Protect

The Right to International Protection

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Institutional Architectures of Political Asylum in
Europe (1970-2000)

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The Right to International Protection. Institutional Architectures of Political Asylum in Europe (1970-2000)

Foreword

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This report is a preliminary study covering the period from 1975 to 2003 and offers the historical material to analyze how different institutional architectures have affected the quality of asylum determination and to identify the institutional architectures that have performed best in the past. While prescribing common goals and specific methods for the protection of refugees, the Global Compact on Refugees (GRC) proposes few procedures or institutional arrangements for governance. The EU's reforms on asylum procedures, on the other hand, give a more detailed description of the asylum determination procedure that the Member States are expected to deploy. Neither the GRC nor the European Union's Asylum Procedures Directive, however, give any prescription on the nature of the institutional architecture in which asylum decisions are to be made. This historical part of WP3 is to assess which institutional architectures of asylum determination may be instrumental in achieving high international standards in asylum policy implementation. In this working document we analyzed the position of the asylum offices through the second half of the 20th century when nation states in Western Europe, with little interference of the European Community/Union still decided sovereign about their protection policy.

This is a working document bringing together the vast material relevant to answer this research question. Two historical different, but interrelated processes had to be brought together. We outline in this report first the historical evolution of immigration policy, mainly how West-European states developed, concomitant with a restructuration of their post-industrial economies a seemingly more elaborated migration control system than before. Secondly we focus on how this affected refugee policy. Within refugee policy we see how migration control conflicted in the last decades of the 20th century with the Geneva Convention (1951), and even more so with the codification of proper state behavior in the European Convention of Human Rights. An enlarged human rights' regime that challenged states and their existing asylum institutions and transformed them.

This is only a first draft as some historical material we wanted to consult is still not available. Covid delayed some research trips and some of the subsequent requests for accessing archival resources are still pending. We structured the historical material we had access to in a meaningful way around our research questions. In the third and last year of the Protect research project other deliverables will refine our analysis and will enable us to answer the questions we started this project with. This report brings together the material we will use for this reflection. We envisage, if new findings change the narrative, even slightly, to provide an update of the report. A report which enables us to reflect on the role of the first instance asylum institutions in the protection of refugees in Europe since the last quarter of the 20th century. When the research within the Protect project will be finalized we will be able to conclude if throughout this half a century those at the frontline of refugee protection fulfilled their duty to protect and whether the institutional position of these protection officers mattered.

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Table of contents

Protection of refugees fleeing warlike situations and the institutional architecture of asylum policy in the last decades of the age of the European nation states, 1970-1999/2006

The hypothesis we want to verify in this report is whether institutional conditions matter for an optimal protection of human rights norms in immigration policy. By a historical and comparative approach, we focus on the protection effectiveness of the Asylum Offices (AO) in continental Europe. In this report we focus on ten West-European countries in the last quarter of the 20th century: Austria, Benelux, Denmark, France, Germany, Greece, Italy and Switzerland.[1] The existing literature, be it by jurists or political scientists, is mainly dedicated to the appeal procedure in the asylum procedure, as this is the most transparent stage in the asylum procedure. The influence of the executive and the legislative power of civil society and even more so of the internal developments within the AO are largely ignored in the existing analyses of the decision-making process in the domain of recognition policy. This report focuses on the first instance decisions of the (administrative) AO. The contemporary institutional set up of these agencies, however, should not be transposed to the recent past. In 1970 the two-stage asylum procedure only existed in a few European states, and an asylum office as an administrative unit dedicated solely to refugee protection was very uncommon. In this working document we will outline the political process that led to the contemporary institutional setup.

The existing literature on the appeal bodies[2] strongly underlines the influence of courts on the recognition policy of the AO. It seems that the appeal bodies mostly returned (or changed) only a small number of the negative decisions of the AO. What matters is not so much the quantity of decisions contested, but rather the appeal bodies, be it asylum tribunals or courts

[1] We will only include continental European cases as the differences between the national cases may not be too vast so as to endanger the comparative focus on the (functioning of) AO. The countries we selected share a geographical location, the European continent, some kind of affiliation with the European Community, later Economic Union, and also an experience with managing immigration. Due to the geographical location and the pull of a mature industrial economy, the immigration management during the *Trente Glorieuses* (1945-1975) of these states also had to address irregular migration including the spontaneous arrival of asylum seekers. Although the Italian and Greek management experience with immigration before 1975 was minimal, their geographical experience and them being part of the European Community advocates for inserting them in our sample of countries. Institutional variation between the European continent and Ireland and the UK is, due to the differing legal systems-- common versus civil law-- too vast and can endanger our focus on a strict asylum-related diversity, not to mention the unique geographical position of Ireland and the UK, which has important repercussions for their immigration policy. Also, most of Scandinavia is excluded because of the unique geographical position of Finland, Sweden, and Norway. The specific geopolitical position of Finland during the Cold War and, to a much lesser extent, Sweden makes this region different. Their peripheral geographical location-- its geopolitical position as well as its uniquely effective corporatist management of immigrant labor meant that Scandinavia had little experience with irregular migration, let alone spontaneously arriving refugees during the *Trente Glorieuses* (1945-1975). Byström and Frohnert 2013.

[2] In this report we distinguish courts from asylum tribunals. The asylum tribunals (AT) are administrative bodies reviewing negative decisions by the AO. Such an administrative body is mostly presided by a professional judge and composed of representatives of different administrations, of the bar and by times also a representatives of a refugee aid organization (civil society) or UNHCR. It was part of administrative decision making and the members of the decision-making panel are only part time involved in this asylum tribunal (AT).
Another format is a quasi-judicial body but also committed to an active investigatory task. The members of these asylum courts are full time professionals and nominated as judges for life. Other appeals bodies are more working according like the judicial branch of the state. They honor adversarial legalism, thus based on the premise that an impartial judge will decide whether the claimant is a refugee after hearing both sides argued forcefully. In these courts the asylum applicant and the IO/AO act as parties against each other in a trial and they review both questions regarding facts and law. These courts can be specialized asylum courts, but asylum seekers (with their legal counsels) can also be put against the lawyer of the state (AO or IO) before generalist judges. Throughout the period we cover there is in several countries a relocation of the asylum appeal procedure from the administrative tribunals to aliens or migration courts part of the regular administrative courts.

contesting the quality of decisions of the AO. Still, also the quantity matters and when more than 5% of the decisions are returned (or changed) we will try to understand the conflict between the AO and the appeal bodies. The argument is mostly that court decisions force the AO to abide by higher human rights standards. We acknowledge this process, but we question whether that is the only way of understanding the dynamic of decision making within the AO. The AO are a black box in research. We will use the existing literature on the appeal courts to investigate the extent to which court decisions have changed decision making in the AO and it turns out that the courts have also forced the AO to water down their protection policy. However, our hypothesis is that the dynamic of decision making in the AO is influenced by more than appeal courts.

Our hypothesis is that the AO are institutions that embody human rights. Therefore, we call the decision makers in the AO Protection Officers (PO).[3] This terminology takes seriously the self-presentation of these institutions. Respecting human rights has become a desirable mode of behavior for European states. The legislative branch of government has armed the executive with instruments to make the EU states behave 'properly'. Within asylum policy the AO was charged with a human rights mission; it effectively has to embody human rights norms in refugee status determination. How broad is the authority of the AO in asylum matters? The interaction between asylum policies and immigration policies is of importance to optimal refugee protection. Indeed, immigration policy beyond asylum policy has effects, both conceptually and empirically, on refugee protection. The AO in its mission can collide with national immigration policy as the human rights mission of the AO can have ramifications beyond the immediate task of recognizing refugees among those who officially request asylum. The AO embodying human rights norms or merely considered a human rights expertise center can be granted competences beyond refugee status determination (RSD). Do we see in the historical experience the AO behave in an active or even pro-active manner to shield refugee rights within the country from more mundane state interests? This working document will unpack the "black box" of the state to understand better the role of the AO in protecting refugees. Our central question is to understand how this institution can achieve an optimal effectiveness in refugee protection.

The research question

In this report we focus on this administrative asylum agency on its own. There is little literature on the recognition policy of the AO as the deliberations and decisions of the AO are in general not made public. With hindsight and most of all with archival material or personal interviews the interaction between the administration and the political actors can be reconstructed. However, to obtain insight into the decision-making process within the AO, one has to look into the discussions internal to the administration as the AO were, at times, merely an administrative unit within a larger department, which makes it opaque. Even access to decisions in individual cases is not straightforward due to privacy concerns: since the closure period is at least 50 years for material related to individuals, the researcher typically needs the permission of the persons concerned.

Our analysis of AO protection practices in Europe is based on the historical and contemporary literature on the asylum agencies as well as on archival research and interviews with privileged time witnesses, mainly (former) leading officials of these institutions. Our analysis of the AO protection practices is embedded in the evolving immigration and asylum policies of the continental European states. The literature on these policy developments is largely dominated by legal scholars, only few political scientists and historians have examined

[3] This name-giving is referring to contemporary function classifications in for example the Belgian and Italian AO. UNHCR called its officers implied in refugee status determination eligibility officers but has changed this recently to PO.

this policy domain. The few who did work on these topics almost exclusively focused on one country. To juxtapose these national developments and compare the changes in Europe demanded a considerable effort to see difference and similarities.

A historical approach to recognition policy

Working as historians with archival material has the advantage of potentially unveiling the full processes of decision making to the extent that decisions have left traces in archived documents. In the literature, few authors have made use of archival material to have a fuller understanding of decision making in the asylum offices. Mayer (2018), Parak (2019) and Akoka (2020) have done this for the postwar German, Swiss, and French asylum offices, respectively**.** Mayer gained insight into the RSD of the German AO in close interaction with the administrative courts by analyzing 5000 asylum cases. He situates decision making in refugee protection within the broader field of immigration policy. However, his analysis stops where our research starts. Parak (2019) offers basic insight into how the Swiss AO changed over time and is mainly an overview of how the AO handled applications from very different countries based on the archives of the Swiss AO, yet the decision making on protection within this institution remains out of sight. The author made little use of the archival material available on the meetings to establish the *Rapports on doctrine* and thus this publication has only limited value for our research question (Parak 2019: 31). Akoka covers the post war period up to the early 1990s, concentrating primarily on the internal functioning of the French AO. For the last decades she covers (and which overlap with this research), her analysis is based on an extensive use of time witnesses (leading officials and protection officers) and on some internal archival material.

We have worked mainly in Dutch, Belgian, and French archives dealing with immigration and asylum policy. The closure period for archives does limit our access to documents. State archives have variable closure periods, but 30 years is the usual closure period; still access to archives of asylum institutions for the 1980s has been difficult. In Austria the Ministry of the Interior has not yet deposited its archives in the state archives for the early 1990s.[4] In Germany the archives of the BAMF only contain the individual cases and are not open for research. The general records of BAMF until 1990, as well as the files of the Federal Ministry of the Interior, are kept at the *Bundesarchiv* in Koblenz. As Mayer (2018) has shown, analyzing the history of refugee protection in Germany demands a multi-level analysis. From 1983 onwards, refugee protection became an increasingly regional competence, therefore we refrained from working in German archives. Only from July 1993 onward did the BAMF obtain full authority to protect war refugees, but the archives on this period are not yet accessible.

We had access to the archives of OFPRA up to 1995 as France has only a 25-year closure period. Only files which had information on private persons were not accessible as the closure period for such files is 50 years; therefore, several general files related to the policy towards war refugees were not accessible. We also had access to the archives of the Ministry of Interior in charge of immigration policy. The Belgian asylum institution stated that due to multiple moves of the institution, they have no archives on the first decade of its existence (1989-1999)[5]. They do have individual files of all asylum requests that the institution has handled but due to privacy rules those files are not accessible. Luckily the archives of the Belgian immigration office for the 1980s have been deposited in the state archives, and for the early 1990s we had a generous access to the material still kept at the IO. In the Netherlands the Ministry of Justice has deposited its archives up to 1985 at the state archives. The IND granted us access to files

[4] Austrian State archives to the authors, 21.7.2021.

[5] Interview Dirk Van Den Bulck, commissarian-general Belgian AO, 9.12.2021. Brussels

related to the creation of the AO within the IND and the policy toward war refugees and other tolerated rejected asylum seekers[6] up to the early 1990s.

In order to expand the geographical reach of our research beyond Benelux and France, we privileged historical material that sheds light on asylum policy in a comparative manner, namely, the archives of UNHCR and CIREA. CIREA or the *Clearing House on Migration* or *Centre d'Information de Réflexion et d'Echange en Matière d'Asile* was an information platform created in 1990 in the wake of the Schengen agreement that provided comparative information on eligibility and recognition policy of different EU countries. Thanks to the OFPRA archives we had access to CIREA's internal documents covering the period 1991 to 1995. The UNHCR has a closure period of 20 years, but different additional types of restrictions exist.[7] In addition the decision of UNHCR to decentralize its documentation in 1994 implied that its central registry was discontinued. Records after 1994 were managed by the various units throughout UNHCR. Unfortunately the decision to decentralize led to the need for an additional effort to make records accessible for public research. Although large volumes of the UNHCR material of the second half of the 1990s is already catalogued the European office's archives are not yet accessible. On top of that direct access to UNHCR archives was not possible in the first two years of our research due to Covid. Thanks to the generosity of the staff of the UNHCR archive in Geneva we could however consult 3500 pages of scanned archival material which has been very helpful for reconstructing the history of the (policy of) asylum offices in Europe. At the end of May 2022 we obtained a slot to work in the UNHCR archives in Geneva and this will enable us to further our insights.

