which these rights were infringed upon or restricted. Fundamental rights protection is unthinkable without the existence of an independent judiciary. In paragraph 3.2.4., I will address the manner in which they interact in further detail.

3.2.3. Individual rights as material limits to political power

The rule of law is not confined to matters of procedure or questions of institutional design. Individual liberties are intrinsic to the idea of the rule of law as precisely principles relating to each man's freedom and equality constitute the basis for the idea of limited government. The way in which the constitution establishes material limits to political power is "well represented by the barrier which fundamental rights – once recognised and legally protected – raise against the claims and presumptions of the holder of sovereign power to regulate every action of individuals or groups."²⁰⁵

²⁰⁴ Gordon (1999), p. 43.

²⁰⁵ Bobbio (1989), p. 97.

We already saw that the idea of inalienable rights was the ratio behind social contract theories. We find a first impulse towards such an idea of rights in the Christian tradition, although in the medieval feudal order, individual rights were not perceived as such, but they consisted of privileges, split off feudal authority. Instead of a conceptual foundation that spoke of rights inherent in men because they were men, those rights had a contractual character.²⁰⁶ A famous example of such contractual guaranteeing of rights is the Magna Carta of 1215.

The modern idea of fundamental rights developed in the seventeenth century. We have seen that in the enlightenment tradition, natural law was seen as a claim to inalienable rights inherent in each individual.²⁰⁷ Fundamental rights are accorded to man by virtue of his humanity and not because of his particular position in the body politic. This new conception of rights finds a clear expression in the Bill of Rights of the American States and the French Revolution's Declaration of the Rights of Man and the Citizen. This notion of fundamental rights, a guarantee for the individual's freedom independently from and antecedently of the existence any political community, constitutes constitutionalism's material limits on state power. Individual rights in this sense are called classical fundamental rights, or civil rights, the most important of which are the right to life, liberty, physical integrity, and equality, and diverse freedoms such as freedom of thought, religion, and expression.

Later developments with regard to the regulation of governmental power and the tasks of the modern state, led to the articulation of additional kinds of fundamental rights: political rights and social or economic rights. Political rights, such as the right to vote and to fulfil a public office, aim to ensure equal participation for every citizen in the body politic. Their purpose is to translate the ideal of popular sovereignty into political practice. The emergence of economic and social rights is directly related to changing conceptions at the beginning of the twentieth century about the role which the modern state should play in the life of its citizens. Social demands were reframed in the language of rights, when governments became obliged to promote actively the well-being of their citizens. In the modern language of individual rights, civil, political and social rights are all accorded the status of fundamental rights. In political practice, the

²⁰⁶ Shafir (2004), p. 13; and Burkens (1989), p. 3.

²⁰⁷ Pot and Donner (1995), p. 24; Sabine (1941), p. 525.

three groups of rights and their exercise by the individual are related, most clearly illustrated in the concept of citizenship.

3.2.4. Judicial review, fundamental rights and the limits of the rule of law

Rules of institutional design are closely related to the protection of classical rights, which aim to establish an area in which the individual is free from interference from the state. In some instances, it may not be possible or desirable that individuals exercise the full scope of their fundamental rights. One example is the case in which the fundamental rights of two individuals conflict with each other; another example is the case in which the state's task of providing security for all its subjects clashes with individuals' unrestricted exercise of their fundamental rights. In these cases, the exercise of fundamental rights can be restricted, provided that the essence of the right in question remains intact.

Interferences by the executive with the individual's fundamental rights should be based on restrictions that are endorsed by the legislature. When his rights are interfered with, the individual has the right to have the interference reviewed by an independent judiciary. This accountability needs to be real, which means that, when assessing whether an infringement of a fundamental right has occurred, judges should not merely examine whether the executive has acted in accordance with the rules laid down by the legislature, but in addition, they should assess whether the interference itself is not in breach with the core of the right in question. Thus, also fundamental procedural rights and issues of fairness are associated with the rule of law.²⁰⁸

The rule of law thwarts assertions of sovereignty as power without restraint. Especially in the field of the rights of the individual, political power is clearly circumscribed, according to rules that simultaneously set formal and material limits to its exercise. Nonetheless, there are situations in which the normal constitutional guarantees of the state do not apply fully. In these situations, we can catch a glimpse of sovereignty in its pure form as absolute power, both with regard to its territorial form as with regard to its content as power over people.

²⁰⁸ Dauvergne (2004), p. 593.

Contemporary migration policy is one of the fields in which we are most likely to perceive pure sovereignty, associated as it is with the essence of the nation. Chapters 4 and 5 will deal with the regulation of international movement, and Chapters 6 and 7 investigate restrictions on the right to liberty in the specific context of immigration law and policy. Those Chapters will show that in the field of immigration policy, extensive executive discretion and a traditional deference of the judiciary with regard to actions of the executive exist. Thus, with regard to the rule of law, the relevance of the distinction between insiders and outsiders is not only that outsiders generally enjoy a lesser degree of access to judicial protection,²⁰⁹ as the Section on citizenship below will describe. We will see that particularity of the rule of law goes further than that. Its territorial assumptions are illustrated with the fact that in the field of migration we encounter “power which does not conform to judicial or legislative modes of exercise.”²¹⁰ The exact way in which migration law and policy may engage the exposed core of state power, where arbitrary exercise of political power is most likely to manifest itself, will be addressed in detail later in this study.

3.3. CITIZENSHIP, INDIVIDUAL RIGHTS AND TERRITORY

The rule of law and constitutionalism are products of specific historical processes, which, from the seventeenth century onwards, took place within sovereign states defined by territoriality. With regard to rules regulating institutional design, their embeddedness in the territorial state is logical and does not bring about serious inconsistencies. However, concerning individual rights, the consequences of their “particular historical institutionalisation in sovereign states”²¹¹ may turn out to be in contradiction with their underlying ideals of equality and dignity of universal humankind. The institutionalisation of individual rights in the state has mainly occurred in the concept of citizenship, a concept that impinges significantly on the life outside constitutional affairs.²¹²

²⁰⁹ Dell’Olio (2005), p. 25.

²¹⁰ Dauvergne (2004), p. 592.

²¹¹ Huysmans (2003), with regard to democratic forms of politics.

²¹² Tilly (1999), p. 253.

My account of modern citizenship is divided in three Sections. Section 3.3.1. will deal with the factual circumstances that gave birth to modern citizenship. In addition, it will show that the very tension at the heart of the modern state between ideals based on a universal humankind and a political particularistic reality – a tension that is, as we have seen in the previous Chapter, largely the result of territorialisation – is also present in the concept of citizenship. Section 3.3.2. addresses the resulting implications of this tension for the rights of the individual. We will see that universal rights have been actualised mostly within national states, and that national citizenship became a necessary condition for access to those rights that one supposedly has by virtue of belonging to universal humankind. Subsequently, in Section 3.3.3, I will focus on citizenship's role in a global structure of sovereign states based on clearly demarcated territory, in order to argue that outsiders are not only denied access to fundamental rights on account of the internal sovereign claims of the national state, but that discrimination against them is also a structural aspect of the Westphalian state system.

3.3.1. Citizenship as an apparent paradox

The idea of citizenship itself is much older than the existence of the territorial state. Since ancient Athens, theories of citizenship have rested on some idea of political participation.²¹³ However, citizenship as a status which accords people, at least formally, a uniform collection of rights and duties, by virtue of their membership of the polity is a modern idea, which developed in the framework of the emerging nation state. In all accounts of citizenship as it emerged after the French Revolution, two notions are emphasised. The first represents membership of the polity, which, as marker of identity, creates a clear boundary between inside and outside, and the second connotes a legal status, endowing the individual with a set of rights and responsibilities. Most writers about citizenship have depicted these two elements of citizenship as conflicting with each other, the tension which exists between them making their synthesis in a single

²¹³ Rubenstein (2003), p. 160.

concept seem a paradox. Partly this tension is explained by the fact that modern citizenship fused two ways of thinking about liberty.²¹⁴

The first, dating much further back than the second, relates to the extent in which the individual can partake in political affairs. Citizenship of ancient Greece was based on such a conception of liberty. The idea of political participation in the modern state is determined by the collective right to exercise popular sovereignty.²¹⁵ The second way of thinking about liberty is a modern one, and its appearance on the political state dates from the enlightenment era. Instead of a political concept, it is a legal notion, which is based on equality and characterised by the rights of the individual.²¹⁶

When these two ways of thinking about liberty are merged in the single concept of citizenship a certain tension will surface. For to lay claim to a right based on universal equality of mankind one does not need any further qualifying conditions than to be human, but in order to claim a part in collective decision making about the future of the polity, one has to form, by definition, part of that collective. Precisely this is what Pietro Costa refers to when he writes that citizenship is a seemingly successful synthesis between two very different traditions, the first being the one based on the unbreakable ties between individual and the body politic and the second embodied by the natural law paradigm in which the individual is the symbol of sovereignty and the immediate titleholder of rights.²¹⁷

However, there is more to it. Ties between the individual and the body politic are not stable and are not necessarily unbreakable. Furthermore, they need not be based on criteria that are exclusive. But modern citizenship developed simultaneously with the modern state. Inevitably, then, it is influenced by the ambiguities inherent in the modern state. Indeed, citizenship's innate tension is the same as that which we find in the territorial nation-state, as was described in Chapter 2. There it was portrayed as the very tension that lies at the heart of modernity, between ideals concerning the universality of mankind and particularistic claims of distinct communities, *in casu* distinguished by varying national origins, however understood. Nationalism determined which ties between people and state are politically relevant, and as such, by putting citizenship on

²¹⁴ Lange (1995).

²¹⁵ *Ibid.* p. 97.

²¹⁶ *Ibid.* p. 98.

²¹⁷ Costa (2002), p. 218-219.

a par with nationality, it has magnified the potential for conflict between the different idea's that underlie citizenship.

More than in contemporary nationalism per se, which by definition has become a particularistic claim, the paradox between universal humanity and political particularity is still deeply ingrained in the discourse of citizenship. In the words of Andrew Linklater, much of the moral capital that has accumulated in the course of resistance to the growth of state power is embodied in the concept of citizenship.²¹⁸ But at the same time, by its equation with nationality, the same concept of citizenship is employed to defend a certain distinction between the inside and the outside.

"The citizenship project is about the expansion of equality among citizens. But as equality is based upon membership, citizenship status forms the basis of an exclusive politics and identity."²¹⁹

Chapter 2 made clear how the universal ideals inspired by the French Revolution developed into particularistic realities. I will briefly reiterate, with specific regard to citizenship, some of the issues that were touched upon there. As the Revolutionaries wished to abolish all titles of distinction that were current during the old regime, the concept of equality of all members of the body politic required expression in the new notion of citizenship. Before the French Revolution, certain parts of Europe had known urban citizenship, providing those who were fortunate enough to possess it with autonomy, control of guild institutions and even social welfare entitlements at the local level.²²⁰ However, after the Revolution a new kind of citizenship spread over Europe. Particular rights and duties based on a notion of universal humankind found their place in a political discourse that would keep its relevance in the future as it could be adapted to fit all kinds of struggles for equality on a national scale. Fitzsimmons captures how the new idea of equality related to the concept of the nation, when he writes that "membership in the nation, rather than privilege mediated through the monarch, became the basis for political rights in the polity."²²¹

²¹⁸ Linklater (1998), p. 169.

²¹⁹ Rubenstein (2003), p. 163.

²²⁰ Hanagan (1997), p. 398; and Marshall (1950).

²²¹ Fitzsimmons (1993), p. 32.

The concept of citizenship played an important role with regard to the new mode of legitimation of political power. Theories of popular sovereignty were the driving force behind the transformation of subjects of a King to citizens of a nation. The French Declaration of the Rights of Man and Citizen expresses the ideal of equality of universal mankind in the concept of citizenship. For the early Revolutionaries the distinction between man and citizen was not problematic: The title of French Citizen could be accorded to foreigners, living in France or abroad, who "in various areas of the world, [had] caused human reason to ripen and blazed the trail of liberty"²²².

However, citizenship was affected by the changing character of the concept of the nation. As we have seen in Chapter 2, that concept, originally founded on equality and liberty, acquired a different meaning in the nineteenth century. Its emphasis shifted from 'demos' to 'ethnos'. Citizenship became a tool in an exclusionist philosophy, instead of a principle for realising on a small (territorial) scale ideals concerning universal humankind. But before turning to these changing connotations of nation and citizenship, the beginning of which were marked by the Revolutionary Wars, it is necessary to add some additional observations regarding the emergence and development of citizenship.

We have seen how ideals of popular sovereignty led to citizenship. However, the "moral capital" which accumulated in the notion of citizenship was not just a result of political ideals and a discourse that was based on universalistic conceptions of justice. Certainly, sovereignty in the form of direct rule based on representation required the notion of citizenship, in order to solve the legitimation problem posed by the abstract notion of popular sovereignty and to realise ideals of equality. But in addition to the ideals of the Revolutionaries, which made citizenship as a concept ideologically conceivable, it was direct rule, exercised by the modern state based on popular sovereignty, which made citizenship practically possible and necessary. More prosaically, the content of modern citizenship is the result of war, coercion, and violence.²²³

This link between citizenship and state power is emphasised in the work of Charles Tilly, who describes the role played by warfare, state expansion and direct rule

²²² Kristeva (1991), p. 156. See also Ferrajoli (1996), p. 153.

²²³ Tilly (1995).

with regard to the emergence of citizenship.²²⁴ When, in the second half of the eighteenth century, states were in need of ever bigger armies, they did not rely so much any more on mercenaries, but started to draw troops from their own populations. Taxation of the population was the way in which they financed increasing military activity. Resistance by domestic populations to these practices led to citizenship:

(...) both ordinary people and their patrons fought war-impelled taxation, conscription, seizures of goods and restrictions on trade by means ranging from passive resistance to outright rebellion, put down with varying combinations of repression, persuasion and bargaining. The very acts of intervening, repressing, persuading and bargaining formed willy-nilly the institutions of direct rule. Out of struggle emerged citizenship, a continuing series of transactions between persons and agents of a given state in which each has enforceable rights and obligations uniquely by virtue of the persons' membership in an exclusive category, a category of native born or naturalized people."²²⁵

Thus Tilly emphasises the role played by warfare and state expansion: "the causal chain from military activity to citizenship". In a similar vein, Andrew Linklater regards citizenship as a reaction to the totalising project. With the totalising project he refers to efforts made by central governments to homogenise communities and their creation of a clear mechanism to distinguish inside from outside, in order to meet the challenges of war.²²⁶ As such, he argues, states' totalising practices led to the elaboration of citizenship rights, because as subjects were confronted with the extension of state power and the increasingly demanding and restrictive character of political communities, they were forced to organise political and legal rights.²²⁷ In addition, he stresses the importance of capitalism and production processes in the process of establishing direct rule and the expansion of citizenship's moral potential.²²⁸

I have briefly paid some attention to these more factual roots of citizenship because it is essential to understand that citizenship is not only a concept which was conjured up in an age dominated by ideals regarding equality and universality of mankind, but that it is very much linked to the actual process of state formation. In

²²⁴ Ibid.

²²⁵ Ibid. p. 230.

²²⁶ Linklater (1998), p. 6.

²²⁷ Ibid. p. 146-147.

²²⁸ See also Marshall (1950).

addition to examining citizenship's place in political thought and discourse, one needs to be aware that it is to a large degree formed by the actualities of political power. As such, it is able to transform and keep its relevance, as it can be adapted to support all kind of struggles for equality. Marshall's classic account of citizenship, depicting the evolution of civil to political to social rights, exemplifies this clearly.²²⁹ In his account, citizenship's potential for equality and universality, clearly surfaces. But as already mentioned above, there is also a particularistic side to citizenship, one that was emphasised by the role which the nation assumed on Europe's political stage during the nineteenth century and onwards.

We have seen in Chapter 2 that by the time that the Napoleonic wars had swept over Europe, territoriality and sovereignty were firmly anchored political concepts. Citizenship became inextricably linked to these concepts. Citizenship was territorial because the population over which the state exercised its rule was territorially defined. But the role that nationalism was to play in the subsequent century with regard to the setting of boundaries to the political community, shaped citizenship's political particularism in an even more decisive way. Nationality and citizenship developed into interchangeable terms, in a manner that could not have been foreseen by the Revolutionaries who drew up the Declaration of the Rights of Man and the Citizen.

Chapter 2 described how nationalism in the nineteenth century caused the discourse of sovereignty to become a particularistic one, excluding a universal approach based on the idea of a common humanity. These tendencies reached their zenith in the twentieth century, in the period between the two World Wars.²³⁰ Citizenship became an indicator as well as an instrument of exclusion and provided protection only for those who 'belonged'.

The conflicting tendencies of the modern state are thus exemplified by the role and content of citizenship during this period. The contraction of the political community in the twentieth century was synchronous with the extension of citizenship rights internally. These may seem contradictory tendencies, but perhaps it is more accurate, following Linklater, to depict them as trends that reinforced each other.²³¹ When welfare rights became part of the citizenship package, states acquired more influence in the

²²⁹ Ibid.

²³⁰ Linklater (1998), p. 161.

²³¹ Ibid. p. 150.

everyday lives of their citizens. The totalising project thus received new impetus, national feelings were strengthened, and as a result, trans-national loyalties weakened. On the other hand, it was also nationalism that shaped the conditions for unprecedented levels of social and political mobilisation.²³²

Hence, the interaction between nationalism and citizenship is complex and cannot be regarded as only leading to a more exclusive notion of citizenship. Be that as it may, citizenship's political particularism was undoubtedly enhanced by nationalism. The hostile way in which national governments responded to the problems regarding displaced people after the First World War and concerning large migration flows in the latter half of the twentieth century emphasised the new function citizenship had assumed since its invention in the nineteenth century.

In this Section, I have elaborated upon the development of citizenship. I have discussed the factual circumstances that gave rise to the birth of citizenship. In addition, we have seen that the universal ideals that originally underpinned that concept were gradually overshadowed by the instrumentalist use that the modern state made of the concept in order to distinguish the inside from the outside. Before the national state came into existence, states also defined their social boundaries in terms of who is and who is not included in the community. However, when government was not yet based on popular sovereignty, membership had just meant that one was subjected to the authorities of that state.²³³

Popular sovereignty, social contract theories and the idea of natural rights changed the meaning of membership that was not self-evident. In order to understand territoriality's fundamental role in the particularistic connotations that citizenship has acquired in the course of history, one needs to understand that the initial question of membership itself cannot be settled by social contract theories. Instead, whether one does or does not belong to the people can ultimately only be determined by territoriality and jurisdiction, instead of by any (implied) contract.²³⁴ The specific implications of citizenship's particularism for the rights of the individual will be dealt with below.

²³² Ibid. p. 145.

²³³ Habermas (1996), p. 285.

²³⁴ Kratochwil (1996), p. 183.

3.3.2. National citizenship as a condition for access to universal rights

Whereas in the eighteenth century citizenship was meant to provide equality to all because the distinction between man and citizen was not seen as problematic, presently we live in an age in which this distinction has become a highly significant one. In this Section we will see that universal rights have been actualised mostly within national states, and that citizenship became a necessary condition for access to those rights that one supposedly has by virtue of belonging to universal humankind. In order to understand this process properly, we need to take into account the political forces that shaped the nation state and take a closer look at the development of the concept of the Rights of Man and their subsequent implementation in political reality.

When the Rights of Man were reinvented in the enlightenment era, they were proclaimed as inalienable. They did no longer flow from religion, nor were they privileges granted by the King or any other ruler, but man itself was their source. Nevertheless, at the same time they became linked to the right of the people to self-government, as we have seen in Chapter 2. Thus, man had for the first time in history just appeared as an individual who carried rights without reference to a larger order, when these rights almost immediately came to be identified with the rights of peoples, guaranteed by the concept of the nation.²³⁵ As Julia Kristeva observes, "the man supposedly independent of all government turns out to be the citizen of a nation."²³⁶

The explanation for the duality of man/citizen at the heart of the French Declaration is the interdependence of sovereignty and rights. And if on the one hand, the modern state based on popular sovereignty was an effective and powerful vehicle for the protection and implementation of the Rights of Man, that state at the same time set obvious limits to the universalism of those rights.²³⁷ Equal rights and freedoms were secured through membership in a nation, which was constituted by the 'people'. Even though the French Revolution, with its emphasis on universal humankind, is hostile to any pre-constitutional concept of the people,²³⁸ we have seen in the previous Chapter how theories of popular sovereignty open the door to particularistic nationalist claims, due to the fact that liberal theory fails to define what is meant by a concept as intangible

²³⁵ Arendt (1976), p. 291; and Xenos (1996), p. 233.

²³⁶ Kristeva (1991), p. 150.

²³⁷ Shafir (2004), p. 24.

²³⁸ Brunkhorst (2000), p. 51.

as the people. These nationalist claims are facilitated in a system where the organisation of political life on the basis of clear territorial demarcations is a fact.

Nationalism played an ambiguous role in the development of citizenship: without it the political mobilisation that led to the extension and expansion of citizenship would perhaps not have been possible, because for that an appeal was needed that was stronger than the somewhat abstract ideas on human rights and popular sovereignty.²³⁹ However, the result was that only national citizenship seemed to be able to secure access to the rights of man. Hannah Arendt depicts this process unambiguously:

“The whole question of rights [...] was quickly and inextricably blended with the question of national emancipation; only the emancipated sovereignty of the people, of one’s own people, seemed to be able to ensure them. As mankind, since the French Revolution, was conceived in the image of a family of nations, it gradually became self-evident that the people, and not the individual was the image of man.”²⁴⁰

The disastrous consequences of this identification of the rights of man with the rights of citizen, according to Arendt, became clear only in the twentieth century. Nationalism had by then long lost its original function of integrating diverse social strata and peoples in one nation, but it had led to an exclusive ideal of the nation state, purportedly constituted by a people whose bonds to each other and to its territory were pre-political. The plight of the refugees and the stateless, and the sufferings of the victims of the totalitarian governments showed that “the Rights of Man, supposedly inalienable, proved to be unenforceable – even in countries whose constitutions were based upon them – whenever people appeared who were no longer citizen of any state.”²⁴¹

Without belonging to an organised political community of a particular sort - the territorial nation state - rights had become illusory: the loss of national rights in practice meant the loss of human rights. The attempts of the stateless and the minorities to fight for their own national states only strengthened the perception of a natural and necessary link between the territorial state, citizenship and individual rights. In a similar

²³⁹ Habermas (1996), p. 285.

²⁴⁰ Arendt (1976), p. 291.

²⁴¹ Arendt (1976), p. 293.

manner was such a perception of the link between national sovereignty and rights reinforced by the minority treaties concluded after the First World War, which were deemed necessary to protect the rights of minorities that did not have a state of their own.²⁴²

After the Second World War the dangers inherent in a system in which the rights of man had “no reality and no value except as political rights, rights of the citizen”²⁴³ was recognised. The idea of natural rights based on truly universal humankind received new impetus, and although the nationality-territory link still grants unconditional access to many entitlements, formal citizenship status and rights have to a certain extent become disconnected in contemporary political societies. Human rights discourse and constitutional norms underlying Western liberal democracies, have led to what some scholars describe as post-national citizenship, an approach to rights which is allegedly not linked to territorial or national exclusivity. This notion of so-called post-national citizenship will receive attention in Section 3.5.2, after I have looked at the emergence and development of human rights in international law in Section 3.4.4.

3.3.3. Citizenship’s structuring role in a world of nation states

However, before turning to international law, there is another aspect of citizenship that deserves our attention. Whereas most accounts of citizenship focus on the relation between the individual and the state, the role of citizenship on a global scale in the Westphalian state system is often ignored. Barry Hindess is a scholar who turns away from this wholly internalist perspective on citizenship, but instead examines its global role. He argues that discrimination is a requirement of the modern state system, and not only a result of the internal sovereign claims that contemporary states make on behalf of their own populations.²⁴⁴

We have already seen in Chapter 2 that, by establishing external sovereignty as a principle of international relations, the Peace of Westphalia ascribed to each territorial state the exclusive government of the population within its territory.²⁴⁵ States were able

²⁴² Shafir (2004), p. 23.

²⁴³ Balibar (1994), p. 212. See also Edwards (2001).

²⁴⁴ Hindess (2000) and (1998)

²⁴⁵ Hindess (1998), p. 65.

to establish to a large degree exclusive control over their territories and the populations within it. The important point made by Hindess is that the modern state system as such does not only regulate the conduct of states amongst each other but that it simultaneously constitutes “a dispersed regime of governance covering the overall populations of the states concerned.”²⁴⁶ This regime of governance is dependent on the division of humanity into distinct national populations, with their own territories and states.

The notion of citizenship serves as an instrument of such a system of global governance that determines who belongs where. Thus, citizenship’s particularism is not only the result of the internal sovereign claim of the state to determine its own boundaries. Distinctions between nationals and foreigners are also an inevitable outcome of the Westphalian state system that partitions “humanity into citizens of a plurality of states (and a minority who are both displaced and stateless).”²⁴⁷

By looking at citizenship’s structural role in the territorial state system, important insights surface, which are lost when we depict citizenship solely as a national project that gradually turned the privileges of the few into the rights of the many. In our contemporary global system, citizenship is an important tool for an ongoing construction of territory as a political concept. It is a fundamental notion in order to maintain a global political system based on territoriality, as it perpetuates “an image of a world divided into ‘national’ populations and territories, domiciled in terms of state membership.”²⁴⁸ The notion of the nation state as a container of society plays an important role: the assumption that various sovereign states constitute a world system of separate, closed and homogenous units.²⁴⁹

The era after the Second World War gives a clear example of the process by which identity and territory are linked and by which the latter is inscribed with strong political meaning. Massive population transfers based on ethnicity were tellingly called ‘repatriation’ and those people without a nationality were termed ‘displaced’.

An internalist account of citizenship ignores the structural role of citizenship in the Westphalian state system. Citizenship can be understood as a project that gradually led to turning the privileges of the few into the rights of the many only if the national

²⁴⁶ Hindess (1998), p. 65.

²⁴⁷ Hindess (1998), p. 66.

²⁴⁸ Walters (2002), p. 282.

²⁴⁹ Tully (1997), p. 187.

state is perceived as a closed container, in which the only relevant political processes take place. If, however, we perceive territorial boundaries not as natural and self-evident, but as features of political life that have grown out of particular historical contingencies, then it becomes, to say the least, doubtful whether citizenship has really turned the privileges of the few into the rights of the many. The borderline between the privileged and the rightless may simply have shifted when the territorial state came into existence.

In addition, by focussing on the citizens of the most prosperous and democratic countries, most theoretical accounts of citizenship ignore the fact that all human beings are supposed to be citizens of some kind of political community.²⁵⁰ It is exactly with regard to individuals whose national rights do not match the standard account of citizenship, that citizenship's particularism becomes truly problematic. People detained in waiting zones at European airports, or those intercepted at the Mediterranean, certainly are citizens of one state or another. But instead of being a guarantee for social, political or economical rights in their home countries (the absence of which in many cases constituted the very reason for their departure), the discourse of citizenship denies these people the possibility to pursue these rights elsewhere. By allocating populations to specific states, the global institution of national citizenship implicitly endorses the view that only national self-emancipation is suitable for securing the Rights of Man.

Hence, the two aspects of citizenship that I have discussed here – citizenship as a condition for access to rights and citizenship as a tool for allocating populations to specific territories – interact to reinforce the ideal of national sovereignty and territoriality. Hannah Arendt explains the lack of attention for the concept of human rights during the nineteenth century by arguing that such rights were supposed to be embodied in the notion of citizenship, and in theory, all members of humanity could achieve citizenship rights.

All human beings were supposed to be citizens of some kind of political community; if the laws of their country did not live up to the demands of the rights of Man, they were supposed to change them, by legislation in democratic countries, or through revolutionary action in despotisms.²⁵¹

²⁵⁰ Hindess (2000), p. 1495.

²⁵¹ Arendt (1976), p. 293.

The idealisation of national sovereignty and the interconnectedness of the concept of rights and territoriality, which are both inherent in such a perception of citizenship, are apparent when we realise that the words with which Hindess condemns the contemporary international discourse of citizenship, essentially express the same idea:

The teleological discourse of citizenship promises the poorest of the world that, if only they would stay at home and learn to behave themselves, they too could be citizens like us.²⁵²

As such, for many people citizenship offers far less than protection against sovereign power: it justifies their exclusion and it sustains inequality on a global scale. In Section 3.5., I will investigate whether post-national citizenship has severed the link between nationality, rights and territory so as offer a more inclusive protection against sovereign power. Post-national conceptions of citizenship, based upon a notion of rights that is no longer nationally exclusive, partly emerged in response to developments in international law. The Section below will address these developments.

3.4. INTERNATIONAL LAW AND VIOLENCE

3.4.1. Sovereignty and international law

In this Section I will investigate the way in which international law has set limits to the use of violence by the state. However, before turning to these limits, some preliminary remarks about the relationship between sovereignty and international law are necessary. Realists have often portrayed the Westphalian system as providing law and morality solely within states, whereas outside these states anarchy and chaos reign. The international environment is seen as a permanent Hobbesian state of nature. And how else could it be, these realists ask, in the absence of an international Leviathan: a 'supra-national' authority that manages the relations between sovereigns? In the eyes of thinkers such as Hobbes, Rousseau and Morgenthau, the concept of state sovereignty necessarily entails anarchy in international relations. And certainly, in view of the sheer number of international conflicts, "the history of international relations since the days of

²⁵² Hindess (2000), p. 1496.

the Westphalia treaties provide overwhelming evidence that [theirs] is a reasonable accurate depiction of the dynamics of relations between states.”²⁵³ Admittedly, the concept of sovereignty as elaborated upon in Chapter 2 precludes an ‘international sovereign’ who rules over sovereign national states. A realist account of international relations is inevitable in Hobbes’ theory of sovereignty, where government is identified with force and it is a logical impossibility for the sovereign to be bound.

However, contemporary international reality also demonstrates that restrictions on the liberty of states to manage their affairs are legion.²⁵⁴ To understand these it is essential to be aware that sovereignty is not only a monopoly over the legitimate means of coercion, nor merely ultimate authority, but that these aspects of sovereignty are exercised exclusively within a certain territory. Westphalian sovereignty entails the exclusion of external authority within the territory of the state. Thus, although sovereignty was initially thought of as a concept to conceptualise and justify authority within the state, its territorial form inevitably came to bear upon relations among states.

International law thus developed alongside the emergence of the system of sovereign states. Nevertheless, in spite of the normative and regulating character of international law, it should be clear from the outset that there are limits to what international law can achieve. Some authors have found the reason for these limits generally in the configurations of state interest and the distribution of state power.²⁵⁵ In this study, I argue more specifically that the existence of these limits, expressed in an almost structural immunisation of territorial sovereignty against international forms of correction, are due to the reification of territoriality as an organising principle for the modern state system.

We will see that even the modern version of the international rule of law embodied in the concept of international human rights suffers from what I will call a “territorial blind spot”. In order to properly evaluate the alleged novelty of the modern version of the rule of law embodied in the human rights discourse, in that it breaks with traditional, exclusive and silencing notions of international law, we need to understand the importance of territoriality in classical international law. Therefore, this Section will first picture the development of traditional international law with regard to the

²⁵³ Holsti (1995), p. 6.

²⁵⁴ Brownlie (2003), p. 369; and Tamanaha (2004), p. 131.

²⁵⁵ Goldsmith and Posner (2005), p. 13.

regulation of violence, after which it will focus on modern human rights law as it developed after the Second World War.

In international law, the regulation of violence and territorial boundaries are connected to each other by much the same logic as which binds people, territory and authority within the nation state. Similarly, the same tension that exists between particularism and universalism in the idea of the nation state and its accompanying concepts, such as citizenship, comes to the fore in international law, albeit in a different fashion. Here the tension between universalistic ideals and a reality which is in a high degree particularistic is expressed in differing conceptions about who are the subjects of international law. The way in which this tension is resolved, has profound implications for which kinds of violence have become a matter of concern for international law. Whether one believes that “only states have international legal personality” or assumes that, on the contrary, “individuals are the true and exclusive legal persons”²⁵⁶ makes an enormous difference, especially in this area of international law.

In Section 3.4.2., I will argue that until recently, this tension has been resolved in favour of the national territorial state. Subsequently, Section 3.4.3. will address different sorts of violence that classical international law deals with. The consequences of the ideal of the national territorial state dominating the international legal discourse regarding state violence will be illustrated with examples relating to the regulation of interstate violence, diplomatic protection and the treatment of minorities under international law. Lastly, in Section 3.4.4., I will concentrate in detail on international human rights law. I will seek an answer to the question whether the state based approach of classical international law, based upon the same obdurate link between sovereignty, territory and identity as that we find in the citizenship discourse, has been abandoned there.

3.4.2. The national territorial state as the true and only subject of international law

International law emerged at a time when the state was not yet the decisive political entity it was later to become, and in early international law, the individual was fully included. The influence of ideas which had their roots in the *Res Publica*

²⁵⁶ Nijman (2004), p. 6. See also McCorquodale (2004).

Christiana were for a long while palpable in international law, such as the notion that the rights of individuals were morally prior to the rights of the body politic to which they belonged. Early theorists of international law were natural lawyers and argued that assertions of what is now called Westphalian sovereignty are subject to limits. Vitoria (1480-1546) and Suarez (1548-1617) grounded international law in the divine order, in which the individual had its own place. Grotius (1583-1645) modernised the law of nations, as he maintained that its content could be based on reason. For him, international law was still natural law, but no longer divine. In Grotius' law of nations the individual featured as a subject, inevitably, in view of the foundation for his *ius gentium*: a society of sovereigns and their subjects who were united in the natural bond of mankind.²⁵⁷

Chapter 2 described that the emergence of the modern state with its reliance on territory and the concept of the nation caused the universalistic ideals from the enlightenment era to translate in a political particularistic reality. Similarly, with the emergence of the modern state, the tension in international law with regard to its subjects gradually begins to be decided in favour of the nation state, and the individual loses much of his relevance as a subject of international law. Enlightenment ideals influenced this process twofold.

First, as we have already seen, indirectly, as the modern territorial state based on nationality clearly differentiated between inside and outside. A consequence was that the nation state was gradually perceived as a unified force, with supreme and exclusionary authority within a clearly demarcated territory. The manner in which this conception of the state influenced international law is aptly illustrated by the work of Wolff (1679-1754). Still a natural law theorist, instead of according natural rights to individuals, he ascribes them to states, in his eyes the exclusive subjects of international law. One of the natural rights of states was the right to non-interference by other states.²⁵⁸

A second trend that contributed to the demise of the individual in international law was the emergence of empiricist theories during the enlightenment. Instead of deriving international law from absolute principles, it was reinterpreted in terms of what

²⁵⁷ Nijman (2004), p. 46-47

²⁵⁸ Nijman (2004), p. 82.

actually happened between states.²⁵⁹ The work of Emmerich de Vattel (1714-1767) marks the transition from natural law theories in international law to an approach that identified the law of nations with positive law between sovereign states. To him, as to Wolff, the exclusion of external authority, as a characteristic of sovereignty, was one of the cornerstones of the law of nations. Under the influence of legal positivism in the eighteenth century, the law of nations came to rely fully upon national sovereignty, and legal personality in international law was dependant on absolute sovereignty.²⁶⁰

In this way, the role of the state in international law was doubly emphasised. Eighteenth century ideals of individualism and human equality did not lead to a strengthening of the position of the individual in international law. On the contrary, just as they had contributed towards nationalism and hostility towards outsiders within the nation state, they consolidated the importance of the sovereign state in international law as the sole bearer of rights. In the nineteenth century, this tendency in international law was reinforced, as idealised concepts such as nation and state were romantically perceived as one. As a result, the idea of the individual as a subject of international law had become unthinkable in the late nineteenth century, with its Hegelian glorification of the state and national sovereignty. In short, a positivist approach which obscured the natural law origins of international law, combined with the mythic dimension the state had acquired, by use of idealised or constructed concepts such as territory and nationality, led to a perception of international law as law solely for and by states.²⁶¹

In those few cases where the individual featured, his position was derived from and dependent on the will of the sovereign state,²⁶² as we will see below. This situation would last until 1945, although already before that time voices were heard to make the international legal system more inclusive, by deconstructing the “artificial and absolute separation” that existed between the state and its citizens in international law.²⁶³ We will see below that a perception of the territorial state as the sole subject of international law

²⁵⁹ Shaw (1997), p. 22.

²⁶⁰ Nijman (2004), p. 111.

²⁶¹ In addition, sovereignty did not only function as a shield between the individual and the international legal system, but by defining it as something exclusively European, it excluded for a long time non-western states and indigenous communities from international law. See Orford (2004), p. 470.

²⁶² Harding and Lim (1999), p. 5.

²⁶³ Nijman (2004), p. 128.

has had a strong impact on the regulation and legitimisation of violence by international law.

3.4.3. Sorts of violence regulated by classical international law

Here I will outline the forms of violence that traditional international law regulates, and the way in which it does that. Far from being an in-depth investigation of this field of international law, this outline serves to further elucidate some aspects of the relationship between (il)legitimate violence, sovereignty, territory, and people. As a result, we will see that the way in which international law offers protection against violence, and how it determines whether the use of force is legitimate or not, is to a large degree determined by the concept of national sovereignty and the meanings ascribed to territorial boundaries.

Although the relevance of inter-state violence, humanitarian law, diplomatic protection and the treatment of minorities may not seem directly apparent for the subject under consideration in this study, these issues illustrate that the international legal regime dealing with violence is decisively shaped by the way in which territorial boundaries are drawn in the past, and by the meanings that were subsequently ascribed to them. Only a thorough understanding of this structural characteristic of international law, will make it possible to evaluate the alleged novelty of international human rights. Thus, as already mentioned, emphasis will be on classical conceptions of international law, as the law between sovereign states. Developments of a more recent date will be addressed in Section 3.4.4. that deals with international human rights law.

3.4.3.1. Inter-state violence

We have seen in Chapter 2 that the emergence of a territorial state system led to a new structure delimiting legitimate and illegitimate violence. Before territorial demarcations became the foundation for political authority, the absence of a clear mechanism to determine “us” from “them” made it impossible to make a distinction between war and mere crime,²⁶⁴ even though there were religious theories justifying the

²⁶⁴ Mansbach and Wilmer (2001), p. 56.

use of violence in specific instances, such as the doctrine of just war. Through the establishment of the Westphalian order, war could be distinguished from mere crime by defining it as something that only sovereign states engaged in.²⁶⁵ In nineteenth century conceptions of international law, the right of a state to wage war in order to settle disputes with other states was regarded as a fundamental aspect of that state's sovereignty.²⁶⁶ State interest was a legitimate reason for resorting to violence against other states, if only conditioned by the requirement that it should be a last resort.

Thus, territorialisation diminished the importance of non-state actors twofold: as we have seen above, only the sovereign state was in possession of international legal personality, and only violence waged by the sovereign state was regarded as legitimate. The result was that whenever the individual featured in the laws of war, his position was derived from the state's right to resort to force. Regulation of violence was monopolised by national states in a very literal sense: fighters that did not fight for a national army, such as religious minorities and sub-state rebels, were not accorded rights, just as indigenous peoples were not protected, by the laws of war.²⁶⁷

After the First World War, the attitude in which the right to wage war was perceived as inherent in sovereignty changed. The Kellogg-Briand Pact of 1928 renounced war as an instrument of foreign policy except in self-defence. This attitude was reinforced by the Tokyo and Nuremberg trials in which the Japanese and German were prosecuted for planning aggressive wars, so-called crimes against the peace. The prohibition on the use of force is forbidden in contemporary international relations, pursuant to Article 2(4) of the Charter of the United Nations.²⁶⁸ Territorial integrity of sovereign states is a cornerstone of contemporary international law.²⁶⁹ Nevertheless, even if the right to wage war is no longer regarded as inherent in sovereignty, the language of war has principally remained the language of the state. This is illustrated by

²⁶⁵ Van Creveld. (1991), p. 41.

²⁶⁶ Brand (2002), p. 287; and Steiner and Alston (2000), p. 114.

²⁶⁷ Mansbach and Wilmer (2001), p. 61.

²⁶⁸ UN Charter Article 2(4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."

²⁶⁹ See ICJ, Case concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.A.), Merits, 1986 ICJ Reports 4, 27 June 1986.

the way in which international law has formulated exceptions to the prohibition on the use of force and the present framework of international humanitarian law.

The two exceptions to the prohibition on the threat or use of force are both clearly modelled on the ideal of the Westphalian state system, consisting of independent territorial entities with exclusive rule within their territories. Chapter 7 of the Charter of the United Nations permits the collective use of force and sanctions the right of self-defence solely in the case of an armed attack on a state's territory. More recent developments in international law with regard to humanitarian interventions, where purely internal situations are capable of being deemed a threat to the peace, are related to the emergence of an international human rights regime, which will be dealt with later.

Although contemporary international law has somewhat weakened the strict assumption of sovereignty as precluding any legal interference in domestic politics, international laws of war remain largely constructed against the background of the Westphalian state system. Norms regarding international responses to civil wars are less developed than those that regulate interstate wars, humanitarian law regulating internal conflict offers less protection than that which pertains to interstate wars, and only states can become parties to the Geneva Conventions.²⁷⁰

3.4.3.2. *Diplomatic protection and the treatment of minorities*

In Chapter 2 we have seen how the Westphalian structure did not only lead to a new structure by which to differentiate between legitimate and illegitimate violence, but it also resulted in a division between internal and external violence. Violence that was resorted to by the state within its own territory has long remained within the exclusive sphere of domestic jurisdiction, consistent with the idea of sovereignty as supreme legitimate authority within a territory. However, although international law has largely ignored the question of violence by the state within the state,²⁷¹ the treatment of minorities and foreigners constitute exceptions to this notion of *domain réservé* in classical international law.

Chapter 2 demonstrated how in the course of history ties of allegiance, nationality and citizenship have provided the basis for the legal community of the

²⁷⁰ Fitzpatrick (2002); and Kaldor (1999), p. 116.

²⁷¹ Mansbach and Wilmer (2001), p. 63; Donnelly (1994), p. 8; and Henkin (1999), p. 4.

state.²⁷² The protection of the rights of aliens in international law demonstrates the relevance of the same ties in international law. International law's recognition of the significance of these ties has led to the paradox that "the individual in his capacity as an alien [enjoyed] a larger measure of protection by traditional international law than in his character as the citizen of his own state."²⁷³ Generally speaking, international law decrees that foreigners may not be unlawfully discriminated against, have the right to respect for their life and property, and most importantly, that they are entitled to judicial protection to vindicate their rights in the host country.²⁷⁴

Although the significance of the individual in this field of international law is obvious, the traditional stance with regard to international legal personality is not abandoned here: only the sovereign state is actually accorded rights. Individuals wronged by a foreign state cannot appeal to international law; solely national states can claim compliance with international rules to the benefit of their nationals residing abroad, which is the right to exercise so-called diplomatic protection. Neither can individuals under classical international law claim a right to seek and obtain diplomatic protection of their national state; legal entitlements to such forms of protection are a matter of domestic law alone.²⁷⁵

Diplomatic protection with respect to nationals in foreign countries has existed since the Middle Ages, but practice with modern features appeared in the late eighteenth century.²⁷⁶ During the nineteenth century issues of diplomatic protection increased enormously because more people resided outside their national states than ever before.²⁷⁷ From that time onwards, the place that diplomatic protection occupies in international law is determined by two features of the modern state: a strong linkage of identity and sovereignty internally, and a powerful assertion of sovereignty externally. Vattel's argument that an injury to an alien is an injury to his state,²⁷⁸ illustrates the

²⁷² Brownlie (2003), p. 497.

²⁷³ Lauterpacht (1968), p. 121.

²⁷⁴ Cassese (2005), p. 121. Diplomatic protection can only be invoked when the individual has exhausted the domestic remedies available in the host state.

²⁷⁵ Cassese (2005), p. 122.

²⁷⁶ Brownlie (2003), p. 500.

²⁷⁷ "In the century after 1840 some sixty mixed claims commissions were set up to deal with disputes arising from injury to the interests of aliens." Brownlie (2003), p. 500.

²⁷⁸ McDougal, Lasswell, and Chen (1976), pp

assumption by international law that one's state interference with another one's national may constitute a breach of the sovereignty of the former state. "In taking up a case of one of its nationals, by resorting to diplomatic protection or international judicial proceedings on his behalf, a state is in reality asserting its own right, the right to ensure in the persons of its nationals respect for the rules of international law."²⁷⁹

In the discourse concerning limitations upon a state's treatment of foreigners we can distinguish two different approaches: one which argues that it is sufficient for foreigners to be treated as nationals; the other maintaining that their treatment should live up to a minimum standard of civilisation: the international minimum standard.²⁸⁰ In the latter discourse, a purely state centred discourse is abandoned in favour of an approach based on the dignity of the individual. And as the latter approach prevailed, it can be contended that, even though international law does not confer individuals directly with rights regarding their treatment by a foreign state, universalistic ideals based on the dignity of the individual came to play an important role in this field of law.²⁸¹

The fact that the modern state is based on ties of allegiance, nationality and citizenship, and its linkage of sovereignty and identity, provide a rationale for the existence of a right of diplomatic protection in international law. The weight which international law attaches to the meaning of these ties is proven by its insistence that the presence of such ties is not merely a formal question. In the *Nottebohm Case*, the International Court of Justice declared Liechtenstein's claim against Guatemala, concerning the treatment of one of its nationals, inadmissible. It was of the opinion that Mr. Nottebohm's nationality could not be validly invoked by Liechtenstein against Guatemala, as it did not correspond to a factual situation.²⁸² The Court reaffirmed that matters concerning nationality are within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition of its nationality.

However, the issue to be decided by the Court did not pertain to the domestic legal system of Liechtenstein, but instead it dealt with the international effects of naturalisation. International law can only recognise naturalisation if it constitutes a legal

²⁷⁹ *Panavezys-Saldutiskis Railway Case (Estonia v. Lithuania)*, 28 February 1939, Ser A/B No 76 (1939).

²⁸⁰ McDougal, Laswell, and Chen (1976), p. 443.

²⁸¹ Although the two approaches often reflect conflicting economic and political interests. See Casesse (2005), p. 120 and Brownlie (2003), p. 503.

²⁸² ICJ, *Nottebohm Case (Liechtenstein v. Guatemala)*, 6 April 1955.

recognition of a person's factual membership in a state's population. Such membership is expressed, according to the Court, by adherence to the state's traditions, its interests, way of life and by assuming the obligations and rights of its citizens. The concept of diplomatic protection in international law as such is consistent with the structural role of citizenship, as discussed in Section 3.3.3. The way in which international law affords protection to the individual is by regulating the relations between sovereign powers and allocating to each their specific responsibilities concerning those that allegedly "belong" to them.

The allocation to the sovereign of those that "belong" is mostly based on territorial demarcations made in the past. Minorities occupy a special place in the discourse that distinguishes the inside from the outside of the modern territorial state, and their protection has always been a concern for international law. Chapter 2 argued that the Treaties of Westphalia anchored the notion of external sovereignty in international relations, by establishing mutually independent territorial political units with supreme and exclusionary authority within their domains. By doing so, it gave the sovereign the right to determine the religion within his territory.

Yet, this is not a complete account of the Treaties.²⁸³ They also contained restrictions on the sovereign's right to regulate religious affairs in his territory by giving minority religious groups the right to practice their religion, and by prohibiting religious discrimination to a certain extent.²⁸⁴ Thus, although the Peace of Westphalia established sovereignty as a principle governing international relations by ascribing a fixed territory to the sole jurisdiction of a sovereign and categorising populations as belonging to one state or another, at the same time these Treaties impinged significantly on the supreme right of the sovereign, by placing him under an obligation to protect and respect certain religious freedoms within his territory.

The enforcement mechanism for these rights was largely effective, as it consisted of "a clear and easy-to-implement threat of retaliation: protestant states would conduct reprisals against their own minority population and vice versa."²⁸⁵ Here we can discern a parallel with diplomatic protection. Sovereign states would regard coreligionists living in another state as a matter of their concern, just as they consider

²⁸³ Krasner (2001).

²⁸⁴ Goldsmith and Posner (2005), p. 113.

²⁸⁵ Goldsmith and Posner (2005), p. 155.

the treatment of their nationals by another state as not falling entirely within the domestic jurisdiction of the latter state.

After WWI, the issue of minorities was brought to the forefront of international law and the protection of minorities was placed under the guarantee of the League of Nations. The design of a system of minority protection by the League of Nations was prompted by the fact that many claims of self-determination of national groups in Europe were not satisfied.²⁸⁶ This system was built on the basis of several documents, which regulated the situation of specific states and certain population groups living in these states.²⁸⁷ Obligations on minority protection did not amount to a closed system of international law, as they were only imposed on certain states, and only concerned some of the minorities living under their jurisdiction.²⁸⁸

The Permanent Court of International Justice, in an advisory opinion, formulated two general principles, which form the basis of the minority protection by the Treaties. First, nationals belonging to racial, religious or linguistic minorities were to be "placed in every respect on a footing of perfect equality respect with the other nationals of the state." Secondly, these minorities had a right to "the preservation of the racial peculiarities, their traditions and their national characteristics."²⁸⁹

The cases of minority protection and diplomatic protection constitute an exception to the assumption that the deployment of internal violence is a matter for the sovereign state alone, in which classical international law has no role to play. Nevertheless, international laws that protect minorities and aliens do not depart from a traditional understanding of sovereignty which links authority, territory and people and makes a strict distinction between inside and outside. By providing 'outsiders' – foreigners and minorities – with protection against sovereign power, international law in this area reinforces the ideal of the nation state with its perfect link between identity and territory.

Such an ideal led to a perception in which "only nationals could be citizens, only people of the same national origin could enjoy the full protection of legal institutions," and in which "people of a different national origin needed some law of exception."²⁹⁰ In

²⁸⁶ Henrard (2000), p. 4.

²⁸⁷ Ibid. p. 4-5.

²⁸⁸ See Arendt (1976), p. 272.

²⁸⁹ PCIJ, *Minority Schools in Albania*, Advisory Opinion of 6 April 1936.

²⁹⁰ Arendt (1976), p. 275.

addition, it should be noted that the Minority Treaties had a clear geopolitical aim which consisted of maintaining the territorial ideal: "the system of protection of minorities (...) is also intended (...) to ensure that States with a minority within their boundaries should be protected from the danger of interference by other powers in their internal affairs."²⁹¹ Accordingly, just as in the discourse of citizenship and the regulation of interstate violence, in these fields of international law, we see once more affirmed that "the relationship between identity and borders underlies both the process of norm articulation and the kinds of violence identified as problematic".²⁹²

3.4.4. International human rights

We have seen above that the rise of territorial concentrations of power in the Westphalian era has been checked by developments in two different areas.²⁹³ These developments took place along separate lines and each followed a different logic. Internally, the growth of state power led to the demand for citizenship rights, offering protection to the people against the arbitrary use of power by the state. Externally, the state was to undergo constraints formulated by international law.

The separateness of the discourses regulating internal and external restraints on state power led to a gap between national and international law. International law was the law between sovereign states, in which the regulation of violence was determined by strong territorial assumptions and in which the individual as such did not feature. The treatment by a state of its territorially defined population usually did not involve any question of international law, with its acceptance of sovereignty's exclusive link between power, territory and population. Internally, the concept of fundamental rights, based on the dignity of the individual, became linked to national sovereignty, which involved a similar exclusive linkage between territory, nationality, and citizenship. Accordingly, within the nation state, the original universality of citizenship rights gradually turned into a particularistic conception of rights, based on national belonging.

²⁹¹ League of Nations Official Journal, Volume 9, 1928, p. 942.

²⁹² Mansbach and Wilmer (2001), p 56.

²⁹³ Linklater (1998), p. 213.

When, during the period between the two world wars, sovereignty's narrow link – internally as well as externally – between power, territory, identity and rights, was at its firmest, the existence of the gap between international and domestic law resulted in the absence of any enforceable rights for large groups of individuals. The terrible consequences thereof became clear during the Second World War, exemplified as they were in factual spaces of rightlessness, such as the concentration and extermination camps and, to a lesser degree, the internment camps for displaced people and refugees.

After 1945, the welfare of the individual, irrespective of his nationality, was increasingly considered as a matter of international concern by the international community.²⁹⁴ The Nuremberg War Crimes Trials prosecuted individuals on the novel charge of crimes against humanity. Crimes committed against a state's own population became a general matter of concern for international law. The Nuremberg Trials did not break completely with the territorially defined "process of norm articulation and the traditional kinds of violence identified as problematic", seeing that crimes against humanity could only be committed in connection with war crimes or crimes against the peace. Thus, the treatment of Germany's Jewish population by the Nazi's prior to 1939 was not adjudicated. However, the Trials marked an important first step in deconstructing sovereignty's function as a barrier between the individual and the international legal order. Although the criminalization of aggression in the Trials amounted to erecting "a wall around state sovereignty", the effect of criminalizing certain acts carried out against a state's own population was "to pierce the veil of sovereignty."²⁹⁵ Indirectly, the enactment of 'crimes against humanity' constituted the recognition of individual rights in international law that are superior to the law of the sovereign state.²⁹⁶

The emerging human rights regime captured in various legal documents carried this process further. In the Charter of the United Nations, human rights were explicitly listed as a matter of concern for the new organisation, and it imposed on its members

²⁹⁴ Oda (1968), p. 495.

²⁹⁵ Luban (1994), p. 336.

²⁹⁶ Lauterpacht (1968), p. 38. As I am concerned with individual rights and protection against violence employed by the state, I will not look into developments which deal with individual criminal responsibility under international law. These developments, however, give also a clear indication of the diminishing importance of sovereignty as shielding the individual from the international legal system.

the obligation to respect such rights, irrespective of nationality.²⁹⁷ The post-war period saw an immense proliferation of international institutions and norms dedicated to protecting human rights. Many of these norms acquired binding legal force as they became embodied in multilateral frameworks for the protection of human rights.²⁹⁸ Apart from treaties that were open for signature to all states, irrespective of their geographic location, human rights were also incorporated into international law on a regional scale.²⁹⁹

In addition, certain rights of individuals have become customary international law. Irrespective of the fact whether a state has entered into specific treaty obligations with regard to the rights of the people under its jurisdiction, the prohibition on torture, genocide, slavery, racial discrimination, extra-judicial killings and disappearances have acquired the status of customary international law, or even *ius cogens*.³⁰⁰ International law no longer permits states to defend violations of these rights as legitimate exercises of national sovereignty. The status of international law in this area is confirmed by the fact that states, even when violating basic human rights norms, generally do not assert a legal entitlement to do so; instead, they deny that such violations took place.³⁰¹

Not only the development of individual rights was suddenly taking place beyond the nation state, aspects relating to their enforcement and implementation were in some cases transferred to the international sphere as well. International institutions, such as the United Nations' Commission on Human Rights, acquired monitoring tasks with regard to member states' human rights obligations, and in case of violations, the

²⁹⁷ Donnelly (1994), p. 8; and Lauterpacht (1968), p. 347.

²⁹⁸ The most important of which: *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, G.A. Res. 39/46, U.N. GAOR, 39th Session., Supp. No. 51, at 197, U.N. Doc. A/Res/39/708 (1984); *Convention on the Elimination of all Forms of Discrimination Against Women*, 18 December 1979, G.A. Res. 34/180, U.N. GAOR 34th Sess., Supp. No. 46, at 193, U.N. Doc. 34/46/ (1980); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature on 7 March 1966, 660 U.N.T.S. 195; ICCPR; *International Convention on Economic, Social and Cultural Rights*, 19 December 1966, 993 U.N.T.S. 3; *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277.

²⁹⁹ ECHR; American Convention on Human Rights, 1969; African Charter on Human and Peoples' Rights, 1981.

³⁰⁰ McCorquodale (2004), p. 486; and Aceves (2002), p. 261. See also the ICJ in the *Barcelona Traction Case*, 5 February 1970.

³⁰¹ Fox (1997), p. 115-116.

individual in some cases can appeal directly to an international body.³⁰² Nonetheless, real enforcement and implementation of universal human rights, going further than monitoring and pressure procedures, have largely remained national.³⁰³

This does not mean that the real effect of international law is nugatory in this area. First of all, in the absence of effective international institutions, national judges of liberal states have assumed an important role with regard to the enforcement of international human rights norms, as will be looked into more closely below.³⁰⁴ Secondly, there is an indirect effect of international human rights law in domestic systems, even when that law concerns so-called soft law: national judges may interpret national law in conformity with standards laid down in international instruments, even when those are not binding, or not ratified.³⁰⁵ Thirdly, the existence and acknowledgement of international norms with regard to the dignity of the human person have important normative consequences: demands can now be framed in the language of law, which make them more powerful, and lends them a legitimacy they might have been lacking before.³⁰⁶

The regional record with regard to the implementation and enforcement of human rights shows a diverse picture.³⁰⁷ Asia and the Middle East lack intergovernmental regional human rights organisations, whereas Africa, Europe and the Americas have established international mechanisms to ensure the protection of fundamental rights. By far the most effective and extensive of these is the protection of human rights in the framework of the Council of Europe.

The ECHR covers mainly civil and political rights, and is ratified by all forty-one Member States of the Council of Europe. Its influence is not only felt in the domestic systems of the Member States, the majority of which have incorporated it into national law, but also the European Union, although not a party to the ECHR,³⁰⁸ has

³⁰² See the first Optional Protocol to the ICCPR.

³⁰³ Donnelly (1994), p. 9.

³⁰⁴ See also Aceves (2002).

³⁰⁵ Gurowitz (2004), p. 144.

³⁰⁶ Gurowitz (2004), p. 149; Martin (1989); and Tamanaha (2004), p. 131.

³⁰⁷ Donnelly (1994), p. 9.

³⁰⁸ And accession to the ECHR in the near future is unlikely, see ECJ, Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human rights and Fundamental Freedoms*, 28 March 1996.



undertaken to respect the fundamental rights as guaranteed by it.³⁰⁹ The ECHR accords the individual a right of appeal to an international body, the European Court of Human Rights (ECtHR), in the case of an alleged breach of the fundamental rights protected by the Convention. Contracting parties to the ECHR have undertaken to abide by the judgements of the Court, which has, in the case that it finds a violation of one of the rights enumerated in the Convention, the right to oblige a state to pay just satisfaction to a victim, or to take other measures. The Committee of Ministers of the Council of Europe supervises the execution of judgements, and makes recommendations with regard to general measures, in the case that domestic legislation or administrative arrangements make subsequent similar breaches of the ECHR foreseeable. Member States of the Council of Europe generally comply with the judgments of the European Court, encouraged as they are by a number of pressures and interests.³¹⁰

By its transfer to the international sphere of constitutional principles, which had thus far only featured in the domestic sphere, international human rights law intends to close the aforementioned gap between national and international law. Perhaps this is best illustrated by the way in which human rights are protected in the framework of the Council of Europe, with the ECHR as an “instrument of European public order”,³¹¹ in which individuals are not only accorded international rights, but in addition, are able to secure the protection of these rights on the international plane.

In order to understand the way in which international human rights affect the modern state, it is helpful to distinguish between the internal and external effects of international law in this area. Externally, the sovereign state can no longer maintain that the treatment of its population is a matter of domestic jurisdiction. The individual has become a subject of international law, and it has been said that “the development of international law in this century is likely to be framed and judged not so much by the way international law defines relations between states, as by the way it defines relations between persons and states.”³¹² Within the nation state, national citizenship can no longer legitimately be the only foundation upon which rights are determined, as

³⁰⁹ Article 6 TEU. See Spielmann (1999), p. 759-760.

³¹⁰ For an exception. see the case of *Loizidou vs. Turkey*, Judgments of 23 March 1995 (preliminary objections); and 18 December 1996 (merits); and 28 July 1998 (just satisfaction). See Ovey and White (2002), pp. 431-435.

³¹¹ The ECtHR in *Loizidou v. Turkey*, (preliminary objections), 23 March 1995, §75.

³¹² Brand (2002), p. 280.

international law guarantees fundamental rights irrespective of a person's nationality. The 'piercing of the veil of sovereignty' in these two directions engages the sovereign claim of the modern state, as it results in incapacity of the modern state to maintain a strong distinction between the inside and the outside. The precise implications of modern human rights law on the sovereign claims of the modern state will be dealt with in the next Section.

3.5. CLOSING THE GAP: A MORE INCLUSIVE PROTECTION THROUGH HUMAN RIGHTS?

3.5.1. Legitimacy and sovereignty

We have seen above that in traditional international law, Westphalian sovereignty entailed that the state was able to maintain a distinction between inside and outside, *inter alia* by designing certain areas as falling under its domestic jurisdiction, where international law had no role to play. The treatment of the individuals under its power, apart from some exceptions (in which the status of individuals under international law was derived from the sovereign status of the state), constituted one of the areas of domestic jurisdiction. Presently, international law has changed in this respect: incorporation of norms concerning human dignity in international law results in an inability of states to argue that national sovereignty entails that the treatment of the individuals under their jurisdiction is not a matter for international law.

Thus, contemporary international law has caused congruence between the ideas underlying Westphalian and domestic sovereignty. Internally, sovereignty has always been "authority, not might."³¹³ Externally, however, it was actual power and not legal authority, which constituted the basis for Westphalian sovereignty, where statehood was determined by effective control over a defined territory and a permanent population. With the recognition of human rights (and before that, the prohibition on the use of force) in modern international law, this standard of material effectiveness has been diluted, as the international community can refuse recognition of statehood when

³¹³ McIlwain (1969), p. 30.

effective control within a territory is established in violation with fundamental human rights, the principle of self-determination, or the prohibition on the use of force.³¹⁴

Also in this respect we see that sovereignty is no longer capable of bringing about a strict divide between the domestic and the international. Formerly, such a divide entailed a territorialisation of the rule of law, containing the legal within the territorially defined state where authority is defined and bound by the rule of law, and defining the international as a space that lacks a constitutional order (at least with respect to the individual).³¹⁵

Consequently, human rights law has instituted a constitutional order over and across national boundaries, and as a result, a blurring between domestic and international law has occurred in the field of individual rights. International human rights norms add a new dimension to the rule of law within the constitutional state, with particular repercussions concerning its practice of judicial review. As such, human rights can simultaneously be seen as a tool to close the gap between national and international law, and as an attempt to overcome the tension between particularism and universality of a global structure of sovereign states that each have jurisdiction within clearly demarcated territories. Whether it succeeds in establishing a guarantee for individual freedom that is not trapped within “the image of the sovereign, the territorial state and its traditional [...] institutions”³¹⁶ will be investigated below.

In addition to the domestic – international divide, we have seen that sovereignty traditionally distinguished the inside from the outside through two related claims: the first concerning territory; the second regarding matters of identity. I will start investigating the effect of the blurring between domestic and international law on matters of identity with specific regard to individual rights in Section 3.5.2. We will see that distinctions regarding inside and outside that are based on national identity have lost much of their former importance. Due to international human rights norms, post-national conceptions of citizenship have developed within the state.

³¹⁴ Warbrick (2003), p. 205; and Nollkaemper (2004), pp. 116-118. Examples are the resolutions of the U.N. Security Council in which the establishment of the South African homelands (violation of the prohibition of apartheid), and the establishment of North Cyprus by Turkey (violation of the prohibition on the use of force) were deemed in violation of international law. S/Res/181 and S/Res/182 (1962) and S/Res/541 (1983).

³¹⁵ Huysmans (2003), p. 215-216. See also Fox (1997), pp. 113-114.

³¹⁶ Huysmans (2003), p. 223, who poses this question with regard to trans-national democracy.

With regard to the modern state's territorially based claims, which will be looked at in Section 3.5.3., however, the picture is more ambiguous, and I will argue that territoriality as an organising principle has not been weakened by international human rights norms. On the contrary, we will see that the limits to the validity of these norms are often determined precisely by territoriality.

3.5.2. Identity and rights in the contemporary state: post-national citizenship

I have described in Section 3.3.1 how citizenship and nationality acquired identical meanings when the meanings of statehood and nationhood coincided.³¹⁷ Just like nationality, the institution of national citizenship was centred on exclusive allegiance,³¹⁸ and legal personhood became linked to nationality. Individual rights were in reality national rights, and the result was that non-citizens fell in a gap that existed between national and international law, without real possibilities for enforcement of those rights that were proclaimed as inalienable when they were formulated during the enlightenment.

However, the linkage of nationality and citizenship does not need to be "indispensable, inevitable or necessary."³¹⁹ On the contrary, we have seen that the bundling of the rather diverse elements in the single institution of citizenship came about as a result of specific historical processes. In this Section, I argue that contemporary developments indicate, in some respects a gradual weakening of the linkage between nationality and citizenship, if not with regard to citizenship as a formal status, than at least with regard to citizenship as a normative project. According to Saskia Sassen, the tension between citizenship as a formal status or as an increasingly comprehensive social membership, have been fuelled by "globalisation and human rights, therewith furthering the elements of a new discourse on rights."³²⁰

Thus, not only the increased prominence of the international human rights regime features in Sassen's analysis of how globalisation destabilizes the particular bundling of diverse elements in the institution of citizenship, and how it "brings to the

³¹⁷ Preuß (1996), p. 128.

³¹⁸ Sassen (2004), p. 194.

³¹⁹ Dell'Olio (2005), p. 13.

³²⁰ Sassen (2004), p. 198.

fore the fact itself of that bundling and its particularity."³²¹ In addition to international human rights, Sassen accords a crucial role to various forms of globalisation, such as economic deregulation and the subsequent prominence of the markets. Important as these developments are, I will not address them when examining the changing connotations of social membership. The scope of this study allows only for investigation of the influence of human rights norms on the discourse of rights within the nation state.

Moreover, I take the opportunity to point out that in this Section, I will not investigate the way in which international human rights norms involve a right of non-citizens to be present on the territory of the state. Although an important aspect when examining how international human rights norms limit state sovereignty and how they have the capacity to transform citizenship as a normative project, questions with regard to the right to cross national boundaries and the right to remain in the national state's territory will be addressed in Chapter 5.

Under the influence of human rights norms, formal membership in the territorially exclusive nation-state ceases to be the only ground for entitlement to rights. Although, as we will see in later in this study, international law is largely silent with regard to the national state's discretion to admit or refuse aliens, once these aliens are present within the territory of the national state, international human rights norms impose important obligations upon the state with regard to non-citizens. As governments are obliged to guarantee some fundamental rights irrespective of nationality, rights based on universal personhood have broken the state's monopoly on granting membership rights.³²²

At this point, it is important to reiterate the blurring which human rights law has caused between national and international law. The international human rights regime operates partially within the nation state, as adherence to the rule of law within the nation state, as discussed in Section 3.2., ensures that international human rights norms are grounded in national institutions and practices. As a result, these norms have changed the domestic constitutional order by their implication that an individual is protected by the law as an individual, and no longer because of formal citizenship status. In addition, most of the enforcement of human rights norms takes place within

³²¹ Sassen (2004), p. 191.

³²² Murphy and Harty (2003), p. 181.

the nation state, with domestic courts playing an especially important role.³²³ These courts have become obliged to extend basic legal protection to anyone falling under the state's jurisdiction.³²⁴ Consequently, any tension between sovereignty as absolute power and international human rights should not be perceived as a conflict between a clear-cut inside and the outside,³²⁵ but this tension may surface purely within the national state.

In the case of rights protection for non-citizens, the tension between international human rights and sovereignty acquires an additional dimension, as human rights interests in that case do not compete merely with states' jurisdictional independence, but with another central element of sovereignty that I have addressed in the previous Chapter: the right to determine who belongs to the community.³²⁶

Under the influence of human rights norms, a blurring has occurred between the position of nationals and long-term or legal residents within the nation state. I will not deal with the question whether this gradual increase in rights for aliens is the result of international developments,³²⁷ or rather due to the "liberalness of liberal states" and the way domestic courts in these states have been guaranteeing rights for aliens over the past year, as Christian Joppke argues.³²⁸ As already said, the human rights discourse operates both within and without the nation state, which is one of its defining characteristics. The fact that extension of rights to non-citizens has taken place mostly in Western states under the rule of law through domestic judiciaries, does not necessarily diminish the importance of an international dimension to human rights, but it could instead underscore the unique quality of these norms when compared to other forms of (international) law.

Human rights norms have secured civil and a certain amount of political as well as social rights for non-citizens, who as a result become part of the community of the state. Even if these non-citizens do not acquire citizenship as a formal status, their position in the nation state is anchored in an explicit discourse on rights and belonging, which has been called post-national citizenship.³²⁹

³²³ See Aceves (2002), p. 277; Martin (1989), p. 564; and Sassen (1999), p. 181.

³²⁴ See McDougal, Lasswell, and Chen (1976), pp. 461-463.

³²⁵ Sassen (1996), p. 61.

³²⁶ Bosniak (2004), p. 329.

³²⁷ See for example the HRC in *Gueye et al. v. France*, 3 April 1989.

³²⁸ Joppke (1998), see in particular pp. 292-293.

³²⁹ Soysal (1994). See also Jacobson (2001) and (1996), who instead talks about the decline of citizenship.

However, with regard to discourses on post-national citizenship, it is important to make a distinction between the various categories of fundamental rights, as not the full range of political and economic rights forms part of the post-national citizenship package. Furthermore, with regard to non-citizens' status in the nation state, lawful residents should be distinguished from persons who do not have the authorisation of the state to be present on its territory. Accordingly, even more so than with regard to national citizenship, the content of post-national citizenship is impossible to define, as it is a scale on which diverse factors determine the extent of rights and the degree of belonging for each individual.

International human rights instruments oblige the state to respect classical individual rights, such as the right to life, liberty, physical integrity, freedom of thought, conscience and religion, etc, to anyone under their jurisdiction, without regard to nationality. Thus, anyone present on the territory of the state – citizen, legal resident and illegal immigrant alike – is entitled to the enjoyment of fundamental civil rights. Especially in the case of undocumented migrants, international norms, such as laid down in instruments such as the ECHR and the ICCPR are frequently invoked, as those people have no formalised status within the state to rely on.

However, with regard to their entitlement to rights, important differences exist between documented and undocumented migrants. The way in which human rights norms weakened the link between nationality and social membership is most distinctly illustrated in the case of legal, long-term residents. In addition to civil rights, most European states grant long-term legal residents many social rights on an almost equal footing with their own citizens. The gradual expansion of social rights to this class of non-citizens is emphasised by Sassen, who argues that concerning social services, citizenship status is of minor significance in Europe: “What matters is residence and legal alien status.”³³⁰ In contrast, the status of illegal immigrants within the nation state, although not devoid of access to rights, can hardly be described as approaching something like citizenship status.

With regard to political rights, the distance between post-national citizenship of legal residents and national citizenship remains greatest. Notwithstanding the fact that in many European countries, long-term residents have the right to vote in municipal elections, foreigners, when they do not naturalise, are by far not accorded the full range

³³⁰ Sassen (1996), p. 95.

of political rights within the national state. A clear example of the universality of civil rights versus the enduring particularity of political rights is provided by the ECHR. Most rights which this Convention guarantees are civil rights thus to be secured to anyone under the jurisdiction of one of the Contracting Parties, as is required by Article 1 ECHR. However, with regard to Articles 10 and 11 ECHR, respectively securing freedom of expression and freedom of assembly and association – freedoms that consist of the exercise of political rights – Article 16 ECHR expressly stipulates that nothing in these provisions shall be regarded as preventing the Contracting Parties from imposing restrictions on the political activity of aliens. The fact that political rights are only to a very limited extent included in the post-national citizenship package is due to the direct link of such rights with the concept of popular sovereignty, and as such with a resounding particularistic connotation of the concept of the people.

With specific regard to post-national citizenship, it is once again important to stress the importance of the existence of the rule of law domestically, in order for human rights norms to reach their full potential and as such to transform the traditional domestic legal order. I have remarked already several times upon the fundamental role which domestic courts play with regard to the enforcement of such norms. The judiciary in a state based upon the rule of law is able to mediate between the international and the domestic legal order. Sassen contends that, as domestic courts have to accept the existence of undocumented migrants making rights-based claims, a new social contract comes into being between these aliens and society at large.³³¹

The same holds true, even more so, for immigrants that have acquired legal residence status. Such a new form of social contract may partly make up for the lack of political rights for non-nationals. David Jacobson and Galya Ruffer claim replacement of the traditional democratic route of voting, civic participation and political mobilization, by the concept of judicial agency: “Through this new mode of political engagement, litigants challenge legislative and executive authority as they cross organizational and even national boundaries.”³³² In line with Sassen’s argument, they contend that judicial agency, which term designates individual access to a dense web of judicially mediated rights and restraints, changes the connotations of the traditional

³³¹ Sassen (1996), p. 96.

³³² Jacobson and Ruffer (2003), p. 74. See also Stacy (2003), p. 2050, who argues that the human rights regime causes political requests to be framed in the language of rights.

social contract, for also outsiders can avail themselves of such access, and as such become part of the organised political community. Exclusive measures taken by the executive are challenged at the level of the nation state, where the judiciary assesses their legality in light of international human rights obligations of the state. Conflicting forces between the judiciary and the executive lead to a “shift of power towards formal commitment to human rights”,³³³ which thwarts executive but also legislative attempts to exclude non-nationals from the enjoyment of rights which were originally retained for nationals.

Any account of post-national citizenship is incomplete when it ignores citizenship of the European Union, the only formal constitutionalisation of post-national citizenship. The Treaty on the European Union, which was agreed upon and signed by the Member States in Maastricht in 1992, introduces the concept of citizenship of the European Union. Article 17 EC Treaty provides that every person holding the nationality of a Member State shall be a citizen of the Union, which citizenship shall complement and not replace national citizenship.

The most important right which European citizenship enshrines is the right to move and reside freely within the territory of all Member States (Article 18 EC Treaty), but it should be emphasised that the right to reside in another Member State for a period exceeding three months is granted only to certain classes of Union citizens.³³⁴ Citizens of the Union who reside lawfully in the territory of another Member State have the right to equal treatment within the material scope of community law, giving them in effect much the same social and economic rights as nationals of that Member State. Freedom of movement and the prohibition of discrimination on the grounds of nationality in Article 12 EC Treaty were codified long before the notion of Union citizenship came into being. Indeed, as these principles constitute cornerstones of EC law, the concept of

³³³ Jacobson and Ruffer (2003), p. 79.

³³⁴ Directive 2004/38/EC of the European Parliament and the Council of April 29, 2004, (to be implemented by April 30, 2006), on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 74/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC, and 93/96/EEC, [2004], O.J. L158/77, grants a right of residence for a period longer than three months to Union citizens who are workers or self-employed, who have sufficient resources not to become a burden on the social assistance system of the host state, students and family members of these citizens. See Lenaerts, Van Nuffel and Bray (2005), p. 548.

citizenship of the Union formalised already existing community law in the field of socio-economic rights. Nonetheless, it should be noted that the approach which the ECJ has taken to the concept of citizenship has the effect of significantly extending access to fundamental rights for EU citizens, sometimes even contrary to secondary Community legislation.³³⁵

Furthermore, citizenship of the Union entails more than the right to move and a prohibition on discrimination on the ground of nationality. Every citizen of the Union has the right to petition the European Parliament and the European Ombudsman.³³⁶ In addition, in the territory of a non-Member State in which their Member State is not represented, Union citizens are entitled to protection by the diplomatic authorities of any Member State, on the same conditions as nationals of that State.³³⁷ Moreover, every citizen of the Union has the right to vote and stand as candidate for municipal and European Parliament elections of the Member State in which he or she resides.³³⁸ Although to a limited extent, Union citizenship is thus complemented with political rights.

The impact of Community law in this respect extends outside the Community legal framework into other areas of international law, which more specifically aim at the protection of human rights proper. In *Piermont v. France*, France relied on the aforementioned Article 16 ECHR to restrict the freedom of expression of a German national who was present in French Polynesia.³³⁹ Contending that neither European citizenship, nor the status of Ms Piermont as a member of the European Parliament was relevant, France argued before the ECtHR that Ms Piermont came within the scope of Article 16 ECHR, as anyone did who was not a national of the country in which he intended to exercise the freedoms of Article 10 and 11 ECHR. However, according to the Court in Strasbourg, although not taking into account the concept of European citizenship as the Community Treaties did at the material time not recognise any such

³³⁵ See Case C-184/99, *Grzelczyk v. Centre public d'aide social d'Ottignies-Louvain-la-Neuve*, 20 September 2001; Case C-209/03, *Bidar v. London Borough of Ealing*, 15 March 2005; and Case C-456/02, *Trojani v. Centre Public D'Aide Sociale de Bruxelles*, 7 September 2004.

³³⁶ Article 21 ECT.

³³⁷ Article 20 ECT.

³³⁸ Article 19 ECT.

³³⁹ ECtHR, *Piermont v. France*, 27 April 1995.

citizenship, EU Member States were precluded to raise Article 16 against anyone in possession of the nationality of one of the Member States.³⁴⁰

Nonetheless, Union citizenship is traditional in the sense that it maintains a strong link between the very concept of nationality and rights. Only individuals who possess the nationality of one of the Member States are endowed with Union citizenship. Long term residents that do not possess the nationality of one of the Member States – those that according to Yasemin Soysal benefit from access to rights on the ground of post-national citizenship – do not benefit from the right of free movement and other Union citizenship rights, save the right to petition the Parliament and the Ombudsman. So although discrimination on grounds of nationality becomes increasingly prohibited with regard to persons that possess the nationality of one of the Member States, such discrimination is permitted with regard to the large numbers of non-European citizens present on the same territory.³⁴¹ Council Directive 2003/109/EC³⁴² attempts to improve the status of third country nationals, but essential differences remain. Even if voices are heard to base Union citizenship on residence status,³⁴³ in light of individual Member States' reluctance this will probably not happen in the near future.

If EU membership were to be truly post-national, the link between territory, nationality and rights would have to be disconnected more radically. From the outside – in the eyes of individuals who do not possess the nationality of one of the Member States – with the establishment of Union citizenship, the EU as a whole acquired the characteristics of the traditional territorial state. Indeed, Union citizenship even enhanced national citizenship,³⁴⁴ as could be confirmed by those outsiders who are subject of expulsions organised by EU joint charter flights. Rainer Bauböck contends that taking Union citizenship seriously entails that such citizenship should be accessible

³⁴⁰ Ibid. par. 64.

³⁴¹ Boelaert-Suominen (2005), p. 1015.

³⁴² Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long term residents, O.J. L 16 of 23 January 2003, p 44.

³⁴³ See for example European Parliament, *Working Document on the Fourth Report of Citizenship of the Union (1 May 2001 – 30 April 2004)*, Committee on Civil Liberties, Justice and Home Affairs, 30 June 2005; and also the Parliamentary Assembly of the Council of Europe, *Recommendation 1714 (2005), Abolition des Restrictions au Droit de Vote*, text adopted by the Assembly on 24 June 2005.

³⁴⁴ See Dell'Olio (2005).

under fair conditions to all long-term residents in the Member States. The fact that nationality laws of Member States are not harmonised, and in addition are illiberal and exclusionary, is “a matter of concern to the Union as a whole as it is through them that membership in the Union is regulated.”³⁴⁵ The status of third-country nationals is de facto determined by Member States’ national immigration rules,³⁴⁶ which matter will receive closer attention in Chapter 5.

We have seen that the internalisation of international human rights norms within the nation state has led to a shading of the distinction between inside and outside. Inside and outside can no longer be separated by drawing an unambiguous line between nationals and foreigners, but instead the extent of inside and outside can be expressed in terms of degrees. Wholly inside are those who possess the nationality of the nation state, entitled to the full range of civil, political and social rights. Wholly outside are those that do not find themselves under the jurisdiction of the nation state. Inside, albeit to a lesser degree than nationals, are foreigners who are in possession of a formal residence status that secures their entitlement to civil rights, a range of social and economic rights, and in some cases a limited amount of political rights. Partially inside and partially outside are foreigners who are illegally present on the nation state’s territory: their entitlement to rights concerns mainly civil rights.

The erosion of the link between nationality and citizenship is exemplified by this shading of the distinction between inside and outside. Apart from the erosion of this once necessary linkage, it should also be noted that under the influence of international law, issues related to the concept of nationality itself no longer fall exclusively under the national state’s domestic jurisdiction. Although international law still largely allows each state to determine whom it regards as its citizens,³⁴⁷ it is possible to discern developments at the international plane, indicating that the state no longer enjoys an unlimited discretion with regard to all matters relating to nationality. These developments relate mostly to the prevention of statelessness and issues of dual nationality, and should not be overstated.³⁴⁸ Nonetheless, with regard to these issues, international law treats questions of nationality increasingly from a rights-oriented perspective. As such, they may signal a departing from international law’s traditional

³⁴⁵ Bauböck (2003), p. 6. See also Lange (1995), pp. 109-110.

³⁴⁶ Boelaert-Suominen (2005), p. 1049.

³⁴⁷ Rubenstein (2003), p. 168-169.

³⁴⁸ See for a detailed discussion: Spiro (2003).

approach to nationality law, which consisted of a “matter of human geography confronted on the same terms as territorial geography”, predicated to the maintenance of international order instead of directly accounting for individual interests.³⁴⁹ Kim Rubenstein argues along the same lines, suggesting a movement away from the centrality of the state in international law towards a rights-based, individualized focus: “as international law becomes more flexible in its use of nationality so too it becomes part of citizenships progressive project.”³⁵⁰

This Section has argued that international law has increasingly taken account of the individual interests that are involved in the exercise of jurisdiction over people by the state within its territory. International human rights have factually led to a weakening of the tie between formal citizenship status and individual rights within the nation state. In this sense, one can speak of what I will call the ‘denationalisation of the rule of law’. The next Section will investigate how human rights have affected territoriality: what is their impact on the territorial claim of the modern state to distinguish inside from outside? Are human rights norms capable of transforming the territorial form of sovereignty in a likewise manner as they have affected its content, so as to be able to speak of a ‘de-territorialisation of the rule of law’?

3.5.3 Sovereignty, territory, and individual rights

In the previous Section, we have seen that human rights norms have led to an extension of citizenship status, if not formally, than at least with regard to citizenship as a status indicating membership and access to rights in the organised political community. However, although this has certainly been beneficial for large groups of individuals living in states which are not their own, in this Section I will argue that advancing human rights norms have not led to a truly radical new approach to citizenship, one that is able to abandon the decisive distinction between universalism and particularism. We will see that formal citizenship status remains of fundamental importance for a territorial regime of governance and access to fundamental rights for the individual.

³⁴⁹ Spiro (2003), p. 94-95.

³⁵⁰ Rubenstein (2003), pp. 185-186.

“ While it may be true that advancing human rights norms increasingly commit countries to granting the same civil and social (though not political) rights to those merely resident in their territories as accorded their full citizens, this development does not necessarily signal the “decline of citizenship” for most people. These arguments primarily concern the access to rights only of immigrants, not of the main stock of the populations that constitute and replenish the bodies of citizens that constitute states. Such arguments tend to overstate the significance of what are, in fact, relatively marginal phenomena. From this point of view, it seems quite exaggerated to claim that, “in terms of translation into rights and privileges, [national citizenship] is no longer a significant construction.”³⁵¹

We have seen that within the nation state, the status of legal residents and undocumented aliens differ in important respects. According to Linda Bosniak, it is the state’s claim to territorial sovereignty that accounts for this difference in treatment. She argues that with regard to undocumented immigrants, the state’s territorial sovereignty has been breached, which explains why the state accords these persons far less rights than legal residents.³⁵²

The way in which the modern state perceives and wishes to maintain its territorial sovereignty, has a direct link with individual rights, and as such also with its capacity to exercise power over people. Nevertheless, the territorial form of sovereignty and its actual content as jurisdictional claims over people within a certain territory are often perceived as separate from each other because the former has acquired an image of neutrality and self-evidence. Whereas we have seen that international law has increasingly conceded that the content of sovereignty implicates individual interests, acknowledgement of the fact that the territorial form of sovereignty involves individual interests as well is rare.

In this Section, my first argument will be that territoriality exerts a limiting influence on the universality of human rights. To make this point, I will first confirm the importance of territoriality in this respect by examining the territorial scope of human rights obligations of national states and the way in which access to rights is factually guaranteed to the individual in Section 3.5.3.1. Secondly, I will contend that human rights norms have made very few inroads whenever the states bases its claims on its territorial sovereignty in Section 3.5.3., which investigates the way in which fundamental rights limit the state’s spatial powers or its assertions of territorial

³⁵¹ Torpey (2000), p. 156.

³⁵² See for a detailed discussion Bosniak (1991), pp. 753-756.

sovereignty. I will conclude that international law regards the notion of territoriality and sovereignty's territorial frame essential to the preservation of a particular international order. The result is that the individual interests that are involved in sovereignty's form are still only marginally accounted for, a proposition that will be investigated further in Chapters 4 and 5.

3.5.3.1. Territorial scope of human rights protection: Duties beyond borders?

"The concept of universal human rights is antithetical to the [...] geographic distinctions that cause the protection of humanitarian law and the Constitution to be variable and unpredictable."³⁵³

Most human rights instruments provide that the state is to ensure individual rights protection to anyone under its jurisdiction.³⁵⁴ Thus, in any case, actions of states within their national territory may not violate any fundamental rights. With regard to actions of states outside national territory, the situation is more complex. Concerning European states' human rights obligations, the admissibility decision of the ECtHR in *Bankovic*³⁵⁵ has led to ambiguity with regard to how the notion of jurisdiction in Article 2 ECHR is to be interpreted and the Court's approach to this issue has been criticised as fundamentally flawed.³⁵⁶ Before considering the implications of *Bankovic* and other recent case law, I will discuss the approach that the Strasbourg organs have traditionally taken towards extra-territorial application of the Convention, as well as the way in which other international human rights bodies have dealt with the question of extra-territoriality.

Taking into account the object and purpose of human rights obligations of national states, there is no *a priori* reason why they should not be held responsible for those violations attributable to them that occurred outside national territory.³⁵⁷ Both the European Commission for Human Rights and the ECtHR have repeatedly held that in

³⁵³ Fitzpatrick (2002), p. 334.

³⁵⁴ Article 1 ECHR, Article 1 American Convention on Human Rights, Article 2 ICCPR.

³⁵⁵ ECtHR, *Bankovic and others v. Belgium and others* (inadmissible), 12 December 2001.

³⁵⁶ Altiparmak (2004); Mantouvalou (2004); R  th and Trilsch (2003); and Happold (2003).

³⁵⁷ Meron (1989), p. 78.

certain instances the national state can be held responsible for actions of its authorities outside its national territory, as the term jurisdiction is not limited to the national territory of the contracting states.³⁵⁸ According to the Commission, “it is clear from the language [...] and the object of [Article 1] and the purpose of the Convention as a whole, that High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad.”³⁵⁹

Apart from the situation in which it has occupied foreign territory,³⁶⁰ a state can be held responsible for violations of the Convention rights and freedoms of persons who were in the territory of another state, but who were “found to be under the former state’s authority and control through its agents operating – whether lawfully or unlawfully – in the latter state.”³⁶¹ Before the *Bankovic Case*, the case law of both the Strasbourg Commission and the Court show that in order to engage a state’s liability under the ECHR, overall exercise of jurisdiction is not always required and even a specific act committed abroad is capable of bringing a person within the jurisdiction of the state to which that act can be attributed.³⁶²

“[...] nationals of a State are partly within its jurisdiction wherever they may be, and authorised agents of a State not only remain under its jurisdiction when abroad, but bring any other person “within the jurisdiction” of that State to the extent that they exercise authority over such persons.

³⁵⁸ ECtHR, *Drozd and Janousek v. France and Spain*, 26 June 1992. EcommHR, *Hess. v. United Kingdom*, Decision of 28 May 1975. In particular, actions by a state’s consular and diplomatic representatives may involve the liability of a national state under the ECHR. See EcommHR, *X. v. Germany*, Decision of 25 September 1965; and Lush (1993), p. 898. In *Drozd and Janousek*, the Court accepted that France had limited its jurisdiction *ratione loci* by a declaration under Article 63, but it concluded that it exercised jurisdiction *ratione personae*. Lush (1993) concludes that the Convention thus seems to be “hybrid, not without a measure of internal consistency.”

³⁵⁹ EcommHR, *Cyprus v. Turkey*, Decision of 26 May 1975 and EcommHR, *X. and Y. v. Switzerland*, Decision of 14 July 1977.

³⁶⁰ And exercises effective control of an area outside its national territory. See ECtHR, *Loizidou v. Turkey*, (preliminary objections), 23 March 1995, par. 62 and 18 December 1996 (merits), par 52.

³⁶¹ EcommHR, *M v. Denmark*, decision of 14 October 1992; and *Illich Sanchez Ramirez v. France*, decision of 24 June 1994, p. 155.

³⁶² EcommHR, *H. v. Ireland*, Decision of 28 February 1983, par. 17. Altiparmak (2004), pp. 233-244.

Insofar as the State's acts or omissions affect such persons, the responsibility of that State is engaged."³⁶³

The Inter-American Commission on Human Rights and the UN Human Rights Committee take a similar approach in order to establish extra-territorial responsibility for human rights violations.³⁶⁴ According to these bodies, the meaning of the term jurisdiction is not to be equated with territorial competence, but it should also cover extra-territorial acts by the state or its agents that violate the fundamental rights protected by respectively the IACHR and the ICCPR outside national territory.³⁶⁵

This broad interpretation of the term jurisdiction, taking as a starting point the "relationship between the person affected and the state concerned, not [...] the geographical location of the violation"³⁶⁶ may perhaps not reflect the ordinary meaning of jurisdiction in international law, but it is consistent with the object and purpose of international human rights documents. When the term jurisdiction is used in international law to discuss the relationship between states amongst each other, it is clear that its scope is limited by the sovereign (territorial) rights of other states. The concept of jurisdiction in human rights documents in contrast should be understood as having a direct relationship with the rules concerning state responsibility in international law, which determine that responsibility derives from control.³⁶⁷ This line of reasoning is confirmed by the Commission's observations in *Stocké*:

"An arrest made by the authorities of one State on the territory of another State, without the prior consent of the State concerned, does not [...] only involve State responsibility vis-à-vis the other State, but [it] also affects that person's individual right to security under Article 5(1). The question whether or not the other State claims reparation for violation of its rights under international law is not relevant for the individual right under the Convention."

³⁶³ EcommHR, *Stocké v. Germany*, Report of 12 October 1989, par. 166-167. See also EcommHR, *Chrysostomides and others v. Turkey*, Decision of 4 March 2003.

³⁶⁴ Inter-American Commission of Human Rights, *Coard et al. v. The United States*, decision of 29 September 1999, par. 37, 39, 41; HRC, *Lopez Burgos v. Uruguay*, 29 July 1981, par. 12.3 and HRC, *Celiberti de Casariego v. Uruguay*, 29 July 1981, par. 10.3.

³⁶⁵ Lush (1993).

³⁶⁶ Altiparmak (2004), p. 239.

³⁶⁷ Lawson and Schermers (1999), p. 603. See also Draft Articles on State Responsibility, International Law Commission (2001).

Thus, although a state's jurisdictional competence is primarily territorial, responsibility for violations of fundamental rights is not restricted to national territory. Case law of the Strasbourg organs, the IACHR and the HRC make clear that responsibility *ratione personae* for extra-territorial acts, although it may not be as straightforward to establish as responsibility *ratione loci*, is not exceptional.³⁶⁸ This approach is in fact required by the idea of the modern rule of law, which wishes to overcome the particular, territorially defined, universalism of traditional constitutional discourses. In the words of the IACHR, "no person under the authority and control of a state, regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable human rights."³⁶⁹

However, in *Bankovic*, the ECtHR seemed to depart from some of the principles that were deemed established jurisprudence by both the Commission and the Court. The application originated in the 1999 NATO bombing of Radio Televizije Srbije in Belgrade and was lodged by one individual who had been injured by the bombing and five surviving relatives of those killed by it. They alleged that by bombing the Serbian Television Station, the respondent States had violated Articles 2, 10 and 13 of the Convention. The Court declared their application inadmissible as it was not satisfied that the applicants and their deceased relatives were within the jurisdiction of the respondent states on account of the extra-territorial act in question.³⁷⁰ Although it has been argued that the Court's conclusion can be supported on the ground that the NATO did not at any moment assert authority or exercise control over the individuals,³⁷¹ the decision of the Court was framed in much wider terms that certainly signalled a departure from the stance that the Strasbourg bodies have previously taken towards the question of extra-territorial jurisdiction.

In the first place, the Court referred to the 1969 Vienna Convention in order to ascertain the "ordinary meaning" of the term jurisdiction. It went on to state that, from

³⁶⁸ In addition to the cases quoted above see also IACHR, *Salas v. The United States*, 14 October 1993 and; *the Haitian Centre for Human Rights et. Al. v. United States*, decision of 13 March 1997.

³⁶⁹ IACHR, *Detainees in Guantanamo Bay, Cuba; Request for Precautionary Measures*, March 13, 2002.

³⁷⁰ *Bankovic v. Belgium* (inadmissible), 12 December 2001, par. 82.

³⁷¹ Happold (2003), p. 90 who calls it the right decision for the wrong reasons. The right decision as there was no structured relationship between the NATO and the victims of the bombing, who were rather unfortunate enough to be in a building targeted by NATO forces.

the standpoint of international law, the jurisdictional competence of a state is primarily territorial. If extra-territorial jurisdiction is exercised, the suggested bases of such jurisdiction are, according to the Court, defined and limited by the sovereign territorial rights of other states.³⁷² It concluded that “Article 1 of the Convention must be considered to reflect this ordinary and essential territorial notion of the term jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case.”³⁷³

In reaching this conclusion, the Court referred to its previous case law, which “demonstrates that the recognition of the exercise of extra-territorial jurisdiction is exceptional: [the Court] has done so when the respondent state, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally ascribed to that government.”³⁷⁴ It is unfortunate that the Court did not refer to decisions of the ECommHR, such as the above cited *Stocké Case*, where the question as to whether the extra-territorial act occurred with or without the consent of the state on whose territory it took place was deemed irrelevant for the interpretation of Article 1.

The Court’s adherence to the ordinary meaning in international law of the term jurisdiction in *Bankovic*³⁷⁵ is problematic for a number of reasons, such as involving a danger “to embroil the Court in disputes as to whether a state has acted lawfully or unlawfully”.³⁷⁶ More fundamentally, it adheres to an understanding of the territorial frame of sovereignty that thwarts international human rights law’s underlying principles. That it is no longer the sovereignty of the violating state that constitutes a barrier to claim rights that are supposed to be inalienable, but instead the sovereignty of the state on whose territory the violation took place, does not matter much from the viewpoint of those whose rights are violated.

In the second place, the Court’s interpretation of previous cases that were decided or pending is problematic. It stated that in the admissibility decisions in the

³⁷² *Bankovic v. Belgium*, 12 December 2001, par. 60.

³⁷³ *Ibid.* par. 61.

³⁷⁴ *Ibid.* par. 71.

³⁷⁵ Its approach was repeated in *Gentilhomme and Others v. France*, 14 May 2002, §20.

³⁷⁶ Happold (2003), p. 83.

cases of *Issa*,³⁷⁷ *Öcalan*,³⁷⁸ and *Xhavara*,³⁷⁹ the Respondent States did not raise the jurisdiction issue.³⁸⁰ Apart from the fact that the absence of claims by the parties concerning admissibility has not impeded the Court from addressing the issue of admissibility, the circumstance that the respondent states refrained from raising admissibility objections that were related to the jurisdiction issue at least indicates state practice that does not adhere to the ordinary meaning of the term jurisdiction.

But it is the Court's referral to its judgment in the *Cyprus v. Turkey Case*³⁸¹ that is perhaps most unsettling. Its observation in the latter case that there was a need to avoid "a regrettable vacuum in the system of human rights protection" in Northern Cyprus was to be read in the territorial context of that case:

"[...] the inhabitants of Cyprus would have found themselves excluded from the benefits of the Convention safeguards and system which they had previously enjoyed, by Turkey's effective control of the territory and by the accompanying inability of the Cypriot government, as a contracting state, to fulfil the obligations it had undertaken under the Convention."³⁸²

It went on to state that the desirability of avoiding a vacuum in human rights protection has so far been relied on the Court in order to establish jurisdiction solely with regard to territories that would normally be covered by the Convention. Accordingly, the Court excluded the Federal Republic of Yugoslavia from the legal space in which contracting states have to ensure respect for the Convention, even in respect of their own conduct. This analysis has been criticised as turning an argument that was originally intended to expand the court's jurisdiction into one that limits extra-territorial jurisdiction.³⁸³

³⁷⁷ ECtHR, *Issa and others v. Turkey* (Admissible), 30 March 2000.

³⁷⁸ *Öcalan v. Turkey* (Partly admissible), 14 December 2000.

³⁷⁹ *Xhavara and others v. Italy and Albania*, 11 January 2001.

³⁸⁰ *Bankovic v. Belgium*, 12 December 2001, par. 81. It also mentioned the admissibility decision in the case of *Ilascu*. In the latter case, the Court stated that responsibility under the Convention may also arise when a state exercises effective control of an area outside its national territory as a consequence of military action. However, the Court did not draw any conclusion on the jurisdiction issue as it found it too closely bound up with the merits of the case that it would be inappropriate to determine them at the admissibility stage. See *Ilascu and Others v. Moldova and Russia* (admissible), 4 June 2001.

³⁸¹ *Cyprus v. Turkey*, 10 May 2001.

³⁸² *Bankovic v. Belgium*, 12 December 2001, par. 80.

³⁸³ Ruth and Trilsch (2003), p. 172.

In fact, the Court's approach in *Bankovic* illustrates that it is at times decisively and unnecessarily influenced by territoriality and the resultant (territorial) division of humanity as falling under the responsibility of one particular state, even though this construction may obstruct the important principle of effective protection of the Convention Rights and Freedoms, so often invoked by the Strasbourg Court itself.³⁸⁴

When deciding on the merits of the *Issa Case*,³⁸⁵ the Court seemed to mitigate its restrictive interpretation of the term jurisdiction again. This time it did refer to some of the cases decided by the HRC and former decisions of the ECommHR, and it declared that a state may be held accountable for violation of Convention rights of persons "who are in the territory of another state but who are found to be under the authority and control of the former state through its agents operating – whether lawfully or unlawfully – in the latter state."³⁸⁶ However, the Court concluded that the applicants came not within the jurisdiction of Turkey as they could not prove that the Turkish armed forces had conducted operations in the area where the alleged violations took place.³⁸⁷

Also in its judgment on the merits in the *Öcalan case*, the Court referred to the ECommHR decision in *Stocké*.³⁸⁸ According to the Court, the *Öcalan case* was to be distinguished from *Bankovic* as the "applicant was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest and return to Turkey."³⁸⁹ When it decided on the merits in the *Ilascu Case*, the Court again stressed the ordinary meaning of the term jurisdiction in public international law and referred to *Banković* to stress the prevalence of the territorial principle in the

³⁸⁴ See for example ECtHR in *Loizidou v. Turkey* (preliminary objections), 23 March 1995, par. 72.

³⁸⁵ *Issa and others v. Turkey*, 16 November 2004. Worth noting that the Turkish Government submitted post-admissibility observations contending that in *Bankovic* the Court had departed from its previous case law on the scope of interpretation of Article 1. See par. 52 of the judgment

³⁸⁶ *Ibid.* par. 71.

³⁸⁷ *Ibid.* par. 81.

³⁸⁸ *Öcalan v. Turkey*, 12 March 2003, par. 88.

³⁸⁹ *Ibid.* par. 93. See also ECtHR, *Hussein v. Albania and others* (Inadmissible), March 2006, where the Court decided that the arrest of Saddam Hussein in Iraq did not fall within the jurisdiction of the respondent European States as he had not substantiated any evidence of a jurisdictional link between himself and those States.

application of the Convention. However, it added that the concept of “jurisdiction” is not necessarily restricted to the national territory of the contracting states.³⁹⁰

Thus, we may conclude that if a state acts extra-territorially, in certain cases, whether they are deemed exceptional or not, it is theoretically bound by its international human rights obligations. Everyday reality, however, poses limits to extra-territorial responsibility that are perhaps even more difficult to overcome than those formulated in a court of law. We will see in Chapter 5 that especially in the field of immigration policy, European countries resort to a range of extra-territorial measures to prevent immigrants reaching their territory, actions that may result in breaches of fundamental rights. In practice, these measures are seldom challenged judicially, not least because persons affected by them are not likely to be able to bring their cases to court, an observation that brings us to a further issue to be investigated in order to understand territoriality’s influence on the modern version of the rule of law.

Apart from looking at the territorial scope of human rights obligations as laid down in various instruments, one needs to investigate the way in which access to those rights is factually guaranteed in order to comprehend the importance of sovereignty’s territorial frame for the notion of individual rights. This leads back to Torpey’s scepticism concerning the decline of citizenship in a world where territory is exclusively divided amongst nation states. Indeed, we need to investigate citizenship once more, but now in terms of a global system of governance, to become aware of the fundamental role which space as a political construct plays in determining access to rights.

Human rights and their realisation depend on the state system, a global structure in which governance is still largely undertaken on a territorial basis.³⁹¹ Celebrations of post-national citizenship overlook the territorial aspect of the global political system, and thus fail to appreciate the importance of territory in the practice of fundamental rights protection.³⁹² As such, accounts of post-national citizenship, just as traditional accounts of citizenship, take an internalist perspective. Citizenship is investigated as a process taking place within the nation state as a closed container, territorially defined:

³⁹⁰ *Ilascu and others*, 8 July 2004, par. 310-314.

³⁹¹ Henkin (1999), p. 7; and Shafir (2004), p. 23.

³⁹² See Murphy and Harty (2003), who make the same argument with regard to what they call models of post-sovereign citizenship and self-determination of sub-state nations.

“The state under the rule of law is one of the key institutional arenas for the implementation of human rights of all individuals regardless of nationality.”³⁹³

From a wholly internalist perspective, it makes sense to claim that nationality is no longer determining the status of an individual. In other words, nationality is no longer decisive for the extent of access to rights, but only as long as an individual is present within the territory of the nation state. However, from a global perspective, taking into account the numerous individuals living in states not governed by the rule of law, nationality, citizenship and fundamental rights are still firmly linked. In practice, rights are “territorially limited at the level of the nation state”³⁹⁴

The Universal Declaration of Human Rights of 1948 (UDHR) states that fundamental rights are to be guaranteed, not only without distinction to the personal characteristics of an individual, but in addition without distinction on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs. However, the concept of territoriality, continuously confirmed and reinforced by international law,³⁹⁵ leads to a different reality. We saw that the ECtHR has stated unambiguously that Article 1 ECHR sets limits on the reach of the Convention.³⁹⁶ Even apart from the question of responsibility for extra-territorial acts, these limits in general can only be explained in a system that divides responsibly and population on the basis of territory, and they constitute the very limits on the universality of human rights generally. As long as political community is based on space; in other words, when the “territorial compartmentalisation of the globe remains based on the existing pattern of sovereign states,”³⁹⁷ true universality of human rights remains mere theory. In this context, Gershon Shafir argues that human rights can only be really effective if they are transformed in membership in a global community, which has its own distributive and enforcing institutions.³⁹⁸

It goes beyond this study to design feasible instances of citizenship that are not dependent on territorially demarcated units such as the nation state, the enforcement

³⁹³ Sassen (1999), p. 194

³⁹⁴ Chandler (2003), p 332.