As the AO is in the literature mostly not the focus, except for the publications mentioned above, insights in the role of the AO are largely attributable to the archival material we consulted. Therefore, for some countries in particular Denmark and Greece we had only limited information on the role of their AO. We hope that the UNHCR archives will yield more material.

[6] We use the label "asylum seeker" rather than "refugee claimant" or "candidate refugee" as "asylum seeker" was the word used for most of the time we cover by the authorities. Asylum seeker obtained a derogatory meaning in the anti-asylum discourse of the 1980s and 1990s, which prepared the important changes we reconstruct in our report. The concept underlines the mixed character of the asylum flow : those needing protection but also does who do not. Since about 2018 the EU uses systematically those requesting international protection probably to underline the international (and not only European) responsibility in this domain.
see : https://ec.europa.eu/home-affairs/pages/glossary/application-international-protection_en

[7] UNHCR. n.d. 'UNHCR Archives Access Policy, Annex C: Guidelines on Access to UNHCR Archives'. Accessed 28 January 2022. https://www.unhcr.org/research/archives/3b03896a4/unhcr-archives-access-policy.html.

1. Protection and the institutional architecture of asylum policy within continental EU

This research has a twofold objective:

- Identify the institutions competent for asylum matters and analyze the eventual changing locations and characteristics of those institutions in charge of protecting refugees within the state apparatus since the last quarter of the 20th century.
- Analyze the relationship between the institutional architecture of asylum policy and protection effectiveness.

Our research hypothesis is that achieving optimal recognition rates, which acknowledge refugee status to refugees, can only be attained by an administrative authority which has some autonomy from the administration controlling immigration. An asylum office will only serve optimal refugee protection when it is open to an expanded refugee definition in order to include people fleeing newly perceived kinds of persecution and new situations creating forced migration. Such an openness is not possible when the AO serves blindly the objective of an immigration policy to restrict unwanted immigration, except for the legal category of refugees. The asylum architecture could be intended to institutionally shield the AO from the IO (Immigration Office). This can be done in a radical manner by making the AO into an independent agency part of another Ministry than the one the IO is attributed to. France chose this radical option in the 1950s. A less radical institutional setup is to locate the AO within the IO, but to assure the ability of the AO to develop autonomously its protection policy distinct from general immigration policy objectives of the overall agency. This can be done through multiple organizational identities. By shielding (the staff of) the AO from the immigration control objectives of the overall agency optimal protection could still be provided (Kraatz & Block 2008; Skelcher & Smith 2015). Carlier (1997: 693) wanted an administrative authority and an administrative court, both focusing solely on refugee issues to be in charge of RSD because of the need for a specialized knowledge both of law and of the situation in the countries of origin. There has been no research as to whether such specialized bodies with rights to intervene in all RSD stages safeguard refugee rights better than agencies, which beside their RSD-competence are also in charge of migration control. Such an agency dedicated solely to refugee protection would not only be a knowledge center, as Carlier claims, but could also institutionalize and thus strengthen respect for human rights within immigration policy.

Did these independent institutions act as an active human rights expertise center and exert such a normative influence? How should we measure such influence? We look into the role of the AO in the extension of protection through a more generous interpretation of the Convention of Geneva during the last quarter of the 20th century. Also, the retrenchment of the refugee definition of the Convention of Geneva, as for example happened in West Germany in the mid-1980s, will get our attention. Was this more generous or restrictive interpretation only enforced by decisions of courts and asylum tribunals against the decisions of AO to deny or grant refugee status, or was there a proper dynamic within the AO? Whether the AO played an active role in the process of the interpretation of the Convention of the Geneva from its inception has not been adequately explored. Through court verdicts numerous scholars have identified a sensitivity to protection against persecution because of gender issues or being a member of a sexual minority. Courts have used the Geneva convention's 'social group' to qualify this persecution within the refugee definition (Carlier et al 1997; Jansen 2013; Prat 1992; Jansen & Spijkerboer 2012; Millbank 2003; Spijkerboer 2016, 2018). Did the AO merely decide to implement the established jurisprudence of courts or is there also a dynamic internal to the AO? Miaz (2014, 2017) has shown, mainly through ethnographic research, how, since the 1990s, this sensitivity to diversity has translated itself in the daily protection routine of the Swiss AO. He analyzed how PO have not only implemented gender sensitive protection, but also have actively shaped and promoted the protection instruments they developed. Still, the genesis of this sensitivity has yet to be substantiated empirically. This openness of the AO to

gender sensitive protection needs could be analyzed through an analysis of individual case studies through time. Beside difficulties of access to these files, this is a very labor-intensive methodology. We have chosen a less labor-intensive approach for detecting openness to new protection needs by focusing on the case of war refugees. People fleeing war and civil war can be granted Convention refugee status if the AO can make their persecution related to the grounds of the refugee definition. If the AO considers they do not qualify for Convention protection, the AO can advise the competent authorities to requalify their status from rejected asylum seekers and thus irregular immigrants to *de facto* refugees. In the latter case the AO can be mandated by the legislator to do so. Thus, if the AO use this competence, it would be qualified as an active decision, whereas if the legislator has not called upon the AO to go beyond applying the Convention of Geneva it would be called a pro-active decision.

There are some limits to our research. This research hardly deals with immigration policy before the refugee can apply for asylum. The AO has no authority to influence the decisions in the consulates, in the transit countries, at the border, or even in the territory of a country, when no asylum has yet been requested, but a pro-active AO could address problems related to the access to the asylum procedure and we have been attentive for such case.

If such an active (and pro-active) role had been assumed, was such a role dependent on the location and characteristics of the AO? Central to our research project is the hypothesis that the institutional variation in the relation of the AO to the objective of immigration policy to stop uninvited immigration influences protection effectiveness. By this historical research we want to achieve insights into the relevance of institutional settings for an optimal recognition policy.

This research goes beyond merely presenting national cases. It will be a comparative exercise; thus, we will not merely juxtapose national asylum institutions and policies, but also make a comparative analysis of the similarities and differences between national institutions and policies. How national cases influence each other and how supranational processes influence the institutional settings and policies will be addressed, but the central issue is how the institutional setting of the asylum office influenced the outcome in terms of acknowledging refugees' need for protection.

1.1. Asylum institutions' position changing throughout time and place

The asylum procedure in continental Europe is today divided into three decisions to be made: registration, eligibility, and recognition. Registration is the mere notification of an asylum application, which turns the foreigner, either at the border or in the territory of the state, into an asylum seeker protected against *refoulement*. This registration is mostly performed by the police, either local or central, or by the immigration office, either local or central.[8] It occurred that the police or the IO refused to register an asylum request. The foreigner was then denied access to the asylum procedure so registration could also be called an admission decision. The admission decision in 2022 consists basically in verifying the first country of asylum based on the fingerprints in the European Asylum Dactyloscopy Database (Eurodac). Before the Dublin Convention the applications of those for whom the country was not the first country of asylum were discarded, but each country had its own criteria to establish whether another country was the first country of asylum.

A second decision is the eligibility decision which is based on a rather superficial evaluation of the merits of the case and by which an asylum request can be declared ineligible when it is considered for example manifestly unfounded, abusive, coming from a safe country

[8] Some countries (among others Denmark, Switzerland, France) allow or have allowed asylum applications abroad. The history behind this opportunity of applying for asylum at diplomatic or consular missions and the manner these applications have been handled is of interest to our research question. As this topic is hardly discussed in the literature and because of time constraints we were however not able to discuss this matter in this report.

of origin or a safe third country. The concept of safe country can be used to disqualify an asylum request either as a decision of not admitting or not registering the asylum application or as a decision to consider the application not eligible. The latter ineligibility decision is based on a quick investigation of the merits of the case, while the former decision uses the concept safe country in a blind manner without entering in the individual circumstances of the case.

The third decision is the recognition decision which refers to granting refugee status. In contemporary Europe, the recognition of the need of protection is attributed to an asylum office, a specialized agency, and an administrative or judicial court to decide the recognition of need of protection in appeal. The first decision on the merits of an asylum application is an administrative decision taken by the AO. The AO is mostly housed within the Ministry in charge of immigration policy, which is usually the Ministry of the Interior, but occasionally the Ministry of Justice. Formerly, the AO in many countries was part of the Ministry of Justice or the Ministry of Foreign Affairs. Had this shift to the Ministry of the Interior implications for recognition rates? Did this shift mean less sensitivity to the rule of law, the core business of the Ministry of Justice? Or perhaps this shift engendered less sensitivity to diplomatic pressure not to harm the humanitarian reputation of a country. Upholding a so-called national tradition of providing refuge or serving humanitarian interests would be interests to which the Ministry of Foreign Affairs would rather cater.

In most West European states today, the decision whether to grant asylum is taken by a central authority. There has been a strong process of centralization in several countries of our sample. However, we see at the same time a process of decentralization of asylum offices in the Netherlands, Austria, Italy, and Germany. This decentralization by setting up regional affiliates of the AO can aim at a more efficient decision making, one closer to the applicants and the appeal courts. This merely physical decentralization of institutions does not imply a decentralized decision making. Decentralized decision making refers to local or regional institutions to which some autonomy in decision making is conceded, so that interference of the central organization in their mode of operation is restrained. Local or regional institutions could even be shielded from the central institution by their own staff, training, decision making, and budget. Even when there is a centralized decision making of the AO, asylum governance is located within a multilevel structure. Mostly two levels (central and regional) are taken into consideration.[9]

The authority granted to the AO embodying human rights' norms should be scrutinized. In which areas of policy has this institution authority at the moment of its creation, and was its authority changed, restricted or extended throughout time? For example when the concept of Safe Countries of Origin (SCO) and Safe Third Countries (STC) were introduced did the AO have an input in the deciding process which countries were considered safe? If the asylum office gave the government or Parliament non-binding advice on SCO and STC, was/is its advice heeded?

The recognition decision is a decision on the merits of an asylum application. For their investigation the protection officers use the administrative records of the asylum application, but they also resort to oral hearings or to any other information technique to inform their decision. In some countries an oral hearing is mandatory. The decision-makers are usually constrained by general guidelines in their decision-making, but the degree of autonomy of these frontline workers seems to vary greatly in time and space. When *de jure* protection was denied, did the AO have a role in the process of attributing other humanitarian statuses? Did the asylum office have competencies in the domain of granting *de facto* refugee status?

[9] For Germany, however, there are three levels of decision making in asylum/immigration policy. Thus, for Germany we distinguish between local (municipalities), regional (the level of the *Länder*) and the federal level. The regional dimension in Greece refers to provinces, in France the departments, in Austria the Länder.

Beyond these closely related decision-making processes on RSD, an institution dedicated to defending refugees, we are also concerned with other aspects of immigration policy. The question is whether the AO as the potential institutional defender of refugees has a say in border and expulsion policy (and related to that, detention policy). Expulsion policy is relevant to the protection of refugees, certainly for those refugees who have not yet requested asylum. Was the expertise of the AO called upon to verify whether expulsion policy accords with *non-refoulement* and respect of Article 3 of the ECHR? Our investigation into whether the AO has broader authority in (the protection dimension of) immigration policy will show the power of this institution beyond RSD in individual cases. It will determine whether the human rights expertise of the AO can exert an influence on the diffusion and dissemination of human rights norms in any policy relevant for refugee protection. Do national policies enable the AO with its human rights expertise to function as a lever for an immigration policy abiding to higher standards of respect for human rights?

1.2. The Convention of Geneva and UNHCR supervising national refugee policy

The international refugee regime enshrined by the Convention of Geneva (1951) defines as being refugees those persons who had a well-founded fear of being persecuted because of their race, nationality, political and religious beliefs, or belonging to a social group due to events prior to 1951. At the start of the international refugee regime, the Convention of Geneva was only meant to solve the refugee problem of the immediate post war. The protection of refugees granted by the international refugee regime curtailed national sovereignty as the state who adhered to the international refugee regime committed to *non-refoulement*. States could no longer treat uninvited immigrants at will: even a foreigner who immigrated in an irregular manner had to be temporarily tolerated if (s)he requested asylum. The authorities had first to investigate the merits of the case and if the asylum seeker was recognized as a refugee article 33 of the Convention prohibited the sending back (*refoulement*) of this refugee to his/her country.[10] The difference between the refugee definition of Article 1 and that of Article 33 of the Refugee Convention is that, in Article 1, the criterion is 'well-founded fear of being persecuted', while Article 33 requires a threat to 'life or freedom'. The latter refers thus to a more serious threat. The discussions during the drafting of the Convention of Geneva did not provide any explanation for these different standards of proof and it is highly probable that no distinction was intended (Marx 1992: 169). The concept of well-founded fear is the key-element of refugee law. Whether an individual has a well-founded fear of persecution has both a subjective and an objective element, but the fear has to be real; a plausible account has to be given as to why (s)he fears persecution.

Our West European states ratified the Convention of Geneva. The historical experience of the 1930s, when Nazi Germany had dumped its unwanted (Jewish) citizens in the neighboring countries, together with a strong aversion for the Soviet-Union, the enemy of the incipient Cold War, led the states of West Europe to agree to provide protection to refugees. A decision based on ideological and humanitarian motives, but also a realistic assessment that those unwanted immigrants who had been forced to flee had no longer a home to return to and thus had to be accommodated. Providing facilities for refugees was done in order to improve the efficiency and effectiveness of their immigration policy. An international refugee regime, albeit to the detriment of national sovereignty, also improved the relations between states, in particular as there would be no "refugees in orbit" being pingponged over the border (Caestecker & Moore 2010; Caestecker 2017).

[10] Article 33 of the Convention of Geneva: 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.

A controversial point of discussion during the draft of the Convention of Geneva was its geographical reach. Some countries like France and Luxemburg restricted the application of the Convention to Europe, while Belgium and the UK were strong advocates of a global reach of the refugee definition and refuted any geographical limitation; There was no discussion on the 1951 deadline, the states adhering to the international refugee regime saw it as only a temporary commitment. Whether this temporary concession was a steppingstone for making refugee policy a universal and permanent feature of international relations was open to discussion. However, the creation of an organization, the High Commissioner for Refugees, within the United Nations, to oversee the implementation of the Convention of Geneva meant that making refugee protection part of the new world order had an institutional defender (Ben-Nun 2017).

In the UNHCR Statute defining the authority of UNHCR, two almost identical definitions of refugees were used, the only distinction was that Article 6A contained the deadline of January 1, 1951 as end date for events which created refugees and that Article 6B referred to refugees in general terms. UNHCR considered that those who became refugees as a result of events after January 1, 1951 were also within its mandate. For UNHCR, the refugee they had to protect was a universal category, independent from time and place. This expanded definition of refugee, going beyond what states had promised to do by ratifying the Convention of Geneva, meant that UNHCR had to walk a tight rope. We will see that the AO in several countries in Western Europe pursued a pro-active course and went beyond the legal mandate they had been given by their national legislation. The 1956 Hungarian refugee crisis was a case in point. The Hungarian refugees were collectively considered as Convention-refugees although their persecution was not necessarily due to events prior to 1951. This was hardly a concern raised by UNHCR, but they legitimized granting refugee status to these Hungarians by pointing out that communists had taken over power before 1950 (Jackson 1999; Kecskés & Scheibner 2022).

UNHCR started as an agency with very limited means, but, by 1956 in all the Western European counties in our study, except for Denmark and Luxemburg, UNHCR had opened a branch.[11] Mostly a national of the country had been nominated as representative of UNHCR and he had to stimulate a local refugee policy loyal to the Convention of Geneva (Loescher 2001; Caestecker & Ecker 2022). By the beginning of the 1960s UNHCR successfully pushed for giving the refugee definition of the Convention of Geneva a broader scope. The international refugee regime had to be cut off from the Second World War and its largely Euro-centric nature. The Protocol of New York (1967), which our ten Western European countries ratified, formalized a universal and timeless definition of the Convention of Geneva (Einarsen 2011: 68-73). Italy was the only country that had refused in the early 1950s to extend the application of the Geneva Convention beyond Europe that with the Protocol not extended protection beyond Europe. By the same token UNHCR decided that its staff should be the agents of a global agency which furthered the interests of refugees worldwide. That the mandate to oversee the implementation of the Convention of Geneva in a country was given to a national of that country was considered inappropriate. As the sole mission of UNHCR was to defend the rights of refugees globally, the UNHCR branches in the countries under study had to be led by a member of the international staff rotating between countries as local ambassadors for the refugees (Caestecker & Ecker 2022).

Article 35 of the 1951 Geneva Convention gave UNHCR the authority to ask for information on, *inter alia,* the implementation of the Convention. UNHCR played also an important role in the interpretation of the Convention of Geneva. An authoritative source on the Convention of Geneva was the UNHCR published *Handbook on Procedures and Criteria for*

[11] Luxemburg was covered by the Branch Office in Brussels, also Denmark had no UNHCR branch at that time. Only in 2017 a branch office was opened in Denmark. https://www.unhcr.org/neu/about, accessed 15.2.2022.

Determining Refugee Status (Lewis 2005). By 1980, in the West European countries under study, UNHCR had obtained the right to be present at hearings of the AO and to have access to individual files. In many countries the national branches of UNHCR could follow as an observer the decision-making process of the AO and/or the courts. UNHCR also developed contacts with attorneys, and these attorneys, mostly under contract with voluntary agencies co-funded by UNHCR, provided legal counselling to asylum seekers. UNHCR provided support for the cost of litigation in questions likely to set precedent in issues of importance to refugees and asylum seekers.[12]

A significant handicap in delivering its protection mandate is UNHCR's limited human and financial resources. This means that many field operations were inadequately staffed. Still, this global agency was a privileged witness of refugee protection in our states. Therefore, we privileged their archival collection in Geneva. At the same time, UNHCR is an actor wanting to optimize refugee protection. Due to time constraints, we could not analyze its evolving concept of optimal refugee protection and its strategies to convince states to improve its RSD. Such research remains wanted. In particular, its lobbying for extending refugee protection to war refugees and its advocacy of temporary protection needs additional research.

1.3. Protection for refugees

The dichotomy between refugees and (economic) migrants is the basic insight of contemporary migration management. The refugee or the forced migrant is not a stable legal, political, and even sociological category, as its meaning is open to changes reflecting a changing legal order, a changing polity, and/or a changing society. The sociological category refugees is defined as people forced to leave their country of origin due to political reasons. Although we acknowledge that there is no sharp line to be drawn between refugees and (economic) migrants, we consider the distinction between politically and economically induced migrations an important reality within population movements.[13] Refugees are also migrants, but for the sake of convenience we denote economic migrants as migrants in contrast to refugees. The labels migrants and refugees refer to the different sociological reality of their migration. The causes of emigration of refugees are distinct from those of migrants; refugees flee, and their return "home" might constitute a danger to their life and limb or at least might be more problematic than the return home of a migrant. The legal, political, and sociological reality of refugees did (and do) not always correspond. Refugees were/are not always acknowledged as such by the authorities as they were/are not always recognized as refugees.

1.3.1. Refugees and migrants as realities and administrative categories

The Geneva Convention of 1951 defined a refugee as a person who 'owing to well-founded fears of being persecuted for reasons of race, religion, nationality, membership of a particular

[12] For example, for Germany Annual Protection Reporting Exercise, 4.1992, 2.1.1. AUNHCR, 600.GFR - Vol.8 - 1991-1992; on the role of UNHCR see also Pallis 2005, Cuéllar 2006, Alexander 1999, Caestecker & Ecker 2022.

[13] We do not share an approach in political science that denies the concept of refugee any intrinsic value. That the category "refugee" does not reflect any reality, but is a mere administrative construction does not do justice to the complex reality of the category refugee. This approach can be quite dogmatic as, for example, Akoka (2020: 308) illustrates when she attributes the rising recognition rates in the 2010s only to changes in the functioning of asylum institutions and totally ignores the changes in the reality of forced migration. As refugees from Syria, Eritrea, Iraq, and Afghanistan flee wars and violence they qualify for protection and cause higher recognition rates, although this historical overview shows evidence that this is not by definition the case. In addition, Akoka's methodology on comparing recognition rates which underpins her ideological argument is flawed as she compares recognition rates between spontaneously arriving African asylum seekers and largely (already recognized) refugees from South East Asia who had been invited to France as part of a resettlement operation. This argument does not do justice to the complexity of refugee policy (and her otherwise valuable and innovative research). Miaz (2021: 197), although adhering to the same approach, is more flexible and acknowledges that the rising recognition rates in the last decade show that the bureaucratic lens is not the only lens with which to understand refugee policy.

social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country". The subjective refugee concept of the Geneva Convention and the many different grounds of persecution it enumerated was an expansion in contrast to previous, narrower, objective refugee concepts.[14] Most importantly, during the last quarter of the 20th century the refugee definition of the Convention turned out to be open enough to acknowledge new kinds of persecution on the base of which an individual qualified for protection. For the Convention of Geneva individual persecution is an intrinsic part of the refugee definition. Fleeing from situations of general violence is not covered by this refugee definition. In a situation of total anarchy and general violence persecution as it is understood in the Convention of Geneva is difficult to locate.

The Organization of African Union's Convention on Refugees (1969) expanded the scope of the refugee definition. The 1951 definition was amended with the following subsidiary protection: "The term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality." The Organization of American States also extended the definition of refugee in the Cartagena Declaration, adopted by ten Latin American countries in 1984. In a similar manner, it offered protection to "...persons who have fled their country because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order."

During the period covered by this report no regional instrument was developed in Europe that expanded the refugee concept. Since the 1970s UNHCR had led a campaign to expand the refugee definition in Europe in line with developments in Africa and South America. The Council of Europe was the forum in which the topic was put on the political agenda. This international campaign was aborted in 1985 (see 2.3.1). The European Community, later European Union was a new forum where war refugees were put onto the political agenda (Lavenex 2001). It was in this forum that the expansion of the European refugee definition would be successfully formulated. The European experience with forced migration during the last quarter of the 20th century would convince member states to develop a new common instrument. The qualification directive 2004/83/EU added subsidiary protection for war refugees to the existing protection instruments. The EU recast qualification directive 2011/95/EU codified an expansive re-interpretation of the Convention of Geneva. It is this EU-definition of refugee which we use in this report. Although we acknowledge that this definition is a political compromise, it was a result based on the experiences of immigration/refugee policy of the late 20th century and new sensitivities in the realm of human rights. During the last quarter of the 20th century many European countries denied refugee status to forced migrants who would qualify to be called refugees by the European asylum institutions of the early 21st century.[15]

[14] The definition of the Geneva Convention expanded the definition of the International Refugee Organization (1946) which considered refugees as persons who had valid objections to returning to their country of origin, including "fear based on reasonable grounds of persecution because of race, religion, nationality or political opinion" Salomon (1991: 60). During the interwar period the legal definition of a refugee was mostly linked to the absence of diplomatic protection, while in the 19th century only political refugees, political activists fleeing authoritarian rulers, qualified for protection. The political refugee has remained the basic concept in popular understanding of refugee law. Caestecker & Moore 2010.

[15] Although asylum institutions in the EU share this early 21th century expanded definition of refugee, different interpretations of the refugee definition are being used in their recognition policy. This issue will be addressed by the next paper covering the period 2000/2006-2018 and by the paper analyzing the quantitative data on recognition policy by the University of Bergen.

De jure and *de facto* refugees refer respectively to the legal and political confirmation of their recognition as refugees. Refugee policy can cover the sociological reality of refugees but does not do so by definition. The EU Qualification Directives have closed, to a large extent, the gap between the sociological and the legal reality of refugees as we perceive it today. Therefore, we look at the recent past with the instruments of today in order to assess whether refugees received protection and which institutional set-up is most appropriate to reach the optimal recognition policy by our contemporary standards. The use of an anachronistic definition of refugee for analyzing refugee policy since the 1970s serves the objective to measure the effectiveness of the protection mandate of the asylum offices.

1.3.2. The kind of protection granted to refugees: shifting boundaries of de jure and de facto refugees

In this report we use the contemporary definition of *de jure* refugee as the EU qualification directive (2011) defines: a combination of Convention refugee and refugee because of a need of subsidiary protection. During the last quarter of the 20th century there were numerous refugees that AO did not qualify as *de jure* refugees but who today would qualify as *de jure* refugees. While they were denied the legal category refugee, many of them were shelved into the political category *de facto* refugee, an administrative category which lacked many rights given to the *de jure* refugee. The *de jure* refugee had strong rights. The Convention of Geneva made them "privileged" immigrants. They could not be forced the leave the country as upon recognition they had been granted a leave to remain, others were granted a permanent residency permit shortly –at most a few years- after their recognition as a refugee. This meant that they hardly could be forced to leave the country, when a change in their country meant they did no longer need protection or when they, because of criminal convictions or disturbing public order, became troublesome guests. Not only did they have (the prospect of) a permanent residency status, they also had, by and large, full access to the labor market and could reunite with their family. In a lot of respects, including access to social rights, the international refugee regime placed refugees on a par with nationals.

Tab. 1. Overview of 'refugee' status classification in Europe, 1975-2006

<table>
<tr><td colspan="4">Convention Refugees (de jure)</td></tr>
<tr><td colspan="4">↕</td></tr>
<tr><td colspan="4">Temporary protection with lawful status (status is de jure, but second rate de jure refugees)</td></tr>
<tr><td colspan="4">↕</td></tr>
<tr><td colspan="4">De facto refugees</td></tr>
<tr><td colspan="2">Explicit protection (=recognition of protection needs by the state)</td><td colspan="2">Implicit tolerance (= no recognition of protection needs by the state)</td></tr>
<tr><td>Ad hoc temporary protection
Weak status as not enshrined by law</td><td>Tolerance
Temporary suspension of expulsion order (no residency status)</td><td>'Ordinary' alien status
Stay is granted but treatment like regular foreigners in the country</td><td>No residency status
No expulsion due to reasons related to logistics (technical reasons)</td></tr>
</table>

Humanitarian status
Part of the 'regular' immigration policy. Residence permitted for reasons not related to protection but due to medical reasons, long asylum procedures, …

The *de jure* protection was the basic mission of the AO. The *de facto* refugee statuses were mostly *ad hoc* statuses granted to refugees who were perceived not to qualify for protection granted by the Convention of Geneva. The AO was mostly not authorized to grant *de facto* refugee statuses as his status was granted in many instances by the IO. At times and in certain countries *de jure* refugee status and *de facto* refugee status were mutually exclusive, which meant that *de facto* refugees were denied access to the regular asylum procedure while being protected by the *de facto* status. When their *de facto* status ended they had to leave the country. When refugees were denied any refugee status and were considered merely irregular immigrants these refugees could be 'returned home', where they could be exposed to persecution and inhuman treatment. The refugee denied even the most minimal recognition as a *de facto* refugee is difficult to trace in the paper trail of history. However, the refugees' resistance to be returned 'home' makes it difficult to ignore their specific situation. Refugees whose forced emigration is denied could also by default be left in peace. In this report, we view the state's passive endurance of an irregularly staying refugee as the state implicitly tolerating a refugee.