³⁹⁵ McCorquodale (2004), p. 480.

³⁹⁶ *Loizidou v. Turkey*, 23 March 1995, par. 62.

³⁹⁷ Newman (2001), p. 138.

³⁹⁸ Shafir (2004), p. 24. See also Eriksen (2003), pp.369-370.

capacity of which is presently so important for the realisation of human rights.³⁹⁹ What I have attempted to do in this Section is show how territoriality impedes the realisation of the universal aspirations of the human rights discourse.

Even though within the territory of the nation state, citizenship as a normative project and nationality become increasingly decoupled, I have argued that outside its territory, the two remain doctrinally linked. Although, as Sassen asserts, the ascendance of human rights may strengthen the tendency to move away from nationality as an absolute category, the territorial borders of the nation state at the same time determine the exact limits of this tendency. Hence, I disagree with her argument that human rights equally contribute to a move away from national territory.⁴⁰⁰ Similarly, I contest the claim made by Yasemin Soysal, who argues that, as national belonging per se is no longer the basis for rights, we witness the emergence of a new “model of membership, anchored in deterritorialized notions of person’s rights.”⁴⁰¹

On the contrary, it may well be that a reassertion of territorial sovereignty is the modern state’s answer to the growing significance of individual rights protection – irrespective of nationality – within its territory. In a system where presence on territory is decisive for the extent of rights to be enjoyed, states may actually benefit from keeping people out of their territories. Whether there are limits to such assertions of territorial sovereignty will be investigated below.

3.5.3.2. Limits to the state's spatial powers

Dora Kostakopoulou and Robert Thomas argue that the British asylum regime cannot be understood without reference to a specific understanding of territoriality, which is modelled upon private ownership law.⁴⁰² According to these authors, the idea of territoriality is conducive to the formation of what they call a geo-authoritarian culture, which culture does not only impede the recognition of duties beyond borders, as we have seen above, but also increases the spatial powers of governments.⁴⁰³ Asylum and matters relating to freedom of movement more generally will be addressed in the

³⁹⁹ See Lipschutz (2004), pp. 45; and Shafir (2004), p. 24

⁴⁰⁰ Sassen (1999), p. 185.

⁴⁰¹ Soysal (1994), p. 3.

⁴⁰² Kostakopoulou and Thomas (2004), p. 7.

⁴⁰³ Kostakopoulou and Thomas (2004), p. 7.

next two Chapters, but here I will sketch the context in which the state is able to make use of its spatial powers when dealing with these issues.

First, it has become clear in the Sections of this Chapter dealing with citizenship, be it national or post-national, that territory is the means through which governments compartmentalise and control populations.⁴⁰⁴ Furthermore, we have seen in the Section on international law that inviolability of national territory is one of the key principles of international law. In international law, sovereignty stands for ownership of territory, and international law functions as a distributive mechanism for determining which state can exercise sovereignty over a certain territory.⁴⁰⁵ International law organises power and authority into territorially defined sovereign units, and inviolability of national territory and the maintenance of the territorial status quo are its elemental principles. In this particular context, David Luban discusses what he calls Nuremberg's "equivocal and immoral legacy". He argues that, although the veil of sovereignty was pierced by criminalizing certain acts which are carried out by the state against its own population, the criminalization of aggression in the Trials amounted to erecting a wall around state sovereignty, resulting in the old-European model of unbreachable nation states.⁴⁰⁶

It follows that that international law makes a difference between the sovereignty's territorial form and the exercise of its jurisdiction within this territorial framework. Although the state is no longer permitted to employ the latter in whatever way it pleases, the maintenance of the integrity of its territorial boundaries remains its exclusive prerogative. It seems that human rights norms have transformed international law, but only with regard to the sovereign state's jurisdictional claims over persons within a given territory. Regarding territorial sovereignty, international law is still the law for and by sovereign states alone,⁴⁰⁷ and its main aim is to serve the narrow interests of the stability of international order and those of already existing states.⁴⁰⁸

⁴⁰⁴ Newman (2001), p. 144.

⁴⁰⁵ McCorquodale (2001), p. 142

⁴⁰⁶ Luban (1994), p. 336.

⁴⁰⁷ It may be countered that humanitarian considerations in contemporary international law sometimes justify violations of national territory. In the case where a purely internal situation is deemed a threat against the peace, international law may authorise a breach of territorial sovereignty. However, although such interventions clearly violate territorial sovereignty, their justification lies in the state's abuse of jurisdiction over people in a given body politic, not in the use of its spatial powers. In addition, and perhaps more significantly, the example of humanitarian interventions proves that human rights norms play an important role in maintaining the system of sovereign states based on territoriality: if the modern

Perhaps the prohibition on the use of force can hardly be used as an example to demonstrate that the state's spatial power – its territorial sovereignty – is not limited by international law. However, as we have seen in Section 3.4.3., the notion of war, legitimate violence, and territorial boundaries are intertwined. They mutually influence each other in a discourse that attempts to reduce every trans-national problem to a territorial solution. And, as Mary Kaldor writes, “the stylised notion of war [...] as a construction of the centralised, ‘rationalised’, hierarchically ordered, territorialized modern state, [...] dominates, even today, the way policy makers conceive of security.”⁴⁰⁹

Accordingly, the nearly absolute value of territorial integrity extends far beyond the language of armed force between national states, while it is at the same time decisively shaped by that language. In this respect, international law still regards territorial sovereignty through much the same eyes as the United States Supreme Court did in the *Chinese Exclusion Case*, which was decided in 1889:

“to preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us”⁴¹⁰

With regard to freedom of movement of persons, Chapters 4 and 5 will more specifically explore the relationship between the regulation of the permeability of the national border and international law. In Chapter 5, I will examine in closer detail the allegation that “human rights norms have seen states yielding jurisdiction, but not territory, which remains doctrinally enclosed.”⁴¹¹ There, I will investigate with specific regard to individual rights and international movement whether human rights norms

state respects human rights there are no reasons to doubt its territorial claims. Just as in the cases of diplomatic protection and the protection of minorities, international law's exceptions seem to prove the territorial rule

⁴⁰⁸ See McCorquodale (2001), p. 138.

⁴⁰⁹ Kaldor (1999), p. 15.

⁴¹⁰ *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. (1889) 581, at 606.

⁴¹¹ Panglangan (2001), p. 165.

have nevertheless contributed towards a development in which account is taken of the individual interests that are involved in the territorial form of sovereignty.

In this Section, I have investigated the link that exists between territory and rights. I have argued that territoriality impedes the realisation of human rights' universal aspirations. At the same time, it seems that human rights have not made any significant inroads in the state's assertion of its territorial sovereignty, a provisional conclusion that will be examined in detail in Chapters 4 and 5. With regard to territorial sovereignty, international law seems to be still largely the law for and by sovereign states alone. In this respect, it seems justified to conclude that human rights have failed to establish a constitutional order over and across physical borders.

In addition, it can be argued that human rights norms perhaps even have a reifying effect on territoriality, as the progressive development of these norms has "formally enshrined modern ideals of legitimate statehood in the normative fabric of international society."⁴¹² When we regard human rights from this perspective, it seems that they form an inherent part of the modern discourse of legitimate statehood, a discourse that still seeks to justify territorial particularism on the grounds of ethical universalism.⁴¹³

3.6. CONCLUSIONS: A PARTICULARIST UNIVERSALISM?

In this Chapter, I have explored the ways in which, over time, the use of violence by the state has been limited by various discourses. We have seen that in the general concept of the rule of law we can discern material and formal limits on the exercise of political power. The former are constituted by fundamental rights, whereas with regard to the latter, the separation of powers and an independent judiciary deserve special attention.

It is important to bear in mind that there exists a difference between the legitimacy of the exercise of political power (legality), and the legitimacy of its foundations. The latter question is decided by the concept of sovereignty as the construction of a particular legal order; an intrinsically political concept the foundations

⁴¹² Reus-Smit (2001), p. 531.

⁴¹³ Reus-Smit (2001), p. 522, with regard to the proliferation of new sovereign units and decolonisation.

of which cannot be assessed with reference to that same legal order. In contrast, the exercise of state power within a constitutional framework can be subjected to the requirements of the rule of law, and can accordingly be judged as to its legality or legitimacy. Consequently, at the moment that the rule of law or the normal constitutional guarantees of the modern state do not fully apply, we can observe sovereignty's undisguised claim to distinguish the inside from the outside, a claim that is, as we have seen in Chapter 2, based on both territory and identity. The emergence of the exposed core of state power in this sense is likely in the field of migration, associated as it is with the "essence of the nation"⁴¹⁴ and the unity of political community in contemporary Western states, and which is indeed an area where we discern extensive executive discretion and widespread judicial deference, as will be shown later in this study.

We have seen that citizenship's potential for universalism was nipped in the bud on account of territorialisation, both by the resulting Westphalian order as a global structure (the structural dimension of citizenship) and by the ensuing internal sovereign claims of the territorial state. This led to a construction by which membership in the territorially defined state became a necessary condition for access to those rights that were supposed to be universal: the loss of national rights in practice entailed the loss of human rights. Citizenship's internal and structural dimensions interact to reinforce the ideal of national territorial sovereignty, and it presents the link between rights and territorial belonging as natural and necessary.

However, it is not only citizenship's linkage between rights and identity, which shows how territorial boundaries drawn in the past, influence the question of which kinds of state violence are prone to correction through the law. Also international law's regulation of state violence is strongly shaped by the way in which territorial demarcations were brought about. The result is that in international legal regulation of state violence, matters of identity and territorial boundaries are connected to each other by the same sovereign logic as which binds together people, territory and authority within the nation state. And just as a tension exists between the universal and the particular within the nation state, the same tension is present in all accounts of international law, expressed in differing conceptions of who are the subjects of international law.

⁴¹⁴ Dauvergne (2004), p. 592.

A stubborn conception of the territorial state as the sole subject of international law has had a strong impact on the regulation and legitimisation of violence. International law, until the advent of international human rights, has largely ignored domestic violence, but it has attempted to regulate those kinds of violence that crossed national boundaries. When in the course of the twentieth century, territorial integrity became a cornerstone of international law, sovereignty in international law no longer entailed a right to wage war as an instrument of foreign policy. Nonetheless, the old language of war, a state-based discourse with emphasis on the territorial component of sovereignty that is firmly rooted in the Westphalian state system, still decisively shapes the way in which we conceive of sovereignty, political community and the state prerogatives with regard to its territorial boundaries.

Even classical exceptions to the rule that internal violence is a matter for the sovereign state alone affirm a particularistic conception of the modern state and the system it forms part of. As these rules only confer states with rights, they are consistent with citizenship's structuring role in the global world, in which national sovereignty is supposed to embody a perfect link between territory and identity. In addition, international law's exceptions concerning the treatment of minorities and foreigners prove and reinforce the rule that decrees that territorial belonging is essential in order to enjoy rights that were supposed to be universal and inalienable.

The way in which both citizenship and classical international law afford protection against state violence is thus profoundly shaped by sovereignty's claim to distinguish the inside from the outside. The argument by Richard Mansbach and Franke Wilmer that "the relationship between identity and borders underlies both the process of norm articulation and the kinds of violence identified as problematic"⁴¹⁵ thus proves to be true, not only in the international arena, but equally with regard to the domestic order.

Thus, different discourses traditionally regulated internal and external state violence. The existence of the notion of *domain réservé* in international law, exemplified the separateness of the domestic and international orders. Even though not directly apparent, the strict separation between international and domestic law that was brought about by the territorial state and the system it forms part of made a theoretical division within the concept of sovereignty possible. Sovereignty's claim to distinguish

⁴¹⁵ Mansbach and Wilmer (2001), p 56.

the inside from the outside is based on both power over territory and power over people; nevertheless, in due time sovereignty's territorial frame became conceptually distinct from the exercise of jurisdiction over people within a body politic. The state's jurisdiction within a clearly demarcated territory was regulated by domestic law only. Matters relating to the territorial frame of sovereignty were dealt with by international law, as external violence was perceived as engaging the territorial sovereignty of the modern state in an area where only the interests of states were legally recognised. The result was that the exercise of power through political institutions and the clear spatial demarcation of the territory on which this power was exercised, became distinct aspects in the definition of the state,⁴¹⁶ and the intrinsic bond that existed between them was seldom accounted for.

After the Second World War, the international community recognised the inherent dangers of the old system. Human rights law was intended to close the gap between national and international law. From then onwards, international law decrees that all individuals present within the territory of the nation state, citizens and non-citizens alike, are entitled to protection of their fundamental rights. Human rights law has thus to a certain degree caused convergence between national and international law. Internally, citizenship can no longer be the only foundation for access to rights, and the domestic judiciary in the constitutional state plays an important role with regard to the implementation of international norms protecting human dignity. Externally, the individual has become a subject of international law, and the treatment by the national state of persons under its jurisdiction is no longer a mere matter of sovereign discretion.

Nevertheless, even though human rights have caused convergence between national and international law with regard to the rule of law, they have not succeeded in abolishing the conceptual distinction between content and form of sovereignty, which in turn results in the immunisation of the territorial component of sovereignty against legal forces of correction. In order to see this clearly, I have investigated the way in which modern human rights law affect sovereignty's claim to distinguish the inside from the outside.

We have seen that human rights norms have significantly limited the state's claim to decide matters of inside and outside within its territory by reference to identity. Nevertheless, when sovereignty's claim to distinguish the inside and the outside is

⁴¹⁶ Agnew and Corbridge (1995).

based on territory, human rights law has not achieved a similar transformation. In spite of notions of post-national citizenship, the modern version of the rule of law remains territorially limited for two reasons.

In the first place, in most cases, access to fundamental rights is factually determined by presence on territory. National states refuse to be held accountable for actions that took place outside their national territories, an attitude that in the European context may be facilitated by ambiguous recent case law of the ECtHR that seems to revert to a territorial version of the legal space in which the ECHR applies.

In addition, territorialisation ensures that territory and rights remain linked in a more structural way. Celebrations of post-national citizenship suffer essentially from the same shortcoming as any theory that presents citizenship simply as a project that gradually turned the privileges of the few into the rights of the many. The viewpoint from which they investigate citizenship is the territory of the national (liberal) state. When the territorial basis of the global state system is disregarded or taken for granted, it makes sense to claim that nationality and rights have become untangled. However, the internal perspective that such theories take, conceal the fact that this is only the case within the territory of the liberal, Western democracy. Outside its territory, questions of identity and rights remain firmly linked. Thus, territoriality causes the stateless, the refugee and the citizen of dictatorships to remain largely beyond the fundamental rights protection of the constitutional state.⁴¹⁷

In the second place, I have provisionally concluded that human rights law does very little to limit the exercise of the state's spatial powers. Territorial integrity is a cornerstone of international law, and protection of its territorial boundaries has remained the exclusive prerogative of the national state. Chapter 5 takes a closer look at these issues, but for now it is important to reiterate that the way in which the notions of sovereignty and territorial boundaries interact is still decisively shaped by a state-centred discourse which adheres to the sanctity of territorial boundaries in order to maintain a stable order of sovereign states, instead of a just community of individuals. In addition, we need to be aware of the possibility that in a situation in which presence on national territory automatically leads to entitlement to fundamental rights, the sovereign state may wish to keep people outside its territory in order to not have to accord them these fundamental rights.

⁴¹⁷ Isaac (1996), p. 162.

Hence, in spite of its increasing 'denationalisation', the modern rule of law remains territorially limited, and it seems that the status of sovereignty's territorial frame in international law has remained largely the same as it was before the advent of modern human rights law. Nuremberg's "equivocal and immoral legacy" combined with the reification of territoriality has led to a structural blindness for the involvement of personal interests whenever the state bases its claims on the notion of territorial sovereignty, a proposition which will be investigated in further detail in the next two Chapters. There we will see that such blindness is exacerbated whenever the individuals who are affected by such claims are rendered invisible, either because they are far away and unknown or alternatively because they are very different from "us" and that the territorial blind spot of the modern version of the rule of law affects individual rights most obviously and disadvantageously in the global context of immigration from poor, underprivileged citizens of non-Western countries into the Western, liberal democracies.

A version of the rule of law that keeps the content of sovereignty within a territorially defined body politic and its territorial form apart, scrutinising the former aspect while it is largely silent with regard to the latter aspect, obscures the fact that constraints on individual behaviour and freedom are always motivated on account of the notion of political community and the unity of the body politic, interests that concern both form and content of sovereignty. The fact that the modern version of the rule of law has not acknowledged the interrelatedness between the nation state's exercise of jurisdiction over people within a given body politic and the territorial framework in which those jurisdictional claims take place is a particularly serious concern when it comes to the national state's perception of and responses to "new threats"⁴¹⁸, such as immigration. In later Chapters, we will see that international movement of persons constitutes a field that by its very nature engages sovereignty's territorial frame as well as its jurisdictional content as we will see in later Chapters.

⁴¹⁸ See Bigo (2001).

Chapter 4 The extent of the right to leave

4.1. INTRODUCTION

“Theoretically, in the sphere of international law, it had always been true that sovereignty is nowhere more absolute than in matters of emigration, naturalization, nationality and expulsion; the point, however, is that practical consideration and the silent acknowledgement of common interests restrained national sovereignty until the rise of totalitarian regimes.”⁴¹⁹

In the previous Chapter, I have looked at the way in which the sovereign power of the state has been restrained by the use of various discourses. I have argued that the notion of territoriality has exerted a limiting influence over all these discourses, bringing to light the tension between universalism and particularism within each of them. Citizenship is the most obvious example of these potentially “explosive tensions”⁴²⁰, but the way in which a political particularistic reality has triumphed over universal ideals in classical international law as well is for a large extent the result of the Westphalian territorial constellation. Until the advent of international human rights, the few instances in which international law concerned itself with the interests of individuals were those when the territory-identity-population ideal of the sovereign state was most clearly not reflected in reality, as in the case of minorities and resident aliens.

Another significant anomaly in a territorial world that international law cannot afford to overlook is the phenomenon of international migration. People between borders expose the construction, as opposed to the naturalness, of territoriality’s ideal. This Chapter and the next (Chapter 5) will explore the development and the nature of the legal framework regulating international freedom of movement. I will argue that the decisive impact of territoriality upon the rule of law and the resulting immunisation of territorial sovereignty against international legal correction is unambiguously expressed in international law’s regulation of international migration.

⁴¹⁹ Arendt (1976), p. 278.

⁴²⁰ Costa (2002), p. 218.

Many studies dealing with questions directly related to contemporary immigration policies do not concern themselves with the way in which the issue of exit is regulated by legal norms. Nicholas De Genova has argued that, whenever immigration law is addressed, a detailed empirical investigation of its actual operations is often not provided.⁴²¹ The result is that existing laws appear to provide merely a neutral framework.⁴²² In this study, I do not intend to carry out empirical research on the way in which immigration law affects the lives of individuals. Nonetheless, its actual operations will be more closely looked at by including the issue of exit. In this way, I hope to demonstrate that immigration laws do anything but provide a neutral framework. Instead, they are a result of changing perceptions of political authority, and intimately linked to the way in which we perceive the nation state. Indeed, states' monopolisation of the right to regulate movement, therewith comprising both the right to enter *and* the right to leave, has been intrinsic to the very construction of the territorial state.⁴²³

By looking at the overall framework regulating international movement, one of territoriality's most significant implications on the rule of law will be exposed: the artificial distinction between sovereignty's territorial frame and its jurisdictional content within a given body politic. A further reason to include the right to leave in a study dealing with the detention of immigrants in Europe is provided by the fact that questions of emigration are greatly affected by current immigration policies, which have increasingly externalised, as we will see in Chapter 5.

Accordingly, this Chapter deals with the right to leave, leaving questions of immigration to Chapter 5. Section 4.2. presents an overview of the way in which over time perceptions on the issue of exit have developed. We will see that at various times in history, emigration was looked upon in the same way as immigration is at present: it had to be directed in channels which the authorities deemed favourable in the national interests.⁴²⁴ After the Second World War, however, the possibility of an individual to leave his or her country became recognised as a fundamental right in international law. Section 4.3. deals with the international legal norms regulating emigration in detail, with particular emphasis on the permitted restrictions on the exercise of the right to

⁴²¹ De Genova (2002), p. 432.

⁴²² Ibid. p. 424.

⁴²³ Torpey (2000), p. 6.

⁴²⁴ See Christie Tait (1927).

leave. In the conclusions to this Chapter, in Section 4.4., I will briefly touch upon the way in which contemporary immigration policies of Western countries have an impact on individuals' actual exercise of the right to leave, a matter that will be further elaborated on in Chapter 5.

4.2. The right to leave in its historical context

The right to leave one's country is the ultimate form of self-determination. Not to be able to leave a country factually amounts to deprivation of liberty: imprisonment within imagined lines on the surface of the earth instead of incarceration by concrete walls. Centuries ago, the right to leave was already recognised in the Magna Carta of 1215:

In future it shall be lawful for any man to leave and return to our kingdom unharmed and without fear, by land or water, preserving his allegiance to us, except in time of war, for some short time, for the common benefit of the realm.⁴²⁵

Thus, the Magna Carta qualified the right to leave: it was made subject to the condition that allegiance to the Kingdom was guaranteed and it provided for restrictions on exit in times of war. The latter sort of limitation is still to be found in present formulations of the right to leave, which I address in Section 4.3.2. At this moment, it is the qualification "preserving his allegiance to us" which deserves closer attention, for it clearly illustrates the changes that the medieval feudal order was undergoing under the influence of the growing powers of European monarchs.

In medieval Europe, the extent of freedom of movement had been determined by the feudal order. Many people were tied to territory because of their obligations to their feudal lord. The system of serfdom granted no individual freedom of movement whatsoever as serfs were not allowed to leave their place of employment.⁴²⁶ Nonetheless, movement was free for those whose status was free. National borders "were insignificant to the individual traveller, though state boundaries were of warlike

⁴²⁵ Chapter 42 of the Magna Carta of 1215.

⁴²⁶ However, serfdom in Europe was an economic relationship between lord and serf which implied that serfs could in theory and sometimes also in practice buy their freedom. See Dowty (1987), p. 25.

concern to rulers.”⁴²⁷ In the restriction on the right to leave as formulated in the Magna Carta, only granted to free men, an early shift from feudalism to absolutism can be discerned. In Chapter 2, we saw how the doctrine of perpetual allegiance developed when everybody, in addition to their status in the feudal hierarchy, also became a subject of the King. Consequently, permanent emigration, as we know it now, was theoretically impossible, for it was assumed that a subject could always be recalled to his duties to his King.

The recognition of the qualified right to leave in the Magna Carta of 1215 was only short-lived. It is not to be found in later versions of that document, due to the assertion by later kings of their absolute powers to control exit. The situation was not different in other European countries. From the fifteenth century onwards, feudalism was no longer the defining hierarchical relationship. Henceforth, it would be the relationship between the sovereign and its subjects that determined the extent of actual freedom of movement. In the era stretching from the sixteenth to the eighteenth century, the relationship between people, territory and authority was determined by “mercantilism in the service of absolutism”⁴²⁸ and the right to leave was virtually non-existent. Population was considered a scarce economic and military resource, and rulers, in their efforts to maximise economic growth and military power, prohibited emigration almost entirely.

Nonetheless, in this era, the prohibition of emigration was mainly instrumental in securing a concrete state interest. Conceptions of freedom of movement had nothing to do yet with ideologies such as nationalism, alluding to a deeper, symbolic relationship between people and territory, or other ideological convictions, tying the notions of people and their state to each other in a more profound way. This was reflected by the fact that immigration was in most cases welcomed; European monarchs even attempted to acquire populations from what was for them the outside world.⁴²⁹

Chapter 2 showed that at the end of the seventeenth century, the absolute power of the sovereign came under attack by the idea of natural rights and changing ideas about the location of sovereignty. Whereas before emigration had been considered a matter entirely subject to the discretion of the sovereign, theorists of international law

⁴²⁷ Dummet and Nicol (1990), p. 11.

⁴²⁸ Dowty (1987), p. 29.

⁴²⁹ Zolberg (1992), p. 37.

increasingly perceived the right to emigrate as a natural right.⁴³⁰ This was only logical if the idea of political society as a voluntary contract was to be taken seriously. For if every individual must, by free choice, be able to determine whether he wants to be a member of that society, he should also be free at any time to break his ties and leave.⁴³¹

Nonetheless, actual practice of the new regimes that were inspired by enlightenment ideals was not always consistent with the same ideals. In France, restrictions were imposed on freely leaving the country on grounds of national security soon after the Revolution, even though the revolutionary regime had abolished the passport, and in spite of the fact that the right to leave was recognised in the French Constitution of 1791.⁴³² Officially, American governments did not even recognise the right of voluntary expatriation until 1907.⁴³³

However, liberal ideals continued to penetrate governments so that at the end of the nineteenth century it had become possible to leave almost any European state.⁴³⁴ Very few countries required passports or other documents in order to exit their territories. Their liberal attitude in this regard was not only due to enlightenment ideals that had influenced daily political practice; also the fact that under-population was no longer a problem in these states made those states regard emigration without concern. All European and American states, except Russia, in practice regarded the right to leave as a basic right which was inalienable.⁴³⁵ When serfdom was finally entirely abolished throughout Europe in the nineteenth century, thousands of people left their homes to sail for the Americas, Australia or Asia. Nonetheless, freedom of movement was typically not granted to inhabitants of the colonies. It was clearly in the interests of the imperial powers that these citizens should not leave the colonies. As in many other instances, the rulers applied liberalism at home, but in Africa and Asia they held on to medieval ideas.

The First World War signalled the end of the liberal era regarding freedom of movement and caused passports to reappear on the international stage. During the twentieth century, possession of these documents would develop into a requirement for

⁴³⁰ Jagerskiold (1981), p. 169.

⁴³¹ Whelan (1981), p. 650.

⁴³² See about the rather complicated issue of freedom of movement during the Revolutionary years: Torpey (2000), p. 21-56.

⁴³³ Dowty (1987), p. 49.

⁴³⁴ Dowty (1987), p. 46.

⁴³⁵ Dowty (1987), pp. 54, 82.

lawful exit.⁴³⁶ In the twenties and thirties, more and more European countries restricted their citizens' possibilities to leave.⁴³⁷ Various factors contributed towards this narrowing down of the right to leave. Countries were no longer as open to immigration as they had been, due to xenophobia and racism of their populations and their own nationalistic aspirations, and the losses caused by the First World War combined with reduced birth rates made population once again a scarce resource. The restrictions on freedom of movement however, were not comparable to those in the mercantilist era.

The difference is found in altering conceptions of the relationship between people, territory and state. Chapter 2 described how nationalism led to a perception of sovereignty as entailing an unbreakable and self-evident link between territory, population and authority. National identity became an instrument to distinguish between us and them. People were defined by virtue of where they belonged, and cultural or ethnic homogeneity in a state was something to be aspired. It was nationalism which, if not exactly gave birth to, at least nourished "the intimate relationship between identities and borders"⁴³⁸. People were bound to each other and their territory by their ethnicity. For the nationalistic mind a liberal attitude to emigration is inconceivable: it cannot be possible to choose freely one's allegiance with a state or abandon it at will, if such allegiance is conceived as belonging to a community of individuals bound to each other and 'their' land by common identity, history and 'blood'.

Moreover, the collectivist ethic proclaimed by many regimes after the First World War also contributed to a restrictive view on the right to leave. Instead of the ethnic or cultural homogeneity that the nationalists strive after, collectivism aims at social homogeneity. Likewise, the collectivist state cannot regard emigration without suspicion. Leaving the society will inevitably be an act of disloyalty, even treason.⁴³⁹ In addition, it becomes difficult to maintain that the interests of the citizens are the same as those of the state when these citizens are leaving the country en masse. Finally, a regime sustained by coercion or in which there is no room for dissent can presumably only survive by restricting exit.⁴⁴⁰

⁴³⁶ Hofmann (1988), p. 3; and Torpey (2000), p. 21.

⁴³⁷ Christie Tait (1927), p. 31

⁴³⁸ Lapid (2001), p. 10.

⁴³⁹ Dowty (1987), p. 60; and Torpey (2000), p. 124-125.

⁴⁴⁰ Dowty (1987), p. 60.

After the Second World War, the idea of natural rights revived, as we have seen in the previous Chapter. Human rights, as they were called now, were codified and one of them was the right to leave. Over time, the right to leave was laid down in many different binding human rights treaties, as we will see in Section 4.3.1. Judging from the codification of the right to leave in all major human rights instruments, one could safely assume that, during the period following the Second World War, it had become a right generally recognised in international law. However, perhaps the most conspicuous effect of this promise made by international law was that the practice of a substantial number of countries was only the more striking. The most obvious violators of the right to leave were the Communist countries: while the collectivist ethic inspired by the extreme right had not survived the Second World War, its counterpart on the other side of the political spectrum had expanded.

None of the countries united by the Warsaw Pact recognised the right to leave as a human or constitutional right.⁴⁴¹ Instead, it was regarded by these countries as a favour, the granting of which fell wholly within the sovereign state's discretion. This did not mean, however, that policies regarding exit permits were the same in all these countries; neither were they equally restrictive.⁴⁴² The erection of the Berlin Wall in 1961 was the ultimate illustration of the Communist view on freedom of movement. In time it became easier for citizens of the East-Bloc countries to visit other countries of the 'socialist world system', but permission for this kind of travelling was by no means obtained as a matter of course.⁴⁴³ Moreover, although travel to the West increased over time, the right to leave was definitely not recognised as such for the purpose of visiting Western countries or for emigration. The German Democratic Republic was, according to its penal code, able to persecute those seeking official permission to emigrate for the crime of "incitement hostile to the state."⁴⁴⁴ Its constitutional legal doctrine justified the lack of a basic right to emigrate by the socialist government's concern for each of its citizens: Allowing a citizen to emigrate to the West "was tantamount to delivering him up to an imperialist, aggressive and anti-social system of exploitation".⁴⁴⁵ In addition, East German policy of prohibiting its citizens to visit Western countries was defended

⁴⁴¹ Brunner (1990), p. 204.

⁴⁴² Dowty (1987), pp. 111-127; and Hannum (1987), pp. 95-105.

⁴⁴³ Brunner (1990), p. 208.

⁴⁴⁴ Turack (1978), p. 55.

⁴⁴⁵ Brunner (1990), p. 217.

on the grounds that the Federal Republic did not recognise the citizenship of the German Democratic Republic.⁴⁴⁶

In Russia, the right to leave had never been recognised, not even before the Communist era.⁴⁴⁷ After serfdom was abolished in 1861 in Russia, the former serfs had lived in village communities, from which no-one could leave without communal permission. Communist ideology strengthened traditional restrictive notions concerning the right to leave to such an extent as to equal it with treason. For other East-Bloc countries, restrictive views on the right to leave were a result both of their ideologies and economic considerations. These countries had an interest in population building in general, and having educated professionals at their service in particular. The fact that these countries were closely linked to Western Europe and had in the past been relatively open, would have made it easier for their population to cross borders in pursuit of more rewarding opportunities than it was for Soviet nationals.⁴⁴⁸ If these countries had permitted free immigration, presumably a large part of their population would have left for the West.

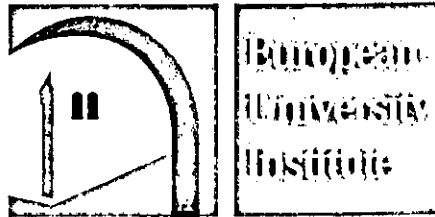
Despite the international obligation of countries to permit citizens and others to leave their territory as laid down in inter alia the ICCPR and the UDHR, the reality of East-Bloc practice was acknowledged in the Helsinki Accord.⁴⁴⁹ The Helsinki Accord proclaimed that the participating states should act in accordance with the purposes and principles of the UDHR, and that they should fulfil their obligations as set forth in international human rights instruments by which they are bound. It seems to be in direct contradiction with this statement that the Helsinki Accord then, instead of recognising a general right for citizens to leave their country permanently, requires the signatories solely "to facilitate freer movement on the basis of family ties, family reunification,

⁴⁴⁶ The Federal Republic maintained that an all German nationality still existed and accorded West German identity papers to all East-Germans who applied for such documents. See Turack (1979), p. 110-111.

⁴⁴⁷ Dowty (1987, p. 208) argues that Communist countries applying restrictive exit policies are copying from the Soviet Union policies that are not so much Communist as Russian. This would explain the relative absence of such strict policies in countries with related ideologies but less political links to the USSR if compared to those countries heavily under Soviet political influence, such as the countries of the Warsaw Pact.

⁴⁴⁸ Dowty (1987), p. 116. Evidently, this was especially so with regard to emigration from East Germany to West Germany. See also Reinke (1986), p. 665.

⁴⁴⁹ The Final Act of the Conference on Security and Co-operation in Europe of 1975 (1975), p. 1292.



607

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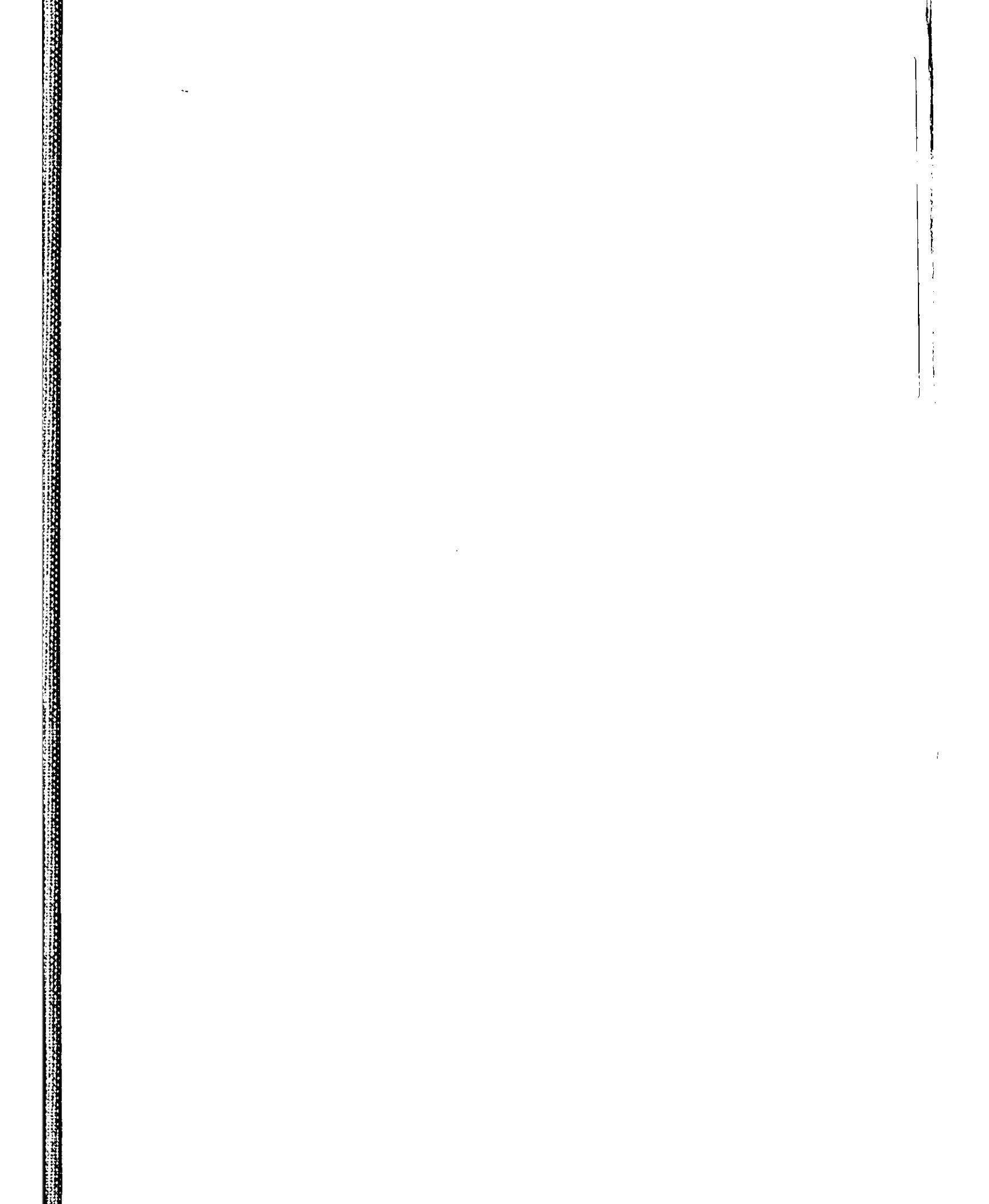
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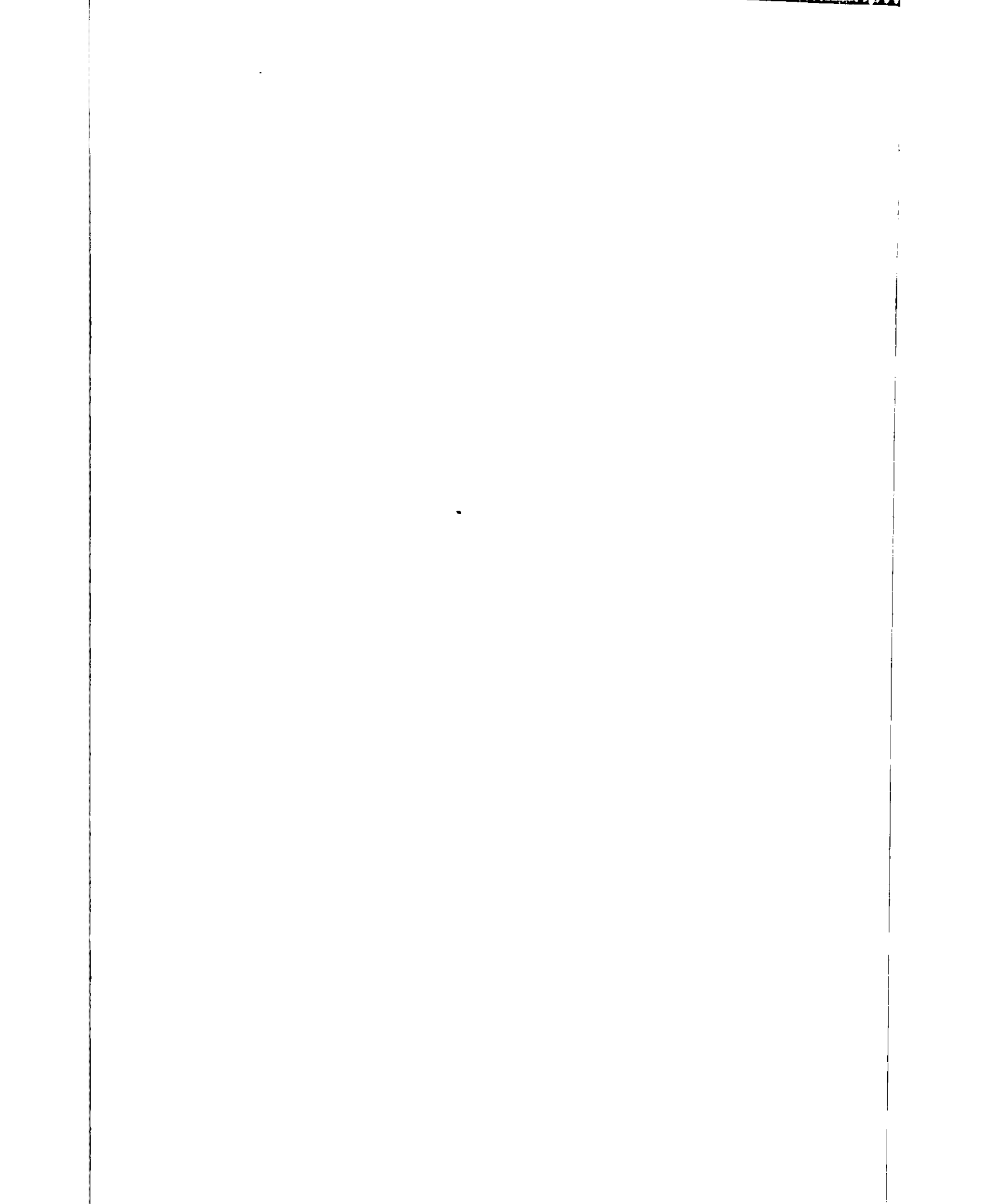
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*Supervisor:
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Thesis submitted with a view to obtaining the degree of
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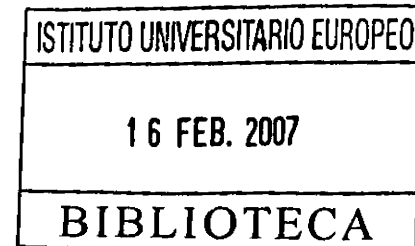






68
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**IMMIGRATION DETENTION, TERRITORIALITY AND
HUMAN RIGHTS:**

**TOWARDS DESTABILIZATION OF SOVEREIGNTY'S
TERRITORIAL FRAME?**

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Florence, February 2006



CHAPTER 1 INTRODUCTION: IMMIGRATION DETENTION AND POLITICAL ORDER.....	6
1.1. INTRODUCTION.....	6
<i>1.1.1 Subject and scope of this study.....</i>	<i>6</i>
<i>1.1.2 Immigration detention as state practice within the EU.....</i>	<i>11</i>
1.1.2.2. The use of detention within the asylum system.....	16
1.1.2.3. Detention and removal	19
1.2. AIM OF THIS STUDY AND PLAN OF RESEARCH.....	27
1.3. CONTENT OF THIS STUDY	30
CHAPTER 2 SOVEREIGNTY, PEOPLE AND TERRITORY	36
2.1. INTRODUCTION.....	36
2.2. SOVEREIGNTY: LEGITIMISATION OF POLITICAL POWER WITHIN THE BODY POLITIC	40
<i>2.2.1. Development of the modern notion of sovereignty.....</i>	<i>40</i>
<i>2.2.2. The people as the source of legitimacy.....</i>	<i>46</i>
2.3. THE STATE, ITS TERRITORY AND IDENTITY: POLITICAL PARTICULARISM.....	50
<i>2.3.1. The sovereign claim to distinguish inside from outside</i>	<i>50</i>
<i>2.3.2. Emergence of territorial states and changing perceptions of allegiance and loyalty.....</i>	<i>52</i>
<i>2.3.3. Popular sovereignty and the discovery of the nation: inconsistent universalism.....</i>	<i>56</i>
<i>2.3.4. Nation and the territorially defined population as foundations of sovereignty</i>	<i>62</i>
2.4. CONCLUSIONS: BORDERS, VIOLENCE, AND SOVEREIGNTY'S CLAIMS	65
CHAPTER 3 LIMITS ON SOVEREIGN POWER.....	71
3.1. INTRODUCTION.....	71
3.2. CONSTITUTIONALISM AND THE RULE OF LAW	73
<i>3.2.1. The theory and practice of the limits on political power.....</i>	<i>73</i>
<i>3.2.2. The rule of law through institutional design and formal limits on government</i>	<i>74</i>

3.2.3. <i>Individual rights as material limits to political power</i>	76
3.2.4. <i>Judicial review, fundamental rights and the limits of the rule of law</i>	78
3.3. CITIZENSHIP, INDIVIDUAL RIGHTS AND TERRITORY	79
3.3.1. <i>Citizenship as an apparent paradox</i>	80
3.3.2. <i>National citizenship as a condition for access to universal rights</i>	87
3.3.3. <i>Citizenship's structuring role in a world of nation states</i>	89
3.4. INTERNATIONAL LAW AND VIOLENCE	92
3.4.1. <i>Sovereignty and international law</i>	92
3.4.2. <i>The national territorial state as the true and only subject of international law</i>	94
3.4.3. <i>Sorts of violence regulated by classical international law</i>	97
3.4.3.1. <i>Inter-state violence</i>	97
3.4.3.2. <i>Diplomatic protection and the treatment of minorities</i>	99
3.4.4. <i>International human rights</i>	104
3.5. CLOSING THE GAP: A MORE INCLUSIVE PROTECTION THROUGH HUMAN RIGHTS?	109
3.5.1. <i>Legitimacy and sovereignty</i>	109
3.5.2. <i>Identity and rights in the contemporary state: post-national citizenship</i>	111
3.5.3 <i>Sovereignty, territory, and individual rights</i>	120
3.5.3.1. <i>Territorial scope of human rights protection: Duties beyond borders?</i>	122
3.5.3.2. <i>Limits to the state's spatial powers</i>	131
3.6. CONCLUSIONS: A PARTICULARIST UNIVERSALISM?	134

CHAPTER 4 THE EXTENT OF THE RIGHT TO LEAVE.....140

4.1. INTRODUCTION.....	140
4.2. <i>The right to leave in its historical context</i>	142
4.3. INTERNATIONAL LEGAL FRAMEWORK OF THE RIGHT TO LEAVE.....	152
4.3.1. <i>The right to leave as an international human right</i>	152
4.3.2. <i>Restrictions on the right to leave in the ECHR and the ICCPR</i>	153
4.4. CONCLUSIONS: THE RIGHT TO LEAVE AND THE VISIBILITY OF SOVEREIGNTY'S CONTENT	160

CHAPTER 5 THE RIGHT TO ENTER AND IMMIGRATION LAW

ENFORCEMENT	164
5.1. INTRODUCTION.....	164
5.2. DEVELOPMENT OF THE ASSUMPTION OF A SOVEREIGN RIGHT TO EXCLUDE.....	167
5.3. THE RIGHT TO ENTER AND REMAIN IN INTERNATIONAL LAW	179
5.3.1. <i>General limitations on the sovereign right to exclude</i>	180
5.3.2. <i>Refugee law and the prohibition of non-refoulement</i>	187
5.3.3. <i>Family rights and limits on immigration control</i>	199
5.4. THE EUROPEAN UNION, NATIONAL SOVEREIGNTY AND IMMIGRATION FROM THIRD COUNTRIES	205
5.4.1. <i>Freedom of movement within the EU</i>	206
5.4.2. <i>The Common Immigration and Asylum Policy</i>	210
5.5. REAFFIRMING SOVEREIGNTY: DEPORTATION AND DETENTION	218
5.5.1. <i>Deportation as administrative practice</i>	219
5.5.2. <i>Immigration detention, state power and territoriality</i>	226
5.6. CONCLUSIONS: FREEDOM OF MOVEMENT, SOVEREIGNTY AND RIGHTS IN A TERRITORIAL WORLD.....	232
5.6.1. <i>Freedom of movement and territoriality's implications</i>	232
5.6.2. <i>Territoriality and the asymmetry of international movement</i>	235
5.6.3. <i>Territoriality and limitations on the state's exclusionary powers</i>	240
5.6.4. <i>Maintaining the territorial order</i>	250

CHAPTER 6 IMMIGRATION DETENTION AND INTERNATIONAL

HUMAN RIGHTS	252
6.1. INTRODUCTION.....	252
6.2. PERSONAL LIBERTY AND ARBITRARINESS: UNIVERSAL HUMAN RIGHTS	255
6.2.1. <i>Scope and character of the right to personal liberty</i>	255
6.2.2. <i>Article 9 of the International Covenant of Civil and Political Rights</i>	256
6.2.2.1. Prohibition of arbitrariness in Article 9 ICCPR	258
6.2.2.2. Procedural guarantees	261
6.2.2.3. Conditions of immigration detention and arbitrariness	264
6.3. HUMAN RIGHTS AND DETENTION OF REFUGEES AND ASYLUM SEEKERS	265

6.4. REGIONAL DISCOURSE: THE COUNCIL OF EUROPE AND IMMIGRATION DETENTION	269
6.5. CONCLUSIONS: THE RIGHT TO PERSONAL LIBERTY AND SOVEREIGNTY'S FRAME	272

CHAPTER 7 IMMIGRATION DETENTION AND THE ECTHR: A LIMITED DISCOURSE?.....277

7.1. INTRODUCTION.....	277
7.2. LEGITIMATE AIMS OF IMMIGRATION DETENTION UNDER THE ECHR	278
7.3. THE PROHIBITION ON ARBITRARY DETENTION IN ARTICLE 5 ECHR.....	280
7.3.1. "Lawful" detention "in accordance with a procedure prescribed by law"	280
7.3.2. Safeguards against arbitrary detention in Article 5 ECHR.....	283
7.4. IMMIGRATION DETENTION AND THE PROHIBITION OF ARBITRARINESS	289
7.4.1. General	289
7.4.2. Lack of predictability and inappropriateness as elements of arbitrariness	290
7.4.3. When do the prevention of illegal entry and securing expulsion justify detention?	293
7.5. PROPORTIONALITY AS A GENERAL PRINCIPLE EMBODIED IN THE ECHR.....	300
7.5.1. The concept of proportionality in the Strasbourg case law	300
7.5.2. The margin of appreciation and proportionality	307
7.5.3. Deprivation of liberty of persons of unsound mind, alcoholics and vagrants	308
7.6. CONCLUSIONS: IMMIGRATION DETENTION AS THE BLIND SPOT OF THE ECHR? ..	311

CHAPTER 8 CONCLUSIONS: DESTABILIZATION RIGHTS AND SOVEREIGNTY'S TERRITORIAL FRAME.....316

8.1. SOVEREIGNTY'S FRAME AND CONSTITUTIONALISM'S TERRITORIAL BLINDNESS..	316
8.1.1. Nationalism and the reification of territoriality: particularistic universalism	317
8.1.2. The territoriality of the modern rule of law and its territorial blind spot ..	320
8.1.3. Freedom of movement and the modern version of the rule of law	321
8.2. IMMIGRATION DETENTION AS THE LITMUS TEST OF THE TERRITORIAL ORDER.....	326
8.3. DESTABILIZATION RIGHTS AND IMMIGRATION DETENTION	328

BIBLIOGRAPHY.....	338
TABLE OF CASES.....	374

Chapter 1 Introduction: immigration detention and political order

1.1. INTRODUCTION

From a sociological point of view, camps or transit zones may present the institutionalisation of temporariness as a form of radical social exclusion and marginalisation in modern society and a conservation of borders as dividing lines.¹

1.1.1 Subject and scope of this study

All Member States of the European Union have provisions in their immigration legislation under which they can deprive foreigners of their liberty. The use of detention for immigration related purposes by these countries has greatly increased over the past few years.² Concerning asylum seekers this increase seems to be related to the extended use of accelerated procedures and preliminary border checks due to the implementation of the principles of safe third country, safe country of origin and the Council Regulation replacing the Dublin Convention.³ Concerning immigration in general it can be said that Member States perceive growing problems related to irregular immigration and one of their responses has been an increasing exercise of their powers to detain illegal immigrants.

The institutionalised practice of immigration detention has become an inherent part of a policy package that has as its main aims to deter future irregular migrants and to remove those already on national territory as fast and as effectively as possible. If these policies are criticised by NGO's or other social actors, Member States defend their

¹ Tóth (2006), p. 3.

² Kelly (2005), p. 2.

³ Council Regulation No 343/2003 of 18 February 2003, establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. OJ L 50/1, 25 February 2005.

detention policies with arguments bearing on the growing numbers of foreigners, the need to maintain the integrity of border controls and security related issues.

Detention of immigrants is seldom a transparent practice: information concerning detention facilities is often not made public and many of these facilities are located at isolated places. In addition, journalists are habitually denied access, allegedly in order to respect the privacy of the inmates but resulting in the absence of public control over the conditions, legality and procedures inside immigration detention centres.⁴ In 2004, an Italian journalist infiltrated in a detention centre in Sicily by acting as a Kurdish refugee and published an article on humiliating conditions that he had witnessed and experienced during his stay here.⁵ Instead of taking legal steps that might have resulted in the improvement of the conditions at the centre, the Italian state opened a case against the journalist on charges of presenting a false identity.⁶ After the Italian section of 'médecins sans frontières' published a critical report on the circumstances in various closed centres for migrants, the organisation was accused of disloyalty by the Italian government and denied entry to immigration detention centres.⁷

Numerous reports by NGO's in various countries describe instances of abuse of force by the police, lack of structures for adequate accommodation, illegal detention beyond the foreseen time limits, and the detrimental effects of detention on the mental health of immigration detainees.⁸ More often than not, these reports are confirmed by findings of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) during its visits to places where individuals are deprived of their liberty. Furthermore, detaining children in immigration detention

⁴ Tóth (2006), p. 8.

⁵ See Gatti (2005)

⁶ International Helsinki Federation for Human Rights (2006), p. 215. The same journalist had already been handed a suspended 20 days sentence on the same charges in 2004, as he had infiltrated a detention facility for immigrants in Milan in 2000.

⁷ See Statewatch (June 2004) The main violations that MSF found in this report pertained to limited contacts with the national health service; insufficient legal assistance; irregular use of psychiatric drugs; and excesses during interventions by guards. See Médecins Sans Frontiers (2004).

⁸ See for only a few examples: Amnesty International United Kingdom (2005); Amnesty International Italy (2005); Amnesty International Spain (2005); Aide aux Personnes déplacées et al. (2006); and Cimade (2004).

centres is becoming standard practice in many countries,⁹ contrary to international and domestic norms protecting children's rights.¹⁰

In addition to the lack of homogenous legislation on asylum and immigration in the Member States of the European Union, serious legal gaps as well as logistic and material problems exist with regard to the detention of non-citizens under immigration legislation. Immigrants are being accommodated in hotels or makeshift shelters for extended periods, and the lack of space in the reception centres is often compensated with accommodation in prisons. Schemes of legal assistance are often flawed, adequate medical structures absent, and the incidence of auto-mutilation and (attempted) suicides under the population in immigration detention is high.¹¹ The British press in particular regularly features reports about abuse at immigration detention centres, but also in other countries the public media increasingly publish evidence of unacceptable conditions in closed centres for immigrants, reflecting a growing concern in civil society about the practice of immigration detention.¹²

Under these circumstances, the detention of thousands of people in Europe, merely because they allegedly breach the state's territorial sovereignty, may easily be labelled as an anomaly for Western liberal democracies, especially when seen in the context and development of citizenship discourse, constitutionalism and human rights. However, it would be too easy to portray immigration detention solely like an incongruity for otherwise liberal regimes.

Instead, in this study I will argue that the practice of depriving unwanted foreigners of their liberty is a consequence of the territorial foundations of the global political system and their impact on constitutional discourse. Some forms of state violence have become so embedded in our understanding of the state and the structure of which it forms part of that they have remained insulated against the usual forms of legal correction and political control. Thus it seems natural that either nationality or the absence of state authorisation for presence on national territory can legitimately

⁹ Such as the United Kingdom, Ireland, Italy, the Netherlands, Latvia, Spain, Lithuania, Greece, Finland, France, Belgium and Poland. See Bolton (2006) and Gil-Robles (8 June 2005), p. 18.

¹⁰ Gil-Robles (15 February 2006), par. 254.

¹¹ Silove, Steel and Mollica (2001); and Pourgourides (1998)

¹² Allegations of ill-treatment of migrants suffering from psychiatric disorders in the closed centre of Vottem for irregular migrants, disclosed by guards of the centre, have recently prompted Amnesty International to call for an independent investigation. VRT News, Belgium (16 November 2006).

constitute a ground for discrimination and a possible reason for the use of various forms of state violence.

Before turning to the way in which I intend to address these issues in this study, I will attempt to bring to life the structural features of the practice of immigration detention in EU Member States in order to contextualise my subsequent discussion of the law and theory pertaining to immigration detention in later chapters. In this study, I will use the term immigration detention to designate the administrative decision to deprive an individual of his liberty for reasons that are directly linked to immigration policy. This entails that both irregular migrants and asylum seekers fall under the scope of this study. At certain points, the distinction between the two groups will be explicitly made, for example when the relevant legal norms are applicable to only one of the two categories or when the description of state practice requires the distinction. However, it is important to mention at the outset that the focus of this study will not be on the deprivation of liberty of either asylum seekers or irregular migrant as distinct categories, but on the administrative detention of individuals on account of the lack of state authorisation for their presence on national territory.

With regard to this focus on administrative detention, an important complication needs to be mentioned with regard to the detention of foreigners in the EU, which is the tendency towards increasing criminalisation of illegal entry or stay on national territory. A state that has defined these acts as criminal offences, can “detain, charge, convict and sentence to further detention under criminal law” irregular migrants and even applicants for asylum.¹³ Cyprus for example appears to have no closed centres for irregular migrants and asylum seekers in surveys that address immigration detention. However, irregular immigrants in Cyprus are detained in police custody while awaiting verification of identity.¹⁴ As illegal entry and stay are penal offences under Cypriot law, punishable up to two years in prison, detention is not an administrative measure, but a

¹³ Guild (2006). See for international law relating to deprivation of liberty as a criminal sanction on illegal entry: Pacurar (2003), pp. 9-10.

¹⁴ Foreigners that have been arrested for illegal entry or stay and then apply for asylum are detained for the duration of the sentence that is handed for their “offence”. If their applications are rejected they are kept in police cells, until they can be deported, which often takes a long time due to reluctance of the embassies of countries of origin to cooperate. See EU Foreigners in Prison Project, Country Report Cyprus, pp. 3 and 17.

penal one.¹⁵ Also in Germany, illegal entry and residence in certain cases constitute criminal offences, and subsequent penal detention takes priority over administrative detention pending removal.¹⁶

In various other Member States, although they do not necessarily define illegal stay and entry as criminal offences, the legal position of the foreign detainee who was initially apprehended on criminal charges is often unclear, due to the interaction between criminal proceedings with the administrative procedure of expulsion to leave the country.¹⁷ Although the increasing criminalisation of irregular migration is highly significant for the practice of detaining individuals as a response to a breach of the state's territorial sovereignty, for practical reasons concerning the length of this study, only the practice of administrative detention under immigration legislation will explicitly fall within its scope.

Another preliminary remark needs to be made about the terms "detention" and "deprivation of liberty", which are used interchangeably in this study. The line between deprivation of liberty or detention on the one hand and restrictions upon personal liberty on the other hand is not always easy to draw. The European Court of Human Rights has observed that in many cases, that difference is merely one of degree or intensity, not one of nature or substance, and that some borderline cases are a "matter of pure opinion".¹⁸ This court regards the cumulative impact of the restrictions, as well as the degree and intensity of each one separately, when deciding as to whether one can speak of *deprivation* of liberty, in which case other guarantees apply than in the case of restrictions on free movement.¹⁹

Especially in the area of migration law, the line between deprivation of liberty and restrictions upon free movement can be a blurred one. The most common

¹⁵ Ibid. p. 17-18. In additional complication of such an approach is that it is difficult to obtain precise numbers of the persons detained for these "offences", as they are grouped together with other offenders in the statistics. Recently, the Cypriot government has been reconsidering the criminalisation of illegal entry of irregular migrants (Commissioner for Human Rights, Follow-Up Report on Cyprus, 2006).

¹⁶ EU Foreigners in Prison Project. Country Report Germany pp. 41-42. Other countries that define irregular stay or entry under certain conditions as criminal offences that are punishable by prison sentences are Estonia; France; Greece; Ireland; Italy; Lithuania;

¹⁷ See for example EU Foreigners in Prison Project. Country Report Belgium, p. 19.

¹⁸ ECtHR, *Guzzardi v. Italy*, 6 November 1980, §93.

¹⁹ Ibid. par. 95. See also UNHCR (1999). Revised Guidelines on Applicable Criteria and Standards Relating to the detention of asylum seekers, Guideline 1.

distinction made in this regard is that between closed and open centres, the latter often referred to as reception centres where the individuals who are required to reside can leave at will or within reasonable limits.²⁰ These so-called open centres, generally housing applicants for asylum, will not be included in my analysis.²¹ Neither will I look at migrants that are subjected to mandatory residence requirements, as they are merely *restricted* in their personal liberty, just as those that are obliged to report frequently to the authorities. Only the practice of placing individuals in closed centres, or in any other narrowly confined location that they are not able to leave, including a ship, train or vehicle,²² will be the subject of my investigation.

Especially with regard to the situation of irregular migrants and asylum seekers that are kept in transit zones, such as the international zone of an airport, specific problems may arise with regard to the question whether one can define their situation as a deprivation of liberty. States have repeatedly argued that individuals who are held in these zones are not deprived of their liberty, either because they are free to leave at will, or because they are not yet present on the territory of the state in question. These issues will receive detailed attention in later chapters where the impact of international human rights law on practice of immigration detention is discussed, but in this introduction, transit zones will explicitly be included in my presentation of a general overview of the practice of immigration detention.

1.1.2 Immigration detention as state practice within the EU

A first difficulty that one encounters when attempting to present an overview of state practice in this field is to obtain reliable figures with regard to immigration detention.²³ Many governments do not have coherent systems of recording figures

²⁰ Guild (2006), p. 3.

²¹ See for an example the centres in the Spanish enclaves in Ceuta and Melilla, where migrants are free to leave during the day but need official permission if they want to leave for more than 24 hours. See European Parliament, Committee on Civil Liberties, Justice and Home Affairs (January 2006).

²² See UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention (28 December 1999).

²³ On the grounds of partially available data, Jesuit Refugee Service (2004) estimated that the number of immigration detainees in Europe may be in the 100.000 persons per year.

concerning immigration detention, especially when it comes to the duration of detention and the reasons for ending the detention. Even the total numbers of immigration detainees is often unknown to national governments themselves,²⁴ as different categories of persons or different places for detention fall under different regulations and authorities.²⁵ If states do keep statistics, they are notoriously reticent to make them available to the public.²⁶ This official haziness surrounding immigration detention is exacerbated by the fact that in many countries, not only media but also human rights

²⁴ In Austria, for example, reporting on administrative detention for immigration law purposes is extremely deficient (EU Foreigners in Prison Project, Country Report Austria, p. 24) In Greece, the lack of publication of any data by the Ministry of Public Order makes the calculation of the number of persons affected by administrative detention nearly impossible. (EU Foreigners in Prison Project, Country Report Greece, p. 21). In Malta, none of the NGO's involved, nor the ministry is able to provide reliable figures of the persons detained at any time. (EU Foreigners in Prison Project, Country Report Malta). In the United Kingdom, the Home Office only releases 'snapshot' figures that range from 1105 detained asylum seekers on a given day to 1515. Amnesty International has concluded that the Home Office quarterly statistics belie the true scale of detention and this organisation believes that thousands of people are detained every year (EU Foreigners in Prison Project, Country Report United Kingdom, p. 34). France records 25.828 persons that were detained under immigration legislation in 2004. However, persons kept in zones d'attente are not included in this number. Countries that detain relatively low persons under immigration legislation generally keep better statistics, such as Estonia that recorded 68 immigration detainees in the period from 10 March 2003 until 31 December 2005 (EU Foreigners in Prison Project, Country Report Estonia) and Ireland that records 946 persons detained under immigration legislation for 2004 (EU Foreigners in Prison Project, Country Report Ireland).

²⁵ See for example France where some of the administrative detention facilities fall under control of "Sécurité Public Regional", some under the border police and some others again under the Gendarmerie (EU Foreigners in Prison Project, Country Report France). In a federal state such as Germany these difficulties are compounded because the federal states each have different regulations.

²⁶ Guild (2006), p. 4. Some exceptions exist such as Belgium: according to the Office for Foreigners Affairs, 7.622 individuals have been detained during the year 2004 in closed centres for migrants (EU Foreigners in Prison Project, Country Report Belgium) and The Netherlands, reporting a total of 1952 irregular migrants detained at 31 December 2004 (Dienst Justitiële Inrichtingen at <http://www.dji.nl>). In Sweden, a daily average of 214 persons was detained in 2005 (EU Foreigners in Prison Project, Country Report Sweden). According to the Hungarian authorities, around 6000 foreigners a year are placed in detention (Commissioner of Human Rights, Follow-Up Report on Hungary, 2006, p. 19). In other countries, possible indicators of the numbers of immigration detainees are the places officially available for immigration detention: i.e. Germany: 2250; Finland: 40; Hungary: 640; Lithuania: 500; and Slovenia: 180 (See the respective Country Reports of the EU Foreigners in Prison Project); and the United Kingdom: around 2750 at the end of 2005 (Gil-Robles, 8 June 2005, p. 15.)

organisations are frequently denied access to places where migrants are kept in detention.²⁷

The factual information in the following paragraphs is to a large extent drawn from the “EU Foreign Prisoners Project”, an extensive study on foreigners in European prisons that was recently completed in cooperation with the EU.²⁸ The object of that project, encompassing all 25 Member States of the European Union, is to address the issue of social exclusion of prisoners who were detained in Europe outside their countries of origin. In addition to the various country reports of the EU Foreign Prisoners Project, I will make use of other sources of information such as the Council of Europe, various NGO’s and occasionally national governments.

Partly drawing on Elspeth Guild’s classification in her report for the European Parliament on a typology of different types of centres in Europe,²⁹ I will distinguish between three types of immigration detention in order to present structural features of state practice in this area. These are detention upon arrival; detention of individuals within the asylum system; and detention as a result of a decision to deport or expulse the foreigner.³⁰

²⁷ See Written questions E1104/05 and E1118/05 (23 March 2005) by MEPs H. Flautre and J. Muscat to the European Commission as regards the situation in Malta. 23 March 2005. See also the European Parliament Resolution on the situation with refugee camps in Malta of 6 April 2006, calling for unlimited access to the centres of the UN High Commissioner for refugees and competent NGO’s who were formerly denied access. Another example is France, where only CIMADE, an ecumenical care service that provides social and legal support has access to the administrative detention centres. Regular human rights organisations are also denied access to the zones d’ attente. See EU Foreigners in Prison Project, Country Report France.

²⁸ See <http://www.foreignersinprison.eu>. Co-ordinated by Tilburg University, the Netherlands. The various country reports (publication to be expected in February 2007) that the contributors to the project have written will be referred to as “FPP-CR - name of the relevant state” throughout this study.

²⁹ Guild (2006).

³⁰ Ibid, p. 5.

1.1.2.1. Detention upon arrival

From southern Algeria to Malta, from the Island of Lampedusa to the Ukrainian border, and from the Canaries to Slovenia, camps of all types are now strung out like so many nets for migrants, with the common aim of impeding, if not blocking, their way into Europe.³¹

Most EU Member States are familiar with legislation that provides for detention of foreigners upon arrival in the state. Often, such detention is ordered by border guards and it is carried out in a so-called transit zone, which can be the international zone of an airport, or any other place located close to border crossings.³² Also regular prisons or centres specifically designed for immigrants are used.³³ Detention is thus used to prevent unauthorised entry, and serves to clarify the conditions for entry, including verification of identity. At times it is also justified by states with an appeal to health hazards or in order to implement readmission agreements.³⁴

Serious concerns have been expressed by NGO's and other political actors about detention upon arrival, as the legal position of the detainee is often unclear and not enough guarantees are applicable to the deprivation of liberty.³⁵ Insufficient access to legal aid appears to be structural, detainees are often not told of the reasons for their detention at all, or, when they are, not always in a language that they understand.³⁶

³¹ Rodier (2003).

³² In France, zones d'attente were introduced in 1992, and are defined as places where "the foreign national arriving in France [...] who is not authorised to enter French territory or who seeks asylum" will be detained "during the time strictly necessary for his leave, and, as an asylum seeker, for a check of his demand." There are more than 100 waiting zones facilities, most of them small rooms, for instance police stations, hotel rooms, administration offices, and are located near the borders, airports, harbours or railway stations. However, the great majority of those detained upon arrival in France are found in the waiting zone Roissy-Charles de Gaulle in Paris (FPP-CR-France).

³³ For example the so-called Grenshospitium in The Netherlands

³⁴ FPP-CR's-Czech Republic and Hungary.

³⁵ The French term for deprivation of liberty in these zones d'attente is 'retention', in which case lesser safeguards are applicable to the persons concerned than in the case of detention, as France maintains that these people are free to leave French territory. Judicial review of the detention takes place after 72 hours, instead of the 48 hours normally required by law in immigration detention cases (FPP-CR-France).

³⁶ See Jesuit Refugee Service (2004). Following its visit in 2002 to the Czech Republic, the CPT signalled serious shortcomings concerning the information provided for the detainees on their legal position and rights (CPT, 12 March 2004, pp. 20-29). Also with regard to the situation of the immigration detainee in

Furthermore, the conditions in these places are regularly below national constitutional and international legal standards as well.³⁷ The length of time that a migrant may spend in pre-admittance detention varies greatly from less than 24 hours to several weeks, even months, and only some states have the duration of this kind of detention limited by law.³⁸

The southern borders of the EU deserve special mention with regard to detention upon arrival. Large numbers of migrants who have been apprehended while attempting to reach mainland Europe are held on Malta, Lampedusa and the Canary Islands in what have been described as “internment camps of dubious legality where people are

Hungary, CPT expressed concern about access to information in a language that the foreigner could understand (CPT, 29 June 2006, pp. 24-25). In Latvia, the judicial review of the immigrant who is deprived of his liberty lacks the required effectiveness, as the rights of the persons concerned are not clearly defined and the right to legal assistance is difficult to exercise. Latvia provides no legal assistance or exemption of legal fees (EU Network of independent experts on Fundamental Rights, 2005, pp. 74-75). In Ireland, persons deprived of their liberty upon arrival are not informed of their right to bring legal proceedings against the detention, neither are they asked if they require legal assistance, nor are they informed that they can request it (Kelly, 2005, pp. 21-23). To these already significant problems, it can be added that many of the detention centres are far removed from anywhere, which makes contacts with lawyers even more difficult. See Gil-Robles (8 June 2005), p. 17 with regard to the United Kingdom.

³⁷ The INADS centre at Brussels Airport for persons that arrive without documentation and who are refused entry in Belgium territory (INADS) has been criticised several times by the CPT, in particular with regard to factual access to a lawyer and the lack of any activity for people that are kept in waiting zones for weeks, sometimes even months (See for the most recent report: CPT (20 April 2006). Also Germany has received criticism in this respect, especially regarding the situation in the transit zone at Frankfurt am Main Airport (CPT, 12 March 2003, p. 60.) With regard to the situation in the United Kingdom, HM Chief Inspector of Prisons observed that none of the short term holding facilities in Heathrow were fit to hold detainees overnight, although all held detainees overnight and sometimes detainees were held there for up to 36 hours. Detainees asking but failing to get legal advice and basic information about their detention formed a structural problem as well (HM Chief Inspector of Prisons, 2006b, p. 5. It can be added that many of the detention centres are far removed from anywhere, which makes contacts with lawyers even more difficult. See Gil-Robles (8 June 2005), p. 17 with regard to the United Kingdom.

³⁸ For example Ireland, where detention of people “refused to land” may not exceed 8 weeks. However, if those individuals bring legal proceedings to challenge the validity of the detention, the ‘clock is stopped’ on this 8 week period (Kelly 2005). But see also Hungary, which has a time limit for ‘detention for refusal’ of thirty days. However, if the authorities simply take a formal decision to expel the foreigner, the legal basis of the detention alters, and the foreigner can then remain legally in so-called aliens policing detention for a maximum of one year (FPP-CR-Hungary).

deprived of their freedom yet supposedly are not prisoners.”³⁹ These centres in particular have repeatedly been condemned on account of both the deplorable material conditions in which the detainees are held there, and their legality.⁴⁰

1.1.2.2. The use of detention within the asylum system

Regarding the detention of asylum seekers,⁴¹ state practice shows a diverse pattern. All European governments detain people in the asylum procedure, but the conditions, maximum duration and actual time spent in detention by an asylum seeker are widely differing in the various Member States. It is important to note that with regard to this type of detention, relevant EC law exists. Under Article 18(1) of Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, the Member States shall not hold a person in detention for the sole reason that he applied for asylum.⁴²

³⁹ European United Left/Nordic Green Left (May 2006), p. 11.

⁴⁰ The delegation of the European Parliament that visited the various Maltese administrative detention centres described the conditions as appalling, “*unacceptable for a civilised country and untenable in Europe which claims to be the home of human rights.*” (European Parliament, Committee on Civil Liberties, Justice and Home Affairs 30 March 2006, p. 9). See also the criticism expressed by the Spanish Ombudsman as regards the situation in Fuerteventura and Lanzarote, addressing overpopulation, inadequate facilities, hard conditions of life, secrecy and lack of transparency, lack of interpreters and lack of regular medical care (FPP-CR-Spain); and European United Left/Nordic Green Left (2005) with regard to the situation at Lampedusa. Regarding the centre in Lampedusa, the Council of Europe Commissioner of Human Rights noted that at times of large influxes, “*the congestion and overcrowding [...] defy imagination. The centre falls totally short of the minimum standards of space and hygiene needed to accommodate numbers beyond its official capacity in decent condition.*” (Gil-Robles, 14 December 2005, p. 38.)

⁴¹ It should be noted that detention upon arrival and detention of asylum seekers are not always separate categories as asylum seekers are often detained upon arrival in a state. See for example Poland, where asylum seekers are not detained, unless they apply for asylum while staying illegally on national territory, during border control while they have no right to enter, or when they attempt to cross borders contrary to the law (FPP-CR-Poland). Taking into account that few persons seeking international protection first await a decision on a visa application in their countries of origin, many asylum seekers will be detained upon arrival in Poland.

⁴² OJ L 326/23 of 13 December 2005. See also Article 7 of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the Member States (OJ L 31/18 of 6 February 2003), which provides that Member States are authorized to confine an applicant to a

Nevertheless, numerous countries detain asylum seekers without much further justification than the fact that they are asylum seekers, sometimes for a short time in order to determine the admissibility of the application,⁴³ often as part of a ‘fast-track procedure’, after which those not rejected on admissibility grounds, are transferred to open centres.⁴⁴ However, sometimes the detention of asylum seekers lasts longer and has almost become an inherent part of some stage,⁴⁵ or even the whole of the asylum procedure.⁴⁶ Concern has been voiced about this practice in particular as some feel that

particular place in accordance with their national law only “*when it proves necessary, for example for legal reasons or reasons of public order*”.

⁴³ Or, as is the case in Czech Republic where all applicants for asylum are initially detained, in order to identify the individuals; to subject them to a medical check; and to initiate the asylum procedure (FPP-CR-Czech Republic). In Italy, asylum seekers may be detained for a maximum of thirty days in a so-called identification centre (Gil-Robles, 14 December 2005, p. 35).

⁴⁴ As in Portugal, where asylum seekers are detained until the authorities decide that they have legitimate grounds for asking for asylum, which takes an average of three days. Thereafter, those applying for asylum on legitimate grounds are transferred to open reception centres (FPP-CR-Portugal). Finland only detains asylum seekers after they have received a negative decision on their application (FPP-CR-Finland, p. 19) In Latvia, asylum seekers are detained if their identity is not confirmed, or if their claims have been rejected and they await expulsion (FPP-CR-Latvia).

⁴⁵ In Austria, asylum seekers may be detained prior to a first negative decision if a procedural notice is issued by the Federal Asylum Authority during the admissibility proceedings stating that the application is likely to be dismissed or rejected, while there is no appeal possible against such a notice (EU Network of independent experts 2005, p. 75-76).

⁴⁶ See for example Hungary where the detention of asylum seekers depends on “*accidental circumstances and arbitrary decisions of the authorities*”. If the asylum seeker is able to file an application for asylum before he is apprehended by the border guards, he will not be detained. However, if the border guard apprehends him before he can do so, he will be detained and an alien policing procedure will be started against him before he can possibly submit an application for asylum. Although the pending expulsion will be suspended as soon as he submits an application, it will keep serving as the basis for continued detention (FPP-CR-Hungary, par. 3.5.). Malta has mandatory detention policy for asylum seekers and irregular migrants alike, but whereas for the latter group, the maximum length is 18 months, asylum seekers may not be detained for over 12 months. However, these limits are merely administrative practice, and are not laid down in any binding legislation (Commissioner of Human Rights, Follow-Up Report on Malta, 2006). In Greece, not all asylum seekers are detained, but those that file an application whilst in immigration detention (i.e. on the grounds of illegal entry or stay) remain in detention until a decision on their applications is given, or until the time limit of three months expires (FPP-CR- Greece). In the United Kingdom, the vast majority of those detained have applied for asylum at one stage or another (FPP-CR United Kingdom; and Gil-Robles, 8 June 2005).

“detention is resorted to on the basis that a bed is available in a detention centre,” rather than considering the “necessity, legality and appropriateness” of detaining asylum seekers.⁴⁷

Furthermore, widespread discrimination on the grounds of nationality exists, as some states routinely detain certain nationalities (or ethnic groups),⁴⁸ whereas others seldom or never end up in an immigration prison. Although some countries only allow for the detention of asylum seekers if it is ordered by a judicial authority,⁴⁹ in many other countries, the decision to detain is taken administratively.⁵⁰ In that case, extensive discretion often exists for individual immigration officers to decide about the detention of asylum seekers,⁵¹ and sometimes automatic judicial review is absent,⁵² or it can take a long time.⁵³ It should be noted that most countries’ legislation allows for the detainees themselves to contest the lawfulness of the detention through judicial review, habeas corpus proceedings or bail.⁵⁴ Nonetheless, even in such cases, the possibility of

⁴⁷ Amnesty International EU Office (2005). See also Jesuit Refugee Service (2004), p. 4.

⁴⁸ I.e. Roma in the United Kingdom. See Weber (2003).

⁴⁹ Estonia, Germany, and Sweden.

⁵⁰ Finland (where the decision to detain is taken by the police but needs to be reviewed by a judge within four days); France (where the decision to detain is taken by the préfet, and must be reviewed within 48 hours); Hungary (where the administrative decision to detain must be reviewed within five days); Latvia (where the administrative decision to detain pertains to a maximum period of ten days, and prolongation may only be given by a judge); Lithuania and Poland (where detention of more than 48 hours can only be ordered by a court, and where in the former country, the foreigners presence is mandatory during the Court’s hearing); The Netherlands; Belgium; Austria; Greece; the United Kingdom; Portugal; and Ireland (where asylum seekers that are detained must be brought before a judge as soon as practicable (Kelly, 2005, p. 29).

⁵¹ UNHCR Executive Committee (4 June 1999), p. 168. See Gil-Robles (8 June 2005) and Weber (2003) with regard to the situation in the United Kingdom.

⁵² Greece and the United Kingdom. If automatic judicial review is absent, the detention may be subject to periodical automatic administrative review as is the case in the latter country (Gil-Robles, 8 June 2005).

⁵³ In the Netherlands, automatic review by a court of the lawfulness of the detention is provided, but it can take up to 7 weeks until it actually takes place. See Baudoin (2004).

⁵⁴ With the important exception of Malta, where no proper form of judicial review exists, although there is the possibility to appeal to an administrative board, which can only order release in a limited number of circumstances (FPP-CR-Malta). In theory, the habeas corpus procedure from the criminal code is applicable, but has never been used (Gil-Robles, 12 February 2004). In the United Kingdom, immigration detainees can apply for bail.

effectively contesting one's detention is frequently non-existent due to the lack of information provided to the detainees, or insufficient access to legal aid.⁵⁵

In addition, the detention of refugees in particular may also prejudice their legal position as persons applying for international protection, as they are not always informed about the possibility of applying for asylum while in detention, and sometimes they are even impeded from access to the asylum system as a result of their detention.⁵⁶

1.1.2.3. Detention and removal

The last category that I will address is the detention as a result of a decision to deport or expel the foreigner.⁵⁷ If a third-country national⁵⁸ has been ordered to leave

⁵⁵ Often one encounters similar problems as were discussed above with regard to detention upon arrival, see in particular footnote 36. At times, the official regulations themselves provide well enough for the right of access to information about the reasons for detention and additional information about rights when held in detention, but in practice, detained asylum seekers are often not fully informed of their position and the full extent of their rights (See Kelly, 2005, p. 35; and Gil-Robles, 8 June 2005, p. 18).

⁵⁶ In France, for example, asylum application forms have to be completed in French since August 2004, and foreign nationals that apply for asylum while in administrative detention have to pay for an interpreter themselves. The result is that it is made very difficult for asylum seekers to claim for asylum while they are detained, as was observed by a European Parliamentary delegation that visited the administrative detention centre of Mesnil-Amelot, about 50% of the asylum applications that were filed by persons held there were immediately rejected on the grounds of technical shortcomings, while the content of the applications was not examined at all (European Parliament, Committee on Civil Liberties, Justice and Home Affairs, 22 March 2006). In Italy, in Lampedusa Temporary Holding Centre, almost no asylum claims are made, and migrants there are not given information about the possibilities to claim asylum open to them under Italian law. Besides, there are allegations that there have been consular authorities of third countries cooperating in identification procedures to determine migrants' nationalities, a situation that carries great risks for potential asylum seekers (European United Left/Nordic Green Left, 2005, p. 10). Furthermore, anyone failing to observe the rules on absence in the closed Italian identification centres for asylum seekers is regarded as having withdrawn his asylum application (Gil-Robles, 14 December 2005, p. 35. Amnesty International has expressed concern that the Greek authorities may be impeding refugees access to asylum through their inability to communicate in Greek, especially in border areas. In addition, persons have told Amnesty International that upon arrival in the places of detention, they had been persuaded to sign papers that they could not understand (Amnesty International, 12 October 2005; and CPT, 20 December 2006, p. 38)

⁵⁷ We have already seen that it is not always possible to make a watertight separation between detention upon arrival and detention within the asylum procedure. Similarly, detention as a result of the decision to

national territory, immigration legislation of most EU countries provides for the possibility of administrative detention.⁵⁹ In theory, this type of detention is neither a punishment, nor a means of directly coercing the foreigner leave the country, but it serves to safeguard removal, such as expulsion or deportation.⁶⁰ Thus, the sole fact of irregular residence does usually not provide a sufficient justification for detention in the EU Member States.⁶¹ Nevertheless, foreigners are frequently kept in detention for significant periods of time before their deportation is practically arranged.⁶² In addition, although various national laws require that detention is to be necessary (often with a view to public policy or national security interests),⁶³ in everyday practice, national authorities detain without due regard to the necessity and proportionality of the

expulse or deport can also affect asylum seekers if their claims have been rejected or declared inadmissible. In the United Kingdom for example, asylum seekers who were detained in 'fast track centres' and whose applications are rejected, can remain in detention until they are removed (FPP-CR-United Kingdom CR, p. 34).

⁵⁸ Detention of irregular migrants that are EU citizens should be highly exceptional practice according to EC law, only to be resorted to if they constitute a genuine threat to public policy. See ECJ, Case C-215/03, *Salah Oulane v. Minister voor Vreemdelingenzaken en Integratie*, 17 February 2005, par. 40-44.

⁵⁹ Such as (not exhaustive) Austria; Belgium; Denmark; Estonia; Finland; Czech Republic; France; Germany; Greece; Hungary; Latvia; Luxembourg; Poland; United Kingdom; Portugal (although it is unusual practice); Slovenia; and Sweden.

⁶⁰ See FPP-CR-Germany, p. 33. Nonetheless, there are countries that have provisions in their legislation that suggest the coercive nature of detention: in Ireland, the purpose of detention is to ensure that the person will co-operate in making arrangements, such as securing travel documents (FPP-CR-Ireland, p. 22).

⁶¹ Guild (2006), p. 5.

⁶² As is the case in Lithuania and the United Kingdom (EU Network of Independent Experts (2005), p. 73). With regard to Hungary, the Commissioner for Human Rights of the Council of Europe has expressed concern that irregular aliens are detained for up to 12 months on the sole ground that they have been found on Hungarian territory without a valid residence (Commissioner of Human Rights, Follow-Up Report on Hungary, 2006, p. 20). Hungary also has the possibility of enforcing detention even if the deportation order is suspended (FPP-CR-Hungary). In addition, some countries, such as Hungary and Germany provide for the possibility of detention in *preparation* of deportation procedures, therewith including verification of the identity of the foreigner and clarification of his residence status (FPP-CR's-Germany and Hungary).

⁶³ For example Sweden, where the legislation provides for detention if a decision to expel has been taken and the person is likely to abscond or engage in criminal activity (FPP-CR-Sweden).

detention, often as a result of wide discretionary powers conferred by them by domestic laws.⁶⁴

Even in judicial procedures where the legality of the detention is challenged, the question as to whether the administration has employed its discretionary powers in accordance with these otherwise important principles is often not addressed.⁶⁵ It remains to be seen whether this situation will change if Article 14 of the Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals becomes part of EC law.⁶⁶ According to this provision, immigration detention of third-country nationals, who are or will be subject to a return decision or a removal order, is only to be resorted to if there is a risk of absconding and where it would not be sufficient to apply less restrictive measures.

⁶⁴ UNHCR, Executive Committee of the High Commissioners Programme (4 June 1999). See Weber (2003) with regard to the situation in the United Kingdom. In the Netherlands, the public order criterion of Article 56(1) is interpreted so widely in policy guidelines that the required balance of interests almost always results in an outcome in favour of the executive (van Kalmthout, 1995b, p. 326). In addition, Article 56(2) of the Aliens Act 2000 provides for detention 'required by public order' on the sole ground that the necessary papers for removal are available.

⁶⁵ See for example Afdeling bestuursrechtspraak van de Raad van State, 6 September 2005, 200507112/1, JV 2005/452, where the highest administrative court in the Netherlands (Raad van State) ruled that it is not for the judge to assess whether less restrictive measures could have been applied in order to safeguard the aim of removal. In the United Kingdom, according to paragraph 16 of Schedule 2 to the Immigration Act 1971, a person may be detained under the authority of an immigration officer pending his removal. The House of Lords opinions that "*'pending'* in paragraph 16 means no more than 'until'. The word is being used as a preposition, not as an adjective. Paragraph 16 does not say that the removal must be "pending", still less that it must be 'impending'. So long as the Secretary of State remains intent upon removing the person and there is some prospect of achieving this, paragraph 16 authorises detention meanwhile." See House of Lords, *Regina v. Secretary of State for the Home Department (Respondent) ex parte Khadir (FC) (Appellant)*, 16 June 2005, [2005] UKHL 39, par. 32.

⁶⁶ European Commission (1 September 2005).

Many countries have the duration of this type of detention limited by law.⁶⁷ In this case, irregular migrants are released from administrative detention if expulsion has not been effected within the legal period for detention.⁶⁸ However, as they are often not able to leave the country, they remain illegally on its territory, and are apprehended and detained over again. As a result, in many countries, irregular migrants may spend very long periods in detention with small breaks of freedom that are followed by detention again.⁶⁹ This actual situation is neither apparent from legal provisions that lay down time limits, nor is it reflected in statistics that record the duration of detention.⁷⁰

Concerning the legal position of the immigration detainee who is to be expelled or deported, similar remarks can be made as were made with regard to the two types of detention discussed above.⁷¹ Often extensive administrative discretion exists with

⁶⁷ In Belgium, detention for removal is normally imposed for a maximum of two months, but it may be extended to five months. Further extension up to the absolute maximum of eight months is only permitted if it is necessary for the protection of public order or national security. In Czech Republic, irregular migrants can only be detained when an administrative decision on expulsion is imposed, but it is subject to a time limit of 180 days. In Estonia, if expulsion is not possible within the legal time limit to administrative detention of two months, an administrative court can prolong the detention for a maximum of up to four months (the average time of this type of detention is also 4 months in Estonia). In Finland, there is no time limit laid down in legislation, but the courts order release after three months. A French law passed on 26 November 2003 prolonged the maximum duration of administrative detention from 12 to 36 days. In Greece, if the foreigner is not expelled within three months, he must be released immediately. In Hungary, detention in preparation for expulsion may not last longer than 30 days, but detention in order to expulse is subject to a legal limit of twelve months. In Latvia, administrative detention may not exceed twenty months. In Malta, before 2005, there was no legal limit to the duration of the detention, and it was not unusual for persons to be detained for several years. A change in the law set a general time limit of 18 months, but in practice, release does not take place automatically after 18 months, and it may take many more months, even if this is against Maltese laws. In Poland and Slovenia, the total time spent in detention may not exceed twelve months. See FPP, the respective country reports.

⁶⁸ In Spain, if it is foreseeable that expulsion is not possible within the 40 day limit to the detention, the judge has to be notified immediately so that the detainee can be released.

⁶⁹ See for example Greece (FPP-CR-Greece, p. 21).

⁷⁰ A different situation, but with similar results, is the case of Belgium, where courts and tribunal have decided that whenever a detainee resists an attempt to actually remove him, the detention begins over new, and time previously spent in detention is not counted for the duration of the detention. (Jesuit Refugee Service, 2007). See also ECtHR, *Ntumba Kabongo c. Belgique* (inadmissible), 2 June 2005.

⁷¹ See in particular footnotes 36 and 50-55. Opondo and Harrell-Bond (1996) argue that the major difference that exists in the United Kingdom between the legal position of criminals and that of

regard to the decision to detain; countries that provide for periodical and automatic judicial review of the detention are the smaller part; and the possibility to appeal to a judicial authority against the deprivation of liberty, if provided for by law, is often difficult to exercise due to a lack of (understandable) information regarding the right to challenge the legality of the detention or insufficient access to legal aid for detainees.⁷² Often the basis for detention is not adequately explained, and at times, also the immigration status of the persons detained remains unclear to them.⁷³

I will conclude this overview of state practice with some brief observations regarding the conditions of detention with a view to deportation or expulsion.⁷⁴ The CPT has repeatedly held that “a prison is by definition not a place in which to detain someone who is neither convicted nor suspected of a criminal offence”⁷⁵ and has urged Contracting States to put an end to holding immigration detainees in ordinary law enforcement agency detention facilities.⁷⁶ Even so, many Member States keep detaining persons that are subject to a removal order in ordinary prisons or police custody facilities, sometimes as a result from a lack of available places in special centres, but often it is common policy.⁷⁷ Furthermore, persons subject to an expulsion order are at

immigration detainees is that the latter can be detained for an indefinite period of time without a judgment.

⁷² See CPT (21 July 2005), pp. 31-32; HM Chief Inspector of Prisons (2006a), pp. 25-26; Kelly (2005), pp. 40-42; and Gil-Robles (9 November 2005), p. 36.

⁷³ HM Chief Inspector of Prisons (2006a), p. 26.

⁷⁴ These observations are in many cases also applicable to the previous two categories of detention.

⁷⁵ See for example CPT (18 September 2003), par 69. Also the UN Working Group on Arbitrary Detention is of the opinion that custody should be effected in a public establishment specifically intended for this purpose. If this is for practical reasons not possible, immigration detainees should in any case be separated from persons who are imprisoned under criminal law UN Commission on Human Rights, 28 December 1999).

⁷⁶ CPT (20 December 2006), p. 24.

⁷⁷ In Estonia, one expulsion centre opened in 2003 following a visit by the CPT. Detention in police cells for those to be expelled can only be resorted to for a maximum of thirty days (FPP-CR-Estonia, pp. 20-21.) Finland has one special custody unit for aliens as referred to in the Finish aliens act with a capacity of 40 places. When the custody unit is full, an alien may exceptionally be placed in police detention premises, in which case the detention may not exceed four days. In France, there are 18 administrative detention centres and many more local facilities specifically designed for foreigners on which no information is available. However, foreigners who are under measures or procedures of removal may be detained with prisoners who are detained under criminal law. (FPP-CR-France). In Austria, detention for

times kept in transit zones. The latter situation calls for extra scrutiny as some states argue that in these situations it is not depriving individuals of their liberty at all.⁷⁸

Even in the case that special holding centres exist for immigration detainees, conditions are at times worse than in ordinary prisons,⁷⁹ with circumstances reminding of high security prisons and regulations that are not appropriate to the legal status of the inmates and the low security risk that they pose.⁸⁰ In addition, many of these centres

the purpose of removal is often practised in normal prisons (FPP-CR-Austria, p. 24). In Germany, special institutions for administrative detention under immigration legislation are to be found only in a few federal states. Most cases of administrative detention of foreigners is carried out in penitentiary institutions and prisons (FPP-CR-Germany p. 33). Greece has only a few administrative detention centres. Thus, every detention facility of police stations all over the country constitutes de facto institution for administrative detention, where a vast majority of the immigration detainees are held (FPP-CR-Greece, p. 19). In Ireland, solely ordinary prisons are used (Kelly 2005). Also Hungary resorts to immigration detention in ordinary prisons. In that case, however, the immigration detainees are kept separate from those that are held under criminal law (FPP-CR-Hungary). Latvia has one administrative detention facility, to which foreigners must be transferred if they have spent ten days in police detention facilities (FPP-CR-Latvia). Similarly, in Lithuania, foreigners can be kept in police facilities, but they must be transferred within 48 hours to the one centre for immigration detainees (FPP-CR-Lithuania). The Netherlands have special places for administrative detention, but detention is regularly carried out in police custody facilities or prisons (Baudoin, van de Burgt, Hendriksen 2002, pp. 211). In Sweden, special centres under the authority of the migration board exist for immigration detention. Placement in penitentiary institutions is only permitted only in the case of special circumstances (FPP-CR-Sweden, p. 17). In Portugal, irregular migrants may be placed in prisons with convicted prisoners or in transit zones of the international airport (FPP-CR-Portugal).

⁷⁸ Belgium for example, argues that in this case, the foreigners in question have no right of residence in Belgium, are subject to deportation orders issued by the Office for Foreigners and that by being placed in the transit zone, they are not being detained, but simply escorted to Belgium's border and are free to leave by catching a flight to their country of origin or a third country. See Amnesty International (1 September 2004).

⁷⁹ In Latvia and France, the rules concerning the detention of illegal immigrants are more restrictive than those applied to persons convicted for criminal offences (FPP-CR's-Latvia and France).

⁸⁰ See for example Travis (2005), reporting in the Guardian about a weapon commonly carried by prison officers in British removal centres, despite the fact that their use is banned in low security prisons. In some Austrian detention centres, detainees are only able to communicate with their visitors through a glass partitioning, which the European Committee for the Prevention of Torture did not deem in accordance with the low security risk of the persons detained (CPT, 21 July 2005, p. 32) In Germany, the CPT was alarmed by the existence of violent and inappropriate security measures that could be used in the immigration detention centre of Eissenhüttenstadt (CPT, 12 March 2003, p. 32.) The Council of

suffer from problems resulting from serious overpopulation, inadequate medical and hygienic care and limited possibilities for contact with the outside world.⁸¹ In view of these problems, it is to be welcomed that the proposed directive on common standards and procedures in Member States for returning illegally staying third-country

Europe Commissioner of Human Rights has called on the Maltese authorities to stop using military methods of searches of immigration detainees (Commissioner of Human Rights, Follow-Up Report on Malta, 2006, p. 12) and to abolish the practice of systematically handcuffing migrants when they are taken to and from the hospital (Gil-Robles, 12 February 2004, p. 8). In the Netherlands, the regulations for immigration detainees are comparable and sometimes identical to those applicable to persons who have been convicted of criminal offences. Van Kalmthout (2005a) argues that by subjecting the immigration detainee to restrictions that do not bear any relationship to the aim of the detention, the human rights of the immigration detainee are unnecessarily and disproportionately interfered with. It is significant that in the Netherlands, administrative courts are excluded by law (Articles 60 and 69 of the *Penitaire Beginselenwet*) from assessing the conditions and regulations applicable to immigration detention. See *Afdeling bestuursrechtspraak van de Raad van State*, 28 April 2005, 200410273/1, JV 2005/308. Nevertheless, there are also exceptions, see for example Finland, where detainees have access to better and more relaxed living conditions than normal prisoners and where the possibilities for receiving visits by friends and family are not limited (FPP-CR-Finland, pp. 20-21).

⁸¹ In Luxembourg, restrictions on the visits to immigration detainees are more severe than those applicable to normal prisoners (Gil-Robles, 8 July 2004, p. 11.) The CPT in its visit to the Czech Republic in 2002 criticised conditions of detention and was alarmed by allegations of ill-treatment and verbal abuse in some of the facilities (CPT, 12 March 2004, pp. 20-29). In Poland, the CPT observed that health care and psychological and psychiatric support for immigration detainees were not adequate. In addition, no regimes of activities appropriate to the detainees' legal status and the length of the stay were available (CPT, 2 March 2006, pp. 22-27). See CPT (20 December 2006), pp. 22, 31-39; and Amnesty International (5 October 2005) for documentation about very poor conditions and allegations of ill-treatment in the detention facilities for illegal migrants in Greece. In *Dougoz v. Greece* (ECtHR, 6 March 2001, par. 48), the Court in Strasbourg considered that the conditions of immigration detention at the Alexandras police headquarters and the Drapetsona detention centre, "*in particular the serious overcrowding and absence of sleeping facilities, combined with the inordinate length of the period during which the applicant was detained in such conditions*", amounted to degrading treatment contrary to Article 3 ECHR. The Commissioner for Human Rights of the Council of Europe called the conditions in the administrative holding centre for men under the Palais de Justice in Paris "*disastrous and unworthy of France*" and urged its closure because a place of this kind at the heart of the French judicial system was unacceptable (Gil-Robles, 15 February 2006, p. 62, and for similar criticism see also European Parliament, Committee on Civil Liberties, Justice and Home Affairs, 22 March 2006)

nationals⁸² lays down requirements regarding the conditions of temporary custody. According to Article 15 of the Proposal, immigration detainees shall, upon request, be allowed without delay to establish contact with legal representatives, family members and competent consular authorities as well as with relevant international and non-governmental organisations. In addition, it stipulates that temporary custody shall be carried out in specialised temporary custody facilities,⁸³ and that Member States shall ensure that international and non-governmental organisations have the possibility to visit temporary custody facilities in order to assess the adequacy of the temporary custody conditions.

⁸² Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals. European Commission (1 September 2005).

⁸³ Where a Member State cannot provide accommodation in a specialised temporary custody facility and has to resort to prison accommodation, it shall ensure that third-country nationals under temporary custody are permanently physically separated from ordinary prisoners (Article 15, par. 2).

1.2. AIM OF THIS STUDY AND PLAN OF RESEARCH

The aim of this study is threefold. First it argues that the particular development of sovereignty, neither a natural nor a self-evident notion but the result of historical contingencies, has led to a situation in which the use of force against outsiders is justified in a way which is fundamentally different from the way in which the use of force against insiders is scrutinised.

The second argument, strongly related to the first, posits that the contemporary application of human rights has not been able to formulate adequate answers to the use of force in the instances that the national state wishes to verify and enforce its sovereignty against those who have violated its material or symbolic boundaries. We will see that this so-called blind spot of human rights protection, which is nowhere more visible than in the contemporary practice of immigration detention, is due to an enduring perception of territoriality as a self-evident and innocent concept for the organisation of the global political system.

At the heart of this second argument is the premise that the concept of territory and the idea of rights are firmly linked and that the international legal discourse regards the jurisdictional content of sovereignty in a way that fundamentally differs from the way in which it considers its territorial frame. However, it is important to be aware from the outset that sovereignty's form and content are necessarily intertwined. Both play an equally significant role with regard to the definition of political community, although their relationship within the context of political organisation has varied over time.

Before the advent of the modern state, political power was based upon personal relations. After the Peace of Westphalia in 1648, this structure began to change slowly into a system where clearly demarcated and independent territorial units formed the basis for political power. The fact that the foundation of political power has over time shifted from the personal to the territorial does not entail that power over people has diminished in importance, nor does it mean that territory was politically insignificant before the emergence of the modern state. It means that at present, jurisdiction is exercised over individuals because of their presence in a certain territory instead of on account of their specific position in the body politic. In addition, the state uses its spatial powers to protect its territorial borders. The enormous growth of state power during the last few centuries has been accompanied with increasing demands for safeguards

against the state abusing its jurisdiction over people, resulting in a multifaceted system for the protection of individual liberties.

However, in this study I will argue that with regard to the state's spatial powers and sovereignty's territorial frame, a corresponding development through which the individual interests that are involved in it are accounted for, is lacking. This has led to what I call a "territorial blindness" on the part of constitutional principles in the domestic as well as in the international sphere.

The administrative detention of irregular migrants and asylum seekers is one of the ways in which European states protect their territories from unwanted immigration: in essence these states want to sustain the above-mentioned territorial blindness of systems of individual rights protection. However, immigration detention is special amongst the other instruments and policies by which these states try to stem the flows of migration. In the first place, it is special because deprivation of liberty is the sharpest technique by which the state protects that blindness. We will see that personal liberty and sovereignty are conceptually intertwined: the protection of the former is the reason for the existence of the latter. In societies based upon the rule of law there is no more serious interference with an individual's fundamental rights as depriving him of his liberty.

Secondly, immigration detention is not only a way in which states violently guard the territorial blind spots of individual rights protection, but as a practice itself it attempts to make ultimate use of these same blind spots. Thus, territorial blindness of the rule of law, a blindness that states seem only too eager too protect, has made the detention of thousands of people, simply because they crossed boundaries, not only possible but also commonplace.

The second argument thus presents the administrative detention of foreigners as a legal anomaly in societies that are otherwise based upon respect for the rule of law. However, this study will not merely portray immigration law enforcement in the form of detention as illiberal practices of liberal regimes, made possible by a structural feature of contemporary political organisation. In addition, it hopes to introduce a complementary but more hopeful approach by showing how the administrative detention of foreigners, however deplorable as contemporary political practice, may also provide opportunities to erase the artificial distinction in the modern version of the rule of law between the state's exercise of jurisdiction within a given body politic and the

territorial frame in which this power is exercised, and thus to deconstruct the narrow linkage between territoriality and personal rights.

Drawing on Roberto Unger's idea of "destabilization rights",⁸⁴ the third aim of this study is to argue that the capacity of the destitute, the refugee and the citizen of dictatorships, while interned by European states on European territory, to resort to traditional rule of law guarantees, however marginal such guarantees may be in their specific cases, has the potential to destabilize the institution of territorial sovereignty, and therewith it may in time strike at the conceptual innocence and perceived neutrality of territorial borders in constitutional discourse, domestically as well as internationally.

This study sets out with an investigation into the conceptual background of immigration detention from the perspective of the sovereignty paradigm. What is sovereignty (Chapter 2), and whether and how can it be limited (Chapter 3) are questions which will be dealt with in the first two Chapters. Subsequently, a general contextualisation of immigration detention will be provided by exploring the development and nature of the international legal framework regulating international freedom of movement (Chapters 4 and 5).

Thereafter, I will specifically deal with the limits that have been set to the use of immigration detention by human rights law. First, I will address the way in which these limits are formally given shape in various general human rights instruments (Chapter 6). Subsequently, I will analyse in depth how the European Court of Human Rights (ECtHR) as the constitutional court for Europe applies fundamental rights to cases of immigration detention (Chapter 7). These two Chapters intend to determine whether the limits that are set to the use of detention in immigration policy are satisfactory when regarded in the light of other contemporary discourses about limiting the violence potentially inherent in sovereignty. Where I find that this is not the case, I maintain that the reason for the fact that immigration detainees receive inadequate protection is related to the idea of territoriality. I argue that the problem is not so much territoriality in itself, but has to be sought in the fact that the territorial frame of sovereignty does not have the same history of being subjected to critical scrutiny as its jurisdictional content.