The most outspoken form of *de facto* refugee is temporary protection. This term is used if immigrants were considered refugees but were not granted *de jure* status and thus were not granted (the prospect of) a permanent residence status. However, these refugees were explicitly tolerated by giving them some temporary entitlement to stay. Similar to the *de jure* protection granted on the base of the Convention of Geneva, temporary protection as a form of explicit toleration is a concept which underlines the commitment to refugee protection in immigration policy. It honors the internationally agreed principle of *non-refoulement*, but the temporary nature of this asylum makes admission more a matter of national discretion. With temporary protection the normative link between the international refugee regime and national politics is broken. The universal doctrinal solutions to refugee problems are relinquished. Temporary protection constitutes a less costly compliance with the international obligation of *non-refoulement* that compels states to provide asylum. Temporary protection of refugees is still a positive choice whereas implicit toleration or temporary admission is a negative choice due to indifference or impotence. The latter refers to the incapacity to enforce immigration rules, which causes authorities halfheartedly to give in and put up with immigrants who have not been authorized to enter and stay in the country. Temporary admission is merely referring to the authorities allowing an alien access to its territory, be (s)he a tourist, a refugee or on a business trip. When refugees are temporary admitted, they are implicitly tolerated.

When the authorities acknowledge the protection needs, we call this explicit toleration; however, this can yield very different ways of tolerating the person on their territory. There are other less developed forms of explicit toleration than temporary protection. With temporary protection the *de facto* refugee is granted a temporary residence permit that formally recognizes (temporary) protection needs. Explicit toleration can be limited to a merely temporary suspension of an expulsion order.

Most often these people were termed "displaced persons" rather than "refugees." We do not use these *ad hoc* labels; we only label a person as a refugee based on the qualification directive (2011) and look into how the European states in the past provided protection by recognizing them either as a *de jure* or *de facto* refugees or by totally denying them a refugee status and labelling them as irregular immigrants. A *de facto* refugee is explicitly tolerated, but while a refugee who is implicitly tolerated is considered by the state as an irregular immigrant. But the state does not force him/her to leave its territory. We term this implicit toleration as the state did not acknowledge the protection needs, let alone its duty to protect. Among those who are explicitly tolerated, some receive a temporary residence permit (temporary protection) while others do not.

Since the last quarter of the 20th century *de facto* refugees have been mainly war refugees, but *de facto* refugees could also be refugees who fled 'private' persecution, a persecution against which their state did not protect them. Some asylum institutions considered (some of) these refugees to be *de jure* refugees; others denied them this favor. The EU-qualification directive 2011/95/EU has opted for what from a historical perspective, as is outlined in this paper, can be called an expansive interpretation of the Convention of Geneva. Over time, in certain countries some of these *de facto* refugee statuses became written in statute books and thus became a kind of *de jure* refugees. Although this administrative category had a legal upgrade, these refugees remained second-rate refugees as they were still deprived of rights bestowed on the Convention refugee as the *de jure* refugee par excellence. Therefor we call them second-rate *de jure* refugees. The EU-qualification directive (2004/83/EU and) 2011/95/EU meant to upgrade this kind of refugees collectively to *de jure* refugees all over the EU, at least in the books. The extent to which these subsidiary protected refugees were/are still second-rate *de jure* refugees bestowed with fewer rights than the Convention refugees is dependent on the national case and will be tackled by the next report.

This is not an investigation in the compassionate or humanitarian attitude of the AO. We only look into protection policy. Our investigation does not delve into the humanitarian-based exceptions for rejected asylum seekers whose legal residence was regularized because of the prolonged residence in the country of asylum during the asylum procedures. Medical reasons could be the reason for a humanitarian status. Medical reasons can be related to the inability to deport an individual, but medical reasons can be also related to the lack of medication or treatment in the country of origin. Tolerating an individual for the latter reason can be called part of a protection policy, but there are other means of providing medication or even medical treatment than by granting asylum. We chose not to integrate this sensitive topic in our analysis. A temporary stay for those who were undeportable because of technical reasons such as lack of passport or lack of an airway connection with the country of origin are beyond the scope of our research.

1.3.3. Recognition rates as a tool to measure effectiveness of protection

The figures on asylum seekers we use are based on UNHCR data.[16] The recognition rate is an instrument used to measure the generosity or restrictiveness of an asylum system. One can refer to an overall recognition rate, but for the comparative focus of our study it is better to use a recognition rate by citizenship, as in this way the diverse asylum applications countries have to process are taken into account.

In the archival material we consulted as well as in the contemporary literature recognition rates are mentioned. Little or no information is given on how this rate is being calculated. It is often not clear who is counted and who is not. Thus, the statistics may refer to adults, cases or all persons. We presume that the rate refers to the number of positive decisions taken by the asylum office (eventual including the correcting decisions of the appeal authority) in a given year in relation to the total number of decisions taken in that year. Thus, the recognition rates are calculated by dividing the number of Convention status recognitions by the total of Convention status recognitions and negative decisions.

[16] UNHCR. 2001. 'Asylum Applications in Industrialized Countries: 1980-1999'. Geneva. From 2006 onward we only use the number of first time applications. Before 2006 UNHCR did not differentiate between first time applications and category "V" for other types, standing for various/unknown. In the latter category reopened cases, appeals, administrative reviews, and all the other categories used – not consistently – by national authorities and UNHCR are included. We prefer to use the number of first time applications as this conveys most clearly the influx of asylum seekers, including the other categories of asylum applications refers more to the administrative workload.

There are numerous problems in calculating this quantitative indicator. For the denominator, are only first applications included and what about subsequent applications? If applications in the framework of resettlement are included, the recognition rate rises. [17] Also, if applications for spouse and children are included, the recognition rate rises. [18]
Comparing national data is a daunting task. As refugee status determination procedures are based on national law and practices, the scope for comparing these statistics is limited. This became even more difficult as during the 1980s and 1990s new refugee statuses or humanitarian statuses were created. For instance, the war refugees fleeing the explosion of Yugoslavia were in some countries individually screened in the regular asylum procedure. In other European countries these persons were granted temporary protection on a group basis. These Yugoslavian war refugees were one of the largest groups of asylum-seekers in the early 1990s but as a result of these different national practices, they were included in the asylum and adjudication statistics in the first group of countries, but mostly excluded from the statistics of the other countries.

A recognition rate taking into account all the asylum applicants in a given year that were processed over the course of several years is the best yardstick for evaluating protection policies, but for the time period we focus upon this is rarely available. The processing of asylum applications could take years and in addition there can be large discrepancies in processing times between different countries which could create a distorted picture. In this report when we use the concept recognition rates we refer to the share of refugees recognized as part of the total number of decisions on asylum applications and for further reference we also add, if that information is available the total number of (positive and negative) decisions to which this recognition rate is referring to. For example a recognition rate 25% on a population(n) of 56 means that 14 of the 56 asylum applicants were recognized as refugees. Thus if no decision has been made on an asylum application it is not taken into account for calculating the recognition rate. In some countries the figures do not specify explicitly whether their negative decisions exclude the withdrawal of request for asylum or request which due to departure from the country or other regularization of their stay or death have been closed. Errors are possible in this way, but we have crosschecked our quantitative information as far as possible.

[17] The so-called quota refugees, refugees who arrived in the framework of a resettlement program, were not included in the asylum applications in West-Germany, while they were included in the Belgian and French figures. Annual Protection Reporting Exercise, 4.1992, 2.1.1. AUNHCR, 600.GFR - Vol.8 - 1991-1992; Caestecker & Ecker 2022.

[18] In France the recognition decisions for spouse and children were long time included in the decisions of OFPRA, but from 1995 onward, due to a decision of the Council of State on December 2, 1994 (Mrs. A.) only the spouse which the refugee had married before this flight to France was still granted refugee status, while this was no longer the case for the spouse married after the flight. Also for minor-aged children such a distinction was being made. Conseil d'administration, 28.5.1995, AOFPRA, Dir 1/13. In West Germany only from 1990 onward were spouse and minor aged children of a refugee qualified for refugee status (under condition that the recognized refugee had been the spouse/parent before the flight).

2. European asylum institutions under the pressure of globalization and the demise of the Soviet bloc, 1980-1991

In the 1950s, Italy, France, and Luxemburg signed the Convention of Geneva with a geographical reservation while Austria, Belgium, Denmark, Greece, Germany, and the Netherlands agreed to extend the incipient international refugee regime beyond Europe.[19] Italy expressly maintained its declaration of geographical limitation upon acceding to the 1967 Protocol, while France and Luxemburg did not. At that time, during the *Trente Glorieuses,* immigration was largely managed by the Ministry of Labor and/or Social Affairs. Central were the labor needs of the mature industrial economies and certainly, during the 1960s, immigration policy was very liberal. Immigrants, even if they were refugees, could easily regularize their stay by filling vacancies on undervalued segments of the labor market. The Ministry of Interior or Justice which translated more the security concerns in immigration policy had to compromise with the Ministry of Labor, but although they were the junior partner in immigration management, they developed an administrative capacity in this domain by insisting on regularizing the stay of the foreign workers who, for economic reasons, they could not stop from entering. Greece, where industry was less developed, had no need for foreign labor and did not develop its administrative capacities to manage a labor flow. The Italian industrial economy was concentrated in the North and could tap the labor reservoir in the underdeveloped South, which meant they did not need foreign labor and thus the Italian state did not develop capacities in international migration management.

During the *Trente Glorieuses* asylum was a small immigration flow and of limited political significance. The Convention of Geneva was silent on the procedural dimension of the protection regime. It had left the organization of RSD to the national authorities. In the Benelux and France, the competence to determine refugee status had been vested in the Ministry of Foreign Affairs. In their understanding, providing asylum was an obligation resulting from an international commitment. In France, the Minister of Foreign Affairs had created an AO in 1952.[20] To appeal the negative decisions of the AO an administrative court was created in which UNHCR had a say. This respect for the international refugee regime was even more outspoken in Belgium and the Netherlands as the Minister of Foreign Affairs had outsourced refugee status determination to UNHCR. In Germany, recognition policy was under the authority of the *Bundesdienststelle*, and from 1965 onwards in the *Bundesambt für die Anerkennung ausländische Flüchtlinge* (BAFI), which was an independent agency within the orbit of the Minister of Interior. Appeal against its decision was possible at administrative courts.

In Austria, Denmark, Switzerland, Italy and Greece the asylum procedure was integrated in the Ministry that had immigration policy within its administrative purview, so either the Ministry of Interior or of Justice. In Italy a specialized unit within the Ministry of Interior was created in 1952, the *Commissione Paritetica di Eleggibilita.* In the other countries management of immigration and asylum were closely integrated in one and the same agency and managed by instructions of the Minister in charge. These central authorities dealt with asylum applications in tandem with the local or regional police. No training to evaluate asylum requests in terms of human rights was organized. The police looked at individual request for asylum cases primarily from the point of view of security.

From the second half of the 1970s onward the total number of asylum seekers increased as spontaneous arrivals largely from the global South added to the number of asylum applications. The acceleration of globalization meant that international travel became easier and cheaper. This rise in asylum requests was partly due to asylum being the only remaining immigration opportunity for people from the South. The post-industrial transition wreaked

[19] United Nations Treaty Series, 1954, pp.137-218. https://www.refworld.org/pdfid/3be01b964.pdf accessed, 27.1.2022.

[20] The French AO was and is called *l'Office français de protection des réfugiés et apatrides* (OFPRA).

havoc on the labor market. Automation and to a lesser extent delocalization created a postindustrial economy. This transition was painful for many industrial workers as unemployment rose and became a permanent feature. Dissatisfaction with being economically superfluous expressed itself also in politics with the electoral rise of extreme right parties as the French National Front, the Belgian *Vlaams Blok* and the Austrian FPO. Where parties became more popular during the 1980s by denouncing the presence of non-Europeans among their midst, and in particular in Austria, asylum seekers were targeted. They were pictured as welfare scroungers, profiteers, and criminals. The arrival of asylum seekers from outside Europe was politicized and added political salience tot the so-called asylum crisis.

The post-industrial transition and the end of the need to import labor had already changed the agency leading immigration policy within the state. By 1980, all over Europe the Ministry of Justice or the Interior had taken over command of immigration policy from the Ministry of Labor and/or Social Affairs. The increase in asylum request was not matched with more administrative resources for the institutions which had to process these applications. As a result, backlogs built up. By the mid-1980s the strain placed on asylum procedures caused delays and the waiting period between lodging a request and a decision took ever longer. In Germany it lasted six to eight years and in Switzerland between four and six years, while in France it took in average three years.[21] Given the time it took to process applications, any immigrant, also those with no need for protection, could remain for several years in continental Europe as an asylum seeker, albeit with a precarious legal status. The Ministry of Justice or the Interior led a restrictive move in most West European countries to stem the asylum flow first and foremost by strengthening the role of the IO during the eligibility phase of the asylum procedure.

2.1. Legal doctrine in refugee protection

Changing practice in protection of refugees has been explained by changing legal doctrine. Legal doctrine in the domain of refugee protection in Europe during the 1980s was based on customary norms, the Convention of Geneva, domestic legislation and the European Convention on Human Rights. In post war Europe two legal sources of protection existed for refugees, the Convention of Geneva and National Constitutions. The Italian Constitution says in Article10.3 “An alien who is denied, in his or her own country, the effective exercise of the democratic liberties guaranteed by the Italian Constitution shall have the right of asylum in the territory of the Italian Republic, in accordance with the conditions established by law”.[22] The French Constitution of 1946 offers in its Article 4 asylum « *à toute personne persécutée en raison de son action en faveur de la liberté* ».[23] Article 16 (2) of the Basic Law of West Germany stipulates “Persons persecuted on political grounds shall enjoy the right of asylum” thus stating a subjective right to protection.

Although France and Italy have a provision for asylum in their constitutional law it hardly found a translation into domestic refugee law and even less so into the reality of refugee

[21] Auf der Suche nacht Zukunft: Tamilische Fluchtlinge aus Sri Lanka – Analyse und Handlungsvorschlage’ (1985) 4(3) Refugee Abstracts 60, 61; AN, 19970381/4.

[22]«Lo straniero, al quale sia impedito nel suo Paese l’effettivo esercizio delle libertà democratiche garantite dalla Costituzione italiana, ha diritto d’asilo nel territorio della Repubblica secondo le condizioni stabilite dalla legge». Benvenuti, Marco. n.d. ‘La forma dell’acqua. Il diritto di asilo costituzionale tra attuazione, applicazione e attualità’. Accessed 3 February 2022. http://www.questionegiustizia.it/rivista/articolo/la-forma-dell-acqua-il-diritto-diasilo-costituzionale-traattuazione-applicazione-eattualita_531.php.

[23] This Article has been taken over in 1958 by the current Constitution of the Fifth Republic which says “The French People solemny proclaims its attachment to Human Rights and the principles of national sovereignty as they have been defined in the Declaration of 1789, confirmed and completed by the Preamble of the 1946 Constitution”. Weil 1995.

policy.[24] In West Germany, this is fundamentally different. West Germany was the only country where its Constitution also became a legal source for refugee policy. Granting asylum in West Germany not only has the Geneva Convention as a legal basis, but also Article 12 (2) of the German constitution.

2.1.1. The Convention of Geneva as applied in Continental Western Europe

The Convention of Geneva underlines the importance of the subjective notion of persecution, but legal scholars, mainly in the 1990s who have reconstructed the rulings of the asylum courts focused their attention on the persecuting state. These overviews of legal doctrine in West Europe, nearly exclusively based on rulings of the asylum tribunal in France and courts in West Germany start with stating that at the beginning of the corpus of refugee law jurisprudence the courts referred only to persecution that was imputable to state authorities and excluded non-state agents of persecution

In those overviews of legal doctrine, a first breach in this restrictive definition of refugee was that the private persecution had to be condoned by the state. At this stage, tantamount to state persecution was persecution by private parties actively tolerated by the state. The requirement to amount to persecution as mentioned in the Convention of Geneva was the indirect participation of the state authority through its voluntary tolerance or encouragement of the persecution emanating from private persons. The applicant had to have sought the protection of the authorities or shown that the authorities were aware of the persecution going on, but had refused to take any action. At this stage, refugee status was not recognized where the state authorities are willing, but simply unable to offer protection. In a situation where there was no government at all, refugee status was equally denied. Only if the authorities enticed, encouraged, approved of or in any way tolerated persecution by third parties was this seen as persecution in the sense of refugee law.

A case in point was the position taken by the French asylum court in 1979 with the Duman case. This case was, according to legal scholars, the first time that persecution by non-state agents of persecution could be considered 'persecution' under the Convention of Geneva.[25] In the Dankha case (1983)[26], the Council of State confirmed the legal reasoning of the Duman case by holding that there may be recognition of refugee status where the state or public authorities voluntarily tolerate or encourage persecution by third parties. However, refugee status will not be recognized where the state authorities are willing, but simply unable to offer protection. The Council of State confirmed the legal reasoning in a ruling of 1995, to the delight of the French Asylum Tribunal (AT) who saw its stand at that time confirmed.[27]

However, there was an evolution toward allowing more flexibility on the point at which private acts were considered being tolerated by the state. An important step in this respect was the concept of "*de facto* authority". Private bodies, which, although not *de jure* a state-power, but which were the *de facto* power of parts of the territory could qualify as state-like bodies. To

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[24] For Italy: Benvenuti 2007; Benvenuti, Marco. n.d. 'La forma dell'acqua. Il diritto di asilo costituzionale tra attuazione, applicazione e attualità'. Accessed 3 February 2022. http://www.questionegiustizia.it/rivista/articolo/la-forma-dell-acqua-il-diritto-diasilo-costituzionale-traattuazione-applicazione-eattualita_531.php.

[25] French AT, 3 April 1979, Duman: An asylum seeker who alleged repeated and systematic ill -treatment organized by the population against inhabitants of a Christian denomination, where this ill -treatment was tolerated by the government, was recognized as a refugee". ECRE 2000.

[26] Conseil d'Etat, 27 May 1983, 42.074, Dankha: The Council of State held that persecution does not automatically imply action by a public authority. Persecution that does not emanate from the public authorities can lead to recognition where "the facts are in fact voluntarily tolerated or encouraged by the public authorities, effectively making it impossible for the interested party to claim the protection of these authorities"

[27] Conseil d'administration OFPRA, 29.11.1995, AN, 19970381/6.

quality as state-like these "*de facto* authorities" had to have a continuous and effective power over specific parts of the territory and its population. Persecutions that this "*de facto* authority" exercised or tolerated could be taken into account for protection based on the Convention of Geneva. [28] However, if the state that had official sovereignty over this territory combatted this competing power, even if success was minimal or even non existing, this competing power could not qualify as an agent of persecution. Also, if there was no state or *de facto* authority exercising state-like powers, there could be no claim to refugee status. The absence of a state to provide protection resulted in a denial of refugee status.

A fourth and final stage in the acceptance of private persecution as falling within the scope of the 1951 Geneva Convention was reached when persecution by third parties qualified under the concept of persecution of the Convention of Geneva even when the state was in general unable to protect and to prevent persecution due to the absence of a functioning state power. Persecution by third parties need no longer to be tolerated or encouraged by the State but may also exist where the state authorities were incapable of offering effective protection. In a situation where there is no effective government, all persecution is persecution by third parties (Vermeulen et al 1998: 24).

2.1.2. Constitutional provisions for protection of refugees: the German exception (1977/83-)

From the very beginning the right of asylum in Germany was strongly protected by administrative courts on three levels of jurisdiction as well as by the German Constitutional Court. During the 1950s these German courts interpreted the strong refugee protection stated in art. 16 Basic Law as also being applicable to those who were applying to be recognized on the basis of the Convention of Geneva. The courts struggled increasingly with the temporality of the Convention of Geneva. The Convention referred to "events occurring before January 1, 1951" which were the cause of a well-founded fear of being persecuted because of race, nationality, political and religious beliefs, or belonging to a social group. When in 1965 a formal eligibility process was outlined the legislator referred, seen the Convention's temporality to Article 16 (2) Basic Law as the basis of refugee law, but the administrative courts continued to refer to the Convention of Geneva in their interpretation of the definition of refugee.

This until then harmonious interpretation of the twin sources of refugee law in West Germany started to grow apart during the 1970s. The absolute protection claim of Article 16 (2) of the Basic Law clashed with the exclusionary clauses of art.1F of the Convention of Geneva, but that conflict slumbered throughout the 1970s. More important was the issue of the post flight reasons (or *Nachfluchtsgründe*) which became relevant for a large number of East European asylum seekers who had not been persecuted in their country of origin because of political activities prior to their departure to the West, but who had to prove that they adhered to political beliefs which were combatted by the communist states in Eastern Europe. During the 1970s the courts shifted the burden of proof away from the asylum seekers to the persecuting state. From 1971 onwards East Europeans qualified as refugees as in their national criminal legislation the so-called crime of *Republikflucht* was severely punished. In 1977 the court qualified persecution on a broad interpretation of persecution by the communist state. Courts looked for objective proofs of state action which amounted to persecution. In 1980 the Federal Constitutional Court stipulated that the term political persecution of the Constitutional asylum concept required an objective approach, contrary to the subjective approach of the Geneva convention. According to this legal doctrine persecution measures were only relevant if the agents of the state which carried these measures out had the intention to sanction the individual on account of race, religion, nationality, membership of a particular social group or political

[28] In order to be recognized the refugee had still to prove an individual fear of persecution. Tiberghien 1988: 98-101.

opinion. Decisive in the German doctrine were the political intentions of the state as persecutor and not the subjective feelings of the refugee, albeit grounded in a reality. In the asylum law of 1982 this evolution was translated into a sole focus on the state persecuting on political grounds as a strict translation of art 16 (2) of the Basic Law (Nicolaus 1990; Bast 2007: 292-293). In 1982 the Federal Administrative Court gave the death stroke to the older, more generous recognition practice by ruling that Article 16 (2) Basic Law may not be limited by the lower ranking Geneva Convention. The Constitutional refugee concept as it was interpreted even stricter by the Federal Administrative Court was far more restrictive than that of the Refugee Convention. As Marx (1992: 155) explains, even "the threat of torture will only lead to asylum if an underlying political intention of the torturer can be assessed". This refugee definition caused a disregard for the well-founded fear for persecution of the refugee in West-Germany. Although the Federal Constitutional Court (*Bundesverfassungsgericht*) has been critical of the doctrinal underpinnings of this approach, it has not been able to repudiate it (Marx 1992). This implied that in West Germany persecution had to either emanate from the State or at least be imputable to the State. Persecution organized by private individuals or groups could fall under the responsibility of the State, but only if the State, despite its ability to intervene, failed to prevent persecution organized by private individuals against a group, thus constituting indirect state persecution. Only persecution emanating from the State or persecution emanating from a state-like organization "quasi-staatliche Verfolgung" could lead to persecution for which protection was offered by the West German refugee law. Thus, there could be no persecution within the meaning of the West German refugee law in countries in which there is no government, or the government is not effectively in control of the country. In West Germany the notion of a person threatened by political persecution presupposes that there was effective State authority over the territory. In the event of civil war such State authority is lacking and thus persecution qualifying a refugee for protection was inexistent (Bosswick 1997: 57).

2.1.3. Legal sources of protection for war refugees

International customary norms are norms states traditionally have to abide by. In the case of war refugees a tradition of norms was mobilized to protect war refugees. However these norms were also expressed by the European Court of Human Rights. The breakthrough of the norms laid down by the European Convention on Human Rights which restrained the powers of the state in how it treated individuals was crucial for the protection of war refugees. By the end of the 1980s lawyers began to mobilize Article 3 of the ECHR banning inhumane and degrading treatment by the states to contest the expulsion of individuals of foreign citizenship, including refugees by the states who had undersigned the ECHR.

International customary norms to protect war refugees

A principle of law becomes a norm of customary international law if it meets two criteria: quite a number of countries must apply the principle consistently and those countries must recognize it as a legal obligation. A norm of customary international law only binds those states that have exercised it in the past (Cookson II 1991).

There is extensive proof of state practice in Europe adhering to a customary norm of protecting war refugees as well during the First World War, the Spanish Civil War as the Second World War. During the First World War the Netherlands and Switzerland, neutral countries as well as France and Great Britain –allied nations- did receive a large number of war refugees (Kushner & Knox 2001; Amara 2008). The Spanish refugees who fled to France in 1939 and before were temporarily protected by the French authorities. During the Second World War the neutral countries Sweden and Switzerland, but also the allied nations -France and Britain- did receive a large number of war refugees (Byström & Frohnert 2013; Schmidlin 1999; Kushner & Knox 2001). The second defining element of a customary international norm, i.e. a conviction

among the policy makers in a country that the rule is obligatory under international law, has not always been fulfilled on the European continent. Some states, as for example Switzerland between 1939 and 1941 expelled numerous war refugees as they did want their control over their borders to be compromised (Machler 1998; Unabhängige Expertenkommission Schweiz-Zweiter Weltkrieg 1999). Potential host countries refused at times to protect war refugees as they considered to protect war refugees an obligation of uncertain scope. Anyhow, if these states protected war refugees, they did not give these refugees a *de jure* refugee status, they were merely temporarily tolerated until the war was over (Aga Khan 1976).