Although territorial sovereignty has so far remained largely immune to traditional forces of domestic and international correction, in the conclusions to this study (Chapter 8), I contend that the international human rights discourse has the

⁸⁴ Unger (1987). See also Sable and Simon (2004).

capacity to change the meaning of territorial borders and mitigate the exclusive effects of modern sovereignty. Paradoxically, the practice of immigration detention, instead of being only illiberal practice, may hand us the tools to transform the international legal order such as to make it into one that is more true to some of its underlying universalistic ideals.

1.3. CONTENT OF THIS STUDY

Deprivations of liberty on a massive scale constitute the ultimate example of the use of force by the state. Apart from a concrete manifestation of state violence, immigration detention camps are also an expression of the state's claim to determine where the boundary between 'inside' and 'outside' lies. Immigration detention is one of the possible outcomes of the conflict between the sovereign claim to determine that boundary and the individual's ideal of freedom of movement. Thus, apart from looking into how sovereignty has generally legitimised the use of force by the state over time, in Chapter 2, special attention will be paid to the inside/outside distinction that the modern notion of sovereignty has brought about by use of the concept of territoriality: the linkage of political power to clearly demarcated territory. Territoriality shaped the notions of nationality and nation state, of belonging and membership in a historically specific way. The result is that at the heart of the modern state we find the two conflicting forces of "the universalism of an egalitarian legal community and the particularism of a community united by historic destiny".⁸⁵ A thorough understanding of this tension is essential in order to comment on the practice of immigration detention.

In addition, Chapter 2 will discuss the external aspects of modern sovereignty in the Westphalian state system in order to contribute to a proper evaluation of legal norms dealing with international migration in later chapters (Chapters 4 and 5).

Thus, Chapter 2 addresses sovereignty's territorial form and its jurisdictional content within a given body politic, as well as its underlying tension between universalism and particularism. Chapter 3 weaves further upon these two lines. This Chapter treats the various ways that have been devised to limit the use of force by the state. Citizenship, constitutionalism and international human rights law are all

⁸⁵ See Habermas (1998), pp. 405-406.

discourses that intend to limit the use of force of the state internally. All of them are characterised by the same tension between a rights-based universalism and the political particularism that we discern at the heart of the modern state.

We will see that citizenship is the most problematic of these discourses when the use of force is employed in order to defend a certain inside/outside distinction, because in addition to protecting against sovereign power, citizenship strongly participates in sovereignty's claim to determine a certain inside from the outside. Constitutionalism as the theory and practice of the limits of power as a more general, inclusive discourse is also addressed.

International human rights as the most recent way of posing limits to state violence will receive particular attention in Chapter 3, since the *raison d'être* of modern human rights law is to overcome the particularism of traditional rule of law guarantees. However, we will see that also here the assumed naturalness and neutrality of the concept of territoriality poses limits to human rights' capacity to become truly universal guarantees for human dignity. In addition, Chapter 3 will briefly deal with the international law of war and humanitarian law. These areas of law receive attention because they also exemplify that the notion of territoriality is pivotal in international law and they exemplify its aim of maintaining the territorial order.

In Chapters 4 and 5, international freedom of movement is investigated. Where Chapters 2 and 3 can be seen as presenting the conceptual framework of these elements of contemporary political organisation that are fundamental to understanding immigration detention, Chapters 4 and 5 flesh out this framework in the particular direction of individual movement crossing international borders.

Chapter 4 addresses historical perspectives on the right to leave and the international legal framework regulating exit is analysed in detail. We will see that the right to leave is a right that the national state can no longer restrict, except for a few narrowly defined exceptions. In other words, sovereignty decreased in importance when it comes to matters concerning exit, a process that found its culmination in the codification of the right to leave in international law in the twentieth century.

Regarding the entrance of non-nationals, Chapter 5 shows that sovereignty has made a reverse development. This Chapter first traces the historic development of the common assumption that the entry and sojourn of foreign nationals are matters that fall largely within the sovereign discretion of the national state alone. Subsequently, it closely examines international legal exceptions to this assumption, such as flowing from

general international law, the prohibition of inhuman treatment, the international refugee regime and the right to family life. Chapter 5 will argue that, exempting the norm of non-refoulement flowing from the prohibition on inhuman treatment, all the legal exceptions to the state's exclusionary powers fit within a territorial image of political order. Instead of denouncing the way in which responsibility, rights and territory are linked, most rights bearing upon a right to enter or stay attempt to fix the inevitable gaps in such a system, and by doing so, they reinforce it. However, we will see that the application of the prohibition on inhuman or degrading treatment in the immigration context shows that territory and rights *can* be decoupled, if it were not for states' ever growing attempts to resort to extra-territorial measures of immigration control.

Chapter 5 pays specific attention to immigration law enforcement as well. A perception of the state's undeniable right to control aliens' entry into and residence in its territory surely must have an impact on the assumed appropriateness of the violence that is used to exercise such control, such as deportation and detention. We will see that deportation and detention are not merely the results of an exclusionary immigration policy, but that they constitute practices which possess a separate socio-political logic of their own.⁸⁶ Instead of just one of the many options available to national states, deportation and detention of unwanted foreigners are presented as the natural and singular response of the modern state to those who have violated its territorial sovereignty. This is reflected in the fact that the detention centre as an organizational structure to administer entry and deportation of foreigners increasingly prevails over other forms of administration in contemporary European societies.⁸⁷ We will see that the state practice of detention in particular constitutes the litmus test for the present regime governing cross-border movement and the unyielding impact of territoriality on the individual's life.

Chapters 4 and 5 taken together show that the regime regulating trans-national freedom of movement brings to light some striking ambiguities and inherent tensions in the international legal order. Chapters 2 to 5 will have made clear that most of these inconsistencies derive from two premises. The first is that the assumed naturalness of territorial borders has led to a conceptual distinction between the jurisdictional content

⁸⁶ De Genova and Peutz (forthcoming).

⁸⁷ Challenge (11 April 2006).

and the territorial form of sovereignty. As a result, international law, although it has increasingly conceded that the sovereign state's jurisdiction over people cannot be without limits, has so far simply refused to take account of the individual interests that are involved in territorial sovereignty.

However, it is important to bear in mind that the sharp distinction in international law between the jurisdictional aspect and the territorial aspect of sovereignty is artificial. Both aspects of sovereignty play an equally important role in the state's construction of political community; and ultimately it is the latter concept that is the rationale for most restrictions on fundamental rights of the individual.

The second premise is that the international order based on sovereign independent states does not only regulate the behaviour of states amongst each other, but it also functions as a mechanism to determine who belongs where. Territorial sovereignty in this system is a principle that allocates the responsibility for separate populations amongst distinct territorial units. The asymmetries within the international legal framework regulating the movement of individuals can only be understood when we take into account these two premises that underpin the international legal system.

The state's assertion of its territorial sovereignty leads to practices such as immigration detention. Chapters 6 and 7 will address the way in which international human rights discourse has constrained this specific instance of state violence resulting from a historically contingent conception of sovereignty. In Chapter 6, I sketch a broad outline of the human rights discourse regulating the administrative detention of irregular immigrants and asylum seekers. This Chapter gives an overview of various human rights instruments that are relevant for the practice of immigration detention. Case law concerning immigration detention of the Human Rights Committee under the Optional Protocol⁸⁸ of the 1966 International Covenant on Civil and Political Rights (ICCPR)⁸⁹ receives particular attention.

Chapter 7 treats the protection afforded by article 5 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in cases of immigration detention. It consists of a detailed analysis of the case law by the European Court of Human Rights (ECtHR) concerning Article 5 ECHR. In this Chapter, I will argue that in the ECtHR's case law on immigration detention, one can discern a serious

⁸⁸ See UNGA Res. 2200A (XX) of 16 December 1966

⁸⁹ 19 December 1966, 999 U.N.T.S. 171

lack in proportionality and as such the Court endorses detentions which are unnecessary and therefore in contradiction with the core of the protection of Article 5 ECHR. When compared to case law concerning the deprivation of liberty in other cases, serious inconsistencies can be identified in the ECtHR's approach to immigration detention. We will understand these inconsistencies once we are conscious of an obdurate and self-reinforcing notion of territorial sovereignty. I argue that the ECtHR in most of its case law dealing with immigration detention defers to international law's distinction between the state's exercise of jurisdiction over persons and the alleged neutral and pre-given territorial framework in which this jurisdiction is exercised. As a result, it is unwilling to address interferences with the right to personal liberty in immigration law in the same manner as it addresses interferences that occur in a purely domestic context where the territoriality of the modern state is not a factor to be reckoned with.

Thus, Chapter 7 argues that the main international mechanism for protecting human rights in the European context is characterised by a blind spot when it comes to limiting the state's power to resort to violence in the form of immigration detention. The discourse of human rights in this context proves to be a limited discourse. In the conclusions to this study in Chapter 8, I will conclude that international constitutional discourse in general suffers from a serious blindness whenever a state presents the exercise of power as being predominantly based on sovereignty's territorial frame. This blindness can be characterised as what Hilary Charlesworth in a different context has called a "silence within the law", which is not the same as a lacuna that can be filled with some "simple construction work".⁹⁰ Indeed, this territorial silence is integral to the whole structure of international (and domestic) law, "a critical element of its stability".⁹¹

However, I will argue that "a shift in its stabilisation"⁹² may be brought about by a new role for human rights, more in keeping with their proclaimed status as universal standards based on the dignity of the individual. I contend that in order for the system of human rights to function effectively, the nation state needs to be held responsible for the exercise of its power on account of its territorial sovereignty, instead of allowing it to present sovereignty's territorial frame as a predisposed and neutral given. By taking into account the individual interests that are involved in sovereignty's frame international

⁹⁰ Hilary Charlesworth with regard to international law's silence of women. Charlesworth (1999), p. 381

⁹¹ Ibid.

⁹² Korhonen (2002), p. 213. See also Charlesworth (1999).

human rights may become what Roberto Unger calls destabilization rights.⁹³ I will draw on the work of Charles Sabel and William Simon, who apply the idea of destabilization rights to public law litigation, in order to explain how the application human rights in immigration detention may induce a transformation of sovereignty's territorial frame in a process in which it must respond to what was previously an excluded stakeholder: the individual.⁹⁴

The fact that this process, as a result of its destabilizing impact on legal structures, have far-reaching political effects need not deter courts whose function it is also to provide individual with the protection of their fundamental rights. What Roberto Unger calls "the halo of reasoned authority and necessity upon the institutionalised structure of society"⁹⁵ should not deter lawyers from imagining alternative possibilities for organising that structure, quite the contrary. I will argue that the way in which constitutional courts such as the ECtHR apply fundamental rights in cases of immigration detention could help this process on its way.

⁹³ Unger (1987).

⁹⁴ See Sabel and Simon (1994), p. 1056

⁹⁵ Unger (1996), p. 96.

Chapter 2 Sovereignty, people and territory

2.1. INTRODUCTION

The discursive practice of sovereignty profoundly influences the way immigration is perceived and it strongly affects the question of the legitimacy of the instruments that the state uses to deal with unwanted immigrants. In the specific context of immigration detention, I believe that in certain respects sovereignty has become one of these discursive practices that Rob Walker so powerfully describes as having “turned an historical problematic into an ahistorical apology for the violence of the present.”⁹⁶ The practice of immigration detention, in its broader context of freedom of movement, is capable of bringing to light insights in the relation between the institution of territorial sovereignty and individual rights that normally remain concealed in commonly accepted notions about political power, political community and the organisation of the global state system.⁹⁷ As such, it may expose shortcomings in the modern version of the rule of law, embodied in the discourse of international human rights.

However, before I turn to these issues in later Chapters of this study, it is first necessary to understand sovereignty’s fundamental claims and their underlying assumptions. In this Chapter, I take a close look at the notion of sovereignty with the particular practice of immigration detention and its context of international migration in mind. This means that certain implications of sovereignty will not be touched upon at all, whereas other aspects will be emphasised. In this introduction, I explain why I deem an inquiry in the concept of sovereignty essential in order to comment upon immigration detention and I will indicate which of its aspects will receive particular attention in my analysis.

⁹⁶ Walker (1993), p. 31

⁹⁷ See Unger (1996) for a more general version of this argument about the relation between individual interests on the one hand and institutions on the other hand, and its implications on legal analysis.

The most common differentiation made within sovereignty's various functions is that between its external and internal aspects. Internally, the function of sovereignty is to ensure that there is no higher authority within the territorial limits of the state than the state itself – within its borders the state has exclusive and ultimate authority. In the course of history, such exclusive and ultimate authority came to entail both power over people and power over territory. Internal sovereignty is bound up with the state's monopoly on the legitimate use of force, as well as with its claim to determine what constitutes the boundary between 'inside' and 'outside'⁹⁸.

External or Westphalian sovereignty entails the exclusion of external authority from the territory of the state. We will see below that, although sovereignty was initially thought of as a concept to conceptualise and justify ultimate political authority within the state, it inevitably came to bear upon relations amongst states as well. The internal and external sovereign claims that the contemporary state makes with regard to people and territory – the monopoly on the use of violence; the determination of the boundary between inside and outside; and those related to the Westphalian structure that all states form part of – touch immediately upon immigration detention and its broader context of international movement of people.

In the first place, deprivations of liberty on a massive scale of asylum seekers or other immigrants clearly constitute the use of force by the state. Only states can legitimately resort to the imprisonment of individuals and in order to understand immigration detention, we need to understand the sovereign state's monopoly on the legitimate use of violence.

In the second place, we need to take into account the particular context in which this specific form of imprisonment takes place. In contemporary Europe, that is a context of an immigration policy which is focussed increasingly on the restriction of individual rights and which finds its justification in the language of crisis and threat. Sovereignty's claim to determine the inside from the outside is employed to portray migration mainly as a security issue, in response to which the use of force is assumed to be justified because "the process of demarcation of friends and enemies, delineation of boundaries of order versus disorder has been the prerogative of the sovereign state, provider of security within its boundaries and preserver of 'law and order'."⁹⁹

⁹⁸ Walker (2003), p 22; and Werner and Wilde (2001), p. 288.

⁹⁹ Aradau (December 2001).

Thus, national responses to international migration do not only illustrate the state's monopoly on the legitimate use of force, but perhaps even more importantly, they also exemplify the sovereign claim of the state to determine its boundaries. These boundaries can be concrete and tangible, such as territorial borders, but they can be implicit as well, contained as they are in concepts such as nationality and citizenship. Both sets of boundaries constitute the sphere where sovereignty's claim to distinguish the inside from the outside and the individual's ideal of freedom of movement conflict. Immigration detention is at once a concrete manifestation of this claim by the state, and a possible outcome of such a conflict between state and individual. We will see that the stance taken by the contemporary sovereign state with regard to immigration epitomizes that internal sovereignty is about the unity of the body politic and the definition of political community. The state uses both its territorial sovereignty and its jurisdiction over people in order to attain or maintain such unity.

However, we will not be able to understand the international legal regulation of international migration if we merely focus on the internal sovereign claims of the nation state. States do not exist in a vacuum, but they form part of a system of sovereign states and international migration engages precisely this system. Thus, the role and place of the notion of sovereignty within this system, as opposed to its mere internal functions, needs to be taken into account as well, in order to place the domestic practice of immigration detention in the wider context of international rules that regulate movement of people between states, as will be done later in this study (Chapters 4 and 5).

Above, I have briefly outlined these aspects of sovereignty that are relevant for achieving an adequate understanding of the contemporary practice of immigration detention. Accordingly, the following inquiry will pay particular attention to the following matters: the manner in which the use of force by the state has been legitimised; the way in which the modern state distinguishes between inside and outside by the use of concepts such as nation state, political community and identity; and the global structure of a territorial system of sovereign states in which these concepts operate. It should be mentioned at the outset that immigration detention and its context of international migration also show unambiguously that all aspects of sovereignty are interrelated and that conceptual separations between them do not always reflect reality.

Indeed, we will see in this study that sovereign states' responses to international migration exemplify that the actual content of sovereignty, i.e. jurisdiction over persons, is necessarily intertwined with the territorial frame in which it operates. In a similar

fashion, such responses illustrate that the internal and external aspects of sovereignty cannot be understood in isolation from each other. As all aspects of sovereignty are profoundly related to and mutually influence each other, it would not do justice to reality to classify their respective developments in distinct categories. For that reason, the structure of this Chapter does not accurately reflect the distinctions made above. Rather, I hope that by using these various aspects of sovereignty as red lines running through my inquiry of the sovereignty paradigm, they will bring out those aspects of our understanding of the modern state and the system that it forms part of that are essential in order to comment on the practice of immigration detention in contemporary European states in later Chapters of this study.

The structure of this Chapter is as follows. In Section 2.2., I give an overview of the development of the concept of sovereignty, as a legitimating discourse for ultimate political power within the body politic. The account of this development is divided in two parts. Section 2.2.1 treats the emergence of a theory of sovereignty against the historical background of gradual territorialisation of political organisation; and Section 2.2.2 addresses the theory of popular sovereignty. Subsequently, in Section 2.3., I deal with the manner in which the modern state has construed its understanding of inside and outside by using territory and identity. We will see that territorialisation, the process by which political authority came to be linked to clearly demarcated territorial units, influenced the way in which the modern state conceives of identity and political community.

Thus, Sections 2.2. and 2.3. make a division within the concept of sovereignty by treating respectively the way in which the exercise of power in a given body politic has been legitimised and the way in which understandings of inside and outside have been constructed. Nonetheless, as already mentioned, we will see that the historical processes that gave rise to these two aspects of sovereignty cannot be neatly separated as relating solely to the one or the other. On the one hand, it will become clear that the way in which the theory of popular sovereignty has legitimised political authority has strongly influenced the manner in which modern states have drawn their boundaries. On the other hand, we will see that the process of territorialisation facilitated the emergence of the very notion of sovereignty as legitimation of ultimate power within the body politic.

The conclusions to this Chapter in Section 2.4. will pay attention to the impact of both the development of the notion of sovereignty and the process of territorialisation

on the legitimacy of violence. The interrelatedness of all sovereignty's aspects is briefly reiterated with specific regard to national responses to international migration.

2.2. SOVEREIGNTY: LEGITIMISATION OF POLITICAL POWER WITHIN THE BODY POLITIC

2.2.1. Development of the modern notion of sovereignty

With regard to freedom of movement, Michael Walzer asserts that emigration and immigration are morally asymmetrical; arguing as he does that restraint on entry serves to protect a group of individuals who are committed to each other, whereas restrictions on exit imply replacing commitment with coercion.¹⁰⁰ It is only in Chapters 4 and 5 that questions regarding freedom of movement will be addressed, but the reason that I refer to Walzer's views here is that I find the last part of his statement intriguing. Does he mean to say that replacing commitment with coercion is not acceptable? Yet we don't seem to think that it is always objectionable that coercion by the state takes the place of commitment on the part of the individual if the latter is lacking: if we do not provide our children with the care that our society deems appropriate they may be separated from us, and if we refuse to pay taxes we could end up in prison. Although coercion may not be the only thing that state power is about, it is certainly a very important aspect of it.

"Ultimate violence may not be used frequently. There may be innumerable steps in its application, in the way of warnings and reprimands. But if all the warnings are disregarded, even in so slight a matter as paying a traffic ticket, the last thing that will happen is that a couple of cops show up at the door with handcuffs and a Black Maria. [...] In Western democracies, with their ideological emphasis on voluntary compliance with popularly legislated rules, this constant presence of official violence is underemphasized. It is all the more important to be aware of it. Violence is the ultimate foundation of any political order."¹⁰¹

Amongst other things, sovereignty entails a claim to hold a monopoly on the legitimate use of force. Some authors feel that the term "legitimate use of force" is a

¹⁰⁰ Walzer (1983), p. 39-40.

¹⁰¹ Berger (1963) p. 69.

contradiction in terms: "It seems contrary to common sense and logical precept that an institution should be able to project its moral injunctions through acts of brute force."¹⁰²

Although the discussion of what constitutes legitimate political power has a much longer history, my analysis starts with the early emergence of sovereignty during the late middle ages. We will see that the manner in which men have since then attempted to legitimise the exercise of political power, thereby turning it into authority instead of mere force, have varied from appeals to religion and the natural order to the notion of the people. Many thinkers about sovereignty have included the use of force explicitly in their perception of political power, either on the grounds of *raison d'État*, or because in their theory subjects surrendered their right to self defence to the sovereign, whose task it then became to protect them, or because sovereignty is logically impossible without complete control and free disposal over the means of violence.

Thinking about sovereignty predated a world in which independent territorial units were the main building blocks for political life.¹⁰³ In medieval Europe, political power was not characterised by territoriality, but different territorial entities overlapped each other, and power structures were complex and hierarchical in varying degrees. Political power manifested itself in personal relations rather than with regard to territory, and these relations could be manifold. However, by the end of the fifteenth century, monarchical power had grown enormously in almost all of Europe at the expense of medieval institutions, such as feudalism, free city states and the church, the latter perhaps the most conspicuous of all medieval institutions. The role of the Reformation in the breakdown of the medieval order should not be underestimated, for before the Reformation Europe was perceived as a single community, even if only in theory: the *Res Publica Christiana* with its head as the agent of God.¹⁰⁴

The gradual consolidation of power and territory under a single and supreme ruler, especially in France, but also in Spain and England, changed modes of political thought and it provided the opportunity for the notion of sovereignty to re-emerge from Roman imperial law and from the theory of divine right.¹⁰⁵ In order to see how the notion of sovereignty was able to secure its fundamental place in political thought, it is instructive to take a brief look at the writings of Machiavelli, and not only because it

¹⁰² Hoffman (1988), p. 73.

¹⁰³ Murphy (1996), p. 82; Hinsley (1986), p. 21; and Werner and Wilde (2001), p. 289.

¹⁰⁴ Philpott (1997), p. 28-33.

¹⁰⁵ See Hinsley (1986) about earlier manifestations of sovereignty.

was mainly these writings that created the meaning that is still attached to the term state in political usage.¹⁰⁶

Machiavelli (1469-1527) was living exactly at the time when the medieval political order, defined by a hierarchy of authorities started to change slowly into to the modern decentralised system of independent political entities defined by territory. The move in Europe from the medieval to the modern was not smooth and peaceful – on the contrary, it was accompanied by civil wars and chaos caused by competing claims to political power. It is no coincidence that many thinkers about sovereignty have been preoccupied with political stability and the unity of the body politic. Machiavelli, although he did not develop a theory on sovereignty and merely hinted at the notion, was no exception. He was deeply disturbed by the particularly chaotic state Italy found itself in at the end of the fifteenth century; for although medieval institutions had broken down there was no power strong enough to unite the whole of Italy and bring order and stability to the region. According to Machiavelli, preservation and continuance of the state is the aim of politics. Every prince must seek to maintain his state and “a wise prince is guided above all by the dictates of necessity.”¹⁰⁷

“When the safety of one’s country wholly depends on the decision to be taken, no attention should be paid either to justice or injustice, to kindness or cruelty, or to its being praiseworthy or ignominious. On the contrary, every other consideration set aside, that alternative should be wholeheartedly adopted which will save the life and preserve the freedom of one’s country.”¹⁰⁸

Thus, it appears that Machiavelli perceived the polity as an abstract entity, and its ruler is placed outside and above the legal and moral framework that applies to the ruled. Linked to his perception of the ruler, is Machiavelli’s conception of the supreme importance of the legislator in a society. However, he never developed his belief in the omnipotent legislator into a general theory of sovereignty or absolutism. Although he was aware of the idea of the body politic as an instrument in the hands of the ruler in the interest of the political community, he did not conceive of a theory in which the prince

¹⁰⁶ Sabine (1941), p. 351; and Bobbio (1989), p. 57.

¹⁰⁷ Skinner (1981), p. 38.

¹⁰⁸ Machiavelli (1987), p. 515.

and the community were tied together in a body politic which itself would possess sovereign power.¹⁰⁹

Jean Bodin (1529-1596) was the first to make a systematic statement of the modern idea of sovereignty. He did so in his *Six Livres de la République* (1576), a work written in and clearly influenced by the disorder of a secularising France in the late sixteenth century. According to Bodin the existence of a sovereign power – ‘la puissance perpétuelle et absolue d’une république’ – is necessary in the interests of the community. Sovereignty for Bodin is indivisible and consists of an unlimited power to make law. However, his views on that limitless quality of sovereign power are not altogether clear. For although he states that sovereignty cannot be limited in function, time, or law, he also maintains that the sovereign is bound by divine and natural law, as well as by the fundamental and customary laws of the political community and the property rights of the citizens.¹¹⁰

For Bodin, government is not possible without sovereignty; without the existence of a sovereign power, there will just be anarchy. Sovereignty is the essence of the state; the latter cannot exist without the former. This led him to conclude that the character of the political community made it necessary that this power be legally recognised as sovereignty.¹¹¹ Thus, the existence of sovereign power does not need to be justified with an appeal to God, but rather it is explained by the nature of political community. Bodin distinguished between different forms of body politic, depending on where the sovereign power was located, but he himself preferred that form in which the sovereign power resided in one person, a monarchy.

The originality of Bodin consisted in his partial detachment of the notion of sovereignty from God, Pope, Emperor or King and by presenting it as a legal theory logically necessary in all political associations.¹¹² Although theories of sovereignty have evolved significantly since Bodin’s introduction of the concept, its rudimentary conceptual foundation has remained largely the same. We will see that contemporary sovereignty, just as it was for Bodin and subsequent theorists, is still concerned with the unity of the body politic.

¹⁰⁹ Hinsley (1986), p. 113.

¹¹⁰ Allen (1926), p. 56; Bobbio (1989), p. 93-94; and Hinsley (1986), p. 123.

¹¹¹ Hinsley (1986), p. 121; and Pot and Donner (1995), p. 15.

¹¹² Allen (1926), p. 59. But see also Engster (1996) for a contrary opinion.

In medieval Europe, political society was conceived as an order instituted by God, in which ruler and people were distinct from each other, each with their own position, rights and duties. The implications of this belief remained tangible even in the seventeenth century; there was little awareness of a conception of the ruler as the personification of the body politic, of the people as more than a collection of individuals, let alone of the idea that the body politic could in itself be a sovereign entity in which ruler and people were linked.¹¹³

The separateness of ruler and ruled in the thoughts of most men in this period caused them to think that sovereignty had to be vested in one and only one of the two. Thus, on the one hand, there were monarchists who used Bodin's theory of sovereignty to strengthen the theory of Divine Right. On the other hand, a thinker such as Johannes Althusius (1557-1638) insisted that sovereign power belonged exclusively to the people, basing his ideas on popular sovereignty equally upon the legislative foundations of sovereignty laid by Bodin.¹¹⁴ There were inherent contradictions in both positions, and writers such as Grotius (1583-1645), who in *De Jure Belli ac Pacis*, attempted to reconcile both positions in a single theory, were not successful.¹¹⁵ The notion of sovereignty did not attain logical coherence until Hobbes (1588-1679), using some elements already present in Bodin's legal theory, based it on radically new premises.

In *Leviathan*, written in 1651, Hobbes takes as a starting point for his theory of sovereignty a state of nature in which people are only driven by instincts of self-preservation and a will to power which is never satisfied. People have no natural rights and there would accordingly be war of all against all. This image of the state of nature was completely at odds with the portrayal of mankind in medieval Christendom.

Moreover, natural law had always been linked with God and normative concepts such as justice, while Hobbes regarded (human) nature as nothing else but a system of causes and effects. Since even the weakest can under circumstances be a threat to the life of the strongest, nobody can ever be safe in Hobbes' state of nature. As this means that everybody is equal in the state of nature – which is with Hobbes clearly not a normative statement – no one will enter into conditions of peace if not upon equal terms. Yet, even in the case that all would agree to respect each others 'rights'; it would

¹¹³ Hinsley (1986), p. 130.

¹¹⁴ London Fell (1999), p. 113.

¹¹⁵ Hinsley (1986), p. 139.

not be rational for the individual to keep such an agreement. Relations of power will always be temporary, a stable order is impossible. To establish such an order, a conscious choice is necessary, made by all, unconditionally and upon equal terms, to surrender completely their freedom to one power, the sovereign.

In the sovereign, the will of all is united; it is a supreme power whose only command is complete obedience, sanctioned with his complete and exclusive control over the means of violence. Only at the moment of surrender does a mere collection of individuals become a people; the multitude constitutes only the people by the will of the sovereign. There cannot be any distinction between state and society, just as the distinction between state and government is an illusion. If there is no state, there can be neither government, nor a society. Sovereignty is indivisible and unlimited. The multitude enters into a covenant with each other in which they agree to surrender to the sovereign, but the latter is not a party to it. For if he could be bound, the absolute power would lie elsewhere, and accordingly he would not be sovereign. Questions of legitimacy of government do not play a role for Hobbes at all – a government is a government by its capacity to govern and a tyranny is merely a government disliked. Whereas for Bodin sovereign power had meant the power to make law, for Hobbes it was to be understood as the exclusive control over coercive force.¹¹⁶

“In substance his theory amounted to identifying government with force; at least, the force must always be present in the background whether it has to be applied or not.”¹¹⁷

After the turmoil and civil wars of the sixteenth and seventeenth centuries, European monarchies were increasingly able to consolidate their powers and the idea of sovereign monarchical power became commonly accepted.¹¹⁸ Related to this was the conception of an independent territorial state system, for which the Peace of Westphalia provided the first formal step.¹¹⁹ The ruler was seen as the personification of the state, and in him was absorbed the personality of the people.

However, there was no writer in Europe who defended the absolutism of the sovereign power that was for Hobbes a logical consequence of the very idea of

¹¹⁶ Poggi (1990), p. 44. See also Sabine (1941), p. 468.

¹¹⁷ Hinsley (1986), p. 468.

¹¹⁸ Pot and Donner (1995), p. 21.

¹¹⁹ Murphy (1996), p. 86.

sovereignty. Defenders of Divine Right concurred that divine and natural law placed constraints on the sovereign ruler. A natural lawyer such as Pufendorf (1632-1694) insisted that even though to be sovereign meant to be absolute and supreme, sovereignty was not equivalent to absolutist power in relation to the society that was subjected to it.¹²⁰ The question was now how to reconcile the notion of sovereignty with the idea that the ruler is responsible to the community that he governs.

The notion of popular sovereignty was to provide the answer to this question. The idea that sovereignty rests with the people who have conferred it by means of a contract to the ruler was not a new one. Nonetheless, the clarity that Hobbes had given to the very notion of sovereignty combined with the wish of most thinkers to refute the absolutist implications of Hobbes' theory, made a new version of social contract theories unavoidable.

2.2.2. The people as the source of legitimacy

In his *Two Treatises of Government*, Locke (1632-1704) attempted to counter Hobbes' arguments for the logical necessity of political absolutism with a theory of constitutional government.¹²¹ In the first Treatise, the theory of Divine Right of Kings is rejected, whereas the second analyses why governments exist at all. Locke's thinking illustrates the approaching enlightenment: instead of a medieval fixation on the spiritual world, he thinks that the use of empirical experience and reason will learn and enable man to live a good life. Like Hobbes, he too takes the state of nature as a starting point for his theory of government

However, unlike Hobbes, Locke believed that in the state of nature, natural law governed, the content of which could be known by reason. If, in the state of nature, someone would transgress this law, entailing that no one ought to harm another, nor in his life, nor in his liberty or possessions, the inflicted party had a right to redress the injury, but only in a manner that was proportionate to the infraction. Only if natural law would be altogether ignored, would a situation comparable to Hobbes' state of nature be

¹²⁰ Hinsley (1986), p. 151.

¹²¹ Sabine (1941), p. 524.

brought about, but this would be an exceptional situation, no longer to be called the state of nature but the state of war.

Whereas medieval thinking had emphasised the duties of a mankind that was divided into a natural (divine) order, Locke instead accords a central place to the unity of mankind and sees natural law as a claim to inalienable rights inherent in each individual.¹²² Modernity marked a different way of thinking about power: legitimacy of power was no longer based on a divine or natural order, but on the assumed will of individuals. Locke argues that a government is necessary in order to guarantee individual rights and with this presumption, the limits of governmental power are simultaneously established. The state is created by a society of contracting individuals, but sovereignty remains with the people who have the right to revolt against a government, to which they have delegated their supreme power, if it fails to protect their rights. In order to make the idea of individual consent plausible, Locke resorted to a fiction, whereby every member of society gives his consent to be a member of the body politic by making use of its government or alternatively, by simply agreeing to be in its territory.

Locke's theory on sovereignty is also a theory on constitutional government – the theory of popular sovereignty explains the foundation for political power, but its important normative assumptions at the same time establish clear limits on the exercise of sovereign power. However, it is important to keep in mind that the question of the legitimisation of the foundation for political power is different from the question of the legality of its exercise. This Chapter deals only with the former question; theories of individual rights, the doctrine of government by law, and related concepts will be dealt with in Chapter 3.

The theory of popular sovereignty found a clear expression in the French and American Bills of Rights. However, revolutions were needed before these bills of rights were established, revolutions that would change thinking about the state and power radically and which would anchor the principle of popular sovereignty firmly in Western political thought and practice. But in the eighteenth century, established government still strongly resisted claims that the community was free to decide how

¹²² Pot and Donner (1995), p. 24; Sabine (1941), p. 525.

much power to give up to government and how much to retain for itself, and insisted that the Ruler, as the personification of the community, was the sovereign.¹²³

In *Du Contrat Social*, Rousseau (1712-1778) dismisses this absolutist interpretation and presents a radical new version of the concept of popular sovereignty. Rousseau in fact adopts Hobbes' absolutist implications of the notion of sovereignty, but transfers absolute power unconditionally and permanently to the people. In order to arrive at this position, Rousseau starts with the state of nature as well, but in contrast to the usual account of it, he reverses the situation completely by arguing that in the state of nature people were good and innocent. It was, according to him, civilisation with its constant appeal to reason that had spoiled mankind. In a sense, Rousseau breaks radically with the ideals of the enlightenment; not by progress and the use of reason will men find out how to live the good life, but they need to return to nature with which he means the common sentiments with regard to which people hardly differ at all.

Rousseau emphasised the importance of community, and he opposes the systematic individualism on which the theories of Hobbes and Locke were built. People do not really exist if not within a community, "for apart from society there would be no scale of values in terms of which to judge well-being."¹²⁴ The ideals of the enlightenment with their emphasis on the individual have created the kind of civilisation in which man cannot find his true self. A return to the liberty and equality of the state of nature is only possible when every man submits himself completely to the community. The state *is* the community, but as the people possess exclusive and omnipotent sovereignty that is inalienable, government is merely the executor of the general will of the community.

Whereas Locke had accorded the people a right of revolt under certain conditions – that is, in the case when the government had not kept the terms of the contract – for Rousseau such a construction is unthinkable because the government always has to respect the general will and can thus be dissolved at any moment should the community wish so. The 'volonté générale' is not the same as the sum of all individual wills, nor is it the will of the majority, for in both cases Rousseau's theory would equally be based on the individualism which he attacks. The general will of a community is a collective good, with its own life and destiny, which is not the same as

¹²³ Hinsley (1986), p. 152-153.

¹²⁴ Sabine (1941), p. 588.

the private interests of its members together.¹²⁵ Man becomes man only as a member of the community and accordingly it is unthinkable that rights can ever be exercised against the community but instead they are something to be enjoyed within it.

Since Rousseau's time the doctrine of popular sovereignty has frequently been restated. But it will be found that, while Rousseau's statement of it can be modified in detail, it cannot in essence be outdone. Since the American and French Revolutions toward the end of the eighteenth century it has sooner or later come to be the prevalent doctrine, at least in all the more advanced political societies."¹²⁶

Rousseau wanted to eradicate the distinction between state and community by extracting a unitary state personality out of the abstract notion of the general will, and the problem was that this left the people without a possibility for governance with actual power over them.¹²⁷ As a result, although his account of popular sovereignty has prevailed, the practical need for governance has made it necessary to accommodate it. Indeed, while the modern notion of sovereignty has created congruence between ruler and ruled, it has not been able to resolve the disparity between people and state. And although his problem has remained without a solution, there have been ways to deal with the tension between the principle of the executive state as merely the agent of the people's will and the reality that it has the potential to turn into Hobbes' absolute sovereign.

One of these is the abstract notion of the sovereign state, based on the constitutionalism that liberal democracies have resorted to, for if the popular will can only be expressed through representation, safeguards for the individual against the power of the executive and the danger of tyranny of the majority have to be built in. These safeguards, first embodied in constitutionalism and the discourse of citizenship, and later also in the international human rights regime, will be looked at in depth in the next Chapter that investigates formal and material limits to government. In concluding this Section, I want to emphasise that the modern notion of sovereignty distinguishes itself from all earlier notions on political authority by its very abstraction. The modern states distinguishes itself from earlier forms of political organisation in that factual

¹²⁵ Ibid. p. 588.

¹²⁶ Hinsley (1986), p. 154.

¹²⁷ Hinsley (1986), p. 155.

relations between individuals do no longer provide the basis for political authority; instead the abstract notion of the people and the concept of territoriality have assumed that role. The way in which these concepts relate to each other will be discussed in the next Section.

2.3. THE STATE, ITS TERRITORY AND IDENTITY: POLITICAL PARTICULARISM

2.3.1. The sovereign claim to distinguish inside from outside

“The present approach to the determination of ownership of territory is exclusive, partial and silencing. [...] Territorial boundaries have become barriers. They determine and identify those within and those without the boundary, based on a particular conception of sovereignty.”¹²⁸

In the previous two Sections, I have explored how a theory of sovereignty became a conceptual necessity in order to legitimise the state’s exercise of political authority within the body politic. Different theories on the source of sovereignty were addressed and we have seen that popular sovereignty has become the prevalent way in which to legitimise ultimate political power within the body politic. However, the important question of how the body politic is to be defined, which is a fundamental question when we take into account the unity with which sovereignty is ultimately concerned, has not been dealt with in the preceding Sections.

Sovereignty by its very nature draws a clear distinction between inside and outside.¹²⁹ Here we see the partial overlap between internal and external sovereignty, for in international relations, Westphalian sovereignty refers to the linkage of independent political authority to inviolable and sharply delimited space. The sovereign claims of each and every state operate in a global structure of mutually independent territorial units with supreme and exclusionary authority within their domain. Nonetheless, the internal sovereign claim of the modern state to distinguish between the inside and the outside is not only based on territorial boundaries, but in addition, it is deeply related to matters of identity and political community.

¹²⁸ McCorquodale (2001), pp. 145, 152.

¹²⁹ Giddens (1985), p. 88.

Therefore sovereignty's content (the state's exercise of jurisdiction over people) and its form (the fact that this jurisdiction is exercised within a territorial frame) are not separate notions that operate independently from each other. When focussing on the political significance of clearly delimited space in the discourse of sovereignty, the abstract concepts of nationality, citizenship and political community cannot be ignored. On the contrary: territorial boundaries that are in themselves no more than arbitrary and imaginary lines on the surface of the earth, acquire their meaning in precisely these concepts and the practices resulting from them; practices that are brought about both by the state's exercise of jurisdiction over people and the particular territorial frame in which this jurisdiction is exercised.

This Section will seek to understand the way in which sovereignty's claim to distinguish the inside from the outside is construed. It will become clear that sovereignty's two claims – to determine the boundary between inside and outside and to ultimate political authority – are inextricably linked to each other. The discourse of popular sovereignty legitimises political power by tying community, authority and territory together. I will argue that this particular conception of sovereignty, which effectively ties people to territory, is the result of specific historical processes that led to the structuring of the global political system in territorial nation states.

It should be borne in mind that my account on the formation of nation states is largely inspired by the experiences of some few Western European states, and there are many nation states which took shape in a very different fashion. However, precisely the experiences of the early nation states as France, England and Spain, have led to the formulation of durable concepts such as nationality, citizenship, and territoriality, which today are relevant to all nation states and the system they form part of.

In order to achieve an understanding of the way in which the modern state distinguishes between inside and outside, this Section is divided in three parts. Above, some attention has already been paid to the fact that, in the period stretching from the sixteenth until the eighteenth century, the idea of territoriality gained ground due to increasing power of the European monarchs. Apart from touching upon the context of this historical process of consolidation of exclusive territorial rule, Section 2.3.2. will describe how medieval ideas of allegiance, under the influence of changing ideas about the nature and location of sovereignty, transformed and acquired new significance in the concept of nationality. Subsequently, in Section 2.3.3. we will see how the interplay between territoriality and the notion of popular sovereignty led to the formation of

exclusive political identities. As theories of popular sovereignty fail to define what is meant with the concept of the people, the notion of territoriality and its accompanying notion of Westphalian sovereignty profoundly influenced the answer to this question. The result was that the universalistic ideals on which theories of popular sovereignty were based, translated into a particularistic practice. The tension between the universal and the particular has remained at the heart of the modern state, and its implications for the way in which the modern state distinguishes the inside from the outside is discussed in paragraph 2.3.4.

2.3.2. Emergence of territorial states and changing perceptions of allegiance and loyalty

In medieval Europe, the feudal system had determined the relation of people to territory. However, relations of authority, as command over loyalties, were based more on personal ties than on territorial considerations. Feudal concepts of fealty were not at all comparable to nationality in the modern sense, and social groups had complex and multiple relations to each other, some based on speech, some on religion and some on administrative loyalty. The governance of any such a group could depend on many different authorities and the idea of rule was certainly not determined by “a conception of permanent borders within which such rule applied and outside of which it did not apply.”¹³⁰ The overlap between (political) identities entailed that there was no clear or uniform mechanism by which to distinguish “us” from “them”, “inside from outside”. We have seen above that the medieval order characterised by pluralism under the umbrella of universal Christendom changed slowly because of the consolidation of monarchical power and the influence of the Reformation.

The process of state formation in Europe was exclusionist practice: before territorial boundaries hardened, attempts were already made by states to homogenise populations by expulsing peoples, such as religious minorities whose allegiance one could not be sure of.¹³¹ Monarchs increasingly tried to reduce regional differences in their territories, fashioned distinctions between insiders and ‘aliens’, and encouraged the

¹³⁰ Caporaso (2000), p. 22.

¹³¹ Linklater (1998), p. 28.

use of standardised languages in order to create stronger loyalties between the inhabitants of their territories, something that was deemed necessary in order to engage their subjects in the waging of war against other emerging states.

The emerging territorial state struck the right balance between possession of the means of violence and capital accumulation so that this form of political organisation became the dominant one during the sixteenth and seventeenth centuries.¹³² Sovereign states survived because their size was ideal for the fighting of wars: they were large enough to withstand attack and small enough to enable administration from a central point.¹³³ Territory started to play a bigger role in political life, but initially the perception that relations of authority were decidedly personal, remained. This was only logical in view of the fact that sovereignty was seen as vested in the king. As the sovereign was the state, 'nationality' – better described as subjecthood – had implied allegiance to the King, not to a certain demarcated territory, and certainly not to a particular social group.

When the feudal order started to transform gradually into absolutism, everybody became, in addition to his status in the hierarchical feudal order, a subject of the King. In time, the doctrine of perpetual allegiance developed, entailing that none of his subjects could unilaterally renounce his obligations towards the King. Subjecthood was generally acquired by birth and could not be changed afterwards. As the will of the King was the source of allegiance, it was also the King who decided who would be conferred with subjecthood. Ideologies such as nationalism, alluding to a deeper relationship between people and territory, or other ideological convictions tying the notions of people and their state to each other in a more profound way were not yet conceivable. Formally, people were subjects by virtue of their being subjected to the sovereign, and not because they had a special relation with each other or with the territory in which they lived.

In practice, however, territorialisation led to a situation in which the people over whom the sovereign ruled were defined by virtue of their location within certain

¹³² Tilly (1992), pp. 30-31.

¹³³ Linklater (1998), p. 27. Of course there were many more factors influencing the establishment of the modern system of states. See Ruggie (1993), pp.152-166. However, I will not go into these: here it suffices to observe that the modern state system developed as the result of specific historical circumstances. See also Kaldor (1999), p. 11-20.

borders.¹³⁴ This situation became a structural aspect of political organisation after 1648, the year when the Peace of Westphalia, by establishing external sovereignty as a principle of international relations, ascribed to each territorial state the exclusive government of the population within its territory.¹³⁵

During the Enlightenment, earlier attitudes with regard to allegiance and political authority started to change. Due to changing perceptions about the location and nature of sovereignty, the object and foundation of allegiance altered. On the one hand, allegiance became a less stringent condition, for this duty, finding its source in the tie between sovereign and subject established at birth, “an implied, original and virtual allegiance, antecedently to any express promise”,¹³⁶ was replaced by a notion that, as we saw above, deducted political obligations from consent or voluntary contract:

“ ‘Tis plain then. ...by the Law of right reason, that a Child is born a Subject of no Country, or Government. He is under his Fathers Tuition and Authority, till he come to the Age of Discretion: and then he is a Free-man, at Liberty what Government he will put himself under; what Body Politick he will unite himself to.”¹³⁷

However, according to Locke, after an individual had consciously chosen to be a member of society, he could never again possess the liberty he would have had in a state of nature. Thus Locke’s lifelong contract still implies perpetual allegiance. Later thinkers, such as Thomas Jefferson (1743-1826), extended the scope of Locke’s initial voluntary choice to a choice on an ongoing basis. Unsurprisingly, it was precisely the American Revolution that challenged the principle of perpetual allegiance. This was not only caused by political problems that the Revolution brought about,¹³⁸ but it was also the result of the very ideals that inspired the Revolution.¹³⁹

¹³⁴ Philpott (1997), p. 19.

¹³⁵ Hindess (1998), p. 65.

¹³⁶ Blackstone (1865), p. 369.

¹³⁷ John Locke (1961), pp. 345-346.

¹³⁸ The doctrine of perpetual allegiance led eventually to war between Britain and America in 1812 as Britain had been stopping ships on the high seas to impress British born seamen, despite their claims of American citizenship. See Dowty (1987), p. 45.

¹³⁹ On the outbreak of the Revolution each inhabitant of America was given the choice whether he wanted to remain a British subject or become an American citizen. Plender (1972), p. 13.

As already mentioned, these Enlightenment ideals did not only challenge the foundation of the principle of allegiance, but they also changed its object. The idea that allegiance was owed to the kingdom instead of the King gained in importance, explainable by altering perceptions on the location of sovereignty. When sovereignty had passed from the King to the people, allegiance acquired a completely different meaning: it was replaced by the abstract notion of nationality, the bond expressing the fact of a person's belonging to a certain state.

*"La notion de nationalité, lien de droit public qui assujettit un individu à un Etat, a succédé à la vieille idée féodale d'allégeance, lien personnel unissant le souverain à son sujet."*¹⁴⁰

Nonetheless, even if the concept of nationality can be seen as the successor to the feudal notion of allegiance in the sense that they both unite the sovereign with its subjects, important distinctions between the two concepts make them otherwise disparate. Apart from changing ideas on the location and source of sovereignty, which altered perceptions of allegiance, the process of territorialisation led to a situation in which the individual's relation to the sovereign was factually determined by territory, and not longer by any personal attribute of the subject, as it had done in the feudal order. States were able to establish to a large degree exclusive control over their territories and the populations within it. The resulting internal sovereign claim corresponds with the state's external sovereignty in the Westphalian structure through which each territorial state was ascribed the exclusive government of the population within its territory. The concept of sovereignty, linking territory, political community and political power plays a fundamental role in the division of humanity into distinct national populations, with their own territories and states. The precise way in which the modern theory of sovereignty has merged these concepts together will be addressed below.

¹⁴⁰ Boulbes (1956), p. 16.

2.3.3. Popular sovereignty and the discovery of the nation: inconsistent universalism

The secularisation of political theory, combined with other, more practical circumstances, which resulted in the consolidation of exclusive territorial rule, led to perceptions of the state as a unified force, with supreme and exclusive authority over the population within a certain territory.¹⁴¹ The modern territorial state began to take shape, and with its emergence, identity became a clear matter of inside and outside:

“Legitimations of identity gave way to legitimations of difference, with difference here becoming a matter of absolute exclusions. The principle of identity embodied in Christian universalism was challenged by the principle of difference embodied in the emerging territorial state. This was perhaps not much more than a change in emphasis. But this change in emphasis had enormous repercussions. From then on, the principle of identity, the claim to universalism, was pursued within states.”¹⁴²

With the emergence of the territorial state, there came to be clear demarcations by which to differentiate, and those were not only territorial ones. The modern state, apart from claiming exclusive territorial jurisdiction, also asserts a specific national identity. Its borders are “inscribed both on maps and in the souls of citizens.”¹⁴³ Yet, it should be noted, the formation of the territorial state and the building of the nation were different, although convergent, processes.¹⁴⁴

How does nationalism – the idea that every nation should have its own state – relate to the Westphalian state system? Is nationalism, as some argue, solely the product of the struggle for state power: monarchs attempting to homogenise their populations in order to augment and facilitate their rule? Or, instead, is it only logical that pre-political communities – people related to each other by shared culture, language, and history – wish to choose their own sovereign?¹⁴⁵ In other words, do state and nation exist apart,

¹⁴¹ Plender (1972), p. 10.

¹⁴² Walker (1993), p. 117.

¹⁴³ Xenos (1996), p. 239.

¹⁴⁴ Habermas (1996), p. 283.

¹⁴⁵ Caporaso (2000), p. 3.

and is it possible to distinguish between the various collective bodies of human beings, which are called nations, on other grounds than common government¹⁴⁶

A different, although related, question is how nationalism and the political philosophy that accompanied the emergence of independent territorial states, relate to each other. At first sight they seem to contradict each other, for it is difficult to see how one can reconcile the universalistic ideals of eighteenth century enlightenment thinking – expressed in the theory of popular sovereignty – with the formation of exclusive political communities during that same era.

We will not find an answer to these questions in early liberal theory itself, for that failed to address the inconsistency between “universal man, which is its point of departure and the citizen or subject of a state, which is its point of arrival.”¹⁴⁷ For Hobbes the body politic is not a natural body, but it is created by men from the state of nature. Community does not pre-exist the body politic – indeed, we saw that in his theory, it is artificial to make a distinction between society and state: the idea of community is dependent on the notion of the sovereign power. But his theory leaves unanswered the question why particular communities exist instead of one universal community. This could be explained by the fact that Hobbes’ writings were occasioned by civil wars and internal chaos, and his Leviathan was a fiction to explain and justify the kind of political power that he deemed logically necessary in a given body politic as well as a practical necessity in his own country.

But also Locke fails to provide a satisfactory answer to the problem caused by territorial particularism in the face of universal humanity. While for Hobbes there is no community at all without the body politic, for Locke there exists a universal community of mankind in the state of nature, in which all men are free and equal: a moral statement flowing from natural law. We saw how Locke explained why men would want to make a contract with each other in order to opt out this state of nature but he does not clarify why this contract is not made between all members of the natural community of mankind instead of just between members of particular communities. Social contract theories failed to explain how, if pre-political humanity was one, anyone could be made sovereign if it were not with the universal consent of all humanity.¹⁴⁸

¹⁴⁶ Veit-Brause (1995), p. 63.

¹⁴⁷ Seth (1995), p. 44.

¹⁴⁸ Seth (1995), p. 48; and Linklater (1998), p. 105-106. Samuel Pufendorf was in this respect an exception among the early liberalists. According to him people have a natural right to create separate

Nevertheless, although nationalism and the theory of popular sovereignty – in fact, modern ideas concerning equality of mankind in general, seem to contradict each other, the two must somehow be connected. Nationalism is not some “primitive and tribal idea”, which survived despite modernity.¹⁴⁹ On the contrary, nationalism is modern, and wherever theories of popular sovereignty emerged, nationalism appeared. This tension at the heart of modernity cannot be explained by a simple cause but it is instead the result of the conflictive and ambiguous processes that led to the formation of the territorial state based on popular sovereignty.

The French Revolution and the radically new notion of citizenship to which it gave birth, illustrate these ambiguities very well. The revolution was inspired by the ideal of universal mankind, but the spreading of revolutionary ideals over Europe led to demands for national rights of people, not to claims concerning the universality of mankind.¹⁵⁰ If we look at the Declaration of the Rights of Man and Citizen, we see that it declares that the source of all sovereignty resides in the nation. Thus, all of a sudden, the concept of the people in the theory of popular sovereignty was defined as the nation. The struggle for control of state power was surely no longer a matter of Divine Right, but nor was it solely an issue of natural rights for the people: instead, it had shifted to the area of national identity.¹⁵¹ What had caused to the concept of the people to be translated in the notion of the nation?

Part of the answer to that question is to be found in the fact that political reformers inspired by enlightenment ideals were operating in a pre-existing territorial framework. They were rebelling against a monarch whose struggle for power had gradually led to the breakdown of the medieval Christian order and to the establishment of the territorial state. In this struggle, boundaries were gradually drawn,¹⁵² and attempts to homogenise populations were made, in order to secure loyalties. Extended periods of war, which had consolidated the territorial state during the sixteenth, seventeenth and

societies. for they need to associate only with those with whom they share special inclinations; where possible political boundaries should converge with an existing harmony of dispositions. See Linklater (1998), p. 51.

¹⁴⁹ Deudney (1996), p. 129. See also Seth (1995), p. 54; and Veit Brause (1995), p. 61.

¹⁵⁰ Kristeva (1991), p. 151.

¹⁵¹ Xenos (1996), p. 238.

¹⁵² Although it would take a long time before these boundaries actually hardened.

early eighteenth centuries, had sowed feelings of identity and patriotism.¹⁵³ All this had caused the Christian ideal of universal humankind to lose ground during the seventeenth century, and its revival in the eighteenth century did not take place in a vacuum, but in a certain political environment.

Thus, the ideals of popular sovereignty were elaborated upon in an emerging system of territoriality where political rule was defined by territory. They were unavoidably shaped by that very framework. If there had not been absolutist, centralised government on the scale that the territorial state provided, it is doubtful whether political philosophy would have developed as it did. But more importantly, territoriality was a fact by the time that ideas of popular sovereignty were brought into practice.

A brief look at France will illustrate the consequences of the fact that the political ideals had to be executed in the framework of the territorial state of which the boundaries had already been drawn before. Before the Revolution there was no other bond uniting Frenchmen with each other than their common allegiance to the monarch.¹⁵⁴ After the Revolution, governance became impersonal, based on abstract ideas of equality instead of based on the personal ties as it had always been. Two different processes were necessary in order to realise the ideal of equality. First, privilege and feudalism were abolished. Individual political equality, by the use of the concept of citizenship, was gradually realised, although important exceptions to this ideal did never disappear completely. Second, the different parts of the territorial entity that was France, formerly joined by personal chains of command that had been vertical, had to be integrated into the abstract idea of the body politic based on popular sovereignty.

A new idea was needed to imagine this new abstract idea of the body politic, governed by the people, just as a new political identity had to be devised to give expression to political equality. The nation became the all-compassing political entity that was the source of equality, and citizenship indicated membership in this political community. The people became the people by their transformation of subjects of the King to citizens of a nation. That a universalistic ethic came to be construed in the particularistic language of nation and national citizenship was caused by the fact that it

¹⁵³ Hough (2003), p. 8.

¹⁵⁴ Fitzsimmons (1993), p. 29

was not within a universal empire but within the territorial state that enlightenment ideals were politically translated.

We see the same mechanism at work in the concept of citizenship. In most accounts of citizenship, its rights and equality aspect is emphasised. However, it should not be overlooked that citizenship is not only a complex package of rights with which the free and equal individual is endowed, but that he is endowed with them precisely because of his membership in a certain polity. This aspect of citizenship has been called "the gatekeeper between humanity in general and communities of character."¹⁵⁵ The French Revolution merged the two aspects together, and in the same way as with regard to the concept of the nation, identity is thus constructed by "straddling the claims of the universal and the particular."¹⁵⁶

Also here, territoriality played a major role: the Treaties of Westphalia, long before modern ideas of equality became politically significant, firmly anchored the principle of sovereignty in 'international' relations, by establishing mutually independent territorial political units with supreme and exclusionary authority within their territories. The resulting division of 'humanity'¹⁵⁷ into distinct populations defined by territory was largely a fact at the time that the modern reformers brought their political ideals in practice.

So, it may be, as Julia Kristeva observes, regrettable to find the duality of man/citizen at the heart of the maximal demand for equality that the French Declaration of the Rights of Man and Citizen was.¹⁵⁸ However true this is in the light of later developments as we will see in Chapter 3, the drafters of the Declaration could not foresee the consequences which identification of the citizen with man could give rise to. Citizenship was intended to provide equality to all those subject to the power of the state, and the distinction between man and citizen in the eighteenth century did not pose the kind of problems that would arise in later times.¹⁵⁹

Practical circumstances, of which the organisation of political life on the basis of territoriality constitutes the most important, may explain the birth of a concept such as

¹⁵⁵ Kratochwil (1996), p. 182.

¹⁵⁶ Jarvis and Paolini (1995), p. 10.

¹⁵⁷ The term humanity is misleading in more than one sense in the context of modernity as the whole discourse was exclusively European.

¹⁵⁸ Kristeva (1991), p. 150.

¹⁵⁹ Ferrajoli (1996).

the nation, but they do not explain the importance that that concept subsequently acquired. Nationalism has proven to be a strong force. The romantic reaction against the enlightenment played a crucial role with regard to the importance that nationalism as an ideology gained in later times. But it has also been argued that it is liberal theory itself that makes the turn to nationalism possible, although at first sight this does not seem logical. For not only is there a tension between the universalistic ethic of early liberal theory and the particularistic attitude nationalism takes, but in addition it is difficult to see how the self-interested, rational individual on which theories of the modern state are based would want to fight and ultimately die for a political community called the nation.

In order to understand the appeal of nationalism we need to understand the very abstraction of the concept of popular sovereignty. The principle of order and legitimacy in pre-modern political entities, whether they were kingdoms, empires or city-states, was based on "inequality, difference and complementarity."¹⁶⁰ As already mentioned, in the medieval world all individuals had their own position, rights and duties, which unified them personally with the sovereign in an order instituted by God. The unity of the modern state is based on an opposite principle: individualism expressed in a contract based on equality. According to Arthur Melzer, this individualism and the concept of equality has led to the identification that is the root of all nationalisms.¹⁶¹

In addition, the spread of popular sovereignty, by introducing the abstract and intangible concept of the people, changed understandings of political community that are not self-evident.¹⁶² In the words of Bernard Yack, it has, on the one hand, led to the nationalisation of political community, exactly because liberal theory has no justification for the existence of territorial boundaries, boundaries that were a fact when liberal theory came about. As a consequence, it facilitates imaginations of a national community that is pre-political. Yack explains how on the other hand, theories of popular sovereignty have given rise to politicisation of national communities.¹⁶³ Sovereignty implies exclusionary control over territory, and popular sovereignty insists that this control be exercised by the people. The exclusiveness of territorial control in the concept of sovereignty in general, when applied to popular sovereignty in particular, means that there can only be one 'people' that controls a certain demarcated territory.

¹⁶⁰ Melzer (2000), pp. 126.

¹⁶¹ Melzer (2000), p. 125-126.

¹⁶² Yack (2001), p. 518

¹⁶³ Yack (2001), p. 523-530.

And although this concept of the people in liberal theory is certainly not a national community, the problem is, once again, that liberal theory does not show us how to define the concept of the people. Accordingly, it invites “assertions of national sovereignty by justifying the right of peoples to de-establish and reconstruct the authority of the state.”¹⁶⁴

I have argued in this Section that the interplay between territorialisation and liberal theory led to the formation of political identities that hold a large potential for political particularism. By the time that the Napoleonic Wars had swept over Europe, the abstract concepts of national citizenship, nation state and territoriality were established concepts in political thought. Independent sovereign territorial entities had become the building blocks for political life, their borders defined the identity of individuals, and their territorial integrity was seen as essential to prevent destruction and violence. Subsequent changes in the Westphalian system during the nineteenth and twentieth century were not so much caused by changes in its underlying premises, but more by alterations in emphasis, as we will see below.¹⁶⁵

The tension between the universal and the particular has remained at the heart of the modern state, and if anything it has become more acute in our present societies. Its implications for the way in which the contemporary discourse of sovereignty has distinguished the inside from the outside will be addressed in the next Section.

2.3.4. Nation and the territorially defined population as foundations of sovereignty

As the nineteenth century advanced, nationalism thus largely lost its early implications of individual freedom and rights. It was no longer about encouraging the integration of diverse populations and classes into one nation, based on the idea of an inclusive political community, as it had been for the French Revolutionaries. Instead, it became a tool for states’ exclusionist practices. The trend that accorded national identity, as a criterion by which to distinguish between “us” and “them”, unique importance was initiated by the reaction that took place against the Enlightenment. Romanticism placed emphasis on tradition, emotion and community. I already

¹⁶⁴ Yack (2001), p. 528.

¹⁶⁵ See Caporaso (2000), pp. 8-11.

discussed the thought of Rousseau with regard to the location and nature of sovereignty. The *volonté générale* is, as we saw, not a construct based on rationality and self-interest, but it is something that is inherent in the concept of community. The cosmopolitanism of the Enlightenment, according to Rousseau, was an empty promise, and ties that resulted from a common feeling of belonging were infinitely more important than abstract ideas of universal mankind. Hence, he warns of cosmopolitans “who seek far off in their books duties which they fail to accomplish nearby.”¹⁶⁶ For Rousseau, man becomes human by his membership in a community: “We begin properly to become men only after we have become citizens.”¹⁶⁷ Community in Rousseau’s sense is not necessarily the nation, but it is not difficult to see how his thoughts could be applied to the newly emerging idea of the nation, which was exactly what subsequent thinkers, such as Hegel (1770-1831) would do.

In Hegel’s philosophy there is no distinction between community, state and nation. The significant unit is neither the individual, nor just any group of individuals, but it is the nation. If for Rousseau sovereignty is expressed in the general will, for Hegel state sovereignty is the fundamental expression of the national will. If, up until contemporary times, nationality is the primary political identity, leaving all other loyalties and ties far behind, that trend was started by Hegel, by whom the state is continually represented as standing for the highest possible ethical value.¹⁶⁸ Increasing nationalism noticeably changed the role of the state: just as in Hegel’s philosophy the state became identified with the nation.

In addition, nationalism reinforced the “sovereign territorial ideal”.¹⁶⁹ By the end of the nineteenth century, sovereignty, territory and the identity of the political community had become inextricably linked. Cultural and “ethnic” homogeneity in a state was something to be aspired. It was nationalism that, if not exactly gave birth to, at least nourished “the intimate relationship between identities and borders”¹⁷⁰. People were bound to each other and their territory by virtue of their nationality.

In the period between the two world wars, national identity had become the highest political priority; states generally did not recognise any other identity or loyalty.

¹⁶⁶ Kristeva (1991), p. 143.

¹⁶⁷ Sabine (1941), p. 582.

¹⁶⁸ Sabine (1941), p. 639.

¹⁶⁹ Murphy (1996), p. 97.

¹⁷⁰ Lapid (2001), p. 10.

The national state had a monopoly control on violence, it was the highest court of appeal and it had an exclusive right of representation in the international sphere.¹⁷¹ The structural importance of clearly demarcated and inviolable territory, ruled by the nation as a discrete social unit, was strengthened by the Treaty of Versailles. People were defined by virtue of to which state they belonged. Political community became increasingly closed in upon itself, and more and more hostile to outsiders, due to nationalistic forces and new state structures that intensified the totalising project.¹⁷² These outsiders were not only people belonging to other states, but also those belying a different identity within the state.

It was however, not only nationalism that changed conceptions of the relationship between people, territory and state. After the First World War, many regimes proclaimed a collectivist ethic. Instead of the ethnic or cultural homogeneity the nationalists strive after, collectivism aims at social homogeneity. Collectivism maintains that the will of the individual coincides with the will of the state – the interests of the individual are identical to the interests of the state. In practice, this meant that the aspirations of the individual were completely subordinated to those of the state.

Although the Second World War made clear the dangers of unbridled nationalism, nationalism as an acceptable political ideology was not discarded, as was shown by decolonisation and the transformation of former USSR republics into nation states. The tendency to fuse the meanings of state and nation is evident up until today, and the perception of the territorial state as a “container of society”¹⁷³ is a persistent one. The territorial state is seen as the proper unit for organising political life, and “the categories through which we have attempted to pose questions about the political are precisely those that have been constructed in relation to the state.”¹⁷⁴ Thus, the exercise of citizenship has become inseparable from belonging to the nation: a very specific kind of membership in a territorially defined political community.¹⁷⁵ Territorial boundaries are to be guarded jealously and strictly, especially with regard to the movement of persons, because the territorially fixed population has become one of the foundations of the concept of sovereignty: “when the rules for differentiating between the inside and

¹⁷¹ Carr (1946), p. 228.

¹⁷² Linklater (1998), p. 4.

¹⁷³ Agnew and Corbridge (1995), pp. 82-92. See also Murphy (1996), p. 103; and Tully (1997), p. 187.

¹⁷⁴ Jarvis and Paolini (1995), p. 7.

¹⁷⁵ See Balibar (1988), p. 726; and Caporaso (2000), p. 22.

the outside become blurred and ambiguous, the foundations of sovereignty become shaky.”¹⁷⁶

Of course, in some areas there are exceptions to this fundamental place of the territorial nation state in politics, most notably the case in the European Union. Within the Union, Member States are limited in their use of territorial borders to maintain a strict divide between inside and outside. However, with regard to the Union’s external frontiers, no such movement away from a traditional conception of sovereignty can be discerned. The external frontiers of The EU have the long-established meaning that territorial boundaries have in distinguishing between “us” and “them”. They may even have reinforced the importance of such distinctions.¹⁷⁷ The fact that the EU in this sense is not as novel as some would like us to believe is perhaps illustrated best by the denial of EU citizenship for long term residents of the EU. Nationality, territory and community become increasingly decoupled for insiders, but for outsiders their linkage remains as strong as ever.

The successful elimination of internal frontiers will of course accentuate in a symbolic way (and in a very real sense too) the external frontiers of the Community [...] In one way, the more that these external borders are accentuated, the greater the sense of internal solidarity [...] in the very concept of European citizenship a distinction is created between the insider and the outsider that tugs at their common humanity.¹⁷⁸

2.4. CONCLUSIONS: BORDERS, VIOLENCE, AND SOVEREIGNTY’S CLAIMS

In this Chapter we have seen how territorialisation, “a historically specific, contradictory, and conflictual process rather than a pre-given, fixed, or natural condition”¹⁷⁹, has led to the current perception of sovereignty as a self-evident and natural abstraction that links state power, people and territory. Sovereignty, understood as the state’s claim to ultimate political authority within its territory is based on two

¹⁷⁶ Doty (1996), p. 122.

¹⁷⁷ See Balibar (2002); and Kostakopoulou and Thomas (2004), p. 6.

¹⁷⁸ Weiler (1992), pp. 65, 68.

¹⁷⁹ Brenner (1999), p. 12.

pillars: the state's asserted monopoly on the legitimate use of violence and its claim to determine the inside from the outside.

I have attempted to show that the question of the legitimacy of political power cannot be seen separate from the modern state's claim to determine its boundaries. On the one hand, the process of territorialisation facilitated the emergence of the abstract notion of sovereignty as legitimation of ultimate power within the body politic. On the other hand, the way in which the theory of popular sovereignty subsequently legitimised ultimate political authority within the body politic has in turn led to an exclusive ideal of political community. In addition, the territorial aspect of the modern state's claim to determine its boundaries cannot be understood properly when we fail to take into account the Westphalian structure in which each and every state necessarily operates.

However, the historical and factual link between all these aspects of sovereignty is often ignored, which in turn leads to a reification of territoriality as an organising principle for politics.¹⁸⁰ We will see later in this study that the result is the near immunisation of sovereignty's territorial frame against forces of political and legal correction. While the content of sovereignty has always been open to debate, contention and change from various perspectives over time, its territorial form has acquired a status of neutrality and innocence. Such self-evidence and uncritical acceptance of territoriality obscures the transformative possibilities in the concept of sovereignty as a whole, and the opportunities for change that may emerge from the relation between our thinking about "ideals and human interests and thinking about institutions".¹⁸¹ In order to make this argument at a later stage, this conclusion will first provide some further insights in the relation between the legitimacy of violence on the one hand, and the way in which the territorial state has distinguished between inside and outside on the other hand. After that, the interrelatedness of sovereignty's aspects in the specific context of international migration is briefly touched upon.

Charles Tilly aptly expresses the link between violence and the state, when he writes that the state made war while war made the state.¹⁸² Tilly refers to factual circumstances of armed conflict that caused the territorial state to become the dominant form of political organisation. However, we have also seen how the religious wars of

¹⁸⁰ Agnew and Corbridge (1995), p. 82. See also Walker (1993); and Anderson and Bigo (2002), p. 17.

¹⁸¹ Unger (1996), pp. 3-7.

¹⁸² Tilly (1992).

the seventeenth century gave a strong impulse to the theory of sovereignty as the foundation for ultimate political authority in the body politic. The notion of sovereignty was partly formulated as an answer to the violence that ravaged Europe. An essential feature of the consolidation of the European state system was that the state's monopoly on the use of force was vigorously institutionalised.¹⁸³ With the advent of popular sovereignty, one of the tasks of the modern state was to provide security, and one of the reasons why the modern state was successful in establishing its monopoly on the use of violence, was its very ability to provide citizens with security.

From then on, individuals had no longer the right to use force between each other. We have seen that most theorists on sovereignty were primarily concerned with its internal claims, but in international relations the concept came to bear upon the relations between states as well. Also the external aspect of exclusive territorial sovereignty, for which the Treaties of Westphalia provided the first step, was perceived as a necessity in order to prevent recurrence of the violence that had devastated Europe during the Thirty Years War.

The way in which the modern state distinguished, from then onwards, between inside and outside, by use of territorial boundaries and later by the assumption of a "necessary alignment between territory and identity, state and nation,"¹⁸⁴ influenced the question of legitimate violence profoundly. In fact, through the process of territorialisation, which was initiated by the monarchical consolidation of territorial rule in the fifteenth century, a new structure by which to distinguish between legitimate and illegitimate violence could materialise.

Before the modern state with its rigid link between clearly demarcated territory and political power came into existence, it was difficult to distinguish between war and mere crime within the widespread violence that Europe continually suffered. The absence of a clear mechanism to determine "us" from "them", due to the overlap between identity-based boundaries, made it impossible to make a distinction between those forms of violence that were legitimate and those that were not.¹⁸⁵ It was only when the territorial state had taken shape that distinctions of this kind could be made within the concept of violence. War was legitimate if it was waged by the authority that

¹⁸³ Hough (2003), p. 7.

¹⁸⁴ Campbell (1996), p. 171.

¹⁸⁵ Mansbach and Wilmer (2001), p. 56.

had the right of waging it: the state.¹⁸⁶ War was thus distinguished from mere crime by defining it as something that only sovereign states engaged in.¹⁸⁷ In nineteenth century conceptions of international law, the right of a state to wage war in order to settle disputes with other states was regarded as a fundamental aspect of that state's sovereignty.¹⁸⁸

These issues will receive further attention in the next Chapter, but for now it is important to see how the very process of territorialisation has shaped the norms delimiting legitimate from illegitimate violence, and thus cannot be seen separate from the exercise of political authority. In addition, the Peace of Westphalia made a sharp distinction possible between internal and external violences. Internal violence was regulated by the sovereign state alone, consistent with the idea of sovereignty as supreme legitimate authority over the population within a certain territory. Violence between states, on the other hand, was regulated by the articulation of international norms, which were again based on strong territorial assumptions as will be dealt with extensively in the next Chapter.

I have already mentioned that the lack of attention for the relation between the exercise of state power through political institutions and the clear spatial demarcation of the territory on which this power is exercised has led to a reification of the principle of territoriality.¹⁸⁹ If we look at early modern Europe, we see that in definitions of political authority, personal power relations preceded power that found its basis in territory. Nonetheless, at present, the linkage of political power to clearly demarcated territory is seen a natural way of organising the global political system and it has led to a framework where the legitimacy of violence is largely dependent on territorial demarcations. The result thereof is that the territorial form that sovereignty has assumed over the course of history is often perceived as separate from its jurisdictional content.

However, we have seen in this Chapter that such a distinction between content and form of sovereignty fails to do justice to reality. The territorial frame in which the modern state operates and the jurisdictional claims over persons that it makes within this frame do not make sense if analysed in isolation from each other. Indeed, the territorial basis of the state intends to "fix and enforce boundaries of identity so that the

¹⁸⁶ Rifaat (1979), p. 12.

¹⁸⁷ Van Creveld, (1991), p. 41.

¹⁸⁸ Brand (2002), p. 287; and Steiner and Alston (2000), p. 114.

¹⁸⁹ Agnew and Corbridge (1995), p. 82.

distinction between inside and outside [becomes] defensible.”¹⁹⁰ These boundaries of identity have everything to do with the unity of the body politic and the definition of the political community. The state uses both form and content of sovereignty to protect and maintain such unity and community. The vague and overlapping identities of medieval Europe gave rise violence, chaos and destruction, but we will see later in this study that the way in which the modern state perceives, construes, and protects political community gives rise to its own sorts of violence.

National responses to international migration exemplify that the Westphalian distinction between the state’s internal and external sovereign claims is blurred and similarly they illustrate the interrelatedness of the territorial frame and the jurisdictional content of sovereign power. The movement of people across borders engages the external sovereign claims of national states in a Westphalian structure that divides humanity in distinct and separate entities. At the same time, international migration engages the internal sovereign claims of the national state in a policy area where its identity-based boundaries and its territorial borders converge. A state who regards immigration as a threat, attempts to guard its territorial boundaries, *inter alia* with the use of military patrols to intercept illegal migrants at the border, and military police to carry out expulsions. Simultaneously, it establishes controls within society, ranging from obligatory language courses for foreigners to checks on ‘bogus’ marriages, to ensure that its identity remains unthreatened. Immigration is thus perceived as both a “resistant element to a secure identity on the inside” as well as a territorial “threat identified and located on the outside of the state through a discourse of danger that contains elements applicable to both.”¹⁹¹

In this study, I will argue that the doctrinal separation between the jurisdictional content and the territorial frame within the notion of sovereignty, resulting from the reification of territoriality as a neutral framework in which the abstract notion of sovereignty operates, has led to a structural blindness for the involvement of personal interests whenever the state bases its claims on the sovereignty’s territorial frame.

It is evident that such blindness is exacerbated whenever the very individuals who are affected by the state’s sovereign power are rendered invisible, either because they are far away and unknown or alternatively because they are very different from

¹⁹⁰ Mansbach and Wilmer (2001), p. 56. See also Newman (2001), p. 139 and 145.

¹⁹¹ Campbell (1996), p. 169. See also Balibar (1998), p. 220.

“us”. Indeed, we will see that the tension between the universal and the particular at the heart of the modern state is made more acute by a strict separation between form and content of sovereignty. The distinction between the state’s territorial framework and its resulting spatial powers on the one hand, and its jurisdiction over people within a certain territory on the other hand obscures the fact that constraints on individual behaviour and freedom are always motivated on account of the notion of political community and the unity of the body politic. Just as its jurisdictional content, the territorial frame of sovereignty has enormous repercussions for individual behaviour and freedom, as we will see in Chapters 4 and 5 that deal with international movement of individuals. However, before turning to the way in which both the external and internal sovereign claims of the national state influence questions of international migration, the next Chapter addresses constraints on the exercise of political power by the sovereign state, most of which are motivated precisely by the concept of individual freedom.

Chapter 3 Limits on sovereign power

3.1. INTRODUCTION

In the previous Chapter, I have investigated how the concept of sovereignty legitimised the state's exercise of political power within its territory. In the modern state, political power is expressed as a legitimate claim to a monopoly of violence, and coercion is a defining element in the construction of state and sovereignty.¹⁹² Due to the way in which it determined boundaries, and later also because it turned into popular sovereignty, sovereignty became a legitimate site of violence. However, that is not to say that it is an unproblematic site of violence. As a response to the growing power of the modern state and its particular notion of sovereignty, ways have been devised to circumscribe the power of the state to resort to its means of coercion. This has been done because, even though the modern notion of sovereignty attempts to attain congruence between ruler and ruled, it has not been able to resolve the disparity between people and state, a disparity that results from the very abstractness of the modern notion of sovereignty. Many of the limits on the power of the modern state result directly from this distinction between state and society: as it is the sovereign state that is in possession of the legitimate means of coercion, certain safeguards for the people are necessary. These safeguards, first embodied in so-called constitutionalism and the rule of law and the discourse of citizenship, and later also in the international human rights regime, will be the subject of this Chapter.

In this Chapter, I will argue that in the legal discourses that aim to limit state violence, we can discern both universality and particularity. The modern tension between the universal and the particular that we encounter in the very concept of the territorial nation state has not been extinguished in the instruments developed to protect against the sovereign power of that specific form of political organisation. In some of these discourses the balance tends to fall more towards an ideal of universality, whereas

¹⁹² Bobbio (1989), p. 75.

in others political particularism is explicitly emphasised. I will argue that the reification of the territorial form of sovereignty poses limits to the universality of all these discourses, including, and with particular emphasis on, the modern version of an international rule of law.

We will see in later Chapters of this study that the practice of immigration detention provides an outstanding example of the implications on the life of the individual of such immunisation of sovereignty's territoriality against domestic and international forms of legal correction. Immigration law and policy is one of the areas in which the tension between the universal and the particular is bound to come out most distinctly, as it is a field that is defined by the very distinction between "us" and "them".

In addition, as we saw in the concluding remarks of last Chapter, the field of immigration shows distinctly that the territorial form of sovereignty and its jurisdictional claims are intertwined, and that the state bases its claims on both aspects of sovereignty in order to preserve the unity of the state and protect its political community. Thus, in this Chapter, the tension between the universal and the particular as well as the conceptual division within sovereignty between its territorial form and its content will be recurrent themes in my investigation of the various instruments that have over time sought to protect the individual against the power of the modern state.

This Chapter is structured as follows. First, I address a general theory of constitutionalism and the rule of law in Section 3.2. Many of constitutionalism's fundamental guarantees have become institutionalised in the concept of citizenship, which will be dealt with in Section 3.3., where we will see that the process of territorialisation caused a political particularistic reality to triumph over citizenship's original universalistic ideals. After that, in Section 3.4., I investigate the way in which international law regulates state violence. In this Section, not only the protection of the individual against the sovereign power of the modern state will be addressed, but also the regulation of inter-state violence receives attention in order to understand territoriality's impact on international law as a discipline. Particular emphasis will be on the emergence of modern human rights law, as this relatively recent area of law emerged as an explicit attempt to overcome the traditional political particularism in the field of individual rights.

Section 3.5. explores the implications of modern human rights law for sovereignty's claim to distinguish the inside from the outside, a claim that is traditionally based, as we have seen in the previous Chapter, on territory and identity. In

Section 3.6., I will conclude that the notion of territoriality impedes the realisation of the self-proclaimed universality of human rights. In fact, just as they did with regard to citizenship, the territorial borders of the modern state have principally kept their role in delimiting the universality of fundamental rights.

3.2. CONSTITUTIONALISM AND THE RULE OF LAW

“In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed: and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on government: but experience has taught mankind the necessity of auxiliary protections.”¹⁹³

3.2.1. The theory and practice of the limits on political power

At no point in history has sovereignty meant absolute rule without accountability, and arbitrary use of power by the sovereign has never gone unchallenged. Certainly, it would have seemed strange to Bodin that the sovereign could be bound by law – for him that would have meant that the sovereign is bound by his own will, something he found inconceivable.¹⁹⁴ Nonetheless, we have seen that also in his theory, sovereign power is subject to limits, albeit not embodied by any human law, but incorporated in the law of God and nature. Even Hobbes’ sovereign is not absolute once it is appreciated that his power is only absolute if it is effective: he needs to provide his subjects with security: hence his monopoly on the means of violence.

We have seen that in the modern state, the foundation for the legitimacy of political power is provided by the idea of popular sovereignty. Popular sovereignty itself is based on ideals of individual liberty and equality. Consequently, not only the foundation, but also the exercise of political power has to be based on the same principles of liberty and equality. If government is necessary to guarantee each individual’s natural rights, it follows that, apart from an obligation to protect these rights against violations by other individuals, the state is obliged to protect these

¹⁹³ Madison, Hamilton and Jay (1987), p. 319-320.

¹⁹⁴ Allen (1967), p. 50.

principles also against the state itself. In order to render such protection effective, it is necessary to limit, as well as control, the powers of the state. In the modern state, this is achieved through constitutionalism's fundamental principles of limited government (governments only exist to serve specified ends) and the rule of law (they should only govern according to specific rules)¹⁹⁵.

Already before the modern state came into existence, there were theories about the limits to political power. However, compared with traditional constitutional doctrines, the constitutionalism of the modern state, based on popular sovereignty and each citizen's equality, is better capable of imposing effective and consistent limits on political power.¹⁹⁶ In modern constitutionalism, individual rights determine the limits, scope, and aim of governmental power, and the prohibition on the arbitrary use of power is shaped by the idea of equality. Modern constitutionalism poses the issue of limits to political power in terms of the relation between power and law.¹⁹⁷ By stipulating that the state itself is bound by the law – requiring that its powers be exercised in accordance with the law – constitutionalism and the doctrine of the rule of law intend to prevent the arbitrary use of power by the state.

3.2.2. The rule of law through institutional design and formal limits on government

Constitutionalism, as the theory and practice of the limits to political power, “finds its fullest expression in the constitution that establishes not just formal but also material limits to political power.”¹⁹⁸ As mentioned, modern constitutional ideals of limited government find their origin in the enlightenment era. In most states, their consolidation in law generally took place during the nineteenth century.¹⁹⁹ I will first pay attention to the formal limits which the rule of law places on the power of the modern state, after which I will investigate its material limits, embodied in theories of fundamental rights.

¹⁹⁵ Schochet (1979), p. 1. In the following paragraphs I will use the terms rule of law and constitutionalism interchangeably.

¹⁹⁶ Ibid. p. 3-4.

¹⁹⁷ See Bobbio (1989), p. 89.

¹⁹⁸ Ibid. p. 97.

¹⁹⁹ Ommeren (2003), p. 11; and Zoethout (2003), p. 69.

First of all, the rule of law prevents arbitrary use of state power through its requirement that the exercise of power by the state is in accordance with, and finds its formal basis in, the law. Ultimately, the legal basis for political power is to be found in the constitution, which “constitutes” the various branches of government, their tasks and the limits of their powers.²⁰⁰ With regard to the principle that power should solely be exercised in accordance with the law, the principle of equality compels these laws to consist of general rules, equally applicable to every citizen.

Secondly, inhibition of arbitrary exercise of state power is also achieved through rules of institutional design. John Locke argued in his *Second Treatise* that, as the supreme power of the people had to be delegated, it would be best for political power to be divided amongst several independent spheres of right in order to prevent abuse. This line of thought was developed further by Montesquieu (1689-1755), whose name is mostly associated with the idea of separation of powers, an idea he alleged to have discovered by a study of the English constitution.²⁰¹ Montesquieu was afraid that the despotism of the French monarchy, which in his eyes equalled law with the sovereign’s will, had so damaged the traditional constitution of France that freedom had become forever impossible.²⁰² For him, personal liberty was the most important value, and would be secured best if the legislative, executive and judiciary powers of the state were to be divided amongst different branches of government, which would then be able to control each other.

The idea of separation of powers was not a new one, but Montesquieu made it into a coherent legal system of checks and balances between the different parts of the constitution,²⁰³ a legal doctrine that is still a central feature of the contemporary Rechtsstaat. Each power is accorded its own status and tasks, but all powers are to a certain extent dependent on each other, which leads to a system of checks and balances in which the different branches can exercise a degree of control on each other. Different legal systems have differing systems of checks and balances, but essential to the doctrine of separation of powers is that restrictions on individual freedom can ultimately

²⁰⁰ Zoethout (2003), p. 60.

²⁰¹ Although at the time that Montesquieu was studying the English constitution the Civil Wars had destroyed the remnants of medieval mixed government and the Revolution in 1688 had settled Parliamentary supremacy. See Sabine (1941), p. 560.

²⁰² Sabine (1941), p. 552.

²⁰³ Sabine (1941), p. 558. See also Bobbio (1989), p. 96.

only be enacted by the legislature, that actions of the executive are bound by the rules which are laid down by the legislative, and the existence of an independent judiciary that ensures that the executive acts within the limits that are set by the legislature.

Judicial review of the exercise of political power is thus inherent to the idea of the separation of powers. However, as an independent judiciary takes such a central place in the theory of constitutionalism,²⁰⁴ I address judicial review by independent courts separately, as a third requirement of the Rechtsstaat. An independent judiciary is indispensable to ensure that the other requirements of the rule of law are actually put into practice. First, an independent judiciary is in the best position to make sure that action by the state is in accordance with the law, and in conformity with its legal basis.

Furthermore, in ensuring the fair application of the law and its strict enforcement, an independent judiciary guarantees the principle of equality. Most importantly of all, individual rights, which, as we will see below, pose material limits to the exercise of power, are only capable of bringing about such limits when they are effective. Individuals need to be able to secure the protection of their fundamental rights, which should occur at an altogether different plane as at which these rights were infringed upon or restricted. Fundamental rights protection is unthinkable without the existence of an independent judiciary. In paragraph 3.2.4., I will address the manner in which they interact in further detail.

3.2.3. Individual rights as material limits to political power

The rule of law is not confined to matters of procedure or questions of institutional design. Individual liberties are intrinsic to the idea of the rule of law as precisely principles relating to each man's freedom and equality constitute the basis for the idea of limited government. The way in which the constitution establishes material limits to political power is "well represented by the barrier which fundamental rights – once recognised and legally protected – raise against the claims and presumptions of the holder of sovereign power to regulate every action of individuals or groups."²⁰⁵

²⁰⁴ Gordon (1999), p. 43.

²⁰⁵ Bobbio (1989), p. 97.

We already saw that the idea of inalienable rights was the ratio behind social contract theories. We find a first impulse towards such an idea of rights in the Christian tradition, although in the medieval feudal order, individual rights were not perceived as such, but they consisted of privileges, split off feudal authority. Instead of a conceptual foundation that spoke of rights inherent in men because they were men, those rights had a contractual character.²⁰⁶ A famous example of such contractual guaranteeing of rights is the Magna Carta of 1215.

The modern idea of fundamental rights developed in the seventeenth century. We have seen that in the enlightenment tradition, natural law was seen as a claim to inalienable rights inherent in each individual.²⁰⁷ Fundamental rights are accorded to man by virtue of his humanity and not because of his particular position in the body politic. This new conception of rights finds a clear expression in the Bill of Rights of the American States and the French Revolution's Declaration of the Rights of Man and the Citizen. This notion of fundamental rights, a guarantee for the individual's freedom independently from and antecedently of the existence any political community, constitutes constitutionalism's material limits on state power. Individual rights in this sense are called classical fundamental rights, or civil rights, the most important of which are the right to life, liberty, physical integrity, and equality, and diverse freedoms such as freedom of thought, religion, and expression.

Later developments with regard to the regulation of governmental power and the tasks of the modern state, led to the articulation of additional kinds of fundamental rights: political rights and social or economic rights. Political rights, such as the right to vote and to fulfil a public office, aim to ensure equal participation for every citizen in the body politic. Their purpose is to translate the ideal of popular sovereignty into political practice. The emergence of economic and social rights is directly related to changing conceptions at the beginning of the twentieth century about the role which the modern state should play in the life of its citizens. Social demands were reframed in the language of rights, when governments became obliged to promote actively the well-being of their citizens. In the modern language of individual rights, civil, political and social rights are all accorded the status of fundamental rights. In political practice, the

²⁰⁶ Shafir (2004), p. 13; and Burkens (1989), p. 3.

²⁰⁷ Pot and Donner (1995), p. 24; Sabine (1941), p. 525.

three groups of rights and their exercise by the individual are related, most clearly illustrated in the concept of citizenship.

3.2.4. Judicial review, fundamental rights and the limits of the rule of law

Rules of institutional design are closely related to the protection of classical rights, which aim to establish an area in which the individual is free from interference from the state. In some instances, it may not be possible or desirable that individuals exercise the full scope of their fundamental rights. One example is the case in which the fundamental rights of two individuals conflict with each other; another example is the case in which the state's task of providing security for all its subjects clashes with individuals' unrestricted exercise of their fundamental rights. In these cases, the exercise of fundamental rights can be restricted, provided that the essence of the right in question remains intact.

Interferences by the executive with the individual's fundamental rights should be based on restrictions that are endorsed by the legislature. When his rights are interfered with, the individual has the right to have the interference reviewed by an independent judiciary. This accountability needs to be real, which means that, when assessing whether an infringement of a fundamental right has occurred, judges should not merely examine whether the executive has acted in accordance with the rules laid down by the legislature, but in addition, they should assess whether the interference itself is not in breach with the core of the right in question. Thus, also fundamental procedural rights and issues of fairness are associated with the rule of law.²⁰⁸

The rule of law thwarts assertions of sovereignty as power without restraint. Especially in the field of the rights of the individual, political power is clearly circumscribed, according to rules that simultaneously set formal and material limits to its exercise. Nonetheless, there are situations in which the normal constitutional guarantees of the state do not apply fully. In these situations, we can catch a glimpse of sovereignty in its pure form as absolute power, both with regard to its territorial form as with regard to its content as power over people.

²⁰⁸ Dauvergne (2004), p. 593.

Contemporary migration policy is one of the fields in which we are most likely to perceive pure sovereignty, associated as it is with the essence of the nation. Chapters 4 and 5 will deal with the regulation of international movement, and Chapters 6 and 7 investigate restrictions on the right to liberty in the specific context of immigration law and policy. Those Chapters will show that in the field of immigration policy, extensive executive discretion and a traditional deference of the judiciary with regard to actions of the executive exist. Thus, with regard to the rule of law, the relevance of the distinction between insiders and outsiders is not only that outsiders generally enjoy a lesser degree of access to judicial protection,²⁰⁹ as the Section on citizenship below will describe. We will see that particularity of the rule of law goes further than that. Its territorial assumptions are illustrated with the fact that in the field of migration we encounter “power which does not conform to judicial or legislative modes of exercise.”²¹⁰ The exact way in which migration law and policy may engage the exposed core of state power, where arbitrary exercise of political power is most likely to manifest itself, will be addressed in detail later in this study.

3.3. CITIZENSHIP, INDIVIDUAL RIGHTS AND TERRITORY

The rule of law and constitutionalism are products of specific historical processes, which, from the seventeenth century onwards, took place within sovereign states defined by territoriality. With regard to rules regulating institutional design, their embeddedness in the territorial state is logical and does not bring about serious inconsistencies. However, concerning individual rights, the consequences of their “particular historical institutionalisation in sovereign states”²¹¹ may turn out to be in contradiction with their underlying ideals of equality and dignity of universal humankind. The institutionalisation of individual rights in the state has mainly occurred in the concept of citizenship, a concept that impinges significantly on the life outside constitutional affairs.²¹²

²⁰⁹ Dcll’Olio (2005), p. 25.

²¹⁰ Dauvergne (2004), p. 592.

²¹¹ Huysmans (2003), with regard to democratic forms of politics.

²¹² Tilly (1999), p. 253.

My account of modern citizenship is divided in three Sections. Section 3.3.1. will deal with the factual circumstances that gave birth to modern citizenship. In addition, it will show that the very tension at the heart of the modern state between ideals based on a universal humankind and a political particularistic reality – a tension that is, as we have seen in the previous Chapter, largely the result of territorialisation – is also present in the concept of citizenship. Section 3.3.2. addresses the resulting implications of this tension for the rights of the individual. We will see that universal rights have been actualised mostly within national states, and that national citizenship became a necessary condition for access to those rights that one supposedly has by virtue of belonging to universal humankind. Subsequently, in Section 3.3.3, I will focus on citizenship's role in a global structure of sovereign states based on clearly demarcated territory, in order to argue that outsiders are not only denied access to fundamental rights on account of the internal sovereign claims of the national state, but that discrimination against them is also a structural aspect of the Westphalian state system.

3.3.1. Citizenship as an apparent paradox

The idea of citizenship itself is much older than the existence of the territorial state. Since ancient Athens, theories of citizenship have rested on some idea of political participation.²¹³ However, citizenship as a status which accords people, at least formally, a uniform collection of rights and duties, by virtue of their membership of the polity is a modern idea, which developed in the framework of the emerging nation state. In all accounts of citizenship as it emerged after the French Revolution, two notions are emphasised. The first represents membership of the polity, which, as marker of identity, creates a clear boundary between inside and outside, and the second connotes a legal status, endowing the individual with a set of rights and responsibilities. Most writers about citizenship have depicted these two elements of citizenship as conflicting with each other, the tension which exists between them making their synthesis in a single

²¹³ Rubenstein (2003), p. 160.

concept seem a paradox. Partly this tension is explained by the fact that modern citizenship fused two ways of thinking about liberty.²¹⁴

The first, dating much further back than the second, relates to the extent in which the individual can partake in political affairs. Citizenship of ancient Greece was based on such a conception of liberty. The idea of political participation in the modern state is determined by the collective right to exercise popular sovereignty.²¹⁵ The second way of thinking about liberty is a modern one, and its appearance on the political state dates from the enlightenment era. Instead of a political concept, it is a legal notion, which is based on equality and characterised by the rights of the individual.²¹⁶

When these two ways of thinking about liberty are merged in the single concept of citizenship a certain tension will surface. For to lay claim to a right based on universal equality of mankind one does not need any further qualifying conditions than to be human, but in order to claim a part in collective decision making about the future of the polity, one has to form, by definition, part of that collective. Precisely this is what Pietro Costa refers to when he writes that citizenship is a seemingly successful synthesis between two very different traditions, the first being the one based on the unbreakable ties between individual and the body politic and the second embodied by the natural law paradigm in which the individual is the symbol of sovereignty and the immediate titleholder of rights.²¹⁷

However, there is more to it. Ties between the individual and the body politic are not stable and are not necessarily unbreakable. Furthermore, they need not be based on criteria that are exclusive. But modern citizenship developed simultaneously with the modern state. Inevitably, then, it is influenced by the ambiguities inherent in the modern state. Indeed, citizenship's innate tension is the same as that which we find in the territorial nation-state, as was described in Chapter 2. There it was portrayed as the very tension that lies at the heart of modernity, between ideals concerning the universality of mankind and particularistic claims of distinct communities, *in casu* distinguished by varying national origins, however understood. Nationalism determined which ties between people and state are politically relevant, and as such, by putting citizenship on

²¹⁴ Lange (1995).

²¹⁵ *Ibid.* p. 97.

²¹⁶ *Ibid.* p. 98.

²¹⁷ Costa (2002), p. 218-219.

a par with nationality, it has magnified the potential for conflict between the different idea's that underlie citizenship.

More than in contemporary nationalism per se, which by definition has become a particularistic claim, the paradox between universal humanity and political particularity is still deeply ingrained in the discourse of citizenship. In the words of Andrew Linklater, much of the moral capital that has accumulated in the course of resistance to the growth of state power is embodied in the concept of citizenship.²¹⁸ But at the same time, by its equation with nationality, the same concept of citizenship is employed to defend a certain distinction between the inside and the outside.

“The citizenship project is about the expansion of equality among citizens. But as equality is based upon membership, citizenship status forms the basis of an exclusive politics and identity.”²¹⁹

Chapter 2 made clear how the universal ideals inspired by the French Revolution developed into particularistic realities. I will briefly reiterate, with specific regard to citizenship, some of the issues that were touched upon there. As the Revolutionaries wished to abolish all titles of distinction that were current during the old regime, the concept of equality of all members of the body politic required expression in the new notion of citizenship. Before the French Revolution, certain parts of Europe had known urban citizenship, providing those who were fortunate enough to possess it with autonomy, control of guild institutions and even social welfare entitlements at the local level.²²⁰ However, after the Revolution a new kind of citizenship spread over Europe. Particular rights and duties based on a notion of universal humankind found their place in a political discourse that would keep its relevance in the future as it could be adapted to fit all kinds of struggles for equality on a national scale. Fitzsimmons captures how the new idea of equality related to the concept of the nation, when he writes that “membership in the nation, rather than privilege mediated through the monarch, became the basis for political rights in the polity.”²²¹

²¹⁸ Linklater (1998), p. 169.

²¹⁹ Rubenstein (2003), p. 163.

²²⁰ Hanagan (1997), p. 398; and Marshall (1950).

²²¹ Fitzsimmons (1993), p. 32.

The concept of citizenship played an important role with regard to the new mode of legitimation of political power. Theories of popular sovereignty were the driving force behind the transformation of subjects of a King to citizens of a nation. The French Declaration of the Rights of Man and Citizen expresses the ideal of equality of universal mankind in the concept of citizenship. For the early Revolutionaries the distinction between man and citizen was not problematic: The title of French Citizen could be accorded to foreigners, living in France or abroad, who "in various areas of the world, [had] caused human reason to ripen and blazed the trail of liberty"²²².

However, citizenship was affected by the changing character of the concept of the nation. As we have seen in Chapter 2, that concept, originally founded on equality and liberty, acquired a different meaning in the nineteenth century. Its emphasis shifted from 'demos' to 'ethnos'. Citizenship became a tool in an exclusionist philosophy, instead of a principle for realising on a small (territorial) scale ideals concerning universal humankind. But before turning to these changing connotations of nation and citizenship, the beginning of which were marked by the Revolutionary Wars, it is necessary to add some additional observations regarding the emergence and development of citizenship.

We have seen how ideals of popular sovereignty led to citizenship. However, the "moral capital" which accumulated in the notion of citizenship was not just a result of political ideals and a discourse that was based on universalistic conceptions of justice. Certainly, sovereignty in the form of direct rule based on representation required the notion of citizenship, in order to solve the legitimation problem posed by the abstract notion of popular sovereignty and to realise ideals of equality. But in addition to the ideals of the Revolutionaries, which made citizenship as a concept ideologically conceivable, it was direct rule, exercised by the modern state based on popular sovereignty, which made citizenship practically possible and necessary. More prosaically, the content of modern citizenship is the result of war, coercion, and violence.²²³

This link between citizenship and state power is emphasised in the work of Charles Tilly, who describes the role played by warfare, state expansion and direct rule

²²² Kristeva (1991), p. 156. See also Ferrajoli (1996), p. 153.

²²³ Tilly (1995).

with regard to the emergence of citizenship.²²⁴ When, in the second half of the eighteenth century, states were in need of ever bigger armies, they did not rely so much any more on mercenaries, but started to draw troops from their own populations. Taxation of the population was the way in which they financed increasing military activity. Resistance by domestic populations to these practices led to citizenship:

(...) both ordinary people and their patrons fought war-impelled taxation, conscription, seizures of goods and restrictions on trade by means ranging from passive resistance to outright rebellion, put down with varying combinations of repression, persuasion and bargaining. The very acts of intervening, repressing, persuading and bargaining formed willy-nilly the institutions of direct rule. Out of struggle emerged citizenship, a continuing series of transactions between persons and agents of a given state in which each has enforceable rights and obligations uniquely by virtue of the persons' membership in an exclusive category, a category of native born or naturalized people."²²⁵

Thus Tilly emphasises the role played by warfare and state expansion: "the causal chain from military activity to citizenship". In a similar vein, Andrew Linklater regards citizenship as a reaction to the totalising project. With the totalising project he refers to efforts made by central governments to homogenise communities and their creation of a clear mechanism to distinguish inside from outside, in order to meet the challenges of war.²²⁶ As such, he argues, states' totalising practices led to the elaboration of citizenship rights, because as subjects were confronted with the extension of state power and the increasingly demanding and restrictive character of political communities, they were forced to organise political and legal rights.²²⁷ In addition, he stresses the importance of capitalism and production processes in the process of establishing direct rule and the expansion of citizenship's moral potential.²²⁸

I have briefly paid some attention to these more factual roots of citizenship because it is essential to understand that citizenship is not only a concept which was conjured up in an age dominated by ideals regarding equality and universality of mankind, but that it is very much linked to the actual process of state formation. In

²²⁴ Ibid.

²²⁵ Ibid. p. 230.

²²⁶ Linklater (1998), p. 6.

²²⁷ Ibid. p. 146-147.

²²⁸ See also Marshall (1950).

addition to examining citizenship's place in political thought and discourse, one needs to be aware that it is to a large degree formed by the actualities of political power. As such, it is able to transform and keep its relevance, as it can be adapted to support all kind of struggles for equality. Marshall's classic account of citizenship, depicting the evolution of civil to political to social rights, exemplifies this clearly.²²⁹ In his account, citizenship's potential for equality and universality, clearly surfaces. But as already mentioned above, there is also a particularistic side to citizenship, one that was emphasised by the role which the nation assumed on Europe's political stage during the nineteenth century and onwards.

We have seen in Chapter 2 that by the time that the Napoleonic wars had swept over Europe, territoriality and sovereignty were firmly anchored political concepts. Citizenship became inextricably linked to these concepts. Citizenship was territorial because the population over which the state exercised its rule was territorially defined. But the role that nationalism was to play in the subsequent century with regard to the setting of boundaries to the political community, shaped citizenship's political particularism in an even more decisive way. Nationality and citizenship developed into interchangeable terms, in a manner that could not have been foreseen by the Revolutionaries who drew up the Declaration of the Rights of Man and the Citizen.

Chapter 2 described how nationalism in the nineteenth century caused the discourse of sovereignty to become a particularistic one, excluding a universal approach based on the idea of a common humanity. These tendencies reached their zenith in the twentieth century, in the period between the two World Wars.²³⁰ Citizenship became an indicator as well as an instrument of exclusion and provided protection only for those who 'belonged'.

The conflicting tendencies of the modern state are thus exemplified by the role and content of citizenship during this period. The contraction of the political community in the twentieth century was synchronous with the extension of citizenship rights internally. These may seem contradictory tendencies, but perhaps it is more accurate, following Linklater, to depict them as trends that reinforced each other.²³¹ When welfare rights became part of the citizenship package, states acquired more influence in the

²²⁹ Ibid.

²³⁰ Linklater (1998), p. 161.

²³¹ Ibid. p. 150.

everyday lives of their citizens. The totalising project thus received new impetus, national feelings were strengthened, and as a result, trans-national loyalties weakened. On the other hand, it was also nationalism that shaped the conditions for unprecedented levels of social and political mobilisation.²³²

Hence, the interaction between nationalism and citizenship is complex and cannot be regarded as only leading to a more exclusive notion of citizenship. Be that as it may, citizenship's political particularism was undoubtedly enhanced by nationalism. The hostile way in which national governments responded to the problems regarding displaced people after the First World War and concerning large migration flows in the latter half of the twentieth century emphasised the new function citizenship had assumed since its invention in the nineteenth century.