The shadow of the European Convention of Human Rights

The *European Convention on Human Rights* (1950) to which all our countries in West Europe were party prohibits, notably in Article 3, that a state treats individuals in an inhuman and degrading manner. The European Court for Human Rights (ECtHR) whose regional legal competencies outweighs nowadays those of domestic courts, started to play in the 1980s a standard-setting role in favor of legal standards of proper state behavior in expulsion policy.

The influence of the ECHR on refugee protection is only to be discerned from the end of the 1980s onwards. In the 1980s the number of recourses to the ECHR and in its impact were still very country specific. The European Court for Human Rights (ECtHR) started functioning in 1959, but not all West European countries had ratified the ECHR and individual petitions at the ECtHR were not allowed yet. While for example the Netherlands and Belgium immediately ratified the ECHR, France for example ratified the 1950 Convention only in 1974 and waited until 1981 to permit individual petition under Article 25. Although individual petition was allowed already for years, lawyers in the Netherlands and Belgium did only start to invoke the treaty in the late 1970s and early 1980s. Then public interest law organization filled suits at the ECtHR which created case law (Groenendijk 1980). The attitudes of domestic courts towards the rulings of ECtHR and other international courts was also country specific. In France and Germany, the judiciary was not so open to supranational jurisdictions. While the French Council of State held still that the legality of decisions taken against aliens could not be challenged on the ground of Article 3 ECHR, in other countries magistrates advocated already that their country should respect its international engagements and respect Article 3 and its interpretation by ECtHR (Guiraudon 2008).

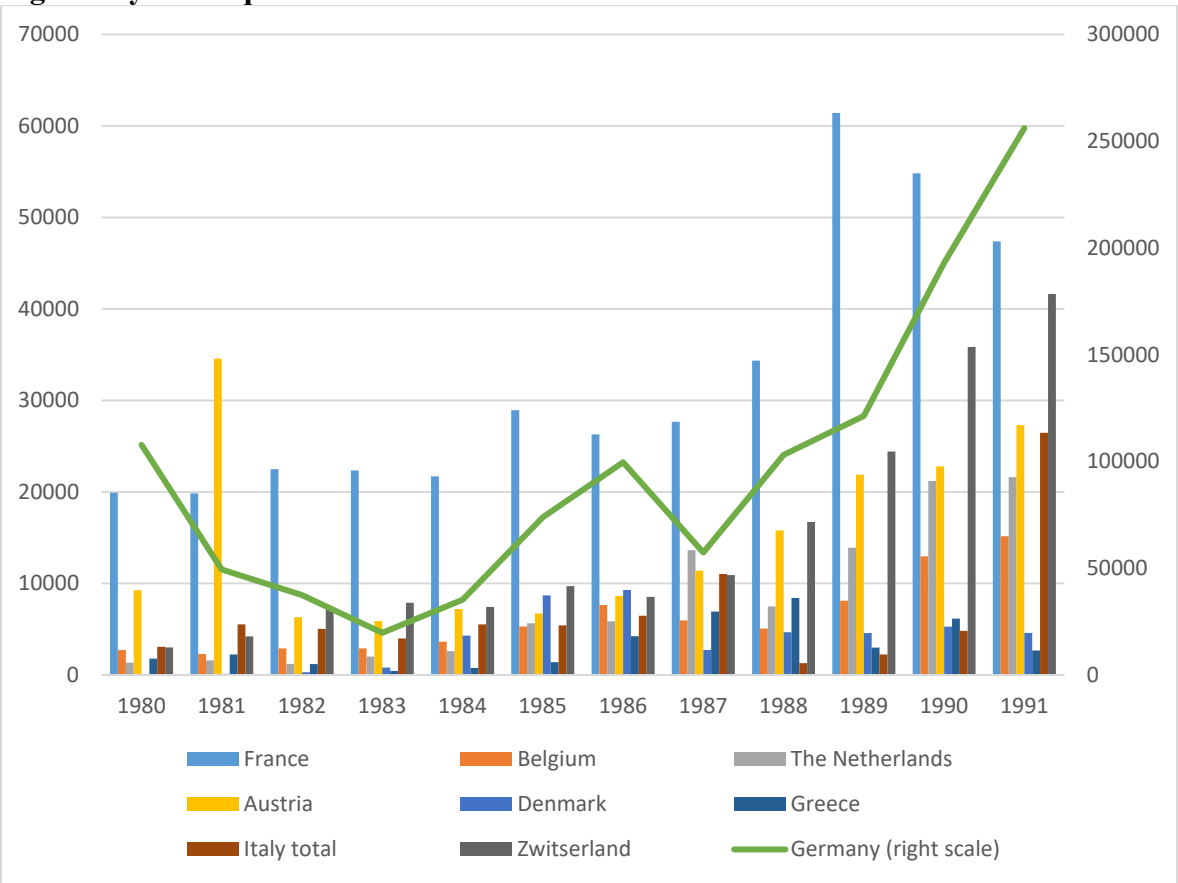
Article 3 ECHR was mobilized by plaintiffs appealing expulsion decisions. In 1989 (Soering vs. UK), the ECtHR stated that Article 3 had an absolute character, considerations relating to public order (and thus also Article 1F of the Convention of Geneva) could not rule out the protection offered by the ECHR. Soering, a German national, faced charges of murder in the USA and his extradition was prohibited by the ECtHR as he was liable for execution. The states signatories of the ECHR agreed that the death penalty was unacceptable. Soering opened the door for cases concerning extradition or removal to other states, where the individual might face a risk of prohibited treatment under Article 3. The court recognized the pertinence of Article 3 in cases of expulsion and opened a breach of redress. Lawyers advocated that asylum seekers whose demand for refugee status had been rejected would suffer upon return inhuman or degrading treatment. Jurisprudence of the ECtHR gave article 3 ECHR an (extraterritorial) protection dimension which guaranteed absolute prohibition of refoulement (Bast 2007: 289).

2.2. Developments in national asylum governance

As Fig. 1. depicting the asylum requests in our ten states between 1980 and 1991 illustrates, the number of annual asylum applications in Continental Western Europe had slowly risen from 150.000 in 1980 to slightly less than half a million in 1991. In particular, with the disintegration of the Soviet bloc, the number of asylum seekers mainly from Eastern Europe and the

disintegrating Soviet Union exploded. Germany and Austria received the lion's share (4/5) of asylum applications.

Fig. 1. Asylum requests in nine states between 1980 and 1991[29]



In all countries considered, the Immigration Office part of the Ministry of Justice or Interior was in charge of the admission decision that determined whether foreigners had access to the asylum procedure. The preliminary decision on admission to the territory and/or the asylum determination procedure was the competence of an IO, at the border or within the territory of a state. This office registered the asylum applications and since the 1950s the IO has decided on its admission using the concept of 'first country of asylum'. In the admission decision the IO only discarded those applications for whom their country was not the first country of asylum. In the early 1980s in several countries, the IO was mandated to apply restrictive eligibility criteria. In these countries, the asylum applications which the IO considered "manifestly unfounded" or "abusive" were declared ineligible. By this extension of their mandate, the IO encroached on the authority of the AO to investigate the merits of asylum claims.

Germany was the only country of our sample which hardly innovated its asylum procedure in this period. In the second half of the 1980s some states (Denmark and Switzerland) launched daring projects to manage asylum requests. They proposed to have the asylum requests processed in an industrialized manner. They wanted to concentrate all asylum seekers in one location – the asylum processing plant- and to decide in a relatively short time span - a few weeks- whether the asylum seeker was a refugee or not. They preferred to have this asylum

[29] As discussed in footnote 16, some figures might include subsequent and other types of applications (UNHCR 2021).

processing plant located at the border so that after the decision being taken, the rejected asylum seekers could be disposed of. Numerous difficulties arose when the plans became reality. The multi-linguistic world of asylum processing, a world whose composition was constantly changing, demanded reliable translators for all different languages. When new groups of asylum seekers arrived for these languages, it would happen at times that no translator at all could be found; let alone a professional and reliable one. Also, Country of Origin Information (COI) was not available and anyhow a reliable COI had to be constantly updated[30]. The capacity of these centers was not adapted to the fluctuating numbers and kinds of asylum seekers. The whole operation was a logistic challenge. Also, the rule of law set legal limits on the management of these plants. Limits to the length of the enforced stay in these plants, but also the right to defense and the suspensive effect of an appeal were difficult to deny to asylum seekers.

Mandatory registration of asylum requests at the border and only there was difficult to enforce for a state like Switzerland, while this was more feasible for Denmark surrounded by sea borders except for the German-Danish land border between Tønder and Flensburg stretching over 68 kilometers. The attraction of an efficient border control to an industrialized management of asylum requests was obvious to many states, as the success of airport procedures illustrates. France inaugurated this procedure already in 1982, followed by Denmark (1986) and Belgium (1987). In this border procedure asylum seekers were, upon arrival in the airport not authorized to leave what was called the extra-territorial zone in the airport. Their asylum request had first to be evaluated if it was eligible, at times even admissible, before they could enter the territory of the state they had requested protection from. Pre-screening procedures leading to dismissal of the case did not enter into the merit of the request. They were decided on the basis of an exclusionary clause like the safe third country where the applicants had passed through. When the claims were dismissed (or rejected in the eligibility phase) the authorities could start the procedures to send the asylum seekers from the airport directly back home. These new asylum procedures gave the border officials and the IO considerable leeway in their decisions of admissibility or eligibility. Infringements of the provisions of the Convention of Geneva and even domestic law, although this is an extremely opaque phase, seem to have been frequent. In particular, dismissing asylum claims without entering into the merit of the case created refugees 'in orbit' as no state was willing to take responsibility for them. These returns were unilaterally decided and returns to the country where the asylum seeker had come from, or merely had passed through, needed an agreement of the state to which they were sent back to. There were readmission agreements signed between West European states in the 1950s and 1960s. For readmission proof, it was required that the third country national had been authorized to stay in the country or had come from that country. Evidence that an asylum seeker had passed through another member state was necessary as states are only bound to readmit their own citizens under international law but retain the right to deny entry to foreigners. In the airport procedure, proof was relatively easy to produce. A more extensive implementation of a safe third country rule, also affecting those who had crossed the green border, made the conclusion of readmission agreements necessary to decide about the proof needed to be able to do so.

The safe third country rule released the individual state from its obligations under the Geneva Convention. If it is used in a blind manner in the sense that it was not checked whether

[30] COI are used as a tool in asylum adjudication as they provide background information on the country of origin of asylum seekers. It alleges to provide protection officers a factual basis for their decisions. This knowledge production is mostly based on social science methodology and is a combination of desk research and field trips, but the objective is not the production of scientific knowledge but to enable and support asylum decisions. This instrumental knowledge production was initially the domain of the Ministry of Foreign Affairs and their embassies, but as the AO felt a need for more information in the 1990s specialized institutions were created to provide the AO this documentation. By 2020 most AO have specialized COI unites who provide information for asylum decisions. Van der Kist et al 2019; Vink & Engelmann 2012.

the asylum seeker would get a fair chance to lodge the asylum request in the third country could be a breach of *non-refoulement*. Some refugees send to a so-called safe third country were pushed back to their country of origin when the third country in question did not consider itself responsible for the treatment of the asylum application (Fullerton 1988).

Industrialized management of asylum requests benefitted from more collective approaches and the AO with their individualized approach were increasingly ignored. In the second half of the 1980s Denmark dismissed asylum applications because the asylum seeker originated from a country considered safe or because (s)he had passed through a safe third country where (s)he could have applied for protection. As most neighboring countries were called safe, only asylum requests by immigrants who had directly arrived by airplane from a non-neighboring country had still some chance to be accepted. By legally designating other countries as safe, the Danish authorities could deport asylum seekers and on the face comply with the principle of *non-refoulement* although the Danish deportation decision could through chain deportation end up by delivering a refugee to his/her country of origin.

In addition, remote control mechanisms such as liability of carriers, already instituted in 1987 in Germany, Denmark and Belgium and mandatory visa requirements were put in place to stop the arrival of unwanted immigrants and asylum seekers (Cruz 1991). In the following overview of national developments, we will focus on the role of the AO within this context of evolving asylum and refugee policies.

2.2.1. Denmark, pioneer in dismissing asylum claims from safe (third) countries

In Denmark in the 1970s the IO under the authority of the Minister of Justice decided on refugee recognition. The IO made an eligibility decision based on the first country of asylum or if the application was deemed *unrelated to the grounds on which asylum was granted.* In these cases, the verdict was final as there was no appeal available. Asylum seekers who did pass the eligibility test were interviewed more extensively after which the IO made a draft proposal. If they intended to reject the asylum application, the Danish Refugee Council could hand in non-binding advice to the Ministry of Justice which made the final decision. Yet in practice the Council's advice was followed most of the time. Rejected applicants could ask for a review by the Ministry of Justice, which had a suspensive effect (Jaeger 1983b).

From 1965 onward, asylum seekers who were considered refugees were granted either *de jure* or *de facto* refugee status. The latter status was granted by the IO to those who were not considered convention refugees, but who were still perceived to be in need of international protection. Granting refugees *de facto* status was an administrative practice that had been informally agreed upon between the Ministry of Justice and the Danish Refugee Council and was not mentioned in the Aliens Law. It entailed a one-year renewable residence permit, while refugees granted *de jure* status obtained a five-year residence permit immediately followed by a permanent residence permit. Such a permanent residence permit was only granted to *de facto* refugees after 9 years of residence in Denmark. The *de facto* status was granted to Eastern Europeans simply on the basis of *Republikflucht*, to draft evaders and to asylum seekers who either could not meet the burden of proof required for Convention status or about whom the Danish authorities were not capable of assessing the danger of persecution (Lassen 2002; Jaeger 1983b; Gammeltoft-Hansen & Scott Ford 2021; Vedsted-Hansen 1993).