In this Section, I have elaborated upon the development of citizenship. I have discussed the factual circumstances gave rise to the birth of citizenship. In addition, we have seen that the universal ideals that originally underpinned that concept were gradually overshadowed by the instrumentalist use that the modern state made of the concept in order to distinguish the inside from the outside. Before the national state came into existence, states also defined their social boundaries in terms of who is and who is not included in the community. However, when government was not yet based on popular sovereignty, membership had just meant that one was subjected to the authorities of that state.²³³

Popular sovereignty, social contract theories and the idea of natural rights changed the meaning of membership that was not self-evident. In order to understand territoriality's fundamental role in the particularistic connotations that citizenship has acquired in the course of history, one needs to understand that the initial question of membership itself cannot be settled by social contract theories. Instead, whether one does or does not belong to the people can ultimately only be determined by territoriality and jurisdiction, instead of by any (implied) contract.²³⁴ The specific implications of citizenship's particularism for the rights of the individual will be dealt with below.

²³² Ibid. p. 145.

²³³ Habermas (1996), p. 285.

²³⁴ Kratochwil (1996), p. 183.

3.3.2. National citizenship as a condition for access to universal rights

Whereas in the eighteenth century citizenship was meant to provide equality to all because the distinction between man and citizen was not seen as problematic, presently we live in an age in which this distinction has become a highly significant one. In this Section we will see that universal rights have been actualised mostly within national states, and that citizenship became a necessary condition for access to those rights that one supposedly has by virtue of belonging to universal humankind. In order to understand this process properly, we need to take into account the political forces that shaped the nation state and take a closer look at the development of the concept of the Rights of Man and their subsequent implementation in political reality.

When the Rights of Man were reinvented in the enlightenment era, they were proclaimed as inalienable. They did no longer flow from religion, nor were they privileges granted by the King or any other ruler, but man itself was their source. Nevertheless, at the same time they became linked to the right of the people to self-government, as we have seen in Chapter 2. Thus, man had for the first time in history just appeared as an individual who carried rights without reference to a larger order, when these rights almost immediately came to be identified with the rights of peoples, guaranteed by the concept of the nation.²³⁵ As Julia Kristeva observes, “the man supposedly independent of all government turns out to be the citizen of a nation.”²³⁶

The explanation for the duality of man/citizen at the heart of the French Declaration is the interdependence of sovereignty and rights. And if on the one hand, the modern state based on popular sovereignty was an effective and powerful vehicle for the protection and implementation of the Rights of Man, that state at the same time set obvious limits to the universalism of those rights.²³⁷ Equal rights and freedoms were secured through membership in a nation, which was constituted by the ‘people’. Even though the French Revolution, with its emphasis on universal humankind, is hostile to any pre-constitutional concept of the people,²³⁸ we have seen in the previous Chapter how theories of popular sovereignty open the door to particularistic nationalist claims, due to the fact that liberal theory fails to define what is meant by a concept as intangible

²³⁵ Arendt (1976), p. 291; and Xenos (1996), p. 233.

²³⁶ Kristeva (1991), p. 150.

²³⁷ Shafir (2004), p. 24.

²³⁸ Brunkhorst (2000), p. 51.

as the people. These nationalist claims are facilitated in a system where the organisation of political life on the basis of clear territorial demarcations is a fact.

Nationalism played an ambiguous role in the development of citizenship: without it the political mobilisation that led to the extension and expansion of citizenship would perhaps not have been possible, because for that an appeal was needed that was stronger than the somewhat abstract ideas on human rights and popular sovereignty.²³⁹ However, the result was that only national citizenship seemed to be able to secure access to the rights of man. Hannah Arendt depicts this process unambiguously:

“The whole question of rights [...] was quickly and inextricably blended with the question of national emancipation; only the emancipated sovereignty of the people, of one’s own people, seemed to be able to ensure them. As mankind, since the French Revolution, was conceived in the image of a family of nations, it gradually became self-evident that the people, and not the individual was the image of man.”²⁴⁰

The disastrous consequences of this identification of the rights of man with the rights of citizen, according to Arendt, became clear only in the twentieth century. Nationalism had by then long lost its original function of integrating diverse social strata and peoples in one nation, but it had led to an exclusive ideal of the nation state, purportedly constituted by a people whose bonds to each other and to its territory were pre-political. The plight of the refugees and the stateless, and the sufferings of the victims of the totalitarian governments showed that “the Rights of Man, supposedly inalienable, proved to be unenforceable – even in countries whose constitutions were based upon them – whenever people appeared who were no longer citizen of any state.”²⁴¹

Without belonging to an organised political community of a particular sort - the territorial nation state - rights had become illusionary: the loss of national rights in practice meant the loss of human rights. The attempts of the stateless and the minorities to fight for their own national states only strengthened the perception of a natural and necessary link between the territorial state, citizenship and individual rights. In a similar

²³⁹ Habermas (1996), p. 285.

²⁴⁰ Arendt (1976), p. 291.

²⁴¹ Arendt (1976), p. 293.

manner was such a perception of the link between national sovereignty and rights reinforced by the minority treaties concluded after the First World War, which were deemed necessary to protect the rights of minorities that did not have a state of their own.²⁴²

After the Second World War the dangers inherent in a system in which the rights of man had “no reality and no value except as political rights, rights of the citizen”²⁴³ was recognised. The idea of natural rights based on truly universal humankind received new impetus, and although the nationality-territory link still grants unconditional access to many entitlements, formal citizenship status and rights have to a certain extent become disconnected in contemporary political societies. Human rights discourse and constitutional norms underlying Western liberal democracies, have led to what some scholars describe as post-national citizenship, an approach to rights which is allegedly not linked to territorial or national exclusivity. This notion of so-called post-national citizenship will receive attention in Section 3.5.2, after I have looked at the emergence and development of human rights in international law in Section 3.4.4.

3.3.3. Citizenship’s structuring role in a world of nation states

However, before turning to international law, there is another aspect of citizenship that deserves our attention. Whereas most accounts of citizenship focus on the relation between the individual and the state, the role of citizenship on a global scale in the Westphalian state system is often ignored. Barry Hindess is a scholar who turns away from this wholly internalist perspective on citizenship, but instead examines its global role. He argues that discrimination is a requirement of the modern state system, and not only a result of the internal sovereign claims that contemporary states make on behalf of their own populations.²⁴⁴

We have already seen in Chapter 2 that, by establishing external sovereignty as a principle of international relations, the Peace of Westphalia ascribed to each territorial state the exclusive government of the population within its territory.²⁴⁵ States were able

²⁴² Shafir (2004), p. 23.

²⁴³ Balibar (1994), p. 212. See also Edwards (2001).

²⁴⁴ Hindess (2000) and (1998)

²⁴⁵ Hindess (1998), p. 65.

to establish to a large degree exclusive control over their territories and the populations within it. The important point made by Hindess is that the modern state system as such does not only regulate the conduct of states amongst each other but that it simultaneously constitutes “a dispersed regime of governance covering the overall populations of the states concerned.”²⁴⁶ This regime of governance is dependent on the division of humanity into distinct national populations, with their own territories and states.

The notion of citizenship serves as an instrument of such a system of global governance that determines who belongs where. Thus, citizenship’s particularism is not only the result of the internal sovereign claim of the state to determine its own boundaries. Distinctions between nationals and foreigners are also an inevitable outcome of the Westphalian state system that partitions “humanity into citizens of a plurality of states (and a minority who are both displaced and stateless).”²⁴⁷

By looking at citizenship’s structural role in the territorial state system, important insights surface, which are lost when we depict citizenship solely as a national project that gradually turned the privileges of the few into the rights of the many. In our contemporary global system, citizenship is an important tool for an ongoing construction of territory as a political concept. It is a fundamental notion in order to maintain a global political system based on territoriality, as it perpetuates “an image of a world divided into ‘national’ populations and territories, domiciled in terms of state membership.”²⁴⁸ The notion of the nation state as a container of society plays an important role: the assumption that various sovereign states constitute a world system of separate, closed and homogenous units.²⁴⁹

The era after the Second World War gives a clear example of the process by which identity and territory are linked and by which the latter is inscribed with strong political meaning. Massive population transfers based on ethnicity were tellingly called ‘repatriation’ and those people without a nationality were termed ‘displaced’.

An internalist account of citizenship ignores the structural role of citizenship in the Westphalian state system. Citizenship can be understood as a project that gradually led to turning the privileges of the few into the rights of the many only if the national

²⁴⁶ Hindess (1998), p. 65.

²⁴⁷ Hindess (1998), p. 66.

²⁴⁸ Walters (2002), p. 282.

²⁴⁹ Tully (1997), p. 187.

state is perceived as a closed container, in which the only relevant political processes take place. If, however, we perceive territorial boundaries not as natural and self-evident, but as features of political life that have grown out of particular historical contingencies, then it becomes, to say the least, doubtful whether citizenship has really turned the privileges of the few into the rights of the many. The borderline between the privileged and the rightless may simply have shifted when the territorial state came into existence.

In addition, by focussing on the citizens of the most prosperous and democratic countries, most theoretical accounts of citizenship ignore the fact that all human beings are supposed to be citizens of some kind of political community.²⁵⁰ It is exactly with regard to individuals whose national rights do not match the standard account of citizenship, that citizenship's particularism becomes truly problematic. People detained in waiting zones at European airports, or those intercepted at the Mediterranean, certainly are citizens of one state or another. But instead of being a guarantee for social, political or economical rights in their home countries (the absence of which in many cases constituted the very reason for their departure), the discourse of citizenship denies these people the possibility to pursue these rights elsewhere. By allocating populations to specific states, the global institution of national citizenship implicitly endorses the view that only national self-emancipation is suitable for securing the Rights of Man.

Hence, the two aspects of citizenship that I have discussed here – citizenship as a condition for access to rights and citizenship as a tool for allocating populations to specific territories – interact to reinforce the ideal of national sovereignty and territoriality. Hannah Arendt explains the lack of attention for the concept of human rights during the nineteenth century by arguing that such rights were supposed to be embodied in the notion of citizenship, and in theory, all members of humanity could achieve citizenship rights.

All human beings were supposed to be citizens of some kind of political community; if the laws of their country did not live up to the demands of the rights of Man, they were supposed to change them, by legislation in democratic countries, or through revolutionary action in despotisms.²⁵¹

²⁵⁰ Hindess (2000), p. 1495.

²⁵¹ Arendt (1976), p. 293.

The idealisation of national sovereignty and the interconnectedness of the concept of rights and territoriality, which are both inherent in such a perception of citizenship, are apparent when we realise that the words with which Hindess condemns the contemporary international discourse of citizenship, essentially express the same idea:

The teleological discourse of citizenship promises the poorest of the world that, if only they would stay at home and learn to behave themselves, they too could be citizens like us.²⁵²

As such, for many people citizenship offers far less than protection against sovereign power: it justifies their exclusion and it sustains inequality on a global scale. In Section 3.5., I will investigate whether post-national citizenship has severed the link between nationality, rights and territory so as offer a more inclusive protection against sovereign power. Post-national conceptions of citizenship, based upon a notion of rights that is no longer nationally exclusive, partly emerged in response to developments in international law. The Section below will address these developments.

3.4. INTERNATIONAL LAW AND VIOLENCE

3.4.1. Sovereignty and international law

In this Section I will investigate the way in which international law has set limits to the use of violence by the state. However, before turning to these limits, some preliminary remarks about the relationship between sovereignty and international law are necessary. Realists have often portrayed the Westphalian system as providing law and morality solely within states, whereas outside these states anarchy and chaos reign. The international environment is seen as a permanent Hobbesian state of nature. And how else could it be, these realists ask, in the absence of an international Leviathan: a 'supra-national' authority that manages the relations between sovereigns? In the eyes of thinkers such as Hobbes, Rousseau and Morgenthau, the concept of state sovereignty necessarily entails anarchy in international relations. And certainly, in view of the sheer number of international conflicts, "the history of international relations since the days of

²⁵² Hindess (2000), p. 1496.

the Westphalia treaties provide overwhelming evidence that [theirs] is a reasonable accurate depiction of the dynamics of relations between states.”²⁵³ Admittedly, the concept of sovereignty as elaborated upon in Chapter 2 precludes an ‘international sovereign’ who rules over sovereign national states. A realist account of international relations is inevitable in Hobbes’ theory of sovereignty, where government is identified with force and it is a logical impossibility for the sovereign to be bound.

However, contemporary international reality also demonstrates that restrictions on the liberty of states to manage their affairs are legion.²⁵⁴ To understand these it is essential to be aware that sovereignty is not only a monopoly over the legitimate means of coercion, nor merely ultimate authority, but that these aspects of sovereignty are exercised exclusively within a certain territory. Westphalian sovereignty entails the exclusion of external authority within the territory of the state. Thus, although sovereignty was initially thought of as a concept to conceptualise and justify authority within the state, its territorial form inevitably came to bear upon relations among states.

International law thus developed alongside the emergence of the system of sovereign states. Nevertheless, in spite of the normative and regulating character of international law, it should be clear from the outset that there are limits to what international law can achieve. Some authors have found the reason for these limits generally in the configurations of state interest and the distribution of state power.²⁵⁵ In this study, I argue more specifically that the existence of these limits, expressed in an almost structural immunisation of territorial sovereignty against international forms of correction, are due to the reification of territoriality as an organising principle for the modern state system.

We will see that even the modern version of the international rule of law embodied in the concept of international human rights suffers from what I will call a “territorial blind spot”. In order to properly evaluate the alleged novelty of the modern version of the rule of law embodied in the human rights discourse, in that it breaks with traditional, exclusive and silencing notions of international law, we need to understand the importance of territoriality in classical international law. Therefore, this Section will first picture the development of traditional international law with regard to the

²⁵³ Holsti (1995), p. 6.

²⁵⁴ Brownlie (2003), p. 369; and Tamanaha (2004), p. 131.

²⁵⁵ Goldsmith and Posner (2005), p. 13.

regulation of violence, after which it will focus on modern human rights law as it developed after the Second World War.

In international law, the regulation of violence and territorial boundaries are connected to each other by much the same logic as which binds people, territory and authority within the nation state. Similarly, the same tension that exists between particularism and universalism in the idea of the nation state and its accompanying concepts, such as citizenship, comes to the fore in international law, albeit in a different fashion. Here the tension between universalistic ideals and a reality which is in a high degree particularistic is expressed in differing conceptions about who are the subjects of international law. The way in which this tension is resolved, has profound implications for which kinds of violence have become a matter of concern for international law. Whether one believes that “only states have international legal personality” or assumes that, on the contrary, “individuals are the true and exclusive legal persons”²⁵⁶ makes an enormous difference, especially in this area of international law.

In Section 3.4.2., I will argue that until recently, this tension has been resolved in favour of the national territorial state. Subsequently, Section 3.4.3. will address different sorts of violence that classical international law deals with. The consequences of the ideal of the national territorial state dominating the international legal discourse regarding state violence will be illustrated with examples relating to the regulation of interstate violence, diplomatic protection and the treatment of minorities under international law. Lastly, in Section 3.4.4., I will concentrate in detail on international human rights law. I will seek an answer to the question whether the state based approach of classical international law, based upon the same obdurate link between sovereignty, territory and identity as that we find in the citizenship discourse, has been abandoned there.

3.4.2. The national territorial state as the true and only subject of international law

International law emerged at a time when the state was not yet the decisive political entity it was later to become, and in early international law, the individual was fully included. The influence of ideas which had their roots in the Res Publica

²⁵⁶ Nijman (2004), p. 6. See also McCorquodale (2004).

Christiana were for a long while palpable in international law, such as the notion that the rights of individuals were morally prior to the rights of the body politic to which they belonged. Early theorists of international law were natural lawyers and argued that assertions of what is now called Westphalian sovereignty are subject to limits. Vitoria (1480-1546) and Suarez (1548-1617) grounded international law in the divine order, in which the individual had its own place. Grotius (1583-1645) modernised the law of nations, as he maintained that its content could be based on reason. For him, international law was still natural law, but no longer divine. In Grotius' law of nations the individual featured as a subject, inevitably, in view of the foundation for his *ius gentium*: a society of sovereigns and their subjects who were united in the natural bond of mankind.²⁵⁷

Chapter 2 described that the emergence of the modern state with its reliance on territory and the concept of the nation caused the universalistic ideals from the enlightenment era to translate in a political particularistic reality. Similarly, with the emergence of the modern state, the tension in international law with regard to its subjects gradually begins to be decided in favour of the nation state, and the individual loses much of his relevance as a subject of international law. Enlightenment ideals influenced this process twofold.

First, as we have already seen, indirectly, as the modern territorial state based on nationality clearly differentiated between inside and outside. A consequence was that the nation state was gradually perceived as a unified force, with supreme and exclusionary authority within a clearly demarcated territory. The manner in which this conception of the state influenced international law is aptly illustrated by the work of Wolff (1679-1754). Still a natural law theorist, instead of according natural rights to individuals, he ascribes them to states, in his eyes the exclusive subjects of international law. One of the natural rights of states was the right to non-interference by other states.²⁵⁸

A second trend that contributed to the demise of the individual in international law was the emergence of empiricist theories during the enlightenment. Instead of deriving international law from absolute principles, it was reinterpreted in terms of what

²⁵⁷ Nijman (2004), p. 46-47

²⁵⁸ Nijman (2004), p. 82.

actually happened between states.²⁵⁹ The work of Emmerich de Vattel (1714-1767) marks the transition from natural law theories in international law to an approach that identified the law of nations with positive law between sovereign states. To him, as to Wolff, the exclusion of external authority, as a characteristic of sovereignty, was one of the cornerstones of the law of nations. Under the influence of legal positivism in the eighteenth century, the law of nations came to rely fully upon national sovereignty, and legal personality in international law was dependant on absolute sovereignty.²⁶⁰

In this way, the role of the state in international law was doubly emphasised. Eighteenth century ideals of individualism and human equality did not lead to a strengthening of the position of the individual in international law. On the contrary, just as they had contributed towards nationalism and hostility towards outsiders within the nation state, they consolidated the importance of the sovereign state in international law as the sole bearer of rights. In the nineteenth century, this tendency in international law was reinforced, as idealised concepts such as nation and state were romantically perceived as one. As a result, the idea of the individual as a subject of international law had become unthinkable in the late nineteenth century, with its Hegelian glorification of the state and national sovereignty. In short, a positivist approach which obscured the natural law origins of international law, combined with the mythic dimension the state had acquired, by use of idealised or constructed concepts such as territory and nationality, led to a perception of international law as law solely for and by states.²⁶¹

In those few cases where the individual featured, his position was derived from and dependent on the will of the sovereign state,²⁶² as we will see below. This situation would last until 1945, although already before that time voices were heard to make the international legal system more inclusive, by deconstructing the “artificial and absolute separation” that existed between the state and its citizens in international law.²⁶³ We will see below that a perception of the territorial state as the sole subject of international law

²⁵⁹ Shaw (1997), p. 22.

²⁶⁰ Nijman (2004), p. 111.

²⁶¹ In addition, sovereignty did not only function as a shield between the individual and the international legal system, but by defining it as something exclusively European, it excluded for a long time non-western states and indigenous communities from international law. See Orford (2004), p. 470.

²⁶² Harding and Lim (1999), p. 5.

²⁶³ Nijman (2004), p. 128.

has had a strong impact on the regulation and legitimisation of violence by international law.

3.4.3. Sorts of violence regulated by classical international law

Here I will outline the forms of violence that traditional international law regulates, and the way in which it does that. Far from being an in-depth investigation of this field of international law, this outline serves to further elucidate some aspects of the relationship between (il)legitimate violence, sovereignty, territory, and people. As a result, we will see that the way in which international law offers protection against violence, and how it determines whether the use of force is legitimate or not, is to a large degree determined by the concept of national sovereignty and the meanings ascribed to territorial boundaries.

Although the relevance of inter-state violence, humanitarian law, diplomatic protection and the treatment of minorities may not seem directly apparent for the subject under consideration in this study, these issues illustrate that the international legal regime dealing with violence is decisively shaped by the way in which territorial boundaries are drawn in the past, and by the meanings that were subsequently ascribed to them. Only a thorough understanding of this structural characteristic of international law, will make it possible to evaluate the alleged novelty of international human rights. Thus, as already mentioned, emphasis will be on classical conceptions of international law, as the law between sovereign states. Developments of a more recent date will be addressed in Section 3.4.4. that deals with international human rights law.

3.4.3.1. Inter-state violence

We have seen in Chapter 2 that the emergence of a territorial state system led to a new structure delimiting legitimate and illegitimate violence. Before territorial demarcations became the foundation for political authority, the absence of a clear mechanism to determine “us” from “them” made it impossible to make a distinction between war and mere crime,²⁶⁴ even though there were religious theories justifying the

²⁶⁴ Mansbach and Wilmer (2001), p. 56.

use of violence in specific instances, such as the doctrine of just war. Through the establishment of the Westphalian order, war could be distinguished from mere crime by defining it as something that only sovereign states engaged in.²⁶⁵ In nineteenth century conceptions of international law, the right of a state to wage war in order to settle disputes with other states was regarded as a fundamental aspect of that state's sovereignty.²⁶⁶ State interest was a legitimate reason for resorting to violence against other states, if only conditioned by the requirement that it should be a last resort.

Thus, territorialisation diminished the importance of non-state actors twofold: as we have seen above, only the sovereign state was in possession of international legal personality, and only violence waged by the sovereign state was regarded as legitimate. The result was that whenever the individual featured in the laws of war, his position was derived from the state's right to resort to force. Regulation of violence was monopolised by national states in a very literal sense: fighters that did not fight for a national army, such as religious minorities and sub-state rebels, were not accorded rights, just as indigenous peoples were not protected, by the laws of war.²⁶⁷

After the First World War, the attitude in which the right to wage war was perceived as inherent in sovereignty changed. The Kellogg-Briand Pact of 1928 renounced war as an instrument of foreign policy except in self-defence. This attitude was reinforced by the Tokyo and Nuremberg trials in which the Japanese and German were prosecuted for planning aggressive wars, so-called crimes against the peace. The prohibition on the use of force is forbidden in contemporary international relations, pursuant to Article 2(4) of the Charter of the United Nations.²⁶⁸ Territorial integrity of sovereign states is a cornerstone of contemporary international law.²⁶⁹ Nevertheless, even if the right to wage war is no longer regarded as inherent in sovereignty, the language of war has principally remained the language of the state. This is illustrated by

²⁶⁵ Van Creveld, (1991), p. 41.

²⁶⁶ Brand (2002), p. 287; and Steiner and Alston (2000), p. 114.

²⁶⁷ Mansbach and Wilmer (2001), p. 61.

²⁶⁸ UN Charter Article 2(4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."

²⁶⁹ See ICJ. Case concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.A.), Merits, 1986 ICJ Reports 4, 27 June 1986.

the way in which international law has formulated exceptions to the prohibition on the use of force and the present framework of international humanitarian law.

The two exceptions to the prohibition on the threat or use of force are both clearly modelled on the ideal of the Westphalian state system, consisting of independent territorial entities with exclusive rule within their territories. Chapter 7 of the Charter of the United Nations permits the collective use of force and sanctions the right of self-defence solely in the case of an armed attack on a state's territory. More recent developments in international law with regard to humanitarian interventions, where purely internal situations are capable of being deemed a threat to the peace, are related to the emergence of an international human rights regime, which will be dealt with later.

Although contemporary international law has somewhat weakened the strict assumption of sovereignty as precluding any legal interference in domestic politics, international laws of war remain largely constructed against the background of the Westphalian state system. Norms regarding international responses to civil wars are less developed than those that regulate interstate wars, humanitarian law regulating internal conflict offers less protection than that which pertains to interstate wars, and only states can become parties to the Geneva Conventions.²⁷⁰

3.4.3.2. *Diplomatic protection and the treatment of minorities*

In Chapter 2 we have seen how the Westphalian structure did not only lead to a new structure by which to differentiate between legitimate and illegitimate violence, but it also resulted in a division between internal and external violence. Violence that was resorted to by the state within its own territory has long remained within the exclusive sphere of domestic jurisdiction, consistent with the idea of sovereignty as supreme legitimate authority within a territory. However, although international law has largely ignored the question of violence by the state within the state,²⁷¹ the treatment of minorities and foreigners constitute exceptions to this notion of *domain réservé* in classical international law.

Chapter 2 demonstrated how in the course of history ties of allegiance, nationality and citizenship have provided the basis for the legal community of the

²⁷⁰ Fitzpatrick (2002); and Kaldor (1999), p. 116.

²⁷¹ Mansbach and Wilmer (2001), p. 63; Donnelly (1994), p. 8; and Henkin (1999), p. 4.

state.²⁷² The protection of the rights of aliens in international law demonstrates the relevance of the same ties in international law. International law's recognition of the significance of these ties has led to the paradox that "the individual in his capacity as an alien [enjoyed] a larger measure of protection by traditional international law than in his character as the citizen of his own state."²⁷³ Generally speaking, international law decrees that foreigners may not be unlawfully discriminated against, have the right to respect for their life and property, and most importantly, that they are entitled to judicial protection to vindicate their rights in the host country.²⁷⁴

Although the significance of the individual in this field of international law is obvious, the traditional stance with regard to international legal personality is not abandoned here: only the sovereign state is actually accorded rights. Individuals wronged by a foreign state cannot appeal to international law; solely national states can claim compliance with international rules to the benefit of their nationals residing abroad, which is the right to exercise so-called diplomatic protection. Neither can individuals under classical international law claim a right to seek and obtain diplomatic protection of their national state; legal entitlements to such forms of protection are a matter of domestic law alone.²⁷⁵

Diplomatic protection with respect to nationals in foreign countries has existed since the Middle Ages, but practice with modern features appeared in the late eighteenth century.²⁷⁶ During the nineteenth century issues of diplomatic protection increased enormously because more people resided outside their national states than ever before.²⁷⁷ From that time onwards, the place that diplomatic protection occupies in international law is determined by two features of the modern state: a strong linkage of identity and sovereignty internally, and a powerful assertion of sovereignty externally. Vattel's argument that an injury to an alien is an injury to his state,²⁷⁸ illustrates the

²⁷² Brownlie (2003), p. 497.

²⁷³ Lauterpacht (1968), p. 121.

²⁷⁴ Cassese (2005), p. 121. Diplomatic protection can only be invoked when the individual has exhausted the domestic remedies available in the host state.

²⁷⁵ Cassese (2005), p. 122.

²⁷⁶ Brownlie (2003), p. 500.

²⁷⁷ "In the century after 1840 some sixty mixed claims commissions were set up to deal with disputes arising from injury to the interests of aliens." Brownlie (2003), p. 500.

²⁷⁸ McDougal, Lasswell, and Chen (1976), pp

assumption by international law that one's state interference with another one's national may constitute a breach of the sovereignty of the former state. "In taking up a case of one of its nationals, by resorting to diplomatic protection or international judicial proceedings on his behalf, a state is in reality asserting its own right, the right to ensure in the persons of its nationals respect for the rules of international law."²⁷⁹

In the discourse concerning limitations upon a state's treatment of foreigners we can distinguish two different approaches: one which argues that it is sufficient for foreigners to be treated as nationals; the other maintaining that their treatment should live up to a minimum standard of civilisation: the international minimum standard.²⁸⁰ In the latter discourse, a purely state centred discourse is abandoned in favour of an approach based on the dignity of the individual. And as the latter approach prevailed, it can be contended that, even though international law does not confer individuals directly with rights regarding their treatment by a foreign state, universalistic ideals based on the dignity of the individual came to play an important role in this field of law.²⁸¹

The fact that the modern state is based on ties of allegiance, nationality and citizenship, and its linkage of sovereignty and identity, provide a rationale for the existence of a right of diplomatic protection in international law. The weight which international law attaches to the meaning of these ties is proven by its insistence that the presence of such ties is not merely a formal question. In the *Nottebohm Case*, the International Court of Justice declared Liechtenstein's claim against Guatemala, concerning the treatment of one of its nationals, inadmissible. It was of the opinion that Mr. Nottebohm's nationality could not be validly invoked by Liechtenstein against Guatemala, as it did not correspond to a factual situation.²⁸² The Court reaffirmed that matters concerning nationality are within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition of its nationality.

However, the issue to be decided by the Court did not pertain to the domestic legal system of Liechtenstein, but instead it dealt with the international effects of naturalisation. International law can only recognise naturalisation if it constitutes a legal

²⁷⁹ *Panavezys-Saldutiskis Railway Case (Estonia v. Lithuania)*, 28 February 1939, Ser A/B No 76 (1939).

²⁸⁰ McDougal, Laswell, and Chen (1976), p. 443.

²⁸¹ Although the two approaches often reflect conflicting economic and political interests. See Casesse (2005), p. 120 and Brownlie (2003), p. 503.

²⁸² ICJ, *Nottebohm Case (Liechtenstein v. Guatemala)*, 6 April 1955.

recognition of a person's factual membership in a state's population. Such membership is expressed, according to the Court, by adherence to the state's traditions, its interests, way of life and by assuming the obligations and rights of its citizens. The concept of diplomatic protection in international law as such is consistent with the structural role of citizenship, as discussed in Section 3.3.3. The way in which international law affords protection to the individual is by regulating the relations between sovereign powers and allocating to each their specific responsibilities concerning those that allegedly "belong" to them.

The allocation to the sovereign of those that "belong" is mostly based on territorial demarcations made in the past. Minorities occupy a special place in the discourse that distinguishes the inside from the outside of the modern territorial state, and their protection has always been a concern for international law. Chapter 2 argued that the Treaties of Westphalia anchored the notion of external sovereignty in international relations, by establishing mutually independent territorial political units with supreme and exclusionary authority within their domains. By doing so, it gave the sovereign the right to determine the religion within his territory.

Yet, this is not a complete account of the Treaties.²⁸³ They also contained restrictions on the sovereign's right to regulate religious affairs in his territory by giving minority religious groups the right to practice their religion, and by prohibiting religious discrimination to a certain extent.²⁸⁴ Thus, although the Peace of Westphalia established sovereignty as a principle governing international relations by ascribing a fixed territory to the sole jurisdiction of a sovereign and categorising populations as belonging to one state or another, at the same time these Treaties impinged significantly on the supreme right of the sovereign, by placing him under an obligation to protect and respect certain religious freedoms within his territory.

The enforcement mechanism for these rights was largely effective, as it consisted of "a clear and easy-to-implement threat of retaliation: protestant states would conduct reprisals against their own minority population and vice versa."²⁸⁵ Here we can discern a parallel with diplomatic protection. Sovereign states would regard coreligionists living in another state as a matter of their concern, just as they consider

²⁸³ Krasner (2001).

²⁸⁴ Goldsmith and Posner (2005), p. 113.

²⁸⁵ Goldsmith and Posner (2005), p. 155.

the treatment of their nationals by another state as not falling entirely within the domestic jurisdiction of the latter state.

After WWI, the issue of minorities was brought to the forefront of international law and the protection of minorities was placed under the guarantee of the League of Nations. The design of a system of minority protection by the League of Nations was prompted by the fact that many claims of self-determination of national groups in Europe were not satisfied.²⁸⁶ This system was built on the basis of several documents, which regulated the situation of specific states and certain population groups living in these states.²⁸⁷ Obligations on minority protection did not amount to a closed system of international law, as they were only imposed on certain states, and only concerned some of the minorities living under their jurisdiction.²⁸⁸

The Permanent Court of International Justice, in an advisory opinion, formulated two general principles, which form the basis of the minority protection by the Treaties. First, nationals belonging to racial, religious or linguistic minorities were to be “placed in every respect on a footing of perfect equality respect with the other nationals of the state.” Secondly, these minorities had a right to “the preservation of the racial peculiarities, their traditions and their national characteristics.”²⁸⁹

The cases of minority protection and diplomatic protection constitute an exception to the assumption that the deployment of internal violence is a matter for the sovereign state alone, in which classical international law has no role to play. Nevertheless, international laws that protect minorities and aliens do not depart from a traditional understanding of sovereignty which links authority, territory and people and makes a strict distinction between inside and outside. By providing ‘outsiders’ – foreigners and minorities – with protection against sovereign power, international law in this area reinforces the ideal of the nation state with its perfect link between identity and territory.

Such an ideal led to a perception in which “only nationals could be citizens, only people of the same national origin could enjoy the full protection of legal institutions,” and in which “people of a different national origin needed some law of exception.”²⁹⁰ In

²⁸⁶ Henrard (2000), p. 4.

²⁸⁷ Ibid. p. 4-5.

²⁸⁸ See Arendt (1976), p. 272.

²⁸⁹ PCIJ, *Minority Schools in Albania*, Advisory Opinion of 6 April 1936.

²⁹⁰ Arendt (1976), p. 275.

addition, it should be noted that the Minority Treaties had a clear geopolitical aim which consisted of maintaining the territorial ideal: “the system of protection of minorities (...) is also intended (...) to ensure that States with a minority within their boundaries should be protected from the danger of interference by other powers in their internal affairs.”²⁹¹ Accordingly, just as in the discourse of citizenship and the regulation of interstate violence, in these fields of international law, we see once more affirmed that “the relationship between identity and borders underlies both the process of norm articulation and the kinds of violence identified as problematic”.²⁹²

3.4.4. International human rights

We have seen above that the rise of territorial concentrations of power in the Westphalian era has been checked by developments in two different areas.²⁹³ These developments took place along separate lines and each followed a different logic. Internally, the growth of state power led to the demand for citizenship rights, offering protection to the people against the arbitrary use of power by the state. Externally, the state was to undergo constraints formulated by international law.

The separateness of the discourses regulating internal and external restraints on state power led to a gap between national and international law. International law was the law between sovereign states, in which the regulation of violence was determined by strong territorial assumptions and in which the individual as such did not feature. The treatment by a state of its territorially defined population usually did not involve any question of international law, with its acceptance of sovereignty’s exclusive link between power, territory and population. Internally, the concept of fundamental rights, based on the dignity of the individual, became linked to national sovereignty, which involved a similar exclusive linkage between territory, nationality, and citizenship. Accordingly, within the nation state, the original universality of citizenship rights gradually turned into a particularistic conception of rights, based on national belonging.

²⁹¹ League of Nations Official Journal, Volume 9, 1928, p. 942.

²⁹² Mansbach and Wilmer (2001), p 56.

²⁹³ Linklater (1998), p. 213.

When, during the period between the two world wars, sovereignty's narrow link – internally as well as externally – between power, territory, identity and rights, was at its firmest, the existence of the gap between international and domestic law resulted in the absence of any enforceable rights for large groups of individuals. The terrible consequences thereof became clear during the Second World War, exemplified as they were in factual spaces of rightlessness, such as the concentration and extermination camps and, to a lesser degree, the internment camps for displaced people and refugees.

After 1945, the welfare of the individual, irrespective of his nationality, was increasingly considered as a matter of international concern by the international community.²⁹⁴ The Nuremberg War Crimes Trials prosecuted individuals on the novel charge of crimes against humanity. Crimes committed against a state's own population became a general matter of concern for international law. The Nuremberg Trials did not break completely with the territorially defined "process of norm articulation and the traditional kinds of violence identified as problematic", seeing that crimes against humanity could only be committed in connection with war crimes or crimes against the peace. Thus, the treatment of Germany's Jewish population by the Nazi's prior to 1939 was not adjudicated. However, the Trials marked an important first step in deconstructing sovereignty's function as a barrier between the individual and the international legal order. Although the criminalization of aggression in the Trials amounted to erecting "a wall around state sovereignty", the effect of criminalizing certain acts carried out against a state's own population was "to pierce the veil of sovereignty."²⁹⁵ Indirectly, the enactment of 'crimes against humanity' constituted the recognition of individual rights in international law that are superior to the law of the sovereign state.²⁹⁶

The emerging human rights regime captured in various legal documents carried this process further. In the Charter of the United Nations, human rights were explicitly listed as a matter of concern for the new organisation, and it imposed on its members

²⁹⁴ Oda (1968), p. 495.

²⁹⁵ Luban (1994), p. 336.

²⁹⁶ Lauterpacht (1968), p. 38. As I am concerned with individual rights and protection against violence employed by the state. I will not look into developments which deal with individual criminal responsibility under international law. These developments, however, give also a clear indication of the diminishing importance of sovereignty as shielding the individual from the international legal system.

the obligation to respect such rights, irrespective of nationality.²⁹⁷ The post-war period saw an immense proliferation of international institutions and norms dedicated to protecting human rights. Many of these norms acquired binding legal force as they became embodied in multilateral frameworks for the protection of human rights.²⁹⁸ Apart from treaties that were open for signature to all states, irrespective of their geographic location, human rights were also incorporated into international law on a regional scale.²⁹⁹

In addition, certain rights of individuals have become customary international law. Irrespective of the fact whether a state has entered into specific treaty obligations with regard to the rights of the people under its jurisdiction, the prohibition on torture, genocide, slavery, racial discrimination, extra-judicial killings and disappearances have acquired the status of customary international law, or even *ius cogens*.³⁰⁰ International law no longer permits states to defend violations of these rights as legitimate exercises of national sovereignty. The status of international law in this area is confirmed by the fact that states, even when violating basic human rights norms, generally do not assert a legal entitlement to do so; instead, they deny that such violations took place.³⁰¹

Not only the development of individual rights was suddenly taking place beyond the nation state, aspects relating to their enforcement and implementation were in some cases transferred to the international sphere as well. International institutions, such as the United Nations' Commission on Human Rights, acquired monitoring tasks with regard to member states' human rights obligations, and in case of violations, the

²⁹⁷ Donnelly (1994), p. 8; and Lauterpacht (1968), p. 347.

²⁹⁸ The most important of which: *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, G.A. Res. 39/46, U.N. GAOR, 39th Session., Supp. No. 51, at 197, U.N. Doc. A/Res/39/708 (1984); *Convention on the Elimination of all Forms of Discrimination Against Women*, 18 December 1979, G.A. Res. 34/180, U.N. GAOR 34th Sess., Supp. No. 46, at 193, U.N. Doc. 34/46/ (1980); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature on 7 March 1966, 660 U.N.T.S. 195; ICCPR; *International Convention on Economic, Social and Cultural Rights*, 19 December 1966, 993 U.N.T.S. 3; *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277.

²⁹⁹ ECHR; American Convention on Human Rights, 1969; African Charter on Human and Peoples' Rights, 1981.

³⁰⁰ McCorquodale (2004), p. 486; and Aceves (2002), p. 261. See also the ICJ in the *Barcelona Traction Case*, 5 February 1970.

³⁰¹ Fox (1997), p. 115-116.

individual in some cases can appeal directly to an international body.³⁰² Nonetheless, real enforcement and implementation of universal human rights, going further than monitoring and pressure procedures, have largely remained national.³⁰³

This does not mean that the real effect of international law is nugatory in this area. First of all, in the absence of effective international institutions, national judges of liberal states have assumed an important role with regard to the enforcement of international human rights norms, as will be looked into more closely below.³⁰⁴ Secondly, there is an indirect effect of international human rights law in domestic systems, even when that law concerns so-called soft law: national judges may interpret national law in conformity with standards laid down in international instruments, even when those are not binding, or not ratified.³⁰⁵ Thirdly, the existence and acknowledgement of international norms with regard to the dignity of the human person have important normative consequences: demands can now be framed in the language of law, which make them more powerful, and lends them a legitimacy they might have been lacking before.³⁰⁶

The regional record with regard to the implementation and enforcement of human rights shows a diverse picture.³⁰⁷ Asia and the Middle East lack intergovernmental regional human rights organisations, whereas Africa, Europe and the Americas have established international mechanisms to ensure the protection of fundamental rights. By far the most effective and extensive of these is the protection of human rights in the framework of the Council of Europe.

The ECHR covers mainly civil and political rights, and is ratified by all forty-one Member States of the Council of Europe. Its influence is not only felt in the domestic systems of the Member States, the majority of which have incorporated it into national law, but also the European Union, although not a party to the ECHR,³⁰⁸ has

³⁰² See the first Optional Protocol to the ICCPR.

³⁰³ Donnelly (1994), p. 9.

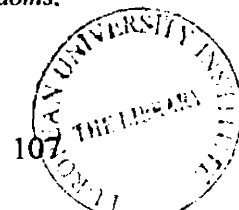
³⁰⁴ See also Aceves (2002).

³⁰⁵ Gurowitz (2004), p. 144.

³⁰⁶ Gurowitz (2004), p. 149; Martin (1989); and Tamanaha (2004), p. 131.

³⁰⁷ Donnelly (1994), p. 9.

³⁰⁸ And accession to the ECHR in the near future is unlikely, see ECJ, Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 28 March 1996.



undertaken to respect the fundamental rights as guaranteed by it.³⁰⁹ The ECHR accords the individual a right of appeal to an international body, the European Court of Human Rights (ECtHR), in the case of an alleged breach of the fundamental rights protected by the Convention. Contracting parties to the ECHR have undertaken to abide by the judgements of the Court, which has, in the case that it finds a violation of one of the rights enumerated in the Convention, the right to oblige a state to pay just satisfaction to a victim, or to take other measures. The Committee of Ministers of the Council of Europe supervises the execution of judgements, and makes recommendations with regard to general measures, in the case that domestic legislation or administrative arrangements make subsequent similar breaches of the ECHR foreseeable. Member States of the Council of Europe generally comply with the judgments of the European Court, encouraged as they are by a number of pressures and interests.³¹⁰

By its transfer to the international sphere of constitutional principles, which had thus far only featured in the domestic sphere, international human rights law intends to close the aforementioned gap between national and international law. Perhaps this is best illustrated by the way in which human rights are protected in the framework of the Council of Europe, with the ECHR as an “instrument of European public order”,³¹¹ in which individuals are not only accorded international rights, but in addition, are able to secure the protection of these rights on the international plane.

In order to understand the way in which international human rights affect the modern state, it is helpful to distinguish between the internal and external effects of international law in this area. Externally, the sovereign state can no longer maintain that the treatment of its population is a matter of domestic jurisdiction. The individual has become a subject of international law, and it has been said that “the development of international law in this century is likely to be framed and judged not so much by the way international law defines relations between states, as by the way it defines relations between persons and states.”³¹² Within the nation state, national citizenship can no longer legitimately be the only foundation upon which rights are determined, as

³⁰⁹ Article 6 TEU. See Spielmann (1999), p. 759-760.

³¹⁰ For an exception, see the case of *Loizidou vs. Turkey*, Judgments of 23 March 1995 (preliminary objections); and 18 December 1996 (merits); and 28 July 1998 (just satisfaction). See Ovey and White (2002), pp. 431-435.

³¹¹ The ECtHR in *Loizidou v. Turkey*, (preliminary objections), 23 March 1995, §75.

³¹² Brand (2002), p. 280.

international law guarantees fundamental rights irrespective of a person's nationality. The 'piercing of the veil of sovereignty' in these two directions engages the sovereign claim of the modern state, as it results in incapacity of the modern state to maintain a strong distinction between the inside and the outside. The precise implications of modern human rights law on the sovereign claims of the modern state will be dealt with in the next Section.

3.5. CLOSING THE GAP: A MORE INCLUSIVE PROTECTION THROUGH HUMAN RIGHTS?

3.5.1. Legitimacy and sovereignty

We have seen above that in traditional international law, Westphalian sovereignty entailed that the state was able to maintain a distinction between inside and outside, inter alia by designing certain areas as falling under its domestic jurisdiction, where international law had no role to play. The treatment of the individuals under its power, apart from some exceptions (in which the status of individuals under international law was derived from the sovereign status of the state), constituted one of the areas of domestic jurisdiction. Presently, international law has changed in this respect: incorporation of norms concerning human dignity in international law results in an inability of states to argue that national sovereignty entails that the treatment of the individuals under their jurisdiction is not a matter for international law.

Thus, contemporary international law has caused congruence between the ideas underlying Westphalian and domestic sovereignty. Internally, sovereignty has always been "authority, not might."³¹³ Externally, however, it was actual power and not legal authority, which constituted the basis for Westphalian sovereignty, where statehood was determined by effective control over a defined territory and a permanent population. With the recognition of human rights (and before that, the prohibition on the use of force) in modern international law, this standard of material effectiveness has been diluted, as the international community can refuse recognition of statehood when

³¹³ McIlwain (1969), p. 30.

effective control within a territory is established in violation with fundamental human rights, the principle of self-determination, or the prohibition on the use of force.³¹⁴

Also in this respect we see that sovereignty is no longer capable of bringing about a strict divide between the domestic and the international. Formerly, such a divide entailed a territorialisation of the rule of law, containing the legal within the territorially defined state where authority is defined and bound by the rule of law, and defining the international as a space that lacks a constitutional order (at least with respect to the individual).³¹⁵

Consequently, human rights law has instituted a constitutional order over and across national boundaries, and as a result, a blurring between domestic and international law has occurred in the field of individual rights. International human rights norms add a new dimension to the rule of law within the constitutional state, with particular repercussions concerning its practice of judicial review. As such, human rights can simultaneously be seen as a tool to close the gap between national and international law, and as an attempt to overcome the tension between particularism and universality of a global structure of sovereign states that each have jurisdiction within clearly demarcated territories. Whether it succeeds in establishing a guarantee for individual freedom that is not trapped within “the image of the sovereign, the territorial state and its traditional [...] institutions”³¹⁶ will be investigated below.

In addition to the domestic – international divide, we have seen that sovereignty traditionally distinguished the inside from the outside through two related claims: the first concerning territory; the second regarding matters of identity. I will start investigating the effect of the blurring between domestic and international law on matters of identity with specific regard to individual rights in Section 3.5.2. We will see that distinctions regarding inside and outside that are based on national identity have lost much of their former importance. Due to international human rights norms, post-national conceptions of citizenship have developed within the state.

³¹⁴ Warbrick (2003), p. 205; and Nollkaemper (2004), pp. 116-118. Examples are the resolutions of the U.N. Security Council in which the establishment of the South African homelands (violation of the prohibition of apartheid), and the establishment of North Cyprus by Turkey (violation of the prohibition on the use of force) were deemed in violation of international law. S/Res/181 and S/Res/182 (1962) and S/Res/541 (1983).

³¹⁵ Huysmans (2003), p. 215-216. See also Fox (1997), pp. 113-114.

³¹⁶ Huysmans (2003), p. 223, who poses this question with regard to trans-national democracy.

With regard to the modern state's territorially based claims, which will be looked at in Section 3.5.3., however, the picture is more ambiguous, and I will argue that territoriality as an organising principle has not been weakened by international human rights norms. On the contrary, we will see that the limits to the validity of these norms are often determined precisely by territoriality.

3.5.2. Identity and rights in the contemporary state: post-national citizenship

I have described in Section 3.3.1 how citizenship and nationality acquired identical meanings when the meanings of statehood and nationhood coincided.³¹⁷ Just like nationality, the institution of national citizenship was centred on exclusive allegiance,³¹⁸ and legal personhood became linked to nationality. Individual rights were in reality national rights, and the result was that non-citizens fell in a gap that existed between national and international law, without real possibilities for enforcement of those rights that were proclaimed as inalienable when they were formulated during the enlightenment.

However, the linkage of nationality and citizenship does not need to be "indispensable, inevitable or necessary."³¹⁹ On the contrary, we have seen that the bundling of the rather diverse elements in the single institution of citizenship came about as a result of specific historical processes. In this Section, I argue that contemporary developments indicate, in some respects a gradual weakening of the linkage between nationality and citizenship, if not with regard to citizenship as a formal status, than at least with regard to citizenship as a normative project. According to Saskia Sassen, the tension between citizenship as a formal status or as an increasingly comprehensive social membership, have been fuelled by "globalisation and human rights, therewith furthering the elements of a new discourse on rights."³²⁰

Thus, not only the increased prominence of the international human rights regime features in Sassen's analysis of how globalisation destabilizes the particular bundling of diverse elements in the institution of citizenship, and how it "brings to the

³¹⁷ Preuß (1996), p. 128.

³¹⁸ Sassen (2004), p. 194.

³¹⁹ Dell'Olio (2005), p. 13.

³²⁰ Sassen (2004), p. 198.

fore the fact itself of that bundling and its particularity."³²¹ In addition to international human rights, Sassen accords a crucial role to various forms of globalisation, such as economic deregulation and the subsequent prominence of the markets. Important as these developments are, I will not address them when examining the changing connotations of social membership. The scope of this study allows only for investigation of the influence of human rights norms on the discourse of rights within the nation state.

Moreover, I take the opportunity to point out that in this Section, I will not investigate the way in which international human rights norms involve a right of non-citizens to be present on the territory of the state. Although an important aspect when examining how international human rights norms limit state sovereignty and how they have the capacity to transform citizenship as a normative project, questions with regard to the right to cross national boundaries and the right to remain in the national state's territory will be addressed in Chapter 5.

Under the influence of human rights norms, formal membership in the territorially exclusive nation-state ceases to be the only ground for entitlement to rights. Although, as we will see in later in this study, international law is largely silent with regard to the national state's discretion to admit or refuse aliens, once these aliens are present within the territory of the national state, international human rights norms impose important obligations upon the state with regard to non-citizens. As governments are obliged to guarantee some fundamental rights irrespective of nationality, rights based on universal personhood have broken the state's monopoly on granting membership rights.³²²

At this point, it is important to reiterate the blurring which human rights law has caused between national and international law. The international human rights regime operates partially within the nation state, as adherence to the rule of law within the nation state, as discussed in Section 3.2., ensures that international human rights norms are grounded in national institutions and practices. As a result, these norms have changed the domestic constitutional order by their implication that an individual is protected by the law as an individual, and no longer because of formal citizenship status. In addition, most of the enforcement of human rights norms takes place within

³²¹ Sassen (2004), p. 191.

³²² Murphy and Harty (2003), p. 181.

the nation state, with domestic courts playing an especially important role.³²³ These courts have become obliged to extend basic legal protection to anyone falling under the state's jurisdiction.³²⁴ Consequently, any tension between sovereignty as absolute power and international human rights should not be perceived as a conflict between a clear-cut inside and the outside,³²⁵ but this tension may surface purely within the national state.

In the case of rights protection for non-citizens, the tension between international human rights and sovereignty acquires an additional dimension, as human rights interests in that case do not compete merely with states' jurisdictional independence, but with another central element of sovereignty that I have addressed in the previous Chapter: the right to determine who belongs to the community.³²⁶

Under the influence of human rights norms, a blurring has occurred between the position of nationals and long-term or legal residents within the nation state. I will not deal with the question whether this gradual increase in rights for aliens is the result of international developments,³²⁷ or rather due to the "liberalness of liberal states" and the way domestic courts in these states have been guaranteeing rights for aliens over the past year, as Christian Joppke argues.³²⁸ As already said, the human rights discourse operates both within and without the nation state, which is one of its defining characteristics. The fact that extension of rights to non-citizens has taken place mostly in Western states under the rule of law through domestic judiciaries, does not necessarily diminish the importance of an international dimension to human rights, but it could instead underscore the unique quality of these norms when compared to other forms of (international) law.

Human rights norms have secured civil and a certain amount of political as well as social rights for non-citizens, who as a result become part of the community of the state. Even if these non-citizens do not acquire citizenship as a formal status, their position in the nation state is anchored in an explicit discourse on rights and belonging, which has been called post-national citizenship.³²⁹

³²³ See Aceves (2002), p. 277; Martin (1989), p. 564; and Sassen (1999), p. 181.

³²⁴ See McDougal, Lasswell, and Chen (1976), pp. 461-463.

³²⁵ Sassen (1996), p. 61.

³²⁶ Bosniak (2004), p. 329.

³²⁷ See for example the HRC in *Gueye et al. v. France*, 3 April 1989.

³²⁸ Joppke (1998), see in particular pp. 292-293.

³²⁹ Soysal (1994). See also Jacobson (2001) and (1996), who instead talks about the decline of citizenship.

However, with regard to discourses on post-national citizenship, it is important to make a distinction between the various categories of fundamental rights, as not the full range of political and economic rights forms part of the post-national citizenship package. Furthermore, with regard to non-citizens' status in the nation state, lawful residents should be distinguished from persons who do not have the authorisation of the state to be present on its territory. Accordingly, even more so than with regard to national citizenship, the content of post-national citizenship is impossible to define, as it is a scale on which diverse factors determine the extent of rights and the degree of belonging for each individual.

International human rights instruments oblige the state to respect classical individual rights, such as the right to life, liberty, physical integrity, freedom of thought, conscience and religion, etc, to anyone under their jurisdiction, without regard to nationality. Thus, anyone present on the territory of the state – citizen, legal resident and illegal immigrant alike – is entitled to the enjoyment of fundamental civil rights. Especially in the case of undocumented migrants, international norms, such as laid down in instruments such as the ECHR and the ICCPR are frequently invoked, as those people have no formalised status within the state to rely on.

However, with regard to their entitlement to rights, important differences exist between documented and undocumented migrants. The way in which human rights norms weakened the link between nationality and social membership is most distinctly illustrated in the case of legal, long-term residents. In addition to civil rights, most European states grant long-term legal residents many social rights on an almost equal footing with their own citizens. The gradual expansion of social rights to this class of non-citizens is emphasised by Sassen, who argues that concerning social services, citizenship status is of minor significance in Europe: "What matters is residence and legal alien status."³³⁰ In contrast, the status of illegal immigrants within the nation state, although not devoid of access to rights, can hardly be described as approaching something like citizenship status.

With regard to political rights, the distance between post-national citizenship of legal residents and national citizenship remains greatest. Notwithstanding the fact that in many European countries, long-term residents have the right to vote in municipal elections, foreigners, when they do not naturalise, are by far not accorded the full range

³³⁰ Sassen (1996), p. 95.

of political rights within the national state. A clear example of the universality of civil rights versus the enduring particularity of political rights is provided by the ECHR. Most rights which this Convention guarantees are civil rights thus to be secured to anyone under the jurisdiction of one of the Contracting Parties, as is required by Article 1 ECHR. However, with regard to Articles 10 and 11 ECHR, respectively securing freedom of expression and freedom of assembly and association – freedoms that consist of the exercise of political rights – Article 16 ECHR expressly stipulates that nothing in these provisions shall be regarded as preventing the Contracting Parties from imposing restrictions on the political activity of aliens. The fact that political rights are only to a very limited extent included in the post-national citizenship package is due to the direct link of such rights with the concept of popular sovereignty, and as such with a resounding particularistic connotation of the concept of the people.

With specific regard to post-national citizenship, it is once again important to stress the importance of the existence of the rule of law domestically, in order for human rights norms to reach their full potential and as such to transform the traditional domestic legal order. I have remarked already several times upon the fundamental role which domestic courts play with regard to the enforcement of such norms. The judiciary in a state based upon the rule of law is able to mediate between the international and the domestic legal order. Sassen contends that, as domestic courts have to accept the existence of undocumented migrants making rights-based claims, a new social contract comes into being between these aliens and society at large.³³¹

The same holds true, even more so, for immigrants that have acquired legal residence status. Such a new form of social contract may partly make up for the lack of political rights for non-nationals. David Jacobson and Galya Ruffer claim replacement of the traditional democratic route of voting, civic participation and political mobilization, by the concept of judicial agency: “Through this new mode of political engagement, litigants challenge legislative and executive authority as they cross organizational and even national boundaries.”³³² In line with Sassen’s argument, they contend that judicial agency, which term designates individual access to a dense web of judicially mediated rights and restraints, changes the connotations of the traditional

³³¹ Sassen (1996), p. 96.

³³² Jacobson and Ruffer (2003), p. 74. See also Stacy (2003), p. 2050, who argues that the human rights regime causes political requests to be framed in the language of rights.

social contract, for also outsiders can avail themselves of such access, and as such become part of the organised political community. Exclusive measures taken by the executive are challenged at the level of the nation state, where the judiciary assesses their legality in light of international human rights obligations of the state. Conflicting forces between the judiciary and the executive lead to a “shift of power towards formal commitment to human rights”,³³³ which thwarts executive but also legislative attempts to exclude non-nationals from the enjoyment of rights which were originally retained for nationals.

Any account of post-national citizenship is incomplete when it ignores citizenship of the European Union, the only formal constitutionalisation of post-national citizenship. The Treaty on the European Union, which was agreed upon and signed by the Member States in Maastricht in 1992, introduces the concept of citizenship of the European Union. Article 17 EC Treaty provides that every person holding the nationality of a Member State shall be a citizen of the Union, which citizenship shall complement and not replace national citizenship.

The most important right which European citizenship enshrines is the right to move and reside freely within the territory of all Member States (Article 18 EC Treaty), but it should be emphasised that the right to reside in another Member State for a period exceeding three months is granted only to certain classes of Union citizens.³³⁴ Citizens of the Union who reside lawfully in the territory of another Member State have the right to equal treatment within the material scope of community law, giving them in effect much the same social and economic rights as nationals of that Member State. Freedom of movement and the prohibition of discrimination on the grounds of nationality in Article 12 EC Treaty were codified long before the notion of Union citizenship came into being. Indeed, as these principles constitute cornerstones of EC law, the concept of

³³³ Jacobson and Ruffer (2003), p. 79.

³³⁴ Directive 2004/38/EC of the European Parliament and the Council of April 29, 2004, (to be implemented by April 30, 2006), on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 74/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC, and 93/96/EEC, [2004], O.J. L158/77, grants a right of residence for a period longer than three months to Union citizens who are workers or self-employed, who have sufficient resources not to become a burden on the social assistance system of the host state, students and family members of these citizens. See Lenaerts, Van Nuffel and Bray (2005), p. 548.

citizenship of the Union formalised already existing community law in the field of socio-economic rights. Nonetheless, it should be noted that the approach which the ECJ has taken to the concept of citizenship has the effect of significantly extending access to fundamental rights for EU citizens, sometimes even contrary to secondary Community legislation.³³⁵

Furthermore, citizenship of the Union entails more than the right to move and a prohibition on discrimination on the ground of nationality. Every citizen of the Union has the right to petition the European Parliament and the European Ombudsman.³³⁶ In addition, in the territory of a non-Member State in which their Member State is not represented, Union citizens are entitled to protection by the diplomatic authorities of any Member State, on the same conditions as nationals of that State.³³⁷ Moreover, every citizen of the Union has the right to vote and stand as candidate for municipal and European Parliament elections of the Member State in which he or she resides.³³⁸ Although to a limited extent, Union citizenship is thus complemented with political rights.

The impact of Community law in this respect extends outside the Community legal framework into other areas of international law, which more specifically aim at the protection of human rights proper. In *Piermont v. France*, France relied on the aforementioned Article 16 ECHR to restrict the freedom of expression of a German national who was present in French Polynesia.³³⁹ Contending that neither European citizenship, nor the status of Ms Piermont as a member of the European Parliament was relevant, France argued before the ECtHR that Ms Piermont came within the scope of Article 16 ECHR, as anyone did who was not a national of the country in which he intended to exercise the freedoms of Article 10 and 11 ECHR. However, according to the Court in Strasbourg, although not taking into account the concept of European citizenship as the Community Treaties did at the material time not recognise any such

³³⁵ See Case C-184/99, *Grzelczyk v. Centre public d'aide social d'Ottignies-Louvain-la-Neuve*, 20 September 2001; Case C-209/03, *Bidar v. London Borough of Ealing*, 15 March 2005; and Case C-456/02, *Trojani v. Centre Public D'Aide Sociale de Bruxelles*, 7 September 2004.

³³⁶ Article 21 ECT.

³³⁷ Article 20 ECT.

³³⁸ Article 19 ECT.

³³⁹ ECtHR, *Piermont v. France*, 27 April 1995.

citizenship, EU Member States were precluded to raise Article 16 against anyone in possession of the nationality of one of the Member States.³⁴⁰

Nonetheless, Union citizenship is traditional in the sense that it maintains a strong link between the very concept of nationality and rights. Only individuals who possess the nationality of one of the Member States are endowed with Union citizenship. Long term residents that do not possess the nationality of one of the Member States – those that according to Yasemin Soysal benefit from access to rights on the ground of post-national citizenship – do not benefit from the right of free movement and other Union citizenship rights, save the right to petition the Parliament and the Ombudsman. So although discrimination on grounds of nationality becomes increasingly prohibited with regard to persons that possess the nationality of one of the Member States, such discrimination is permitted with regard to the large numbers of non-European citizens present on the same territory.³⁴¹ Council Directive 2003/109/EC³⁴² attempts to improve the status of third country nationals, but essential differences remain. Even if voices are heard to base Union citizenship on residence status,³⁴³ in light of individual Member States' reluctance this will probably not happen in the near future.

If EU membership were to be truly post-national, the link between territory, nationality and rights would have to be disconnected more radically. From the outside – in the eyes of individuals who do not possess the nationality of one of the Member States – with the establishment of Union citizenship, the EU as a whole acquired the characteristics of the traditional territorial state. Indeed, Union citizenship even enhanced national citizenship,³⁴⁴ as could be confirmed by those outsiders who are subject of expulsions organised by EU joint charter flights. Rainer Bauböck contends that taking Union citizenship seriously entails that such citizenship should be accessible

³⁴⁰ Ibid, par. 64.

³⁴¹ Boclart-Suominen (2005), p. 1015.

³⁴² Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long term residents, O.J. L 16 of 23 January 2003, p 44.

³⁴³ See for example European Parliament, *Working Document on the Fourth Report of Citizenship of the Union (1 May 2001 – 30 April 2004)*, Committee on Civil Liberties, Justice and Home Affairs, 30 June 2005; and also the Parliamentary Assembly of the Council of Europe, *Recommendation 1714 (2005), Abolition des Restrictions au Droit de Vote*, text adopted by the Assembly on 24 June 2005.

³⁴⁴ See Dell'Olio (2005).

under fair conditions to all long-term residents in the Member States. The fact that nationality laws of Member States are not harmonised, and in addition are illiberal and exclusionary, is “a matter of concern to the Union as a whole as it is through them that membership in the Union is regulated.”³⁴⁵ The status of third-country nationals is de facto determined by Member States’ national immigration rules,³⁴⁶ which matter will receive closer attention in Chapter 5.

We have seen that the internalisation of international human rights norms within the nation state has led to a shading of the distinction between inside and outside. Inside and outside can no longer be separated by drawing an unambiguous line between nationals and foreigners, but instead the extent of inside and outside can be expressed in terms of degrees. Wholly inside are those who possess the nationality of the nation state, entitled to the full range of civil, political and social rights. Wholly outside are those that do not find themselves under the jurisdiction of the nation state. Inside, albeit to a lesser degree than nationals, are foreigners who are in possession of a formal residence status that secures their entitlement to civil rights, a range of social and economic rights, and in some cases a limited amount of political rights. Partially inside and partially outside are foreigners who are illegally present on the nation state’s territory: their entitlement to rights concerns mainly civil rights.

The erosion of the link between nationality and citizenship is exemplified by this shading of the distinction between inside and outside. Apart from the erosion of this once necessary linkage, it should also be noted that under the influence of international law, issues related to the concept of nationality itself no longer fall exclusively under the national state’s domestic jurisdiction. Although international law still largely allows each state to determine whom it regards as its citizens,³⁴⁷ it is possible to discern developments at the international plane, indicating that the state no longer enjoys an unlimited discretion with regard to all matters relating to nationality. These developments relate mostly to the prevention of statelessness and issues of dual nationality, and should not be overstated.³⁴⁸ Nonetheless, with regard to these issues, international law treats questions of nationality increasingly from a rights-oriented perspective. As such, they may signal a departing from international law’s traditional

³⁴⁵ Bauböck (2003), p. 6. See also Lange (1995), pp. 109-110.

³⁴⁶ Boelaert-Suominen (2005), p. 1049.

³⁴⁷ Rubenstein (2003), p. 168-169.

³⁴⁸ See for a detailed discussion: Spiro (2003).

approach to nationality law, which consisted of a “matter of human geography confronted on the same terms as territorial geography”, predicated to the maintenance of international order instead of directly accounting for individual interests.³⁴⁹ Kim Rubenstein argues along the same lines, suggesting a movement away from the centrality of the state in international law towards a rights-based, individualized focus: “as international law becomes more flexible in its use of nationality so too it becomes part of citizenships progressive project.”³⁵⁰

This Section has argued that international law has increasingly taken account of the individual interests that are involved in the exercise of jurisdiction over people by the state within its territory. International human rights have factually led to a weakening of the tie between formal citizenship status and individual rights within the nation state. In this sense, one can speak of what I will call the ‘denationalisation of the rule of law’. The next Section will investigate how human rights have affected territoriality: what is their impact on the territorial claim of the modern state to distinguish inside from outside? Are human rights norms capable of transforming the territorial form of sovereignty in a likewise manner as they have affected its content, so as to be able to speak of a ‘de-territorialisation of the rule of law’?

3.5.3 Sovereignty, territory, and individual rights

In the previous Section, we have seen that human rights norms have led to an extension of citizenship status, if not formally, than at least with regard to citizenship as a status indicating membership and access to rights in the organised political community. However, although this has certainly been beneficial for large groups of individuals living in states which are not their own, in this Section I will argue that advancing human rights norms have not led to a truly radical new approach to citizenship, one that is able to abandon the decisive distinction between universalism and particularism. We will see that formal citizenship status remains of fundamental importance for a territorial regime of governance and access to fundamental rights for the individual.

³⁴⁹ Spiro (2003), p. 94-95.

³⁵⁰ Rubenstein (2003), pp. 185-186.

“ While it may be true that advancing human rights norms increasingly commit countries to granting the same civil and social (though not political) rights to those merely resident in their territories as accorded their full citizens, this development does not necessarily signal the “decline of citizenship” for most people. These arguments primarily concern the access to rights only of immigrants, not of the main stock of the populations that constitute and replenish the bodies of citizens that constitute states. Such arguments tend to overstate the significance of what are, in fact, relatively marginal phenomena. From this point of view, it seems quite exaggerated to claim that, “in terms of translation into rights and privileges, [national citizenship] is no longer a significant construction.”³⁵¹

We have seen that within the nation state, the status of legal residents and undocumented aliens differ in important respects. According to Linda Bosniak, it is the state’s claim to territorial sovereignty that accounts for this difference in treatment. She argues that with regard to undocumented immigrants, the state’s territorial sovereignty has been breached, which explains why the state accords these persons far less rights than legal residents.³⁵²

The way in which the modern state perceives and wishes to maintain its territorial sovereignty, has a direct link with individual rights, and as such also with its capacity to exercise power over people. Nevertheless, the territorial form of sovereignty and its actual content as jurisdictional claims over people within a certain territory are often perceived as separate from each other because the former has acquired an image of neutrality and self-evidence. Whereas we have seen that international law has increasingly conceded that the content of sovereignty implicates individual interests, acknowledgement of the fact that the territorial form of sovereignty involves individual interests as well is rare.

In this Section, my first argument will be that territoriality exerts a limiting influence on the universality of human rights. To make this point, I will first confirm the importance of territoriality in this respect by examining the territorial scope of human rights obligations of national states and the way in which access to rights is factually guaranteed to the individual in Section 3.5.3.1. Secondly, I will contend that human rights norms have made very few inroads whenever the states bases its claims on its territorial sovereignty in Section 3.5.3., which investigates the way in which fundamental rights limit the state’s spatial powers or its assertions of territorial

³⁵¹ Torpey (2000), p. 156.

³⁵² See for a detailed discussion Bosniak (1991), pp. 753-756.

sovereignty. I will conclude that international law regards the notion of territoriality and sovereignty's territorial frame essential to the preservation of a particular international order. The result is that the individual interests that are involved in sovereignty's form are still only marginally accounted for, a proposition that will be investigated further in Chapters 4 and 5.

3.5.3.1. Territorial scope of human rights protection: Duties beyond borders?

“The concept of universal human rights is antithetical to the [...] geographic distinctions that cause the protection of humanitarian law and the Constitution to be variable and unpredictable.”³⁵³

Most human rights instruments provide that the state is to ensure individual rights protection to anyone under its jurisdiction.³⁵⁴ Thus, in any case, actions of states within their national territory may not violate any fundamental rights. With regard to actions of states outside national territory, the situation is more complex. Concerning European states' human rights obligations, the admissibility decision of the ECtHR in *Bankovic*³⁵⁵ has led to ambiguity with regard to how the notion of jurisdiction in Article 2 ECHR is to be interpreted and the Court's approach to this issue has been criticised as fundamentally flawed.³⁵⁶ Before considering the implications of *Bankovic* and other recent case law, I will discuss the approach that the Strasbourg organs have traditionally taken towards extra-territorial application of the Convention, as well as the way in which other international human rights bodies have dealt with the question of extra-territoriality.

Taking into account the object and purpose of human rights obligations of national states, there is no *a priori* reason why they should not be held responsible for those violations attributable to them that occurred outside national territory.³⁵⁷ Both the European Commission for Human Rights and the ECtHR have repeatedly held that in

³⁵³ Fitzpatrick (2002), p. 334.

³⁵⁴ Article 1 ECHR, Article 1 American Convention on Human Rights, Article 2 ICCPR.

³⁵⁵ ECtHR, *Bankovic and others v. Belgium and others* (inadmissible), 12 December 2001.

³⁵⁶ Altiparmak (2004); Mantouvalou (2004); R  th and Trilsch (2003); and Happold (2003).

³⁵⁷ Meron (1989), p. 78.

certain instances the national state can be held responsible for actions of its authorities outside its national territory, as the term jurisdiction is not limited to the national territory of the contracting states.³⁵⁸ According to the Commission, "it is clear from the language [...] and the object of [Article 1] and the purpose of the Convention as a whole, that High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad."³⁵⁹

Apart from the situation in which it has occupied foreign territory,³⁶⁰ a state can be held responsible for violations of the Convention rights and freedoms of persons who were in the territory of another state, but who were "found to be under the former state's authority and control through its agents operating – whether lawfully or unlawfully – in the latter state."³⁶¹ Before the *Bankovic Case*, the case law of both the Strasbourg Commission and the Court show that in order to engage a state's liability under the ECHR, overall exercise of jurisdiction is not always required and even a specific act committed abroad is capable of bringing a person within the jurisdiction of the state to which that act can be attributed.³⁶²

"[...] nationals of a State are partly within its jurisdiction wherever they may be, and authorised agents of a State not only remain under its jurisdiction when abroad, but bring any other person "within the jurisdiction" of that State to the extent that they exercise authority over such persons.

³⁵⁸ ECtHR, *Drozd and Janousek v. France and Spain*, 26 June 1992. EcommHR, *Hess v. United Kingdom*, Decision of 28 May 1975. In particular, actions by a state's consular and diplomatic representatives may involve the liability of a national state under the ECHR. See EcommHR, *X v. Germany*, Decision of 25 September 1965; and Lush (1993), p. 898. In *Drozd and Janousek*, the Court accepted that France had limited its jurisdiction *ratione loci* by a declaration under Article 63, but it concluded that it exercised jurisdiction *ratione personae*. Lush (1993) concludes that the Convention thus seems to be "hybrid, not without a measure of internal consistency."

³⁵⁹ EcommHR, *Cyprus v. Turkey*, Decision of 26 May 1975 and EcommHR, *X. and Y. v. Switzerland*, Decision of 14 July 1977.

³⁶⁰ And exercises effective control of an area outside its national territory. See ECtHR, *Loizidou v. Turkey*, (preliminary objections), 23 March 1995, par. 62 and 18 December 1996 (merits), par 52.

³⁶¹ EcommHR, *M v. Denmark*, decision of 14 October 1992; and *Illich Sanchez Ramirez v. France*, decision of 24 June 1994, p. 155.

³⁶² EcommHR, *W. v. Ireland*, Decision of 28 February 1983, par. 17. Altıparmak (2004), pp. 233-244.

Insofar as the State's acts or omissions affect such persons, the responsibility of that State is engaged."³⁶³

The Inter-American Commission on Human Rights and the UN Human Rights Committee take a similar approach in order to establish extra-territorial responsibility for human rights violations.³⁶⁴ According to these bodies, the meaning of the term jurisdiction is not to be equated with territorial competence, but it should also cover extra-territorial acts by the state or its agents that violate the fundamental rights protected by respectively the IACHR and the ICCPR outside national territory.³⁶⁵

This broad interpretation of the term jurisdiction, taking as a starting point the "relationship between the person affected and the state concerned, not [...] the geographical location of the violation"³⁶⁶ may perhaps not reflect the ordinary meaning of jurisdiction in international law, but it is consistent with the object and purpose of international human rights documents. When the term jurisdiction is used in international law to discuss the relationship between states amongst each other, it is clear that its scope is limited by the sovereign (territorial) rights of other states. The concept of jurisdiction in human rights documents in contrast should be understood as having a direct relationship with the rules concerning state responsibility in international law, which determine that responsibility derives from control.³⁶⁷ This line of reasoning is confirmed by the Commission's observations in *Stocké*:

"An arrest made by the authorities of one State on the territory of another State, without the prior consent of the State concerned, does not [...] only involve State responsibility vis-à-vis the other State, but [it] also affects that person's individual right to security under Article 5(1) . The question whether or not the other State claims reparation for violation of its rights under international law is not relevant for the individual right under the Convention."

³⁶³ EcommHR, *Stocké v. Germany*, Report of 12 October 1989, par. 166-167. See also EcommHR, *Chrysostomides and others v. Turkey*, Decision of 4 March 2003.

³⁶⁴ Inter-American Commission of Human Rights, *Coard et al. v. The United States*, decision of 29 September 1999, par. 37, 39, 41; HRC, *Lopez Burgos v. Uruguay*, 29 July 1981, par. 12.3 and HRC, *Celiberti de Casariego v. Uruguay*, 29 July 1981, par. 10.3.

³⁶⁵ Lush (1993).

³⁶⁶ Altiparmak (2004), p. 239.

³⁶⁷ Lawson and Schermers (1999), p. 603. See also Draft Articles on State Responsibility, International Law Commission (2001).

Thus, although a state's jurisdictional competence is primarily territorial, responsibility for violations of fundamental rights is not restricted to national territory. Case law of the Strasbourg organs, the IACHR and the HRC make clear that responsibility *ratione personae* for extra-territorial acts, although it may not be as straightforward to establish as responsibility *ratione loci*, is not exceptional.³⁶⁸ This approach is in fact required by the idea of the modern rule of law, which wishes to overcome the particular, territorially defined, universalism of traditional constitutional discourses. In the words of the IACHR, "no person under the authority and control of a state, regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable human rights."³⁶⁹

However, in *Bankovic*, the ECtHR seemed to depart from some of the principles that were deemed established jurisprudence by both the Commission and the Court. The application originated in the 1999 NATO bombing of Radio Televizije Srbije in Belgrade and was lodged by one individual who had been injured by the bombing and five surviving relatives of those killed by it. They alleged that by bombing the Serbian Television Station, the respondent States had violated Articles 2, 10 and 13 of the Convention. The Court declared their application inadmissible as it was not satisfied that the applicants and their deceased relatives were within the jurisdiction of the respondent states on account of the extra-territorial act in question.³⁷⁰ Although it has been argued that the Court's conclusion can be supported on the ground that the NATO did not at any moment assert authority or exercise control over the individuals,³⁷¹ the decision of the Court was framed in much wider terms that certainly signalled a departure from the stance that the Strasbourg bodies have previously taken towards the question of extra-territorial jurisdiction.

In the first place, the Court referred to the 1969 Vienna Convention in order to ascertain the "ordinary meaning" of the term jurisdiction. It went on to state that, from

³⁶⁸ In addition to the cases quoted above see also IACHR, *Salas v. The United States*, 14 October 1993 and; *the Haitian Centre for Human Rights et. Al. v. United States*, decision of 13 March 1997.

³⁶⁹ IACHR, *Detainees in Guantanamo Bay, Cuba; Request for Precautionary Measures*, March 13, 2002.

³⁷⁰ *Bankovic v. Belgium* (inadmissible), 12 December 2001, par. 82.

³⁷¹ Happold (2003), p. 90 who calls it the right decision for the wrong reasons. The right decision as there was no structured relationship between the NATO and the victims of the bombing, who were rather unfortunate enough to be in a building targeted by NATO forces.

the standpoint of international law, the jurisdictional competence of a state is primarily territorial. If extra-territorial jurisdiction is exercised, the suggested bases of such jurisdiction are, according to the Court, defined and limited by the sovereign territorial rights of other states.³⁷² It concluded that "Article 1 of the Convention must be considered to reflect this ordinary and essential territorial notion of the term jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case."³⁷³

In reaching this conclusion, the Court referred to its previous case law, which "demonstrates that the recognition of the exercise of extra-territorial jurisdiction is exceptional: [the Court] has done so when the respondent state, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally ascribed to that government."³⁷⁴ It is unfortunate that the Court did not refer to decisions of the ECommHR, such as the above cited *Stocké Case*, where the question as to whether the extra-territorial act occurred with or without the consent of the state on whose territory it took place was deemed irrelevant for the interpretation of Article 1.

The Court's adherence to the ordinary meaning in international law of the term jurisdiction in *Bankovic*³⁷⁵ is problematic for a number of reasons, such as involving a danger "to embroil the Court in disputes as to whether a state has acted lawfully or unlawfully."³⁷⁶ More fundamentally, it adheres to an understanding of the territorial frame of sovereignty that thwarts international human rights law's underlying principles. That it is no longer the sovereignty of the violating state that constitutes a barrier to claim rights that are supposed to be inalienable, but instead the sovereignty of the state on whose territory the violation took place, does not matter much from the viewpoint of those whose rights are violated.

In the second place, the Court's interpretation of previous cases that were decided or pending is problematic. It stated that in the admissibility decisions in the

³⁷² *Bankovic v. Belgium*, 12 December 2001, par. 60.

³⁷³ *Ibid.* par. 61.

³⁷⁴ *Ibid.* par. 71.

³⁷⁵ Its approach was repeated in *Gentilhomme and Others v. France*, 14 May 2002, §20.

³⁷⁶ Happold (2003), p. 83.

cases of *Issa*,³⁷⁷ *Öcalan*,³⁷⁸ and *Xhavara*,³⁷⁹ the Respondent States did not raise the jurisdiction issue.³⁸⁰ Apart from the fact that the absence of claims by the parties concerning admissibility has not impeded the Court from addressing the issue of admissibility, the circumstance that the respondent states refrained from raising admissibility objections that were related to the jurisdiction issue at least indicates state practice that does not adhere to the ordinary meaning of the term jurisdiction.

But it is the Court's referral to its judgment in the *Cyprus v. Turkey Case*³⁸¹ that is perhaps most unsettling. Its observation in the latter case that there was a need to avoid "a regrettable vacuum in the system of human rights protection" in Northern Cyprus was to be read in the territorial context of that case:

"[...] the inhabitants of Cyprus would have found themselves excluded from the benefits of the Convention safeguards and system which they had previously enjoyed, by Turkey's effective control of the territory and by the accompanying inability of the Cypriot government, as a contracting state, to fulfil the obligations it had undertaken under the Convention."³⁸²

It went on to state that the desirability of avoiding a vacuum in human rights protection has so far be relied on the Court in order to establish jurisdiction solely with regard to territories that would normally be covered by the Convention. Accordingly, the Court excluded the Federal Republic of Yugoslavia from the legal space in which contracting states have to ensure respect for the Convention, even in respect of their own conduct. This analysis has been criticised as turning an argument that was originally intended to expand the court's jurisdiction into one that limits extra-territorial jurisdiction.³⁸³

³⁷⁷ ECtHR, *Issa and others v. Turkey* (Admissible), 30 March 2000.

³⁷⁸ *Öcalan v. Turkey* (Partly admissible), 14 December 2000.

³⁷⁹ *Xhavara and others v. Italy and Albania*, 11 January 2001.

³⁸⁰ *Bankovic v. Belgium*, 12 December 2001, par. 81. It also mentioned the admissibility decision in the case of *Ilascu*. In the latter case, the Court stated that responsibility under the Convention may also arise when a state exercises effective control of an area outside its national territory as a consequence of military action. However, the Court did not draw any conclusion on the jurisdiction issue as it found it too closely bound up with the merits of the case that it would be inappropriate to determine them at the admissibility stage. See *Ilascu and Others v. Moldova and Russia* (admissible), 4 June 2001.

³⁸¹ *Cyprus v. Turkey*, 10 May 2001.

³⁸² *Bankovic v. Belgium*, 12 December 2001, par. 80.

³⁸³ Ruth and Trilsch (2003), p. 172.

In fact, the Court's approach in *Bankovic* illustrates that it is at times decisively and unnecessarily influenced by territoriality and the resultant (territorial) division of humanity as falling under the responsibility of one particular state, even though this construction may obstruct the important principle of effective protection of the Convention Rights and Freedoms, so often invoked by the Strasbourg Court itself.³⁸⁴

When deciding on the merits of the *Issa Case*,³⁸⁵ the Court seemed to mitigate its restrictive interpretation of the term jurisdiction again. This time it did refer to some of the cases decided by the HRC and former decisions of the ECommHR, and it declared that a state may be held accountable for violation of Convention rights of persons "who are in the territory of another state but who are found to be under the authority and control of the former state through its agents operating – whether lawfully or unlawfully – in the latter state."³⁸⁶ However, the Court concluded that the applicants came not within the jurisdiction of Turkey as they could not prove that the Turkish armed forces had conducted operations in the area where the alleged violations took place.³⁸⁷

Also in its judgment on the merits in the *Öcalan case*, the Court referred to the ECommHR decision in *Stocké*.³⁸⁸ According to the Court, the *Öcalan case* was to be distinguished from *Bankovic* as the "applicant was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest and return to Turkey."³⁸⁹ When it decided on the merits in the *Ilascu Case*, the Court again stressed the ordinary meaning of the term jurisdiction in public international law and referred to *Banković* to stress the prevalence of the territorial principle in the

³⁸⁴ See for example ECtHR in *Loizidou v. Turkey* (preliminary objections), 23 March 1995, par. 72.

³⁸⁵ *Issa and others v. Turkey*, 16 November 2004. Worth noting that the Turkish Government submitted post-admissibility observations contending that in *Bankovic* the Court had departed from its previous case law on the scope of interpretation of Article 1. See par. 52 of the judgment

³⁸⁶ *Ibid.* par. 71.

³⁸⁷ *Ibid.* par. 81.

³⁸⁸ *Öcalan v. Turkey*, 12 March 2003, par. 88.

³⁸⁹ *Ibid.* par. 93. See also ECtHR, *Hussein v. Albania and others* (Inadmissible), March 2006, where the Court decided that the arrest of Saddam Hussein in Iraq did not fall within the jurisdiction of the respondent European States as he had not substantiated any evidence of a jurisdictional link between himself and those States.

application of the Convention. However, it added that the concept of "jurisdiction" is not necessarily restricted to the national territory of the contracting states.³⁹⁰

Thus, we may conclude that if a state acts extra-territorially, in certain cases, whether they are deemed exceptional or not, it is theoretically bound by its international human rights obligations. Everyday reality, however, poses limits to extra-territorial responsibility that are perhaps even more difficult to overcome than those formulated in a court of law. We will see in Chapter 5 that especially in the field of immigration policy, European countries resort to a range of extra-territorial measures to prevent immigrants reaching their territory, actions that may result in breaches of fundamental rights. In practice, these measures are seldom challenged judicially, not least because persons affected by them are not likely to be able to bring their cases to court, an observation that brings us to a further issue to be investigated in order to understand territoriality's influence on the modern version of the rule of law.

Apart from looking at the territorial scope of human rights obligations as laid down in various instruments, one needs to investigate the way in which access to those rights is factually guaranteed in order to comprehend the importance of sovereignty's territorial frame for the notion of individual rights. This leads back to Torpey's scepticism concerning the decline of citizenship in a world where territory is exclusively divided amongst nation states. Indeed, we need to investigate citizenship once more, but now in terms of a global system of governance, to become aware of the fundamental role which space as a political construct plays in determining access to rights.

Human rights and their realisation depend on the state system, a global structure in which governance is still largely undertaken on a territorial basis.³⁹¹ Celebrations of post-national citizenship overlook the territorial aspect of the global political system, and thus fail to appreciate the importance of territory in the practice of fundamental rights protection.³⁹² As such, accounts of post-national citizenship, just as traditional accounts of citizenship, take an internalist perspective. Citizenship is investigated as a process taking place within the nation state as a closed container, territorially defined:

³⁹⁰ *Ilascu and others*, 8 July 2004, par. 310-314.

³⁹¹ Henkin (1999), p. 7; and Shafir (2004), p. 23.

³⁹² See Murphy and Harty (2003), who make the same argument with regard to what they call models of post-sovereign citizenship and self-determination of sub-state nations.

“The state under the rule of law is one of the key institutional arenas for the implementation of human rights of all individuals regardless of nationality.”³⁹³

From a wholly internalist perspective, it makes sense to claim that nationality is no longer determining the status of an individual. In other words, nationality is no longer decisive for the extent of access to rights, but only as long as an individual is present within the territory of the nation state. However, from a global perspective, taking into account the numerous individuals living in states not governed by the rule of law, nationality, citizenship and fundamental rights are still firmly linked. In practice, rights are “territorially limited at the level of the nation state”³⁹⁴

The Universal Declaration of Human Rights of 1948 (UDHR) states that fundamental rights are to be guaranteed, not only without distinction to the personal characteristics of an individual, but in addition without distinction on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs. However, the concept of territoriality, continuously confirmed and reinforced by international law,³⁹⁵ leads to a different reality. We saw that the ECtHR has stated unambiguously that Article 1 ECHR sets limits on the reach of the Convention.³⁹⁶ Even apart from the question of responsibility for extra-territorial acts, these limits in general can only be explained in a system that divides responsibly and population on the basis of territory, and they constitute the very limits on the universality of human rights generally. As long as political community is based on space; in other words, when the “territorial compartmentalisation of the globe remains based on the existing pattern of sovereign states,”³⁹⁷ true universality of human rights remains mere theory. In this context, Gershon Shafir argues that human rights can only be really effective if they are transformed in membership in a global community, which has its own distributive and enforcing institutions.³⁹⁸

It goes beyond this study to design feasible instances of citizenship that are not dependent on territorially demarcated units such as the nation state, the enforcement

³⁹³ Sassen (1999), p. 194

³⁹⁴ Chandler (2003), p. 332.

³⁹⁵ McCorquodale (2004), p. 480.

³⁹⁶ *Loizidou v. Turkey*, 23 March 1995, par. 62.

³⁹⁷ Newman (2001), p. 138.

³⁹⁸ Shafir (2004), p. 24. See also Eriksen (2003), pp.369-370.

capacity of which is presently so important for the realisation of human rights.³⁹⁹ What I have attempted to do in this Section is show how territoriality impedes the realisation of the universal aspirations of the human rights discourse.

Even though within the territory of the nation state, citizenship as a normative project and nationality become increasingly decoupled, I have argued that outside its territory, the two remain doctrinally linked. Although, as Sassen asserts, the ascendance of human rights may strengthen the tendency to move away from nationality as an absolute category, the territorial borders of the nation state at the same time determine the exact limits of this tendency. Hence, I disagree with her argument that human rights equally contribute to a move away from national territory.⁴⁰⁰ Similarly, I contest the claim made by Yasemin Soysal, who argues that, as national belonging per se is no longer the basis for rights, we witness the emergence of a new “model of membership, anchored in deterritorialized notions of person’s rights.”⁴⁰¹

On the contrary, it may well be that a reassertion of territorial sovereignty is the modern state’s answer to the growing significance of individual rights protection – irrespective of nationality – within its territory. In a system where presence on territory is decisive for the extent of rights to be enjoyed, states may actually benefit from keeping people out of their territories. Whether there are limits to such assertions of territorial sovereignty will be investigated below.

3.5.3.2. Limits to the state’s spatial powers

Dora Kostakopoulou and Robert Thomas argue that the British asylum regime cannot be understood without reference to a specific understanding of territoriality, which is modelled upon private ownership law.⁴⁰² According to these authors, the idea of territoriality is conducive to the formation of what they call a geo-authoritarian culture, which culture does not only impede the recognition of duties beyond borders, as we have seen above, but also increases the spatial powers of governments.⁴⁰³ Asylum and matters relating to freedom of movement more generally will be addressed in the

³⁹⁹ See Lipschutz (2004), pp. 45; and Shafir (2004), p. 24

⁴⁰⁰ Sassen (1999), p. 185.

⁴⁰¹ Soysal (1994), p. 3.

⁴⁰² Kostakopoulou and Thomas (2004), p. 7.

⁴⁰³ Kostakopoulou and Thomas (2004), p. 7.

next two Chapters, but here I will sketch the context in which the state is able to make use of its spatial powers when dealing with these issues.

First, it has become clear in the Sections of this Chapter dealing with citizenship, be it national or post-national, that territory is the means through which governments compartmentalise and control populations.⁴⁰⁴ Furthermore, we have seen in the Section on international law that inviolability of national territory is one of the key principles of international law. In international law, sovereignty stands for ownership of territory, and international law functions as a distributive mechanism for determining which state can exercise sovereignty over a certain territory.⁴⁰⁵ International law organises power and authority into territorially defined sovereign units, and inviolability of national territory and the maintenance of the territorial status quo are its elemental principles. In this particular context, David Luban discusses what he calls Nuremberg's "equivocal and immoral legacy". He argues that, although the veil of sovereignty was pierced by criminalizing certain acts which are carried out by the state against its own population, the criminalization of aggression in the Trials amounted to erecting a wall around state sovereignty, resulting in the old-European model of unbreachable nation states.⁴⁰⁶

It follows that that international law makes a difference between the sovereignty's territorial form and the exercise of its jurisdiction within this territorial framework. Although the state is no longer permitted to employ the latter in whatever way it pleases, the maintenance of the integrity of its territorial boundaries remains its exclusive prerogative. It seems that human rights norms have transformed international law, but only with regard to the sovereign state's jurisdictional claims over persons within a given territory. Regarding territorial sovereignty, international law is still the law for and by sovereign states alone,⁴⁰⁷ and its main aim is to serve the narrow interests of the stability of international order and those of already existing states.⁴⁰⁸

⁴⁰⁴ Newman (2001), p. 144.

⁴⁰⁵ McCorquodale (2001), p. 142

⁴⁰⁶ Luban (1994), p. 336.

⁴⁰⁷ It may be countered that humanitarian considerations in contemporary international law sometimes justify violations of national territory. In the case where a purely internal situation is deemed a threat against the peace, international law may authorise a breach of territorial sovereignty. However, although such interventions clearly violate territorial sovereignty, their justification lies in the state's abuse of jurisdiction over people in a given body politic, not in the use of its spatial powers. In addition, and perhaps more significantly, the example of humanitarian interventions proves that human rights norms play an important role in maintaining the system of sovereign states based on territoriality: if the modern

Perhaps the prohibition on the use of force can hardly be used as an example to demonstrate that the state's spatial power – its territorial sovereignty – is not limited by international law. However, as we have seen in Section 3.4.3., the notion of war, legitimate violence, and territorial boundaries are intertwined. They mutually influence each other in a discourse that attempts to reduce every trans-national problem to a territorial solution. And, as Mary Kaldor writes, “the stylised notion of war [...] as a construction of the centralised, ‘rationalised’, hierarchically ordered, territorialized modern state, [...] dominates, even today, the way policy makers conceive of security.”⁴⁰⁹

Accordingly, the nearly absolute value of territorial integrity extends far beyond the language of armed force between national states, while it is at the same time decisively shaped by that language. In this respect, international law still regards territorial sovereignty through much the same eyes as the United States Supreme Court did in the *Chinese Exclusion Case*, which was decided in 1889:

“to preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us”⁴¹⁰

With regard to freedom of movement of persons, Chapters 4 and 5 will more specifically explore the relationship between the regulation of the permeability of the national border and international law. In Chapter 5, I will examine in closer detail the allegation that “human rights norms have seen states yielding jurisdiction, but not territory, which remains doctrinally enclosed.”⁴¹¹ There, I will investigate with specific regard to individual rights and international movement whether human rights norms

state respects human rights there are no reasons to doubt its territorial claims. Just as in the cases of diplomatic protection and the protection of minorities, international law's exceptions seem to prove the territorial rule

⁴⁰⁸ See McCorquodale (2001), p. 138.

⁴⁰⁹ Kaldor (1999), p. 15.

⁴¹⁰ *Chac Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. (1889) 581, at 606.

⁴¹¹ Panglangan (2001), p. 165.

have nevertheless contributed towards a development in which account is taken of the individual interests that are involved in the territorial form of sovereignty.

In this Section, I have investigated the link that exists between territory and rights. I have argued that territoriality impedes the realisation of human rights' universal aspirations. At the same time, it seems that human rights have not made any significant inroads in the state's assertion of its territorial sovereignty, a provisional conclusion that will be examined in detail in Chapters 4 and 5. With regard to territorial sovereignty, international law seems to be still largely the law for and by sovereign states alone. In this respect, it seems justified to conclude that human rights have failed to establish a constitutional order over and across physical borders.

In addition, it can be argued that human rights norms perhaps even have a reifying effect on territoriality, as the progressive development of these norms has "formally enshrined modern ideals of legitimate statehood in the normative fabric of international society."⁴¹² When we regard human rights from this perspective, it seems that they form an inherent part of the modern discourse of legitimate statehood, a discourse that still seeks to justify territorial particularism on the grounds of ethical universalism.⁴¹³

3.6. CONCLUSIONS: A PARTICULARIST UNIVERSALISM?

In this Chapter, I have explored the ways in which, over time, the use of violence by the state has been limited by various discourses. We have seen that in the general concept of the rule of law we can discern material and formal limits on the exercise of political power. The former are constituted by fundamental rights, whereas with regard to the latter, the separation of powers and an independent judiciary deserve special attention.

It is important to bear in mind that there exists a difference between the legitimacy of the exercise of political power (legality), and the legitimacy of its foundations. The latter question is decided by the concept of sovereignty as the construction of a particular legal order; an intrinsically political concept the foundations

⁴¹² Reus-Smit (2001), p. 531.

⁴¹³ Reus-Smit (2001), p. 522, with regard to the proliferation of new sovereign units and decolonisation.

of which cannot be assessed with reference to that same legal order. In contrast, the exercise of state power within a constitutional framework can be subjected to the requirements of the rule of law, and can accordingly be judged as to its legality or legitimacy. Consequently, at the moment that the rule of law or the normal constitutional guarantees of the modern state do not fully apply, we can observe sovereignty's undisguised claim to distinguish the inside from the outside, a claim that is, as we have seen in Chapter 2, based on both territory and identity. The emergence of the exposed core of state power in this sense is likely in the field of migration, associated as it is with the "essence of the nation"⁴¹⁴ and the unity of political community in contemporary Western states, and which is indeed an area where we discern extensive executive discretion and widespread judicial deference, as will be shown later in this study.

We have seen that citizenship's potential for universalism was nipped in the bud on account of territorialisation, both by the resulting Westphalian order as a global structure (the structural dimension of citizenship) and by the ensuing internal sovereign claims of the territorial state. This led to a construction by which membership in the territorially defined state became a necessary condition for access to those rights that were supposed to be universal: the loss of national rights in practice entailed the loss of human rights. Citizenship's internal and structural dimensions interact to reinforce the ideal of national territorial sovereignty, and it presents the link between rights and territorial belonging as natural and necessary.

However, it is not only citizenship's linkage between rights and identity, which shows how territorial boundaries drawn in the past, influence the question of which kinds of state violence are prone to correction through the law. Also international law's regulation of state violence is strongly shaped by the way in which territorial demarcations were brought about. The result is that in international legal regulation of state violence, matters of identity and territorial boundaries are connected to each other by the same sovereign logic as which binds together people, territory and authority within the nation state. And just as a tension exists between the universal and the particular within the nation state, the same tension is present in all accounts of international law, expressed in differing conceptions of who are the subjects of international law.

⁴¹⁴ Dauvergne (2004), p. 592.

A stubborn conception of the territorial state as the sole subject of international law has had a strong impact on the regulation and legitimisation of violence. International law, until the advent of international human rights, has largely ignored domestic violence, but it has attempted to regulate those kinds of violence that crossed national boundaries. When in the course of the twentieth century, territorial integrity became a cornerstone of international law, sovereignty in international law no longer entailed a right to wage war as an instrument of foreign policy. Nonetheless, the old language of war, a state-based discourse with emphasis on the territorial component of sovereignty that is firmly rooted in the Westphalian state system, still decisively shapes the way in which we conceive of sovereignty, political community and the state prerogatives with regard to its territorial boundaries.

Even classical exceptions to the rule that internal violence is a matter for the sovereign state alone affirm a particularistic conception of the modern state and the system it forms part of. As these rules only confer states with rights, they are consistent with citizenship's structuring role in the global world, in which national sovereignty is supposed to embody a perfect link between territory and identity. In addition, international law's exceptions concerning the treatment of minorities and foreigners prove and reinforce the rule that decrees that territorial belonging is essential in order to enjoy rights that were supposed to be universal and inalienable.

The way in which both citizenship and classical international law afford protection against state violence is thus profoundly shaped by sovereignty's claim to distinguish the inside from the outside. The argument by Richard Mansbach and Franke Wilmer that "the relationship between identity and borders underlies both the process of norm articulation and the kinds of violence identified as problematic"⁴¹⁵ thus proves to be true, not only in the international arena, but equally with regard to the domestic order.

Thus, different discourses traditionally regulated internal and external state violence. The existence of the notion of *domain réservé* in international law, exemplified the separateness of the domestic and international orders. Even though not directly apparent, the strict separation between international and domestic law that was brought about by the territorial state and the system it forms part of made a theoretical division within the concept of sovereignty possible. Sovereignty's claim to distinguish

⁴¹⁵ Mansbach and Wilmer (2001), p 56.

the inside from the outside is based on both power over territory and power over people; nevertheless, in due time sovereignty's territorial frame became conceptually distinct from the exercise of jurisdiction over people within a body politic. The state's jurisdiction within a clearly demarcated territory was regulated by domestic law only. Matters relating to the territorial frame of sovereignty were dealt with by international law, as external violence was perceived as engaging the territorial sovereignty of the modern state in an area where only the interests of states were legally recognised. The result was that the exercise of power through political institutions and the clear spatial demarcation of the territory on which this power was exercised, became distinct aspects in the definition of the state,⁴¹⁶ and the intrinsic bond that existed between them was seldom accounted for.

After the Second World War, the international community recognised the inherent dangers of the old system. Human rights law was intended to close the gap between national and international law. From then onwards, international law decrees that all individuals present within the territory of the nation state, citizens and non-citizens alike, are entitled to protection of their fundamental rights. Human rights law has thus to a certain degree caused convergence between national and international law. Internally, citizenship can no longer be the only foundation for access to rights, and the domestic judiciary in the constitutional state plays an important role with regard to the implementation of international norms protecting human dignity. Externally, the individual has become a subject of international law, and the treatment by the national state of persons under its jurisdiction is no longer a mere matter of sovereign discretion.

Nevertheless, even though human rights have caused convergence between national and international law with regard to the rule of law, they have not succeeded in abolishing the conceptual distinction between content and form of sovereignty, which in turn results in the immunisation of the territorial component of sovereignty against legal forces of correction. In order to see this clearly, I have investigated the way in which modern human rights law affect sovereignty's claim to distinguish the inside from the outside.

We have seen that human rights norms have significantly limited the state's claim to decide matters of inside and outside within its territory by reference to identity. Nevertheless, when sovereignty's claim to distinguish the inside and the outside is

⁴¹⁶ Agnew and Corbridge (1995).

based on territory, human rights law has not achieved a similar transformation. In spite of notions of post-national citizenship, the modern version of the rule of law remains territorially limited for two reasons.

In the first place, in most cases, access to fundamental rights is factually determined by presence on territory. National states refuse to be held accountable for actions that took place outside their national territories, an attitude that in the European context may be facilitated by ambiguous recent case law of the ECtHR that seems to revert to a territorial version of the legal space in which the ECHR applies.

In addition, territorialisation ensures that territory and rights remain linked in a more structural way. Celebrations of post-national citizenship suffer essentially from the same shortcoming as any theory that presents citizenship simply as a project that gradually turned the privileges of the few into the rights of the many. The viewpoint from which they investigate citizenship is the territory of the national (liberal) state. When the territorial basis of the global state system is disregarded or taken for granted, it makes sense to claim that nationality and rights have become untangled. However, the internal perspective that such theories take, conceal the fact that this is only the case within the territory of the liberal, Western democracy. Outside its territory, questions of identity and rights remain firmly linked. Thus, territoriality causes the stateless, the refugee and the citizen of dictatorships to remain largely beyond the fundamental rights protection of the constitutional state.⁴¹⁷

In the second place, I have provisionally concluded that human rights law does very little to limit the exercise of the state's spatial powers. Territorial integrity is a cornerstone of international law, and protection of its territorial boundaries has remained the exclusive prerogative of the national state. Chapter 5 takes a closer look at these issues, but for now it is important to reiterate that the way in which the notions of sovereignty and territorial boundaries interact is still decisively shaped by a state-centred discourse which adheres to the sanctity of territorial boundaries in order to maintain a stable order of sovereign states, instead of a just community of individuals. In addition, we need to be aware of the possibility that in a situation in which presence on national territory automatically leads to entitlement to fundamental rights, the sovereign state may wish to keep people outside its territory in order to not have to accord them these fundamental rights.

⁴¹⁷ Isaac (1996), p. 162.

Hence, in spite of its increasing 'denationalisation', the modern rule of law remains territorially limited, and it seems that the status of sovereignty's territorial frame in international law has remained largely the same as it was before the advent of modern human rights law. Nuremberg's "equivocal and immoral legacy" combined with the reification of territoriality has led to a structural blindness for the involvement of personal interests whenever the state bases its claims on the notion of territorial sovereignty, a proposition which will be investigated in further detail in the next two Chapters. There we will see that such blindness is exacerbated whenever the individuals who are affected by such claims are rendered invisible, either because they are far away and unknown or alternatively because they are very different from "us" and that the territorial blind spot of the modern version of the rule of law affects individual rights most obviously and disadvantageously in the global context of immigration from poor, underprivileged citizens of non-Western countries into the Western, liberal democracies.

A version of the rule of law that keeps the content of sovereignty within a territorially defined body politic and its territorial form apart, scrutinising the former aspect while it is largely silent with regard to the latter aspect, obscures the fact that constraints on individual behaviour and freedom are always motivated on account of the notion of political community and the unity of the body politic, interests that concern both form and content of sovereignty. The fact that the modern version of the rule of law has not acknowledged the interrelatedness between the nation state's exercise of jurisdiction over people within a given body politic and the territorial framework in which those jurisdictional claims take place is a particularly serious concern when it comes to the national state's perception of and responses to "new threats"⁴¹⁸, such as immigration. In later Chapters, we will see that international movement of persons constitutes a field that by its very nature engages sovereignty's territorial frame as well as its jurisdictional content as we will see in later Chapters.

⁴¹⁸ See Bigo (2001).

Chapter 4 The extent of the right to leave

4.1. INTRODUCTION

“Theoretically, in the sphere of international law, it had always been true that sovereignty is nowhere more absolute than in matters of emigration, naturalization, nationality and expulsion; the point, however, is that practical consideration and the silent acknowledgement of common interests restrained national sovereignty until the rise of totalitarian regimes.”⁴¹⁹

In the previous Chapter, I have looked at the way in which the sovereign power of the state has been restrained by the use of various discourses. I have argued that the notion of territoriality has exerted a limiting influence over all these discourses, bringing to light the tension between universalism and particularism within each of them. Citizenship is the most obvious example of these potentially “explosive tensions”⁴²⁰, but the way in which a political particularistic reality has triumphed over universal ideals in classical international law as well is for a large extent the result of the Westphalian territorial constellation. Until the advent of international human rights, the few instances in which international law concerned itself with the interests of individuals were those when the territory-identity-population ideal of the sovereign state was most clearly not reflected in reality, as in the case of minorities and resident aliens.