The Aliens Law of 1983 put *de facto* status on a legal footing with *de jure* status. In the preparatory works of the law of 1983 draft evaders and deserters were explicitly mentioned as groups qualifying for the *de facto* refugee status, as well as those persecuted for *Republikflucht.* It was intentionally defined very broadly to enable the authorities to use it as a flexible recognition tool for unforeseen and/or different kinds of refugees in the future. In practice, the previous liberal procedure was continued (Lassen 2002: 364; Gammeltoft-Hansen & Scott Ford

2021). In 1983 the name of the IO was changed from the Alien Police to the Directorate for Immigration; we ignore whether this entailed more changes to the institution.[31]

1986: dismissals of asylum claims and granting *de facto* protection on the rise

The Aliens Law of 1983 was short-lived; it was revised the next year and later revised twice more. The authorities considered that the increase in asylum applications made this reform necessary. By 1986 the Danish Aliens Act was exceptionally restrictive. Most importantly, in the 1986 law Denmark codified the Safe Third Country-concept, which was used to dismiss applications at the border[32]. The IO, which had the authority to decide which countries were safe, decided that all countries that had signed the Geneva Refugee Convention were safe. The IO considered even a transit through a safe third country enough to dismiss an asylum application (Fullerton 1988: 58). The appeal against the dismissal of the asylum application had no suspensive effect.

When the IO accepted the asylum request, the asylum seeker had to stay in a central reception center north of Copenhagen for identification and processing of his/her claim. All not properly identified asylum seekers were detained. The IO could still declare asylum applications ineligible when they determined the applicants to be *manifestly unfounded.* In those cases, however, the Danish Refugee Council could veto an ineligibility decision (IGC 1992: 24). In 1986 at the peak of the inflow of asylum seekers (9300 cases) 12% were declared ineligible; among the greatly reduced number of asylum requests in 1987 (2750) 14% were still declared ineligible. In the following years the share of ineligible cases diminished substantially; by 1989 only 6% were not further reviewed.

The IO made decisions on eligible asylum claims, granting them either *de jure* or *de facto* refugee status, or rejecting their applications. In the period 1983-1989, 35,090 asylum claims were registered; 38% of these were rejected.[33] Of the protected refugees the IO considered in 1983-1984, only 22% of them qualified for *de jure* status, while in the second half of the 1980s that share increased to 35%.[34]

Tab. 2. First Instance Decisions of the Danish AO, 1983-1989 (IGC 1992: 27)

	Total number of arrivals	Ineligible because manifestly unfounded[35]	De jure refugees	De facto refugees
1983	800			
1984	4300		230	820
1985	8700		1140	5090
1986	9300	1086	1870	4120
1987	2750	380	2450	
1988	4650	395	1100	1910
1989	4590	266	1230	1920
1990	5300	488	700	1242
1991	4610	432	1472	

[31] Intergovernmental Consultations on Migration, Asylum and Refugees, 1990, Report on Denmark, pp.15-19. AN, 199703816. Since 1989, the number of administrative personnel and decision-makers amounted to about 5O persons who dealt with asylum matters and also with general immigration cases. IGC 1992: 28.

[32] We ignore whether also asylum application within the country could be dismissed due to coming from a safe third country.

[33] An overview by year makes little sense as the recognition or rejection decision was mostly not made in the same year.

[34] Intergovernmental Consultations on Migration, Asylum and Refugees, 1990, Report on Denmark, pp.15-19. AN, 199703816. This report had no figures on the decisions of the Refugee Appeals Board.

[35] These asylum claims were qualified as manifestly unfounded with the agreement of the Danish Refugee Council.

The IO granted *de jure* status according to a restrictive interpretation of the Geneva Convention, while the *de facto* status was based on a liberal interpretation of the Geneva Convention and even going beyond it. The preference of the authorities for the latter is due to the greater discretion they had over this status. The IO granted *de jure* status to those who have individually been persecuted, but the IO also recognized some groups as *de facto* refugees as they accepted a collective persecution of some groups as for example Tamils from Sri Lanka (see 2.3.2), stateless Palestinians from Lebanon and some clans, for example the Issaq clan from Somalia. Asylum seekers who evoked a less targeted persecution and certainly when they fled the indiscriminate violence of a civil war were denied protection by the IO (Vedsted-Hansen 1993). Officially the humanitarian status, a status which granted legal stay, was fully discretionary and had nothing to do with refugee protection. However, the humanitarian status was granted to those fleeing generalized violence in the country of origin. In addition, the IO developed another protection strategy during the 1980s and this by *ad hoc* decisions not to expel rejected asylum seekers. Throughout the 1980s many young Lebanese war refugees were in this manner tolerated. They stayed in asylum centers without having any legal status. Only at the end of the decade they received a residence permit because of the length of their, mostly irregular stay in Denmark.

The Aliens Law of 1983 had installed an administrative and collegiate appeal instance, which was presided by a professional judge. The Ministry of Interior appointed the members, which were proposed by the Ministry of Foreign Affairs, the IO, the Danish Bar Association, and the Danish Refugee Council. This AT had the authority both to annul and to grant statuses (Lassen 2002: 384).[36] Asylum seekers in the regular procedure could appeal the decision at the AT, but also those whose claims were considered manifestly unfounded could appeal the decision at the AT, but that procedure could be just a written procedure. Alternatively, the IO could deny them this right. In 1985, an amendment to the Act was made to the effect that the Refugee Board could decide in the case of manifestly unfounded cases with only three members of the Board being present (IGC 1992: 28).According to the Danish authorities, "in the bulk of the cases the appeal instance followed the decision" of the IO and added that "only in a number of cases *de facto* status was granted, but only very few *de jure* statuses were granted".[37] This seems to be a too overtly consensual view of their decisions, as in 1992 Jens Vedsted-Hansen, member of the AT pointed out that asylum seekers who evoked a general persecution not directed at them personally and certainly when they fled civil war were denied protection by the IO, but the AT did declare them refugees. The AT granted them either *de jure* or *de facto* refugee status as the distinction between these two refugee statuses was blurred. However, when they fled civil war they were granted at most a *de facto* refugee status. There was even a high tension between the IO and the AT when after the change of regime of Somalia in 1990, the AT referred a great number of Somali cases, pending before the AT back to the administration because the evaluation of the cases was considered largely insufficient (Vedsted-Hansen 1993).

In 1986 given the selection criteria for the dismissal of asylum requests, there were probably a large number of dismissed asylum applications at the border and within the country.[38] This restrictive policy immediately led to a spectacular drop in asylum applications. From 1989 onward this practice was slightly attenuated as asylum requests at the border could

[36] The AT was called *Flygtningenævnet* and was composed of 7 members – including two members appointed by the Danish Refugee Council. Gammeltoft-Hansen & Scott Ford 2021: 13.

[37] Intergovernmental Consultations on Migration, Asylum and Refugees, 1990, Report on Denmark, pp.15-19. AN, 199703816. This report had no figures on the decisions of the Refugee Appeals Board.

[38] In 1990 Denmark did not provide data to the IGC on non admission to the asylum procedure at the border and within the country.

no longer be dismissed solely on the basis of the asylum seeker having transited through a safe third country (Vedsted-Hansen 1994: 252).

2.2.2. Switzerland as a pioneer in procedural fragmentation

Since the 1930s in Switzerland the Aliens' Police in charge of asylum applications was a unit within the Office of Police that together with the Office of Justice constituted the Ministry of Justice and Police.[39] When in 1979 for the first time in Swiss history the asylum legislation was codified, the matters of asylum were allocated to a small section in the unit General Police within the Office of Police, while all other matters of immigration policy were managed by the Aliens' police within this Office. Asylum was not to be mixed with immigration policy. Still, Christopher Avery (1983) was not impressed with this AO as he criticized the decision makers as lacking a legal background and 'tend[ed] to base their rulings on "common sense".

Switzerland as a federal country had devolved important authority in asylum policy to the cantonal authorities. Asylum application registration was under their direction as well as the expulsion of rejected asylum seekers. The law stipulated that each asylum seeker had to be interviewed personally by a decision maker of this newly created federal administrative unit, and the asylum applicant could be seconded during this interview by a representative of the refugee aid organization.

1985: creation of an AO, a temporal solution to a crisis in migration management

Swiss ambition to control the asylum inflow led to institutional innovation. In 1985 the authority for handling recognition policy was temporarily allocated to a newly created unit within the Police Office of the Ministry of Justice and Police.[40] This temporary AO was intended to deal with the backlog in handling asylum applications; it would be dissolved as soon as it accomplished its task. Speeding up decisions was the main reason for creating a specialized body, which would be able to make quick decisions without too much interference from outside. In 1985 the AO employed already 250 staff members, this increased to 350 in 1990 and 500 in 1992 (IGC 1994:11). The asylum law of 1981 had provided for two possibilities of appeal against the decisions of these executive authorities: an internal administrative one and an appeal to the government (*Conseil federal/Bundesamt*). The latter was abolished in 1983 legitimized by the need to reduce the length of the asylum procedure. The internal appeals against a negative decision with suspensive effect were seldom successful, at most 5% of the decisions of the asylum office were annulled.[41] During the 1980s the Swiss government and Parliament resisted reform by arguing that the decisions of the asylum office were not susceptible to oversight by an administrative court. Decisions in the domain of asylum were of a political nature and this discretionary authority of the executive authorities was not to be questioned (Miaz 2021: 56).

Switzerland tried out different experiments for managing the inflow. The first innovation was in 1983 when an expedited procedure for applications deemed 'manifestly unfounded' was launched. In this accelerated procedure the AO could decide on the basis of

[39] The Ministry of Justice and Police is called in Switzerland the *Eidgenössisches Justiz- und Polizeidepartement/Département Fédéral de Justice et Police* and its Police Department the *Bundesambt für Polizei/ Office Fédéral de la Police.* As the multilevel decision making in Switzerland as a federal country became increasingly less important for immigration policy in the time period this report covers, we do not pay much attention to the cantonal (or municipal) policy making and therefor for the sake of the comparative approach of this report we refer to this federal departments and offices as to the Ministry of Justice and Police.

[40] The temporary AO was called the *Delegierten für das Flüchtlingswesen/ Délégué aux réfugiés* (DFW/DAR) and was led by Peter Arbenz from 1985 to 1993.

[41] Switzerland in Seminar on the Functioning of Asylum procedures arranged in the Context of the Inter-Governmental Consultation on Asylum Seekers in Europe and North America, 1990, AN, 19970381/6; Miaz 2021, 56.

the file with only the interview as part of the registration procedure. The personal interview by the decision makers of the AO was no longer mandatory. In cases where the interview was still conducted the asylum applicant could still be assisted by a representative of the refugee aid organization, which from 1985 onward received financial compensation for this service. A few years later, in 1986 it was decided that registration of asylum request was only possible at 24 border posts, but this decision was to no avail. Most asylum seekers crossed the border illegally and only applied for asylum when they were already on Swiss territory, and due to the manifest failure to make asylum seekers obey this rule the mandatory registration at the border was abolished in 1990. By then four registration centers had been opened on Swiss territory where the first interview was also conducted. The ambition at the launch of these centers in 1988 was that while the asylum seekers stayed at the registration centers the whole procedure would be finalized, but the insufficient capacity of these centers together with legal limits on the duration of the stay in these centers left this ambition unrealized (Parak 2019: 133-138).

The success of two other kinds of refugee protection

Not only did Switzerland start to experiment with different procedures, also with different kinds of protection. The asylum seekers could be granted Convention status, but Swiss aliens legislation since the 1930s had provided weaker protection possibilities. The federal authorities could also grant temporary toleration as a kind of *de facto* refugee status.[42] As can be seen in Tab. 3. the share of Convention statuses granted by AO diminished strongly from 1986 onward when the legal provision of this temporary toleration was "modernized" and called provisional admission (Parak 2019: 169ff.; Ruedin & Efionayi-Mäder 2014).

Tab. 3. Switzerland decisions on three kinds of protection, 1984-1991[43]

	Convention refugee	De facto refugee	Humanitarian Status
1984	640	65	
1985	939	160	
1986	820	(592) 735	610
1987	829	(620) 745	892
1988	(680) 363	312	2036
1989	(654) 707	277	1950
1990	593	127	4879
1991	770	168	14029

The "provisionally admitted persons" were *de facto* refugees covered by either an explicit (*de facto* refugee status) or an implicit (humanitarian status) toleration. Increasingly, the weaker explicit protection of the *de facto* status was granted, and by 1988 the implicit toleration permit of the humanitarian status had become the most popular positive decision granted to asylum seekers.[44] The rise in decisions granting humanitarian status has to be attributed largely to the decisions concerning war refugees from Sri Lanka (see 2.3.2).

[42] We have no more details on whether a *de facto* refugee was granted a residence permit and thus a legal status.