Another significant anomaly in a territorial world that international law cannot afford to overlook is the phenomenon of international migration. People between borders expose the construction, as opposed to the naturalness, of territoriality’s ideal. This Chapter and the next (Chapter 5) will explore the development and the nature of the legal framework regulating international freedom of movement. I will argue that the decisive impact of territoriality upon the rule of law and the resulting immunisation of territorial sovereignty against international legal correction is unambiguously expressed in international law’s regulation of international migration.

⁴¹⁹ Arendt (1976), p. 278.

⁴²⁰ Costa (2002), p. 218.

Many studies dealing with questions directly related to contemporary immigration policies do not concern themselves with the way in which the issue of exit is regulated by legal norms. Nicholas De Genova has argued that, whenever immigration law is addressed, a detailed empirical investigation of its actual operations is often not provided.⁴²¹ The result is that existing laws appear to provide merely a neutral framework.⁴²² In this study, I do not intend to carry out empirical research on the way in which immigration law affects the lives of individuals. Nonetheless, its actual operations will be more closely looked at by including the issue of exit. In this way, I hope to demonstrate that immigration laws do anything but provide a neutral framework. Instead, they are a result of changing perceptions of political authority, and intimately linked to the way in which we perceive the nation state. Indeed, states' monopolisation of the right to regulate movement, therewith comprising both the right to enter *and* the right to leave, has been intrinsic to the very construction of the territorial state.⁴²³

By looking at the overall framework regulating international movement, one of territoriality's most significant implications on the rule of law will be exposed: the artificial distinction between sovereignty's territorial frame and its jurisdictional content within a given body politic. A further reason to include the right to leave in a study dealing with the detention of immigrants in Europe is provided by the fact that questions of emigration are greatly affected by current immigration policies, which have increasingly externalised, as we will see in Chapter 5.

Accordingly, this Chapter deals with the right to leave, leaving questions of immigration to Chapter 5. Section 4.2. presents an overview of the way in which over time perceptions on the issue of exit have developed. We will see that at various times in history, emigration was looked upon in the same way as immigration is at present: it had to be directed in channels which the authorities deemed favourable in the national interests.⁴²⁴ After the Second World War, however, the possibility of an individual to leave his or her country became recognised as a fundamental right in international law. Section 4.3. deals with the international legal norms regulating emigration in detail, with particular emphasis on the permitted restrictions on the exercise of the right to

⁴²¹ De Genova (2002), p. 432.

⁴²² Ibid. p. 424.

⁴²³ Torpey (2000), p. 6.

⁴²⁴ See Christie Tait (1927).

leave. In the conclusions to this Chapter, in Section 4.4., I will briefly touch upon the way in which contemporary immigration policies of Western countries have an impact on individuals' actual exercise of the right to leave, a matter that will be further elaborated on in Chapter 5.

4.2. The right to leave in its historical context

The right to leave one's country is the ultimate form of self-determination. Not to be able to leave a country factually amounts to deprivation of liberty: imprisonment within imagined lines on the surface of the earth instead of incarceration by concrete walls. Centuries ago, the right to leave was already recognised in the Magna Carta of 1215:

In future it shall be lawful for any man to leave and return to our kingdom unharmed and without fear, by land or water, preserving his allegiance to us, except in time of war, for some short time, for the common benefit of the realm.⁴²⁵

Thus, the Magna Carta qualified the right to leave: it was made subject to the condition that allegiance to the Kingdom was guaranteed and it provided for restrictions on exit in times of war. The latter sort of limitation is still to be found in present formulations of the right to leave, which I address in Section 4.3.2. At this moment, it is the qualification "preserving his allegiance to us" which deserves closer attention, for it clearly illustrates the changes that the medieval feudal order was undergoing under the influence of the growing powers of European monarchs.

In medieval Europe, the extent of freedom of movement had been determined by the feudal order. Many people were tied to territory because of their obligations to their feudal lord. The system of serfdom granted no individual freedom of movement whatsoever as serfs were not allowed to leave their place of employment.⁴²⁶ Nonetheless, movement was free for those whose status was free. National borders "were insignificant to the individual traveller, though state boundaries were of warlike

⁴²⁵ Chapter 42 of the Magna Carta of 1215.

⁴²⁶ However, serfdom in Europe was an economic relationship between lord and serf which implied that serfs could in theory and sometimes also in practice buy their freedom. See Dowty (1987), p. 25.

concern to rulers.”⁴²⁷ In the restriction on the right to leave as formulated in the Magna Carta, only granted to free men, an early shift from feudalism to absolutism can be discerned. In Chapter 2, we saw how the doctrine of perpetual allegiance developed when everybody, in addition to their status in the feudal hierarchy, also became a subject of the King. Consequently, permanent emigration, as we know it now, was theoretically impossible, for it was assumed that a subject could always be recalled to his duties to his King.

The recognition of the qualified right to leave in the Magna Carta of 1215 was only short-lived. It is not to be found in later versions of that document, due to the assertion by later kings of their absolute powers to control exit. The situation was not different in other European countries. From the fifteenth century onwards, feudalism was no longer the defining hierarchical relationship. Henceforth, it would be the relationship between the sovereign and its subjects that determined the extent of actual freedom of movement. In the era stretching from the sixteenth to the eighteenth century, the relationship between people, territory and authority was determined by “mercantilism in the service of absolutism”⁴²⁸ and the right to leave was virtually non-existent. Population was considered a scarce economic and military resource, and rulers, in their efforts to maximise economic growth en military power, prohibited emigration almost entirely.

Nonetheless, in this era, the prohibition of emigration was mainly instrumental in securing a concrete state interest. Conceptions of freedom of movement had nothing to do yet with ideologies such as nationalism, alluding to a deeper, symbolic relationship between people and territory, or other ideological convictions, tying the notions of people and their state to each other in a more profound way. This was reflected by the fact that immigration was in most cases welcomed; European monarchs even attempted to acquire populations from what was for them the outside world.⁴²⁹

Chapter 2 showed that at the end of the seventeenth century, the absolute power of the sovereign came under attack by the idea of natural rights and changing ideas about the location of sovereignty. Whereas before emigration had been considered a matter entirely subject to the discretion of the sovereign, theorists of international law

⁴²⁷ Dummet and Nicol (1990), p. 11.

⁴²⁸ Dowty (1987), p. 29.

⁴²⁹ Zolberg (1992), p. 37.

increasingly perceived the right to emigrate as a natural right.⁴³⁰ This was only logical if the idea of political society as a voluntary contract was to be taken seriously. For if every individual must, by free choice, be able to determine whether he wants to be a member of that society, he should also be free at any time to break his ties and leave.⁴³¹

Nonetheless, actual practice of the new regimes that were inspired by enlightenment ideals was not always consistent with the same ideals. In France, restrictions were imposed on freely leaving the country on grounds of national security soon after the Revolution, even though the revolutionary regime had abolished the passport, and in spite of the fact that the right to leave was recognised in the French Constitution of 1791.⁴³² Officially, American governments did not even recognise the right of voluntary expatriation until 1907.⁴³³

However, liberal ideals continued to penetrate governments so that at the end of the nineteenth century it had become possible to leave almost any European state.⁴³⁴ Very few countries required passports or other documents in order to exit their territories. Their liberal attitude in this regard was not only due to enlightenment ideals that had influenced daily political practice; also the fact that under-population was no longer a problem in these states made those states regard emigration without concern. All European and American states, except Russia, in practice regarded the right to leave as a basic right which was inalienable.⁴³⁵ When serfdom was finally entirely abolished throughout Europe in the nineteenth century, thousands of people left their homes to sail for the Americas, Australia or Asia. Nonetheless, freedom of movement was typically not granted to inhabitants of the colonies. It was clearly in the interests of the imperial powers that these citizens should not leave the colonies. As in many other instances, the rulers applied liberalism at home, but in Africa and Asia they held on to medieval ideas.

The First World War signalled the end of the liberal era regarding freedom of movement and caused passports to reappear on the international stage. During the twentieth century, possession of these documents would develop into a requirement for

⁴³⁰ Jagerskiold (1981), p. 169.

⁴³¹ Whelan (1981), p. 650.

⁴³² See about the rather complicated issue of freedom of movement during the Revolutionary years: Torpey (2000), p. 21-56.

⁴³³ Dowty (1987), p. 49.

⁴³⁴ Dowty (1987), p. 46.

⁴³⁵ Dowty (1987), pp. 54, 82.

lawful exit.⁴³⁶ In the twenties and thirties, more and more European countries restricted their citizens' possibilities to leave.⁴³⁷ Various factors contributed towards this narrowing down of the right to leave. Countries were no longer as open to immigration as they had been, due to xenophobia and racism of their populations and their own nationalistic aspirations, and the losses caused by the First World War combined with reduced birth rates made population once again a scarce resource. The restrictions on freedom of movement however, were not comparable to those in the mercantilist era.

The difference is found in altering conceptions of the relationship between people, territory and state. Chapter 2 described how nationalism led to a perception of sovereignty as entailing an unbreakable and self-evident link between territory, population and authority. National identity became an instrument to distinguish between us and them. People were defined by virtue of where they belonged, and cultural or ethnic homogeneity in a state was something to be aspired. It was nationalism which, if not exactly gave birth to, at least nourished "the intimate relationship between identities and borders"⁴³⁸. People were bound to each other and their territory by their ethnicity. For the nationalistic mind a liberal attitude to emigration is inconceivable: it cannot be possible to choose freely one's allegiance with a state or abandon it at will, if such allegiance is conceived as belonging to a community of individuals bound to each other and 'their' land by common identity, history and 'blood'.

Moreover, the collectivist ethic proclaimed by many regimes after the First World War also contributed to a restrictive view on the right to leave. Instead of the ethnic or cultural homogeneity that the nationalists strive after, collectivism aims at social homogeneity. Likewise, the collectivist state cannot regard emigration without suspicion. Leaving the society will inevitably be an act of disloyalty, even treason.⁴³⁹ In addition, it becomes difficult to maintain that the interests of the citizens are the same as those of the state when these citizens are leaving the country en masse. Finally, a regime sustained by coercion or in which there is no room for dissent can presumably only survive by restricting exit.⁴⁴⁰

⁴³⁶ Hofmann (1988), p. 3; and Torpey (2000), p. 21.

⁴³⁷ Christie Tait (1927), p. 31

⁴³⁸ Lapid (2001), p. 10.

⁴³⁹ Dowty (1987), p. 60; and Torpey (2000), p. 124-125.

⁴⁴⁰ Dowty (1987), p. 60.

After the Second World War, the idea of natural rights revived, as we have seen in the previous Chapter. Human rights, as they were called now, were codified and one of them was the right to leave. Over time, the right to leave was laid down in many different binding human rights treaties, as we will see in Section 4.3.1. Judging from the codification of the right to leave in all major human rights instruments, one could safely assume that, during the period following the Second World War, it had become a right generally recognised in international law. However, perhaps the most conspicuous effect of this promise made by international law was that the practice of a substantial number of countries was only the more striking. The most obvious violators of the right to leave were the Communist countries: while the collectivist ethic inspired by the extreme right had not survived the Second World War, its counterpart on the other side of the political spectrum had expanded.

None of the countries united by the Warsaw Pact recognised the right to leave as a human or constitutional right.⁴⁴¹ Instead, it was regarded by these countries as a favour, the granting of which fell wholly within the sovereign state's discretion. This did not mean, however, that policies regarding exit permits were the same in all these countries; neither were they equally restrictive.⁴⁴² The erection of the Berlin Wall in 1961 was the ultimate illustration of the Communist view on freedom of movement. In time it became easier for citizens of the East-Bloc countries to visit other countries of the 'socialist world system', but permission for this kind of travelling was by no means obtained as a matter of course.⁴⁴³ Moreover, although travel to the West increased over time, the right to leave was definitely not recognised as such for the purpose of visiting Western countries or for emigration. The German Democratic Republic was, according to its penal code, able to persecute those seeking official permission to emigrate for the crime of "incitement hostile to the state."⁴⁴⁴ Its constitutional legal doctrine justified the lack of a basic right to emigrate by the socialist government's concern for each of its citizens: Allowing a citizen to emigrate to the West "was tantamount to delivering him up to an imperialist, aggressive and anti-social system of exploitation".⁴⁴⁵ In addition, East German policy of prohibiting its citizens to visit Western countries was defended

⁴⁴¹ Brunner (1990), p. 204.

⁴⁴² Dowty (1987), pp. 111-127; and Hannum (1987), pp. 95-105.

⁴⁴³ Brunner (1990), p. 208.

⁴⁴⁴ Turack (1978), p. 55.

⁴⁴⁵ Brunner (1990), p. 217.

on the grounds that the Federal Republic did not recognise the citizenship of the German Democratic Republic.⁴⁴⁶

In Russia, the right to leave had never been recognised, not even before the Communist era.⁴⁴⁷ After serfdom was abolished in 1861 in Russia, the former serfs had lived in village communities, from which no-one could leave without communal permission. Communist ideology strengthened traditional restrictive notions concerning the right to leave to such an extent as to equal it with treason. For other East-Bloc countries, restrictive views on the right to leave were a result both of their ideologies and economic considerations. These countries had an interest in population building in general, and having educated professionals at their service in particular. The fact that these countries were closely linked to Western Europe and had in the past been relatively open, would have made it easier for their population to cross borders in pursuit of more rewarding opportunities than it was for Soviet nationals.⁴⁴⁸ If these countries had permitted free immigration, presumably a large part of their population would have left for the West.

Despite the international obligation of countries to permit citizens and others to leave their territory as laid down in inter alia the ICCPR and the UDHR, the reality of East-Bloc practice was acknowledged in the Helsinki Accord.⁴⁴⁹ The Helsinki Accord proclaimed that the participating states should act in accordance with the purposes and principles of the UDHR, and that they should fulfil their obligations as set forth in international human rights instruments by which they are bound. It seems to be in direct contradiction with this statement that the Helsinki Accord then, instead of recognising a general right for citizens to leave their country permanently, requires the signatories solely "to facilitate freer movement on the basis of family ties, family reunification,

⁴⁴⁶ The Federal Republic maintained that an all German nationality still existed and accorded West German identity papers to all East-Germans who applied for such documents. See Turack (1979), p. 110-111.

⁴⁴⁷ Dowty (1987, p. 208) argues that Communist countries applying restrictive exit policies are copying from the Soviet Union policies that are not so much Communist as Russian. This would explain the relative absence of such strict policies in countries with related ideologies but less political links to the USSR if compared to those countries heavily under Soviet political influence, such as the countries of the Warsaw Pact.

⁴⁴⁸ Dowty (1987), p. 116. Evidently, this was especially so with regard to emigration from East Germany to West Germany. See also Reinke (1986), p. 665.

⁴⁴⁹ The Final Act of the Conference on Security and Co-operation in Europe of 1975 (1975), p. 1292.

proposed marriages and personal or professional travel.”⁴⁵⁰ Furthermore, the document merely enumerates certain ‘obligations’⁴⁵¹ for states to achieve this aim, which are not exactly far-reaching, and do certainly not reflect what states committed themselves to under the ICCPR.

The Helsinki Accord could be described as *realpolitik* in view of the East-West relationship during the Cold War, seeking to improve practice of the Communist states in the area of human rights in a manner open to political compromise.⁴⁵² Nevertheless, Western countries continued to express indignation over the denial of the right to leave in diplomatic relations. The United States did so by according most-favoured-nation treatment only to those non-market countries which did not deny or make impossible for their citizens the right or opportunity to emigrate.⁴⁵³ Western countries continued to undermine East-German practice of restricting exit by insisting that access to West Berlin should be free on the western side of the border wall, i.e. possible without passport or customs control.⁴⁵⁴ Most people who managed to leave Communist countries were accepted as political refugees by the Western democracies, although many of them were motivated by economic considerations instead of purely political reasons.

Other countries which breached their obligations with regard to the right to leave after the Second World War were developing countries and dictatorships. After decolonisation, the former colonies embarked on a process of nation building, a

⁴⁵⁰ Turack (1978), p. 44.

⁴⁵¹ The legal status of the Helsinki Accord was unclear, as it was not a treaty, and could not be registered as such. See Schermers (1977), p. 801; and Martin (1989), p. 556.

⁴⁵² Reinke (1986), p. 658; and Martin (1989), pp. 556-557, who argue that such a strategy of *realpolitik* was effective in securing increased protection of individual rights in this area.

⁴⁵³ Turack (1979), p. 104; and Lillich (1984a), pp. 149-150. The consequence for a country which denied its citizens the right or the opportunity to emigrate was not only that it was not eligible for most-favoured-nation treatment, but it could neither receive US credits, credit guarantees, investment guarantees, nor conclude a US commercial agreement. The legislation led to the end of the first period of *détente* between the US and the Soviet Union as the latter regarded it as an interference in its internal affairs (Gabor, 1991, p. 853-854), but at the same time it caused liberalisation of China’s emigration policies (Dowty, 1987, p. 234).

⁴⁵⁴ Turack (1979), p. 113. This practice was defended by the view of France, Britain and the US that Berlin was under joint command of the Allies and should not be a divided territory. The GDR also insisted that East Germans were not required to have a passport in order to enter West Germany because the frontier between the two states was not an external border. See Torpey (2000), p. 147.

process perceived as necessary in view of the fact that the territories of many of these countries were determined by boundaries which did not reflect cultural, linguistic or ethnic divisions. The policies of the ruling class to strengthen national unity often consisted in targeting these groups that did not fit in with their image of national unity. This inevitably caused conflict, internal struggle and civil war, which in turn produced refugees and displaced persons. Developing countries however, while on the one hand producing great numbers of refugees, were on the other hand not always happy to lose parts of their population, especially if these consisted of educated people seeking a better future in the developed world. Thus, in some of those countries, restrictions on exit were put into place and justified by invoking the problem of so-called brain-drain. Their policies of restricting exit – while at the same time carrying out forced expulsions⁴⁵⁵ – could be explained by the ruling elite's wish to sustain their illegitimate rule, economic motivations and their ideas of nation-building. However, there are many developing countries that, although they have repeatedly expressed concerns over brain drain, do not resort to prohibiting emigration. Countries that deny the right to leave, such as for example Burma under military rule, and Iran under the Shah and the Ayatollahs appear to do so more as a result of their ideology and dictatorial practices.⁴⁵⁶

The Cold War also influenced the exercise of the right to leave for numerous citizens of Western States. Since 1918 it had been illegal to leave the United States without a passport, the issuing of which fell under the competence of the State Department. In the 1950's it was usual for the State Department to deny passports on the basis of individual political beliefs. Refusals were frequently not sufficiently motivated and the Internal Security Act of 1950 even prohibited the issuing of passports to members of the Communist Party.⁴⁵⁷ The State Department held that its decisions, being an exercise of governmental foreign policy powers, could not be reviewed by the judiciary.⁴⁵⁸ Consequently, during this period, the right to leave the United States lost its character as a fundamental right, and factually assumed the character of a favour, the granting of which fell wholly within the discretion of the State Department.

However, decisions of the State Department were regularly challenged in court, and the Supreme Court ruled in 1958 that the right of exit is a part of the "liberty" of

⁴⁵⁵ A famous example is Idi Amin's expulsion of 40.000 Asians from Uganda in 1972.

⁴⁵⁶ Hannum (1987), p. 127. See also Dowty (1989), p. 184-187.

⁴⁵⁷ Dowty (1987), p. 128; and Torpey (2000), p. 148.

⁴⁵⁸ Dowty (1987), p. 128.

which is a citizen cannot be deprived without due process of law under the Fifth Amendment.⁴⁵⁹ In 1964, that same Court ruled that political belief alone was not a sufficient reason for the denial of the right to leave and it held that the Section of the Internal Security Act which forbade the issuing of passports to members of the Communist Party was unconstitutional.⁴⁶⁰ Nevertheless, the decision of the Secretary of State to revoke the passport of a former CIA agent who disclosed information concerning US intelligence activities was upheld by the Supreme Court, stating that national security and foreign policy considerations were superior to the freedom to travel abroad and that the latter right could therefore be made subject to reasonable government regulation.⁴⁶¹ Furthermore, the restriction of travel to certain areas by invalidating passports for travel to specific countries was not deemed illegitimate by the Supreme Court, if it was justified by considerations of national security or foreign policy.⁴⁶²

In 1989, a revolution, peaceful in character but nonetheless a revolution in view of the deep and abrupt transformations it brought about, changed the political landscape of Central and Eastern Europe. One of the first manifestations of these changes was the exercise of the right to leave.⁴⁶³ Hungary was the first nation that demolished a part of the Iron Curtain on its Austrian border. When Hungary, in September 1989, allowed East Germans to leave to the West through that border, East Germans had for the first time since 1961 a real possibility to leave their country. Consequently, thousands of them reached West Germany through Hungary and Czechoslovakia, where the Iron Curtain had been dismantled as well. In view of this exodus, Honecker decided to ease travel restrictions in East Germany, hoping that if East Germans were openly given the possibility to emigrate, many might choose to stay.⁴⁶⁴ However, East Germans continued to leave by the thousands and after Honecker's resignation, the new leadership in East-Germany confirmed the right of free and unrestricted travel. As the Berlin wall had been "the foremost symbol of the denial of the basic human right of

⁴⁵⁹ U.S. Supreme Court, *Kent v. Dulles* (1958), pp. 125-127.

⁴⁶⁰ U.S. Supreme Court, *Aptheker v. Secretary of State* (1964), pp. 505-514.

⁴⁶¹ U.S. Supreme Court, *Haig v. Agee* (1981). See Dowty (1987), p. 130; and Hannum (1987), p. 53.

⁴⁶² U.S. Supreme Court, *Zemel v. Rusk* (1965).

⁴⁶³ Gabor (1991), p. 854.

⁴⁶⁴ Palmer and Colton (1995), p. 1021.

self-determination",⁴⁶⁵ its opening up on 9 November 1989 can be seen as symbolic of the reassertion of this right for the people living in the former East-bloc countries.⁴⁶⁶

Similar changes in the Soviet Union were not waited upon for a long time. Already under Gorbachov's policy of glasnost, traditional Soviet views on emigration were changing. Such altering views were most obviously expressed in the easing of travel restrictions for one group of Soviet citizens who had perhaps suffered most seriously under the denial of the right to leave, the Soviet Jews.⁴⁶⁷

Yeltsin brought about the collapse of communism in the Soviet Union and under his rule the Soviet Union dissolved into various republics. These new states formally recognise the right to leave. The Conference on Security and Co-operation in Europe, which organisation found its origins in the Helsinki process, has paid considerable attention to the right to leave, also after 1989, and the importance of freedom of movement was confirmed by the Charter of Paris for a New Europe.⁴⁶⁸ The revolutions of 1989 in East and Central Europe and the changes in the Soviet Union reasserted ideals that had been proclaimed as the Rights of Man in the past and that were now called human rights.

The preceding paragraphs have briefly recounted that, in the course of history, restrictions on exit have been justified by considerations about the nature of political authority, and later, more specifically by conceptions of sovereign territorial state. From modernity onwards, views on a right to leave were grounded in secular ideologies, such as allegiance to the King, nationalism, and in the era after the Second World War, collectivism in the name of communism. As all these ideologies have been officially discarded, it has been argued that the only secular ideology of contemporary relevance is the belief in human rights.⁴⁶⁹ In the Section below, I will examine how contemporary international human rights law regulates the issue of exit.

⁴⁶⁵ Gabor (1991), p. 855.

⁴⁶⁶ See Turack (1993, pp. 292-302) about the changes in the practice of these countries.

⁴⁶⁷ The Jews in the Soviet Union were not completely denied the possibility to leave at all times since the Second World War, but it was very difficult and at times impossible to get permission to emigrate to Israel. This policy seems not to have been motivated only by Soviet ideology, but also by the Soviet Union's wish to maintain good relations with the Arab states.

⁴⁶⁸ Conference on Security and Co-operation in Europe, 21 November 1990, Charter of Paris for a New Europe and Supplementary Document to give effect to certain provisions of the Charter (1991), p. 199.

⁴⁶⁹ Gacte (1993).

4.3. INTERNATIONAL LEGAL FRAMEWORK OF THE RIGHT TO LEAVE

4.3.1. The right to leave as an international human right

The right to leave any country, including one's own, is laid down in the UDHR, the first international document in which human rights were codified after the Second World War. The right to leave was also codified in human rights instruments of a later date with binding force, such as the ICCPR; the Convention on the Elimination of Racial Discrimination;⁴⁷⁰ the ECHR; the African Charter of Human and People's Rights; and the American Convention of Human Rights.⁴⁷¹ In the following paragraphs, main emphasis will be on the legal framework of the right to leave as established by the ICCPR and the ECHR.

Article 12 ICCPR and Article 2 of Protocol 4 ECHR guarantee the right to leave in identical terms. They read as follows:

Everybody shall be free to leave any country, including his own.

The right to leave should be protected for nationals and non-nationals alike. Furthermore, the right to leave puts obligations on both the state of residence and the state of nationality because often possession of a passport is a requirement for lawful exit. Accordingly, the state of nationality is under a positive obligation to provide a passport, whereas the state of residence is under the (mainly) negative obligation to permit exit.⁴⁷²

⁴⁷⁰ In this treaty the right to leave is not guaranteed as such, but Article 5 states that the right to leave should be enjoyed without discrimination on the grounds of race, colour, or national or ethnic origin.

⁴⁷¹ There are more international binding documents which have a bearing on the right to leave, such as the 1951 Convention on Refugees, the 1961 UN Convention on the Elimination or Reduction of Statelessness. See Nanda (1971), pp. 112-113. Another example is the European Social Charter: in Article 18 §4 the Contracting Parties recognise the right to leave of their nationals who wish to pursue an activity on the territory of the other Parties.

⁴⁷² HRC in *Vidal Martins v. Uruguay*, 23 March 1982, §7; *Pereira Montero v. Uruguay*, 31 March 1981, §9.4; *Lichtensztejn v. Uruguay*, 31 March 1983, §8.3; and *Varela Nunez v. Uruguay*, 22 July 1983, §9.3.

4.3.2. Restrictions on the right to leave in the ECHR and the ICCPR

Neither the ICCPR, nor the ECHR accord the individual an absolute right to leave. Certain circumstances may justify restrictions on the right to leave. However, according to the UN Human Rights Committee, these are exceptional circumstances, and restrictions may not impair the essence of the right.⁴⁷³ In a similar vein, the CSCE Declaration of the Copenhagen Meeting of 29 June 1990 states that restrictions on the right to leave must be very rare exceptions, only necessary if they respond to a specific public need, pursue a legitimate aim, are proportionate to that aim and are not abused or applied arbitrarily.⁴⁷⁴ The Strasbourg Declaration on the Right to Leave and Return emphasised that restrictions on the right to leave must be construed narrowly.⁴⁷⁵ Moreover, it declared that such restrictions should be subject to international scrutiny, in which the burden of justification lies with the state.

When examining the permissible restrictions on the right to leave, it will become once more apparent that the scope of that right relies on the relationship between people, territory and authority. Whereas human rights in general can be described as claims of the individual concerning his or her relationship to authority, the right to leave has a very direct bearing on that relationship. After a person has left, the state is in most cases neither capable nor competent to exercise jurisdiction over that person. That specific characteristic of the right to leave in particular, taken together with the fact that freedom of movement in general may have great impact on social and economic circumstances in a country, in many cases constitute the ratio behind possible restrictions.⁴⁷⁶

⁴⁷³ HRC, General Comment 27 (Sixty-seventh session 1999), at 11-13.

⁴⁷⁴ Article 9.4 of the Document of the Copenhagen Meeting of the Conference of the Human Dimension of the CSCE (1990). See also Article 20 and 21 of the Concluding Document of the Vienna Conference on Security and Co-operation in Europe held in 1989 (1989); The Draft Declaration on Freedom and Non-Discrimination in Respect of the Right of Everyone to Leave any Country, including his Own and to Return to his Country, by the Special Rapporteur Mubanga-Chipoya, (hereinafter The Draft Declaration on Freedom and Non-Discrimination in Respect of the Right of Everyone to Leave any Country, Mubanga-Chipoya (1988b)); and Article 6 of The Right to Leave and Return, A Declaration adopted by the Uppsala Colloquium on 21 June 1972 (Uppsala Colloquium, 1974).

⁴⁷⁵ Strasbourg Declaration on the Right to Leave and Return, Adopted by the Meeting of Experts on 26 November 1986, International Institute of Human Rights (1987).

⁴⁷⁶ See Cassese (1975), p. 222.

Paragraph 3 of Article 12 ICCPR:

The above mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant.

In Paragraph 4 of Article 2 of the Fourth Protocol ECHR, the limitation clause with regard to the right to leave is framed in a slightly different manner, similar to the way in which exceptions to fundamental rights are generally formulated by the ECHR:

No restrictions shall be placed on the exercise of these rights other than such are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of "ordre public", for the prevention of crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.

In spite of obvious differences in wording, it can be assumed that both limitation clauses have the same scope and effect.⁴⁷⁷ The denial or seizure of a passport or other necessary travel documents constitutes a direct interference with the right to leave and in order to be legitimate such interference needs to satisfy the requirements for the permissible restrictions.⁴⁷⁸ Also indirect limitations on the right to leave, such as restrictions on the export of foreign currency or high costs for obtaining the necessary documents need to satisfy the requirements of Article 12 ICCPR or Article 2 Protocol 4 ECHR.⁴⁷⁹

Restrictions on the right to leave need to be in accordance with (ECHR), or provided for by (ICCPR) law: the source of the restriction should be a general rule.⁴⁸⁰ This requirement should be understood as to refer to substantive law. Instead of embodying a purely formal requirement it also calls for a certain qualitative standard of

⁴⁷⁷ Nowak (1993), p. 212.

⁴⁷⁸ ECtHR, *Baumann v. France*, 22 May 2001, §§63-67; and ECtHR, *Napijalo v. Croatia*, 13 November 2003, §73.

⁴⁷⁹ But see ECommHR, *S. v. Sweden*, Decision of 6 May 1985, p. 224, in which it was decided that the right to take property out of a country is not embodied in the right to leave.

⁴⁸⁰ Jagerskiold (1981), p. 172.

the laws in question, which should be accessible and foreseeable.⁴⁸¹ The so-called legality requirement arises from the claims of a society based on the rule of law and serves to prevent arbitrary and discriminatory practices.⁴⁸²

The prohibition of discrimination in general plays an important role with regard to freedom of movement, and there will clearly be a violation of Article 12 ICCPR or Article 4 Protocol 2 ECHR, if there is not an objective justification for differences in treatment between persons exercising their right to leave.⁴⁸³ It is not accidental that the Sub-Commission on Prevention of Discrimination and Protection of Minorities has paid considerable attention to the right of freedom of movement.⁴⁸⁴ The emphasis on discrimination in this area is understandable: contemporary history has shown time and again that the extent of the right to leave depends on sovereignty's link with matters of identity.

The ECHR and the ICCPR allow only for exceptions on the right to leave that are necessary in a democratic society. The ICCPR does not use the words "democratic society", but it can be assumed that the word necessary refers to that concept.⁴⁸⁵ The most important component of the necessity-requirement is that restrictive measures must abide by the principle of proportionality: They must be appropriate to achieve the legitimate aims enumerated in the provisions; they must be the least intrusive measure

⁴⁸¹ ECtHR, *Sunday Times v. the United Kingdom*, 26 April 1979, §49; ECtHR, *Kruslin v. France*, 24 April 1994, §29-36; ECtHR, *Groppera Radio AG and others v. Switzerland*, 28 March 1990, §65-68; and ECtHR, *S.W. v. the United Kingdom*, 22 November 1995, §35.

⁴⁸² See the Study of Discrimination in Respect of the Right of Everyone to Leave any Country, Including His Own, and to Return to His Country, Report Submitted by the Special Rapporteur J.D. Inglés on 23 November 1962 to the Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities (1963) (hereinafter Inglés (1963)), p. 47.

⁴⁸³ Higgins (1973), p. 343 and p. 353; and UN Commission on Human Rights, Mubanga-Chipoya, C, Analysis of the current trends and development regarding the right to leave any country, and some other rights or considerations arising there from (Hereinafter Mubanga-Chipoya, 1988a), p. 27-28.

⁴⁸⁴ The first substantive study that was requested by the Sub-Commission focussed on discrimination with regard to freedom of movement. See Inglés (1963). See also the Draft Report of the Special Rapporteur: Study of discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country, Draft Report submitted by the Special Rapporteur, J.D. Inglés on 13 December 1961, (hereinafter Inglés (1961)).

⁴⁸⁵ Partsch (1975), p. 261. The requirement that restrictions on the right to leave are compatible with other rights guaranteed by the Covenant supports this assumption.

available to achieve those aims; and they should not place a disproportionate burden on the individual concerned when compared with the aim to be achieved.⁴⁸⁶

Proportionality should not only be guaranteed in the laws dealing with restrictions on the right to leave, but administrative and judicial authorities are also bound to respect this principle, which implies *inter alia* that proceedings relating to the exercise of the right are expeditious and that subsequent decisions are sufficiently motivated.⁴⁸⁷ Necessity has also been interpreted as to imply a pressing public and social need, for example by the Special Rapporteur in his Draft Declaration on the Right to Leave.⁴⁸⁸ It is not hard for a state to maintain that restrictions on the right to leave fall under one of the enumerated state interests, but the requirement of proportionality prevents a too extensive use of these state interest in order to justify interferences.⁴⁸⁹ In addition, in the ICCPR, the requirement that limitations on the right to leave must be in accordance with the other rights guaranteed in the ICCPR could well be adopted in order to avoid such extensive use of the permissible grounds for restriction that codification of the right to leave would in effect be rendered meaningless.

Problems of interpretation have played a role especially with regard to the concepts of national security and public order, while to a much lesser extent with regard to the protection of health and morals and the rights of others.⁴⁹⁰ It is argued that national security as a general ground for restricting exit should only be invoked in the case of a political or military threat to the entire nation.⁴⁹¹ However, the drafters of the ICCPR seem to have been primarily concerned with the control over military

⁴⁸⁶ ECtHR, *Riener v. Bulgaria*, 23 May 2006, §118-130; and HRC, *Miguel González del Río v. Peru*, 28 October 1992, par. 5.3.

⁴⁸⁷ HRC, General Comment 27 (Sixty-seventh session 1999) at 15.

⁴⁸⁸ Article 7(c) of the The Draft Declaration on Freedom and Non-Discrimination in Respect of the Right of Everyone to Leave any Country, Mubanga-Chipoya (1988b).

⁴⁸⁹ The first draft of Article 12 ICCPR contained an exhaustive list of all grounds of restriction. Nowak (1993), p. 206; and Jagerskiold (1981), p. 171

⁴⁹⁰ Higgins (1988), p. 9.

⁴⁹¹ Article 4(d) of the Strasbourg Declaration on the Right to Leave and Return, International Institute of Human Rights (1987); Article 7(d) of the Draft Declaration on Freedom and Non-Discrimination in Respect of the Right of Everyone to Leave any Country, Mubanga-Chipoya (1988b), p. 51-52; and Nowak (1993), p. 212.

personnel.⁴⁹² Also other persons with access to "sensitive" information regarding the military or security of the state may be subjected to wider restrictions with regard to freedom of movement than ordinary citizens.⁴⁹³

Furthermore, a person may be prevented from leaving the country with the purpose of ensuring security against the international spread of diseases, a restriction based on public health considerations, which must be temporary.⁴⁹⁴ It is difficult to think of permissible restrictions on exit based on morality,⁴⁹⁵ although public health and morality can be of significance with regard to internal freedom of movement, an issue that is also regulated by Article 12 ICCPR or Article 4 Protocol 2 ECHR. The rights and freedoms of others can also constitute a ground on which the right to leave can be restricted. Restrictions of this kind will be justifiable if someone is not willing to fulfil contractual obligations or trying to escape family maintenance obligations by leaving the country.⁴⁹⁶

Public order or 'ordre public' is the most elusive of all the permissible grounds for restriction. It is a broad conception of public order which applies in Article 12 ICCPR and Article 2 Protocol 4 ECHR, entailing "all those universally accepted fundamental principles, consistent with respect for human rights, on which a democratic society is based."⁴⁹⁷ The grounds of public safety and the prevention of crime in the ECHR are included in the concept of public order as understood by the ICCPR. Someone who is suspected of or sentenced for committing a crime may be prevented

⁴⁹² Jagerskiold (1981), p. 172 and 178. See also ECommHR, *Peltonen v. Finland*, Decision of 20 February 1995, p. 38.

⁴⁹³ Hofmann (1988), p. 311; and Sohn and Buergenthal (1992), p. 77.

⁴⁹⁴ Mubanga-Chipoya (1988a), p. 55.

⁴⁹⁵ Nowak (1993), p. 216. Prevention of traffic in persons for the purpose of prostitution is said to fall in this category. See Mubanga-Chipoya (1988a), p. 56; Jagerskiold (1981), p. 179; and Hofmann (1988), p. 312. However, it would make more sense to use the more tangible grounds such as prevention of crime for restriction in this case.

⁴⁹⁶ Jagerskiold (1981), p. 179; and Hofmann (1988), p. 312.

⁴⁹⁷ Article 4(e) of the Strasbourg Declaration on the Right to Leave and Return, International Institute of Human Rights (1987); and Article 6(e) of the Draft Declaration on Freedom and Non-Discrimination in Respect of the Right of Everyone to Leave any Country, Mubanga-Chipoya (1988b). See also Mubanga-Chipoya (1988a), p. 11; Daes (1990), p. 121 and 126-127; Aybay (1977), p. 126-127; and Inglés (1963), p. 48.

from leaving the country,⁴⁹⁸ just as persons who are detained with a view of bringing them before the competent legal authority.⁴⁹⁹ However, in the case that those judicial proceedings are unduly delayed, restrictions on the right to leave cannot be said to serve public order.⁵⁰⁰ The lawful detention of persons for other reasons, for example in a labour institution, also constitutes a permissible ground for restricting the right to leave.⁵⁰¹ The legality of restrictions on exit on the grounds of outstanding public debts, such as taxes, is questioned by some authors.⁵⁰² It is argued that, since imprisonment for inability to fulfil contractual obligations is not allowed in international human rights law, it can neither be a reason for prohibiting exit. However, this argument loses sight of the fact that the international legal protection of the right to personal liberty differs from the international legal protection of the right to freedom of movement. Furthermore, as the proportionality of restrictions on exit of this kind can be easily reviewed, I would not necessarily conclude that they are illegal.⁵⁰³

Much more difficult to assess are restrictions based on considerations of a general character about the well-being of the state, such as economic considerations or grounds connected to migration and population policies.⁵⁰⁴ Restrictions on exit to prevent brain drain is one example of a broad application of the concept of public order. The fact that restrictions must always be justified on the grounds of proportionality and necessity in each individual case makes it difficult to maintain that far-reaching restrictions on such general grounds are permitted. Caution is particularly warranted in

⁴⁹⁸ ECommHR, *X v. Federal Republic of Germany*, Decision of 14 December 1970, p. 69; ECommHR, *C. v. Federal Republic of Germany*, Decision of 2 December 1985, p. 198; and Mubanga-Chipoya (1988a), p. 54.

⁴⁹⁹ ECommHR, *X. v. Federal Republic of Germany*, Decision of 16 May 1977, p. 190.

⁵⁰⁰ HRC, *Miguel González del Río v. Peru v. Peru*, 28 October 1992, at 5.3.

⁵⁰¹ ECommHR, *X. v. Federal Republic of Germany*, Decision of 5 February 1970, p. 688.

⁵⁰² Jagerskiold (1981), p. 179; and Nowak (1993), p. 214.

⁵⁰³ Cf. the *travaux préparatoires* of Article 12 ICCPR; see Mubanga-Chipoya (1988a), p. 53, 54.

⁵⁰⁴ See Hofmann (1988), p. 43; and van Dijk en van Hoof (1998), p. 670. The majority of the Committee of Experts on Human Rights preparing the ECHR Protocol was against the inclusion of a provision permitting restrictions on the ground of economic welfare. See Explanatory Report, par. 15, 16 and 18. Similarly, grounds such as general welfare and economic and social well-being of the state were proposed by some representatives in the Commission of Human Rights when drafting Article 12, but they were rejected because they were considered to be too far-reaching. Inglés (1963), Annex IV, Development of Article 12 of the Draft Covenant on Civil and Political Rights, p. 2.

these cases, precisely because measures of this kind are only meaningful if they target a whole group, instead of one individual. We have seen that interferences with the right to leave must be narrowly interpreted exceptions to a general rule permitting exit and that discriminatory practices are forbidden. In addition, the outflow of professionals from developing countries often has to do with the lack of adequate possibilities for them in these countries. There is lack of effective demand for educated professionals in developing nations, although an almost unlimited need exists.⁵⁰⁵ Hence, restrictions on exit in such a situation do not seem to provide a solution to the problem of brain drain, and their necessity can be doubted.⁵⁰⁶

A very topical issue is a proposal by the British Delegation in the Human Rights Commission in 1948, entailing that the right to emigrate may be restricted in order to help neighbouring states to fight illegal immigration.⁵⁰⁷ It is highly doubtful whether the concept of public order in both the ICCPR and the ECHR can be understood in such a way as to allow one state to restrict rights in order to protect such a general and ambiguous aspect of the public order of another state. In addition, it is difficult to evaluate such measures in the light of their proportionality vis-à-vis each individual.⁵⁰⁸ The way in which the right to leave interacts with contemporary immigration policies is complex and ambiguous and will be addressed in the next Chapter.

Remarkable is the decision by the European Commission of Human Rights in a case involving detention with a view to deportation.⁵⁰⁹ The Commission decided that a person whose deportation has been ordered and is detained with a view to enforcement of the order may not avail himself of the right to freely leave the country.⁵¹⁰ Here the

⁵⁰⁵ Mubanga-Chipoya (1988a), p. 84. See also the Recommendation of the Meeting of Experts on The Right to Leave and Return to One's Country, Attached to the Strasbourg Declaration on the Right to Leave and to Return, International Institute of Human Rights (1987), p. 483-484.

⁵⁰⁶ Jagerskiold (1981), p. 178; and Higgins (1973), p. 354. According to Special Rapporteur Inglés, restrictions of this kind are only justified in times of war or national emergency, but not in normal times. Inglés (1961), p. 31.

⁵⁰⁷ Report of the Third Session of the Commission on Human Rights at Lake Success, 24 May to 18 June 1948 (1948), p. 26.

⁵⁰⁸ Which is the important difference with the case that restrictions on the right to leave based on public order are applied to persons who constitute a serious danger to the country to which they intend to travel. See Mubanga-Chipoya (1988a), p. 54.

⁵⁰⁹ ECommHR. *X. v. Federal Republic of Germany*, Decision of 26 May 1970, pp. 1028-1035.

⁵¹⁰ *Ibid.* p. 1034.

Commission is handling the concept of public order rather contradictorily: if someone is detained because public order requires his removal from the country, it can not at the same time be argued that on account of his detention, public order does not allow him to leave the country. The paradoxical way in which the Commission addresses the relation between immigration detention and the right to leave in this case indicates that immigration detention possesses a political logic of its own, a subject that will receive close attention in the next Chapter.

4.4. CONCLUSIONS: THE RIGHT TO LEAVE AND THE VISIBILITY OF SOVEREIGNTY'S CONTENT

Few rights have been so widely proclaimed, and of few rights has their violation been regarded so plainly as a symptom of tyranny, as the right to leave one's country. Yet, it should be borne in mind that a *right* to leave is a relatively recent notion that is immediately linked with ideas on popular sovereignty and the nature of the sovereign territorial state. If in liberal theory the conceptual basis for the body politic is a voluntary contract, then a fundamental right to leave has to be recognised. In this light it is understandable that non-liberal governments, underpinned as they are by very different ideas on the nature of political authority, have consistently refused to recognise an individual right to leave.

However, not only illiberal states have regarded the issue of exit as a favour, the granting of which was within their sovereign power alone. We have seen that even after the Second World War, when the right to leave was already codified in various international instruments, also Western governments have at times regarded the question of exit as a matter falling entirely under the discretionary power of the executive. The stance of the United States' federal government in its fight against communism was particularly contradictory: while insisting on the right to leave for citizens of the communist countries, it maintained at the same time that its own decisions on exit were not for the judiciary to review as they constituted acts of foreign policy. The US Supreme Court, however, considered the right to leave to be a fundamental right, the interference of which should be subject to judicial scrutiny.

Indeed, recognising that the issue of exit is a fundamental right does not entail that its exercise may never be limited. We have seen in Chapter 3, that at times the

sovereign state's duty to provide security for all its subjects clashes with individuals' unrestricted exercise of their fundamental rights. The rule of law requires in these situations that interferences are endorsed by the legislative power and that there is a possibility of review by the judiciary. Maintaining that the right to leave is a matter solely up to the executive is an assertion of sovereign power without restraint. Such assertions of sovereign power with regard to exit are at present expressly forbidden by the ECHR and the ICCPR.

In the first place, these documents stipulate that interferences with the right to leave are to be laid down by law. In the second place, the Articles 13 ECHR and Article 2(3) ICCPR require an effective remedy before a national authority if the individual can present an arguable complaint that his right to leave is violated. Hence, even when national security is at stake, a field that is typically determined by traditional conceptions of sovereignty with emphasis on wide executive powers, the rule of law requires that measures interfering with the right to leave are subject of review by an independent and impartial body. In the third place, restrictions must be justified on the grounds of a number of limited state interests and they need to be proportionate to the aim they purportedly serve.

According to the Human Rights Committee, the right to leave encompasses the right of the individual to choose the state of destination.⁵¹¹ This also means that an alien who is expelled from one state is allowed to determine to which state he or she will be expelled.⁵¹² However, it is significant that the Committee adds that the right of the individual to decide freely where to go is dependent on the consent of the state that he or she wishes to enter. In his study on the right to leave, Chama Mubanga-Chipoya considered that it is the need for this consent that makes international movement problematic in the contemporary world, rather than the question of exit in itself.⁵¹³

However, western states' immigration policies in themselves have clear repercussions for the very exercise of the right to leave as well. Indeed, we seem to be witnessing the re-emergence of a notion that in the past was reserved for countries

⁵¹¹ Cf. EcommHR in *Peltonen v. Finland*, Decision of 20 February 1995.

⁵¹² HRC, General Comment 27(Sixty-seventh session 1999), at 8; and HRC, General Comment 15 (Twenty-seventh session, 1986) at 9.

⁵¹³ See Mubanga-Chipoya (1988a), p. 15. Cf. the Working paper on the right to freedom of movement and related issues prepared by Mr Vlodymyr Boutkevitch in implementation of Decision 1996/109 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (Boutkevitch (1997)).

inspired by the Soviet model.⁵¹⁴ The term 'illegal emigration' is becoming commonplace again, but now as a tool in the fight against unwanted immigration.⁵¹⁵ The fact that it is a concept that has, as we saw, no legal basis and is in most cases in violation of a fundamental right, appears to make little difference. Or else, how can we possibly explain that the Moroccan Minister of the Interior, Mustafah Sahel, visiting his French counterpart Nicholas Sarkozy, could proudly declare that in 2004 his country succeeded in curbing by 27% the number of candidates to illegal emigration?⁵¹⁶ And how, in the light of this Chapter, are we to interpret the statement made by the recent Conference of the Interior Ministers of the Western Mediterranean (CIMO) of May 2006, "welcoming the efforts made by the countries on the southern shore of the Mediterranean to limit illegal emigration towards Europe"?⁵¹⁷ Furthermore, the notion of illegal emigration turns up increasingly frequent in newspaper articles, reporting for example that Libya succeeded in arresting more than a thousand candidates for illegal emigration during the second half of July 2006.⁵¹⁸ The Moroccan Minister of the Interior announced publicly that Moroccan authorities arrested 383 "illegal emigrants" in the same period, the majority of whom were Moroccan citizens.⁵¹⁹

In the next Chapter it will become clear that a world completely divided up into territorial states cannot guarantee the right to leave adequately if it holds on to the view that matters relating to the entry and stay of non-nationals fall wholly within the sovereign prerogative of the sovereign state. But even more significantly, we will see that the sovereign right to decide on entry and stay of non-nationals is often defended with much the same arguments that were used to submit matters relating to exit to the sovereign discretion of the nation state in the past. Thus, I will argue that both leaving a country and entering it engage sovereignty's content as well as its form. We will see in the next Chapter that international law's differentiation between the two is caused by the fact that with regard to the right to leave, the content of sovereignty in the form of jurisdiction over persons in a given body politic has become visible and explicit, while

⁵¹⁴ Rodier (2006).

⁵¹⁵ Ibid.

⁵¹⁶ Source: Morrocotimes.com. 6 October 2005. The law of 11 November 2003 makes it possible to severely punish people who illegally leave Moroccan territory.

⁵¹⁷ Quoted by Rodier (2006).

⁵¹⁸ Le Soleil (Senegal). 8 August 2006

⁵¹⁹ Source: Libération (Casablanca). 28 July 2006.

with regard to the issue of entering or staying in a state that is not one's own, sovereignty's content remains largely concealed on account of the way in which the state presents immigration as predominantly engaging sovereignty's territorial frame.

Chapter 5 The right to enter and immigration law enforcement

5.1. INTRODUCTION

“(...) the present international legal system is so determined to protect the interests of states and their territorial boundaries that any people who seek to move across those boundaries are seen as intruders. If they can enter at all, they enter at their own risk.”⁵²⁰

In the previous Chapter, I have dealt with the right to leave, the international recognition of which constitutes an evident interference with the domestic competence of the state.⁵²¹ The development of that right in particular shows that the reserved domain of domestic jurisdiction is not an absolute and invariable notion, but a relative one which varies with the development of political theory, international law and the extent of obligations imposed and undertaken.⁵²² It is not long ago that national executives attempted to restrain the right to leave with much the same motivations that, as we will see below, are used now to portray decisions on entry as discretionary. Both aspects of freedom of movement pose direct challenges to the concept of community, but while we find that concerning emigration, the jurisdictional content of sovereignty is emphasised while its territorial frame remains hidden, with regard to immigration the picture is just the other way around.

Immigration is described as the behaviour of individuals “disturbing the geographical sovereignty of states (as political refugees or otherwise).”⁵²³ In addition, refugees and large flows of unauthorised migration are pictured as a threat to international stability and security because territorial boundaries are crossed without state consent, contrary to the rules and expectations of the international legal system.⁵²⁴

Thus, with regard to the state responses to immigration, sovereignty’s territorial

⁵²⁰ McCorquodale (2001), pp. 145, 152

⁵²¹ Vazquez (1982), p. 92-93.

⁵²² Goodwin Gill (1978), p. 55.

⁵²³ Harding and Lim (1999), p. 18.

⁵²⁴ McCorquodale (2001), p. 151.

frame is emphasised, and the fact that jurisdictional aspects are also involved when a state imposes immigration controls and restrictions, is often simply ignored. Such concealing of sovereignty's content while drawing attention to its form is not difficult in the field of immigration because the individuals interests that are affected often remain invisible, alternatively because the individuals involved are far away and unknown, or because they are very different from "us".

In this Chapter, which presents an overview of the historical development of the state's exclusionary powers in immigration law and the present regulation of these powers by international legal norms, I will argue that the conceptual distinction within international law between sovereignty's territorial frame and its jurisdictional content is the rationale behind the system of movement controls in our world. International law regards the former aspect as neutral and innocent, an attitude that differs fundamentally from the way in which it considers the latter aspect, a distinction that is brought about by the reification of territoriality, as was argued in Chapter 3. The result is that modern human rights law suffers from a serious blindness for the personal interests that are involved whenever the state presents its claims as being based on sovereignty's territorial frame, notwithstanding the fact that in reality the state always bases its decisions with regard to movement that crosses national borders – be it entering or leaving - on both sovereignty's form and its content.

In addition, we need to address a second implication of the contemporary reification of territoriality in order to fully understand the way in which international law regulates international movement. This is its structural role of ascribing distinct populations to distinct territorial entities, which has resulted in an additional territorial bias in international human rights law.

International movement across borders has produced a growing feeling of crisis in many countries because of its association with the loss of control and sovereignty in a globalising world.⁵²⁵ National states make increasing use of restrictive tools of migration management such as deportation and detention in order to demonstrate their continuing control over territorial boundaries. However, it seems that these tools, "in promising more than they can deliver, [...] only exacerbate the feeling of crisis, so that these extraordinary measures seem normal and justifiable."⁵²⁶ This circle merely fuels

⁵²⁵ Mills (1996), p. 81.

⁵²⁶ Bloch and Schuster (2005), p. 509.

the perception in which migration forms a threat to the territorial ideal that must be maintained at any cost. Contemporary illustrations of the impact of this perception on the real lives of individuals are numerous and diverse. Their similarity lies in their testimony to human suffering. Accounts of how many persons died at Europe's frontiers over the last years differ, but in any case they rate into the thousands. Every week newspapers recount novel occurrences of shipwrecked migrants, drowned as a result of their attempts to reach the coasts of European states. Because of their desire for a better life and future in another place, countless women from poor countries fall victim to trafficking networks and are sexually exploited in rich democracies. Undocumented migrants are exposed to inhuman working conditions in states that apply sophisticated social legislation to those who are officially acknowledged to be 'present'. The debasing living conditions that sub-Saharan immigrants endure in the Moroccan forests around the Spanish enclaves of Ceuta and Melilla make one doubt the political commitment to true universality of human rights.⁵²⁷ The human dramas that unfold everyday are a result of the common perception in which migration poses a problem to the global system based on territory and the social system of the nation state, which therefore needs to be prevented and contained by the use of violent dissuasive measures.⁵²⁸ However, one can also drastically reverse the angle from which migration is regarded:

"Anthropologists understand humans as a 'migratory species' (Massey et al, 1998) and interpret migration as normal behaviour (Kubat and Nowotny, Hoerder, 2003). In that view, it is rather the way, the existing social systems are organised, that poses a problem for the principally mobile human species. In order to vision policies, which would be more adequate to the migratory species one could try to put the entire debate upside down. And instead of analysing the reasons for migration, tackling what are perceived as migration crises, and combating illegal migration, one could alternatively analyse why the social systems fail to integrate mobile populations."⁵²⁹

In line with Frank Düvell's proposition above, in this Chapter I will argue that the self-evidence of territory as the foundation for political organisation accounts for the international legal system's blindness for the individual interests of mobile populations. In order to do so, I will first present a historical overview of the development of the sovereign right to exclude in Section 5.2. Subsequently, Section 5.3. deals with the legal

⁵²⁷ See documentation and witness accounts reported by Médecins Sans Frontiers (2005).

⁵²⁸ See Düvell (2004), p. 9; and Médecins Sans Frontiers (2005), p. 4.

⁵²⁹ Düvell (2004), p. 9.

framework regulating the entry and stay of nationals in a state other than their own. In Section 5.4., the European Union is addressed in conjunction with immigration from third countries. Instead of a detailed analysis of the various EU policies and legislation, this Section is included in order to show how territoriality preserves its fundamental status, also in the allegedly post-national constellation of the EU.

Immigration law enforcement strategies such as deportation and detention are separately addressed in Section 5.5., where I draw attention to their significance in maintaining the territorial system. In the conclusions to this Chapter, I engage my findings from Chapter 4 on the right to leave with those arrived at in the present Chapter in order to make clear territoriality's distinct implications for freedom of movement in the contemporary world. I will argue that the importance that states attach to maintaining the territorial ideal is at bottom not so much about territoriality *per se* as it is about matters of identity.

5.2. DEVELOPMENT OF THE ASSUMPTION OF A SOVEREIGN RIGHT TO EXCLUDE

For a long time, it has been a commonly accepted position that matters concerning the entry and sojourn of aliens fall within the reserved domain of domestic jurisdiction of the national state, which possesses an almost absolute right of exclusion, unfettered by international law⁵³⁰

"It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in the sovereignty, and essential to its self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may seem fit to describe."⁵³¹

Before investigating the validity of this claim in contemporary international law in Section 5.3., I will address the way in which historically, questions of entry and

⁵³⁰ Oppenheim (1955), p. 692; Lillich (1984b), p. 35; Oda (1968), p. 481; Jean (1988), p. 33; Doehring (1992), p. 107-108 For a summary of these views see Plender, (1988) pp. 1-4. See also Judge Read in his dissenting opinion to the *Nottebohm Case*: "When an alien comes to the frontier, seeking admission, the State has an unfettered right to refuse." International Court of Justice, *Liechtenstein v. Guatemala*, 6 April 1955, p. 46.

⁵³¹ United States Supreme Court, *Nishimura Ekiu v. U.S.*, (1892), p. 659.

sojourn of foreigners have become so explicitly bound up with an absolute notion of sovereignty. We have seen in Chapter 2 that the contemporary understanding of sovereignty accords crucial importance to territorial boundaries. These are to be guarded jealously and strictly, especially with regard to the movement of persons, because the territorially fixed population has become one of the foundations of the concept of sovereignty. But Chapter 2 also described how sovereignty became popular sovereignty. As a result of changing perceptions about the nature and source of the ultimate power of the state, the concept of sovereignty decreased in importance when it came to matters concerning exit: a process which found its culmination in the codification of the right to leave in international law in the twentieth century.

We will see that regarding entrance and, to a lesser extent, sojourn, of aliens, altering views on the notion of sovereignty have in general led to a reverse development. Extensive exercise of the right to regulate immigration is a relatively recent phenomenon, and the allegedly classical perspective that the right to exclude aliens is an essential attribute of sovereignty may turn out to be a "late nineteenth century artefact".⁵³²

Indeed, early theorists of international law did not recognize an absolute right of the sovereign to exclude. Hugo de Groot, for example, was insistent on a right of foreign refuge for those who had been expelled from their homes, and in his eyes expulsion was only acceptable when it was justified by a due cause.⁵³³ Francisco de Vittoria as well, in his eagerness to establish as a fundamental human right the faculty of trading with residents of other lands, favoured the individual right of freedom of movement above a sovereign's right of exclusion.⁵³⁴ Although it is his name that is most often associated with an absolute right of exclusion, also Emmerich de Vattel (1714-1767) applies limitations to external sovereignty when it comes to entry or sojourn of aliens.⁵³⁵

In medieval Europe, when the nation state did not yet exist, it was not so much the possibility to enter territory that gave rise to problems. Instead, we have seen that for many individuals the right to depart from it was problematic, as a large part of the population was tied to territory due to the institution of serfdom. Nonetheless, for free

⁵³² Martin (1989), p. 547.

⁵³³ Nafziger (1983), p. 811; and Plender (1988), p. 63.

⁵³⁴ O'Connell (1970), p. 693.

⁵³⁵ Nafziger, (1983), p. 814; Goodwin-Gill (1978), p. 95; and McGrath Dale (1991), p. 365.

people there was ample opportunity for freedom of movement and choice of residence, due to the imperatives of economic trade, even though medieval cities often controlled immigration strictly.⁵³⁶ Borders were of concern to rulers with regard to warfare but for the individual traveller they possessed little significance. Entry could be refused, and removal imposed, but such measures were usually directed against certain individuals, not against foreigners in general.⁵³⁷ Exile was an individual measure used against members of the polity, as a punishment, mainly for political offences, and in those cases that expulsion was a mass measure, it was directed at religious minorities, and not at foreigners as such. However, expulsion of these minorities was bound up with early attempts of monarchs to homogenise populations in order to form strong states, inhabited with a population whose allegiance they could be sure of.

“The fact that questions of religion and political loyalty are intertwined is clear by the sixteenth and seventeenth century. Corporate expulsion can be seen as a tool of state formation, occurring against the backdrop of the break-up of the universal church. Indeed, for some observers its frequency, and concentration in the western part of Europe is related to the fact that it goes hand in hand with the emergence of the modern state system there.”⁵³⁸

Another example in which the ‘right to remain’ was infringed upon, apart from exile for those who had attempted to undermine the authority of the state and expulsions of religious minorities, was the practice in early modern Europe to restrict poor relief to the local poor. By placing deportation in a historical perspective, William Walters shows that the policing – in the sense of governing – of the foreign poor becomes, by the late nineteenth century, a major preoccupation of deportation policy.⁵³⁹ Yet, in the sixteenth and seventeenth centuries, the foreigner is not yet defined in national terms, but it is the distinction local versus foreigner which is deemed relevant for the application of poor laws.⁵⁴⁰

The Westphalian system of territorial states, dividing and allocating populations to specific territories, conflicts with the ideal of individual freedom of movement. We have seen that in the era of mercantilism, this friction came to the surface with regard to

⁵³⁶ Nafziger (1983), p. 810.

⁵³⁷ Dummet and Nicol (1990), p. 11.

⁵³⁸ Walters (2002), p. 271.

⁵³⁹ *Ibid.* p. 270.

⁵⁴⁰ See also Torpey (2000), p. 19.

the right to leave. However, the possibility to enter remained largely unaffected. States were happy to welcome immigrants, as immigration was a way to increase population. At the time that the absolute power of the sovereign ruler was being attacked, free movement across boundaries became the norm. Not only the right to emigrate was perceived as a natural right, also the freedom to enter was scarcely subject to restrictions. The French Constitution of 1791 guaranteed “liberté de aller, de rester, de partir”. The Revolution with its cosmopolitan spirit was initially very welcoming towards foreigners. Refugees and exiles were received with encouragement, in the hope that cosmopolitan ideals and principles of human rights would “contaminate neighbouring people and incite uprisings against tyrants.”⁵⁴¹

Nevertheless, during the Revolutionary Wars, the situation changed dramatically. Foreigners, especially those from countries with which France was at war, suddenly became suspicious individuals, who could be banished from the territory of the French Republic. Measures that were directed at them at that time may remind one of some of the contemporary national policies in Europe:

“Many were imprisoned in town houses and requisitioned state buildings. It was proposed that ‘hospitality certificates’ be created, which would be given by municipalities to those foreigners having successfully passed the ‘civics examination’; they would then wear an armband bearing the name of their country of origin and the word ‘hospitality’.”⁵⁴²

Not only France adopted restrictive measures. Around the same time, similar developments took place in other European countries and in the United States.⁵⁴³ Here again one witnesses the inconsistency, already dealt with in detail in Chapters 2 and 3, between modern theory with its emphasis on universalism, and the actual practices inspired by it, characterised by territorial particularism. This inconsistency is magnified by the way in which the foreigner is treated. The meanings that are ascribed to territorial boundaries in general reveal modernity’s ambiguity as well: as we have seen above, around the same time restrictions were imposed on freely leaving the country.

However, liberal ideals continued to increase in importance, and during the nineteenth century freedom of movement had become the norm. Millions of people left

⁵⁴¹ Kristeva (1991), p. 156. Cf. Torpey (2000), p. 24.

⁵⁴² Kristeva (1991), p. 158.

⁵⁴³ Plender (1988), p. 65.

their countries in order to start a life elsewhere. Entry was generally an uncomplicated matter, due to an expanding economy in the Western countries, compatibility between source and destination countries, and the predominance of liberal thought in general.⁵⁴⁴ The International Emigration Conference passed a resolution in 1889 that affirmed the right of the individual to come and go and dispose of his destinies as he pleased. In 1891, the Institute of International Law rejected the idea that sovereign power entails an absolute right of exclusion and in 1892 it adopted the 'International Regulations on the Admission and Expulsion of Aliens', in which states were permitted to refuse entry solely in the public interest and for very serious reasons. It was stipulated that the protection of national labour in itself was not a sufficient reason for non-admission.⁵⁴⁵

Expulsions in this era were seldom specifically directed at foreigners as such, but they were seen as a means of social regulation in the case of criminals. Their punishment consisted of removal from the territory of their countries of origin and they were transported to colonies or other areas.⁵⁴⁶

However, from the late nineteenth century onwards, states gradually started to impose border controls. Even though the attitude towards freedom of movement initially remained fairly liberal, states commenced to make distinctions between aliens and nationals. The changing connotations of nationalism, from freedom and equality for the people, to the particularistic language of national identity linked to territorial boundaries, and a common identity of the people, as elaborated upon in Chapter 2, expressed themselves in a growing hostility towards foreigners. Ethnic, racial or national fault lines became the markers for political order. This period saw the introduction of racially, culturally and socially exclusive immigration laws.⁵⁴⁷ With the onset of World War I, passports became obligatory in order to enter another country, and the 'foreigner' had to be identified by means of documentation.⁵⁴⁸ Although these

⁵⁴⁴ Nafziger (1983), p. 815; and Torpey (2000), p. 91-92.

⁵⁴⁵ Institut de Droit International (1892), p. 218; O'Connell (1970), p. 695; Nafziger (1983), p. 832; and Schindlmayer (2003), p. 113.

⁵⁴⁶ Walters (2002), p. 272.

⁵⁴⁷ Such as laws preventing the immigration of paupers or persons with 'low morals' and certain specific nationalities. Christie Tait (1927); and Fields (1932). Good examples of the latter are the US Chinese Exclusion Act of 1882 (Act of May 6th, f 1882, 22 Stat 58); restrictions on Jewish migration to the United Kingdom; and laws concerning "foreign poles" working in Prussia. See Walters (2002b), p. 571.

⁵⁴⁸ See Aybay (1977), p. 123; Plender (1988), p. 77; and Torpey (2000), p. 1.

measures were initially seen as temporary, necessary in view of the war, the *laissez faire* era with regard to international migration had reached its definite end.⁵⁴⁹

We saw that the perception of an unbreakable and necessary linkage between state, people, and identity reached its zenith in the period between the two world wars. Nationalism had changed citizenship's connotations of equality, freedom and self-government. National identity was the first political priority and had become synonymous with citizenship. International movement of people and the significance of territorial boundaries were greatly influenced by this shift in mentality. Most countries that had been welcoming towards immigrants before now imposed serious restrictions or even closed their borders completely.⁵⁵⁰

The idea that every nation should have its own state also influenced the right to remain. After the First World War and the break-up of the last European empires, population transfers were seen as an acceptable way in which the ideal of the nation state could be achieved, especially in the new states that were formed after the disintegration of the Ottoman Empire.⁵⁵¹ And although Nazi Germany later took these practices to their extreme, they were by no means exclusive to Hitler's Germany, nor were they limited to the period between the two world wars:

"While today it might be associated with ethnic cleansing, for statespersons at the middle of the century, population transfer was legitimated as an unpleasant but expedient and technical means of effecting national and international order. Hence population transfer did not end with the defeat of the Nazi regime. Under the Potsdam Protocol the Allies sanctioned a wave of transfers that would culminate in the removal of more than 14 million ethnic Germans from such countries as Poland, Hungary and Czechoslovakia."⁵⁵²

Precisely due to the way in which national identity, territory, and rights had become linked in the beginning of the twentieth century, an international refugee regime

⁵⁴⁹ Torpey (2000), p. 112; and Marrus (1985), p. 62.

⁵⁵⁰ See about the interwar situation: Christie Tait (1927), p. 27-29 and Fields (1932). Christie Tait provides some telling figures for the situation in the late 20's: "in the months ending 30th June 1914, 283,738 Italian immigrants entered the United States, the present quota for Italian immigrants is 3,845. (...) The corresponding figures for Greece are 35,832 and 100, for Spain 7,591 and 131, Romania 4,032 and, for a larger area, 603." Christie Tait (1927), p. 33-34.

⁵⁵¹ Lillich (1984b), p. 33.

⁵⁵² Walters (2002), p. 274. See also Arendt (1976), p. 276; Lillich (1984b), pp. 62 and 76; and Marrus (1985), pp. 327-328.

started to emerge around the same time. We will see below that international refugee law, on the one hand, and a system of sovereign states based on territoriality, on the other, are logically connected. The First World War with its break up of empires and subsequent revolution produced millions of refugees and a whole new category of people, the stateless.⁵⁵³ Passports had become essential for international movement, but for many refugees it was impossible to obtain the proper documents. The League of Nations recognised the difficult situation these people were in, and efforts were made in order to make movement easier for them. The Nansen Passport, named after the League's first High Commissioner for Refugees, was initially intended solely for Russian refugees, but later it was expanded to cover other groups, such as Armenians and minorities from the former Ottoman territories.

At first, these passports only facilitated movement: participating governments agreed to recognise those documents, but no state was obliged to receive refugees bearing such papers.⁵⁵⁴ Later, in 1926, some of the participating governments to the original agreement extended the right of movement to a right of return to the state that had issued the document. The League of Nations, in the 1933 Convention Relating to the International Status of Refugees, accorded Nansen Passport bearers some elements of "supranational citizenship" by giving the High Commissioner for Refugees the authority to perform certain consular functions on behalf of those refugees in possession of such a document.⁵⁵⁵

Besides, the Convention provided that a refugee had to be admitted by a Contracting State if he came directly from a state where he feared persecution.⁵⁵⁶ The emergence of the Nansen passports can be seen as the birth of an international refugee law regime: no longer was the protection of refugees a matter solely for the state that chose to afford them protection, but it became a concern of the international community at large.

International law's emerging concern with refugees after the First World War finds an interesting parallel with the way in which it dealt with the issue of national minorities during the same period, as was described in the previous Chapter. Refugees,

⁵⁵³ The refugees from Russia were probably the most prominent. A vast majority of them were denationalised after departing and thus became stateless. Torpey (2000), p. 124-125.

⁵⁵⁴ Lui (2002), at 36.

⁵⁵⁵ Torpey (2000), p. 129.

⁵⁵⁶ Lillich (1984b), p. 36.

just as minorities, did not fit the population-territory-identity ideal of the sovereign state. In addition, both endangered the stability of a state system based on territoriality. Geopolitical considerations in the refugee regime were made apparent by the fact that the League of Nations gave attention only to those refugees from regions that were considered most disruptive to the European order.⁵⁵⁷

The previous two Chapters traced a changed perception of sovereignty in the period between the two World Wars, one that was “more jealous and absolute than anything known before.”⁵⁵⁸ We saw how that development caused citizenship to acquire new connotations, far removed from those by which it had previously been characterised. Citizenship became instrumental in determining and establishing who belonged and who did not. In its most extreme uses, such as by the Nazis, this instrumental use of citizenship affected the right to remain.⁵⁵⁹ The Nuremberg Laws of 1935, which deprived Jews of German citizenship, were the foundation for subsequent plans to expel all Jews from German territory.⁵⁶⁰ The newly emerged sovereignty, with its accompanying system of controls on movement embedded in national membership, made sure that the victims of these measures could find refuge elsewhere only with difficulty. “Paper walls” had been erected around all Western democracies, and at the Evian Conference, which was organised in 1938 in order to address the problem of refugees from Germany and Australia, it was made clear by Western governments that they had little intention of changing their perception of sovereignty as entailing an absolute right of exclusion. This had already been illustrated by the fact that only eight states had ratified the 1933 Convention on Refugees.⁵⁶¹

After the Second World War, the number of displaced people in Europe finding themselves outside their countries of origin counted over 11 million. A refugee crisis of unprecedented magnitude presented itself, and a great part of the displaced persons over Europe were interned in camps. Already during the war, refugee relief operations were being planned. An international organisation, the United Nations Relief and

⁵⁵⁷ Lui (2002), at 38.

⁵⁵⁸ Polanyi (1944), p. 202.

⁵⁵⁹ Or the right to enter (return), as had already been shown by Soviet Russia, which, after the Revolution, denationalised a large part of the refugees that had left the country.

⁵⁶⁰ See about pre-war Nazi plans for the mass departure of German Jews: Marrus (1985), pp. 211-219

⁵⁶¹ Lillich (1984b), p. 36.

Rehabilitation Administration (UNRRA), with the task of repatriating people, was established in 1943. Factually, the Allied Forces handled most resettlements.

In 1947, the UNRRA was succeeded by the International Refugee Organisation (IRO), intended to deal with the remaining one million displaced persons in Europe. The constitution of the IRO stated that if a displaced person had reasonable grounds to fear on returning to his country of origin, persecution because of race, religion, nationality or political opinion, he could refuse repatriation. Indeed, many of the remaining displaced persons refused repatriation, especially those Eastern European refugees hostile to the Soviet regime and its expansionism. Thus, the IRO had to secure admission for them somewhere. When it became clear that most Western European countries were reluctant to grant admissions on a large scale, the IRO searched for other solutions, encouraging non-European States to open their borders by linking the economic needs of these countries with the labour potential of the DP population.⁵⁶²

The IRO in turn was succeeded by the UN High Commissioner's Office for Refugees in 1949. Although initially concerned only with Europeans, the United Nations High Commissioner for Refugees (UNHCR) gradually adopted a global mandate, less explicitly focussed on the events of the war in Europe. Whereas during the pre-war period, with the emergence of the Nansen Passports, refugees had been defined according to their membership in a particular national group, the UNHCR adopted the view that refugees had rights irrespective of their nationality.⁵⁶³

These developments were reflected in the 1951 Convention relating to the Status of Refugees and the modifications made to that Convention by the 1967 Protocol relating to the Status of Refugees. In spite of the fact that discretion over entry and admission of aliens were still seen as essential attributes of sovereignty, under the Convention governments accepted certain restrictions on their perceived unlimited discretion in this field. The nature and extent of these restrictions will be dealt with in the Section below.

During the late forties, many refugees from Eastern Europe started to come to the West, their departure prompted by harsh economic conditions combined by increasing political oppression. Before the communist countries closed their borders

⁵⁶² Marrus (1985), pp. 344-345. Three quarters of the approximately remaining one million DP's between 1947 and 1951 went to the United States, Australia, Israel, and Canada. Only 170,000 were received by Western European states.

⁵⁶³ Torpey (2000), p. 144.

completely to emigration, thousands of Eastern Europeans left their countries, seeking a safe haven or a better future in the West, which initially did not open its doors spontaneously, nor welcomed these people warmly:

"[...] escapees who reached the American zone of Germany stood a reasonable chance of being jailed for illegal crossing of a frontier. By 1952, nearly 200.000 anti-Communist refugees were jammed into camps and centers in Berlin and West Germany, sometimes living in appalling conditions."⁵⁶⁴

However, as the Cold War hardened, Western countries started to maintain an open admissions policy for almost anyone coming from a communist country, and refugee status was not reserved for the politically persecuted, but also afforded to those who were driven to emigrate by obvious economic motivations.⁵⁶⁵ This policy was on the one hand a tool in the ideological struggle: refugee law was used to stigmatise the Communist regimes.⁵⁶⁶ On the other hand, it was a consequence of Western insistence upon the acknowledgement of the right to leave by the Communist countries. Furthermore, firm control over exit by the Soviets and their Eastern European allies anyhow prevented truly massive flows of people reaching the West. However, at the same time Cold War concerns made entry a more complicated issue as well for reasons of state and public security. In the case of the Federal Republic of Germany, foreigners crossing the border could receive severe penalties if they diverged from the route or destination prescribed in the visa.⁵⁶⁷

Because of shortages on the labour market, and in their efforts to rebuild post war Europe, Western European countries encouraged importation of foreign workers from the 1950s to the 1960s. These were mostly recruited from Mediterranean countries such as Italy, Yugoslavia, Turkey and Morocco. Around the same time, refugees started to come to Europe from the developing world. As applications for asylum were

⁵⁶⁴ Marrus (1985), p. 354.

⁵⁶⁵ See Ghoshal and Crowley (1983).

⁵⁶⁶ In addition, the common perception might have been that communist poverty is attributable to the government, whereas poverty in capitalist countries to the individual. The US for example openly recognised the economic considerations of refugees from communist countries, but refugees from non-communist countries were sent back because they were economic refugees. See *Harv.L.Rev.* (1985-1986), p. 463.

⁵⁶⁷ Torpey (2000), p. 148.

increasing steadily, restrictive measures were taken in order to stem these flows. The Western European countries were more sympathetic to the plight of Eastern European refugees than to that of those coming from the third world. Another post-war development was immigration to European countries from their colonies or former colonies. In the latter case as well, although initially fairly open to people from the overseas territories, former colonial powers in general closed their borders quite quickly, except to those who were perceived to have close ties to the European country in question.

From the 1970s onwards, due to economic concerns propelled by the 1973-1974 oil crisis, Northern European countries actively attempted to stem immigration flows and wished to repatriate many of the guest workers they had so enthusiastically recruited in the previous two decades. It appeared that they were not always able to do so. Asylum laws could be, and indeed were, made more restrictive, but repatriation programmes failed and because family reunification had in most domestic jurisdictions become a legal right for resident immigrants, many new immigrants had to be admitted. The alarm caused by states' incapacity to reduce immigration pressures called for more restrictive measures, which in turn produced illegal immigration.⁵⁶⁸ The circle was complete when governments responded to this phenomenon with ever more strict legislation concerning entry and sojourn of non-nationals.

In addition, migration slowly came to be regarded not only as an economic concern, but also as a security issue.⁵⁶⁹ Political power in the twentieth century, especially with the advent of the welfare state after WWII, had come to be concerned with the wealth, health, welfare and prosperity of populations. As a result, immigration policy could, when the presence of aliens was perceived as an economic and social threat, become an instrument to defend and promote the welfare of a nationally defined population. This trend, originating in the ethnically and socially exclusive immigration laws at the turn of the nineteenth century, has become much stronger since the 1970s. Since the late 1980s, immigration has become a major political concern. The problems associated with immigration are presently worded in a rhetoric of 'threat, crisis, invasion, and flooding', which leaves one without doubt about the link with traditional notions of sovereignty and security. National identity once again plays a distinct role in

⁵⁶⁸ Samers (2004) argues that illegal immigration is produced by migration and citizenship policy.

⁵⁶⁹ Melis (2001), p. 11.

public discourse. The legal, individual rights based, system of asylum is far from immune from political influences.⁵⁷⁰ On the contrary, we will see later that an international system of refugee protection is linked to the territorialisation of political organisation, with all its concurrent emphasis on identity.

Generally speaking, since the early twentieth century onwards we have witnessed an ever more progressive assertion of sovereignty as inherently entailing the right to exclude foreigners. The idea of fundamental rights has made some inroads in this powerful and unhampered use of sovereignty, which is most clearly illustrated by the rights of long-term legal residents in liberal democracies, as we have seen in the previous Chapter. Nevertheless, in the course of the twentieth century, immigration control has become one of the ways to protect the essence of the nation, in whatever aspect one sees that essence expressed: population, borders, mythology or coercive power.⁵⁷¹

Certainly, there are exceptions to this development, mainly at the regional level, the most notable being the European Union. But the very novel and revolutionary character of its notion of supranational citizenship, with the accompanying rights of freedom of movement throughout the countries of the Union, is perhaps all the more striking due to the fact that in general the development has been a reverse one. In addition, as was already remarked in Chapter 2, the European project has also emphasised the inside/outside distinction, notwithstanding the fact that the scales according to which who is labelled insider and who is an outsider have been shifting in important and unprecedented ways. With the abolition of internal borders in the EU, worries about the vulnerability about the external frontiers have risen equally, and much action is taken to strengthen these borders against unwanted immigration. Before I consider these issues and other questions specific to immigration policies in contemporary European states in greater detail, it is necessary to sketch the international legal framework governing the right to enter and remain. Which legal constraints does it formulate against an unlimited sovereign right to exclude?

⁵⁷⁰ Schindlmayer calls attention to the fact that refugees from countries which lack in geopolitical importance generally do not enjoy priority status. See Schindlmayer (2003), p. 119.

⁵⁷¹ Dauvergne (2004), p. 592.

5.3. THE RIGHT TO ENTER AND REMAIN IN INTERNATIONAL LAW

Only a brief glance at international law is sufficient to discover that the right to leave and the right to enter a country are not symmetrically protected. Whereas the right to leave a country should be guaranteed for any person irrespective of his or her nationality, a general right to enter a country in international human rights instruments is reserved for nationals of the country in question. The corresponding duty of states to admit their nationals is well established in international law, and as such it is regarded as the logical correlative of the right of other states to expel non-nationals.⁵⁷² In classic international law, this duty raised obligations only between states, but presently the right to enter one's own state is incorporated in all major human rights instruments. With regard to a general right to remain, only nationals are in a sense in-expellable.⁵⁷³ However, the right to enter and remain for nationals does not fall within the scope of a study dealing with the detention of irregular immigrants and refugees, a category by definition consisting of non-nationals. Therefore, in the following paragraphs, I will focus on the international legal framework concerning the right to enter or remain in a state of which one is not a national.⁵⁷⁴

It is argued widely that there exists no right for aliens to enter the territory of a foreign state, except in particular cases, resulting from treaties, and that states similarly possess a general competence to require aliens to leave.⁵⁷⁵ Often, exclusion seems to be regarded as an inherent attribute of sovereignty. Yet, we have seen in the previous Chapter that sovereignty is never unlimited, and that certain concerns in particular have caused concepts such as domestic jurisdiction or the *domain réservé* to undergo profound changes during the last century. Indeed, we will see that those instances in which an alleged sovereign right to exclude is limited generally flow from considerations regarding the fundamental rights of individuals: contemporary international migration law is largely rooted in human rights law.

⁵⁷² Goodwin-Gill (1978), p. 137. See also ECJ, Case 41-74, *Van Duyn v. Home Office*, 4 December 1974.

⁵⁷³ For a contrary opinion, see Doehring (1992), p. 110. The right to remain is guaranteed for nationals by Article 3 Protocol 4 ECHR.

⁵⁷⁴ As in section 4.2.2., concerning the legal framework of the right to leave, I will be selective in my treatment of international law in this area. Main emphasis will be on the ICCPR and the ECHR.

⁵⁷⁵ Doehring (1992), p. 108; O'Connell (1970), p. 707; and Fourlanos (1986), p. 61.

The extent to which such considerations put limits on the right to exclude is perhaps not so very wide if only taking into account customary international law or *ius cogens*. However, in Chapter 3, I have indicated that one misunderstands the discourse of fundamental rights, if one deems an investigation into their origin (however interesting) necessary in order to evaluate their impact on the sovereign claims of the modern state. Thus, be it treaty obligations or the case law of domestic courts that put limits on an alleged sovereign right to exclude the foreigner, they are as much about restraining a particular assertion of sovereignty, as *ius cogens* or customary international law would be in the same case. This is especially so when we take into account the fact that the traditional perception of the sovereign power to exclude entails extensive executive discretion, with little or no room for the legislative or judiciary powers.

5.3.1. General limitations on the sovereign right to exclude

The main venues for legal migration into the Member States of Europe consist of immigration on humanitarian or human rights related grounds; family reunification or formation; and primary labour migration. Concerning the two former categories, international law plays a significant role that will be described in Sections 5.3.2. and 5.3.3. However, with regard to migration for employment or other general purposes, international law does very little to limit the national state's discretionary powers, except to decree that its decisions may not be discriminatory. As a general rule, the principle of non-discrimination contained in Article 26 ICCPR may play a role in limiting the power of states to exclude.⁵⁷⁶ The prohibition on racial discrimination can

⁵⁷⁶ The principle of non-discrimination plays an ambiguous role in international migration law as discrimination on the grounds of nationality is inherent to it. Additionally, it will often be difficult to prove discrimination precisely in view of the broad powers of the state. This problem is circumvented when the rights of nationals are involved as well: see the decision by the HRC in the *Mauritian Women's Case*, in which it decided that Mauritian practice of affording alien wives automatic residence rights while denying such rights to alien husbands was discriminatory with respect to Mauritian women (*Amauruddyu-Cziffra et al. v. Mauritius*, 9 April 1981, at 67).

be seen as *ius cogens*,⁵⁷⁷ but states would also act in contravention of Article 26 ICCPR if their decisions on requests for entry or applications for visa would be discriminatory on the grounds such as race, sex, language, religion, opinion, national or social origin, property, birth or other status.⁵⁷⁸ While the principle of non-discrimination seems to be the only international principle bearing upon a general right of the individual to enter, with regard to a general right to remain, international law offers more protection by imposing certain restraints on the circumstances in which a state may expel an alien from its territory.⁵⁷⁹

It should be noted, however, that this extended protection is usually only offered to those individuals who were initially authorised to enter or stay in national territory. International law thus treats irregular residents on the same footing as those who never entered, therewith endorsing a view of sovereignty as a right to decide on matters of exclusion, at least initially. The fact that international law's main concern with the rights of aliens is only after authorised entry into national territory makes apparent once more the importance of territoriality for an international constitutionalism.

We have seen in the Chapter 3 that under international law, foreigners are entitled to treatment in accordance with a minimum international standard. Hence, such a standard applies equally to matters relating to their sojourn, and they should not be subject to arbitrary expulsions.⁵⁸⁰ Chapter 3 described that international law relating to the treatment of foreigners accords rights to national states instead of bestowing entitlements on the individual. Thus, diplomatic protection is capable of posing some limits to the sovereign right to exclude, but not in favour of a right of the individual.

However, the emergence of human rights enhanced international protection of aliens, also regarding matters of their sojourn. First of all, just as decisions pertaining to

⁵⁷⁷ See also the International Convention on the Elimination of All Racial Discrimination of 21 December 1961, entry into force 4 January 1969. Although the non-discrimination provision in the ECHR cannot be invoked independently from a claim concerning one of the rights set forth in the Convention, racial discrimination may amount to degrading treatment, prohibited by Article 3 ECHR. See about the application of this provision to racially discriminatory immigration legislation: ECommHR, *East African Asians v. The United Kingdom*, Report of 14 December 1973. Protocol 14 ECHR, prohibiting discrimination in respect of the enjoyment of any right set forth by law is ratified by only 5 EU Member States.

⁵⁷⁸ Goodwin-Gill (1978), p. 81; and Cholewinski (2002), p. 51-52.

⁵⁷⁹ See Iran-U.S. Claims Tribunal, *Rankin v. Iran*, 3 November 1987, par. 22.

⁵⁸⁰ Higgins (1973), p. 346; and Oda (1968), p. 482.

entrance should not amount to forbidden discrimination; neither should removal from national territory be effected on discriminatory grounds.⁵⁸¹ Secondly, a general principle of customary international law prohibits mass expulsions of aliens.⁵⁸² The prohibition of collective expulsion is closely related to the non-discrimination requirement. Expulsions do not violate international law merely because numerous aliens are expelled; instead the prohibition concerns the expulsion of them as group if it is not the result of decisions based on the merits of each individual case.⁵⁸³ Codifications of the prohibition on mass expulsion are *inter alia* contained in the Fourth Protocol to the ECHR⁵⁸⁴ and the International Convention on the Protection of the Rights of Migrant Workers and their Families⁵⁸⁵.

Thirdly, various provisions of international law stipulate that certain procedural guarantees need to be satisfied before a state may expel a foreigner. Although these provisions are procedural in character, they serve to prevent arbitrary expulsions.⁵⁸⁶ According to Article 13 ICCPR and Article 1 of Protocol 7 ECHR,⁵⁸⁷ an alien residing lawfully in a Contracting State's territory may be expelled there from only in pursuance of a decision reached in accordance with the (domestic) law.⁵⁸⁸ Both provisions do not affect the substantive law governing expulsions, and the HRC in applying Article 13 ICCPR does not deem it within its powers to evaluate whether national authorities have

⁵⁸¹ HRC, General Comment 15 (Twenty-seventh session, 1986).

⁵⁸² Henckaerts (1995); Plender (1988); and Cassese (2005), p. 121.

⁵⁸³ EcommHR, *Becker v. Denmark*, Decision of 3 October 1976, p. 454.

⁵⁸⁴ Article 4 Protocol 4 ECHR (CETS No.: 046, entry into force 1968, ratified by all EU Member States save Spain and the United Kingdom).

⁵⁸⁵ Article 22 (Convention adopted by General Assembly Resolution 45/158 of 18 December 1990: Entry into force: 1 July 2003).

⁵⁸⁶ International laws that expressly give the individual a substantial guarantee against arbitrary expulsions are rare. See for example Article 19(8) of the 1961 European Social Charter, which decrees that migrant workers may only be expelled if they form a danger to national security, public interest or public morality.

⁵⁸⁷ Entry into force: 1998 (ratified by all EU Member States save Spain, The Netherlands and Greece).

⁵⁸⁸ Other important provisions in this respect are Article 3 of the 1955 European Convention on Establishment (CETS No.: 019, entry into force: 23 February 1965) and Article 22 of the International Convention on the Protection of the Rights of Migrant Workers and their Families. Article 3 of the European Convention on Establishment also enumerates permissible grounds for expulsion. Its provisions are only applicable to nationals of Contracting States who reside on the territory of another Contracting Party.

interpreted and applied the law correctly, unless it is established that they have not acted in good faith or there was abuse of power.⁵⁸⁹ Thus, substantive power regarding exclusion is left to the national state alone, a fact that is emphasised by the fact that the procedural guarantees are only applicable in the case of 'lawful residency', which lawfulness similarly refers to domestic law.⁵⁹⁰ One inroad into this power is provided for by the HRC: when the legality of an alien's entry or stay is in dispute, any decision resulting in his expulsion or deportation should be taken in conformity with Article 13 ICCPR.⁵⁹¹

Article 13 ICCPR and Article 1 of Protocol 7 ECHR⁵⁹² accord lawful residents the right to advance reasons against the ordered expulsion and have their case reviewed by an authority that is capable of offering an effective remedy.⁵⁹³ The reviewing authority may be the same as who made the initial decision. Exceptions to these procedural guarantees are also provided for. In the ICCPR, compelling reasons of national security may justify the absence of appeal and the entitlement of review. In Protocol No. 7 ECHR, both public order and national security are grounds for derogation of these procedural rights. Nevertheless, according to the ECtHR, someone expelled on grounds of public order or national security does retain the right to invoke his procedural rights after expulsion. However, this can hardly be seen as an effective remedy.⁵⁹⁴

A national state, when invoking the interest of public order in order to avoid its obligations under Article 1 Protocol 7, needs to furnish prove that this is a necessary measure in the particular case.⁵⁹⁵ However, the advancement of reasons of national

⁵⁸⁹ HRC, *Maroufidou v. Sweden*, 5 September 1979.

⁵⁹⁰ ECommHR, *Voulfovitch and Oulianova v. Sweden*, Decision of 13 January 1993, par. 3. Furthermore, aliens who arrive at ports or other points of entry are excluded from the protection of those provisions, just as 'overstayers' and those present on the territory awaiting a decision on a request for a residence permit. See the Explanatory Report to Protocol 7, Par. 9; and HRC, General Comment 15 (Twenty-seventh session, 1986).

⁵⁹¹ HRC, General Comment 15 (Twenty-seventh session, 1986) at 9.

⁵⁹² CETS No.: 117, entry into force 11 November 1988.

⁵⁹³ HRC, *Hammel v. Madagascar*, 3 April 1987, par. 19.

⁵⁹⁴ The ECtHR does not consider a remedy effective if it does not suspend the contested measure. ECtHR, *Bozano v. France*, 18 December 1986, §48.

⁵⁹⁵ See ECommHR, *Mezghiche v. France*, Decision of 9 April 1997.

security is sufficient, and no further justification by the national state is required.⁵⁹⁶ The HRC limits its own powers of review in a similar manner when reasons of national security are advanced,⁵⁹⁷ therewith undermining the significance of the term compelling in Article 13 ICCPR.⁵⁹⁸ This is regrettable, as some sort of judicial check on invoking national security is desirable in order not to reduce the guarantees contained in Article 13 ICCPR and Article 1 Protocol 7 to “the merely hortatory”.⁵⁹⁹ This lack in judicial protection may be remedied at the national level, where it is not exceptional for courts to adjudicate claims of national security in expulsion cases.⁶⁰⁰ It should be noted that where other rights are concerned, neither the Strasbourg organs, nor the HRC leave the assessment of whether a right balance is struck between national security concerns and individual rights solely to the national authorities.⁶⁰¹

That the HRC chooses to do so and the Strasbourg Court is obliged to do so in a case in which national security, the right to remain and the power to exclude are at stake, and in which no other fundamental rights are implicated, is perhaps not surprising: what could be a more suitable site for national sovereignty to emerge unrestrained by an internationally administered rule of law? Whether such judicial restraint fits within a system of protection of individual rights is another question.⁶⁰²

A proposal to include a similar provision in the European Convention system at an earlier date (in Protocol No. 4), in which it would also be for the national state alone to decide whether reasons of public security exist, was refused. The Committee of Experts felt that this situation would prevent the exercise of powers vested by the Convention in the bodies that it instituted for the purpose of ensuring that Contracting

⁵⁹⁶ Explanatory Note to Protocol No. 7, par. 15.

⁵⁹⁷ “It is not for the Committee to test a sovereign state’s evaluation of an alien’s security rating.” *I.M.R.B. v Canada*, 26 July 1988, at 8.4.; and *J.R.C. v Costa Rica*, 30 March 1989, at 8.4.

⁵⁹⁸ Joseph, Schultz and Castan (2004), p. 383.

⁵⁹⁹ Martin (1989), p. 571.

⁶⁰⁰ See Martin (1989), pp. 570-571 and Goodwin-Gill (1978), pp. 282-310.

⁶⁰¹ Although in the ECtHR’s case law, often a wide margin of appreciation is in such cases left to the national authorities. ECtHR, *Leander v. Sweden*, 26 March 1987; and ECtHR, *Klass v. Germany*, 6 September 1978. The HRC is generally more willing to adjudicate national security considerations. See *Sohn v. Republic of Korea*, 3 August 1995, par. 10.4; *Mukong v. Cameroon*, 21 July 1994, par. 9.7.; and *Kim v. Republic of Korea*, 4 January 1999, par. 12.4 -12.5.

⁶⁰² See the ECtHR in *Al Nashif v. Bulgaria*, 20 June 2002.

Parties would respect their commitments.⁶⁰³ Another objection that was expressed at that time was the absence of impartiality if review of the expulsion order could be effected before the same authority which took the initial decision.⁶⁰⁴

In the traditional perception of the power to exclude, judicial review does not play a large role on account of the allegedly great extent of executive discretion. In a sense, the Strasbourg organs have sanctioned such a perception of the state's power to decide on exclusion, as can be deduced from a number of decisions in which it was decided that the fair trial guarantees of Article 6 ECHR neither apply to the decision to deport an alien, nor to administrative proceedings on prohibition of entry. The European Commission for Human Rights and the ECtHR have both held that the right of an alien to reside in a particular country is matter of public law and the decision to deport him does not constitute a determination of his civil rights and obligations in the sense of Article 6.⁶⁰⁵ For the Commission, the discretionary nature of the powers of immigration authorities was decisive in reaching this conclusion.⁶⁰⁶

The Explanatory Report to Protocol No. 7 expressly states that its Article 1 does not affect this interpretation of Article 6.⁶⁰⁷ Whether the HRC entertains similar views on the application of Article 14(1) ICCPR on exclusion cases is not clear. The English version of Article 14 (1) ICCPR stipulates that a fair trial should be guaranteed to any person in the determination of his rights and obligations in a "suit at law", which refers to the nature of the right in question, instead of the status of the parties concerned or the particular forum where the right is to be adjudicated.⁶⁰⁸ However, the question whether a decision to deport an alien may amount to the determination of his rights and

⁶⁰³ Explanatory Note to Protocol 4 ECHR, par. 34.

⁶⁰⁴ Ibid.

⁶⁰⁵ ECtHR, *Maaouia v. France*, 5 October 2000, §§36-37; and the ECommHR: *Agee v. The United Kingdom*, Decision of 17 December 1976, p. 164, par. 28; *X v. The United Kingdom*, Decision of 18 May 1977; and *Kareem v. Sweden*, Decision of 26 October 1996, p. 173. A recent conformation of the approach taken in *Maaouia* can be found in ECtHR, *Üner v. the Netherlands*, 18 October 2006, §56.

⁶⁰⁶ ECommHR, *Uppal and others v. the United Kingdom*, Decision of 2 May 1979, p. 157; and *X, Y, and Z v. The United Kingdom*, Decision of 6 July 1982, par. 4.

⁶⁰⁷ Explanatory Report, par. 9.

⁶⁰⁸ HRC, *Y.L. v. Canada*, 8 April 1986, at. 9.1.; and HRC, General Comment 13 (21st Session, 1984).

obligations in a suit at law was never answered by the Committee, although in the case of *Madafferi v. Canada* it left the possibility that it may do so open.⁶⁰⁹

Other important provisions in this regard are Article 13 ECHR and Article 2(3) ICCPR, granting the individual a right to an effective remedy before a national authority if he can present an arguable complaint that his rights as set forth in respectively the ECHR or the ICCPR are violated.⁶¹⁰ The precise relation between these provisions and Article 1 Protocol 7 ECHR or Article 13 ICCPR, both pairs of provisions involving procedural guarantees, is unclear. In this context, it is important to note that neither provision grants a right to review by a judicial authority. It is well possible that, should it be concluded that Article 1 Protocol 7 or Article 13 ICCPR is violated, no additional assessment of a state's obligations under the more general procedural provisions would be considered necessary.⁶¹¹

In any case, seeing that nor Article 1 Protocol 7, neither Article 13 ICCPR involve any guarantee relating to substantive grounds of expulsion, these grounds in themselves cannot become subject of an effective remedy before a national authority by virtue of Article 13 ECHR or Article 2(3) ICCPR. The only way in which substantive grounds of exclusion can become relevant issues to consider in the framework of these provisions is when they involve other rights or freedoms which are set forth in the ECHR or ICCPR. The way in which the substantive exclusionary powers of the state

⁶⁰⁹ HRC, *Madafferi v. Australia*, 26 July 2004, at 8.7. The issue was also raised in *V.M.R.B. v. Canada*, 26 July 1988; and *Nartey v. Canada*, 18 July 1997, but these complaints were declared inadmissible.

⁶¹⁰ ECtHR, *Boyle and Rice v. United Kingdom*, 27 April 1988, §§52-55; *Kudla v. Poland*, 26 October 2000, §157; *Christine Goodwin v. the United Kingdom*, 11 July 2002, §112; and the HRC in *Kazantzis v Cyprus*, 19 September 2003, at 6.6.

⁶¹¹ Much of the European Court's case law indicates that it considers Article 13 ECHR a *lex generalis* in respect of provisions that include separate procedural guarantees. See ECtHR, *Foti and Others v. Italy*, 10 December 1982, §78; *Hentrich v. France*, 22 September 1992, §65; and *X. and Y. v. The Netherlands*, 26 March 1985, §36. However, a recent change in the Court's view on the subsidiary character of Article 13 ECHR may be apparent from its decision in *Kudla v. Poland*, 26 October 2000. The relationship between Article 1 Protocol 7 and Article 13 ECHR becomes especially interesting when the national states attempts to evade its obligations in the former provision on the grounds of national security as national security concerns should not lead to a state disregarding its obligations under Article 13. See *Al Nashif v. Bulgaria*, 20 June 2002, §136-138. Nonetheless, the scope of Article 13 ECHR depends on the rights and interests involved. ECtHR, *Aksoy v. Turkey*, 18 December 1996, §98.

may be limited by rights and freedoms other than the mere concept of freedom of movement will be addressed in the two following Sections.

5.3.2. Refugee law and the prohibition of non-refoulement

When discussing international legal limits on the sovereign right to exclude, in the minds of many, refugee law provides the most obvious instances of just such limits. However, it is important to be aware of the fact that international refugee law does far more than that: it is an extensive body of international law, dealing with subjects ranging from the treatment of refugees on entry (such as detention) to diverse rights of refugees who have permanently settled in their country of refuge, such as pertaining to housing, employment and education.

In this Chapter, I will only investigate the way in which international refugee law restrains the sovereign right to exclude. Factually, this restraint is not premised on the right of asylum, which is nothing more than a right of a territorial state to grant asylum to an alien,⁶¹² and which, on the international plane, implicates solely interstate relations. A provision such as Article 14 UDHR, declaring that everybody has the right to seek and enjoy asylum, is in fact merely an affirmation of the right to leave.⁶¹³ Although many domestic legal systems have legislation containing a right to asylum, national states have strongly resisted codification of such a right in international law.

An exception is provided by EU Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.⁶¹⁴ A person who according to this Directive qualifies for refugee status should be afforded a residence permit that is valid for at least three years and renewable unless reasons of national security or public order so require.⁶¹⁵ Moreover,

⁶¹² Lillich (1984a), p. 150; Plender (1988), p. 394; and Oda (1968), p. 490

⁶¹³ Grahl-Madsen (1980), pp. 4-5.

⁶¹⁴ Council Directive 2004/83/EC of 29 April 2004, O.J. L 304, 30/09/2004, pp. 12-23, to be implemented by the Member States by 10 October 2006.

⁶¹⁵ Article 24(1).

the EU Charter on fundamental rights appears to recognise an individual right to asylum.⁶¹⁶

We will see that the way in which general human rights law constrains the national state with regard to its decisions on exclusion is in many instances far more significant than international refugee law's guarantees in this respect. The relationship between the two areas of law is complex and at times confusing. Many of their differences are explained by the early twentieth century origins of modern refugee law and the fact that it has retained many classical international law characteristics, whereas human rights law is of a more recent date, and explicitly attempts to break away from traditional views on international law. In this Section, I will first deal with the way in which international refugee law may limit national exclusionary powers. Subsequently, I will investigate how human rights law has widened the scope of the cornerstone of international refugee law: the principle of non-refoulement.

In Section 5.2., I have traced the development of an international regime concerned with the legal protection of refugees. Refugee law was a response to the international legal dilemma caused by the denial of state protection for various groups in Europe during the early twenty century.⁶¹⁷ In essence, the rationale for refugee law has remained the same: refugees become an issue of international law because they cannot invoke the protection of their country of nationality,⁶¹⁸ despite the fact that at present, the country of nationality is no longer the only entity capable of defending an individual's interests on the international plane.

This view on the underlying principles of refugee law is affirmed by the way in which the 1951 Convention Relating to the Status of Refugees as amended by the Protocol of 1967 (hereinafter the 1951 Convention) defines the refugee as someone who, owing to a well-founded fear of persecution, is outside his own country and is unable or unwilling to avail himself of the protection of that country.⁶¹⁹ Council

⁶¹⁶ Article 18 of the Charter of Fundamental Rights of the European Union.

⁶¹⁷ Hathaway (1991), p. 2.

⁶¹⁸ Plender (1988), p. 393. See Nathwani (2003) who proposes of different (normative) rationale for refugee law.

⁶¹⁹ Article 1 Refugee Convention: For the purposes of the present Convention, the term "refugee" shall apply to any person who: (2) owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of nationality, and is unable or, owing to such fear, is unwilling to avail himself of the protection of that

Directive 2004/83/EC applies a similar definition of the refugee. There is ample legal scholarship concerning almost every single word constituting the core of the refugee definition.⁶²⁰ It goes far beyond this study to discuss this scholarship in depth, but some brief remarks concerning the interrelated issues of fear of persecution and lack of protection are necessary in order to fully appreciate refugee law's constraints on national exclusionary powers.

In the first place, only EC law has explicitly defined the concept of persecution, but also in general international law its relationship with human rights law is fairly obvious: just as in Directive 2004/83/EC, persecution can be said to consist of severe human rights abuses.⁶²¹ It is important to note that a well-founded fear of persecution is only relevant for the purposes of the Convention (and similarly for those of Directive 2004/83/EC), if persecution occurs or would occur on the enumerated grounds of race, religion, nationality, membership of a particular social group or political opinion. Especially the application and interpretation by national judiciaries of the 'membership of a particular social group' ground has been "pushing the boundaries of refugee law", as it is a plausible vehicle for claims to refugee status which do not fall under the other grounds set out in Article 1 of the Refugee Convention.⁶²²

In the second place, the lack of protection referred to in the refugee definition has been interpreted in various ways. Does it refer to the protection which the national state can offer within its territory, and thus impose an additional condition be satisfied in order to conclude that a risk of persecution exists, namely "scrutiny of the state's ability and willingness to effectively respond to that risk"?⁶²³ Or, should the lack of protection be understood as a lack of external protection, thus denoting the diplomatic protection that the refugee, once he is outside his country of origin, cannot avail himself of, for fear of a possibility of being returned to the country where the feared persecution could occur? The latter interpretation is certainly supported by a textual interpretation of

country; or who, not having a nationality and being outside of his country of his former habitual residence is unable or, owing to such fear, unwilling to return to it.

⁶²⁰ Steinbock (1999), p. 14; and Türk and Nicholson (2003), p. 38.

⁶²¹ See Article 9 of the Directive; and UNHCR (2001), par. 17.

⁶²² Aleinikoff (2003), p. 264. See also Council of Europe, Recommendation Rec(2004)9 of the Committee of Ministers on the concept of membership of a social group in the context of the 1951 Convention relating to the status of refugees (adopted by the Committee of Ministers on 30 June 2004).

⁶²³ Hathaway (1991), p. 135.

Article 1 of the 1951 Convention and makes more sense from a general international law perspective.⁶²⁴ Irrespective of the answers to these questions, both interpretations reveal the central place that the national state occupies in determining who is regarded as a refugee in international law. Precisely instances of persecution by non-state agents make clear that the question of persecution cannot be regarded separately from the issue of lack of national protection. Some countries have consistently refused the application of the 1951 Convention to persons fleeing human rights violations committed by non-state actors, although that situation seems to be changing.

In particular EU Member States will no longer be able to maintain such a distinction between persecution by non-state actors and persecution by the state, seeing that Directive 2004/83/EC explicitly enumerates non-state actors as possible actors of persecution.⁶²⁵ Lastly, with regard to the question as to who is regarded as a refugee, Article 1F of the 1951 Convention is of importance, as this provision excludes from refugee status persons who have committed crimes of great severity, such as war crimes, crimes against humanity or non-political acts of cruelty. Council Directive 2004/83/EC provides for exclusion on similar grounds.⁶²⁶

As already mentioned above, general international law does not contain a right to asylum, not even when an individual fulfils the 1951 Convention definition of a refugee. There are only three provisions in the 1951 Convention that have a direct bearing on the exclusionary powers of the national state in the case of refugees. Article 32 prohibits expulsion of refugees who reside lawfully in national territory, save on grounds of national security or public order. Procedural guarantees comparable to those contained in Article 13 ICCPR are given if expulsion should be ordered on these grounds, in which case the refugee shall be allowed a reasonable period during which to seek legal admission into another country. Article 31 stipulates that states may not impose penalties on refugees on account of unauthorised entry or presence in their territories. The latter obligation is qualified by two conditions: the refugees should have come directly from territories where they feared persecution, and they should present themselves to the authorities without delay. But by far the most important provision in

⁶²⁴ See Türk and Nicholson (2003), p. 40, and the sources quoted there.

⁶²⁵ Article 6 Council Directive 2004/83/EC.

⁶²⁶ Article 12.

this respect is Article 33 of the Refugee Convention, containing the norm of non-refoulement:

Article 33 (1): No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.⁶²⁷

The second paragraph of Article 33 allows for two exceptions to the principle of non-refoulement: if an alien presents a danger to national security or, having been convicted of a particularly serious crime, constitutes a danger to the community of the state of refuge. Identical grounds for derogation are laid down in Article 21 (2) of Council Directive 2004/83/EC. Non-refoulement embodies the "humanitarian essence" of refugee law,⁶²⁸ and its significance exceeds the area covered by the 1951 Convention. Before turning to the principle of non-refoulement in general human rights law, I will make some brief remarks concerning its role in the narrow context of the 1951 Convention.

In the first place, it is important to understand the way in which non-refoulement relates to the lack of a right to asylum in international law. The only way to reconcile these two seemingly conflicting issues is by presuming that if a country is not prepared to grant asylum to a refugee, it must act in accordance with non-refoulement, as in the cases of temporary protection or removal to a safe third country.⁶²⁹

A second question is whether refoulement is only prohibited concerning those refugees who are already inside the state's territory, or whether the principle also applies to non-admittance at the border. A consistent interpretation of the 1951 Convention combined with various Conclusions of the Executive Committee of the United Nations High Commissioner of Refugees (hereinafter ExCom) and other key instruments in the field of refugee protection support the view that non-refoulement also

⁶²⁷ According to Article 42 of the 1951 Convention, no reservations are permitted with regard to the non-refoulement provision. The prohibition of non-refoulement of refugees is codified in several other instruments, for example Article 3 of the 1967 Declaration on Territorial Asylum (UNGA 14 December 1967).

⁶²⁸ Lauterpacht and Bethlehem (2003), p. 107.

⁶²⁹ Ibid. p. 113. On temporary protection measures, see Council of Europe, Committee of Ministers, Recommendation No. R (2000)9 on temporary protection, adopted on 3 May 2000.

applies to rejection at the border.⁶³⁰ However, an increasing number of states are trying to escape their obligations with regard to non-refoulement by physically separating control of the border from the territorial border, as is shown by what Bigo and Guild call “*police à distance*”:⁶³¹ practices such as visa policies and airport carrier sanctions. Indeed, the way in which the principle of non-refoulement increasingly gives way to “policies of non-entrée”⁶³² is painfully illustrated by incidents such as Australia’s refusal to let the MV Tampa enter its territorial waters and U.S. detention of Haitian asylum seekers on Guantanamo. Whether or not such policies are violating international law is not the interesting question *per se*. What is much more fundamental is to find out how states make use of what they perceive as possible gaps in the law and the way in which these gaps are connected with the territorial component of sovereignty. These issues will receive closer attention in Section 5.6.3.

In the third place, the prohibition on refoulement applies irrespective of the fact whether a person is formally recognised as a refugee or not.⁶³³ Thus, non-refoulement is an autonomous concept in international law, truly limiting the exclusionary powers of the state, seeing that there is no reference to domestic law whatsoever contained in it. However, there is an important qualification to the limiting powers of non-refoulement in the 1951 Convention: if a refugee constitutes a danger to the community or security of the country in which he is present, refoulement is permitted.⁶³⁴ Thus, however narrowly these grounds for derogation are to be interpreted,⁶³⁵ the core provision of the

⁶³⁰ 1967 Declaration on Territorial Asylum (UNGA 14 December 1967); UNHCR ExCom Conclusion No. 6 (XXVIII) 1977, par. (c); UNHCR ExCom Conclusion No. 15 (XXX) 1979, at par. (b); and UNGA Resolution A/Res/55/74 of 12 February 2001.

⁶³¹ Bigo and Guild (2003).

⁶³² Hathaway (1992)

⁶³³ See Article 21 Council Directive 2004/83/EC; and Council of Europe, Committee of Ministers, Recommendation No. R (84)1 on the protection of persons satisfying the criteria in the Geneva Convention who are not formally recognised as refugees (adopted on 25 January 1984.) The according of refugee status is a declaratory act; thus unless otherwise specified, refugees not formally recognised should benefit from the international legal protection offered by the 1951 Convention. See *inter alia* UNHCR ExCom Conclusion No. 6 (XXVIII) 1977; and UNHCR ExCom Conclusion No. 79 (XLVII) 1996. Council Directive 2004/83/EC is explicit on this in the Preamble (at 14).

⁶³⁴ Goodwin-Gill (1996a), p. 139.

⁶³⁵ See Lauterpacht and Bethlehem (2003), pp. 133-140.

1951 Convention preserves some remnants of the state's sovereignty in matters of exclusion.

It has been maintained that the norm of non-refoulement is a peremptory norm of international law.⁶³⁶ Some authors have countered such an assumption with the argument that it is difficult to see how the *ius cogens* nature of the norm as contained in the 1951 Convention can be reconciled with the fact that it simultaneously provides grounds for derogation.⁶³⁷ However, contemporary human rights law has added momentum to the norm of non-refoulement so as to make a good case for its peremptory, or at least customary, character.⁶³⁸ Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Punishment (CAT) prohibits refoulement where there are substantial reasons for believing that a person would be subjected to torture.⁶³⁹ Furthermore, the customary prohibition against torture in effect amounts to an obligation on national states not to expel a person to a country where substantial grounds have been shown for believing that he would face a real risk of being exposed to torture.⁶⁴⁰ The HRC and the ECtHR have respectively construed Article 7 ICCPR and Article 3 ECHR as containing a principle of non-refoulement to a state where a real risk exists of torture or other cruel, inhuman or degrading treatment or punishment.⁶⁴¹

Deducting a norm of non-refoulement from the prohibition contained in Article 3 ECHR and Article 7 ICCPR does not entail extra-territorial application of human rights obligations. The real risk to violation of an individual's rights is the result of a decision made in the territory of the Contracting State, with regard to a person within

⁶³⁶ Allain (2001), pp. 538-541. See also UNHCR ExCom Conclusions No. 25 (XXXIII) 1982 and No. 79 (XLVII) 1996.

⁶³⁷ Hannikainen (1988), pp. 261-63.

⁶³⁸ See Lauterpacht and Bethlehem (2003), pp. 140-164.

⁶³⁹ Convention against Torture and other Cruel, Inhuman or Degrading Punishment, Adopted by General Assembly Resolution 39/46 on 10 December 1984 (CAT). The majority of complaints under the CAT relate to Article 3. See among many CAT Committee decisions: *A. R. v. The Netherlands*, 14 December 2003; *Tala v. Sweden*, 15 November 1996; and *Kisoki v. Sweden*, 8 May 1996. See also CAT Committee General Comment No. 1. See CAT (1997).

⁶⁴⁰ Bethlehem and Lauterpacht (2003), p. 140-162.

⁶⁴¹ HRC, General Comment 20 (Forty-fourth session, 1992) at 151; HRC, *C. v. Australia*, 13 November 2002; ECtHR, *Soering v. the United Kingdom*, 7 July 1989, §91; *Cruz Varaz and Others v. Sweden*, 20 March 1991, §§69-70; and *Vilvarajah and Others v. The United Kingdom*, 30 October 1991, §103.

that territory.⁶⁴² However, it cannot be denied that significant extraterritorial aspects are involved in cases such as these, which was affirmed by the ECtHR in the cases of *Loizidou* and *Bankovic*.⁶⁴³

An important question is whether other rights than the right to be free from torture and other degrading treatment can be covered by the “real risk” situation. According to the HRC, a real risk of a violation can occur with regard to any of the rights guaranteed under the Covenant,⁶⁴⁴ although in practice only the right to life in Article 6 ICCPR has featured alongside Article 7 in refoulement cases.⁶⁴⁵ The ECtHR allows for the possibility of other human rights violations as a result of expulsion, such as denial of the right to life and liberty or, exceptionally, the right to a fair trial.⁶⁴⁶ However, it is difficult to see why a real risk of violations of other, derogable, human rights such as the freedom of religion or speech could not lead to a prohibition on expulsion or deportation in principle, in spite of obvious practical difficulties with regard to the assessment of the human rights situation in the country of return.⁶⁴⁷ Hence, it can be concluded that the international case law on refoulement, rather than being led by a consistent interpretation of the relevant human rights treaties, is inspired by the 1951 Convention, which prohibits refoulement solely to territories where a refugee’s life or freedom would be threatened.

⁶⁴² See ECtHR in *Bankovic and Others v. Belgium* (inadmissible), 12 December 2001, §68; and *Al-Adsani v. The United Kingdom*, 21 November 2001, §39. This is also the line of argument used by the HRC although the construction is slightly different: “The foreseeability of the consequence [of refoulement] would mean that there is a present violation by the State Party.” *Kindler v. Canada*, Decision of 11 November 1993, at 6.2.

⁶⁴³ ECtHR, *Loizidou v. Turkey* (preliminary objections), 23 March 1995, §62; and *Bankovic and Others v. Belgium* (inadmissible), 12 December 2001, §68.

⁶⁴⁴ HRC, *Kindler v. Canada*, Decision of 11 November 1993, at 13.2.

⁶⁴⁵ HRC, *Judge v. Canada*, Decision of 17 July 2002, with regard to a breach of Article 6 ICCPR as a result of extradition. In this case the applicant also claimed a breach of Article 14 ICCPR as a result of his extradition. Just as in *Kindler v. Canada*, the Committee’s reasoning seems to imply that it declares itself competent to consider arguments concerning a possible violation in a third country under this provision. Similarly, in *G.T. v. Australia*, Decision of 4 November 1997, the applicant claimed a foreseeable breach of Article 14 ICCPR as a result of deportation. This claim was not examined on its merits.

⁶⁴⁶ *Bankovic and Others v. Belgium* (inadmissible), 12 December 2001, §68. See also EcommHR decisions: *Aylor Davis v. France*, Decision of 20 January 1994, p. 164; *Alla Raidl v. Austria*, Decision of 4 September 1995.

⁶⁴⁷ See Blake (2004), p. 437.

If non-refoulement is applied as a component part of general human rights obligations of the national state, it affords a far wider scope of protection than Article 33 of the 1951 Convention.⁶⁴⁸ The latter instrument protects from refoulement solely persons whom it defines as refugees, which protection is in addition subject to public order and security exceptions. The prohibition on torture or other cruel and degrading treatment, in contrast, should be guaranteed to anyone without exception. Indeed, if the norm of non-refoulement flows from this prohibition, “the activities of the individual in question, no matter how undesirable or dangerous, cannot be a material consideration”⁶⁴⁹.

In addition, the state-centred, territorial focus, apparent in traditional refugee law, by which different states are accorded responsibility for separate populations, is much diminished. Whereas we see that such an approach to human rights is still held by the CAT Committee (inevitable in view of the definition of torture in Article 1 CAT),⁶⁵⁰ the ECtHR and HRC have both held that treatment does not have to emanate from state agents in order to be contrary to the absolute protection offered by Article 3 ECHR and Article 7 ICCPR.⁶⁵¹

Furthermore, it need not even amount to a breach of classical human rights obligations proper, nor needs the source of the risk of the proscribed treatment in the receiving country to engage either directly or indirectly the responsibility of the public authorities of that country, or taken alone to infringe the standards of Article 3.⁶⁵² In the

⁶⁴⁸ See also UNHCR ExCom Conclusion No. 103 (LVI) 2005; and UNHCR ExCom Conclusion No. 74 (XLV) 1994, at par I-o.

⁶⁴⁹ ECtHR, *N. v. Finland*, 26 July 2005, §§159, 166. See also Council of Europe, Committee of Ministers, Recommendation (2005) 6 of the on exclusion of refugee status (adopted on 23 March 2005) in which it is emphasised that exclusion from refugee status on grounds such as provided for in Article 1F of the 1951 Convention is not the same as removal.

⁶⁵⁰ *G.R.B. v. Sweden*, 15 May 1998: at 6.5.: “The Committee considers that the issue whether the State Party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of Article 3 of the Convention.” See also *J.A.N. and H.N. v. Sweden*, 15 May 2000, at 13.8; *S.I. v. Canada* 15 May 2001, at 9.5 and *M.P.S. v. Australia*, 30 April 2002, at 7.4.

⁶⁵¹ ECtHR, *H.L.R. v. France*, 29 April 1997.

⁶⁵² ECtHR, *D. v. The United Kingdom*, 2 May 1997, §49, in which the ECtHR held that the deportation of an individual suffering from the final stages of AIDS to a country where he would not receive adequate medical treatment would amount to a breach of Article 3 ECHR. See also ECtHR, *T.I. v. The United Kingdom* (inadmissible), 7 March 2000.

words of the Court in Strasbourg: the absolute character of Article 3 ECHR requires flexibility.⁶⁵³

If refoulement is forbidden by international law, states can still resort to removal to a third country, provided that such removal would not amount to indirect refoulement. In this context, the application of Article 3 ECHR also blocks the automatic allocating of responsibility for safeguarding the rights of asylum seekers by the Dublin Convention: the receiving country is obliged to examine if the responsible country offers enough safeguards against refoulement.⁶⁵⁴ In the case that national states allow an individual to stay on national territory, they usually grant so-called subsidiary protection, the content of which is generally to be decided by each national state. Security of residence for persons enjoying subsidiary protection is recommended by the Council of Europe.⁶⁵⁵

Council Directive 2004/83/EC requires states to issue a residence permit to persons qualifying for subsidiary protection, which should be valid for at least a year and renewable unless compelling reasons of national security of public order otherwise require, as long as the circumstances which have led to the affording of subsidiary protection continue to exist.⁶⁵⁶ It should be noted that although Directive 2004/83/EC allows Member States to exclude persons from subsidiary protection (on grounds comparable to those leading to exclusion of refugee status), they cannot act in contravention of their international obligations with regard to the principle of non-refoulement.⁶⁵⁷

The principle of non-refoulement thus significantly limits states' sovereign discretion in immigration decisions.⁶⁵⁸ Apart from restraining national states' substantial powers of exclusion, does international law also put formal constraints on national decisions concerning issues of refoulement? The answer to this question is important in order to assess the way in which national sovereignty, individual rights and

⁶⁵³ *D. v. The United Kingdom*, 2 May 1997.

⁶⁵⁴ *T.I. v. The United Kingdom* (inadmissible), 7 March 2000. See Steendijk (2001), p. 187.

⁶⁵⁵ Council of Europe, Committee of Ministers, Recommendation No R (2001)18 on subsidiary protection, adopted on 27 November 2001, par. 14.

⁶⁵⁶ Article 24 (2) (residence permits) and Article 16 (Cessation).

⁶⁵⁷ Article 21.

⁶⁵⁸ Goodwin-Gill (1996b), p. 99.

the rule of law relate in the field of immigration, having regard to the traditionally wide executive discretion in this particular area.

Non-refoulement decisions affect fundamental individual rights, arguably more so than for example a decision on the extension of a student visa. This state of affairs is reflected in state practice: most national states provide for a the possibility for appeal in asylum procedures, which possibility is often presented as an exceptional derivation from the ordinary rule decreeing that decisions relating to immigration fall within the royal prerogative or other national expressions of discretionary executive powers. However, the 1951 Convention leaves it to the state parties alone to shape the way in which decisions with regard to its Article 33 are given.⁶⁵⁹ This is unfortunate as in most domestic systems a trend can be discerned by which checks or balances on executive decision making with regard to immigration, also in the field of asylum, are increasingly under attack.⁶⁶⁰ Presently, the only international provisions that can be invoked in order to rely on rule of law guarantees with regard to decisions on admissibility or deportation are of a general character.

We have seen above that Article 13 ECHR and Article 2(3) ICCPR give individuals the right to an effective remedy if one of their rights as guaranteed under the respective instruments is violated.⁶⁶¹ Drawing on case law of the ECtHR,⁶⁶² the Committee of Ministers of the Council of Europe has adopted a recommendation on the application of Article 13 in conjunction with Article 3 with regard to entry and removal of aliens.⁶⁶³ An effective remedy should be guaranteed when somebody seeking admission or leave to stay is to be expelled to a country about which that person presents an arguable claim that he or she would be subject to torture or other inhuman

⁶⁵⁹ Although it implies access to fair and effective procedures for determining protection needs. See UNHCR ExCom Conclusion No. 82 (XLVIII) 1997, under d(ii) and UNHCR ExCom Conclusion No. 103 (LVI) 2005, under (r).

⁶⁶⁰ A good example is the attempt by the government of the United Kingdom to restrict formal challenges to asylum decisions in a far-reaching ouster clause in the government bill that would eventually become the Asylum and Immigration Act 2004. The plan was met with fierce opposition, which raised several interesting constitutional issues, and was subsequently dropped by the government. See Rawlings (2005).

⁶⁶¹ See also HRC, General Comment 31 (2004).

⁶⁶² Inter alia ECtHR, *Soering v. The United Kingdom*, 7 July 1989; and *Vihvarajah and Others v. The United Kingdom*, 30 October 1991.

⁶⁶³ Recommendation No. R (98) 13, adopted by the Committee of Ministers of the Council of Europe on 18 September 1998.

treatment. A remedy is effective if it is carried out by a judicial authority, or, if it is an administrative authority, it should be impartial and independent, as well as have competence to decide. Furthermore, the execution of the deportation order should be suspended until the decision is taken, also in the case that a claim was dismissed as manifestly unfounded. However, national states may find in the arguable claim requirement of Article 13 ECHR opportunities to evade their obligations with regard to persons seeking entry or leave to stay: if in their interpretation a claim is not arguable because the country of destination in the expulsion order is designed as a safe third country, the recommendation of the Committee of Ministers does not apply, unless the claim concerns substantial grounds to prove that the asylum seeker will be persecuted.⁶⁶⁴

EC legislation will contribute to a strengthening of rule of law elements internationally in asylum procedures. Council Directive 2005/85/EC, to be implemented by the Member States by 1 December 2007, sets minimum standards on national procedures for granting and withdrawing refugee status.⁶⁶⁵ Chapter V of the Directive requires Member States to ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against a decision on their application.⁶⁶⁶ These rights of appeal concern only requests for international protection under the Geneva Convention;⁶⁶⁷ requests for subsidiary protection fall outside their scope.

In this Section I have set out the basic legal framework concerning exceptions to the exclusionary powers of the sovereign state based on refugee law or related human rights grounds. And while states are careful to sustain formal compliance with these fields of international law, meanwhile they also attempt to reduce the number of recorded asylum seekers.⁶⁶⁸ Contemporary practice demonstrates that Western states are apt at minimising the scope of the limits on their exclusionary powers by the use of concepts as safe third country, safe country of origin and manifestly unfounded claims. In addition, states endeavour to evade human rights obligations to individuals who are

⁶⁶⁴ See the Explanatory Memorandum to Recommendation No. R (98) 13, par 13.

⁶⁶⁵ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, O.J. L 326, 13 December 2005, pp. 13-34.

⁶⁶⁶ Also in the case that an application is not examined (Art. 36) or declared inadmissible (Art 25(2)) on the grounds of the safe third country concept. See article 39 of Directive 2005/85/EC.

⁶⁶⁷ Article 2(b) jo. Article 39 Directive 2005/85/EC.

⁶⁶⁸ Martin (1989), p. 574.

not authorised to enter or stay on national territory by making it very difficult for them to reach their national territories. Interception of asylum seekers at the high seas, the use of airport liaison officers, carrier sanctions and visa regulations serve to make sure that states can control movement without having to assume responsibility for the people that move. The way in which national states increasingly make use of concepts and techniques that allow them to (re)assert their exclusionary powers are perhaps best illustrated in regionally specific frameworks for dealing with asylum applications or other claims for international protection, such as that of the European Union. In Section 5.4.2., I will come back the way in which the EU Member States have to a certain extent harmonised and even exported their views on the issue of national sovereignty with regard to immigration.

5.3.3. Family rights and limits on immigration control

The family rights of non-nationals constitute another area in which fundamental rights may limit the state's exclusionary powers. This Section will address the way in which a right to remain or enter is construed against the background of family rights in international law. The main emphasis will be on the way in which states' immigration policies are constrained by Article 8 ECHR, but European case law regarding the application of this provision in immigration decision-making will be placed in a larger perspective by occasionally referring to the ICCPR and decisions made by the HRC.

In the ECHR, Article 8 stipulates that everyone has the right to respect for his family and private life. Paragraph 2 of this article follows the familiar formula for derogable rights under the ECHR: interferences with family or private life should be "in accordance with the law" and "necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." In the ICCPR, the family is protected by two separate provisions. Article 17 deals with the family and private life of the individual and establishes a prohibition on interference. According to article 23(1), the family is to be protected by the law.⁶⁶⁹ Although there seems to be a difference between

⁶⁶⁹ HRC, General Comment 19 (Thirty-ninth session, 1990) at 149.

the two provisions, generally decisions on violations have involved the two articles simultaneously.⁶⁷⁰

If as a result of immigration decision making a breach of Article 8 ECHR is alleged, the Court in Strasbourg will first establish the existence of family life. The Court – and similarly the HRC in applying Article 23 ICCPR – regards this question as one of fact, depending on the existence of close personal ties.⁶⁷¹ A person who has no family life can nonetheless benefit from the protection of Article 8 ECHR on account of his private life, including links connected to educational or professional activities.⁶⁷² If the existence of family life is ascertained, the removal of a person from a state where close members of his family are resident may amount to an infringement of the right to respect for family life as guaranteed in Article 8(1) ECHR.⁶⁷³

In this context, the Court in Strasbourg always reiterates that fact that “no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention,” and 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.”⁶⁷⁴ However, if such control leads to interference with the right protected under Article 8 ECHR, it needs to be in accordance with the requirements under the second paragraph of this provision. It will not be difficult for the state to argue that the contested measures fall under one of the legitimate aims of Article 8(2) ECHR, but it is the necessity of the deportation that will generally be the main point of contestation.⁶⁷⁵

⁶⁷⁰ Joseph, Schultz and Castan (2004), p. 591.

⁶⁷¹ Family life exists *ipso iure* between a child born of a marital union and his parents, which bond can only be broken by exceptional circumstances. See ECtHR, *Berrehab v. the Netherlands*, 21 June 1988, §21; *Hokkanen v. Finland*, 23 September 1994, §54; *Gül v. Switzerland*, 19 February 1996, §32, and *Ciliz v. the Netherlands*, 11 July 2000, §§59 and 60. Regarding relations of couples, both marriages as *de facto* relationships can constitute family life, depending on a number of factors, such as “whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means.” *Al-Nashif v. Bulgaria*, 20 June 2002, §112. See also ECtHR in *Kroon and Others v. the Netherlands*, 27 October 1994, §30; and *X, Y and Z v. the United Kingdom*, 22 April 1997, §36. For the HRC see: *Balaguer Santacana v. Spain*, 15 July 1994.

⁶⁷² ECtHR, *C. v Belgium*, 7 August 1996, p. 915, §25.

⁶⁷³ ECtHR, *Al-Nashif v. Bulgaria*, 20 June 2002, §114.

⁶⁷⁴ *Boultif v. Switzerland*, 2 August 2001, §39

⁶⁷⁵ Rarely has it been asserted that the measures were not “in accordance with the law”. See Sherlock (1998), p. 64.

With regard to the right to enter, the balancing act is a little more straightforward: while the main aim of Article 8 ECHR is to protect against arbitrary interference, the refusal on a request for entry may constitute a breach of a positive obligation inherent in an effective respect for family life.⁶⁷⁶ However, in this case a wide margin of appreciation is left to the national authorities.⁶⁷⁷ In particular, the duty imposed by Article 8 ECHR cannot be considered as extending a general obligation on the part of a contracting state to respect the choice made by married couples of the country of their residence and to accept non-national spouses for settlement there, or otherwise authorise family reunion in its territory.⁶⁷⁸ The test applied by the Court is whether it can reasonably be expected from the persons concerned to establish family life in their own or their families' home countries. This test is to be more stringently applied when it concerns requests for family formation than in the case of family reunification.⁶⁷⁹ Similarly, the HRC does not deduce from Articles 17 and 23 ICCPR a guarantee for establishing family life in a particular country, but the test to be applied is simply whether there can be effective family life, wherever that may be.

As always when assessing whether encroachments by the state on individual liberties constitute violations of fundamental rights, the court engages in a balancing act by which the interests of the applicant in maintaining family life are balanced with those of the sovereign state in controlling entry and residence. However, in the case law of the HRC and the ECtHR, it appears that when the right to enter or remain is at stake, rather more emphasis is traditionally laid on the powers that are implied by national sovereignty than in cases where mere jurisdiction over nationals is involved. Indeed, the case law seems to imply that the right to control entry and residence on national territory as inherent in territorial sovereignty is in itself a fundamental interest of the state, from which only special circumstances can cause a departure.

The Court's silent acquiescence to territorial sovereignty's aim of allocating distinct populations to separate states, by the use of a formal concept such as nationality, is most clearly expressed in those cases in which it dealt with deportation of second generation immigrants after conviction for serious criminal offences. While it

⁶⁷⁶ Forder (2005), p. 72-73.

⁶⁷⁷ ECtHR, *Gül v. Switzerland*, 19 February 1996, §38. See also Blake (2004), p. 442.

⁶⁷⁸ ECtHR, *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, 28 May 1985, §68; and ECtHR, *Gül v. Switzerland*, 19 February 1996, §38.

⁶⁷⁹ ECtHR, *Sen v. The Netherlands*, 21 December 2001, §96.

has regularly concluded that the states actions interfering with a person's existing residence may in such cases may constitute a violation of Article 8,⁶⁸⁰ it has in a significant amount of cases condoned the expulsion of a person from a country which he could call his own in every sense except for the fact that he did not possess its nationality.⁶⁸¹

It can be argued that in these cases, the requirement of proportionality, entailing that no interference with fundamental rights is justified if there are less intrusive measures available, has not really been applied by the Court, as national states have also found adequate ways to deal with national criminals.⁶⁸² The HRC in such cases shows even more deference to national sovereignty: if the decision to deport takes into account the effect of the deportation on the deportee's family life and if there are no evident flaws in the domestic proceedings, deportation is permissible under the ICCPR.⁶⁸³

On the other hand, the early decision by the European Court in *Berrehab* also shows that the reasons for deportation, if the latter constitute a serious interference with someone's family life, need to go beyond a simple enforcement of its immigration laws. In *Dalia*, the Court attached importance to the fact that the applicant's Algerian nationality was not a mere legal fact, but a reflection of certain social and emotional links.⁶⁸⁴ Furthermore, a departure from the Court's deferential stance with regard to territorial sovereignty may also be signalled by its more recent judgments. In *Sen*, a case concerning family re-unification, the issue to be decided, according to the Court, was not whether the Netherlands was the only country in which the applicants could establish family life, but rather what was the most suitable way for the family members

⁶⁸⁰ ECtHR: *Moustaquim v. Belgium*, 18 February 1991; *Nasri v. France*, 13 July 1995, *Boultif v. Switzerland*, 2 August 2001; and *Mehemi v. France*, 26 September 1997.

⁶⁸¹ ECtHR, *C. v. Belgium*, 7 August 1996; *Baghli v. France*, 13 November 1999; *Bouchelkia v. France*, 29 January 1997. See also the judgments in *El Boujaïdi v. France*, 26 September 1997; *Boughanemi v. France*, 24 April 1996; and *Boujlifa v. France*, 21 October 1997, in which cases the Court considered as a factor of importance that the applicants had never shown any desire to acquire French nationality, even when they were entitled to do so. Moreover, Dembour (2003), p. 67) mentions that the cases of dozens of applicants arguing that deportation would violate the right to family life have been declared inadmissible by the EcommHR. See also Recommendation 1504 (2001) of the Parliamentary Assembly of the Council of Europe on non-expulsion of long-term residents (adopted on 14 March 2001).

⁶⁸² Dembour (2003), p. 67.

⁶⁸³ HRC, *Stewart v. Canada*, Decision of 1 November 1996.

⁶⁸⁴ ECtHR, *Dalia v. France*, 19 February 1998.

to continue their family life together.⁶⁸⁵ In the recent case of *Sezen*, removal of the applicant, even if on the grounds of a serious crime, would constitute a violation of Article 8, partly because to ask of Mr. Semen's family members to follow him to his country of origin in order to continue family life would constitute a radical upheaval for them.⁶⁸⁶

Nevertheless, the importance which the Court ascribes to the exclusionary powers of the national state is evident by the way in which the Court deals with family life that is established while an applicant was unlawfully present within the territory. The Court regards the obligation flowing from Article 8 ECHR as positive in the case that an applicant enjoys family life without being entitled to legal residence,⁶⁸⁷ and family life that is established during such unlawful presence will only be protected in "the most exceptional circumstances".⁶⁸⁸ Although the HRC seems to attach less importance to the fact whether family life is established during lawful or unlawful residence, its adherence to the territorial sovereignty of the state is proven by its statement that only extraordinary circumstances may require a State to demonstrate factors justifying the removal of persons within its jurisdiction that go beyond a simple enforcement of its immigration policies.⁶⁸⁹

Furthermore, it should be observed that EU Member States' decisions regarding family re-unification have to be in accordance with the EC Directive on family reunification.⁶⁹⁰ At first sight, the directive seems to afford rather little scope for the assertion of territorial sovereignty with the sole aim of governing populations as the entry of children and spouses of lawfully residing third country nationals can only be refused on the grounds of public order, internal security or public health. Nonetheless, national states are afforded some discretion to make the right conditional, inter alia, upon integration requirements.⁶⁹¹ In addition, not all third country nationals are covered

⁶⁸⁵ Forder (2005), p. 87.

⁶⁸⁶ ECtHR, *Sezen v. The Netherlands*, 31 January 2006. See also *Mehemi v. France*, 26 September 1997, §36.

⁶⁸⁷ ECtHR, *Ahmut v. Netherlands*, 28 November 1996, §63.

⁶⁸⁸ ECtHR, *Mitchell v. The United Kingdom* (inadmissible), 24 November 1998.

⁶⁸⁹ HRC, *Sahid v. New Zealand*, 28 March 2003 at 8.2. See for the HRC acknowledging such extraordinary circumstances: *Winata v. Australia*, 26 July 2001.

⁶⁹⁰ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. OJ L251, 3 October 2003.

⁶⁹¹ See Schneider and Wiesbrock (2005).

by the EC rules, as they do not fully include former spouses after divorce, unmarried partners, and the economically less advantaged.⁶⁹²

The *Al-Nashif* judgment made clear that formal rule of law guarantees are also contained in the second paragraph of Article 8 ECHR.⁶⁹³ In this case, the ECtHR held that there must be procedural safeguards to ensure that the discretion that is left to the executive is exercised in accordance with the law. If the deportation is ordered pursuant to a regime that does not provide the necessary safeguards against arbitrariness, there will be a breach of Article 8(2) ECHR. Even when national security is at stake, the concept of the rule of law requires that measures affecting the fundamental rights of individuals must be subject to some form of adversarial proceedings before an independent body.

The circumstance that there was no possibility for appeal to an independent authority on the decision to deport Mr. Al-Nashif, a measure that interfered with his right to respect for family life under Article 8 ECHR, amounted to a breach of the second paragraph of that provision.⁶⁹⁴ The fact that these issues were subject of considerable constitutional contention in Bulgaria was a matter of importance to the Court in Strasbourg.⁶⁹⁵ The way in which it interpreted in this case the requirements of Article 8(2) ECHR approach the fair trial guarantees of Article 6 ECHR. They have the effect of annulling the effect of the exclusion of this latter provision on immigration decision-making whenever there are family rights involved in a decision to deport an individual.

In addition, pursuant to Article 13 ECHR, a domestic remedy, which is effective, should be available if there is an arguable complaint that family rights are violated as a result of immigration decision making. Again, national security considerations cannot justify the absence of such a remedy, although they may be a reason for certain limitations on the type of remedies available. However, in the case of expulsion of an alien on the grounds of national security, the Court observed in *Al-Nashif* that reconciling the interests of preserving sensitive information is less difficult than in a case in which systems of secret surveillance or secret checks could only

⁶⁹² Peers (2005). p. 4.

⁶⁹³ ECtHR, *Al-Nashif v. Bulgaria*, 20 June 2002.

⁶⁹⁴ *Ibid.* §§122-128.

⁶⁹⁵ *Ibid.* §127.

function if the individual remained unaware of the measures affecting him.⁶⁹⁶ Procedural safeguards may be necessary as to avoid leakage of sensitive information, and the reviewing authority may have to afford the executive a wide margin of appreciation, but there could be no justification for doing away with remedies altogether whenever the executive has chosen to invoke “national security”.

The decision in *Al-Nashif* on procedural safeguards in the context of both Article 8(2) and Article 13 ECHR contrasts sharply with the requirements under Article 1 Protocol 7 ECHR as discussed in Section 5.3.1. We saw that according to Article 1 Protocol 7 ECHR, a legal resident can invoke his procedural rights – rights that are significantly more limited in scope than those formulated in *Al-Nashif* – only after expulsion whenever the national state chooses to invoke reasons of national security to justify such expulsion. Again, it appears that the right to remain acquires considerably more importance whenever there are other fundamental rights involved in the decision to deport.

In this Section, I have addressed how international norms constrain state action in the area of migration control. One of the conclusions to be drawn is that one should definitely not overstate the importance of these norms on the state’s territorial sovereignty. First, because nearly all of them, with the exception of the norm contained in Article 3 ECHR, operate from a bias which is decidedly territorial, an issue to which I will come in Section 5.6.3. But additionally, states have invented strategies to circumvent the application of these norms.⁶⁹⁷ In the next Section we will see that the EU provides good examples of just such strategies.

5.4. THE EUROPEAN UNION, NATIONAL SOVEREIGNTY AND IMMIGRATION FROM THIRD COUNTRIES

Any account on freedom of movement without treating at least in some detail the special legal order of the EU would be incomplete. It is in the context of the EU that individual rights of international movement have developed most extensively. However, the scope of this study does not permit me to deal with freedom of movement rights of

⁶⁹⁶ Ibid. 20 June 2002, §137.

⁶⁹⁷ Guiraudon and Lahav (2000), p. 175.

citizens of the Union, except for the way in which they have an impact on immigration policies vis-à-vis third country nationals. Below I will look at the way in which national states have transferred elements of national sovereignty to the level of the EU in the field of immigration and sojourn of third country nationals. Instead of a comprehensive investigation in the EU common asylum and immigration policy, aspects of which have already been touched upon above, this Section deals with the way in which issues of national and territorial sovereignty are exemplified by how the Union deals with immigration and sojourn of third country nationals.

It is helpful to address the EU in this chapter for three reasons. First, the Member States' pursuing of supranational policies in some areas, while displaying reluctance to do so in other, shows how they make highly selective use of the concept of national sovereignty. This in turn reveals that they perceive national sovereignty still as decisive for unity, notwithstanding the fact that the way in which that unity is imagined may have changed as a result of the European project. Second, the common asylum and immigration policy shows unambiguously how states endeavour to find means by which they can circumvent the constraints put upon them by international law. The third reason, related to the former two, is that the EU provides a good example of the changing connotations of the territorial border.

5.4.1. Freedom of movement within the EU

While EU citizens benefit from extensive freedom of movement rights between the Member States, the Treaty provisions on freedom of movement are not applicable to third-country nationals who are long-term residents in a Member State. It is important to note that other fields of EC law are much more inclusive of third-country nationals, such as the rules on free movement of capital or transfer of undertakings, consumer law and transport policy, and rules regarding working conditions and social security schemes.⁶⁹⁸ The assertion of exclusionary powers per se is no longer deemed necessary, nor legitimate, with regard to EU citizens, but national states wish to keep their discretionary powers with regard to entry and sojourn of third-country nationals in their own hands. According to the ECtHR, such preferential treatment of EU citizens as

⁶⁹⁸ Boelaert-Suominen (2005), p. 1014.

compared to third country nationals does not constitute prohibited discrimination on the ground of nationality on account of the special legal order of the EU.⁶⁹⁹ This is a clear illustration of the way in which Member States' perception of national sovereignty has changed in keeping with the European project, but has far from been abandoned.

Council Directive 2003/109/EC on the status of third country nationals who are long term residents has somewhat rectified this situation, but substantive possibilities for national discretion remain.⁷⁰⁰ The still vivid image of national sovereignty as ultimate territorial control in order to regulate populations is affirmed by the (temporary) reservations that many Member States made with regard to the free movement rights of the new EU citizens in Central and Eastern Europe.⁷⁰¹ Hence, nationality, rights and the possibility for trans-national movement remain firmly linked in the post-national entity of the EU.

For non-citizens of the EU, internal borders are not really disappearing: national sovereignty is still a factor of crucial importance when they want to move from the territory of one Member State to another. This is not to say that the creation of a single market in which goods, persons and capital move freely has not made a real difference for them too, caused by the fact that the internal border is control free. But instead of according them more freedom, the absence of internal border controls combined with Member States' insistence on their exclusionary powers vis-à-vis third country nationals, has led to a situation in which, quoting Malcolm Anderson and Didier Bigo, "controls are still there, but now over the whole of the territory, although perhaps not applied to everyone, but certainly to persons categorised as dangerous and especially as "unwelcome migrants with dark skins."⁷⁰²

The European aim of creating a single market where goods, persons, services and capital move freely, has led to a willingness on the part of the Member States to part with elements of national sovereignty. However, this willingness has a clear limit: when the right to exclude those whom Member States perceive as "real" outsiders, is threatened, national sovereignty once again becomes the pivotal issue. Supranational policies of abolishment of internal borders are acceptable to the Member States only if

⁶⁹⁹ ECtHR: *C. v. Belgium*, 7 August 1996, §34; and *Moustaquim v. Belgium*, 18 February 1991, §49.

⁷⁰⁰ O.J. 2004, L 16/44. See Carrera (2005).

⁷⁰¹ The Accession treaties contain provisions that make this possible in order to "phase in" free movement rights for the new EU citizens.

⁷⁰² Anderson and Bigo (2002), p. 18.

the national state is able to maintain and control its linkage of population and territory, if not in a formal sense, than at least in reality. In this respect, it is significant that in the past the Commission has been in favour of extending free movement rights for third-country nationals, partly motivated with the argument that freedom of movement for economic activities was not as widely used by the nationals of Member States as would be desirable for internal market purposes.

The controversial *Chen* judgment by the ECJ provides an excellent example of Member States' strategic use of the concept of national sovereignty.⁷⁰³ Legislation pertaining to nationality has been held firmly within their sovereign prerogatives, while the issue of free movement rights for EU citizens is within the competence of the EC. We have seen in Chapter 3 that EU citizenship is dependent on citizenship of one of the Member States. In this construction, individual member states retain the power to decide who can benefit from free movement rights, but the reverse side of the coin is that they have to respect other Member States' decisions in this area equally. Their interest in preserving their prerogative over recognition of citizenship status is indicative of their will to retain crucial elements of sovereign statehood.⁷⁰⁴

However, the *Chen* case of showed that such an approach to EU citizenship is not always in the interest of an individual Member State wishing to preserve its ultimate powers to exclude. Catherine Chen was born in Belfast, whereupon she acquired Irish nationality. Her Chinese mother went to England with her (without having to cross any international border), where she held a temporary residence permit as her husband was engaged in business between England and China. The ECJ decided that as an EU citizen, baby Chen had the right to reside in any Member State, under the usual conditions laid down in various directives. As her right of residence would be illusory without her mother to take care of her, her mother acquired a right of residence as well. The argument which was used by the UK government in the proceedings is revealing: the mother's travelling to Belfast to give birth to her son and thus acquire residence rights in the UK would constitute an abuse of EC law. It is difficult to imagine any other case in which a Member State would voluntarily ask the ECJ to usurp "the power of the Member States to decide on whom they can confer

⁷⁰³ ECJ. Case C-200/02. *Chen Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, 19 October 2004.

⁷⁰⁴ See Dashwood (1998), p. 203; and Kveinen (2002), p. 31.

nationality and consequently also citizenship.”⁷⁰⁵ It is equally easy to understand why the UK did precisely that in the *Chen* case: suddenly Irish nationality law in a real sense affected its powers to exclude with possibly far-reaching consequences.

The decision in *Chen*, based upon the fundamental status of EU citizenship, is to be distinguished from cases in which the Court decided that the exercise of Treaty rights by EU citizens entails effective respect for their family life.⁷⁰⁶ However, it should be recognised that this construction has similarly led to a situation in which the concept of EU citizenship has made significant inroads in Member States’ power to exclude third-country nationals. However, to what extent a third-country national unlawfully present in the Union territory can derive rights as a family member of a Union citizen is unclear.

In *Akrich*, the ECJ seemed to repeal some of the principles established by its earlier case law by refusing the use of Community law in order to rectify the illegal status of a third-country national by the exercise of free movement rights of his Union citizen wife.⁷⁰⁷ Instead of recognising that Member States have exclusive competence to regulate migration flows from outside the Union and thus endorsing their territorial sovereignty, this ruling rather seems to result from a consistent interpretation of (secondary) EU law: if there was no right to residence to start with (as in the case of illegal residence of a spouse), movement will not bring about a loss of rights.⁷⁰⁸ That the Court in Luxembourg is not too concerned about Member States’ (collective) sensitivities with regard to national sovereignty is evident from several of its decisions concerning third-country nationals and national immigration control.⁷⁰⁹

Thus, while seen from the inside through the eyes of an insider (i.e. European citizens), territorial borders have lost considerable relevance. However, accounts of the EU that take its constellation to be truly post-Westphalian overlook the traditional, sovereignty-oriented role of the national state with regard to third-country nationals. Similarly, the Fortress Europe metaphor, which merely calls attention to the fact that the function of Europe’s external borders as distinguishing between inside and outside have

⁷⁰⁵ Kunoy (2006), p. 190.

⁷⁰⁶ ECJ, Case C60/00, *Carpenter v. Secretary of State for the Home Department*, 11 July 2002; and ECJ, Case C-459/99, *Mouvement contre le racisme, l’antisémitisme, et la xénophobie ASBL (MIRAX) v. Belgian State*, 25 July 2002.

⁷⁰⁷ ECJ Case C-109/01, *Secretary of State for the Home Department v. Akrich*, 23 September 2003.

⁷⁰⁸ See Spaventa (2005), p. 228.

⁷⁰⁹ See for example ECJ, Case C-503/03, *Commission v. Spain*, 31 January 2006.

become stronger, fails to see that internal (national) borders have not really diminished in importance. Rather, the location of their control has shifted, so that the regulation of trans-national movement is increasingly located inside the country.⁷¹⁰ Enrica Rigo rightly observes that it is only partially true that controls have been relocated from national borders to the external frontiers of the Union. In reality, she argues, the very concept of borders itself underwent deep transformation.⁷¹¹ This is not to say that the external borders of the EU are not important when we investigate the way in which the Member States keep on to their exclusionary powers. On the contrary, as we will see below, they have reinforced the traditional territory-identity link by the use of novel techniques.

5.4.2. The Common Immigration and Asylum Policy

Before the Treaty of Amsterdam, which made immigration and asylum policy a matter of EC competence, co-operation on these matters had for a long time been purely intergovernmental. This was largely due to Member States' reluctance to communitarize an area which was so clearly labelled, both by them and their national constituencies, as constituting the core of national sovereignty. Nonetheless, from the 1980's onwards, a certain degree of Europeanization of migration policies – although not part of the integration process in a formal sense⁷¹² – had taken place in the form of various forms of trans-national cooperation by individual Member States.

Some authors make a link between the beginnings of European co-operation and a developing awareness of legal constraints domestically. Immigration control authorities found that they had more freedom of action if they operated at the European level, where decision-making was largely free of judicial checks and public scrutiny.⁷¹³ Even when at Maastricht, co-operation was institutionalised in the third pillar, the situation in which primacy laid with national executives remained largely the same: apart from the absence of domestic constitutional constraints, there was little scope for

⁷¹⁰ Bauböck (2003), p. 7; and Bigo and Guild (2005), p. 238.

⁷¹¹ Rigo (2003), p. 1.

⁷¹² Huysmans (2000), p. 755.

⁷¹³ See Geddes (2001), p. 28; Boswell (2003), p. 623; and Guiraudon (2003).

action by the Commission, European Parliament or the ECJ.⁷¹⁴ This is one instance through which it may be shown that the European project provides Member States with an opportunity to reassert national sovereignty with regard to control over international movement, by turning to the traditional administrative culture of immigration decision making where the rule of law is severely curtailed.⁷¹⁵ Thus, while European integration may superficially be perceived as limiting the pursuit of some elements of sovereignty, in reality it strengthens the kind of "sovereign authority emerging as central in a globalising world."⁷¹⁶

Hence, when Member States' concern over immigration had risen sufficiently high and dissatisfaction with the intergovernmental approach of the Third Pillar emerged, at Amsterdam the Treaty on the European Union was changed in such a manner that immigration and asylum were moved from the third pillar to the first.⁷¹⁷ Increasing immigration pressure on the European Union countries made the Member States realise that purely intergovernmental strategies would no longer be sufficient to protect their national states. Moreover, although it seems to have been only a secondary motivation, the absence of internal border controls made a common stance on immigration from third countries seem logically required. The complex manner in which the common immigration and asylum policy is shaped, with rules from many overlapping sources, opt-in and opt-out provisions for certain Member States and forms of policy making which depart from the traditional EC legislative process such as the open method of co-ordination is a reflection of Member States' ambiguous feelings regarding the loss of their exclusive competences in this area. Another such example is contained in the special provision for preliminary rulings under Title IV that deviates from the normal procedure for preliminary rulings. According to Article 68 EC only national courts of last instance can refer questions for preliminary rulings to the European Court of Justice.⁷¹⁸ Furthermore, cooperation between Member States still

⁷¹⁴ Boswell (2003), p. 623.

⁷¹⁵ Guiraudon and Lahav (2000), p. 178; Geddes (2001), p. 36; and Geddes (2005), p. 788.

⁷¹⁶ Cohen (2001), p. 84.

⁷¹⁷ Duff (1997), pp. 8, 9, 20; and Huysmans (2000), p. 756.

⁷¹⁸ The Council did not adapt this provision after the transition of the transitional period that expired on 1 May 2004 as required by Article 67(2) EC. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the Court of Justice of the European Communities, Adaptation of the provisions of Title IV of the EC

also takes place outside the formal structure of the EU, such as multilateral cooperation between several Member States in combating illegal immigration under the Prüm Convention.⁷¹⁹ The explicit intention of such cooperation is the transferral of the rules the participating states have agreed upon to the level of the EU. Even though such intergovernmental cooperation may be motivated by a genuine wish of some Member States to achieve closer integration, the inevitable result is that checks on the executive power are largely absent: the European Parliament for example has no say on the proceedings and outcomes within these multilateral frameworks.

Instead of analysing the bulk of EU legislation that has been enacted under Title IV of the EC Treaty, I will focus upon how EU law and policies in this area have changed the connotations of the territorial border with regard to international movement. I will argue that these changes have been triggered by Member States' wishes to retain their sovereign power to exclude in response to the evolving human rights norms as discussed in Section 5.3. They have done so by shifting and extending the enactment of their sovereign powers. I already discussed the shift "upwards", denoting the transferring of migration decision making to the Community level.⁷²⁰ The measures and policies which have been taken so far as a result of this upward shifting show that strong emphasis is laid on traditional control of the territorial border.⁷²¹ In spite of the comprehensive approach to be taken to migration, proclaimed indispensable at Tampere,⁷²² legislation and other instruments such as on harmonising existing practices on expulsions,⁷²³ mutual recognition of expulsion decisions,⁷²⁴ voluntary repatriation,⁷²⁵ the organisation of joint flights for expulsion,⁷²⁶ and controlling illegal

Treaty relating to the jurisdiction of the Court of justice with a view to ensuring more effective judicial protection (European Commission, 28 June 2006).

⁷¹⁹ Convention on the stepping up of cross border cooperation, particularly in combating terrorism, cross-border crime and illegal immigration, signed at Prüm on 27 May 2005 (Schengen III). Participating states are Belgium, France, Spain, Luxembourg, Austria, the Netherlands, Germany and Italy.

⁷²⁰ Guiraudon and Lahav (2000), p. 176-177.

⁷²¹ Ibid.

⁷²² EU Presidency Conclusions Tampere European Council, 15 and 16 October 2001.

⁷²³ Various Recommendations, see for example OJ C 5, 10 January 1996 and OJ C 274, 19 September 1996.

⁷²⁴ Council Directive 2001/40/EC, OJ L 149, 2 June 2001

⁷²⁵ Council Decision 97/340/JHA of 26 May 1997, OJ L 147, 5 June 1997.

⁷²⁶ Council Decision of 29 April 2004, OJ L261, 6 August 2004, pp. 28-35.

immigration in a more general sense,⁷²⁷ all point to Member States' strong commitment to a rigid territory-identity link.

Apart from an upward shift, Member States have externalised migration control through various EU policies, in what can be described as a shift "outwards". They have done so in different ways which all lead to a separation between the concept of the border and the perimeter of European territory.⁷²⁸ The first of such policies is the Schengen system of visa regulation. The Schengen visa system governs movement of potential migrants in their countries of origin instead of at the moment of their arrival at the actual border of the Member States. Particularly in combination with carrier sanctions,⁷²⁹ through which private actors are made responsible for the typical sovereign act of control over borders, the European visa requirements lead to a construction in which control over movement is more easily exercised because the extra-territorialisation of such control facilitates the evasion of human rights obligations. The regulation of visa under Schengen is also indicative of the fact that States are not averse of ceding formal sovereignty if they can win back substantive powers of exclusion: participating states are under an obligation to refuse entry if the Schengen conditions are not met.⁷³⁰

Furthermore, the stationing of immigration liaison officers in third countries in order to prevent what is called irregular migration, is another illustration of the extra-territorializing of sovereignty, and thus implicitly of the way in which Member States

⁷²⁷ See amongst many other documents: Green Paper on Community return policy for illegal residents (European Commission, 10 April 2002); Communication from the Commission to the Council and Parliament on a common policy on illegal immigration (European Commission, 15 November 2001); Council Decision of 27 March 2000 on the improved exchange of information to combat counterfeit travel document O.J. L81, 1 April 2000; Council Regulation EC/2725/2000 of 11 December 2000 concerning "Eurodac", O.J. L 316, 15 December 2000; EU Presidency Conclusions on Justice and Home Affairs of the Laeken European Council, 17 December 2001; EU Presidency Conclusions to the Brussels European Council 25/26 March 2004 including the Hague Programme, and Council Decision 2005/267/EC of 16 March 2005 on establishing a secure web-based Information and Co-ordination Network for Member States' Migration Management Services, O.J. L 083, 1 April 2005, pp. 48-51

⁷²⁸ Rigo (2003), p. 6.

⁷²⁹ Based upon Art. 26 of the 1990 Supplementation Agreement of the Schengen Convention.

⁷³⁰ Steenbergen (1992), p. 65.

conceive of the importance of access to territory for their human rights obligations.⁷³¹ Similarly, certain provisions of The Hague Programme, in particular relating to the establishment of a Border Control Agency (Frontex), make it possible to organise joint EU-level measures to intercept persons travelling on the high seas.⁷³²

Other venues for the extension of control and police methods concerning trans-national movement consist of shifting responsibility to third countries: “third countries are encouraged, or in the case of candidate countries, obliged, to apply EU standards of migration management, or to enter into agreements for readmitting irregular migrants.”⁷³³ Readmission agreements fit very well in a system based on territoriality: they are a means by which control over movement is exercised as they govern populations both inside and outside a state’s territory.⁷³⁴

While we have seen above that such a means of regulating populations may be disrupted on the grounds of certain human rights considerations, concepts such as safe third country and safe country of origin, now commonly used by all Member States, attempt to reinstate the system of territorial governance. Apart from redirecting territorial responsibility for the fundamental rights of applicants for international protection coming from a safe third country or a safe country of origin, these concepts will inevitably undermine the assessment of fundamental rights at stake in individual cases.⁷³⁵

Further proof of the pushing of borders outwards, thereby de-territorializing sovereignty, is provided by proposals made by Italy, Germany, and the UK, for so-called Transit Processing Centres. These proposals were inspired by Australia’s ‘pacific solution’, its asylum policy consisting of “patrolling a naval barrier created around Australia’s territorial waters in order to prevent unauthorized vessels carrying asylum seekers from entering. Intercepted vessels are diverted to off-shore processing centres in

⁷³¹ Council Regulation EC/377/2004 of 19 February 2004 on the creation of an immigration liaison officers network, OJ L 64, 2 March 2004, pp. 1-4

⁷³² European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU, Council Regulation (EC) No 2007/2004 of 26 October 2004. ILPA in House of Lords (23 March 2003), p. 34. See also European Commission Newsroom 4 August 2006: “EU common patrols to control maritime borders will be organised shortly in the south Mediterranean region.”

⁷³³ Boswell (2003), p. 624.

⁷³⁴ Walters (2002).

⁷³⁵ Tuitt (1995).

countries to host [these] in return for financial incentives. [...] if granted refugee status, the refugees are then resettled in third countries.”⁷³⁶ European ideas for Transit Processing Centres similarly envisaged the processing of claims that were made in one of the Member States outside the territory of the EU, thereby facilitating the contracting out of asylum services to third countries.⁷³⁷ It is persuasively argued by several authors that significant legal obstacles would be encountered in realising these plans,⁷³⁸ which perhaps explains why they have up to date not been adopted by the Commission.

Member States, however, seem to think that these obstacles can be evaded if camps for illegal immigrants are set up in countries such as Algeria, Tunisia, Mauritius, Morocco, and Libya, not under formal supervision of the EU, but of these respective countries.⁷³⁹ Increasing co-operation between individual Member States and North African countries, such as between Italy and Libya or Mauritania and Spain, shows a willingness on both sides to contain the alleged threat of migration on the non-European side of the Mediterranean.⁷⁴⁰ Such co-operation has also been institutionalised within the framework of the EU.⁷⁴¹ In Libya,⁷⁴² the European Commission has four projects: centres to house illegal immigrants, information campaigns, training of immigration officials and improvements to border controls. It has furthermore recently adopted a package of measures to help Mauritania contain the flow of illegal immigrants to the

⁷³⁶ Lynskey (2006), p. 242.

⁷³⁷ Ibid. p. 247; and Saint-Saens (2004).

⁷³⁸ Lynskey (2006); and Noll (2003).

⁷³⁹ Helmut (2005); and Andrijasevic (2005-2006), p. 15-16.

⁷⁴⁰ Such as Italy financing the construction of detention camps in Libya. See European Commission (2005), p. 59. Spain has agreed to pay for the construction of detention centres for illegal immigrants in Mauritania (Reuters, 17 March 2006).

⁷⁴¹ For example in the Aeneas Programme, Regulation (EC) 491/2004 of the European Parliament and the Council of 10 March 2004 establishing a programme for financial and technical assistance for third countries in the areas of migration and asylum, O.J. 18 March 2004 L80/1. See also Communication from the Commission to the Council and the European Parliament integrating migration issues in the European Union's relations with third countries, European Commission (3 December 2002); and Communication from the Commission to the European Parliament and the Council, Thematic program for the cooperation with third countries in the areas of immigration and asylum (European Commission, 25 January 2006).

⁷⁴² A country which “does not recognize the mandate of the UNHCR, has no asylum system, is not a signatory of the Geneva Convention and in which, as NGOs documented, irregular migrants and asylum seekers are at risk of arbitrary detentions, unfair trials, disappearance and torture while in detention.” Andrijasevic (2005-2006), p. 22

Canary Islands. Resources for detention form part of the package, a € 2.45 million programme, which furthermore includes capacity building for detection and apprehension; revision of existing legislation; and institutional support.⁷⁴³ The background of such initiatives is a growing unwillingness on the part of the EU to deal with the effects of migration on its own soil, but to contain the problem in non-Member-States, who are enticed to co-operation with political and financial advantages. Although occasionally worded in terms of humanitarian concern,⁷⁴⁴ Member States use EU cooperation with third countries to export their views on territorial sovereignty, even though the situation in these third countries is hardly comparable to the situation in Europe. Similarly, plans for regional protection programmes,⁷⁴⁵ although arguably partly motivated by a genuine wish to provide more accessible and effective protection for refugees in their regions of origin, also fit within an image of a Europe reluctant to be engaged in refugee protection on account of its territorial responsibility.

I have said in the introduction to this Section that a communitarian perspective on international movement reveals important insights with regard to national sovereignty and territoriality. The way in which the Union and its Member States look upon and have regulated free movement within and into the territory of the European Union show that national sovereignty plays a decisive role in shaping the legal and political framework dealing with free movement and immigration. The limited scope for the Court of Justice to give preliminary rulings on matters of immigration and asylum and Member States' reluctance to align its jurisdiction on the general scheme of the Treaty is illustrative in this respect.

Nevertheless, it is undeniable that the (imaginary) unity with which national sovereignty is concerned has changed as a result of the European project: the capacity to control the entry and stay by EU citizens has greatly diminished. Perhaps even more

⁷⁴³ See European Commission Press Release, 10 July 2006, Brussels, IP 06/967.

⁷⁴⁴ With regard to plans for the establishment of reception camps in North Africa, the Austrian Minister of the Interior remarked: "Ce ne sont pas seulement des camps, ce sont des programmes pour créer de l'emploi, pour leur offrir un enseignement, pour les aider à commencer une vie par eux-mêmes." Source: *Liberation* 13 January 2006.

⁷⁴⁵ Communication from the Commission to the Council and the European Parliament, Regional Protection Programmes. European Commission (6 April 2005). At the Vienna Justice and Home Affairs Council. EU Justice and Home Affairs Ministers agreed upon launching regional protection programmes in Belarus, Moldova, Ukraine and Tanzania.

importantly, the abolishment of internal border controls has conceptually 'problematized' border controls as obstacles to individual freedom, and in certain respects the Schengen *acquis* has 'denaturalised' the border.⁷⁴⁶

As a result, in Enrica Rigo's words, one can discern a "blurring of an exclusive/inclusive dichotomy of membership."⁷⁴⁷ In this sense, the development of Europe into a post-national polity raises interesting novel issues, as shown by *Commission v. Spain*. In this case, the European Court of Justice decided that automatic refusal of entry by one Member State on the ground of an alert issued by another Member State under CISA (implementing the 1990 Schengen Convention) violates EC law if the refusals concern spouses of EU citizens.⁷⁴⁸ On the other hand, quoting Rigo again, "functions typical of national borders are maintained or even reinforced"⁷⁴⁹ through the European project. The quintessential function of the territorial border is not changing, although its location and the manner of its enforcement on the individual are evolving. Europe reveals "a system of differentiated memberships, framed by the norms that identify boundaries at each level of the European polity"⁷⁵⁰ Rigo argues that such a system corresponds to a multilevel system of governance of people's mobility.

Indeed, whereas before the concept of nationality was the essential tool with which national states have monopolised the question of trans-national movement, the EU and its Member States have brought about a considerably more sophisticated system of international government of populations. Concepts such as EU citizens, third country nationals, safe country of origin, safe third country, Schengen, and readmission agreements are the constituent elements of this novel structure. However, notwithstanding the novelty of the tools, national sovereignty with its emphasis on control of outsiders' access to national territory is the ratio behind the very existence of that structure. The pushing of Europe's borders outwards through various policies fits also within a traditional image of sovereignty, but instead of solely facilitating control over access to territory, it operates from a complementary logic. In order to protect national territory, it makes use of the fact that access to fundamental rights is still largely limited by the borders of the national state.

⁷⁴⁶ Walters (2002b)

⁷⁴⁷ Rigo (2003), p. 12.

⁷⁴⁸ ECJ, Case C-503/03, *Commission v. Spain*, 31 January 2006.

⁷⁴⁹ Rigo (2003), p. 12.

⁷⁵⁰ Rigo (2003), p. 11. See also Walters (2002b), p. 567.

5.5. REAFFIRMING SOVEREIGNTY: DEPORTATION AND DETENTION

Deportation is the physical removal and therefore ultimate exclusion of individuals or groups from the territory of the state. Detention is enclosure in a camp or prison and consequently the exclusion from the receiving society.⁷⁵¹

Deportation and detention are often regarded as simple instances of immigration law enforcement. In official political discourse they are presented as the proper and natural response of the sovereign state to those who have violated its territorial sovereignty. Deportation, and to a lesser extent detention, are so embedded within the contemporary administrative practice of liberal states that it receives far less attention in comparison with other forms of state violence and forced migration.⁷⁵² Criticism, be it political, academic or activist, revolves mainly about the conditions of their application, but deportation in particular is seldom questioned as more than the unfortunate but predictable consequence of unwanted immigration.⁷⁵³ However, as so evocatively put by Nathalie Peutz and Nicholas de Genova, there must inevitably be something greater at stake in practices of detention and removal, including “the formulation and empathic reaffirmation of state sovereignty itself as well as its concomitant production and refashioning of political subjectivities for “natural” and “naturalized” citizens, all manner of “immigrant” and “foreign” denizens, the communities where the deportees are more or less coercively returned and of course the deportees themselves.”⁷⁵⁴ Their words accurately express the idea that deportation and detention constitute the litmus test for the way in which territoriality shapes the world and the life of its inhabitants.

In addition, as they both engage the exposed core of state power,⁷⁵⁵ deportation and detention make clear what sovereignty is about; both with regard to its aspect of

⁷⁵¹ Schuster (2005), p. 608.

⁷⁵² Walters (2002), p. 256.

⁷⁵³ In an interview with the *Corriere Della Sera* of 3 July 2006, the Italian President Giorgio Napolitano stated that “non c'è alcuna alternativa ai Cpt [Centri di Permanenza Temporanea, the Italian immigration detention centres]. Si può discutere sul modo in cui vengono gestiti, ma altro chiederne la chiusura. Se esiste un problema di sovraffollamento, piuttosto che pensare a chiudere i centri, bisogna aprirne altri.”

⁷⁵⁴ Peutz and Nicholas (forthcoming).

⁷⁵⁵ Dauvergne (2004), p. 592.

monopolist violence⁷⁵⁶ as with regard its claim to determine the inside and the outside. Furthermore, deportation and detention in a global perspective exemplify the idea of an international police of aliens: territoriality and citizenship as mechanisms of allocating responsibility over distinct populations. Monopolist violence and sovereignty's claim to determine the boundaries of the body politic have been looked at closely in Chapter 2, whereas Chapter 3 paid attention to citizenship's structuring role in a world made up of nation states.

In Section 5.5.1., I will discuss the way in which the administrative practice of deportation relates to state power and territoriality by setting it in a wider field of political and administrative practice.⁷⁵⁷ By doing so I draw for a large extent on the work of William Walters who, by comparing modern deportation practice with historical forms of expulsion, offers a venue through which we can historicize and denaturalise deportation.⁷⁵⁸ Section 5.5.2. subsequently deals with the relationship between immigration detention and state power. Michel Foucault's work on confinement and Hannah Arendt's reflections on Europe's post-war internment camps for displaced persons are briefly discussed in order to place the practice of immigration detention in a larger historical narrative of imprisonment. By doing so, Section 5.5.2. seeks to answer the question why in contemporary Europe the detention of unwanted foreigners is increasingly prevailing over other forms of administering the entry and removal of aliens.

5.5.1. Deportation as administrative practice

By investigating historical forms of expulsion, William Walters makes the claim that deportation's link with contemporary immigration policies is not as self-evident as it may seem at first sight. The first form of expulsion he addresses is exile or banishment. Exile was generally used as a form of punishment for serious crimes, in a period reaching from ancient Greece and early Rome until the late Middle Ages. Exile

⁷⁵⁶ "There is no easy way to make those who do not want to depart actually leave: shackles and drugs are both on the menu." (Dauvergne 2004, p. 592)

⁷⁵⁷ See Nascimbene (2001) about the administrative character of deportation measures in most EU Member States.

⁷⁵⁸ Walters (2002).

was used against a person who was a member of the body politic, and Walters quotes the Italian jurist Beccaria (1738-1794) to illustrate the effect of banishment. It nullified all the ties between society and the delinquent citizen: with respect to the body politic, banishment was a civil death, which should produce the same effect as natural death.⁷⁵⁹ Thus, the loss of citizenship put men at the mercy of sovereign power; and as such banishment illustrates the importance of citizenship while at the same time it exposes the insignificance of "bare life"⁷⁶⁰ when confronted with sovereign power, despite declarations and theories in which rights are accorded to men prior to and independent of any political power. Hence, although banishment was frequently employed to lessen the punishment for serious crimes, especially for the poor its impact could be far more serious than imprisonment, which, although greatly restricting individual liberty, did not affect one's presence in the legal and political order.

Subsequently, Walters considers expulsions that are associated with poor policy in early modern Europe. In England, for example, those who were likely to become a charge on the poor rate of a particular parish were subject to removal. Indeed, during the sixteenth and seventeenth centuries, the determination to restrict relief only to the local poor was a general feature of Western Europe, and paupers from other localities could be removed.⁷⁶¹ Thus, although the modern nation state had already started to take form, when it came to deportation the fault line between inside and outside was not determined by nationality, but by the distinction of local versus foreigner.

It is important to note that with regard to warfare, and also taxation, this fault line had started to shift slowly but decisively in the direction of national versus foreigner. It is precisely this shift that is detectable in the third historic example of expulsion that Walters discusses: expulsion on the basis of group membership. Notwithstanding the fact that corporate expulsions in Medieval Europe were not targeted at other nationalities but rather at different religious groups, they were an important tool in the formation of national states as political loyalties and religion were clearly intertwined in this period.⁷⁶² Although the expulsion of religious groups became less commonplace when national states and the state system had consolidated in Western Europe, a new form of forced migration took over as a result of external

⁷⁵⁹ Ibid. p. 269.

⁷⁶⁰ The term comes from Agamben (1998).

⁷⁶¹ Walters (2002), p. 270.

⁷⁶² Ibid. p. 270.

colonization and internal social regulation, the latter denoting the enormous growth of state power, penetrating more and more aspects of the lives of its citizens. One of the ways in which states dealt with those individuals that they perceived as undesirable in their social order was to transport them to colonies overseas where they were subjected to forced labour. Thus, the poor and the criminal were not merely banished; the practice of transportation differed from classic exile as it sought to combine “forced removal with the game of colonization and economic exploitation.”⁷⁶³ Not only convicts were transported to the colonies: the legalisation of deportation in the English Vagrancy Act of 1597 shows that transportation as social regulation encompassed more than the pursuing of criminal law objectives. An intriguing detail with regard to these policies, offering interesting parallels with contemporary practice of readmission agreements, is the case of countries that, as they did not have any significant colonies abroad, sought to arrange transportation of their undesirables with other colonial powers.⁷⁶⁴

The final form of expulsion that Walters examines in his historical overview is so-called population transfer. We have seen in Chapter 3 that the way in which international law dealt with the case of minorities in Europe in the first half of the twentieth century affirmed the perception of a logical link between identity, nation, and state. International law aspired to protect minorities because in their cases, this link did not reflect their actual situation. Another way of dealing with the scenario in which a nation state found itself confronted with minorities of another nation within its borders was the transferral of such minorities to their “own” state. Examples of such “tidying up of national frontiers”⁷⁶⁵ have been described in Section 5.2, but here it is important to appreciate how population transfer relates to modern state power. In this context Walters discerns a significant difference with group expulsions in the early modern period when the nation state had not yet grown to maturity:

[...] with the early modern period expulsion was frequently used as a threat. It could be avoided if the subject agreed to accept baptism, conversion or forswear the practice of usury. Expulsion as population transfer operates on a biopolitical territory where difference is marked indelibly.⁷⁶⁶

⁷⁶³ *Ibid.*, p. 272.

⁷⁶⁴ *Ibid.*, p. 272.

⁷⁶⁵ Linklater (1998), p. 160.

⁷⁶⁶ Walters (2002), p. 247.

The changing connotations of expulsion which Walters tackles here correspond to the change from the medieval order based on individual differences and universal values to the modern state system where the principle of identity was pursued within states. The way in which the state came to assert a specific national identity, and how this process of assuming a collective and pre-political identity relates to theories on state power have been addressed extensively in Section 2.4.3. of Chapter 2. These processes explain the changing character of state administered forced migration.

Walters' genealogy of deportation is significant in three respects. In the first place, it shows us that deportation is not the particular response of the state to one singular situation. Deportation at various times in history has been a tool to facilitate state building; an instrument to regulate wealth; a means of social regulation; and a way in which to realise national ideology. Secondly, in changing practices of deportation one can detect the changing role of state power. Banishment in the early modern period was reserved for political enemies of the state and transfer of religious residents was opportune for creating the modern sovereign state. With the risk of oversimplifying, one could say that such expulsions served to make sure that the emerging state could exercise effective power over a certain territory. The more modern modes of expulsion which became prevalent in the nineteenth and the first half of the twentieth century, such as transportation of convicts and vagrants to colonies and population transfers based on ethnicity, show that the state was no longer merely concerned with territorial exclusiveness of power, but also with its substantial capacity of controlling its citizens' life and identity. These tendencies were reflected in immigration policies: during the same period, as we have seen in Section 5.2., immigration laws were introduced that prevented the immigration of paupers or persons with 'low morals' and certain specific nationalities.

This link between forms of state power and modes of deportation leads us to the third important issue that Walters addresses through his genealogy of deportation. He asks what contemporary deportation practice may tell us about present forms of state power and images of political community. There are two answers to this question.

In the first place, one needs to be aware of the fact that modern deportation practice is the result of the territorial state system. Chapter 3 described how the institution of citizenship is rooted in and simultaneously produces a territorial system through which distinct populations are ascribed to distinct territorial entities. Citizenship's role in a world made up of nation states is to allocate the responsibility for

populations to states. Even conceptions of post-national citizenship depend on initial authorization for presence on national territory by the sovereign state, and are thus consistent with Barry Hindess' idea of citizenship as international 'police'.⁷⁶⁷ International law is formed by this construction of an international government of populations: it prohibits the expulsion of citizens and has naturalised the link between sovereignty and deportation of foreign nationals, as we saw in Section 5.3. of the present Chapter.

But – and it is here that we find the first answer to the question as to what the practice of deportation tells us about state power and political community – deportation is not merely the inevitable outcome of the notions of citizenship and territoriality. It is much more than that. Deportation itself is actively involved in producing and preserving the territorial order. A world made up of independent, sovereign nation states is the result of historical contingencies, not a natural way of structuring the world, nor the inevitable outcome of a linear path of progress, and as such it does not and cannot reproduce itself naturally.⁷⁶⁸ It is the practice of deportation that is constitutive for the modern territorial order.⁷⁶⁹ The EU return policy reveals a similar relation between territoriality, governance of populations and deportation: EU policies with regard to return that, as we have seen above, intensify cooperation with third countries, find their “roots in the emergence of a dominant interpretative framework pertaining to the ‘management of international migration’.”⁷⁷⁰

The constitutive element of deportation leads us to its second feature that is important in order to understand the way in which modern practices of deportation relate to state power. Deportation does not only function as a factual way in which to govern populations. In light of the ineffectiveness of many expulsion measures in several of the Member States,⁷⁷¹ its significance is perhaps more of a symbolic and indirect character. Matthew Gibney and Randall Hansen argue that although deportation measures are often ineffectual, they are a necessity for governments who need to be seen in control of migration and borders. According to these authors, the established practice of deportation is necessary because it “assuages public opinion which would

⁷⁶⁷ Hindess (1998) and (2000).

⁷⁶⁸ Walters (2002), p. 288.

⁷⁶⁹ Ibid.

⁷⁷⁰ Cassarino (2006), p. 10.

⁷⁷¹ See Nascimbene (2001); and Schuster (2005), p. 612.

not view the states incapacity in this area with equanimity” and because it acts as a disincentive to other potential migrants.⁷⁷² William Walters uses the same arguments by placing deportation in the context of governmentality. Although this study will not address conceptual distinctions between sovereign power and governmental power, the latter supposedly a distinctly novel way of reflecting on and exercising state power, one aspect of governmentality deserves to be mentioned in the context of deportation. That is the concern of the state with the governmental mechanism of deportation itself:

“Governments are presently obsessed with the need to ‘tighten up’ their deportation and repatriation policies. One of the main reasons they give is the need to maintain the ‘integrity’ of their immigration and asylum systems. The problem identified is one where lax administration of deportation – the failure to execute deportation orders and actually to remove the subject – marks a particular state as a ‘soft touch’. The fear is that asylum ‘shoppers’ will then flock towards that state to profit from its generous terms of admission. Strictly enforced migration policies send ‘signals’ to asylum seekers and ‘illegal’ migrants. What is being governed is not the population in a direct manner, as was with the population transfer or the socially undesirable, but the governmental system.”⁷⁷³

Here we can again draw a parallel with common EU return policies which “reassert the managerial capacity of the state” and should lead to a “strengthening of the public credibility of states”.⁷⁷⁴ Hence, the practice of deportation offers us two images of state power. The first image is of state power that forms part of a territorial system of sovereign states. In this system deportation is central to the allocation of populations to states.⁷⁷⁵ Governance of populations has become territorial in the second half of the twentieth century, a development that is reflected in modern international law which has delegitimised historical forms of expulsion such as the expulsion of religious minorities, mass expulsions, and transportation of citizens, while simultaneously it naturalised the link between deportation and foreign nationals. Once again it is possible to discern international law’s opposing tendencies: it couples concern with and limitations on the jurisdictional content of sovereignty with acquiescence to the state’s exercise of power whenever it presents it as based on sovereignty’s territorial frame. For although

⁷⁷² Gibney and Hansen (2003), p. 2.

⁷⁷³ Walters (2002), p. 280.

⁷⁷⁴ Cassarino (2006), p. 10.

⁷⁷⁵ Walters (2002), p. 267.

deportation clearly constitutes the exercise of jurisdiction over people, in the contemporary global structure, the basis for the exercise of this power is constituted by sovereignty's territorial frame. Once we take into account the 'sacred' territorial basis of such state power, we understand contemporary international law's differentiation between transportation of the socially undesirable, religious minorities or citizens in general and deportation of the foreigner.

The second image of state power that is revealed by the practice of deportation is internal. Deportation is necessary to prove that a state takes control of its borders and it epitomises sovereignty as the power to distinguish between the inside and the outside. These two images of state power, the first structural and the second internal, are complementary and mutually reinforcing, as is illustrated by the continuity between the externalisation of border control such as visa requirements and readmission agreements and its internalisation resulting precisely from practices such as deportation and detention.⁷⁷⁶

Similarly, the criminalization of illegal stay in national territory also shows how the internal and the structural features of state power complement each other: international governance of populations has reached a peak when merely administrative sanctions do longer seem to suffice and the tendency to criminalize migrants internally gives a very powerful incentive to the inside/outside distinction.⁷⁷⁷ The widespread use of the word 'illegal' in conjunction with migration and migrant, also when discussing preventive and international approaches to migration – even though logically “a migrant can only be illegal once he finds himself within a state whose laws define his presence as illegal”⁷⁷⁸ – has the same effect of both emphasising each individual state's territorial sovereignty and calling attention to an international regime of governance of the larger human population in which certain kinds of movement are taken for granted while other forms are undesirable and thus penalised.

⁷⁷⁶ Rigo (2003), p. 11.

⁷⁷⁷ See about criminal sanctions to illegal presence in various Member States: the various country reports in Nascimbene (2001), in particular p. 592.

⁷⁷⁸ See Elspeth Guild in House of Lords (23 March 2005), at 27.

5.5.2. Immigration detention, state power and territoriality

The above observations on state power and deportation hold equally true for administrative practices of immigration detention: if their aim is to facilitate removal and prevent illegal stay they fit within and simultaneously perpetuate a territorial image of the world. And even if the majority of those held in detention centres are eventually released,⁷⁷⁹ just as deportation, detention is a necessity for states that want to be seen in 'control' of their borders by their own populations. Furthermore, the symbolic function of immigration detention lies also in its deterrent effect to the outside world: detention centres are meant to signal that "'our' immigration policies are not a soft touch."⁷⁸⁰

However, immigration detention is special amongst the other venues through which states try to stem unwanted immigration such as deportation. In the first place it is special because deprivation of liberty is the sharpest technique by which states attempt to preserve the territorial order of sovereign states. We have seen in Chapter 2 that personal liberty and sovereignty are conceptually intertwined: the protection of the former is the reason for the existence of the latter. In societies based upon the rule of law there is no more serious interference with an individual's fundamental rights as depriving him of his liberty. The intimate relationship between personal liberty, sovereignty and violence warrants the utmost scrutiny when assessing the indiscriminate detention of thousands of people in light of traditional safeguards against sovereign power. But in this Section we will see that yet more is at stake in practices of immigration detention. It is this practice that, even more so than deportation, exemplifies in the clearest possible way the consequences of a world fully divided into territorial nation states on the life of the individual.

In *Madness and Civilization*, Foucault traces the origins of and rationale behind the great confinement of the seventeenth century, which ascribed "the same homeland to the poor, to the unemployed, to prisoners and to the insane."⁷⁸¹ William Walters, by drawing a parallel between the logic of medieval poor laws and modern deportation

⁷⁷⁹ "[...] either because they cannot be removed because of conditions in the country of origin, or because travel documents for the person to be removed cannot be issued, or because they are allowed to appeal, or because they are granted leave to remain on compassionate grounds, or, finally, because their claim for asylum is allowed." Schuster (2005), p. 612-613. See also Andrijasevic (2005-2006), p. 18.

⁷⁸⁰ Walters (2002), p. 286.

⁷⁸¹ Foucault (1967), p. 39.

practices, was able to point at the constitutive role of deportation in governing populations. In the same way, the confinement of the poor, the homeless and the insane of the seventeenth and eighteenth centuries may tell us something about contemporary immigration detention.⁷⁸² Precisely the poor laws of medieval Europe, the local logic of which is presently reconstituted on a global, international scale through immigration policies, were in the seventeenth and eighteenth centuries replaced by regulations which provided for the confinement of those who would have been expelled before:

"[...] it was, in any case, a new solution. For the first time, purely negative measures of exclusion were replaced by a measure of confinement; the unemployed person was no longer driven away or punished; he was taken in charge, at the expense of the nation but at the cost of his individual liberty."⁷⁸³

Indeed, whereas an edict of the parliament from 1606 ordered the beggars of Paris to be driven away from the city, fifty years later those people were hunted down and herded into the various buildings of the *Hôpital Général*. The latter institution was a single organisation which united already existing establishments which took care of the poor, but instead of merely an administrative reform, the establishment of the *Hôpital Général* in 1656 brought about a new "instance of order, of the monarchical and bourgeois order being organised in France during this period."⁷⁸⁴ While the origin of former measures of exclusion had been mostly local, the edicts that first established the *Hôpital Général* in Paris in 1656 and later prescribed the establishment of such institutions in every city of France in 1676, originated from the King. It was an early sign that one of the concerns of the emerging modern state was control over its citizens' life and identity, because mere local territorial control – by means of territorial exclusion of the undesirable from certain towns or provinces – would no longer function in a polity that aspired national government.

Thus the main aims of the 'great confinement' consisted of control and moral reform. Instead of being simply excluded, the poor and those without a fixed abode were now governed, albeit still by a logic which was driven by the "fear of pauperism,

⁷⁸² Vagabondage and mental illness still constitute legal grounds for deprivation of liberty according to Article 5 of the ECHR.

⁷⁸³ Foucault (1967), p. 48.

⁷⁸⁴ *Ibid.* p. 40.

with its dangerous 'fluid, elusive sociality, impossible to control or utilise'.⁷⁸⁵ In order to suppress such pauperism, the various *Hôpitals Généraux* provided for the "territorial sedentarization of populations"⁷⁸⁶, but the difference with later measures aiming at a similar result such as public housing, was the repressive nature of confinement. The near absoluteness of the power of the directors of the *Hôpitals Généraux* reminds of sovereign power without restraints: it consisted of "jurisdiction without appeal" and it entailed "writs of execution against which nothing can prevail."⁷⁸⁷

The emergence of imprisonment as an instituted response to crime dates from the eighteenth century and Michel Foucault has shown that this development is linked in important ways with ideas on liberal government.⁷⁸⁸ Although I will not investigate the history of this development in depth, two of its aspects nonetheless deserve to be briefly mentioned here. In the first place, practices of imprisonment had for centuries been linked with the worst abuses of royal power, of which the infamous *lettres de cachet* offer the best example.⁷⁸⁹ Yet, in modernity, prisons became a site where the very power to punish was made accountable and measurable and as such imprisonment can be seen as an "enabling technology of what we would now call the rule of law."⁷⁹⁰ Secondly, the imprisonment of criminals, just as the confinement of the poor, had important reforming functions. These two elements in particular made that the "rise of the penitentiary [...] is in a very real sense a story of rights and liberties as much as it is a story of prejudice and oppression."⁷⁹¹

Such a story of rights and liberties is conspicuously absent in Hannah Arendt's account of the internment camps which were set up for the stateless and refugees of totalitarian regimes during the thirties in Europe. Towards the end of the Second World War, millions of refugees and displaced people were kept in these camps, scattered all over Europe, and many of the former work and concentration camps in Germany were used as "assembly centres" for those people after the war had ended.⁷⁹² We have seen in

⁷⁸⁵ Walters (2002), p. 286.

⁷⁸⁶ *Ibid.*

⁷⁸⁷ Foucault (1967), p. 40.

⁷⁸⁸ Foucault (1989).

⁷⁸⁹ *Ibid.* and Foucault (1967), p. 38.

⁷⁹⁰ Simon (1998), p. 597.

⁷⁹¹ *Ibid.* p. 599.

⁷⁹² Malkki (1995), p. 499.

Chapter 3 that the very existence of the internment camps made painfully clear that the Rights of Man were utterly dependent on citizenship. As the national state did not know what to do with those foreigners who had lost the protection of their national government, they were forced to live outside the jurisdiction of the law, interned in camps, which became "the only practical substitute for a non-existent homeland"⁷⁹³

Arendt writes that it was not so much the loss of a home which led to this situation, but the impossibility of finding a new home, which was a problem not of "space but of political organisation."⁷⁹⁴ In other words, the very construction of a world made up of territorial nation states with their rigid link between identity, territory and rights made that the internment camp was "the only place which the world had to offer the stateless."⁷⁹⁵ The stateless and the refugees were not interned on account of what they had done, but because they did not fit within the territorial image of the world, and it seemed easier to deprive these innocent people of their right to have rights than those who had committed a crime.

In Hannah Arendt's portrayal of the internment camps we do not encounter elements of reform or enabling technologies of the rule of law. Rather, it presents us with an image of exceptionalism, sovereign power that is reduced to violence, a situation in which the rule of law has reached its limits. Evidently, the rationale for this exceptionalism was the assumed threat of the stateless and the refugees to the unity of the state and the overall order of the state system.

How then do contemporary immigration prisons feature in accounts of the modern state and the system it forms part of? Are they, like the confinement of the poor during the seventeenth and eighteenth century, essentially a means of territorial control and moral reform? Or, do they provide in addition, just as the penitentiary did in the nineteenth century, an opportunity for legal accountability? Alternatively, can they be compared with the exceptionalism of the internment camp for the stateless that was set up in Europe during and after the Second World War?

There are certainly similarities concerning the regulation of human mobility in immigration detention in contemporary Europe and the historic examples of internment that have been discussed above. We saw that the confinement of the poor as an answer

⁷⁹³ Arendt (1976), p. 284, p. 287.

⁷⁹⁴ Ibid., p. 294

⁷⁹⁵ Ibid. 287.

to pauperism amounted to “territorial sedentarization” of the poor so that “fixed concentrations of populations” could be produced.⁷⁹⁶ Similarly, the internment camp of post-war Europe was a “standardized, generalizable technology of power in the management of mass displacement.”⁷⁹⁷ Liisa Malkki writes that these refugee camps were a device of power as they provided for the spatial concentration and ordering of people.⁷⁹⁸ The detention of the unwanted foreigner in contemporary Europe can be seen as a comparable “sedentarization campaign” to regulate and control “surplus humanity”.⁷⁹⁹ Unlike confinement of the poor and imprisonment as a response to crime, immigration prisons do not function as a site for reform. Instead of aiming at the production of proper citizens, their sole aim consists of territorial control of persons in order to keep the territorial ideal intact.

Hence, it is certainly helpful to place immigration detention in a historical perspective on imprisonment, for it shows us that unlike deportation, immigration detention is not simply a technology to preserve the territorial state system and its allocation of citizens to states. In addition to being a means through which the national state, despite celebrations of universal human rights and assertions of post-national citizenship, violently guards the rigid link between territory, identity and rights, the immigration detention centre also provides an immediate place for those who do not fit within the territorial ideal of the world. The asylum seeker and the illegal immigrant “represent the nomadic excess that the state seeks to capture and normalize through panoptic confinement” in detention centres.⁸⁰⁰ Hence, immigration detention is an explicit exception to the assumption that all the world’s populations belong to a country, but at the same time, paradoxically, that very assumption is dependent on the existence of immigration detention.⁸⁰¹

Furthermore, immigration detention is not only a way in which states violently guard the territoriality of the global state system and provide a solution for what is perceived as an anomaly in that system: people between national borders. In addition, by resorting to immigration detention, they make ultimate use of territoriality’s logic:

⁷⁹⁶ Walters (2002), p. 286.

⁷⁹⁷ Malkki (1995), p. 498.

⁷⁹⁸ *Ibid.* p. 498.

⁷⁹⁹ Walters (2002), p. 286.

⁸⁰⁰ Diken and Laustsen (2003), p. 3.

⁸⁰¹ Walters (2002), p. 286.

the territorial blind spot of individual rights protection as was discussed in Chapter 3. Perhaps here we can draw an additional parallel between the post-war internment camps for refugees and the contemporary immigration prison. Territorial blindness of the law, a blindness that states seem only too eager to protect, has made the detention of thousands of people, simply because they crossed boundaries, possible and normal. Hannah Arendt argued that the internment camps were places of exceptionalism, where people were placed outside the normal legal order. With regard to the immigration prison the same argument can be made: the indiscriminate detention of thousands of people, sometimes for periods which are not bound to a maximum by law, under special security administration, special laws and wide administrative powers in places which are difficult to access and control, certainly gives the impression of being a practice which is outside the usual legal framework of the *Rechtsstaat*.

Bülent Diken and Carsten Laustsen recount the outbreak from the Australian detention camp Woomera, where fifty people managed to escape. Most of them were captured afterwards, but “they are unlikely to be prosecuted or jailed – if they were, they would have visiting rights and a definite length of imprisonment, luxuries denied them as asylum seekers inside Woomera.”⁸⁰² Precisely this situation would qualify for what Arendt calls one of the perplexities inherent in the concept of human rights: “it seems to easier to deprive a completely innocent person of legality than someone that has committed a crime.”⁸⁰³ We can regard the immigration prison as extra-territorial to the extent that it is outside the normal territorial legal and juridical order.⁸⁰⁴ However, this extra-territoriality is simultaneously governed by the logic of territoriality: only those who are not authorised by the state to be present on national territory will be subjected to detention under these exceptional conditions.

In addition, the immigration prison operates in the zone of indistinction between inside and outside in another, related sense as well. Its two folded logic of sedentarization and exceptionalism leads to what Giorgio Agamben has called “exclusionary inclusion”.⁸⁰⁵ Immigration detention is not *solely* about exclusion. For although detention puts refugees and illegal immigrants outside the normal legal framework of the liberal state, their life inside the immigration detention centre is

⁸⁰² Diken and Laustsen (2003), p. 5 (quoting from the Guardian Weekly 25 May 2002, pp. 25-31).

⁸⁰³ Arendt (1976), p. 275.

⁸⁰⁴ Walters (2002), p. 286.

⁸⁰⁵ Agamben (1998).

strictly ruled and restricted by the law, and they are thus in a very real sense included in the state's domain of sovereign power.⁸⁰⁶

According to Liza Schuster, the normalization of detention as a way in which to deal with unwanted migration in contemporary Europe is disquieting. It exemplifies that it has become acceptable to treat certain categories of people as less deserving of dignity and less deserving of their human rights. She contends that, even disregarding the corrosive impact of such practices on society as a whole,⁸⁰⁷ the way in which they affect the group that is targeted is unacceptable.⁸⁰⁸ However, whether immigration detention is a tale of mere exceptionalism or whether it has the potential to transform into a site for some kind of legal investigation and accountability, is a question that remains to be answered. Just as the imprisonment of criminals offered courts a venue through which to review the sovereign power to punish, I will argue in Chapter 8 that, however minimal the legal investigation of practices of immigration detention, it holds a promise of bringing about legal claims that can possibly unsettle the notion of territorial sovereignty in an unprecedented manner. In order to address these issues comprehensively, we first need to examine closely the way in which contemporary human rights law features in cases of immigration detention. Chapter 6 and 7 will investigate whether and how international human rights law may provide for the legal accountability of practices of immigration detention.

5.6. CONCLUSIONS: FREEDOM OF MOVEMENT, SOVEREIGNTY AND RIGHTS IN A TERRITORIAL WORLD

5.6.1. Freedom of movement and territoriality's implications

This Chapter has dealt with the exclusionary powers of the sovereign state. It has focussed on the dominant perception of sovereignty as entailing a right to exclude. Although the exclusion of the foreigner since the end of the nineteenth century has been presented as self-evidently inherent in territorial sovereignty, we have seen that such

⁸⁰⁶ Diken and Laustsen (2003), p 2-3. See also Foucault (1989), p. 419-420.

⁸⁰⁷ See Neumann (2000) about the larger effects on society as a whole of what he calls 'anomalous zones'.

⁸⁰⁸ Schuster (2005), p. 618.

self-evidence has not always been the case. Indeed, looking upon immigration as closely bound up with sovereignty's territorial frame and falling within a field that is characterised by large executive discretion is a phenomenon that finds its origins in the late nineteenth century. At that time, under the influence of political particularistic ideologies, the modern state's link between sovereignty, identity and rights had become exclusive and rigid. In such a political context, it was easy to portray immigration as a threat to sovereignty's claim to determine the inside from the outside and the unity of the state. As a result, it could become a domain that was largely excluded from normal processes of legal accountability.

The tendency to depict immigration as a threat and a danger has gained momentum in the last three decades, during which it is being increasingly represented as a challenge to the modern state's national identity and its welfare provisions.⁸⁰⁹ At present, the individual has no right to enter or stay in national territory without state authorisation and unauthorised entry or sojourn is seen as a violation of the state's legal order with allegedly grave consequences for its public order and domestic stability.⁸¹⁰ The preponderance of this view in Europe is amongst other things reflected in a growing body of legislation codifying penal sanctions on illegal entry or stay in various Member States.

But at the same time, sovereignty has decreased in importance when it concerns matters relating to exit, as we have seen in the previous Chapter. While immigration has progressively more been turned into an issue of sovereign discretion in a securitized agenda, the question of exit has become regulated by the discourse of fundamental rights: everybody has the right to leave his or her country. In this concluding Section, I will seek to reconcile these seemingly opposing tendencies, which result in an unambiguous asymmetry in the international legal framework regulating international movement.

How can we explain that entry is regarded as a matter so very different from exit? It cannot be contended that entry is different from exit merely because sovereignty has become popular sovereignty, because, if sovereignty is located in the people, it is possible to argue that not only control over entry into, but also control over exit from that voting, resource and rights claiming population is crucial to protecting

⁸⁰⁹ Huysmans (2000), p. 752.

⁸¹⁰ Anderson and Bigo (2002); Kostakopoulou (2004); and Huysmans (2000).

sovereignty.⁸¹¹ This line of reasoning can be countered with the basic premise underlying popular sovereignty: the voluntary contract entails that everyone should be free to decide whether or not to participate in the body politic. Nonetheless, although the latter argument can certainly be employed to claim a fundamental right to leave, it does not follow that there is no corresponding right to enter, as nothing in liberal theory justifies why solely a territorially predefined group is initially entitled to become party to the voluntary contract. Alternatively, arguments rooted in the communitarian tradition, maintaining that restrictions on entry are legitimate as they intend to protect an already defined community, whereas restrictions on exit replace commitment with coercion,⁸¹² perhaps serve to justify limitations on uncontrolled entry, but they do not in themselves show why coercion is not legitimate in the case of exit. Hence, neither they can explain the asymmetry of the present framework dealing with international freedom of movement.

The only way in which we are able to account for what at first seems a flagrant inconsistency in the contemporary system of movement controls is by taking into account the fundamental role that is played by territoriality. Two implications of territoriality as an organising principle for the global political system are essential in explaining the contemporary regulation of international movement.

In the first place, we need to consider territoriality's function in allocating distinct populations to distinct states and the resultant territorial bias in the concept of fundamental rights. In the second place, it is imperative to be aware of the reification of territoriality as a natural and innocent concept, which has led to a conceptual division within international law between sovereignty's territorial frame and its content as the exercise of jurisdiction within a given body politic. These two aspects of sovereignty are looked upon differently by international law: although the modern version of the rule of law has increasingly taken into account the personal interests that are involved in the jurisdictional content of state sovereignty, its territorial frame is considered neutral, resulting in the existence of largely unrestrained power whenever the state presents its claims as based upon sovereignty's territorial frame.

In order to clarify how these two, mutually reinforcing, implications of territoriality have shaped the global system of movement controls, I will address their

⁸¹¹ Shanks (2001), p. 268.

⁸¹² See Walzer (1983).

role in the overall framework of movement controls as was dealt with in this and the previous Chapter in Section 5.6.2. Subsequently, I will support my argument concerning territoriality's importance by demonstrating in Section 5.6.3. how most limitations to the sovereign right to exclude, with particular emphasis on refugee law, operate from territoriality's logic. We will see that the only exception to such particular territorial logic is constituted by international law's prohibition on torture or cruel or degrading punishment. However, even with regard to this prohibition, states increasingly seek to evade their obligations by deterritorialising the tools with which they deal with unwanted immigration. Thus, even in the case that territory and rights have to a certain extent become decoupled, states strategically make use of what they stubbornly wish to perceive as the territoriality of their responsibilities. Finally, in section 5.6.4., I will explain the appeal of immigration detention in particular as a response to unwanted immigration.

5.6.2. Territoriality and the asymmetry of international movement

European states' insistence on their sovereign prerogative to control the entry and stay of foreign nationals has led to the contradictory situation that the function of Europe's eastern frontiers in controlling individual movement do not differ much from their role during the Cold War. This situation is especially paradoxical because the same countries that were vilified by the West because they infringed the right to leave during the Communist era were shortly after the fall of the Berlin wall reprimanded for causing too many illegal entries in Western European countries.

The result is that a country such as Romania introduced extensive regulations concerning exit controls; regulations that, it could easily be argued, violate the right to leave in unambiguous terms. For instance, Romanian citizens who overstay their visa in EU countries can, upon return to Romania, be sanctioned by Romanian law from suspending the right of free circulation to the annulment of the right to bear a passport.⁸¹³ In addition, anyone wishing to depart from Romanian territory must prove that he will return within three months by showing transportation documents pertaining to a round trip. Furthermore, possession of an amount of €100 per day and a valid health

⁸¹³ Lazaroiu and Alexandru (2005), p. 6.

insurance must guarantee that the traveller will not fall back on public funds of the host country.⁸¹⁴

All of these requirements constitute interferences with the right to leave.⁸¹⁵ As we have seen in Chapter 4, restrictions on the right to leave can only be invoked under a limited number of circumstances. It is highly disputable whether the fight against irregular immigration by another country constitutes a justifiable ground for interfering with the right to leave. Invoking the public interest of another country in order to restrict fundamental rights of nationals is, to say the least, unusual. A complicating circumstance with regard to the judicial scrutiny of such interferences is that it will almost be impossible to assess their necessity and proportionality. Clearly, these new regulations on the part of Romania are motivated by a wish to acquire good relations with the EU, with an eye on possible future accession.

Detailed exit regulations such as discussed above exemplify unambiguously how the right to leave in the national context is affected by the exclusionary powers of other states. In the conclusions to Chapter 4, I have referred to various attempts made by third states to stem “illegal emigration”, a concept that in this context is not so much introduced in order to protect a clearly defined national interest, but resulting from the wish to assist Western states to stem the flows of unwanted immigration.⁸¹⁶

However, also without any action on the part of the state who ought to guarantee the right to leave, that right is factually jeopardised by everyday practices of Western states: visa policies, readmission agreements, the stationing of airport liaison officers in other countries and the vigilant patrolling of borders by use of watch towers, military and police all result in the inability of individuals to exercise their right to leave. Thus, it has been said that “instead of being chained to the soil of a feudal lord, the twentieth century poor gradually became chained to the territory of their countries of origin because other countries’ rules forbade them entry.”⁸¹⁷ A new step in the ‘externalisation’ of border control is the recent launch of EU patrols in the

⁸¹⁴ Ibid. p. 6.

⁸¹⁵ General Comment 27 (Sixty-seventh session, 1999) at 8.

⁸¹⁶ I.e. in August 2006, the Senegalese police forces in Basse-Casamance interrogated 58 people who wanted to migrate ‘illegally’ to Spain. Source: JeuneAfrique.com, 3 august 2006, Senegal. Senegalese authorities announced that they arrested 15000 candidates for ‘illegal’ emigration. Source: AFP, 22 May 2006.

⁸¹⁷ Dummett and Nicol (1990), p. 13.

Mediterranean under the auspices of Frontex. Already since June 2006, several Spanish boats patrol Mauritanian territorial waters, in order to prevent 'clandestine emigrations'. These policies have the declared aim of being a deterrent for people who want to leave: "L'objectif est dissuasif. Il faut que les candidats à l'émigration réalisent que les pays Européens sont là, bien présents, et qu'ils ne pourront pas partir."⁸¹⁸

At first sight, a legal regime of international movement that allows for these inconsistencies seems illogical.⁸¹⁹ However, as I have said, we need to understand that the contemporary system of movement controls is rooted in territoriality. Chapter 3 described how the international state system based on territoriality does not only constitute states and regulate conduct between them. It also brings about a dispersed regime of governance covering the overall population of the states concerned.⁸²⁰ This situation is reflected in international law, with its central notion that the state occupies a definite part of the earth within which it exercises jurisdiction over people to the exclusion of other states. International law in this sense is a distributing mechanism for determining which state can exercise sovereignty over a certain, well-defined group of people.⁸²¹

We have also seen that the rule of law requires that the exercise of sovereignty entails responsibility as well, a responsibility on the part of the state that has become embodied in the concept of fundamental rights. The result of territoriality's function of allocating distinct populations to distinct states is that rights, territory and authority have become linked to each other. Thus, the right to leave is to be guaranteed for its bestowment is upon people for whom the state clearly bears responsibility: those who are present within its boundaries. However, the claim of an individual to enter a state of which he is not a national falls outside the unassailable triangle of rights, territory and authority: it is a claim that is made by an individual to whom the state has no relationship according to international law and it is thus impossible to translate that particular claim in the language of rights.

Hence, international movement shows the very limitations of a discourse of universal rights antecedently and independently of any political power, which has to operate in a territorial world. The asymmetry between the right to enter and the right to

⁸¹⁸ Eduardo Lobo, the Spanish coordinator of the project. Source: *Le Monde* (12 August 2006).

⁸¹⁹ See McGrath Dale (1991).

⁸²⁰ Hindess (1998), p. 65.

⁸²¹ McCorquodale (2001), p. 142.

leave becomes understandable when we realise that territoriality's function in determining who belongs where, effectively also ascribes the responsibility for the protection of individual rights to a particular state.

In addition to territoriality's structuring role in the global political system, we have seen in Chapter 3 that territoriality has also led to the perception of territory as a self-evident and innocent foundation for the body politic in the domestic context. This perception in turn has resulted in little awareness of the individual interests that are involved in sovereignty's territorial frame, whereas the exercise of the state's jurisdiction over people within this territorial frame has in the course of history been made subject to various processes of legal accountability. Indeed, "norms of human dignity, whose enforcement was hitherto locked into state jurisdiction, have seen states yielding jurisdiction, but not territory which remains doctrinally entrenched."⁸²²

The fact that norms relating to human dignity have made a fundamental difference with regard to the right to leave, while leaving national discretion with regard to matters of exclusion largely intact can partly be explained by this conceptual distinction between sovereignty's form and content. Even though the right to leave also concerns sovereignty's territorial frame, the visibility of the personal interests involved have caused the issue of leaving to become a jurisdictional issue of the modern state where individual rights have an established role to play, while the implications of emigration for territorial sovereignty remain hidden and silent.

With regard to the right to enter, it is precisely the other way around. Immigration is presented as engaging solely sovereignty's territorial frame, frequently even in a language that implicitly or explicitly alludes to the sanctity of territorial boundaries in the context of armed conflict.⁸²³ Notwithstanding the fact that in order to prevent people from entering national territory and to remove them from it, sovereignty's content must actively be employed, it is the neutral territorial form of sovereignty that is put forward to justify an absolute right to exclude. The near blindness of modern human rights law for the personal interests that are involved in sovereignty's right to exclude is in this construction exacerbated by the fact that these

⁸²² Panglangan (2001), p. 165

⁸²³ See for example U.S Supreme Court in the *Chinese Exclusion Case (Chae Chan Ping v. United States)* (1889), p. 606.) The common use of the word 'invasion' when discussing immigration, in particular by those advocating an absolute right to exclude provides a more recent example of the same attitude as was taken in this latter case.

are the interests of others, who are far away, or very different. In other words, often these interests are frequently literally invisible as well.

International human rights' distinction between sovereignty's form and content does not only surface when we look at the difference in legal recognition between the right to enter and the right to leave, but it is also apparent from the way in which the proliferation of human rights norms in the last sixty years has made significant inroads in the state's power to exclude legally residing aliens, a subject which has received attention in Section 3.5.2. of Chapter 3. The state is no longer capable to dispose aliens at will once their entry or sojourn has been authorised. However, these norms have not "markedly increased rights entitlements at the moment of border crossing," nor have they "significantly increased access to human rights for those without legal status, those illegals beyond the reach of law but at the centre of present rhetoric."⁸²⁴ Human rights law's differentiation between the legal resident and the illegal immigrant here lies precisely in the alleged violation of the latter of the territorial sovereignty of the state. In addition, with regard to legal residents who are present within the territory of the sovereign state, the jurisdictional aspect of sovereignty cannot remain hidden: precisely on account of their authorised presence, their interests have become visible.

There is one last example that I want to address in order to draw attention to the import of territoriality upon the general framework of freedom of movement. When contrasting contemporary views on internal freedom of movement (i.e. within the territory of the national state) with international freedom of movement, the reification of territory as a natural foundation for political organisation is illustrated in yet another way. Internal freedom of movement is seen as one of the hallmarks of democracy.⁸²⁵ Restrictions upon it, such as in South Africa under apartheid and the Soviet Union under communism were generally and unequivocally condemned.⁸²⁶ While freedom of movement within a country is regarded as an indispensable condition for free development of the individual,⁸²⁷ international freedom of movement is nearly always subordinated to state interest. In the uneven perception of domestic and international

⁸²⁴ Dauvergne (2004).

⁸²⁵ Vestal (1955-1956), p. 14. Internal freedom of movement is guaranteed by all major human rights instruments. See for example Article 12 (1) ICCPR; Article 2(1) Protocol 4 ECHR; and Article 22(1) American Convention on Human Rights.

⁸²⁶ Higgins (1973), p. 343.

⁸²⁷ HRC, General Comment 27 (Sixty-seventh session 1999).

movement, the interconnectedness of territoriality's two implications becomes most palpable. On account of territoriality, the territorial state has become "the primary category in understandings of the political", and "the categories through which we have attempted to pose questions about the political are precisely those that have been constructed in relation to the state."⁸²⁸ Thus internal movement is a matter for scrutiny as it concerns processes taking place within the nation state, whereas international movement presents an anomaly for a world where humanity is divided in "separate, closed and homogenous units at various stages of development."⁸²⁹

Perceptions on freedom of movement exemplify the modern tension between the universal and the particular in a world divided into nation states: universal values are factually aspired and achieved solely within the nation state. In addition, the distinction between sovereignty's form and content plays an important role here as well: it is clear that the regulation of internal movement merely concerns the exercise of jurisdiction over persons within a given body politic, whereas international movement impinges significantly on sovereignty's territorial frame.

5.6.3. Territoriality and limitations on the state's exclusionary powers

"Because of the way we label, define and categorise people who move, we obscure and make invisible their actual lived experience."⁸³⁰

"A refugee is an anomaly in a world where the human population is managed by 'belonging' to a sovereign state as a national citizen. It is as a citizen of an exclusive state community that one can enjoy the 'universal' principles of equality, fraternity and liberty. A refugee is someone without the protection of her state and must seek protection in another state, where she is 'out of place'. Refugeehood indicates a transgression of the social contract between the state and its citizen. The purpose of international protection is to provide a surrogate state citizen condition until an authentic one can be established through repatriation, integration and/or settlement – the durable solutions for refugees. A durable solution is one that creates or restores the bond between a person as a citizen and a state as her legal protector."⁸³¹

⁸²⁸ Jarvis and Paolini (1995), p. 5.

⁸²⁹ Tully, p. 187.

⁸³⁰ Crosby (2006), p. 3.

⁸³¹ Lui (2002), at 57.

Territoriality's implications persist in the instruments that aim to constrain the state's exclusionary powers. Even in the situation in which general international norms limit the assertion of territorial sovereignty, less scope to rule of law considerations is given than in those cases that merely concern the state's exercise jurisdiction over nationals. One example is that norms with regard to judicial review of exclusionary powers are not very well developed, as we have seen in Section 5.3.1. That Section also showed that whenever a national state's public order or national security is allegedly threatened, international norms restricting exclusionary powers lose much of their strength. Here again we encounter an asymmetry with regard to the right to leave that cannot be understood when we disregard fundamental rights discourse's rootedness in territoriality. In this Section I will argue that even though international law's limitations on the state's exercise of sovereignty in matters of immigration may appear as exceptions to territoriality's logic, in essence most of these limitations operate from that very logic.

In Section 5.2., I have already touched upon the relationship between the emergence of international refugee law and the way in which national identity, rights and territory had become linked in the beginning of the twentieth century. Refugees internationally, just as minorities within national boundaries, presented a challenge to the territorial state system, and the institution of asylum, just as the system of minority protection, intended to ensure that the Westphalian image of the world kept its validity. Robin Lui argues that emergence of refugee law was crucial to the management of population displacement and refugee law itself served to affirm the significance of an international order of states as a mechanism to govern human populations and to realise peace and stability.⁸³² In order to see this clearly we need to understand the central position of the national state within classical refugee law.

In the first place, we have seen that the granting of asylum is part of the competence arising from the territorial sovereignty of the sovereign state.⁸³³ No right of asylum on the part of the individual exists in international law. Secondly, the state is central for the definition of the concept of persecution in the refugee definition: the Geneva Convention does not protect against any kind of harm, but only then when there is "a risk of a type of injury that would be inconsistent with the basic duty of protection

⁸³² Lui (2002).

⁸³³ Oda (1968), p. 490

owed by a state to its own population.”⁸³⁴ Asylum law is a form of subsidiary human rights protection, a back-up system in the case that the normal way in which individual rights are guaranteed, has failed.⁸³⁵ Just as citizenship then, asylum law works from the territorial premise that allocates the responsibility over distinct populations to distinct states. In the third place, the definition of the refugee reveals the centrality of the national state in a further sense:

(...) in international law a refugee is defined solely in state terms. The Geneva Convention and other international legal agreements limit refugee status to those who have left their state of origin because of persecution or violence and who are unable to return for the same reason. In practice this means that an Ibo woman who is forced to leave her homeland in Nigeria can claim refugee status if she moves across the border into the Ibo part of Cameroon, but not if she moves in a culturally alien part of Nigeria.⁸³⁶

Thus, the extent to which international refugee law is capable of offering protection is dependent on the way in which territorial boundaries are drawn. Robyn Lui writes that “categorisation and characterisation of population displacement are techniques of ordering” and she argues that the question of who is included and excluded from the category of ‘refugee’ is just as important as inclusion and exclusion from the nation-state community.⁸³⁷ Indeed, the answer to both of these questions is decided by the way in which rights, territory and political authority have become linked in a historically specific way. The “techniques of ordering” to which Lui refers, reflect the territorial ideal in which this linkage is embodied. Just as the territorial ideal has determined the way in which rights are guaranteed in the context of domestic law, in international refugee law it affects the extent of rights to be enjoyed by the individual as well. Internationally, the legal position of the Ibo woman who did not cross any national border is much less secure than that of her sister who did: there are several areas of insufficient protection and various clear gaps in the international law that deals with internally displaced persons.⁸³⁸

⁸³⁴ Hathaway (1991), p. 104.

⁸³⁵ Nathwani (2003).

⁸³⁶ Murphy (1996), p. 105.

⁸³⁷ Lui (2002), at 66.

⁸³⁸ See UN Representative of the Secretary-General (1995).

The centrality of the state within traditional refugee law is understandable when we consider the period in which the international refugee regime emerged. According to James Hathaway, the physical presence of a person outside her country of origin was not so much a constitutive element of her refugeehood, but rather a practical condition precedent to placing her within the effective scope of international protection. He argues that when refugee law developed it was unthinkable that it would intervene in the territory of a sovereign state to protect citizens from their own government.⁸³⁹

We have seen that contemporary international human rights law aims at the creation of a constitutional order over and across national boundaries. In contrast to classical international law, international human rights are much less concerned with the principle of non-intervention or the notion of domestic jurisdiction. Below, I will answer the question whether this has reduced the logic of territoriality in international law's attempts to limit the sovereign right to exclude.

We have seen that the principle of non-refoulement, which originates from traditional refugee law, has significantly expanded under the influence of human rights law. Especially the prohibition on torture and other inhuman or degrading punishment has played a major role in diminishing the state-centred, territorial focus in classical asylum law. Refoulement is prohibited to any territory where there is a real risk of torture or other cruel or inhuman treatment as a result of refoulement. For the interpretation by the ECtHR of Article 3 ECHR it is irrelevant whether the state bears responsibility, directly or indirectly, for the prohibited treatment. Thus, territoriality's logic, by which different states are accorded responsibility for separate populations, is absent from the Court's application of Article 3 ECHR. The HRC applies the relevant law in the same manner. In addition, by applying the prohibition on torture and other cruel or degrading treatment on asylum seekers and other persons who are not authorised to enter or stay on national territory, it is made explicit that individual interests are positively involved in sovereignty's territorial frame. This important recognition on the part of the ECtHR is in fact only emphasised by its frequent reiteration that there is no right of an alien to enter or to reside in a particular country as such guaranteed by the Convention, and that as a matter of well-established international law, a state has the right to control the entry of non-nationals into its territory.

⁸³⁹ Hathaway (1991), p. 30-31. Cf. Chimni (2000), p. 392.

However, it should also be noted that the individual interests that may be implicated in sovereignty's territorial frame are narrowly interpreted, both by the ECtHR and the HRC. The real risk construction is only applied to the prohibition of cruel or degrading treatment and occasionally to the right to life. Territorial exclusion that may result in the violation of other fundamental rights is generally not a reason to prohibit refoulement. Nonetheless, there is no logical reason why a consistent application of the way in which the norm of non-refoulement is constructed in Article 3 ECHR in cases where other fundamental rights are involved, would not lead to comparable limitations on the sovereign right to exclude.

Hence, modern human rights law has only in a limited amount of cases decoupled territory and rights: apart from the right to life and physical integrity it still accords the responsibility for safeguarding individual rights according to territoriality's logic. Neither does it concede that sovereignty's territorial frame and the resulting use of the state's spatial powers may involve other individual interests than those related to the physical integrity or the right to life of the individual, that is, with the possible exception of an individual's family life, to which I will turn now.

In Section 5.3.3., I have investigated the way in which the right to family life may limit the sovereign state's exclusionary powers. At first sight it seems that the way in which the ECtHR applies Article 8 ECHR (and similar case law of the HRC based on Article 7 ICCPR) in exclusion cases amounts to recognition that individual interests are involved in the assertion of a state's territorial sovereignty. For a right to enter or remain is constructed on account of the interest of the individual in being able to enjoy an effective family life. Nonetheless, when this proposition is closely scrutinised it becomes clear that family rights can only constitute a barrier to the state's exclusionary powers if a person's family members are legally residing within the state's territory. This observation serves to illustrate that when the state's exclusionary powers are limited by an individual's family rights, there is a direct link with sovereignty's jurisdictional content, and that, in applying Article 8 ECHR, the Court employs the traditional construction by which responsibility for the safeguarding of rights is assigned to states according to territoriality's logic. Thus, limitations on sovereignty in matters of exclusion on account of family rights differ fundamentally from the prohibition of refoulement that I have discussed above.

Even so, it should nevertheless be valued that in the case law of the ECtHR and the HRC, the interest of the individual in the enjoyment of his family life has at times

been able to override the state's exclusionary powers. On the other hand, the ECtHR and the HRC seem to consider the right to control entry and residence on national territory in itself as a fundamental interest of the state, from which only special circumstances can cause a departure. However, recent case law of the ECtHR, which takes the notion of *suitable* family life as a point of reference, suggests a growing reluctance to endorse territorial sovereignty's aim of allocating distinct populations to separate states by the use of a formal concept such as nationality.

This does not signal an overall departure on the part of the ECtHR from the importance which international law attaches to the concept of territorial sovereignty in immigration law. The way in which that court deals with family life established while an applicant was unlawfully in the state's territory, and the distinction between positive and negative obligations in its case law, exemplify the remaining reification of territorial sovereignty and the distinction between sovereignty's territorial frame and its jurisdictional content within a given body politic. We have seen that international law regards an individual whose presence on national territory is illegal as someone who has never entered. The Court in Strasbourg follows this construction, therewith construing the family rights to which the undocumented migrant may appeal so as to relate to entry. These rights are subsequently seen as corresponding to a positive obligation of the state.

Similarly, the refusal of entry is not viewed as an interference with somebody's family rights because a right to enter is not regarded as to correspond to a negative obligation of the state (to abstain from any action) but instead as pertaining to a positive obligation. However, it is important to understand that these legal fictions do not reflect any actual situation: in order to prevent entry or to remove irregular migrants from its territory, the national state is actively and positively performing. By structuring rights discourse in such a way as to give priority to the fiction of territorial sovereignty over the actualities of the exercise of jurisdiction over individual's lives, human rights law feeds "the contradiction between undocumented migrants' physical and social presence and their official negation as 'illegals'."⁸⁴⁰ Again we see illustrated the invisibility of the personal interests that are affected by state power whenever sovereignty's claims are predominantly based on sovereignty's territorial form.

⁸⁴⁰ De Genova (2002), p. 427.

In Chapter 3, I have argued that three separate perspectives are important to understand the way in which territory and fundamental rights interact. In Section 3.5.3.1., I argued that territoriality has construed space as a political concept, which concept subsequently determines who has actual access to fundamental rights, notwithstanding the alleged universality of these rights. In addition, in Section 3.5.3.2., I have made the claim that on account of its reification in the modern world, territoriality has resulted in virtual silence on the part of human rights when it comes to the exercise of the state's spatial powers whenever they are a direct result of sovereignty's territorial frame. These implications of territoriality on human rights law have been applied to the specific context of freedom of movement and the sovereign right to exclude in the previous paragraphs.

We have seen that the only instance in which human rights appear to succeed in overcoming territoriality's limiting influence is in the application of the prohibition on inhuman and degrading treatment. Thus, it seemed justified to conclude that territory and rights are decoupled in the case that the state's exclusionary powers are constrained by a norm such as contained in Article 3 ECHR. However, in reaching this conclusion a third perspective on the relationship between territory and international human rights law has not yet been considered. In Section 3.5.3.1. of Chapter 3, I have also looked at the territorial scope of the human rights obligations of the state. We have seen that the issue of state responsibility for extra-territorial acts is a complex matter, mainly on account of the diverging interpretations that have been given to the term jurisdiction. Especially the recent decision by the ECtHR in *Bankovic* does not help in laying down clear-cut guidelines for determining when a state can be held responsible for extra-territorial acts.

In the more recent cases that are decided in Strasbourg, the Court has considered recognition of the exercise of acts of extra-territorial jurisdiction exceptional. In *Bankovic* it held onto an understanding of jurisdiction in the classic sense, as a concept that regulates the relations of sovereign states amongst each other. I have already observed in Chapter 3 that such an interpretation fits ill within a system for the protection of individual rights. Especially the Court's observations regarding the legal space that the Convention aims to cover,⁸⁴¹ remind of the old blue print of citizenship, in which territory is determinative for the extent of rights to be enjoyed, precisely the

⁸⁴¹ ECtHR, *Bankovic and Others v. Belgium* (inadmissible), 12 December 2001, §80.

situation that modern human rights law wished to thwart. Indeed, if consistently applied, holding that the Convention only applies within the legal space that it normally aims to cover leads to “a rather distasteful distinction between what Contracting Parties can do ‘at home’ and what they can do ‘abroad’, and, by implication, between ‘us’ and ‘them’.”⁸⁴² Nonetheless, it should be reiterated that the narrow interpretation that was given to extra-territorial responsibility for human rights violations in *Bankovic* was mitigated again in later cases decided by the Court.

The issue of extra-territorial responsibility for actions that affect the fundamental rights of individuals is of particular importance in the context of the contemporary regulation of international movement. We have seen that especially in the context of the EU, there has occurred a spatial extension of control far from the EU’s actual frontiers.⁸⁴³ *Police à distance* methods such as visa polices; the stationing of airport liaison officers in host countries; interception practices at the high seas; and plans for the extraterritorial processing of refugee claims, all point to sovereign states’ wish to control international movement without having to assume responsibility. In these practices we can discern Western states’ perception that possible loopholes in an internationally administered rule of law lie precisely in what they perceive as the territoriality of their responsibilities. Australia’s ‘pacific solution’ as was described in Section 5.4.2. of this Chapter provides a good example of just such an approach. The incident in 2001, in which the MV Tampa, a Norwegian ship carrying 422 asylum seekers who were rescued at sea, was prevented from entering Australian waters, provides a dispiriting illustration of Australia’s position that its responsibility for the protection of fundamental rights is limited by its territorial boundaries. In addition, Australia resorts to immigration detention outside its national territory in order to deny refugees and other immigrants fundamental rights.

Employing a similar logic, the United States has maintained that its policy of intercepting Haitian refugees on the high seas and returning them to Haiti did not violate international law as the principle of non-refoulement was not applicable in a situation where a person is returned from the high seas to the territory from which he fled.⁸⁴⁴ The United States Supreme Court concurred with this view, observing that

⁸⁴² Happold (2003), p. 88.

⁸⁴³ Samers (2004), p. 43.

⁸⁴⁴ Submissions of the United States in Inter-American Commission of Human Rights, *the Haitian Centre for Human Rights et. Al. v. United States*, 13 March 1997.

although gathering fleeing refugees and returning them to the one country they had desperately sought to escape may violate the spirit of Article 33 of the Refugee Convention, general humanitarian intent cannot impose unanticipated obligations on treaty signatories.⁸⁴⁵ The Inter-American Commission of Human Rights in contrast approached the matter not from the perspective of the Refugee Convention, but instead it scrutinised the U.S. Executive Order that directed the Coast Guard to intercept vessels illegally transporting passengers from Haiti to the United States and to return those passengers to Haiti, in the light of the provisions laid down in the American Convention of Human Rights. It held that not only did the Order infringe the right to seek and enjoy asylum as guaranteed by the American Convention, but in addition, it violated the right to life and security, as some of the persons thus returned were subsequently killed or tortured by the Haitian government.⁸⁴⁶ The fact that these violations occurred on the high seas, thus not within United States territory did not impede the IACHR from drawing this conclusion.

In the light of the *Öcalan* case, in which it stressed the existence of physical control and actual authority by agents of the state when acting extra-territorially, it is doubtful whether the ECtHR would recognise that functions performed by airport liaison officers would constitute an exercise of jurisdiction as meant in Article 1 ECtHR. In a case that was brought before the House of Lords, appellants were refused leave to enter the UK by British immigration officers who were, by agreement between the United Kingdom and the Czech Republic, stationed at Prague Airport. In effect, this meant that they were effectively hindered from boarding a plane bound for that country. The House of Lords did not squarely answer the question whether the actions performed by these officials constituted the exercise of extra-territorial jurisdiction, but it expressed the gravest doubt that they would. In addition, it considered that, even if it would allow for the assumption that the United Kingdom exercised its jurisdiction extraterritorially in this case, appellants were at any time free to travel to another country or to travel to the United Kingdom otherwise than by air from Prague. Thus, there could be no question of a violation of Article 2, nor of Article 3 ECHR.⁸⁴⁷ These

⁸⁴⁵ US Supreme Court, *Sale, Acting Commissioner, Immigration and Naturalization Service, Et. Al. v. Haitian Centers Council, INC., Et. Al.*, No. 92-344, decided June 1991 (1993).

⁸⁴⁶ Inter-American CommHR, *the Haitian Centre for Human Rights et. Al. v. United States*, 13 March 1997.

⁸⁴⁷ House of Lords, *Regina v. Immigration Officer at Prague Airport*, 9 December 2004, at 21.

observations contrast sharply with the arguments submitted by the UNHCR in its *amicus curiae* brief that it filed in the same case.⁸⁴⁸ By claiming that the United Kingdom effectively extended its frontier into the Czech Republic, the UNHCR recognised that the stationing of airport liaison officers leads to a separation between the concept of the border and the perimeter of British territory. It was argued that in this situation, the United Kingdom should remain bound by its international obligations, and that close scrutiny is required of extra-territorial measures that impinge on human rights, as regular access to the courts may be restricted for practical or jurisdictional reasons.⁸⁴⁹

However, the “shipping out” of the control agenda entails more than placing police and customs officers in third country airports, as is illustrated by Frontex’s project to install patrols in the territorial waters of Mauritania, Senegal and Cape Verde. The intent of these patrols, which are carried out with the aid of the individual Member States Finland, Spain and Portugal, is clear: prevention of international movement. Spain and Senegal reached agreement over joint patrols commandeered by two vessels of the Spanish Guardia Civil in Senegal’s territorial waters.⁸⁵⁰ In August 2006, a Portuguese patrol vessel arrived at Cape Verde for a 45-day mission against ‘illegal’ migration.⁸⁵¹ The Spanish-Mauritanian patrols that have been running since April 2006 have resulted in the interception of several hundreds of emigrants.⁸⁵² Those individuals are intercepted by joint operations between individual EU Member States and third countries and are subsequently put aboard military vessels that are controlled and owned by EU Member States.

However, in view of Frontex’s imprecise role in these operations and the vagueness surrounding the legal bases on which these schemes of international cooperation operate, it is uncertain whether the ECtHR would be willing to recognise that the actions of the Member States involved constitute an instance of the exercise of jurisdiction for the purposes of Article 1 ECHR.⁸⁵³ If it would recognise that operations of Member States that lead to the arrest of individuals in the coastal waters of certain

⁸⁴⁸ UNHCR (2005).

⁸⁴⁹ *Ibid.* p. 452.

⁸⁵⁰ Source: Reuters, 22 August 2006.

⁸⁵¹ Source: JeuneAfrique, 12 August 2006.

⁸⁵² Source: Agence Presse, 14 August 2006.

⁸⁵³ See ECtHR, *Hussein v. Albania and others* (Inadmissible), 14 March 2006.

West African countries involve the exercise of their jurisdiction, complex issues would arise with respect to Article 5 ECHR⁸⁵⁴ and Article 2 Protocol 4 ECHR. In that case, it is difficult to see how the Member State involved could avoid being condemned for violating the right to leave as laid down in the latter provision.

The question as to how extra-territorial measures in the field of immigration may or may not engage the responsibility of states in the interpretation of (inter)national courts is without doubt an interesting and highly significant one. The legal complexities of extra-territorial jurisdiction are compounded by the fact that extra-territorial measures targeting international movement are increasingly carried out in the framework of the EU.⁸⁵⁵ But even without meticulously analysing these complexities, the very fact that states turn to *police à distance* policies, reveals that they themselves feel that access to the perimeter of their territory is decisive for the extent of rights to be enjoyed, also with regard to their obligations flowing from the norm contained in Article 3 ECHR. And once again, irrespective of how a court of law may judge such an assumption, it certainly reflects contemporary reality where in most cases, access to fundamental rights remains inexorably linked to territory because:

For obvious reasons there are very few cases which could in fact challenge the policies constituting the non-arrival regime because the concerned individuals rarely get the chance to get in close contact with a lawyer who could bring their cases to court.⁸⁵⁶

5.6.4. Maintaining the territorial order

It is important to realise that immigration policies are not merely a result of the contemporary system of territoriality. Practices such as deportation and detention actively contribute in reproducing the territorial order in which different populations are ascribed to distinct states. In this sense, immigration laws are not only a “functional by-

⁸⁵⁴ ECtHR, *Öcalan v. Turkey*, 12 March 2003; and EcommHR, *Stocké v. Germany*, Decision of 12 October 1989.

⁸⁵⁵ Thereby introducing even more aspects to be considered with regard to Article 1 ECHR and the application of the Convention. See ECtHR, *Bosphorus etc. v. Turkey*, 30 June 2005, §§136-137 and 156.

⁸⁵⁶ Kjaerum (2002), pp. 525-526.

product of some presumed (and thus teleological) structural logic,"⁸⁵⁷ but they are essential in maintaining the territorial *status quo*. The distinctiveness of immigration detention in particular is that it provides a territorial solution for a problem which is perceived as a problem precisely because it cannot be reduced to a territorial solution. Moreover, the appeal for national states in resorting to immigration detention lies in its additional value of providing an extra-territorial way to deal with unwanted immigration. As a result, they can evade regular constitutional norms that apply to domestic deprivations of liberty. It is noteworthy that, during the nineties, infamous Guantanamo was used by the U.S. government to detain Haitian and Cuban asylum-seekers, who could not rely on a constitutional right to liberty by invoking the habeas corpus jurisdiction of federal courts.⁸⁵⁸

Hence, by resorting to immigration detention, national states do not only aim to protect the territoriality of fundamental rights protection, but in addition, they seek to make ultimate use of its territorial blind spot. In the remaining Chapters of this study, I will analyse whether the application of international human rights to cases of immigration detention is capable of reversing this situation.

⁸⁵⁷ De Genova (2002), p. 424.

⁸⁵⁸ *Cuban American Bar Association v. Christopher*, 43 F. 3d 1412, 1425 (11th Cir. 1995).

Chapter 6 Immigration detention and international human rights

6.1. INTRODUCTION

In this and the next Chapter of this study, I will deal with the way in which the international discourse of human rights has posed limits to the state's power to resort to immigration detention. I will focus on the international regime of human rights instead of particular national constitutional discourses, because of international human rights' explicit aim of overcoming the 'particular universalism' that one finds in traditional versions of the rule of law. Moreover, I will limit my investigation to the application of international human rights by international bodies, with particular emphasis on the ECtHR. That is not because national courts do not have an important role to play in this area: for we have seen in Chapter 3 that especially with regard to the modern version of the rule of law, the distinction between national and international law has become a blurred one. International law in this field has a decisive impact on individual rights protection at the national level as domestic courts may apply a broad range of international norms pertaining to the protection of human dignity. However, for reasons concerning the length of this study, I will not examine the role of national courts in cases of immigration detention apart from occasional references as illustrations for a particular argument or position.

In Chapter 1, we have seen that the use of immigration detention by EU Member States can be divided in three categories. These are detention upon arrival; detention of individuals within the asylum system; and detention as a result of a decision to deport or expulse the foreigner. In all these three, sometimes overlapping, instances, detention is employed in order to protect and vindicate the presupposed sovereign right of the state to decide on matters of entry and stay of foreign nationals, as was elaborated upon in the previous Chapter. There we have also seen that the practice of detention is not only the result of a particular conception of (territorial) sovereignty that holds that refusal of entry of foreign nationals and removal of persons not lawfully within the state's

territory fall almost wholly within the state's sovereign discretion. Detention is also essential in maintaining the territorial status quo of a global political system based on territoriality. Furthermore, in the overview regarding state practice in this area that was provided in Chapter 1 (Section 1.1.2.), it has become clear that many regular constitutional norms either are not applicable, or they are for a variety of reasons not applied by national states to the deprivation of liberty under immigration legislation. The perceived neutrality and naturalness of sovereignty's territorial frame has led to a territorial blind spot in the rule of law, which in turn has made detention an attractive policy option – on account of its perceived unassailability – for national governments wishing to fight irregular immigration and decrease the numbers of asylum applications.

A good illustration of this position is given by Australia's submissions in some of the cases that were brought against it before the HRC. Australia has mandatory detention provisions in its alien's legislation, and unlawful arrivals must be arrested on arrival and cannot be released except when a residence permit is granted.⁸⁵⁹ Australia maintains that the purposes of such detention reflect the state's sovereign right under international law to regulate the admittance of aliens, and hence such detention cannot be unjust, inappropriate or improper.⁸⁶⁰ Its reasoning is not logical from a legal perspective – it is saying that if a certain state act flows from a sovereign right recognised under international law, it cannot be in violation of a fundamental right. Such an argument by a liberal democracy would be inconceivable in a purely 'domestic' context – dealing with, say, freedom of expression – where only the content of sovereignty and not also its territorial frame played a role.

However, when defending policies of immigration detention it is all but exceptional to find such statements issued by national governments and they provide outstanding examples of the assumption that the territorial frame of sovereignty is immune to forces of legal correction and thus forms an "unproblematic and legitimate site of legal violence".⁸⁶¹ Another, slightly more disguised, illustration of that assumption can be found in the contentions of the Belgium government in the *Čonka Case* before the ECtHR, in which it stated that to employ a 'little ruse' in order to arrest irregular migrants and subsequently detain them could not be illegal as they had been

⁸⁵⁹ 1958 Migration Act. Section 189.

⁸⁶⁰ For example: *Bakhtiyari v. Australia*, 6 November 2003.

⁸⁶¹ Burke (2002), at 14, with regard to sovereignty in general.

⁸⁶¹ De Genova (2002), p. 424.

served with orders to leave the territory, which expressly stated that they were liable to detention with a view to deportation if they failed to comply.⁸⁶²

In the remainder of this study, I will analyse whether international human rights may destabilize such a perception of sovereignty's territorial frame. Due to its unique manner of implementation and the right of the individual to appeal directly to the ECtHR, the case law of this Court is arguably the best place to conduct such an analysis with regard to the situation in Europe. However, before turning to the way in which the Strasbourg Court addresses immigration detention as an example of the approach of an international constitutional court in Chapter 7, in this Chapter I will first sketch a general outline of the human rights regime relevant for the topic under consideration.

Accordingly, it will give a wide overview of human rights instruments that are applicable to the practice of immigration detention. It should be noted that not all instruments that are significant for that practice will be discussed. The matter under consideration in this study is the state's power to resort to detention under immigration legislation, rather than subsequent conditions of detention as such. Therefore discussion in this and the next Chapter will concentrate on the way in which the particular right of personal liberty is protected in international human rights law. With regard to procedural guarantees it will be principally those that are included in the scope of this right which will receive attention.

This Chapter is divided in five Sections. Section 6.2. deals with universal protection of the right to personal liberty, as laid down in Article 9 ICCPR. Substantial guarantees as well as procedural requirements of this provision such as formulated by the HRC and other international human rights bodies will be discussed with specific regard to their implications for the practice of immigration detention. Thereafter, international instruments specifically devised for asylum seekers and refugees will be focussed on in Section 6.3. Section 6.4. addresses the human rights discourse pertaining to immigration detention in the framework of the Council of Europe (excluding the ECHR). In Section 6.5., I will present some preliminary observations regarding international human rights discourse's potential for destabilizing sovereignty's territorial frame, when applied to questions of immigration detention.

⁸⁶² ECtHR, *Conka v. Belgium*, 5 February 2002, par. 37.

6.2. PERSONAL LIBERTY AND ARBITRARINESS: UNIVERSAL HUMAN RIGHTS

6.2.1. Scope and character of the right to personal liberty

In societies based upon the rule of law there is no more serious interference with an individual's fundamental rights as depriving him of his liberty. Chapter 2 has made clear that personal liberty and sovereignty are conceptually intertwined: the protection of the former is the reason for the existence of the latter. The right to liberty of person is also one of the oldest recognised basic rights,⁸⁶³ and a fundamental principle of international human rights law.⁸⁶⁴ However, this does not mean that the right to liberty is an absolute right which can not be restricted by states. On the contrary, there are many instances in which international law recognises that deprivation of liberty is a legitimate form of state control, thus not in violation of the right in question.⁸⁶⁵ International human rights law concerning the right to liberty revolves around the conditions that need to be fulfilled in order for a detention or an arrest not to be arbitrary as the prohibition on arbitrariness constitutes the core of the right in question.

⁸⁶³ Magna Carta 1215, Article 39: "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land." Accordingly, the English Habeas Corpus Acts of 1640 and 1679 codified and perfected an already existing procedure by which somebody deprived of his liberty could challenge detention by the King and Council (Marcoux, 1982, p. 347). See also Article 7 of the French Declaration of the Rights of Men and the Citizen, 1789.

⁸⁶⁴ Article 3 and 9 of the UDHR; Article 9 of the ICCPR; Article 5 ECHR; Article 6 of the 2000 Charter of Fundamental Rights of the European Union; Article 7 of the 1969 American Convention on Human Rights; Article 6 of the 1981 African Charter on Human and Peoples' Rights; Article 20 of the 1990 Cairo Declaration on Human Rights in Islam; Article 20 of the 1994 Arab Charter on Human Rights. There are some instruments that deserve special mention: Article 5(a) of The Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live (1985), and Article 16 of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. Most human rights instruments protect the right to personal liberty together with the right to security of person. Whereas the ECtHR has not, as we shall see, accorded the right to security of person an independent status alongside the right to personal liberty, the right to security in Article 9 ICCPR aims to guarantee state protection against interference with personal integrity by private persons (Nowak (1993), p. 162; and HRC, *Delgado Paez v. Columbia*, 12 July 1990, par. 5.5, 5.6, 6). Accordingly, it can be defined as a right with horizontal effects, and is accordingly not relevant for this study.

⁸⁶⁵ Joseph, Schulz and Castan (2003), p. 304.

The term liberty of person refers to freedom of bodily movement in the narrowest sense, which implies that interference with the right occurs only if a person is forced to remain at a certain narrowly confined space. All less serious restrictions on bodily movement fall under the scope of the right to freedom of movement and are not covered by the protection offered by the right to liberty.⁸⁶⁶ Noteworthy in this respect is Article 9 of the UDHR, which combines the right to personal liberty with freedom of movement, for this provision stipulates that no-one shall be subjected to arbitrary arrest, detention or exile. As I have already mentioned in Chapter 1, only those individuals that are placed in closed centres, or are unable to leave any other narrowly confined location, such as an airport transit zone, fall under the protection of the right to liberty.⁸⁶⁷ When considering whether a person is in detention, the cumulative impact of the restrictions, as well as the degree and intensity of each one should be assessed.⁸⁶⁸

Another restriction on the scope of the protection offered by the right to liberty is that it should be seen as applying only to the fact of deprivation of liberty itself and the specific procedural guarantees that are part of it.⁸⁶⁹ In general, a person who is mistreated whilst in detention cannot claim a violation of the right to personal liberty or security. However, taking into account that the conditions of detention may in a limited amount of cases bear upon the question of its possible arbitrariness, arguably especially so in the field of immigration detention, I will briefly pay some attention to their relationship in Section 6.2.2.3.

6.2.2. Article 9 of the International Covenant of Civil and Political Rights

In the remainder of this Section, I will focus on Article 9 of the ICCPR. While discussing this provision, I will in particular pay attention to jurisprudence of the

⁸⁶⁶ See HRC, *Celepli v. Sweden*, 18 July 1994; and *Karker v. France*, 26 October 2000.

⁸⁶⁷ Deliberation No. 5. of the Working Group on Arbitrary Detention (UN Commission on Human Rights, 28 December 1999).

⁸⁶⁸ UNHCR (1999) Revised Guidelines on the Applicable Criteria and Standards Relating to the detention of asylum seekers, Guideline 1.

⁸⁶⁹ Nowak (1993), p. 160.

Human Rights Committee (HRC) under the Optional Protocol of the ICCPR,⁸⁷⁰ as well as to reports and documents of the Working Group on Arbitrary Detention, a UN body entrusted with the investigation of instances of alleged arbitrary deprivation of liberty and detention otherwise inconsistent with international legal instruments.⁸⁷¹

Article 9 ICCPR: 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 9 ICCPR does not provide an exhaustive list of situations in which detention may be permitted, but it simply forbids arbitrary detention, as well as detention that is unlawful. The initial draft of Article 9 ICCPR contained a list of permissible grounds for detention. However, there were quite a few states that thought that this list was too limited, and proposed an additional number of reasons for restriction. It soon became obvious that to reach agreement on permissible grounds for deprivation of liberty would be impossible. Besides, an enumeration of about forty exceptions to the right to liberty was not considered to make a favourable impression.⁸⁷² Therefore two proposals that respectively prohibited arbitrary as well as unlawful

⁸⁷⁰ Under the optional Protocol, the HRC is entitled to receive communications from individuals who claim to be victim of a violation of any of the rights in the Covenant if that violation is committed by a State who is party to the ICCPR and the Optional Protocol.

⁸⁷¹ Established by Resolution 1991/42 of the Commission on Human Rights, which extended and clarified its mandate in resolution 1997/50.

⁸⁷² Nowak (1993), p. 164.

detention were accepted, and no list of exceptions to the right to liberty found its way into the ICCPR.

6.2.2.1. Prohibition of arbitrariness in Article 9 ICCPR

It is clear from the wording of Article 9 ICCPR and its drafting history that arbitrary cannot be equalled with unlawful in the narrow sense of that word.⁸⁷³ The prohibition of an unlawful detention in that sense is expressed in the third sentence of Article 9 ICCPR, which refers to the principle of legality, requiring that detention must be in accordance with a procedure laid down by domestic law. This principle is violated if someone is detained on grounds which are not clearly established by national law or if the act of deprivation of liberty disregards national law.⁸⁷⁴ Thus, the prohibition of arbitrariness requires more than obedience to national laws: these laws and their enforcement must satisfy certain conditions.

The prohibition of arbitrariness was expressed in Article 9 ICCPR because the majority of members of the Commission on Human Rights thought it necessary to impose an international standard on the content of domestic laws since the principle of legality did not provide safeguards against detention authorised by unjust domestic laws.⁸⁷⁵ Thus, with the introduction of the prohibition of arbitrariness, concepts of reasonableness and justice were introduced in the protection of the right to personal liberty. The definition in the 1964 Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile⁸⁷⁶ confirms that the protection of the right to liberty extends beyond protection against deprivation of liberty which is merely unlawful:

“Arrest or detention is arbitrary if it is: (a) on grounds or in accordance with procedures other than those established by law or (b) under the provisions of a law, the purpose of which is incompatible with the right to liberty and security of person.”⁸⁷⁷

⁸⁷³ See Nowak (1993), pp. 164-166; and Marcoux (1982), pp. 359-364.

⁸⁷⁴ Nowak (1993), p. 172. See also Principle 6 of Deliberation no. 5 of the Working Group on Arbitrary Detention (UN Commission on Human Rights, 28 December 1999).

⁸⁷⁵ Marcoux (1982), p. 363. See also Lillich (1984b), p. 138; and Dinstein (1981), p. 130.

⁸⁷⁶ UN Commission on Human Rights (1964).

⁸⁷⁷ See the Draft Principles on Freedom from Arbitrary Arrest and Detention, attached to the Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, UN Commission on Human Rights (1964), p. 205.

The HRC uses a different approach to interpret the prohibition of arbitrary deprivations of liberty:

“Arbitrariness is not to be equated with ‘against the law’ but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.”⁸⁷⁸

This means that deprivation of liberty may not be manifestly disproportional, and the specific manner in which the arrest is made should not be discriminatory and must be proportional in view of the circumstances.⁸⁷⁹ The principle of proportionality constitutes only one aspect of the prohibition of arbitrariness, but it is a practical and useful criterion for the assessment whether the purpose of the deprivation of liberty is incompatible with the right to liberty. Human rights bodies such as the Working Group on Arbitrary Detention use it as a yardstick to evaluate state practice. In its concluding report of its visit to the United Kingdom in 1998, the Working Group reminded the government of that country that detention of asylum seekers and immigrants should only be resorted to if there exists a compelling need to detain that is based on individual circumstances; that detention should be for the shortest possible time; and that alternative, non-custodial measures should always be considered before resorting to detention.⁸⁸⁰

A similar conclusion regarding the central importance of the principle of proportionality in immigration detention can be drawn from the approach that the HRC has taken to the Australian policy of mandatory detention of asylum seekers, already referred to in the introduction to this Chapter. The HRC does not deem the detention of asylum seekers or irregular immigrants in itself arbitrary and in violation with Article 9 ICCPR:

“The fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual such as the likelihood of absconding and lack of co-operation, which

⁸⁷⁸ HRC, *Mukong v. Cameroon*, 21 July 1994, at 9.8 and also *Van Alphen v. the Netherlands*, 23 July 1990.

⁸⁷⁹ Nowak (1993), p. 173.

⁸⁸⁰ See Report on the Visit of the Working Group on Arbitrary Detention to the United Kingdom on the issue of immigrants and asylum seekers, p. 12 (UN Commission on Human Rights, 18 December 1998)

may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.”⁸⁸¹

However, in some of the Australian cases that were brought before it, the HRC considered Australian detention policy in violation of Article 9 ICCPR, as the government solely brought forward general justifications for the detention of asylum seekers, instead of stating any individual justification for the necessity of the detention.⁸⁸² Thus, immigration detention must be reasonable and necessary in view of factors which are particular to the individual in order to be in accordance with Article 9 ICCPR.⁸⁸³ Accordingly, in *Jalloh v. The Netherlands*, the HRC did not deem it unreasonable to have detained the individual concerned for a limited time until the administrative procedure relating to his case was completed, taking into consideration that he had fled from the open facility at which he was accommodated from the time of his arrival for around eleven months.⁸⁸⁴

The importance of the criteria of reasonability and proportionality becomes evident once more when the HRC assesses the duration of immigration detention, as it holds that “detention should not continue beyond the period for which the State can provide appropriate justification”.⁸⁸⁵ With regard to detention in order to secure removal, the HRC has clarified this requirement as meaning that once a reasonable prospect of expelling the individual concerned no longer exists, the detention should be terminated.⁸⁸⁶ Concerning the duration of immigration detention in general, the Working Group on Arbitrary Detention further insists that a maximum period should be set by law and that the duration may never be unlimited or excessive.⁸⁸⁷

⁸⁸¹ HRC, *A. v. Australia*, 3 April 1997, par 9.4.

⁸⁸² See for example: *Baban v. Australia*, 18 September 2003, par. 7.2; and *Bakhtiyari v. Australia*, 6 November 2003, par. 9.2. and 9.3.

⁸⁸³ See also Oda (1968), p. 483.

⁸⁸⁴ *Jalloh v. The Netherlands*, 26 March 2002, par. 8.2. See also *Madafferi v. Australia*, Decision of 26 July 2004, in which case the HRC did not deem the initial decision to detain unlawful as it was based on an individual assessment that had shown there was a risk of flight.

⁸⁸⁵ *A. v. Australia*, 3 April 1997, par. 9.4.

⁸⁸⁶ *Jalloh v. The Netherlands*, 26 March 2002, par. 8.2.

⁸⁸⁷ Deliberation No. 5 of the Working Group on Arbitrary Detention (UN Commission on Human Rights, 28 December 1999).

6.2.2.2 Procedural guarantees

This Section will briefly address paragraphs 2 to 5 of Article 9 ICCPR that contain procedural safeguards for persons who are deprived of their liberty. These guarantees form an integral part of the right to personal liberty, and their violation will accordingly entail a violation of the right to personal liberty.⁸⁸⁸

Paragraph 2 of Article 9 ICCPR contains the right to be informed about the reasons for detention. In the 1988 Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment (hereinafter the 1988 Body of Principles),⁸⁸⁹ the obligation of information is further elaborated by the requirement that anyone detained should be provided with information on and an explanation of his rights and how to avail himself of such rights.⁸⁹⁰ Although Article 9 ICCPR does not state explicitly that the person concerned needs to be informed in a language that he understands, it would be difficult to maintain that someone is informed if he does not understand what is being communicated to him.⁸⁹¹ Whether or not notification of the custodial measure is given in writing in a language understood by the asylum seeker or immigrant is one of the factors the Working Group on Arbitrary Detention considers when it assesses whether immigration detention is arbitrary.⁸⁹² According to the Working Group, the right to information in the case of immigration detainees should include the nature of and the grounds for the decision refusing permission to enter or reside in the territory.⁸⁹³

The right to information about the reasons for the deprivation of liberty serves, *inter alia*, to enable the detainee to make use of the right to challenge his detention in

⁸⁸⁸ In accordance with this, the Working Group on Arbitrary Detention takes due consideration of whether or not the alien is able to enjoy certain guarantees in order to determine whether a case of immigration detention can be considered arbitrary. See Deliberation no. 5 of the Working Group on Arbitrary Detention (UN Commission on Human Rights, 28 December 1999).

⁸⁸⁹ General Assembly Resolution 43/173 (1988).

⁸⁹⁰ 1988 Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment. Principle 13.

⁸⁹¹ According to the 1988 Body of Principles, anyone who does not speak or understand the language used by the authorities, is entitled to receive the required information in a language he understands (1988 Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, Principle 14).

⁸⁹² Deliberation no. 5 (UN Commission on Human Rights, 28 December 1999), Principle 8.

⁸⁹³ *Ibid.* Principle 1.

court, a fundamental procedural guarantee contained in Article 9 ICCPR. Hence, the Working Group on Arbitrary Detention requires the information provided to the immigration detainee to include notification of the conditions under which he is able to apply for a remedy to a judicial authority.⁸⁹⁴

Article 9 ICCPR includes two habeas corpus provisions: its paragraph 3 is specifically meant for persons detained on criminal charges, who shall be brought promptly before a judge. With regard to persons detained on other grounds, such as immigration detainees, paragraph 4 of Article 9 ICCPR gives them the right to have the lawfulness of their detention reviewed in court, which shall decide without delay. Without delay means that the decision usually has to be made within several weeks, although this may depend on the type of deprivation of liberty and other individual circumstances.⁸⁹⁵

Thus, Article 9(4) ICCPR requires that recourse eventually be had to a "court". This may be an administrative court, as long certain requirements of impartiality and independence are satisfied. If the initial decision to detain is taken by a court in the sense of Article 9(4) ICCPR, this provision is usually complied with. What specific form of the judicial procedure in which the legality of the detention is challenged takes is irrelevant, as long as it results in release if the detention is unlawful.⁸⁹⁶

"The Working Group considers that the right to challenge the legality of detention or to petition for a writ of habeas corpus or remedy of amparo is a personal right, which must in all circumstances be guaranteed by the jurisdiction of the ordinary courts."⁸⁹⁷

⁸⁹⁴ Ibid. Principle 8.

⁸⁹⁵ Nowak (1993), p. 179. According to the Working Group on Arbitrary Detention, immigration detainees must be brought *promptly* before a judicial or other authority, therewith according immigration detainees and persons detained on criminal grounds almost equal rights, were it not for the addition of the words 'other authority'. Deliberation no. 5. of the Working Group on Arbitrary Detention (UN Commission on Human Rights, 28 December 1999 See also the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 11).

⁸⁹⁶ 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 32.

⁸⁹⁷ Report of the Working Group on Arbitrary Detention (UN Commission on Human Rights, 15 December 2003), p. 23.

According to the HRC, the scope of the review of the lawfulness by the domestic court is not limited to a mere review whether the detention is in compliance with domestic law, but it should include whether the detention is in accordance with the requirements of Article 9(1) ICCPR.⁸⁹⁸ Thus, the court in question should evaluate the case in the light of the individual circumstances, instead of merely assessing whether the law has been correctly applied. Consequently, it deems the procedure of habeas corpus in a state with immigration legislation containing mandatory detention provisions that have been declared constitutional by its highest court in violation of Article 9(4) ICCPR, as such a procedure would merely entail a verification of the applicability of the mandatory detention provisions to the detainee without due regard to the circumstances particular to the individual concerned.⁸⁹⁹

Paragraph 5 of Article 9 ICCPR gives anyone who is deprived of their liberty in an unlawful manner the enforceable right to compensation. This right covers pecuniary as well as non-pecuniary damages.⁹⁰⁰ Some additional guarantees particular to the situation of immigration detainees have been formulated by the Working Group on Arbitrary Detention. Asylum seekers or immigrants in custody must have the possibility of communicating with the outside world, and of contacting a lawyer, a consular representative, and relatives.⁹⁰¹ The UNHCR and the Red Cross and other duly authorised NGO's must be allowed access to places of custody.⁹⁰² Furthermore, immigration detainees must be registered, and informed of the internal regulations.⁹⁰³

⁸⁹⁸ *Baban v. Australia*, Decision of 18 September 2003, par. 7.2.; and *Bakhtiyari v. Australia*, Decision of 6 November 2003, par. 9.4.

⁸⁹⁹ *A. v. Australia*, Decision of 30 April 1997; *Baban v. Australia*, par. 7.2 and *Bakhtiyari v. Australia*, par. 8.2 and 9.4.

⁹⁰⁰ Nowak (1993), p. 182.

⁹⁰¹ Deliberation no. 5 of the Working Group on Arbitrary Detention (UN Commission on Human Rights, 28 December 1999), Principle 2. See also Article 36(1) under b and c of the Vienna Convention on Consular Relations (1963) and Article 6 of the European Convention on Consular Functions (1967) about the right of detained foreigners to have their consular representatives informed.

⁹⁰² Deliberation no. 5 of the Working Group on Arbitrary Detention (UN Commission on Human Rights, 28 December 1999), Principle 10.

⁹⁰³ *Ibid.* Principles 4 and 5.

6.2.2.3. *Conditions of immigration detention and arbitrariness*

I have already mentioned that, as a rule, the conditions of detention do not fall under the scope of the right to personal liberty. Accordingly, the Working Group on Arbitrary Detention does examine neither complaints about alleged torture during detention, nor complaints concerning inhuman conditions of detention.⁹⁰⁴ Other general human rights norms such as Article 7 ICCPR, Article 3 ECHR and those contained in the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Punishment (CAT) are applicable in these situations. In addition, international human rights law has accorded the treatment of detainees special attention on account of the especially vulnerable position of persons who are deprived of their liberty, as is shown by Article 10 ICCPR. Also the 1988 Body of Principles contains detailed provisions in this respect.⁹⁰⁵ These legal norms in themselves, however, do not limit the state's power to resort to immigration detention as such.

This being said, given the importance of the principle of proportionality in assessing the lawfulness of the deprivation of liberty, conditions of immigration detention may occasionally play a role in balancing the interest of the state to resort to immigration detention on the one hand and the individual's interest in the enjoyment of his fundamental rights. Accordingly, it can be argued that in a limited amount of situations, the conditions of detention may bear upon the question of its arbitrariness, and thus influence the question of the lawfulness of the deprivation of liberty itself, as was alluded to by HRC in the case of *Madafferi v. Australia*:

⁹⁰⁴ Working Group on Arbitrary Detention, Fact Sheet 26.

⁹⁰⁵ In the European context, the European Committee for the Prevention of Torture (CPT) is a key actor in this respect. The CPT examines, by means of visits to member states of the Council of Europe, the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment (Article 1 of the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment). In recent years, it has paid special attention to the treatment of immigration detainees (CPT, 10 September 2003, p. 10; and CPT, 16 December 2003) and it has repeatedly stressed that, if it is deemed necessary to deprive persons of their liberty under immigration legislation, it is far preferable to accommodate them in centres specifically designed for that purpose, offering material conditions and a regime appropriate to the legal status of such persons, and staffed by suitably qualified personnel (CPT Standards, 2003, par. 28-29. See also CPT, 14 June 2004, p. 20).

“As to Mr. Madafferi's return to Maribyrnong Immigration Detention Centre on 25 June 2003, where he was detained until his committal to a psychiatric hospital on 18 September 2003, the Committee [...] observes the author's arguments, which remain uncontested by the State party, that this form of detention was contrary to the advice of various doctors and psychiatrists, consulted by the State party, who all advised that a further period of placement in an immigration detention centre would risk further deterioration of Mr. Madafferi's mental health. Against the backdrop of such advice and given the eventual involuntary admission of Mr. Madafferi to a psychiatric hospital, the Committee finds that the State party's decision to return Mr. Madafferi to Maribyrnong and the manner in which that transfer was affected was not based on a proper assessment of the circumstances of the case but was, as such, disproportionate.”⁹⁰⁶

As the HRC accordingly found that the detention was in violation of article 10(1) ICCPR, a “provision [...] dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7 ICCPR”, it did not deem it necessary to consider the claims arising under article 7 ICCPR separately.⁹⁰⁷

Support for the position that the conditions of detention may result in an unlawful deprivation of liberty can also be found in national jurisprudence. A Dutch administrative court decided in 2005 that deprivation of liberty lasting longer than six months on a so called prison-boat (a facility specifically designed for immigration detention) was unlawful on account of the conditions of detention, which were deemed to result in a disproportional interference with the detainees' fundamental rights.⁹⁰⁸

6.3. HUMAN RIGHTS AND DETENTION OF REFUGEES AND ASYLUM SEEKERS

Refugees and asylum seekers will often constitute a large part of the population in many of the European immigration detention centres.⁹⁰⁹ According to the Working Group on Arbitrary Detention, a deprivation of liberty that results solely from the

⁹⁰⁶ *Madafferi v. Australia*, 26 July 2004, par. 9.3.

⁹⁰⁷ *Ibid.*

⁹⁰⁸ (Rechtbank 's Gravenhage, 18 March 2005). The court reached this decision in spite of the fact that Dutch administrative courts are excluded by law from assessing the conditions and regulations applicable to immigration detention.

⁹⁰⁹ See i.e. the United Kingdom, where the vast majority of those detained have applied for asylum at one stage or another (FPP-CR United Kingdom; and Gil-Robles, 8 June 2005).

exercise of the right to seek and enjoy asylum as laid down in Article 14 UDHR constitutes an arbitrary deprivation of liberty, and is accordingly in violation of Article 9 ICCPR.⁹¹⁰ The Working Group estimates that thousands of people are subject each year to arbitrary detention, inter alia, because of “the growing and pre-occupying practice of administrative detention, notably for those seeking asylum.”⁹¹¹ Clearly, the safeguards of Article 9 ICCPR are applicable to applicants for asylum, but as they are regarded as a particularly vulnerable group, additional guarantees concerning their detention have been formulated.⁹¹² In this Section, I will provide a brief overview of some specific guarantees that apply to the detention of applicants for asylum and refugees, mainly formulated by the UNHCR.

Article 31 of the 1951 Convention Relating to the Status of Refugees is of key importance for the use of detention against refugees. The first paragraph of this provision prohibits criminal sanctions being used against refugees who come directly from a country of persecution, on account of their illegal entry or presence, provided they present themselves to the authorities without delay. It is not plausible that this provision would be violated when a refugee is detained on account of his illegal entry, if the deprivation of liberty is an administrative measure and not categorised as a criminal sanction as such.⁹¹³ But paragraph 2 of Article 31 extends protection in that case: states shall not apply to the freedom of movement of such refugees restrictions other than those which are necessary. Thus, this provision requires the detention to be proportional in view of the individual circumstances of each refugee.

The UNHCR has elaborated further on the principles of necessity and proportionality in its Revised Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (hereinafter the 1999 Guidelines).⁹¹⁴ The 1999 Guidelines are not applicable to asylum seekers whose requests have been rejected

⁹¹⁰ Working Group on Arbitrary Detention, Fact Sheet 26.

⁹¹¹ Ibid.

⁹¹² Extra concern is warranted with regard to this group as the concerned individuals may have suffered persecution or other hardships, and detention in the supposed safe haven that they have fled to will thus be extra harsh. See Sub-Commission on Human Rights (18 August 2000).

⁹¹³ According to NGO's, illegal entry of asylum applicants should never be a ground for detention. See European Council for Refugees and Exiles (April 1996), General Remark No. 14; and Jesuit Refugee Service Europe (2004), p. 11.

⁹¹⁴ UNHCR (February 1999).

on substantial grounds, but they do apply to those refugees whose claims are not investigated because of a principle such as safe third country, or because, for other reasons, another country is responsible for the handling of the claim.

According to the 1999 Guidelines, detention of asylum seekers must whenever possible be avoided, and alternative measures, such as reporting obligations, always need to be considered first.⁹¹⁵ The UNHCR has expressed scepticism about bail hearings as an alternative for detention as the focus would be on establishing the reliability of the surety and its relationship to the applicant as opposed to the reasons for detention.⁹¹⁶ In assessing whether detention of asylum-seekers is necessary, account should be taken of whether the detention is reasonable and whether it is proportional to the objectives to be achieved.⁹¹⁷ If detention is exceptionally resorted to, it is only permitted if it is prescribed by a national law, which has to be in conformity with general norms and principles of international human rights.⁹¹⁸

Apart from these more general requirements that flow, as we saw above, also from Article 9 ICCPR, the 1999 Guidelines specify that detention of refugees may only be used in order to verify identity; to determine the elements on which the claim for asylum is based; in the case that the asylum seekers has destroyed their documents or used fraudulent documents; or to protect national security or public order.⁹¹⁹ Detention may certainly not be used to deter other asylum seekers; neither should it constitute a sanction for failure to comply with administrative requirements or breach of reception centre or other institutional restrictions.⁹²⁰

It is unclear why the 1999 Guidelines include national security or public order as separate grounds for the detention of asylum seekers, as there is no reason why detention for these reasons in the case of asylum seekers should differ from detention for the same reasons of nationals or regular immigrants.⁹²¹ In fact, if we take national

⁹¹⁵ UNHCR Revised Guidelines (1999), Guidelines 2, 3 and 4; and UNHCR ExCom Conclusion No. 44 (XXXVII) 1986. See also European Council on Refugees and Exiles (April 1996).

⁹¹⁶ UNHCR, Executive Committee of the High Commissioners Programme (4 June 1999), p. 168.

⁹¹⁷ UNHCR Revised Guidelines (1999), Guideline 3.

⁹¹⁸ *Ibid.*

⁹¹⁹ *Ibid.* The same grounds are mentioned in UNHCR ExCom Conclusion No. 44 (XXXVII) 1986, under (b).

⁹²⁰ UNHCR, Revised Guidelines (1999), Guideline 3. See also Amnesty International (1996).

⁹²¹ Nor is it necessary to include these grounds: by analogy, the 1999 Guidelines do not allow for the detention of asylum seekers on suspicion of common criminal charges; nonetheless it is clear that in that

executives' interpretation of national legislation as a point of reference, the public order and national security grounds risk becoming a license to resort to detention of asylum seekers on an extensive scale.⁹²² More generally, it can be argued that the grounds of detention as specified in the 1999 Guidelines are very wide and they can therefore be interpreted by states as providing the basis for detaining large numbers of asylum seekers.⁹²³ Detention in order to determine the elements on which the claim for asylum is based in particular may conflict with the principle that there should be a presumption against detention. Also the use of fraudulent documents as a ground for detention may raise serious objections in the case of refugees, a category that is often forced to have recourse to such documents in order to flee. However, it would clearly go against the text, object and purpose of the 1999 Guidelines to interpret these grounds for detention in such a manner that the requirement of proportionality would no longer have any significance.

According to the 1999 Guidelines, detention should only be imposed in a non-discriminatory manner. In addition, minors who are asylum seekers should not be detained.⁹²⁴ Detention of children in general should be a measure of last resort and is even subject to more severe restrictions than detention of adults.⁹²⁵ The 1999 Guidelines

case national laws would be applicable to them in the same way as to anyone else. However, the ECRE in its position paper on the detention of asylum seekers makes explicit mention of criminal charges as a ground for detention of asylum seekers. Probably the reason for this is that it specifies the kind of offence: it needs to be serious and non-political, and excludes offences under immigration law (European Council on Refugees and Exiles, April 1996, General Remark No. 12).

⁹²² Especially when taking into account the way in which national governments interpret the term public order and codify it in national legislation with regard to immigration detention in general. See van Kalmthout (2005b), pp. 325-327 with regard to the situation in the Netherlands, where the public order criterion has lost much of its significance in daily practice. See also Article 59(2) of the Dutch Aliens Act 2000 which provision employs the legal fiction that the detention is required by public order if the necessary papers for removal are available or will be available soon.

⁹²³ European Council on Refugees and Exiles (April 1996), General Remark No. 9; and Jesuit Refugee Service Europe (2004), p. 12.

⁹²⁴ UNHCR (1999) Guideline 6.

⁹²⁵ See also the Article 37 under (b) of the Convention on the Rights of the Child 1989/1990: No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time. Cf. the UN Committee on the Rights of the Child (2004), par. 29-30.

also focus on the conditions of detention, which, they stipulate, should be humane with respect for the inherent dignity of every person.

6.4. REGIONAL DISCOURSE: THE COUNCIL OF EUROPE AND IMMIGRATION DETENTION

With regard to the human rights discourse relating to immigration detention in the framework of the Council of Europe, excluding the ECtHR, the most important document is a recommendation of the Committee of Ministers on measures of detention of asylum seekers adopted in 2003.⁹²⁶ It states that measures of detention of asylum seekers should be in accordance with international standards and prescribed by a national law.⁹²⁷ It is important to note that according to the recommendation, alternative measures always have to be considered before resorting to detention.⁹²⁸ If these are not feasible in the individual case, then detention is only permitted in the following situations: if the identity, including nationality, of the asylum seekers has to be verified (especially if they have destroyed their documents or used false ones); if detention is necessary to obtain elements on which their asylum claims are based; if a decision needs to be taken with regard to their right of entry to the territory; and lastly, if their detention is necessary with regard to national security or public order.⁹²⁹

These grounds are very wide, capable of leaving a large discretion to national states. Accordingly, their inclusion in the recommendation raises similar concerns as were discussed in the previous Section with regard to the grounds for detention included in the 1999 Guidelines. Again, the principle of proportionality – detention should not be resorted to if alternative measures are feasible in the individual case – should curb a too extensive use of these grounds.

⁹²⁶ Council of Europe, Committee of Ministers, Recommendation Rec(2003)5 of the Committee to member states on measures of detention of asylum seekers (16 April 2003).

⁹²⁷ Ibid. General Provisions 4 and 5.

⁹²⁸ Ibid. General Provision 6. Such as monitoring requirements, release on bail, stay at open reception centres and the provision of a guarantor. See Explanatory Memorandum of Recommendation Rec(2003)5.

⁹²⁹ Recommendation Rec(2003)5 of the Committee to member states on measures of detention of asylum seekers (16 April 2003), General Provision 3.

The recommendation also stipulates that the detention of asylum seekers should be reviewed regularly by a court.⁹³⁰ Moreover, detained asylum seekers have the right to have contact with the UNHCR, a legal representative, NGO's, and family and friends.⁹³¹ The remaining provisions of the recommendation deal with guarantees for the mental, spiritual and physical well-being of the asylum seekers, and there are in this respect some special provisions with regard to minors, who, it is stipulated, should only be detained as a measure of last resort and for the shortest possible time.⁹³²

With regard to the detention of irregular immigrants who are subject to removal orders, the "Twenty Guidelines on Forced Return"⁹³³ adopted by the Committee of Ministers contain some relevant provisions.⁹³⁴ In the first place, they require that a person may only be deprived of his liberty in accordance with a procedure prescribed by law with a view to ensuring that a removal order will be executed. In addition, it must be ascertained, after a careful examination of the necessity of the detention in each individual case, that compliance with the removal order cannot be ensured as effectively by resorting to non-custodial measures such as supervision systems, the requirement to report regularly to the authorities, bail or other guarantee systems.⁹³⁵

The latter requirement of an individualised examination of the necessity to detain in order to secure removal is deemed "part of a broader protection against arbitrariness."⁹³⁶ It is further elaborated upon by stipulating that detention pending removal shall be for a time as short as possible and in any case justified only for as long as removal arrangements are in progress and executed with due diligence by the national authorities.⁹³⁷ Furthermore, the person detained shall be informed promptly about the reasons for his detention in a language that he understands and he has the right to access to a lawyer from the very outset of the detention.⁹³⁸

⁹³⁰ Ibid. General Provision 5.

⁹³¹ Ibid. General Provisions 16, 17 and 18.

⁹³² Ibid. General Provisions 20-23

⁹³³ Committee of Ministers, 20 Guidelines on Forced Return (9 May 2005).

⁹³⁴ These Guidelines are not applicable to detention upon arrival. See CAHAR (Ad hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons) (20 May 2005), p. 2.

⁹³⁵ Committee of Ministers, 20 Guidelines on Forced Return (9 May 2005), Guideline 6, par. 1.

⁹³⁶ CAHAR (Ad hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons) (20 May 2005), p. 25.

⁹³⁷ Committee of Ministers, 20 Guidelines on Forced Return (9 May 2005), Guideline 7 and 8, par. 1.

⁹³⁸ Ibid. Guideline 6, par. 2.

The administrative decision to detain is to be reviewed at regular intervals by the authorities and in the case of prolonged detention such reviews are to be subject to the supervision of a judicial authority.⁹³⁹ Requirements regarding the immigration detainee's entitlement to take proceedings by which the lawfulness of the detention is decided upon by a court are similar to those flowing from Article 9 ICCPR, except for the explicit addition that legal aid should be provided for in accordance with national legislation.⁹⁴⁰

Similar guarantees have been formulated by the Commissioner for Human Rights and the European Committee for the Prevention of Torture (CPT), also with regard to detention upon arrival.⁹⁴¹ The CPT has repeatedly emphasised in several of its reports that in the case of immigration detention, the same procedural guarantees shall apply as with regard to other categories of deprivation of liberty.⁹⁴² Especially in waiting zones of airports this is often not the case, and the CPT warns this situation cannot be justified. It does not attach crucial weight to the typical argument made by states that the persons located in such places can leave at any time by taking any international flight of their choice: a stay in a transit, or international zone, can under circumstances amount to deprivation of liberty.⁹⁴³

The origin of the "20 Guidelines on Forced Return" lies in a Parliamentary Assembly Recommendation, urging the member states of the Council of Europe to guarantee, under regular supervision by the judge, the strict necessity and the proportionality of the use and continuation of detention for the enforcement of the deportation order, and to set the length of detention at a maximum of one month.⁹⁴⁴ In addition, the same recommendation by the Parliamentary Assembly insists on member states favouring alternatives to detention that place less restrictions on freedom, such as

⁹³⁹ Ibid. Guideline 8.

⁹⁴⁰ Ibid. Guideline 9.

⁹⁴¹ Commissioner for Human Rights of the Council of Europe (19 September 2001), Recommendation concerning the rights of aliens wishing to enter a Council of Europe member state and the enforcement of expulsion orders, p. 3-4.

⁹⁴² See i.e. See CPT (10 September 2003), p. 10; and CPT (16 December 2003).

⁹⁴³ CPT Standards (2003), par. 25.

⁹⁴⁴ Parliamentary Assembly, Recommendation 1547 (2002) 1 on Expulsion procedures in conformity with human rights and enforced with respect for safety and dignity (22 January 2002).

compulsory residence orders or other forms of monitoring, such as the obligation to register.⁹⁴⁵

6.5. CONCLUSIONS: THE RIGHT TO PERSONAL LIBERTY AND SOVEREIGNTY'S FRAME

This Chapter has shown that international human rights norms pose limits to the sovereign states' power to resort to immigration detention. The decision to detain immigrants and asylum seekers needs to satisfy certain substantial conditions, as well as some essential procedural requirements. Immigration detention is only allowed with an eye to specific purposes which all have to do with the administration of immigration policies in the narrow sense. These consist of regulating entry and securing expulsion. These purposes have acquired an even stricter interpretation when it comes to a specific category of immigrants: refugees or asylum seekers. In any case, detention to deter or penalise immigrants is not allowed. Neither is it permitted to use immigration detention for purposes related to criminal law. Abuses of the law on immigration to evade judicial safeguards and hold aliens in detention indefinitely have been explicitly addressed by the Working Group on Arbitrary Detention, as it has repeatedly expressed concern about improper and discriminatory use of immigration laws to circumvent the presumption of innocence and related judicial guarantees.⁹⁴⁶

Furthermore, detention should be a proportional measure with regard to the legitimate purposes that it serves. According to the Working Group on Arbitrary Detention, one of the main causes of arbitrary deprivation of liberty is precisely non-observance of the principle of proportionality between the gravity of the measure taken and the situation concerned.⁹⁴⁷ The requirement that detention needs to be proportional is to be found in almost all international instruments, either expressly articulated, or implied by the prohibition on arbitrary detention or by formulating specific constraints

⁹⁴⁵ Ibid.

⁹⁴⁶ Report of the Working Group on Arbitrary Detention (UN Commission on Human Rights, 15 December 2003), p. 17, 18 and 20. See also Report of the Working Group on Arbitrary Detention (UN Commission on Human Rights, 3 December 2002). These concerns have become more prominent after 11 September 2001.

⁹⁴⁷ Report of the Working Group on Arbitrary Detention (UN Commission on Human Rights, 15 December 2003), p. 18.

on the use of immigration detention such as that alternative measures need to have been considered. It is worth mentioning here that also the Charter of Fundamental Rights of the European Union permits limitations on the right to personal liberty only if these limitations are proportionate and necessary, and genuinely meet objectives of general interest which are recognised by the Union.⁹⁴⁸

By categorising immigration detention as a legitimate form of state control, international human rights law reaffirms its recognition of the sovereign right of the state to control the entry and sojourn of foreign nationals on its territory. However, the presumption that the regulation of entry and sojourn of non-nationals is a matter falling within the sovereign prerogatives of the national state does not impede international law from safeguarding the human rights of immigration detainees. Although immigration detention *per se* is not in violation of international legal norms, states may not resort to detention solely on the ground that a person does not have the right to enter or stay on national territory. International human rights law requires that there must be some substantive basis for detention in each individual case. In addition, international legal norms oblige national states to provide for a judicial procedure reviewing the lawfulness of immigration detention. In particular with regard to immigration detainees, the Working Group on Arbitrary Detention has placed considerable emphasis on states' duty to guarantee the effectiveness of the right provided by Article 9(4) ICCPR.⁹⁴⁹ According to the HRC, the scope of the review required by this provision may not be limited to a mere review whether the detention is in compliance with domestic law, but it should include reviewing whether the detention is in accordance with the requirements of Article 9(1) ICCPR. As a result, the court in question should evaluate the case in the light of the individual circumstances, taking due account of the proportionality and reasonableness of the detention, instead of merely assessing whether national immigration legislation has been correctly applied.

By balancing the state's sovereign right to control entry and residence of foreign nationals in its territory with the individual's right to personal liberty, international legal norms pertaining to deprivations of liberty under immigration legislation acknowledge the individual interests that are involved in sovereignty's territorial frame. As such, they

⁹⁴⁸ Article 6 and Article 52(1) of the Charter.

⁹⁴⁹ Report of the Working Group on Arbitrary Detention (UN Commission on Human Rights, 12 December 2005), p.2.

have the potential to undermine the perceived neutrality and self-evidence of sovereignty's territorial frame. Their consistent application to domestic practices of immigration detention, especially in view of the important procedural guarantees that they contain, could result in diminishing the immunity of territorial sovereignty against forces of legal correction. The way in which this particular process operates will be further dealt with in the conclusions to this study in Chapter 8.

Nevertheless, also a few critical remarks are called for with regard to the international legal framework as was dealt with in this Chapter. When it comes to the specific practice of immigration detention, the interests of asylum seekers are far more often addressed than those of irregular immigrants. This recurring emphasis on asylum seekers and refugees in international norms and documents that address the administrative detention of non-nationals, however understandable in view of their vulnerable position and need for protection, also runs a risk of resulting in an affirmation of the perception of territorial sovereignty as site of legal and unproblematic violence when it comes to irregular migrants.

A good example of this is to be found in the UNHCR Executive Committee's criticism regarding the failure on the part of states to make the necessary distinction between asylum seekers and illegal migrants, "therewith exposing the former to such control measures as automatic detention for indeterminate periods".⁹⁵⁰ Although undoubtedly not the intent of the Executive Committee, remarks as these, which subsequently fail to address the more fundamental sovereign assumptions that underlie the practice of immigration detention as a whole, may raise the impression that automatic detention for indeterminate periods of irregular migrants remains a sovereign prerogative.

By sketching a wide overview of the international legal regime pertaining to immigration detention, this Chapter investigated only to limited extent the way in which the relevant international norms are implemented and enforced. We have seen that many of the international documents that explicitly address the practice of immigration detention, such as those by the Council of Europe or the Working Group on Arbitrary Detention, articulate recommendations to states, or are in another way directed to states. They do not accord rights to individuals and appealing to them or demanding their implementation by those who would supposedly benefit from them is often not possible.

⁹⁵⁰ Executive Committee of the High Commissioner's Programme (1999), pp. 164-165.

Neither do they in themselves compel states to change existing policies.⁹⁵¹ An exception is Article 9 ICCPR, but the HRC in its rulings on individual cases under the Optional Protocol is sometimes simply ignored by states, of which Australia's stance affords a discouraging example.⁹⁵²

Indeed, according to the UN Special Rapporteur on Migrant Workers, international human rights obligations of states are inadequately translated into practice at the national level. Measures aimed at stopping irregular immigration are all too often taken without due regard for international norms, standards and principles.⁹⁵³ They undermine migrant's basic rights, including the right to be protected against arbitrary deprivation of liberty: detention is often resorted to without due regard for the individual history of the migrant; broad powers to detain are not checked by procedural guarantees; and detention is often very lengthy or even indefinite.⁹⁵⁴

In the European context, Member States' frequent and wide-spread lack of concern for the reasonableness, necessity and proportionality of immigration detention as was described in Chapter 1, results in de facto violations of Article 9 ICCPR.⁹⁵⁵ Furthermore, national judicial procedures such as at the highest administrative court in the Netherlands may well fall below the standards imposed by Article 9(4) ICCPR, as

⁹⁵¹ See for instance Australia's position as quoted in the 2003 Report of the Working Group on Arbitrary Detention, p. 16: "*Immigration detention is an essential element underpinning the integrity of Australia's migration programme and the protection of Australia's borders. There is no recognition in the Working Group's report of the role Australia plays every year in the resettlement of thousands of refugees around the world. In conclusion, the Government considered that, yet again, a United Nations human rights body had produced a report misguidedly critical of Australia.*" (UN Commission on Human Rights, 15 December 2003)

⁹⁵² The Australian Attorney-General expressed the following opinion after several decisions and reports in which the Committee found violations: "*The concerns expressed by the Committee about the application of our immigration policies to asylum-seekers are not new. The Government has, on previous occasions, made clear to the Committee the reasons for these policies, including that of maintaining the integrity of our orderly migration program. The Government has no intention of changing its policy of mandatory detention of asylum-seekers, which is consistent with our obligations under the Covenant.*" 29 July 2000.

⁹⁵³ Report of the Special Rapporteur: Rodríguez Pizarro (2002), p. 11.

⁹⁵⁴ *Ibid.* p. 2 and 3.

⁹⁵⁵ For example Hungary where the detention of asylum seekers depends on "accidental circumstances and arbitrary decisions of the authorities" (FPP-CR-Hungary, par. 3.5.) and irregular migrants are detained on the sole ground that they have been found on Hungarian territory without a valid residence permit (Commissioner of Human Rights, Council of Europe, Follow-Up Report on Hungary, 2006, p.20.)

that court has limited the scope of review of the lawfulness of the detention in favour of the executive by repeatedly arguing that it is not for the judge to assess what is essentially the proportionality of immigration detention.⁹⁵⁶ The reservation by the United Kingdom of its right to comply or not with some of the “20 Guidelines on Forced Return,” provides another clear example of national practice risking violation of binding international norms because the requirements of some of the guidelines to which it made a reservation flow directly from Article 9 ICCPR.⁹⁵⁷

As I have explained above, the length of this study does not permit me to analyse in depth how international human rights are actually implemented at the national constitutional level. In order to investigate the way in which international human rights law may more coercively restrain the state’s power to resort to immigration detention, the next Chapter will address the case law of the ECtHR, a court that, as has been convincingly argued, has become the Constitutional Court for Europe.⁹⁵⁸

⁹⁵⁶ See Afdeling bestuursrechtspraak van de Raad van State, 6 september 2005, 200507112/1, JV 2005/452 and 16 August 2005, 200505443/1, JV 2005/396.

⁹⁵⁷ Committee of Ministers. 20 Guidelines on Forced Return (9 May 2005). p. 1: “the Permanent Representative of the United Kingdom indicated that, in accordance with Article 10.2c of the Rules of Procedure for the meetings of the Ministers’ Deputies, he reserved the right of his Government to comply or not with Guidelines 2, 4, 6, 7, 8, 11 and 16.”

⁹⁵⁸ Greer (1996).

Chapter 7 Immigration detention and the ECtHR: A limited discourse?

7.1. INTRODUCTION

We have seen in Chapter 3 that the ECHR and its enforcement mechanism are by far the most effective and extensive of international human rights mechanisms. According to Steven Greer, the ECtHR has become the Constitutional Court for Europe, promoting national Convention compliance which results in convergence in the “deep structure of national constitutional, legal and political systems.”⁹⁵⁹ Indeed, although the constitution that the Convention provides is only partial, seeing that it does not confer legislative powers,⁹⁶⁰ the fact that it provides for executive functions alongside to its judicial ones is essential in reaching this conclusion. Greater convergence in the structure of national systems with regard to fundamental rights is made possible by the fact that contracting parties to the Convention generally abide by the judgements of the Court, encouraged as they are by a number of pressures and interests, not the least important of which is the fact that the execution of the judgments of the ECtHR is supervised by the Committee of Ministers of the Council of Europe. The special position of the ECtHR as the European Constitutional Court makes it an excellent site to conduct an analysis of the way in which states are in a real sense restrained by international legal norms that protect the human rights of immigration detainees.

Whereas the previous Chapter gave a broad overview of relevant international human rights law with regard to the right to personal liberty in immigration detention cases, the larger part of my investigation of the case law of the ECtHR concerning Article 5 ECHR in this Chapter will focus on the substantive conditions that need to be fulfilled in order for a state to have lawful recourse to immigration detention. In Section

⁹⁵⁹ Greer (2006).

⁹⁶⁰ Ibid.

7.2. I will investigate the legitimate aims of immigration detention under the ECHR. After that, Section 7.3. will deal with the prohibition on arbitrary deprivations of liberty under the ECHR. I will first address the lawfulness of deprivations in general under Article 5(1) ECHR, after which I discuss the safeguards against arbitrary detention that are contained in the remaining paragraphs of Article 5 ECHR. Subsequently, in Section 7.4., I will look how the Court assesses the lawfulness of immigration detention in particular. It will become clear that the Court's case law in this field is lacking in considerations of proportionality and necessity. In Section 7.5., I will compare its approach to immigration detention with the method in which it generally interprets the Convention, as well as with the protection it offers to another category of individuals who may be deprived of their liberty under Article 5 ECHR, namely persons of unsound mind, alcoholics or drug addicts and vagrants. This comparison will bring to light incongruities in the Court's assessment of the lawfulness of immigration detention, resulting in a serious shortcoming in the European protection of the right to liberty in immigration law. In the conclusions to this Chapter in Section 7.6., I will argue that this lack in adequate protection for immigration detainees cannot be explained by a single cause, but that several factors contribute to these inconsistencies, the most important of which is the immunisation of the territorial frame of sovereignty against the usual forces of legal correction.

7.2. LEGITIMATE AIMS OF IMMIGRATION DETENTION UNDER THE ECHR

In the ECHR, the right to personal liberty has been laid down in Article 5. This provision stipulates that everyone has the right to liberty, but it enumerates in its first paragraph six cases in which lawful deprivation of liberty is permitted, if it is carried out in accordance with a procedure prescribed by law:

Article 5(1) ECHR: Everyone has the right to liberty and security of person.

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of an obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

The list of permissible cases of deprivation of liberty under paragraph 1 is exhaustive: if an actual case of detention or arrest cannot be classified as belonging to one of the categories mentioned in this first paragraph of Article 5, it is not permitted by the ECHR. The state's exercise of its power to deprive individuals of their liberty is further restricted by the notion that only a narrow interpretation of the exceptions to the right to liberty is consistent with the aim of Article 5.⁹⁶¹

We have seen in the previous Chapter that under general international legal norms, immigration detention is only allowed when it serves the regulation of entry of foreign nationals or else secures their removal from national territory. Some documents have elaborated further upon these purposes, often specifically with the detention upon arrival of asylum seekers in mind. Article 5(1)(f) ECHR only deals with two categories of immigration detention: detention upon arrival and detention related to deportation, and it does not contain specific provisions with regard to the deprivation of liberty of applicants for asylum.⁹⁶² From the text of this provision it is clear that the ECHR recognises the prevention of unauthorised immigration as a legitimate purpose to resort to detention upon arrival.

⁹⁶¹ See *inter alia*: *D.G. v. Ireland*, 16 May 2002, §74; *Manzoni v. Italy*, 1 July 1997, §25; *Van der Leer v. the Netherlands*, 21 February 1990, §22; *Wassink v. the Netherlands*, 27 September 1990, §24; *Quinn v. France*, 22 March 1995, §42; and *K.-F. v. Germany*, 27 November 1997, §70.

⁹⁶² It also deals with detention of persons who are to be extradited, a separate category of detention of foreigners that will not be dealt with in this study. Moreover, note that only non-nationals can be subjected to immigration detention in the European system of human rights' protection because expulsion of nationals is prohibited and the right of nationals to be admitted to their own country is guaranteed by Article 3 of Protocol no. 4 to the ECHR.

Concerning pre-deportation detention, the Convention is not equally unambiguous. By merely stipulating that detention is permitted of persons against whom “action is taken with a view to deportation”, Article 5(1)(f) does only articulate indirectly on the legitimate aim of pre-deportation through the requirement that the action is taken with a view to deportation. In this respect, this ground for detention is to some extent comparable with the permissible detention of persons of an unsound mind, alcoholics and drug addicts or vagrants under subparagraph e of Article 5(1) ECHR. With regard to that category, the Convention neither makes explicit the aim of the deprivation of liberty. Some authors have argued the purpose of pre-deportation detention is to make it possible to decide on the deportation.⁹⁶³ However, it seems more consistent with the aim of pre-admittance detention to conclude that the purpose of pre-deportation detention is realisation of deportation.⁹⁶⁴ This can also be deduced for the fact that detention is prohibited by Article 5(1) ECHR when deportation is no longer possible.⁹⁶⁵

We may conclude that in the European system of protection of human rights, the only legitimate reasons for states to have recourse to immigration detention are regulation of entry and securing expulsion. The fact that immigration detention resorted to for any other reasons is prohibited by the ECHR as a whole is corroborated by Article 18 ECHR, which provision contains a prohibition on using the permitted restrictions by the Convention to the rights guaranteed by it for any purpose other than for which they have been described.

7.3. THE PROHIBITION ON ARBITRARY DETENTION IN ARTICLE 5 ECHR

7.3.1. “Lawful” detention “in accordance with a procedure prescribed by law”

According to Article 5 ECHR, an individual can only be deprived of his liberty “in accordance with a procedure prescribed by law”. In addition, the subparagraphs under Article 5(1) ECHR enumerating the permissible cases of deprivation of liberty

⁹⁶³ van Dijk and van Hoof (1998), p. 364.

⁹⁶⁴ See Chernishova (2001), p. 4.

⁹⁶⁵ ECommHR, *Ali v. Switzerland*, Opinion of 26 February 1997, p. 2152.

each require separately that the detention or arrest is “lawful”. According to the Court, these two expressions reflect the importance of the aim underlying Article 5(1) ECHR, which is to ensure that no one is dispossessed of his liberty in an arbitrary fashion.⁹⁶⁶ The importance of the prohibition on arbitrariness is emphasised by the interpretation that has been given to the right to security of person in Article 5 ECHR, in particular in some decisions by the ECommHR.⁹⁶⁷ It has held that the terms ‘liberty’ and ‘security’ in Article 5 ECHR must be read as a whole, both referring only to physical liberty and security, with the notion of security explicitly denoting the protection against arbitrary interferences with the liberty of person.⁹⁶⁸

Although in many respects, the term “lawful” overlaps with the notion “in accordance with a procedure in accordance with the law”, in theory they are distinguishable. “In accordance with a procedure prescribed by law” is the narrower one, as it refers mainly to domestic procedural laws. In order not to violate this requirement, domestic law must lay down a procedure which has to be followed whenever a detention or an arrest is carried out.⁹⁶⁹ In the case of *Shamsa*, the ECtHR found a violation of this requirement because the Polish government had permitted the deprivation of liberty to last longer than 90 days although Polish law requires the immigration detainee to be set free if the expulsion is not effected within this period.⁹⁷⁰

However, even in the case that a procedure laid down by national law is followed, a violation of Article 5 ECHR can still occur if the procedural domestic laws do not conform to the Conventions standards:

“The Court considers that the words ‘in accordance with a procedure prescribed by law’ essentially refer back to domestic law; they state the need for compliance with the relevant procedure under that law. However, the domestic law must itself be in conformity with the Convention, including the general principles expressed or implied therein. The notion underlying the term in question is one of fair and proper procedure, namely that any measure depriving a

⁹⁶⁶ *Winterwerp v. the Netherlands*, 24 October 1979, par. 37 and 39.

⁹⁶⁷ De Meyer (1995), p. 190.

⁹⁶⁸ *Adler and Bivas v. the Federal Republic of Germany*, 16 July 1976, §146.

⁹⁶⁹ The deprivation of liberty must have a legal basis in domestic law. see: *Amuur v. France*, 25 June 1996, §50; and *Riera Blume and others v. Spain*, 14 October 1999, §§31-35.

⁹⁷⁰ *Shamsa v. Poland*, 27 November 2003, par. 52.

person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary.”⁹⁷¹

Whereas the expression “in accordance with a procedure proscribed by law” thus refers only to procedural requirements, the notion of ‘lawful’ contained in each of subparagraphs of Article 5 ECHR covers substantive as well as procedural requirements. Moreover, it denotes both the specific requirement that the deprivation of liberty is in accordance with national laws as the more general requirement that any measure depriving the individual of his liberty is compatible with the purpose of Article 5 ECHR, namely to protect the individual from arbitrariness.⁹⁷² The prohibition on arbitrary deprivation on liberty also entails that the domestic law that deprives somebody of his liberty must be in conformity with the Convention, including the general principles expressed or implied therein as well as in the light of the aim of the restrictions permitted by Article 5(1).⁹⁷³

The Court generally considers the two concepts together and the distinction between them is often blurred in its judgments.⁹⁷⁴ Where they both refer back to domestic law, compliance with domestic law becomes part of states’ Convention-based obligations over which the Court in Strasbourg has jurisdiction.⁹⁷⁵ However, when analysing the level of protection offered by the Convention in this respect, it must be taken into account that the scope of this jurisdiction is subject to certain limits. It is in the first place for the national authorities, notably the courts, to interpret and apply

⁹⁷¹ *Winterwerp v. the Netherlands*, 24 October 1979, A-33, §45.

⁹⁷² See, for instance, *Winterwerp v. the Netherlands*, 24 October 1979, §§39 and 45; *Bozano v. France*, 18 December 1986, §54; *Bouamar v. Belgium*, 29 February 1988, §47; *Benham v. the United Kingdom*, 10 June 1996, §40; and *Chahal v. the United Kingdom*, 15 November 1996, §118.

⁹⁷³ *Brogan and others v. the United Kingdom*, 29 November 1989, §65; *Winterwerp v. the Netherlands*, 24 October 1979, §45; *Erkalo v. the Netherlands*, 2 September 1998, §52; and *Kawka v. Poland*, 9 January 2001, §48.

⁹⁷⁴ See e.g. *Lukanov v. Bulgaria*, 20 March 1997, §41: “the central issue (...) is whether the (...) detention (...) was “lawful” within the meaning of Article 5 para. 1, including whether it was effected “in accordance with a procedure proscribed by law.”

⁹⁷⁵ And where a Member State of the EU is concerned, community law must also be taken into consideration to the extent that it is self-executing. ECommHR, *Caprino v. United Kingdom*, 3 March 1987, p. 14.

domestic law, who are given a certain margin of appreciation in this respect.⁹⁷⁶ It is the Court's task to ascertain that domestic laws are not interpreted or applied in an arbitrary manner.

7.3.2. Safeguards against arbitrary detention in Article 5 ECHR

Before investigating more specifically how the Court applies the prohibition on arbitrary detention in cases of immigration detention, I will first discuss some important procedural safeguards against arbitrary detention, embodied in paragraphs 2 and 4 of Article 5 ECHR.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

According to the Court, the remedy of habeas corpus in paragraph 4 is a fundamental guarantee, judicial control being implied by "the rule of law and one of the fundamental principles of a democratic society."⁹⁷⁷ The notion of a court in Article 5(4) ECHR does not necessarily imply the involvement of a traditional court, integrated in the normal judicial structures of a state. Instead, the reviewing body needs to satisfy certain substantial requirements in order to be considered a court in the sense of article 5(4) ECHR.

⁹⁷⁶ See *Winterwerp v. the Netherlands*, 24 October 1979, §46; *Barthold v. Germany*, 25 March 1985, §48; *Bozano v. France*, 18 December 1986, §58; and *Kemmache v. France*, 24 November 1994, §42. See for more Reid (1998), p. 182.

⁹⁷⁷ ECtHR, *Brogan and others v. the United Kingdom*, 29 November 1989, §58.

Three different criteria can be distinguished in the Court's assessment whether an organ fulfils these requirements. The first of these is apparent from the words of the provision itself: the 'court' must have the power to order the release of the detainee if it finds that the deprivation of liberty is unlawful. A reviewing body with merely consulting powers cannot be considered a court in the sense of article 5(4) ECHR.⁹⁷⁸

The second criterion concerns the organisation and impartiality of the reviewing organ vis-à-vis the executive and the parties to the case. According to the Court in *Neumeister*, independence and impartiality are essential features of the concept of a 'court' in paragraph 4.⁹⁷⁹ Thus, appeal to a higher administrative body to review the decision to detain would not satisfy the requirements of Article 5(4) ECHR.

Apart from these formal requirements, the court testing the lawfulness of the detention must provide fundamental guarantees in the proceedings that assess the lawfulness of the detention, the third condition to be fulfilled in order to be deemed a court in the sense of Article 5(4) ECHR. These proceedings must have a judicial character, and in order to determine whether they offer adequate guarantees, regard must be had to the particular nature of the circumstances in which they take place.⁹⁸⁰ It depends on the kind of deprivation of liberty in question what kind of guarantees must be offered.⁹⁸¹ In any case, the individual affected by the deprivation of liberty must be able to participate properly in the proceedings,⁹⁸² which implies they should have an adversarial character. Thus, the person who is deprived of his liberty should be able to submit his views on the matter to the court. With regard to detention to effect a deportation, this requirement entails that the detainee should be well informed of the reasons of the decision to deport him.⁹⁸³ The same would be required in case of detention to prevent entry. In some cases the court is obliged to hear somebody deprived

⁹⁷⁸*Weeks v. the United Kingdom*, 2 March 1987, §64; *X. v. the United Kingdom*, 5 November 1981, §61, and *Chahal v. the United Kingdom*, 15 November 1996, §130.

⁹⁷⁹*Neumeister v. Austria*, 27 June 1968, §24. See also *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, §77; *Winterwerp v. the Netherlands*, 24 October 1979, §56; and *Weeks v. the United Kingdom*, 2 March 1987, §61.

⁹⁸⁰*De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, §§76 and 78; *Winterwerp v. the Netherlands*, 24 October 1979; and *I'an Droogenbroeck v. Belgium*, 24 June 1982, §47.

⁹⁸¹*Weeks v. the United Kingdom*, 2 March 1987, §61; *Wassink v. The Netherlands*, 27 September 1990, §30; *Bouamar v. Belgium*, 29 February 1988, §57.

⁹⁸²*Weeks v. the United Kingdom*, 2 March 1987, §66.

⁹⁸³*Chahal v. the United Kingdom*, 15 November 1996, §130.

of his liberty in person.⁹⁸⁴ It is not clear whether the Court considers hearing in person in the case of immigration detainees essential. In the case of *Sanchez-Reisse*, which dealt with detention for the purpose of extradition, it stated that hearing in person was not necessary because the applicant's presence would not have made a difference for the outcome of the proceedings.⁹⁸⁵ Taking into account that the remedy of habeas corpus does not only provide protection against unlawful detention, but also functions as an important safeguard against ill-treatment during detention, this position of the Court is at least questionable.

The issue of legal assistance in case of detention is directly related to the habeas corpus provision contained in Article 5 ECHR. The Strasbourg case-law seems to indicate that in the case of detention to prevent entry or to effect expulsion, a right to legal assistance is implied by article 5(4) ECHR. In the case of *Chahal*, the fact that Mr. Chahal was not entitled to legal representation before the panel that reviewed his detention was one of the circumstances which lead the Court to conclude that this panel could not be considered a court in the sense of article 5(4) ECHR.⁹⁸⁶ Immigration detention always concerns non-nationals, often neither familiar with the legal system of the state depriving them of their liberty, nor able to speak the language. Accordingly, a lack of legal assistance would prevent them from making a meaningful appeal to a court.⁹⁸⁷ Accordingly, one may conclude that in most cases of immigration detention, legal assistance should be provided for in order to render the safeguard contained in Article 5(4) practical and effective.⁹⁸⁸

The second question is whether article 5(4) ECHR is always applicable. If the decision depriving someone of his liberty is taken by an administrative body, the person concerned is entitled to the judicial review meant in article 5(4) ECHR. This entitlement exists no matter how short the period of detention is.⁹⁸⁹ Moreover, legitimate security

⁹⁸⁴ *Winterwerp v. the Netherlands*, 24 October 1979, §60; and *Bouamar v. Belgium*, 29 February 1988, §60.

⁹⁸⁵ *Sanchez-Reisse v. Switzerland*, 21 October 1986, §51.

⁹⁸⁶ See *Chahal v. the United Kingdom*, 15 November 1996, §130.

⁹⁸⁷ *Conka v. Belgium*, 5 February 2002, §44 and 55.

⁹⁸⁸ In the case of *Bouamar* the Court deemed legal representation imperative in the habeas corpus proceedings of a minor (*Bouamar v. Belgium*, 29 February 1988). It has also considered that special procedural safeguards may be called upon in habeas corpus proceedings in the case of mentally ill people who are deprived of their liberty (*Winterwerp v. The Netherlands*, 24 October 1979, §60).

⁹⁸⁹ *Al Nashif v. Bulgaria*, 20 June 2002, §92.

concerns with regard to a foreigner can never justify a complete lack of judicial review of the detention.⁹⁹⁰ However, if the decision to detain is made by a court at the close of judicial proceedings, the supervision required by Article 5(4) ECHR is already incorporated in the decision, that is to say, if the court that took the initial decision to detain satisfies the requirements that were discussed above.⁹⁹¹ We have seen in Chapter 1 that in the Member States of the EU, different practices exist with regard to who orders immigration detention. In the majority of countries the administrative body that is dealing with the application for entry or with the expulsion order will also be responsible for ordering the detention. Accordingly, judicial review of that decision by a court is required by Article 5 ECHR.

The scope of the judicial review is the next aspect of article 5(4) ECHR to be considered. Article 5 ECHR should be read as a whole which means that the term lawfulness in paragraph 4 of this provision has the same meaning as in its first paragraph.⁹⁹² Accordingly, even though the executive has a certain margin of appreciation with regard to the ordering of the detention, the review should in any case be "wide enough to bear on those conditions which are essential for the "lawful" detention of a person according to Article 5(1) ECHR."⁹⁹³ I will deal with the substantive requirements that the first paragraph of Article 5 ECHR imposes on deprivations of liberty under immigration legislation below, but for now it is important to note that Article 5(4) ECHR thus imposes an autonomous standard on the judicial procedure challenging the lawfulness of the detention by requiring it to address the question whether the actual deprivation of liberty was not arbitrary in the sense of Article 5 ECHR. The question whether domestic law has been complied with thus contains only one element of the review required by Article 5(4) ECHR, which is in this respect comparable to Article 9 ICCPR.

Article 5(4) ECHR requires moreover that the review should take place *speedily*. What does the Court regard as speedily? Seeing that the answer on this question in

⁹⁹⁰ ECtHR, *Al Nashif v. Bulgaria*, 20 June 2002, § 95; and *Chahal v. the United Kingdom*, 15 November 1996.

⁹⁹¹ ECtHR, *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, §76.

⁹⁹² ECtHR, *Dougoz v. Greece*, 6 March 2001, §61; and *Ashingdane v. the United Kingdom*, 28 May 1985, §52.

⁹⁹³ *Chahal v. the United Kingdom*, 15 November 1996, §127; and *Weeks v. the United Kingdom*, 2 March 1987, §59.

particular depends on the circumstances of the case, the Court has never given a clear time limit by which the review must have taken place.⁹⁹⁴ Certainly, the term speedily in paragraph 4 of article 5 ECHR allows for less urgency than the notion of promptly required for the review of deprivations of liberty under criminal law in paragraph 3 of that provision.⁹⁹⁵ In the case of *E. v. Norway*, dealing with a deprivation of liberty of a mentally ill person, the Court found a period of eight weeks excessive and thus in violation of article 5(4) ECHR.⁹⁹⁶ In *Sanchez-Reisse*, periods of 31 and 46 days between requests for release and the judicial decisions on the lawfulness of extradition detention were not considered as in compliance with the notion 'speedily'.⁹⁹⁷ Various circumstances of the case may play a role in determining whether the requirement of a speedy review has been fulfilled, in particular the complexity of the case, the behaviour of the applicant, the conduct of the authorities, and what is at stake for the applicant.⁹⁹⁸ However, delays caused by an excessive workload or vacation periods can never be justified, because the Contracting States are obliged to organise their legal systems in such a way as to enable their courts to comply with the Convention's requirements. Indeed, according to the Court, judicial authorities must ensure that urgent matters in general are dealt with speedily, and this holds especially true when individual liberty is at stake.⁹⁹⁹

Does article 5(4) ECHR entail a right to periodical judicial reviews? The Court has answered this question in various cases, the most important of which deal with the deprivation of liberty of mentally ill persons. With regard to this category, the Court has deducted a right of periodical judicial review at reasonable intervals from the fact that the reasons initially warranting deprivation of liberty may cease to exist.¹⁰⁰⁰ After the first judicial review, new issues affecting the lawfulness of the detention may also arise in the case of detention to prevent unauthorised entry or detention to effect expulsion or

⁹⁹⁴ *Sanchez-Reisse v. Switzerland*, 21 October 1986, §55; and *E. v. Norway*, 29 August 1990.

⁹⁹⁵ *E. v. Norway*, 29 August 1990, §64.

⁹⁹⁶ *Ibid.* §64-66.

⁹⁹⁷ *Sanchez-Reisse v. Switzerland*, 21 October 1986, §59-60.

⁹⁹⁸ Lawson and Schermers (1999), p. 108. See also ECtHR in *Luberti v. Italy*, 23 February 1984.

⁹⁹⁹ *Bezicheri v. Italy*, 25 October 1989, A-164, §25 and *E. v. Norway*, 67, §66. See also *Letellier v. France*, 26 June 1992, §54-57, about the 'speediness' of subsequent reviews.

¹⁰⁰⁰ *Winterwerp v. the Netherlands*, 24 October 1979, §55; and *X. v. the United Kingdom*, 5 November 1981, §52.

deportation. The length of the detention may become excessively long, the state may not be handling the expulsion procedures adequately, or expulsion or deportation may no longer be possible. Therefore, if automatic periodical judicial review is not provided for, the immigration detainee should at least be entitled to institute proceedings to challenge the continuing lawfulness of his detention at reasonable intervals. However, it should be noted that the Court has never expressed an opinion on the question what constitutes a reasonable interval between judicial reviews of immigration detention.

Article 5(4) ECHR does not give persons deprived of their liberty a right to appeal the decision of the court reviewing the lawfulness of their detention or arrest. However, if domestic law allows for such an appeal, the judicial procedure followed by the higher instance should satisfy the requirements of article 5(4).

Paragraph 2 of article 5 ECHR gives everybody the right to be told, in simple, non technical language which he can understand, the essential legal and factual grounds for his arrest.¹⁰⁰¹ This provision is applicable to all categories of deprivation of liberty.¹⁰⁰² It is closely related to the right of judicial review of the deprivation of liberty as only someone who is aware of the reasons for his detention can effectively challenge its lawfulness.¹⁰⁰³ In addition, this right has an independent meaning as well: it is "the embodiment of a kind of legitimate confidence in the relations between the individual and the public powers."¹⁰⁰⁴

Three requirements flow from the obligation laid down in article 5(2) ECHR: the information must be given promptly; it should be complete; and it ought to be communicated in an intelligible manner. The inclusion of the term promptly requires that somebody deprived of his liberty should be informed of the broad reasons right at the moment of arrest or detention. Only very special circumstances may justify a delay.¹⁰⁰⁵ Detailed written reasons for immigration detention may be supplied somewhat later, as the Court confirmed in the case of *Čonka*.¹⁰⁰⁶ The Court found a violation of Article 5(2) in *Saadi*, as the applicant had been in immigration detention for some 76

¹⁰⁰¹ *Čonka v. Belgium*, 5 February 2002, §50.

¹⁰⁰² *Van der Leer v. The Netherlands*, 21 February 1990, §27-28.

¹⁰⁰³ *X v. the United Kingdom*, 55, §66.

¹⁰⁰⁴ See dissenting opinion of judge Evrigenis attached to *X v. the United Kingdom*, 5 November 1981.

¹⁰⁰⁵ van Dijk and van Hoof (1998), p. 369.

¹⁰⁰⁶ *Čonka v. Belgium*, of 5 February 2001, par. 47-52.

hours before his lawyer was orally provided with the real reasons for his detention.¹⁰⁰⁷ The information needs to be complete: which in expulsion cases implies that somebody should not only be informed that he is detained in order to deport or expulse him, but also of the reasons justifying this expulsion.¹⁰⁰⁸ Finally, the importance of the requirement that the reasons for arrest or detention need to be communicated in a language which the detained understands, is evident in cases of immigration detention.

The last paragraph of article 5 ECHR holds a unique provision in the Convention. It gives anybody the right to compensation if he has been deprived of his liberty in contravention of article 5 ECHR. This provision differs from article 50 ECHR in that it gives the individual whose rights under article 5 ECHR have been violated a right to compensation directly vis-à-vis the national authorities. In this respect it is not relevant whether it was the Court in Strasbourg who found a violation or a national court.

In the absence of an enforceable right to compensation under national law in respect of breaches of article 5 ECHR, paragraph 5 of that provision is violated, also if the detention is not illegal under national law.¹⁰⁰⁹ Nonetheless, case law shows that article 5(5) ECHR does not prohibit the Contracting States from making the award of compensation dependent upon the ability of the person concerned to show damage resulting from the breach. Indeed, in the Court's view there can be no question of "compensation" where there is no pecuniary or non-pecuniary damage to compensate.¹⁰¹⁰

7.4. IMMIGRATION DETENTION AND THE PROHIBITION OF ARBITRARINESS

7.4.1. General

As already mentioned above, the term 'lawful', therewith including 'in accordance with a procedure prescribed by law' contained in Article 5(1) ECHR

¹⁰⁰⁷ *Saadi v. the United Kingdom*, 11 July 2006, par. 54-55.

¹⁰⁰⁸ De Gouttes (1995), p. 206.

¹⁰⁰⁹ *Brannigan and McBride*, 26 May 1993, §37, and *Brogan and others v. the United Kingdom*, 29 November 1989, §67.

¹⁰¹⁰ *Wassink v. The Netherlands*, 27 September 1990, §38.

requires that any measure depriving the individual of his liberty is compatible with the purpose of Article 5 ECHR, namely to protect the individual from arbitrariness.¹⁰¹¹ As we have seen above, the notion of arbitrariness clearly goes beyond a violation of the positive law, and it can be understood to contain elements of injustice, inappropriateness, unpredictability and unreasonableness.¹⁰¹²

In this Section, I will address the way in which the ECtHR applies the prohibition on arbitrary detention in cases of immigration detention. When analysing case law of the Court, one can roughly distinguish between four aspects of the detention which have a bearing upon its lawfulness in the sense of Article 5 ECHR: the quality of the national law authorising the detention; the conditions and place of detention; the reasons underlying the decision to resort to detention; and the duration of the detention. I will first address the first two aspects in relation to immigration detention, because they elucidate the manner in which the Court gives concrete shape to some aspects of the notion of arbitrariness. After that I will analyse under which conditions the legitimate purposes of immigration detention under Article 5 ECHR justify a decision to resort to detention in a concrete case.

7.4.2. Lack of predictability and inappropriateness as elements of arbitrariness

When the Court examines whether the detention is carried out in accordance with a procedure prescribed by law, it attaches crucial importance to the quality of the domestic law authorising detention. It is important that these laws are accessible to the person concerned, who should in addition be able to foresee the consequences. Legislation that is imprecise or vague will not satisfy these 'foreseeability and accessibility requirements'.¹⁰¹³ Accordingly, any deprivation of liberty authorised by

¹⁰¹¹ See, for instance, *Winterwerp v. the Netherlands*, 24 October 1979, §§39 and 45; *Bozano v. France*, 18 December 1986, §54; *Bouamar v. Belgium*, 29 February 1988, §47; and *Benham v. the United Kingdom*, 10 June 1996, §40.

¹⁰¹² HRC, *Mukong v. Cameroon*, 21 July 1994, at 9.8 and Nowak (1993), p. 292.

¹⁰¹³ See about these 'quality requirements' of the domestic laws in general: *Sunday Times v. the United Kingdom*, 26 April 1979, §49; *Silver and others v. the United Kingdom*, 25 March 1983, §87-88; *Malone v. the United Kingdom*, 2 August 1984, §66; *Leander v. Sweden*, 26 March 1987, §50, 51; *Kruslin v. France*, 24 April 1990, §30; *Huvig v. France*, 24 April 1990, §29, 31, 33. For these requirements

such laws violates Article 5(1) ECHR. It is only logical that with regard to aliens' legislation these requirements gain extra weight, as it concerns people that are unfamiliar with the national laws. The Court confirmed this in *Amuur*, adding that these quality requirements must be satisfied in order to avoid all risk of arbitrariness.¹⁰¹⁴ It can be argued that the extensive administrative discretion to order immigration detention in many EU Member States may result in arbitrary detentions on account of a lack of predictability.

The manner of implementation of the detention may also play a role in determining its lawfulness. Admittedly, the Court decided in *Bizzotto* that arrangements for implementing sentences cannot, in principle, have any bearing on the "lawfulness" of a deprivation of liberty.¹⁰¹⁵ Nonetheless, this judgement of the Court must not be misinterpreted to purport that conditions of detention can never constitute criteria that are relevant for the determination of the lawfulness. The cases of *Ashingdane* and *Bouamar* confirmed that there should indeed be a relationship between the main ground of permitted deprivation of liberty relied on by the authorities and the manner of implementation of detention.¹⁰¹⁶

Ashingdane was a mental patient and *Bouamar* was a minor who was detained with the aim of educational supervision. In these cases the aim of detention gave clear indication of the place and conditions of the deprivation of liberty. With regard to detention permitted under Article 5(1)(f) it is more difficult to deduct from the aim of the deprivation of liberty binding conclusions about the place or conditions of detention. It seems reasonable to say that deprivation of liberty under Article 5(1)(f) should not consist of more restrictions than necessary.¹⁰¹⁷ Detaining asylum seekers and illegal immigrants in police cells or prison facilities, although questionable from a humanitarian viewpoint will not be unlawful under Article 5(1)(f), although the Court established that the conditions of immigration detention in the case of *Dougoz*

specifically with regard to immigration detention: *Amuur v. France*, 25 June 1996, §50 and *Dougoz v. Greece*, 6 March 2001, §55-57.

¹⁰¹⁴ *Amuur v. France*, 25 June 1996, §50.

¹⁰¹⁵ *Bizzotto v. Greece*, 15 November 1996, §34.

¹⁰¹⁶ *Ashingdane v. the United Kingdom*, 28 May 1985, §44; *Bouamar v. Belgium*, 29 February 1988; and also in *Bizzotto v. Greece*, 15 November 1996, §31.

¹⁰¹⁷ van Dijk and van Hoof (1998), p. 364.

constituted a breach of Article 3 ECHR.¹⁰¹⁸ However, if immigration detainees are obliged to follow the daily routine of the other prison inmates, a routine often characterised by punitive aspects, questions of lawfulness according to Article 5 ECHR may arise.

A good example where the manner of implementation of immigration detention affected its lawfulness can be found in *Čonka v. Belgium*. In this case the Belgium police had sent a notice to a number of rejected asylum seekers, requiring them to attend the police station. The notice stated that their attendance was required to enable the files concerning their applications for asylum to be completed. At the police station however, they were served with an order to leave the territory, accompanied by a decision for their removal and their detention for that purpose and they were taken to a closed transit centre. The Court condemned the use of a “ruse” whereby the authorities tried by misleading asylum seekers to gain their trust in order to arrest and subsequently to deport them:

“The Court reiterates that the list of exceptions to the right to liberty secured in Article 5 § 1 is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision. In the Court’s view, that requirement must also be reflected in the reliability of communications such as those sent to the applicants, irrespective of whether the recipients are lawfully present in the country or not. It follows that, even as regards overstayers, a conscious decision by the authorities to facilitate or improve the effectiveness of a planned operation for the expulsion of aliens by misleading them about the purpose of a notice so as to make it easier to deprive them of their liberty is not compatible with Article 5.”¹⁰¹⁹

Čonka made more concrete the way the Court envisages the relationship between immigration detention and the manner of implementation thereof. That is to say, whereas the Court did not seem to exclude the use of stratagems in order to deprive criminals of their liberty, it did not deem it in accordance with the general principles embodied in the Convention if those stratagems were used to gain the trust of asylum seekers in order to arrest them.

¹⁰¹⁸ The Court has never given a judgment on the relationship between the ground of immigration detention and the manner of implementation thereof. However, in the case of *Dougoz v. Greece*, 6 March 2001, it found the conditions of detention to be in violation of Article 3.

¹⁰¹⁹ *Čonka v. Belgium*, 5 February 2002, §42.

7.4.3. When do the prevention of illegal entry and securing expulsion justify detention?

Clearly, the reasons underlying the decision to detain will affect its lawfulness as well. We have seen in Section 7.2. that the Convention only recognises two legitimate aims for detention under immigration legislation: the removal of the person concerned and the prevention of illegal entry. Article 18 ECHR prohibits using the restrictions that are permitted by the Convention to the rights guaranteed by it for any other purpose other than for which they have been described. Indeed, were it otherwise, the assertion by the Court that the list of exceptions to the right to liberty secured in Article 5(1) ECHR is an exhaustive one, and that only a narrow interpretation of those exceptions is consistent with the aim of that provision, would be rendered meaningless. The issue to be dealt with in this Section is the manner in which the Court interprets the exception under Article 5(1)(f) ECHR. In other words, under which conditions do the legitimate purposes of immigration detention under Article 5 ECHR justify a decision to resort to detention in an individual case? I will address pre-deportation detention in the context of this question, after which I will deal with detention upon arrival.

With regard to pre-deportation detention, the Court, when reviewing the initial decision to detain a foreigner, barely seems to perceive a difference between the question of what is brought forward as a legitimate aim of immigration detention and the question as to under which circumstances such a reason may justify the decision to detention in an individual case as was shown in *Chahal*:

“Article 5(1)(f) does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing; in this respect Article 5(1)(f) provides a different level of protection from Article 5(1)(c). Indeed, all that is required under this provision is that “action is being taken with a view to deportation”. It is therefore immaterial, for the purposes of Article 5(1)(f), whether the underlying decision to expel can be justified under national or Convention law.”¹⁰²⁰

¹⁰²⁰ *Chahal v. the United Kingdom*, 15 November 1996, §112; *Conka v. Belgium*, 5 February 2002, §38; *Quinn*, 22 March 1995, §48. (The last case concerned detention pending extradition.)

It is by elaborating on the specific circumstances in which the expulsion or deportation of an individual allow for his detention, that issues such as reasonability, proportionality and necessity come into play, of which the decisions of the HRC as were discussed in the previous Chapter provide a good example. But according to the Court in Strasbourg, any person against whom deportation proceedings are taken can be detained, without considering these important principles. In the recent case of *Čonka*, the applicants explicitly brought the argument forward that their arrest had not been necessary to secure their departure from Belgium. However, the Court quoted from its earlier case law to express once more that an unnecessary pre-deportation detention is not unlawful.¹⁰²¹ Its statements in *Chahal*, which were once more reiterated in *Saadi* as we will see below,¹⁰²² cannot be interpreted otherwise as to mean that even if the lawfulness of the deportation proceedings is in dispute, detention based upon those proceedings need not to be unlawful in the light of the ECHR.

One exception to the Court's deference to national authorities' decisions in this regard is provided by the situation in which there is no legal basis whatsoever for the deportation proceedings. In that case, the Court has found a violation of the requirement in Article 5(1)(f) that the deprivation of liberty needs to be carried out in accordance with a procedure prescribed by law.¹⁰²³

The only other instance in which the Court addresses issues concerning reasonability, necessity and proportionality of the detention *ipso facto* relate to the duration of the detention. Article 5 ECHR mentions limits to the duration of deprivation of liberty solely with regard to people detained on suspicion of criminal offences. With regard to detention to effect expulsion, the Court has never given any clear guidelines as regards the maximum duration of deprivation of liberty. In *Chahal*, the Court stated that the deprivation of liberty will be justified only as long as deportation proceedings are in

¹⁰²¹ *Čonka v. Belgium*, 5 February 2002, §38. However, note the Court's remark in *Bozano v. France*, 18 December 1986, §60: "Depriving Bozano of his liberty in this way [did not amount] to "detention" necessary in the ordinary course of "action. taken with a view to deportation"."

¹⁰²² *Saadi v. the United Kingdom*, 11 July 2006, par 33.

¹⁰²³ *Mohd v. Greece*, 27 April 2006, par. 20-24.

progress.¹⁰²⁴ If these proceedings are not carried out with due diligence the detention will cease to be lawful under Article 5 ECHR.¹⁰²⁵

When assessing the duration of the expulsion proceedings, attention must also be paid to the detainee's behaviour. If his conduct was the cause for delays, the State cannot be held responsible for an exceedingly long duration.¹⁰²⁶ To judge the diligence with which the state handles the expulsion proceedings the interests at stake for the applicant also play a role.¹⁰²⁷ In *Chahal*, the applicant held that if he would be returned to his country of origin, he would be subjected to treatment in violation of Article 3 ECHR. As his case accordingly involved considerations of an extremely serious and weighty nature, it was neither considered in his interest, nor in that of the general public, if decisions about his expulsion would be taken hastily.¹⁰²⁸ Accordingly, if such grave interests are at stake, it is only logical that deportation proceedings take longer than when the applicant's interests are of a less serious nature. Thus, a lack of due diligence of the authorities in the expulsion proceedings amounts to a violation of Article 5(1)(f). In assessing this aspect of the detention, the Court seems to pay rather more attention to the question as to whether the state has remained active during the period of detention, than to the actual duration of the detention.¹⁰²⁹

As we have seen above, pre-admittance detention is only permissible in order to prevent the person concerned from effecting an unauthorised entry in the country. In *Amuur*,¹⁰³⁰ the Court was not required to arrive at any detailed conclusion as to the test to be applied to detention upon arrival allegedly falling within Article 5(1)(f) ECHR, because this case focussed on the quality of the national laws that were applicable.¹⁰³¹ Nonetheless, it was a highly significant case, as the Court decided that to hold asylum

¹⁰²⁴ *Chahal v. the United Kingdom*, 15 November 1996, §113.

¹⁰²⁵ ECtHR *Quinn v. France*, 22 March 1995, §48; and *Singh v. The Czech Republic*, 25 January 2005. The *Quinn* and *Singh* cases concerned extradition proceedings, but the same principle applies to expulsion proceedings: *Kolompar v. Belgium*, 24 September 1992, §36; and *Chahal v. the United Kingdom*, 15 November 1996, §113.

¹⁰²⁶ *Kolompar v. Belgium*, 24 September 1992, §42.

¹⁰²⁷ See Velde (1999), p. 42.

¹⁰²⁸ *Chahal v. the United Kingdom*, 15 November 1996, §117. The Court did not consider Mr. Chahal's detention, which took almost six years, too long.

¹⁰²⁹ ECtHR, *Ntumba Kabongo c. Belgique* (inadmissible), 2 June 2005.

¹⁰³⁰ *Amuur v. France*, 25 June 1996.

¹⁰³¹ See *Saadi v. the United Kingdom*, 11 July 2006, par. 35.

seekers in the international zone of an airport constitutes a restriction of liberty which under circumstances can turn into a deprivation of liberty. According to the Court, a state cannot refute the existence of deprivation of liberty with the argument that the asylum seekers are not on its territory or that they are free to leave at any time. The possibility for asylum seekers to leave voluntarily the country where they wish to take refuge does not exclude the existence of a restriction of liberty, which can under circumstances become a deprivation of liberty.¹⁰³²

“The Court [...] notes that many member States of the Council of Europe have been confronted for a number of years now with an increasing flow of asylum-seekers. It is aware of the difficulties involved in the reception of asylum-seekers at most large European airports and in the processing of their applications. [...] Contracting States have the undeniable sovereign right to control aliens' entry into and residence in their territory. The Court emphasises, however, that this right must be exercised in accordance with the provisions of the Convention, including Article 5.”¹⁰³³

“Holding aliens in the international zone does indeed involve a restriction upon liberty, but one which is not in every respect comparable to that which obtains in centres for the detention of aliens pending deportation. Such confinement, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations, particularly under the 1951 Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights. States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions. [...] In that connection account should be taken of the fact that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country.”¹⁰³⁴

Taking into account that the applicants were placed under strict and constant police surveillance and had no legal and social assistance, the Court concluded that their situation amounted to a deprivation of liberty which fell under the scope of Article 5 ECHR.¹⁰³⁵ Subsequently, it deemed their detention in violation of Article 5 ECHR because the rules governing their detention in the international zone were not of a

¹⁰³² *Amuur v. France*, 25 June 1996, par. 48.

¹⁰³³ *Amuur v. France*, 25 June 1996, §41.

¹⁰³⁴ *Ibid.* §43.

¹⁰³⁵ *Ibid.* par. 45 and 49.

sufficient quality to satisfy the requirement that the deprivation of liberty should be in accordance with a procedure prescribed by law.¹⁰³⁶

The Court's decision in *Amuur* is important in that it takes due account of the individual interests that are involved in sovereignty's territorial frame. Although the Court recognises the sovereign right of states to regulate the entry of foreigners, it also acknowledges the actualities of the individual movement in a global political system based on territoriality. As such, it effectively dismisses as artificial the sovereign argument that asylum seekers are free to go wherever they want as long as it is not in the territory of the sovereign state that is making that argument.

However, it is arguable that the destabilizing effect of *Amuur* on the territorial frame of sovereignty was mitigated in a later case that was decided by the Court. In *Mahdid and Haddar*, concerning the case of two asylum seekers whose applications had been dismissed by the Austrian government, the Court judged that the applicants' stay on Vienna airport fell outside the scope of Article 5 ECHR.¹⁰³⁷ After the applicants' requests for asylum had been dismissed, they destroyed their travel documents so that they could not be removed. This, "a deliberate choice for which the Contracting State cannot in any way be held responsible", together with the fact that the applicants remained without any special police surveillance and had refused better accommodation in the (surveilled) transit zone, led the Court to conclude that their stay in Vienna Airport did not amount to a deprivation of liberty.¹⁰³⁸

Although this case indeed differed in important aspects from *Amuur*, the Court's quick characterisation of the situation as entirely due to the deliberate choice of applicants is questionable. If one would assume that the *Bundesasylamt* had been wrong in dismissing their applications for asylum – not a mere theoretical possibility as it was still possible to appeal the decision made by the *Bundesasylamt* – the deliberateness of the position of the applicants would have been a lot more difficult to defend.¹⁰³⁹

In the cases discussed above, there was no need for the Court to address the question of the necessity or the proportionality of pre-admittance detention. However, in *Saadi* it became clear that for the Court, these aspects of the decision to detain are as

¹⁰³⁶ Ibid. §43.

¹⁰³⁷ *Mahdid and Haddar v. Austria* (inadmissible), 8 December 2005.

¹⁰³⁸ Ibid.

¹⁰³⁹ Lawson (2005). See for a similar case in which the court's stance is more defensible: *Mogos v. Romania*, 13 October 2005

inconsequential for the question of its lawfulness as they are with regard to pre-deportation detention.¹⁰⁴⁰ Indeed, when reviewing the lawfulness of pre-admittance detention in this case, the Court explicitly refuted the applicability of the principles of proportionality and necessity, a definite shortcoming in its case law that is only the more prominent because with regard to the legitimate aim of this type of detention, the wording of Article 5(1) ECHR is unambiguous: it is to be resorted to in order to prevent unauthorised entries.

In order to reflect the position of the Court unequivocally, I resort to extended quotation from *Saadi*, which concerned the detention of an asylum seeker in Oakington, a British immigration detention that, according to the UK government, is used only for those who do not present a risk of absconding. The sole aim of detention at Oakington is to speed up immigration procedures by using a “fast-track” procedure.

“The first question which the Court must address is whether a person who has presented himself to the immigration authorities and has been granted temporary admission to the country can be considered as a person who is seeking to effect an “unauthorised entry” into the country. The Court does not accept that, as soon as a potential immigrant has surrendered himself to the immigration authorities, he is seeking to effect an “authorised” entry, with the result that detention cannot be justified under the first limb of Article 5(1)(f). In particular, it is a normal part of States’ “undeniable right to control aliens’ entry into and residence in their country that States are permitted to detain would-be immigrants who have applied for permission to enter, whether by way of asylum or not. Such detention must be compatible with the overall purpose of Article 5, which is to protect the individual from arbitrariness, but it is evident from the tenor of the judgment in *Amuur* that the detention of potential immigrants is capable of being compatible with Article 5(1)(f). As to the difference between a short period of detention on arrival in a country in order to assess the risk of absconding [...] and subsequent detention in order to facilitate the processing of cases [...], the Court agrees with the Government that, until a potential immigrant has been granted leave to remain in the country, he has not effected a lawful entry, and detention can reasonably be considered to be aimed at preventing unlawful entry.”¹⁰⁴¹

Accordingly, the Court concluded that in spite of the fact that the applicant had been granted temporary admission, his detention was to prevent his effecting an unlawful entry because, formal entry clearance lacking, he had not lawfully entered the country. Subsequently, the Court investigated whether it was permissible to detain a

¹⁰⁴⁰ *Saadi v. the United Kingdom*, 11 July 2006.

¹⁰⁴¹ *Ibid.* par. 39-40.

potential asylum seeker or immigrant in circumstances where there is no risk of his absconding or other misconduct:

“Detention of a person is a major interference with personal liberty, and must always be subject to close scrutiny. Where individuals are lawfully at large in a country, the authorities may only detain if [...] a “reasonable balance” is struck between the requirements of society and the individual’s freedom. The position regarding potential immigrants, whether they are applying for asylum or not, is different to the extent that, until their application for immigration clearance and/or asylum has been dealt with, they are not “authorised” to be on the territory. Subject, as always, to the rule against arbitrariness, the Court accepts that the State has a broader discretion to decide whether to detain potential immigrants than is the case for other interferences with the right to liberty. Accordingly, and this finding does no more than apply to the first limb of Article 5(1)(f) the ruling the Court has already made as regards the second limb of the provision, there is no requirement in Article 5(1)(f) that the detention of a person to prevent his effecting an unauthorised entry into the country be reasonably considered necessary, for example to prevent his committing an offence or fleeing. All that is required is that the detention should be a genuine part of the process to determine whether the individual should be granted immigration clearance and/or asylum, and that it should not otherwise be arbitrary, for example on account of its length.”

The Court concluded its judgment by dismissing the applicants claim that the detention was arbitrary – for example because its aim was to decide more speedily or because it involved the use of a list of countries whose nationals could or could not be detained at Oakington – as it viewed these claims as mere restatements of the claim that there should be a necessity test for such a detention. In addition, it did deem it necessary to address the applicant’s separate claim that Article 14 ECHR had been breached as a result of the legislation that provided for a list of countries whose nationals could or could not be detained. Essentially, the Court seems to allow for discrimination on the ground of nationality on account of the broad discretion it grants the state to decide on immigration detention.

Regarding both pre-admittance detention and pre-deportation detention, the Court’s interpretation of the restriction on the right to personal liberty permitted by Article 5(1)(f) ECHR can hardly be regarded as a narrow one. On the contrary: it is difficult to think of an interpretation that gives the state more discretion. The Court’s understanding of Article 5(1)(f) seems almost impossible to reconcile with its position that detention must always be compatible with the purpose of Article 5(1) of the

Convention, which is to prevent persons from being deprived of their liberty in an arbitrary fashion. Moreover, it is unclear how to evaluate the position of Article 18 ECHR in the Court's approach. Especially the case of *Saadi*, where the respondent government openly admitted that the aim of detaining the applicant at Oakington was to speed up asylum procedures, warrants no other conclusion than that the Court does not deem Article 18 applicable in cases of immigration detention.

The Court's interpretation of the right to liberty authorises detention of asylum seekers or illegal immigrants which is unnecessary and lacking in proportionality. As we saw, such detentions would be in contravention of Article 9 ICCPR because they violate the prohibition of arbitrariness in the context of this provision. This raises some basic questions concerning the protection offered by the Strasbourg Court. What exactly is proportionality, how does it relate to the concept of necessity, and does it belong to the general principles embodied in the Convention? Moreover, perhaps we need to investigate the way in which the Court evaluates the lawfulness of other categories of deprivation of liberty in order to understand its immigration detention case law.

7.5. PROPORTIONALITY AS A GENERAL PRINCIPLE EMBODIED IN THE ECHR

7.5.1. The concept of proportionality in the Strasbourg case law

The purpose of using the concept of proportionality is to reconcile rights protection with the public interest by attempting to find a balance between the two. That the Court feels at ease with this concept is apparent by its frequent employment of the term 'fair balance', a concept that appears very regularly in its case law.¹⁰⁴² According to the Court the search for a fair balance between the demands of general interest of the community and the requirements of the protection of the individual's rights is inherent in the whole of the Convention.¹⁰⁴³ In *Klass*, the Court agreed with the Commission that

¹⁰⁴² See among many: *Brogan and others v. the United Kingdom*, 29 November 1989, §48; *Rees v. the United Kingdom*, 17 October 1986, §37; *Gaskin v. the United Kingdom*, 7 July 1989, §42; *B. v. France*, 25 March 1992, §44; *Vasilopoulou v. Greece*, 21 March 2002, §24; *Mikulic v. Croatia*, 7 February 2002, §58; and *Jokela v. Finland*, 21 May 2002, §53.

¹⁰⁴³ *Soering v. the United Kingdom*, 7 July 1989, §161. See also *Cossey v. the United Kingdom*, 27 September 1990, §37.

"some compromise between the requirements of defending democratic society and individual rights is inherent in the system of the Convention".¹⁰⁴⁴ In the *Belgian Linguistics Case*, it added that while searching for this fair balance particular importance should be attached to individual rights protection.¹⁰⁴⁵

In the field of human rights protection the concept of proportionality can be used when conflicts arise between individual rights and public interest. It can serve as a tool to evaluate justifications of public authorities for interferences with fundamental rights.¹⁰⁴⁶ The seriousness of the interference is balanced against the importance of the aim pursued by it.¹⁰⁴⁷ The proportionality test in the abstract consists of three different stages. The first step involves examining whether the measure, which interferes with the right, is suitable to protect the public interest. In other words: there should be some causal relationship between the measure and the aim pursued therewith.¹⁰⁴⁸ The next step consists of assessing the measure's necessity to realise the required protection. If a less restrictive measure would also suffice it follows that the measure in question is not necessary. This follows from "the very recognition that certain interests are to be regarded as important rights" which means that "any invasion of them should be kept to the minimum."¹⁰⁴⁹ And finally, in the context of protection of fundamental rights, the measure, even when suitable and necessary, should not impose an excessive burden on the individual concerned. This last requirement can be referred to as proportionality in the narrow sense. Accordingly, if even the least restrictive measure inflicts an unreasonable burden upon the individual it cannot be considered as proportional.

Proportionality is nowhere mentioned in the text of the ECHR. However, in one of its provisions the concept is all but mentioned: Article 15 ECHR permits the contracting States to derogate from the rights protected in the Convention in time of emergency but only to the extent strictly required by the exigencies of the situation. These last words embody the idea of proportionality, which was confirmed by the Court

¹⁰⁴⁴ *Klass v. Germany*, 6 September 1978, §59.

¹⁰⁴⁵ *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"*, 23 June 1968, §5.

¹⁰⁴⁶ Feldham (1999), p. 118.

¹⁰⁴⁷ The Court uses this formulation in the case of *Berrehab v. the Netherlands*, 21 June 1988, A-138, §29. See also Matscher (1993), p. 78.

¹⁰⁴⁸ Jans (2000), p. 240.

¹⁰⁴⁹ Craig (1999), p. 97.

in *Brammigan and McBride*.¹⁰⁵⁰ The Court used the word proportionality for the first time in the *Belgian Linguistics Case*. This was in regard to Article 14 ECHR, the provision in the Convention that prohibits discrimination. According to the Court difference in treatment does not always violate Article 14 ECHR, provided that a legitimate aim is pursued with the measure which amounts to a difference of treatment. However, if the measure in question “does not fully respect [...] the relationship of proportionality between the means employed and the aim sought” it will be incompatible with Article 14 ECHR.¹⁰⁵¹

When using the proportionality principle as a yardstick to evaluate the lawfulness of interferences the Court does not apply the proportionality test as described above in a clear and structured way. On the contrary, the Court has taken many different approaches. What follows is an attempt to identify some red lines in the way in which proportionality features in the Strasbourg case law.

The principle of proportionality has played the most prominent role in case law based on those articles in the Convention which have a second paragraph in which it is expressly stated that limitations to the rights protected in the first paragraph are permitted if this is necessary in a democratic society to achieve a legitimate purpose. These consist of the Articles 8 to 11 of the Convention, protecting the right to family and private life, freedom from thought, conscience and religion, freedom of expression, and freedom of assembly and association. The Court will examine whether the reasons given by the authorities for the restrictive measure are relevant and sufficient.¹⁰⁵²

¹⁰⁵⁰ *Brammigan and McBride v. the United Kingdom*, 26 May 1993, §54.

¹⁰⁵¹ *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"*, 23 June 1968, §32.

¹⁰⁵² See *inter alia*: *Olsson v. Sweden*, 24 March 1988, A-130, §68; *Lehideux and Isorni v. France*, 23 September 1998, §51; *K. and T. v. Finland*, 27 April 2000, §135; *Barthold v. Germany*, 25 March 1985, §55; *Dudgeon v. the United Kingdom*, 22 October 1981, §54; *Handyside v. the United Kingdom*, 7 December 1976, §50; *Lingens v. Austria*, 8 July 1986, §40; *Sunday Times v. the United Kingdom*, 26 April 1979, §50; *Vogt v. Germany*, 26 September 1995, §52; and *Bergens Tidende and others v. Norway*, 2 May 2000, §48. See specifically for requirements of sufficiency and relevance of the reasons given for interferences with the right to liberty in cases examined under Article 5(1) under c: *N.C. v. Italy*, 11 January 2001, §60; *Letellier v. France*, 26 June 1991, §52; *Tomasi v. France*, 27 August 1992, §91; *I.A. v. France*, 23 September 1998, §104; *Wemhoff v. Germany*, 27 June 1968, §12; *Kenmache v. France*, 27 November 1991, §52; *Van der Tang v. Spain*, 30 July 1995, §67; and *Muller v. France*, 17 March 1997, §45.

Especially the element of relevance indicates that this assessment can be seen as the first stage of the proportionality test. If the reasons given for the interference are not relevant, it is justified to conclude that the measure is not suitable to protect the legitimate interest. Nevertheless, the word sufficient does indicate that this examination goes further than just the first step of the proportionality test. The reasons given by the authorities must specifically address the necessity of the interference and it does not suffice if they are solely of a general nature.¹⁰⁵³ This refers to the notion of necessity, the second stage.

Regarding this second stage it is interesting to see how the Court has interpreted the words 'necessary in a democratic society'. Necessary in this context is not the same as indispensable but neither does it have the flexibility of expressions such as admissible, useful, reasonable or desirable.¹⁰⁵⁴ According to the Court the notion of necessity implies a pressing social need.¹⁰⁵⁵ Now that is somewhat unclear and it does not concur with what was described above as the second step in the proportionality test. This interpretation is misleading insofar as the legitimacy of the purpose is challenged with this notion.¹⁰⁵⁶ The legitimacy of the purpose of the measure is something that should be examined elsewhere, and is in itself not relevant for assessing the proportionality of the measure. Also, it is incorrect that in determining what is proportionate it should be taken into account whether a particular interest was actually in peril.¹⁰⁵⁷ For it is only after the Court has decided that the exercise of a right does influence a legitimate public interest that it should proceed to assess the proportionality of the measure interfering with this right. More in line with the second step of the proportionality test is the Court's statement that the restrictions permitted under the second paragraphs are to be given a narrow interpretation, since they provide for an exception to a right guaranteed by the Convention.¹⁰⁵⁸

¹⁰⁵³ *Margareta and Roger Andersson v. Sweden*, 25 February 1992, §96.

¹⁰⁵⁴ *Handyside v. the United Kingdom*, 7 December 1976, §67.

¹⁰⁵⁵ *Ibid.* §48. See also *Sunday Times v. the United Kingdom*, 26 April 1979, §59; *Dudgeon v. the United Kingdom*, 22 October 1981, §§51, 60; and *Lehideux and Isorni v. France*, 23 September 1998, §51.

¹⁰⁵⁶ See also Matscher (1993), p. 79.

¹⁰⁵⁷ See McBride (1999), p. 25. If the public interest is not in peril at all, there is no need for any balancing to be done. However, if there are some possible adverse effects but these are minor it is clear which outcome the search for proportionality will have: *Hertel v. Switzerland*, 25 August 1998, §§49-50; and *Vereinigung Demokratischer Soldaten Österreichs und Gubi v. Austria*, 19 December 1994, §39.

¹⁰⁵⁸ *Klass v. Germany*, 6 September 1978, §42.

In a number of cases the Court did actually examine whether the legitimate interest can be pursued in another, less restrictive way.¹⁰⁵⁹ Also in conformity with this reasoning is the conclusion reached in the cases of *Cremieux, Mihailhe, and Funke*: if the measure does not have adequate and effective safeguards against abuse it cannot be said to be strictly proportionate to the aim pursued.¹⁰⁶⁰ In other words, if the restrictions are “too lax and full of loopholes” they cannot be regarded as necessary to achieve a legitimate aim and authorities must look for measures which gives them less discretion to encroach on the right in question. However, the Court has also come to the conclusion that, even though the authorities could have taken “less severe measures” to pursue their legitimate aim, they nevertheless did not fail to strike a fair balance between the economic interest of the individual and the general national interest.¹⁰⁶¹

Apart from interpreting the words “necessary in a democratic society” in such a manner as to imply a pressing social need the Court has also explicitly equalled this requirement to proportionality.¹⁰⁶² In the case of *Handyside*, the very elements of a democratic society (tolerance, pluralism and broad-mindedness) were presumed to imply that restrictions on freedom of expression had to be proportionate to the aim pursued.¹⁰⁶³ Sometimes the necessity requirement is considered to demand only proportionality of the measure in question.¹⁰⁶⁴ In some cases the Court simply equals democratic necessity with proportionality: if the measure is not proportional it is not necessary in a democratic society.¹⁰⁶⁵

¹⁰⁵⁹ See *Campbell v. the United Kingdom*, 25 March 1992, §48; *Mareckx v. Belgium*, 13 June 1979, A-31, §40; and *Lehideux and Isorni v. France*, 23 September 1998, §57, where it was inter alia the seriousness of a criminal conviction for publicly defending the crimes of collaboration, having regard to the existence of other means of intervention and rebuttal, particularly through civil remedies, which made the measure disproportional; and some cases examined under Article 5(1) under e, which will be treated later.

¹⁰⁶⁰ *Cremieux v. France*, 25 February 1993, §39; *Mihailhe v. France*, 25 February 1993, §38; and *Funke v. France*, 25 February 1993, §57.

¹⁰⁶¹ *Tre Traktorer Bolag v. Sweden*, 7 June 1989, §62.

¹⁰⁶² *Leander v. Sweden*, 26 March 1987, §58; *Gillow v. the United Kingdom*, 24 November 1986, §55; *Olsson v. Sweden*, 24 March 1988, §67; *Schönenberger and Durmaz v. Switzerland*, 20 June 1988, §27; *Berrehab v. the Netherlands*, 21 June 1988, §28; *Beldjoudi v. France*, 26 March 1992, §74; and *Thoma v. Luxembourg*, 29 March 2001, §48.

¹⁰⁶³ *Handyside v. the United Kingdom*, 7 December 1976, §49.

¹⁰⁶⁴ *Eriksson v. Sweden*, 22 June 1989, §69. See Cremona (1995), p. 330.

¹⁰⁶⁵ *Barthold v. Germany*, 25 March 1985, §59; *Margareta and Roger Andersson v. Sweden*, 25 February 1992, §97; *Berrehab v. the Netherlands*, 21 June 1988, §29.

Also taken into account in the Strasbourg case law is the question whether the measure places an excessive burden on the individual concerned: the last step in the proportionality test. The Court uses the concept of "excessive burden" to determine whether an interference is disproportionate especially in cases it examines under Article 1 of Protocol 1 to the ECHR. According to this provision no one shall be deprived of his possessions except in cases in which this is in the public interest. In the case of *Sporrong and Lönnroth*, the term proportionality was not used but the excessive burden that was placed on the applicants made that the fair balance which should be struck between the protection of the right of property and the requirements of the general interest was upset. The Court accordingly concluded that Article 1 of Protocol 1 ECHR was violated.¹⁰⁶⁶ In subsequent cases dealing with this provision, the Court has also used the word proportionality explicitly. According to the Court Article 1 of Protocol 1 ECHR requires a proportional relationship between the means employed and the aim sought to be realised. The required proportionality is not found if the person concerned has to bear an excessive and individual burden.¹⁰⁶⁷

In regard to Article 2 ECHR, which protects the right to life, the Court has deduced from the meaning of 'strictly necessary' the requirement of strict proportionality between the force used and the aims to be achieved therewith.¹⁰⁶⁸ Moreover, proportionality plays a role with regard to provisions that do not explicitly allow for restrictions as well. In connection with Article 6 ECHR for example, if the individual's access to a court is limited, the Court in Strasbourg will examine whether the limitation pursued a legitimate aim and whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.¹⁰⁶⁹ In such cases, proportionality is addressed with a reference to the essence of a right.¹⁰⁷⁰

¹⁰⁶⁶ *Sporrong and Lönnroth v. Sweden*, 23 September 1982, §73.

¹⁰⁶⁷ *Hakansson and Sturesson v. Sweden*, 21 February 1990, §51; *Immobiliare Saffi v. Italy*, 28 July 1999, §59; *James and Others v. the United Kingdom*, 21 February 1986, §50; *Vasilopoulou v. Greece*, 21 March 2002, §24; *Lithgow and others v. the United Kingdom*, 8 July 1986, §120; *Beyeler v. Italy*, 5 January 2000, §§122; and *Ghidotti v. Italy*, 21 February 2002, §§28 and 32.

¹⁰⁶⁸ *McCann v. the United Kingdom*, 27 September 1995, §§148-149; *Andronicou and Constantinou v. Cyprus*, 9 October 1997, §171; and *Tanli v. Turkey*, 10 April 2001, §140.

¹⁰⁶⁹ *Ashingdane v. the United Kingdom*, 28 May 1985, §57; *Z. and Others v. the United Kingdom*, 10 May 2001; and *Osman v. the United Kingdom*, 28 October 1998, §154.

¹⁰⁷⁰ See Eissen (1993), p. 144.

In a case concerning the right to marry, the Court found restrictions on this right not to be proportional to the aim pursued. Again the fact that the measure in question affected the very essence of the right was mentioned in the same sentence as in which was concluded that it was disproportional.¹⁰⁷¹ Article 3 of Protocol No. 1 ECHR guarantees the rights to vote and to stand for election. However, since this provision recognises those rights without defining them, there is room for implied limitations. According to the Court these limitations are only allowed as long as they do not curtail the rights in question to such an extent as to impair their very essence, have a legitimate aim; and are proportional in relationship to this aim.¹⁰⁷²

In sum, with regard to proportionality in the Court's case law it can be said that the Court does not neatly apply the three steps of the test as described above, but instead addresses some elements of these steps. Which elements are addressed varies per case. In some cases the Court just equals proportionality with necessity, in other cases it deems sufficient to examine whether a measure places an excessive burden on the individual to reach a conclusion about its accordance with the principle of proportionality. And sometimes the fact that a measure strikes at the very essence of a right results in disproportionality in the Court's view.

Despite this doctrinal uncertainty regarding the way the Court assesses restrictions on fundamental rights,¹⁰⁷³ it is clear that the principle of proportionality is an essential tool in the Court's assessment of the balance between individual rights protection and the requirements of public interest. It features not only in case law dealing with provisions in which limitations are expressly allowed for in the public interest, but also in cases based on provisions where the applicability of that concept is not immediately evident from their wording. Accordingly, it is justified to conclude that the principle of proportionality has acquired the status of a general principle embodied in the Convention.¹⁰⁷⁴

¹⁰⁷¹ *F. v. Switzerland*, 18 December 1987, §40.

¹⁰⁷² *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, §47; *Labita v. Italy*, 6 April 2000, §201; *Gitonas and Others v. Greece*, 1 July 1997, §39; and *Matthews v. the United Kingdom*, 18 February 1999, §63.

¹⁰⁷³ See McHarg (1999), p. 692 and Harris, O'Boyle and Warbrick (1995), p. 299.

¹⁰⁷⁴ van Dijk and van Hoof (1998), p. 81.

7.5.2. The margin of appreciation and proportionality

The ECHR does not aim to establish a legal framework of human rights protection that is uniform, but instead wants to provide a minimum level of protection without erasing all the differences which exist between national legal systems.¹⁰⁷⁵ This is the reason for the existence of the doctrine of the margin of appreciation. This concept entails that the state is allowed a certain measure of discretion when it takes action in the area of a Convention right.¹⁰⁷⁶ It is not a coincidence that the doctrine of the margin of appreciation has featured strongly in cases where the principle of proportionality played a role. State authorities are, “by reason of their direct and continuous contact with the vital forces of their countries”, in principle in a better position than an international judge to weigh competing public and private interests.¹⁰⁷⁷

The margin of appreciation applies to actions of the legislator as well as to national instances, judicial ones amongst others, which are called upon to interpret and apply the laws in force.¹⁰⁷⁸ Inherent in the concept of the margin of appreciation is that it cannot be applied uniformly and important in determining its scope in a particular case are the rights involved, the particular aim that the domestic authorities pursue with the interference, as well as the question whether the case concerns general policies of the State.¹⁰⁷⁹

However, with regard to the relationship between the European judiciary on the one hand and the domestic executive and legislative powers on the other hand one could argue that there is another justification for the allowance by the former of a certain measure of discretion in favour of the latter. One finds the same justification in literature discussing the principle of proportionality as an independent ground for review by courts in national law.¹⁰⁸⁰ It consists of the generally accepted view that it is not for courts to substitute their judgements on the merits of the case for that of the

¹⁰⁷⁵ Jacot-Guillardmod (1995), p. 50.

¹⁰⁷⁶ Harris, O’Boyle and Warbrick (1995), p. 12.

¹⁰⁷⁷ *Handyside v. the United Kingdom*, 7 December 1976, §48.

¹⁰⁷⁸ *Handyside v. the United Kingdom*, 7 December 1976, §48; *Engel and others v. the Netherlands*, 8 June 1976, §100; *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, §93; *Golder v. the United Kingdom*, 21 February 1975, §45.

¹⁰⁷⁹ *Gillow v. the United Kingdom*, 24 November 1986, §55. See van Dijk and van Hoof (1998), p.95.

¹⁰⁸⁰ See for example: Craig (1999); de Búrca (1997). Jowell (1996), pp. 401-411.

primary decision-maker. Nevertheless, this does not mean that all conflicts between competing interests must be resolved by the legislature, and neither is it always inappropriate for a Court to ask whether a certain public interest could have been pursued by other means.¹⁰⁸¹ It is argued by some that the margin of appreciation obscures questions of appropriateness,¹⁰⁸² and that its uneven application by the Court in Strasbourg causes the principle of proportionality to be implied less vigorously in some cases as in others.¹⁰⁸³ Whether there is always a valid and coherent explanation for this is to be doubted.¹⁰⁸⁴

7.5.3. Deprivation of liberty of persons of unsound mind, alcoholics and vagrants

There are certain similarities between the provisions of Article 5(1)(f) and Article 5(1)(e). The Convention explicates neither with regard to detention pending deportation nor with regard to detention of mentally ill people, alcoholics, drug addicts or vagrants, the aim of detention. Reading these provisions of the Convention gives the impression that deprivation of liberty of these people is simply permitted because of their status as people that are ill, addicted, vagrants or about to be expelled from the country. We already saw that concerning the last category this is true: all that is required for pre-deportation detention to be permitted is that deportation procedures are carried out. But is case law dealing with detention of mentally ill, drunks or vagrants also almost devoid of considerations of necessity or proportionality?

In the case of *Guzzardi*, the Court shed light on the reason for allowing the deprivation of liberty of the mentally ill, drug addicts, alcoholics and vagrants. The Convention permits these people to be deprived of their liberty, not only because they have to be considered as dangerous for public safety but also since their own interests may necessitate their detention.¹⁰⁸⁵ According to the Court an individual cannot be considered to be "of unsound mind" for the purposes of Article 5(1) ECHR and deprived of his liberty under subparagraph e of that provision unless three conditions

¹⁰⁸¹ Craig (1999), p. 103.

¹⁰⁸² Macdonald (1993), p. 124.

¹⁰⁸³ McBride (1999), p. 23.

¹⁰⁸⁴ See for example van Dijk and van Hoof (1998), p. 93; McBride (1999), p. 23; and McHarg, (1999).

¹⁰⁸⁵ *Guzzardi v. Italy*, 6 November 1980, §98.

are satisfied. Firstly the person concerned must be reliably shown to be of unsound mind. In the second place, the mental disorder must be of a kind or degree warranting compulsory confinement. Lastly, the validity of continued confinement depends upon the persistence of such a disorder.¹⁰⁸⁶

The last two conditions clearly imply that the Court regards proportionality and necessity of the detention as indispensable requirements when assessing the lawfulness of such deprivations of liberty. The Court's requirement that an objective medical report must demonstrate to the competent national authority the existence of genuine mental disturbance whose nature or extent is such as to justify such deprivation of liberty, which cannot be extended unless the mental disturbance continues, is a more concrete manifestation of these conditions.¹⁰⁸⁷ In the case of *Varbanov*, the Court explicitly referred, in general terms, to the necessity of the deprivation of liberty in the sense that less restrictive measures would not suffice:

"The detention of an individual is such a serious measure that it is only justified where other, less severe measures, have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. The deprivation of liberty must be shown to have been necessary in the circumstances."¹⁰⁸⁸

The national authorities are granted a wide margin of appreciation with regard to the necessity of the detention of mentally ill, because it is primarily for them to evaluate the evidence brought forward.¹⁰⁸⁹ The Courts' task is to review under the Convention the decisions of these authorities.¹⁰⁹⁰ Therefore the Court does normally not elaborate on what in its own view would constitute a kind or degree of mental illness to justify deprivation of liberty. In the case of *Winterwerp*, it examined instead the Dutch

¹⁰⁸⁶ See *X v. the United Kingdom*, 5 November 1981, §40; *Winterwerp v. the Netherlands*, 24 October 1979, §39; *Luberti v. Italy*, 23 February 1984, §27; *Johnson v. the United Kingdom*, 24 October 1997, §60; *Varbanov v. Bulgaria*, 5 October 2000, §45.

¹⁰⁸⁷ *Herczegfalvy v. Austria*, 24 September 1992, §63.

¹⁰⁸⁸ *Varbanov v. Bulgaria*, 5 October 2000, §46.

¹⁰⁸⁹ See for example *Wassink v. the Netherlands*, 27 September 1990, §25: "The Court sees no grounds for questioning the weight of the evidence on which the President relied to reach his decision that it was necessary to extend Wassink's confinement."

¹⁰⁹⁰ *Luberti v. Italy*, 23 February 1984, §27; *Herczegfalvy v. Austria*, 24 September 1992, §63; and *Winterwerp v. the Netherlands*, 24 October 1979, §40.

legislation which permitted Mr. Winterwerp's confinement in the light of Article 5 ECHR. This legislation, just as the Convention, did not give a definition of persons of unsound mind. This would hardly be very useful either, since the concept of unsound mind evolves with changes in society and medical progress. However, the relevant Dutch legislation laid down the following grounds for committing people to a psychiatric hospital. Such commitment must be in the interest of the person suffering from the illness or in the public interest, and there must be a medical declaration to the effect that the person is in a state of mental illness and that it is necessary or desirable to treat him in a psychiatric hospital. In addition, it appeared from Dutch case law that Dutch courts authorise confinement only if the mental disorder of the person concerned is of such a kind or gravity as to make him an actual danger to himself or to others.¹⁰⁹¹ After the Court had informed itself of the above it reached the conclusion that the deprivation of liberty of Mr. Winterwerp was in conformity with Article 5(1) under f.

In the case of *Witold Litwa*, the Court elaborated on what is meant with the term alcoholics in Article 5(1)(e) ECHR. It contemplated again the object and purpose of this provision, which is not only to safeguard public interest but also to protect the interest of the person concerned.¹⁰⁹² Subsequently it deduced from this *ratio legis* the interpretation of the term 'alcoholics'. In the light of the object and purpose of Article 5(1)(e) ECHR, the Court considered that persons who are not medically diagnosed as alcoholics, but whose conduct and behaviour under the influence of alcohol pose a threat to public order or themselves, can be taken into custody for the protection of the public or their own interests, such as their health or personal safety."¹⁰⁹³

The Court found the detention of Mr. Witold Litwa under Article 5§1(e) unlawful, because it considered it unnecessary under the given circumstances. The Court repeats in this case its generally formulated statement that the detention of an individual is such a serious measure that "it is only justified where other, less severe measures have been considered and found to be insufficient to public or individual interest which might require that the person concerned should be detained." It concluded this argumentation by stating that the deprivation of liberty must be necessary in the circumstances.¹⁰⁹⁴

¹⁰⁹¹ *Winterwerp v. the Netherlands*, 24 October 1979, §38.

¹⁰⁹² *Witold Litwa v. Poland*, 4 April 2000, §60.

¹⁰⁹³ *Ibid.* §61.

¹⁰⁹⁴ *Ibid.* §78.

It is noteworthy that with regard to the deprivation of liberty of vagrants the Court has been less observant of criteria such as proportionality and necessity. In the case of *Ooms, Wilde and Versyp*, Belgian law defined vagrants as people without a fixed abode, no means of subsistence and no regular trade or profession. The Court declared persons who fell within this definition to be vagrants for the purposes of Article 5(1)(e) ECHR. The definition of vagrant is to be narrowly interpreted.¹⁰⁹⁵ *Guzzardi* had made clear the reasons for the allowance for deprivation of liberty of vagrants. It is not only because they can be dangerous for public safety but also because their own interests may necessitate their detention.¹⁰⁹⁶

However, in the only case in which the Court had a chance to elaborate when these reasons would justify detention in a concrete case it did not do that. It seems that once somebody has the character of a "vagrant", he can, under Article 5(1)(e), be made the subject of a detention provided that it was ordered by the competent authorities and in accordance with the procedure prescribed by domestic law.¹⁰⁹⁷ Considerations of necessity or proportionality do not seem to play a role with regard to this category either. Nonetheless, it must be kept in mind that *Ooms, De Wilde and Versyp v. Belgium* was decided in 1971, when the Court had yet not dealt with many cases concerning deprivations of liberty. It is possible that it would pay more attention to these issues were it to decide such a case now,¹⁰⁹⁸ but at the same time one cannot help drawing a parallel with immigration detention, especially when keeping in mind the "great confinement" as an instrument to achieve sedentarization of populations.

7.6. CONCLUSIONS: IMMIGRATION DETENTION AS THE BLIND SPOT OF THE ECHR?

It has become clear that the level of scrutiny applied by the European Court of Human Rights when it assesses the lawfulness of immigration detention is not of the same intensity as it is when the lawfulness of several other categories of deprivation of liberty is examined. Nor are those principles applied which are considered intrinsic to the European system of human rights' protection. The Court's case law with regard to

¹⁰⁹⁵ *Guzzardi v. Italy*, 6 November 1980, §98.

¹⁰⁹⁶ *Ibid.* §98.

¹⁰⁹⁷ *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, §69.

¹⁰⁹⁸ See also Harris, O'Boyle and Warbrick (1995), p. 125.

immigration detention is seriously lacking in considerations of proportionality and necessity,¹⁰⁹⁹ even though these considerations are not entirely absent from its judgments. They play a role when the Court examines the duration of pre-deportation detention, for the requisite due diligence on behalf of the state can be seen as a requirement that the detention should be proportionate to the aim that is pursued with it.¹¹⁰⁰ A passing remark in *Saadi* indicates that it is also willing to address the length of pre-admittance detention with regard to the prohibition on arbitrary detentions.¹¹⁰¹

Moreover, the fact that the Court takes into account the detainee's behaviour as well as his interests when determining whether the duration is excessive, points to a proper application of the concept of proportionality. The case of *Čonka* illustrates that proportionality has also featured in the Court's case law with regard to the implementation of immigration detention.¹¹⁰²

Yet, why does the Court consider it largely irrelevant whether the deportation order underlying the detention is lawful, whereas with regard to mentally ill persons, it is regarded of crucial importance for the lawfulness of the confinement that the person concerned is in reality suffering from a mental illness? Why does the Court with regard to immigration detention neither apply a "necessity test", nor require that other, less severe measures, have been considered and found to be insufficient to achieve the permissible aims as it does with regard to other interferences with the right to liberty? Why is it merely sufficient to start deportation proceedings or refuse entry in order to be able to detain a foreign national? The case law on immigration detention by the ECtHR invokes a legion of pressing questions.

In addition to the ones above, it cannot but surprise that the Court does not even refer once to the documents, discussed in the previous Chapter, that have been realised within the framework of the Council of Europe – the same international organisation as

¹⁰⁹⁹ Some judges in Strasbourg question this approach. See the partly dissenting and partly concurring opinion of Judge Kovler in *Slivenko v. Latvia*, 9 October 2003, in which this judge has problems reconciling the conclusion that Article 8 ECHR was violated with the fact that the deportation proceedings and the detention of the applicants were not deemed unlawful. See also Joint Dissenting Opinion of Judges Casadevall, Traja and Sikuta in *Saadi v. the United Kingdom*, 11 July 2006.

¹¹⁰⁰ Harris, O'Boyle and Warbrick (1995), p. 127.

¹¹⁰¹ *Saadi v. the United Kingdom*, 11 July 2006, par. 44.

¹¹⁰² See especially partly concurring and partly dissenting opinion of Mr Verlaers, Judge Ad Hoc, *Čonka v. Belgium*, 5 February 2002.

to which the Court belongs – which require an individualized examination of the necessity to deprive an individual of his liberty under immigration legislation. Furthermore, the judgment in *Saadi* leaves one with questions regarding the quality of national laws authorising the detention. Indeed, how can legislation providing for wide discretionary powers, sometimes even allowing for discrimination based on nationality be deemed in accordance with the Court's substantive interpretation of the expression "in accordance with a procedure prescribed by law" in Article 5(1) ECHR?

At last, how is Article 18 ECHR to be understood against the background of the Court's position, especially as elaborated upon in *Saadi*? According to the Court, the detention of someone who is not authorised to enter can always be justified as long as it is a genuine part of the process to determine whether the individual concerned should be granted immigration clearance or asylum.¹¹⁰³ With such an attitude, *détournement de pouvoir* is at best impossible to prove, at worst it is encouraged.

The Court, by refusing to assess on a case by case basis when prevention of unauthorised entry or realisation of deportation justify detention, leaves the Contracting States a very wide margin of appreciation. This margin is all the wider because the Court does not explain the reasons behind this uneven application of that concept compared to other categories of deprivations of liberty, apart from a remark in *Saadi* in which it states that the lack of state authorisation for presence on national territory accounts for the broad discretion of the state to detain under immigration legislation when compared to other interferences with the right to liberty.¹¹⁰⁴ However, instead of contributing to an explanation of the remarkable approach that the Court takes in cases of immigration detention, this reasoning begs the question.

Several factors contribute to the serious inconsistencies in the court's case law concerning immigration detention. To begin with, it is true that the Court in general deals neither consistently, nor in a clearly reasoned way with individual rights protection versus public interest, which is probably partly due to its general failure to develop a coherent set of concepts to determine when and how rights prevail over public interest.¹¹⁰⁵ In addition, the fact that recourse to immigration detention has increasingly

¹¹⁰³ *Saadi v. the United Kingdom*, 12 July 2006, par. 44.

¹¹⁰⁴ *Ibid.*

¹¹⁰⁵ See about this general doctrinal uncertainty: McHarg (1999) pp. 671-196.

become a general policy of European states is likely to cause that those states are allowed a wider margin of appreciation.

Furthermore, it should be taken into account that there is no right to reside for foreigners to be found in the Convention. Nor does the ECtHR have direct control over the choices made by states as to priorities in the area of public policy. The dilemmas for the Court as to how far it may go to limit the practices of states in this area are exacerbated by its international position, where it may at times need to be more deferential than national courts in order to keep its credibility. However, the political sensitivity of the area of immigration policy does not sufficiently explain the wide margin of appreciation that the Court grants states in deciding on immigration detention.

We have seen in Chapter 5 that the attitude taken by the Court in cases dealing with immigrants' rights under Article 3 ECHR has not always been so deferential to national sensitivities. In some instances, it has even granted this provision a wider scope of protection than national courts did.¹¹⁰⁶ In this light, it cannot be asserted that the sole reason for the Court's inadequate protection for immigration detainees consists of an uneasiness to encroach too far on a sensitive and highly politicised area.¹¹⁰⁷

The above-mentioned reasons considered separately do not explain the inconsistency of the Strasbourg case law, but together they may well contribute to the difficulty the Court has in defining adequate safeguards for immigration detainees. However, the very roots of the problem have to be sought in the immunity of sovereignty's territorial frame against forces of legal correction. It is precisely because of the persistent perception of sovereignty's territorial frame as neutral and self-evident that the Court grants national states an almost unlimited margin of appreciation in deciding on immigration detention. Its statement in *Saadi* that the lack of state authorisation for presence on national territory accounts for the broad discretion of the state to detain under immigration legislation can only be understood against the background of such a perception of territorial sovereignty. The Court's perception of this specific aspect of sovereignty as a nearly absolute right of states to control their territorial borders results in a failure to address the legitimacy of the coercive means that are used to assert this right.

¹¹⁰⁶ *D. v. United Kingdom*, 2 May 1997, §§49-54. See Hailbronner (2000), p. 495 and Kjaerum (2002), p. 534.

¹¹⁰⁷ Although serious inconsistencies and shortcomings exist in this case law as well as described by Dembour (2003).

Nevertheless, it is important to keep in mind that the Court's position is not one of inevitability, as is shown by some of the decisions of the HRC that were discussed in the previous Chapter. Indeed, even in the ECtHR's case law dealing with immigration detention, one finds an occasional awareness of the fact that the territorial frame of sovereignty cannot remain insulated against processes of legal accountability that have been accepted as applicable to the content of sovereignty a long time ago. In *Čonka*, precisely the fact that the deprivation of liberty concerned merely persons who were not authorised to be on national territory instead of persons guilty of criminal offences made that the authorities had to exercise due care in implementing the decision to detain irregular migrants. And in *Amuur*, the Court took account of the impact of the overall system of movement controls on the freedom of the individual in a global territorial structure of states. Apart from these exceptions, the Strasbourg case law on immigration detention exemplifies the blind spot of the modern version of the rule of law for the human interests that are involved in sovereignty's territorial frame.

The Court's refusal in *Saadi* to examine the complaint under Article 14 ECHR is perhaps the most obvious manifestation of such a territorial blind spot, but the manner in which the rights of immigration detainees are generally protected in Strasbourg exemplifies the persistence of the particularism that is the result of territoriality, even in a discourse that explicitly aspires to surpass it. The conclusions to this study in the next Chapter will deal with the real possibilities contained in modern human rights law that are nevertheless capable of challenging the perceived neutrality of sovereignty's territorial frame, therewith forcing it to respond to the interests of the individual.

Chapter 8 Conclusions: Destabilization rights and sovereignty's territorial frame

8.1. SOVEREIGNTY'S FRAME AND CONSTITUTIONALISM'S TERRITORIAL BLINDNESS

"I once read the story of a group of people who climbed higher and higher in an unknown and very high tower. Their first generation got as far as the fifth storey, the second reached the seventh, the third the tenth. In the course of time their descendants attained the hundredth storey. With the passage of time they forgot that their ancestors had ever lived on lower floors and how they had arrived at the hundredth floor. They saw the world and themselves from the perspective of the hundredth floor, without knowing how people had arrived there. They even regarded the ideas they formed from the perspective of the hundredth floor as universal human ideas."¹¹⁰⁸

In this study I have argued that the contemporary application of human rights is only to a very limited extent able to formulate adequate answers in those instances in which the national state wishes to enforce what it perceives as its sovereign claims against individuals that have allegedly violated its territorial boundaries. The reason for human rights' inadequacy to respond in accordance with its aim of establishing a constitutional order over and across boundaries has to be sought in the doctrinal separation that has been made within the concept of sovereignty between its form and content.

I have shown that sovereignty's form as the exercise of jurisdiction over people within a given territory has always been limited by various constitutional discourses. However, sovereignty's territorial frame, although a relative latecomer on the political stage, has remained substantially insulated against forces of political and legal correction. Such insulation of sovereignty's territorial frame could only occur as a result of the reification of territoriality as an organising principle for the global political system, which reification in turn has been caused by the lack of attention to the relationship between the exercise of state power through political institutions and the clear spatial demarcation of the territory in which this power is exercised.

¹¹⁰⁸ Elias (1992), p. 135.

8.1.1. Nationalism and the reification of territoriality: particularistic universalism

I have attempted to make up for this lack of attention by showing how the state's claim to ultimate power within its territory cannot be understood without paying attention to both the way in which it determines its boundaries and the way in which its external sovereign claims feature in a Westphalian state structure of mutually independent states. We have seen that the territorialisation of political organisation had largely become a fact by the time that the predominant mode of legitimising political authority consisted in an appeal to the sovereignty of the people. Indeed, the very process of territorialisation made possible the emergence of a notion as abstract as popular sovereignty: its very abstraction one of the characteristics that distinguished popular sovereignty from earlier theories by which men had attempted to legitimise political authority.

The result of the fact that ideas of popular sovereignty came to be executed in a system of separate and independent political entities, demarcated by way of territorial borders, was that the enlightenment ideals on which the concept of the people was based quickly lost their universalistic implications. Instead, under the influence of nationalism, they transformed into a particularistic conception of the nation constituted by the people whose bonds to each other were supposedly pre-political. The very survival of a political system in which loyalty was no longer required to the King, but to an anonymous and abstract multitude called the people would not have been possible without an appeal that went deeper than the intangible notion of the people who were only united because they were subject to common government within a certain territory. Nationalism was able to fill the gap that existed between the abstract notion of popular sovereignty and the actualities of a political system based on territoriality.

Moreover, the emerging European nation states firmly established territorial borders' Westphalian function of determining the limits of each state's jurisdiction in a system of sovereign states. The ensuing external sovereign claims by the state largely coincided with sovereignty's internal claim of distinguishing the inside from the outside. By establishing external sovereignty as a principle of international relations, the Peace of Westphalia ascribed to each territorial state the exclusive government of the population within its territory. Again, such a global system of governance of populations would not have been viable if states would not have had at their disposal an

appeal to unity that went deeper than the mere fact of shared presence in a certain territory.

Constitutional discourses, internationally as well as domestically, were inevitably influenced by the fact that territory, identity and sovereignty had become linked to each other in what from the end of the nineteenth century onwards was thus seen as a natural, necessary and inextricable linkage. The establishment of the nation state coincided with the establishment of constitutional government, although already long before that there had been theories concerning limits to the power of the sovereign, mostly incorporated in the notion of individual liberties that were of a contractual character. The modern notion of individual rights distinguished itself from these earlier perceptions of individual liberties in that in theory, rights were accorded to the individual on account of his humanity, not on account of his specific place in the body politic or by reason of his personal relation to the sovereign ruler.

However, the shift from the universal to the particular in the underlying ideals of the nation state, caused by the intricate relation between territorialisation and nationalism, also affected the discourse of the Rights of Man. The Westphalian global structure and the internal claims of the sovereign state to determine inside from outside resulted in a construction in which citizenship, a particular form of membership in the territorially defined state, became a necessary condition for access to those rights that were supposed to be inalienable and pre-political. When in the beginning of the twentieth century, citizenship's role had changed from a means by which to realise equality on a small scale to what has been called a 'gatekeeper of humanity', the link between rights, identity and territory seemed natural and inevitable. The result was that domestically, legal venues for limiting sovereign violence if it was perpetrated against those individuals who did not share in the identity of the national state did not exist at all or were only marginally developed.

The fact that an identity which found its roots in historically contingent territorial borders – notwithstanding the fact that it was presented as based on allegedly more profound ties – determined the fundamental question of access to inalienable rights provides the ultimate example of how the process of territorialisation has deeply influenced questions relating to the legitimacy of the exercise of sovereign power. However, the very appeal to more profound ties such as based on blood and language or to the notion of a people united by a common destiny buttressed the reification of

territoriality with the insidious result that only sovereignty's content was problematized in domestic constitutional discourse.

The way in which classic international law poses limits to the sovereign power of the state is decisively shaped by the process of territorialisation and the force of nationalism as well. Here, political particularistic reality's triumph over the universalistic ideals of the enlightenment era expressed itself in a perception of international law as the law for and between sovereign states alone. In the few cases that individuals featured in this field of law, international law affirmed the rule that national sovereignty should embody a perfect link between identity and territory. Indeed, by providing a law of exception only for those who belied a different identity within the sovereign state, international law reinforced the perception in which territorial belonging constitutes a *sine qua non* for access to the Rights of Man.

In addition, the circumstance that only states were accorded international legal personality combined with the fact that at the basis of international law lies the Westphalian notion that a state occupies a definite part of the earth within which it exercises jurisdiction over persons to the exclusion of other states, resulted in a system in which international law dealt mainly with the territorial frame of sovereignty, with regard to which it took into account solely the interests of states in maintaining their so-called territorial integrity.

The separateness of domestic constitutional discourse and classic international law and the distinct manner in which they problematized sovereign power reinforced the perception in which sovereignty's territorial frame was conceptually distinct from sovereignty's form and in which the latter aspect of sovereignty did not involve the interests of the individual. Moreover, the separateness of external and internal constraints on state power resulted in the absence of enforceable rights for large groups of individuals who could not be fitted within the ideal triangle of sovereignty, territory, and identity. International human rights law emerged as a response to those consequences of the gap between international and national law and its explicit aim consists of securing the Rights of Man universal and effective recognition and observance.¹¹⁰⁹

¹¹⁰⁹ See for example the Universal Declaration of Human Rights.

8.1.2. The territoriality of the modern rule of law and its territorial blind spot

I have shown that human rights law has to a certain degree succeeded in diminishing the gap between external and internal constraints on state power. In the first place, by making the individual a subject of international law, international law is no longer the law for sovereign states alone as it offers venues for addressing the individual interests that it recognises as being involved in the exercise of jurisdiction by the state within a certain territory. In the second place, also domestic constitutional discourses have significantly altered under the influence of human rights law: they have led to a weakening of the tie between identity and rights with regard to those individuals who are present within the territory of the nation state. Such decoupling of rights and identity with regard to sovereignty's form is most apparent in the case of those individuals whose presence on national territory is authorised by the national state.

However, we should not overlook the fact that even in the case of legal residents, human rights have not completely done away with the old linkage between identity and rights, and that formal citizenship status in this respect remains a factor of real significance for the individual's legal position. Indeed, the ECtHR considers that the position of a non-national, even if he holds a very strong residence status and has attained a high degree of integration, cannot be equated with that of a national when it comes to the sovereign power of the state to expel aliens.¹¹¹⁰ However, the very nature of such distinctions, based as they are on the sole fact that the person concerned "believes a different identity within"¹¹¹¹, is not in accordance with the explicit aim of the human rights discourse.

Moreover, celebrations of post-national citizenship that applaud the alleged decoupling of identity and rights tend to overlook the fact that the question of *access* to rights remains determined by territory. Consequently, although human rights law may – albeit to a certain extent – have achieved a decoupling of identity and rights within the territory of the national state, outside its territory the two remain linked on account of the global system in which the nation state is the primary category through which we deal with questions bearing on the rights of the individual. Just as traditional accounts of formal citizenship status, the discourse of post-national citizenship takes a

¹¹¹⁰ See for a recent example: *Üner v. the Netherlands*, 18 October 2006, par. 56.

¹¹¹¹ Xenos (1996) with regard to citizenship and nationalism.

predominantly internalist perspective in which both the global territorial structure and the ensuing importance of territory for access to those rights that are supposed to be inalienable and pre-political are disregarded.

Indeed, the way in which the ECtHR has dealt with the extraterritoriality of the Convention in more recent case law shows that the deterritorialisation of the modern version of the rule of law is still very far from being achieved. The interpretation by the ECtHR of Article 1 ECHR in *Bankovic* only serves as the most obvious example of the consequences of the reification of territoriality on an international constitutionalism. In this respect, just as they did with regard to traditional citizenship rights, the territorial borders of the national state determine the precise extent of the rights to be enjoyed by the individual. The territoriality of the modern rule of law ensures that national citizenship of those who are not authorised by the sovereign to enter or stay on national territory marks their belonging elsewhere and as such it justifies a fundamental difference in the extent to which they are entitled to the enjoyment of fundamental rights.

Another reason why human rights have not succeeded in establishing truly universal guarantees for the dignity of the individual has to be sought in the fact that the modern version of the rule of law suffers from what I call a territorial blind spot. Although norms relating to human dignity have markedly contributed towards increasing protection of fundamental rights for foreigners whose presence within the territory is authorised by the state, a corresponding development through which they secure rights entitlements for them at the moment of border crossing or in the case of irregular presence on national territory is absent.¹¹¹² The term territorial blindness denotes human rights' inability to address the individual interests that are affected whenever the state bases its claims on sovereignty's territorial frame.

8.1.3. Freedom of movement and the modern version of the rule of law

I have demonstrated that the international legal norms regulating movement of people exemplify international law's territorial blind spot: its perception of sovereignty's territorial frame as natural and innocent, in which individual interests as

¹¹¹² Dauvergne (2004).

such do not feature. The territoriality of the rule of law has reinforced this perception in the field of international migration by making it seem natural that the responsibility for safeguarding the fundamental rights of individuals lies with the state to which they are allocated: by way of identity in the case of nationals; or as a result of the exercise of sovereign discretion in the case of legal residents.

The fact that norms relating to human dignity have made significant inroads in the state's discretion to decide on emigration while leaving most decisions relating to the entry of foreign nationals securely embedded in the sovereign prerogative of the national state can only be understood by an approach in which sovereignty's form and content are perceived as separate: the former open to legal contention, the latter only very marginally subject to the rule of law.

At the same time, however, an (historical) investigation of sovereign states' responses to the phenomenon of international migration makes clear that the conceptual distinction between sovereignty's territorial form and its jurisdictional content fails to do justice to the actualities of state power. The same justifications that sovereign states have in the past employed to curtail emigration are currently used to restrict immigration. Thus, be it leaving or entering, sovereignty's jurisdictional content as well as its territorial form are involved whenever the state decides on international movement. Perhaps this is most obvious with regard to sovereign acts of immigration law enforcement: in order to detain and to deport, sovereignty's content must be actively employed. But also border control, be it at the physical border or by means of *police à distance*, involves the exercise of jurisdiction over people.

Why then are international legal norms dealing with movement of individuals across borders nevertheless able to sustain the distinction between on the one hand what it perceives as sovereignty's innocent territorial frame and on the other hand its content that it considers open to legal contention and change? The answer to this question has to be sought in the fact that national states portray immigration as engaging solely sovereignty's territorial frame and the resonating force of the language that they employ to do so, a language modelled upon the classic legal discourse reserved for interstate violence that emphasises the sanctity of territorial boundaries and in which the individual had no role to play. The result of such a discursive approach to immigration is that the jurisdictional content of sovereignty remains hidden and that the personal interests that are affected by sovereign decisions in this field stay largely invisible.

The concealing of the human interests that are involved is made easier by keeping the individuals concerned far away from us (one of the many logics underpinning *police à distance*) or by portraying them as very different from us (an additional link between identity and rights is thus revealed). Similarly, the way in which populist discourse, becoming increasingly common in the Member States of Europe, describes immigration phenomena as “floods”, “avalanches” and “invasions” results in little awareness for the real persons that are involved. The preponderance of the importance of sovereignty’s territorial frame when perceiving or responding to immigration is exacerbated by the current trend in which immigrants are seen as a security threat. The language of security is a political discourse that likewise falls back on the traditional distinctions such as between inside vs. outside; sovereignty’s content vs. its form; and domestic constraints on state power vs. international modes of legitimisation of state violence through the laws of war. As such, securitization offers ample opportunity to obscure the way in which sovereign decisions implicate the freedom and dignity of the individual.

By contrast, on account of the Westphalian system that allocates the responsibility for the interests of individuals to distinct states, the personal interests that are affected by a sovereign decision prohibiting emigration cannot be overlooked. The result is that contemporary international law under the influence of human rights law regards the issue of leaving as a jurisdictional issue of the modern state while simply ignoring the territorial aspect of sovereign power that is involved in matters of emigration as well.

International law’s categorisation of people that move feeds the circle in which human interests alternatively become visible or remain concealed and thus respectively emphasise sovereignty’s content or its form. The various ways in which international law distinguishes between people that move – illegal residents vs. long-term legal residents; persons without what are officially recognised as close ties vs. those with recognised family life; economic migrants and bogus refugees vs. genuine refugees – often do not reflect the real experiences of people, but they serve to reaffirm the state’s near absolute right to control territorial borders or alternatively, its duty to act in accordance with legal norms that safeguard human dignity on account of the exercise of jurisdiction. The way in which this mechanism works is illustrated by the way in which the ECtHR deals with the obligations of a state under Article 8 ECHR to a person whose family life has been established during irregular stay in national territory. The

very fact that those obligations are regarded as positive obligations obscures people's actual lived experiences and it ignores the actualities of immigration law enforcement by the state.

Thus, although the alleged self-evidence and naturalness of territory as the foundation for political power in itself cannot fully explain the asymmetry between the right to leave and the right to enter, such self-evidence and perceived neutrality of the territorial frame of sovereignty do provide the rationale behind the limited impact of international human rights on the sovereign state's exclusionary powers whenever these are presented as a necessity to protect sovereignty's territorial frame. Not only the asymmetry of the international legal norms regulating entry on the one hand and exit on the other hand can thus be understood, but also the increasing acceptance of the constitutional dimensions of freedom of movement within the nation state – where the territoriality of the modern state is not a factor to be reckoned with – which has occurred simultaneously with a hardening of views with respect to movement *into* the territory,¹¹¹³ is explainable against this conceptual background.

Robert McCorquodale's argument that the concept of ownership inherent in the traditional approach of international law is not able to deal with alternative perceptions of sovereignty is thus confirmed by its regulation of international movement.¹¹¹⁴ It seems that the international legal order is not prepared to accept a concept if it entails a clear and visible challenge to the notion of territorial sovereignty. However, the importance that states attach to the territorial ideal goes deeper than the mere wish to maintain independent sovereign units, for exclusive territorial sovereignty is also possible in a country that adheres to an open admissions policy (once again we can discern the artificiality of an ongoing construction in which immigration is perceived as per definition solely engaging sovereignty's territorial frame).

Apart from exclusive and ultimate political authority within a certain demarcated territory, the territorial ideal entails the homogenisation of these territorial units: the sovereignty that states seek to protect by invoking their territorial powers is about unity. In other words, although the focus is on territorial borders, sovereign states' main concern is about "conceptual and organizational borders", as those are the sites where

¹¹¹³ See Goodwin-Gill (1996b), p. 103.

¹¹¹⁴ McCorquodale (2001), p. 153. See also Kostakopoulou (2004), pp. 44-50; and Kostakopoulou and Thomas (2004).

membership conditions are stipulated.¹¹¹⁵ At a time when the discourse of human rights has diminished the extent to which national states can distinguish between inside and outside *within* their territories with regard to the fundamental rights of persons under their jurisdiction, they put forward their territorial powers – hitherto largely unrestrained by international human rights – in order to keep asserting what Catherine Dauvergne has called their “nation’s nationness.”¹¹¹⁶

Paradoxically, the importance that national states attach to the territorial ideal is exemplified by the communitarization of immigration policy by the EU Member States. The motives underlying that process and the way in which national states have strategic recourse to their sovereignty – for example exemplified by the United Kingdom’s arguments in the *Chen Case*, but also by the possibility of restricting free movement of the nationals of the newly acceded countries – shows that the process of integration in this field is driven by a deeply felt wish to maintain the traditional role of territorial boundaries in protecting the identity of the nation state, notwithstanding the fact that the location of their control has been shifting in important and unprecedented ways. In addition, the European Union and its Member States have refined the system of international “police” of populations by the use of concepts such as EU citizen, third country nationals, safe country of origin, safe third country, Schengen, and readmission agreements. However, their novelty should not distract us from the ratio for these tools: an understanding of sovereignty that regards control over identity crucial for the unity of the body politic.

The imaginary unity of the nation state is a persistent idea with far-reaching consequences for individual freedom. Indeed, in this study I have argued that the ways in which we perceive of sovereignty’s territorial frame as neutral and innocent and the nation state as a closed container continue to shape the discourse of individual rights with the result that “images of maps and sharp borders inform the imaginary community of modern constitutional practice.”¹¹¹⁷ In other words, the territoriality of the rule of law and its territorial blindness ensure that human rights remain firmly linked to territory and identity and as such they fail in their ambition of establishing universal guarantees for the dignity of the individual. In this study I have put forward the claim that this

¹¹¹⁵ Geddes (2005).

¹¹¹⁶ Dauvergne (2004), p. 595.

¹¹¹⁷ Tully (1997), p. 201.

failure of the modern version of the rule of law is best illustrated in the contemporary practice of immigration detention.

8.2. IMMIGRATION DETENTION AS THE LITMUS TEST OF THE TERRITORIAL ORDER

Immigration detention is a tool by which states aim at reproducing the territoriality of the global state system. With regard to this aspect of immigration detention, it is important to be aware of the fact that we will not understand sovereign states' responses to migration fully if we fail to take into account each state's role in a global system based on territoriality. In the same way as internal perspectives on citizenship are not sufficient in order to understand the way in which states distinguish between insiders and outsiders, one should consider the way in which the structural features of the modern state system affect the particular policies of individual national states that result from such distinctions. In this sense, the immigration prison can be fitted in a broader range of responses of the sovereign state (or the system that it forms part of) to what it perceives as threats, not only to the unity of the state but to the overall territorial order of the state system. The underlying reasons for the emergence of the refugee regime and the early nineteenth century system of minority protection constitute such examples, just as the population transfers that were resorted to in Europe's recent past in order to achieve the ideal of a stable order of nation states.

Furthermore, the detention of unwanted foreigners serves as a validation of sovereignty as the power to distinguish the inside from the outside. In this respect, immigration detention fits in a trend in which states make increased use of restrictive tools of migration management in order to demonstrate that they are in control over their borders. In the contemporary political climate, the fact that history shows that controlling flows across borders is far from being a "necessary criterion for legitimate statehood"¹¹¹⁸ does nothing to alter states' perception to the contrary.

In addition, I have argued that the immigration prison provides a territorial solution for a problem that is perceived as a problem in our contemporary world precisely because it cannot be reduced to a territorial solution. Thus, states do not only resort to immigration detention in order to keep the territorial ideal intact, but they

¹¹¹⁸ Bauböck (2003), p. 8.

employ the very tool of detention in order reduce the visibility of disruptions to that ideal. The logic of the *Hôpitals Généraux*, driven by a fear of a “fluid, elusive sociality, impossible to control or utilise”¹¹¹⁹ is presently reconstructed in the practice of immigration detention, which is a similar technology of power that provides for the “spatial concentration and ordering of people”¹¹²⁰; the question of its fluidity and elusiveness now determined on the basis of their disruption not merely to the nation state, as was the rationale for the great confinement throughout Europe during the seventeenth century, but to the international territorial system as a whole.

Yet, even more is at stake in practices of detention. Perhaps most importantly of all, by employing detention, states resort to the sharpest technique to achieve the related goals of imaginary unity, maintenance of the territorial order and sedentarization. We have seen that personal liberty and sovereignty are conceptually intertwined: the protection of the former is the reason for the existence of the latter. The intimate relationship between personal liberty and sovereignty warrants the utmost scrutiny when assessing the indiscriminate detention of thousands of people in light of traditional safeguards against sovereign power. Nevertheless, these traditional safeguards are conspicuously absent when it comes to the detention of thousands of non-citizens in our liberal democracies.

Although the aim of this study was not to investigate the impact of national constitutional discourses on immigration detention, even a brief overview of state practice in this area warrants the conclusion that the normal constitutional safeguards do not apply to immigration detainees and that in practice, states refuse to treat them in accordance with international standards pertaining to the rights of the individual. Thus, the very particularity of immigration detention lies in the cynical use that governments make of a system in which territory and rights are firmly linked, despite celebrations of universal rights and assertions of post-national citizenship. Immigrants who are deprived of their liberty at the borders of or inside liberal Western democracies are in essence outside the pale of the law: even in the case that they are actually within the territory of a national state, the absence of initial state authorization for their presence on national territory makes that the usual safeguards embodied in constitutional norms are not applied to them.

¹¹¹⁹ Walters (2002), p. 286.

¹¹²⁰ *Ibid.* p. 498.

Even the Constitutional Court for Europe does not deem it within its powers to reverse this situation. Indeed, the ECtHR's approach to the lawfulness of immigration detention provides the ultimate illustration of my claim that fundamental rights are to a large degree still "caught within the image of the sovereign, the territorial state and the traditional [...] institutions."¹¹²¹ In the ECtHR's case law on immigration detention, states' appeal to their territorial sovereignty in order to justify the decision to detain has immunized that decision against most forms of legal correction known to the Court. I have argued elsewhere that there is a real danger that the manner in which fundamental rights are protected in Strasbourg is influenced by the contemporary attitude in European states vis à vis immigration.¹¹²² The way in which the ECtHR endorses detentions that are in violation both with the core of the right protected by Article 5 ECHR and with the principle contained in Article 18 ECHR reveals that the ECtHR indeed shares the current attitude in which immigration as a general phenomenon presents a "threat" to the territorial border of the nation state that can only be "controlled" with far-reaching measures.

8.3. DESTABILIZATION RIGHTS AND IMMIGRATION DETENTION

"Certain issues cannot be fitted within the categories, the description of certain violations cannot be harnessed through the procedures, certain claims remain unformulable, and other appear irrelevant, too subjective, extra-legal, or simply "mad". One should not, however, conclude that such difficult issues are necessarily improper for international law. After all international law is constantly in the making and the community is constantly in the process of (re)construction. Therefore, it is senseless to say that everything that is not clearly articulable or categorisable in international law is justly driven outside it, for it is the same to say that international law is a finished system and that we have arrived at the end of its progress. (...) there are always certain silences and incommunicabilities that may be investigated and reconsidered – arguably – to the benefit of the community and its ordering systems."¹¹²³

We have also seen in this study that there are international legal norms that seemingly make inroads in the sovereign power to exclude. I have argued that, even so,

¹¹²¹ Huysmans (2003), p. 223, who makes a similar argument with regard to democracy.

¹¹²² Cornelisse (2004).

¹¹²³ Korhonen (2000), pp. 211-212.

the majority of those norms fit within a territorial image of political order. The international refugee regime is the ultimate example of the way in which international laws in this field have not been able to transform the modern territorial order, being a form of “geopolitical humanitarianism that has as its core business the preservation of the value of the nation-state form”¹¹²⁴ as a political-territorial ideal. Instead of contributing to destabilization of the system in which sovereign power, identity, territory, and rights are linked, most international rights bearing upon a right to enter or stay attempt to fix the inevitable gaps in such a system that is based on such a linkage. By failing to address its inherent contradictions, they reinforce the perception of territoriality as a natural way of organising the global political system with all its concurrent implications for the relationship between identity, territory and rights.

There is one important exception to this obdurate impact of territoriality for constitutional discourses. The application of the prohibition on inhuman or degrading treatment in the immigration context shows that human rights norms are able to remedy constitutionalism’s blind spot by recognizing that human interests are indeed involved in sovereignty’s frame. In addition, that application also deconstructs the territoriality of the rule of law by refusing to accept that the responsibility for the dignity of the individual lies with the state to which that individual is allocated on the basis of territoriality’s logic.

Thus, the application of the norm as contained in Article 3 ECHR in immigration cases shows that territory, identity and rights *can* be decoupled (notwithstanding the fact that in practice this occurs only with regard to a very limited amount of non-derogable rights), if it were not for states’ ever growing attempts to resort to extra-territorial measures of immigration control. Their practices of *police à distance* show that states themselves are convinced that presence on territory is crucial for the enjoyment of rights, and in many cases it will be difficult to vindicate claims to the contrary, not least because of practical obstacles. Thus, as a response to the fact that human rights’ territorial blind spots have to a certain extent been remedied at the constitutional level, states make increasingly use of the remnants of the territoriality of the rule of law in order to evade having to act in accordance with human rights norms.

The inability of states to resort to this aspect of the territoriality of the rule of law – access to the perimeter of their territories as a condition for access to rights – in

¹¹²⁴ Lui (2002), at 6.

the case of immigration detention, makes me believe that the application of human rights to the practice of immigration detention may be more successful in destabilizing sovereignty's territorial frame. We have seen that immigration detention's two folded logic of sedentarization and exceptionalism leads to what Giorgio Agamben has called "exclusionary inclusion".¹¹²⁵ Accordingly, just as the imprisonment of criminals offered courts a venue through which to review the sovereign power to punish, the very fact that immigration detainees are in a real sense "included in the state's domain of sovereign power"¹¹²⁶ may provide an opportunity to subject the exclusionary power of the sovereign state to legal contention.

Moreover, we have seen that important procedural guarantees form an inherent part of the prohibition on arbitrary deprivations of liberty. The right to challenge the lawfulness of the detention is due to anyone who is deprived of his liberty. In this respect, the procedural guarantees that accrue to someone on account of his detention are far better developed than those that he may appeal to in the case of his mere exclusion.¹¹²⁷ Indeed, the traditionally wide discretion in immigration law has resulted in the existence of only marginal procedural guarantees with regard to a general right of the individual to enter or stay in a country that is not his own.¹¹²⁸ An exception is contained in Articles 13 ICCPR and 1 of Protocol 7 to the ECHR that provide for such guarantees with regard to the decision to expel, but these provisions are applicable only to those individuals that have lawful residence. In addition, we have seen that they are subject to important public order and national security exceptions. The 1951 Refugee Convention is silent with regard to procedural guarantees applicable to decisions based on the norm contained in its Article 33, even though the Convention as whole implies access to fair and effective procedures for determination of an individual's need for international protection.¹¹²⁹

¹¹²⁵ Agamben (1998).

¹¹²⁶ Diken and Laustsen (2003), p 2-3.

¹¹²⁷ See Boeles (1995), p. 189 who contends that the procedural guarantees in Article 5 (4) ECHR do not differ essentially from those laid down by Article 6 ECHR.

¹¹²⁸ In addition, practice at the national constitutional level shows that while in general the individual's procedural protection against administrative decision making has increased over time, with regard to immigration procedures, the development is a reverse one. *Ibid.*, p. 367.

¹¹²⁹ See UNHCR ExCom Conclusion No. 82 (XLVIII) 1997, under d(ii) and UNHCR ExCom Conclusion No. 103 (LVI) 2005, under (r).

Seeing that in the European context, immigration procedures do not fall within the scope of Article 6 ECHR, the only other international norms pertaining to formal rule of law guarantees with regard to decisions on admissibility or deportation are those that can be invoked only when other fundamental rights are at stake. If an individual presents an arguable claim that as a result of immigration decision making, the norm that is contained in Article 3 ECHR is breached or his rights under Article 8 ECHR are violated (or, in theory, any other rights guaranteed by the ECHR), he has a right to an effective remedy under Article 13 ECHR.¹¹³⁰ However, even in this construction, states may simply refuse to afford procedural guarantees by arguing that a complaint is not arguable, such as in the case of the individual who comes from “a safe country of origin”. In contrast, Article 5(4) ECHR is applicable to anyone who is deprived of his liberty under immigration legislation: whether someone is labelled on the hand as “illegal”, a “security risk”, or a “bogus asylum seeker”, or as a “genuine refugee” on the other is irrelevant when it comes to the procedural guarantees of Article 5 ECHR. Moreover, the court to which the immigration detainee appeals should evaluate the case in the light of the prohibition on arbitrary deprivations of liberty, instead of merely assessing whether national immigration legislation has been correctly applied. As a result, by resorting to the sharpest technique of exclusion, states risk greater accountability for their actions as well.

Thus, instead of presenting the immigration prison as the ultimate example of territorial sovereignty as an “institution that is substantially isolated from processes of normal accountability”,¹¹³¹ I will conclude this study by arguing that it may become a site where human rights transform into claims that unsettle sovereignty’s territorial frame as a “structural, paradigm-related and epistemic limitation” which stands in the way of the very communicability of individual interests.¹¹³² In order to do so, I will draw on the idea of destabilization rights, a concept coined by Roberto Unger. The recurrent theme in Unger’s work is his concern with what he calls institutional fetishism: “the belief that abstract institutional conceptions [...] have a single natural

¹¹³⁰ The ICCPR provides for similar guarantees.

¹¹³¹ Sabel and Simon (2004). See also the European Parliament, Committee on Civil Liberties Justice and Home Affairs (30 March 2006), arguing that it is the very nature of immigration detention which in itself causes human rights violations.

¹¹³² Korhonen (2002), p. 210 about such limitatons in international law in general.

and necessary institutional expression.”¹¹³³ According to Unger, the pervasiveness of this belief should not prevent us from imagining alternative ways in which we can organise that society. Indeed, by ways of thinking that defy “the immunization of the basic institutions of society, defined in law, against effective criticism, challenge and revision,” we may arrive at alternatives that are truer to our interests, ideals and hopes.¹¹³⁴

Charles Sabel and William Simon have elaborated upon the idea of destabilization rights in the area of public law litigation. They apply Unger’s idea to a wide variety of policy fields such as pertaining to prisons, schools and housing, in order to show that judicial recognition and enforcement of rights that “disentrench an institution that has systematically failed to meet its obligations and remained immune to traditional forces of political correction” may be effective in bringing about better compliance with legal obligations. I will not address their arguments with regard to the policy fields that they deal with in substance as these are far too specific to be applicable to sovereignty’s territorial frame, but I will refer to some of the “destabilization effects” which they describe in their analysis in order to demonstrate how the idea of destabilization rights may operate in the case of immigration detention.

We have seen that the exercise of state power when based on sovereignty’s territorial frame fails to live up to constitutional standards. In addition, the institution of territorial sovereignty has thus far not conformed to the usual judicial *and* legislative modes of exercise that, in addition to individual rights, are inherent in the rule of law.¹¹³⁵ As such it satisfies the elements for what Sabel and Simon call the *prima facie* case for public law litigation: “failure to meet standards and political blockage.”¹¹³⁶

With regard to the element of political blockage, they distinguish between three different patterns, the first of which is to a certain extent applicable to the way in which sovereignty’s territorial frame features in contemporary practices of immigration detention: it involves “majoritarian political control unresponsive to the interests of a vulnerable, stigmatized community.”¹¹³⁷ In the case of immigration detention, however, those who Simon and Sabel call the stakeholders are not so much excluded from

¹¹³³ Unger (1996), p. 7.

¹¹³⁴ Unger (1996), p. 96.

¹¹³⁵ Dauvergne (2004), p. 592.

¹¹³⁶ Sabel and Simon (2004), p. 1062.

¹¹³⁷ *Ibid.* p. 163.

political control on account of their belonging to a minority as such, but their exclusion is a result of the very nature of territorial borders as constructs that define who is included in the political community and who is excluded from it. Moreover, the normal processes of political control as they developed in the framework of the constitutional state are generally limited when it comes to the sovereign prerogative to exclude, associated as it is with the essence of the nation.

However, we have seen that a growing body of human rights law is concerned with the practice of immigration detention. Although these norms recognise the sovereign right to control the territorial borders of the nation state, they make the exercise of this right subject to important constraints, all of which are motivated by the interest of the individual in the enjoyment of his right to personal liberty. By the very fact of balancing the sovereign right to exclude with the individual's interest, international legal norms pertaining to deprivations of liberty under immigration legislation acknowledge the individual interests that are involved in sovereignty's territorial frame. In contrast to the application of the norm contained in Article 3 ECHR, those are not only the narrowly defined interests of certain individuals, but they include the interests of all that have been affected by the sovereign right to exclude if this has resulted in a deprivation of liberty. Although a court such as the ECtHR does not make full use of the destabilizing potential of the norms at its disposal in order to undermine the perceived neutrality and self-evidence of sovereignty's territorial frame, such destabilization does come to the fore in those immigration detention cases that have been brought before the HRC. By insisting that the lawfulness of immigration detention requires an individualized test of its proportionality in relation to a limited number of aims, this body invalidates sovereign claims to the effect that the exercise of the power to exclude cannot be contested as it is based on sovereignty's territorial frame.

It should not be overlooked that one finds such an awareness occasionally in the jurisprudence of the Court of Strasbourg as well: its decisions in *Amuur* and *Conka* provide examples of the way in which it refutes the state's assertion of territorial sovereignty as a *carte blanche* for the exercise of sovereign power. In addition, there is considerable dissent within the ECtHR with regard to the dominant approach as well. In *Saadi*, it was only a narrow majority which found that the applicant's detention in Oakington was lawful: it consisted out of four judges to three. The three dissenting judges considered the detention unlawful under Article 5(1)(f) ECHR as the real reason

underlying the detention was “purely based on administrative or bureaucratic grounds aiming to follow the fast-track procedure with regard to the applicant.”¹¹³⁸

At the national level we may encounter a similar attitude in judges who address the question of the lawfulness of immigration detention not only from a formal, legalistic perspective, but instead take due account of the effects of the restrictions on the individuals concerned. Examples of such judgments are those that condemn the detention of children in immigration centres,¹¹³⁹ or those that include the conditions of detention in their assessment of its lawfulness.¹¹⁴⁰ Such practices in the domestic constitutional sphere may receive an impetus if Article 14 of the proposed directive on common standards and procedures in Member States for returning illegally staying third-country nationals becomes part of EC law. According to this provision, immigration detention of third-country nationals, who are or will be subject to a return decision or a removal order, is only to be resorted to if there is a risk of absconding and where it would not be sufficient to apply less restrictive measures.¹¹⁴¹ In the explanatory memorandum to the proposal, the proposed action with regard to this provision is summarised as limiting the use of temporary custody and binding it to the principle of proportionality.

Liability determination based on existing human rights law in cases of immigration detention can have a series of disentrenching effects on state practice in this area.¹¹⁴² First, the fact that courts do no longer discern sovereignty’s territorial frame as immune from most forces of legal correction, releases “the mental grip of

¹¹³⁸ Joint dissenting opinion of judges Casadevall, Traja and Sikuta, *Saadi v. the United Kingdom*, 11 July 2006. In addition, another judge, although concurring with the majority, found it necessary to add some words to the judgment, in which he recognised the concern felt that a person should be deprived of his liberty for reasons essentially of administrative efficiency and the risks of arbitrariness which such detention may entail. See concurring opinion of judge Sir Nicholas Bratza, *ibid.*

¹¹³⁹ See for example Lithuanian Supreme Administrative Court Decision of 13 July 2005.

¹¹⁴⁰ See for a Dutch example: *Rechtbank s’ Gravenhage*, 18 March 2005.

¹¹⁴¹ European Commission (1 September 2005).

¹¹⁴² Simon and Sabel (2004) distinguish between six “destabilization effects” resulting from the application of destabilization rights in public law litigation: the veil effect; the web effect; the status quo effect; the deliberation effect; the publicity effect; and the stakeholder effect. My discussion of the application of destabilizing rights to the practice immigration detention will focus on the last five effects, as the veil affect is too much related to usual public law litigation to be applicable to immigration detention cases.

conventional structures on the capacity to consider alternatives".¹¹⁴³ The regime of immigration detention, instead of appearing as a natural and justified response on the part of the sovereign state to those that have transgressed its boundaries, becomes simply one of the many responses of the state, and not a very good one at that, in view of the fact that in the great majority of cases, it fails to take sufficient account of the individual's fundamental rights.

Related to this is a process in which the abolishment of the neutrality of sovereignty's frame may result in increased pressure on the state to support its position with regard to the exercise of its power to exclude with arguments that persuade by the validity of their reasons.¹¹⁴⁴ Thus, in order to resort to immigration detention, states will have to support their positions with reasons that are grounded in the usual constitutional discourse pertaining to interferences with individual rights on the ground of public interest, instead of merely appealing to what we have seen is in essence a self-referential notion of territorial sovereignty.

A third effect of the destabilization of sovereignty's territorial frame is what Simon and Sabel call the "publicity effect": if the indiscriminate use of immigration detention by the sovereign state is repeatedly condemned, in particular if this occurs in higher national or international courts, that fact will inevitably result in greater public awareness of the problem.¹¹⁴⁵ In this way, the interests that are involved in sovereignty's territorial frame become publicly visible and articulable, not only in a court of law, but also in the political arena, which in turn may result in powerful political pressures advocating a different approach.

In the fourth place, such condemnation provides official legitimation of the claims of immigration detainees, which enhances even more the very visibility and communicability of their interests.¹¹⁴⁶ Instead of merely a faceless mass consisting of those who do not belong, all those affected by the exercise of the sovereign power to exclude become visible as persons to whom the sovereign state is obliged to behave in accordance with certain fundamental norms.

A last effect of the destabilization of sovereignty's territorial frame as a result of consistent application of human rights norms to cases of immigration detention is what

¹¹⁴³ This is what Simon and Sabel call the "status quo effect". Ibid. p. 1075.

¹¹⁴⁴ Referred to as the "deliberation effect". Ibid. p. 1075.

¹¹⁴⁵ Ibid. p. 1077. See also Caloz-Tschopp (1997), pp. 177-178.

¹¹⁴⁶ Referred to as the "stakeholder effect". Ibid. p. 1077.

Simon and Sabel refer to as the “web effect”:¹¹⁴⁷ just as the court’s determination of liability in immigration detention cases has a number of unsettling effects on the practice of immigration detention, the very fact that the state has become accountable for some of its actions that are based on sovereignty’s territorial frame may have ramifications for other practices when similarly based on the self-referential notion of territorial sovereignty. Deportation will perhaps no longer seem as self-evident and legitimate a response on the part of the sovereign state to those who have violated its territorial boundaries as it does in contemporary Europe, and in a similar vein, practices of *police à distance* may lose their image of necessity and legitimacy.

In view of the current trend of externalisation of immigration policies, this last effect of the destabilization of sovereignty’s territorial frame is perhaps the most important. For although the immigration prison may turn into a place of destabilization, it would be naïve to overlook the real risk that such destabilization carries as well. Just as states have exported important aspects of their immigration policy as a response to enhanced protection of the individual’s rights on account of the norm of *non-refoulement*, they may similarly react to increased protection for immigration detainees by offering non-European states incentives to set up detention centres on their own soil in order to keep potential immigrants away from Europe’s external borders.

In the case that such camps are set up in Libya as a result of strong involvement on the part of European States, but under the formal responsibility of Libya,¹¹⁴⁸ it is highly doubtful whether the responsibility of European states would be justiciable. The danger of such exportation of the immigration prison is compounded by the fact that the problem may then just become one of the many that are suffered by the faceless mass outside Europe’s borders. However, we have seen that the right to leave has become recognised as a fundamental right of the individual, and the blanket detention of

¹¹⁴⁷ Ibid. p. 1080.

¹¹⁴⁸ The situation in Libyan camps as observed by the European Commission’s technical mission to Libya: “In the short-term detention centres, migrants are held under armed police guard. In Sulman, in the north of the country, 200 migrants were held in an isolated barn-like structure and sat on the ground: hygiene were described as being “at a minimum”, with an absence of kitchens, places to eat and places to sleep in beds [...]. Long-term detention centres can reportedly “be assimilated to prisons”, one of which was composed of rooms with a capacity of approximately 200 persons, with no divisions according to sex, age, race or other characteristics. Another one in Tripoli was described as a “brand-new prison” holding 1,100 persons, and a further one in Misratah held 250 persons (although detainees claimed 700 were registered in previous days), under police guard.” See European Commission (2005).

candidates for “illegal emigration” is certainly not permitted by international human rights law. Perhaps, if territorial sovereignty has lost its “halo of reasoned authority and necessity” from within, there will also be increased pressure on European States to take the norms pertaining to the right to leave seriously in their external relations.

It goes far beyond this study to provide an image of the practical arrangements of the world where the destabilization of sovereignty’s frame as I have described above may eventually bring us. Therefore I will not answer the question whether such destabilization can lead to truly deterritorialized notions of membership. Neither will I deal with its potential for establishing what Dora Kostakopoulou calls a system of “focal territoriality”, where territorial space is seen as a “dwelling place” where the inhabitants use and possess the territory, instead of owning it.¹¹⁴⁹ In this respect, Seyla Benhabib advocates a world of “porous borders”, where first-admittance rights are recognised but the right of democracies to regulate the transmission of first-admittance to full membership is retained.¹¹⁵⁰

However, in concluding this study, I want to call attention to the fact that in the long term, such destabilization will inevitably result in a perception in which “control over territory and borders [...] no longer strikes at the heart of a society’s self-determination.”¹¹⁵¹ That is not to say ideas of solidarity and identification as such can be done away with, for those remain important for every political community.¹¹⁵² However, instead of resulting in their demise, I have argued here that the application of constitutional norms to sovereignty’s territorial frame may bring about new forms of commitment that are more true to our ideals. Even if the destabilization of sovereignty’s frame as I have described above has as the most immediate effect merely that the human interests which have thus far remained largely concealed acquire a platform where they can be addressed in substance, the very fact of their communicability will be a step towards a more inclusive legal system where accidental demarcations drawn in the past will no longer constitute legitimate reasons for turning a blind eye to the injustices of the present.

¹¹⁴⁹ Kostakopoulou (2004).

¹¹⁵⁰ Benhabib (2004), p. 221.

¹¹⁵¹ Kostakopoulou (2004), p. 51.

¹¹⁵² Benhabib (2004), p. 220.

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Moustaquim v. Belgium, Judgment of 18 February 1991, A-193
Wassink v. the Netherlands, Judgment of 27 September 1990, A-185-A
Cossey v. the United Kingdom, Judgment of 27 September 1990, A-184
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Hakansson and Sturesson v. Sweden, Judgment of 21 February 1990, A-171
Van der Leer v. the Netherlands, Judgment of 21 February 1990, A-170-A
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Bezicheri v. Italy, Judgment of 25 October 1989, A-164
Gaskin v. the United Kingdom, Judgment of 7 July 1989, A-160.
Soering v. the United Kingdom, Judgment of 7 July 1989, A-161.
Eriksson v. Sweden, Judgment of 22 June 1989, A-156
Tre Traktorer Bolag v. Sweden, Judgment of 7 June 1989, A-159
Berrehab v. the Netherlands, Judgment of 21 June 1988, A-138
Schönenberger and Durmaz v. Switzerland, Judgment of 20 June 1988, A-137.
Boyle and Rice v. the United Kingdom, Judgment of 27 April of 1988, A-131
Olsson v. Sweden, Judgment of 24 March 1988, A-130
Bouamar v. Belgium, Judgment of 29 February 1988, A-129
F. v. Switzerland, Judgment of 18 December 1987, A-128
Leander v. Sweden, Judgment of 26 March 1987, A-116.
Mathieu-Mohin and Clerfayt v. Belgium, Judgment of 2 March 1987, A-113
Weeks v. the United Kingdom, Judgment of 2 March 1987, A-114
Bozano v. France, Judgment of 18 December 1986, A- 111
Gillow v. the United Kingdom, Judgment of 24 November 1986, A-109
Sanchez-Reisse v. Switzerland, 21 October 1986, A-107
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Lithgow and others v. the United Kingdom, Judgment of 8 July 1986, A-102
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