[43] Switzerland in Seminar on the Functioning of Asylum procedures arranged in the Context of the Inter-Governmental Consultation on Asylum Seekers in Europe and North America, 1990, AN, 19970381/6; IGC 1992: 81. The figures between brackets refer to the figures in the report of 1990 "corrected" by those in the report of 1992.

[44] We have no information what the criteria were for attributing a refugee a *de jure* or *de facto* status and whether refugees were granted a humanitarian status.

2.2.3. The Netherlands: another advocate of procedural fragmentation

In 1955, Parliament agreed to give the Minister of Justice and the Minister of Foreign Affairs a shared authority over the granting of refugee status based on the Convention of Geneva. The Minister of Foreign Affairs was involved in granting protection as it was considered an obligation resulting from international commitments. The Minister of Justice was in charge of immigration policy with the IO; therefore, he could also co-determine refugee recognition. To avoid disputes between the two ministers, a rather informal 'gentlemen's agreement' was concluded between the Dutch State and UNHCR on the base of which UNHCR could act as a shadow AO. As the Dutch authorities were hesitant about surrendering the recognition decision to UNHCR, finally UNHCR recognized refugees only under its mandate. The IO was in charge of the eligibility decision, and UNHCR recognized these eligible asylum seekers quite independently and autonomously. Asylum seekers recognized as *de facto* refugees under the UNHCR mandate were granted a residence permit by the IO, but these refugees did not gain the rights that the 1951 Convention had granted to refugees. For two decades there were no disputes between UNHCR and the Dutch authorities.

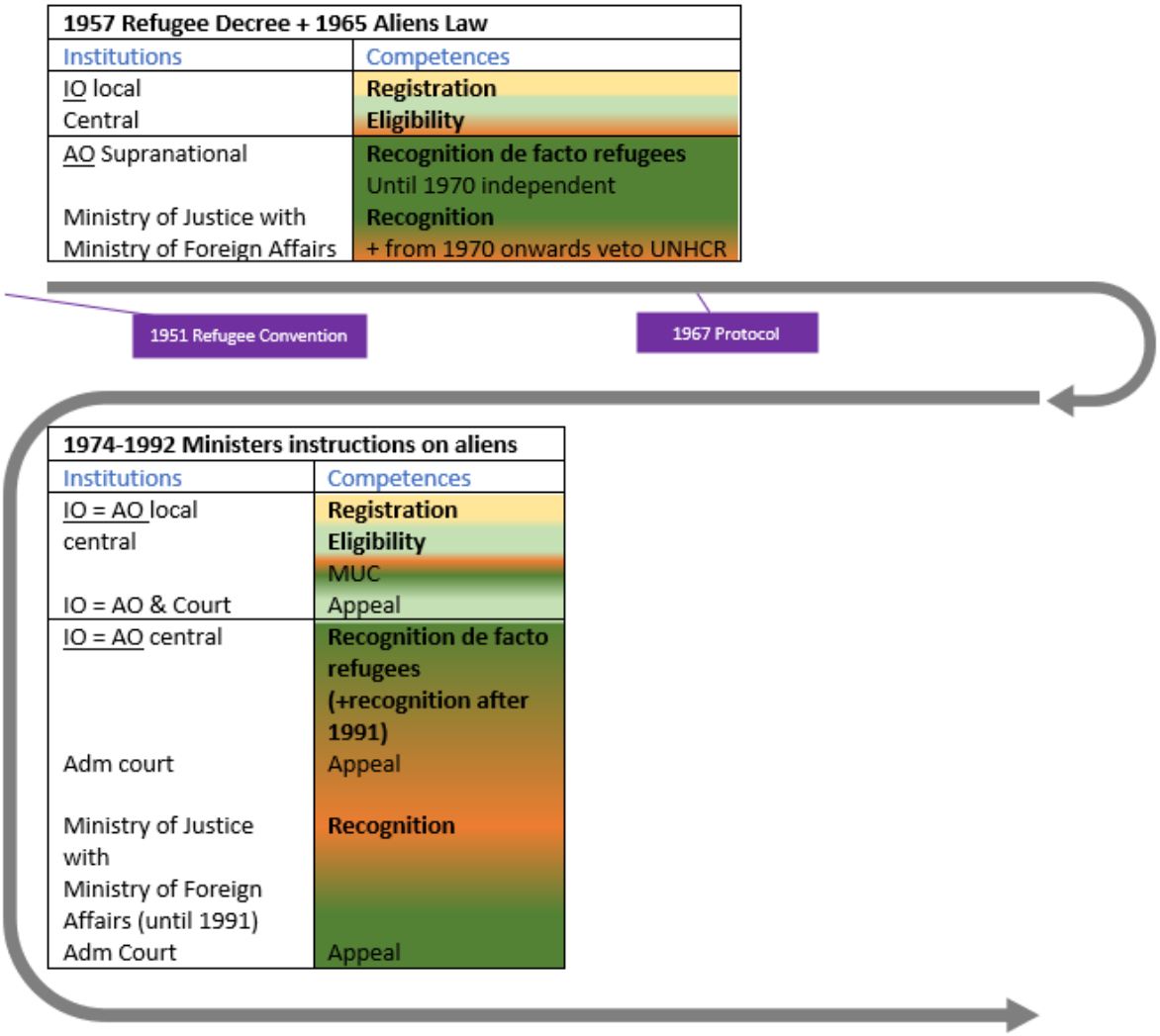
In principle, a refugee could apply for protection at the Dutch authorities. He or she could be granted Convention status by the Dutch authorities, but until 1976 the IO seldom invited the Ministry of Foreign Affairs to decide on asylum requests on the basis of the Geneva convention. In essence, an asylum seeker could not dispute a negative decision at the Council of state as it was *almost* impossible to be eligible for appeal. Moreover, this administrative court could only give nonbinding advice to the decision makers.

The arrangement between UNHCR and the Dutch authorities turned out to be unsustainable. By the 1970s, because of the rising number of asylum applications, the small UNHCR office was no longer able to process all the applications. In addition, there were substantive disagreements between UNHCR and the Dutch state. The HCR-branch wanted to recognize certain refugees, but the Dutch authorities opposed this as they assumed this would create diplomatic problems for them. In addition, NGOs insisted on having an asylum procedure that responded more to the principles of the rule of law and they criticized the asylum procedure as it denied asylum seekers the right of defense. On top of that, similar to the other countries in our overview, economic restructuring made immigrants less welcome.

The Dutch authorities no longer wanted the UNHCR to recognize refugees in the Netherlands and embarked on creating a Dutch AO. Searching for a design, the option of setting up an independent agency similar to the French AO was briefly considered in 1972 but was promptly discarded by the Minister of Justice who insisted on making these decisions himself. Surrendering his recognition authority to an independent agency was out of the question.[45]

[45] Gosschalk aan Parijs, 'Toekenning Status Vluchteling', Ministerie van Buitenlandse Zaken (Dienst Algemene Zaken), 1972, NATH, 2.05.313 (5016); (Presumeably someone from the Ministry of Foreign Affairs). 'Aantekeningen t.b.v. Gesprek Met Mr. A. J. Fonteijn', 1972, NATH. 2.05.313 (5016).

Fig. 2. Institutional timeline asylum determination the Netherlands, 1957-1993[46]



1976: A Dutch sovereign recognition procedure creates different tracks

UNHCR as a *shadow AO* was fading out when in 1972 the Minister[47] created his own *de facto (B)* refugee status, which was codified by a royal decree in 1974. This status was granted when there were *plausible objections of a political nature to return to one's own country*. *De facto* status originated as a solution for an American draft evader who was the subject of a notorious Dutch refugee appeal case in 1971. In this case, the IO, the Ministry of Foreign Affairs, as well as the UNHCR representative took the position that the person was not a Convention refugee, while the Council of State actually found this to be the case.[48] The creation of this *de facto (B)* refugee status eventually served as a compromise between the actors involved. The beneficiary received a one-year renewable residence permit marked with the letter 'A' for asylum. In the early 1970s, the asylum seekers originated not only from Eastern Europe, but also from Portugal where young men were conscripted to fight in the colonial wars. Quickly, granting *de facto (B)*

[46] See list of tables for the explication of the use of colors.

[47] Decision making in the domain of asylum policy was in reality largely under the purview of the Secretary of State, assisting the Minister of Justice. For comparative purposes we discuss the Minister of Justice and only mention the Secretary of State if this is crucial for understanding the policy developments.

[48] Interview Jaap Hoeksma, 6.07.2021. Amsterdam; Fraaij H. C. aan de Staatssecretaris, 'Nota: Portugese Asielzoekers', Ministerie van Justitie, 1973, NATH, IND 1956-1985 (1443).

status became the norm in refugee protection to the disadvantage of a *de jure* protection. Denying *de jure* protection was to a large extent due to the Ministry of Foreign Affairs, which feared the diplomatic repercussions that this recognition could entail. In the case of the Portuguese draft evaders, Foreign Affairs did not want to alienate a NATO partner (Schrover & Walaardt 2011). By 1976 the authority to recognize a refugee was fully in the hands of the state, and the Dutch-UNHCR gentleman's agreement came to an end.

Within the Ministry of Justice, in the 1970s no real distinction was made between the IO and AO. Only in 1982 did the Minister of Justice decide to set up a separate AO within the IO for efficiency reasons. This AO was not formalized by the law but created through a circular letter. The eligibility decision remained under the purview of the IO. A circular letter authorized local IOs who did the first intake and interview to propose to the Minister, in fact the central IO, to reject an asylum application on the basis of manifestly unfounded claims. If the local (and central) IOs declared an asylum application eligible the central IO left the further handling of the case to the AO. [49] However, the IO still made the final decision in first instance, so if the AO considered the asylum seeker a refugee, be it *de jure* or *de facto,* this had to be confirmed by the IO. The IO also developed an internal review, possibility for cases where the AO took a negative decision, the IO could still reverse these decisions. If the AO deemed a Convention refugee status appropriate, it was still necessary to consult with the Ministry of Foreign Affairs. The *de facto (B)* refugee status enabled the Ministry of Justice for the most part to circumvent the Ministry of Foreign Affairs in the decision making on recognizing a refugee. Once the *de facto* status was acquired, the IO could only refuse the renewal in a few, clearly defined situations. The AO made refugee policy more of a distinct policy domain within Dutch immigration policy among others by participating in international consultations on asylum matters and by reporting consistently on asylum applications and recognition decisions. The AO kept statistics useful for evidence-based decisions and built up a specific expertise. [50] The table shows that since the 'establishment' of the AO, the restrictive *de jure* Convention refugee status granting practice did not change. However, the *de facto* (B) status was granted more frequently. Yet, we did not found evidence on whether or not this increase can be attributed to this institutional change.

In the early 1980s the IO created a new *de facto* (C) status for some rejected asylum seekers, which enabled them to stay legally in the Netherlands with a provisional residence permit. This status became a kind of safety net for those asylum seekers who met neither the (strict) criteria for *de jure* refugee status nor for the already existing *de facto* (B) refugee status, but whom the ministry agreed should not be deported. The motivation for creating this new status as well as the further use of this status is nebulous. At times it was described as a regular immigration status, other times it was described as a humanitarian status. It seems the IO had from the very beginning full authority over this *de facto* (C) status, although the AO acknowledged this clearly only from the mid1980s as a humanitarian status. By then, it indeed served as a humanitarian status, even a *de facto* refugee status as the IO granted this status for asylum seekers they considered unrepatriable based on the *general living conditions* and in

[49] For example, when a draft evader had not even been called up for military service his asylum application was ineligible. van Loon Glastra (staatssecretaris van Justitie), 'Behandeling van Asielaanvragen', Ministerie van Justitie (afdeling Vreemdelingenzaken en Grensbewaking), 1974, NATH, IND 1956-1985 (2296). However in 1983 the secretary of state claimed that the possibility of dismissing manifestly unfounded claims had been abolished, but the archival material does not seem to confirm this statement Staatssecretaris van Justitie. Staatssecretaris van Justitie, Letter to Seeger R. (UNHCR NL), 5 August 1983, NATH, IND 1956-1985 (2309).

[50] Asylum Branch of the ministry of Justice, 'Circular Letter from the Minister of Justice 1982 Chapter: Refugees (B7)', Asylum Branch (Ministry of Justice), 1983, NATH, IND 1956-1985 (2296); Asylum Branch of the ministry of Justice, 'Asiel in Nederland', Afdeling Asielzaken, 1983, NATH, IND 1956-1985 (2305); van Loon Glastra (staatssecretaris van Justitie), 'Behandeling van Asielaanvragen', Ministerie van Justitie (afdeling Vreemdelingenzaken en Grensbewaking), 1974, NATH, IND 1956-1985 (2296).

particular on the security situation in the country of origin. During the 1980s, the recognition policy of the AO became more restrictive, group persecution became less a ground for protection, and only those who could prove individual persecution still qualified for protection, be it by the *de facto* (B) refugee status (Lucassen & Penninx 1997).

In the meantime, a general judiciary reform in 1976 had made it possible for asylum seekers to appeal asylum decisions. The Council of State also obtained full jurisdiction, so it acquired the authority to grant refugee statuses itself. However, access to appeal was still slowed down by the IO as those rejected because of manifestly unfounded were denied a right to appeal. Moreover, the Minister could decide whether the appeal had a suspensive effect.[51] In 1983, in 15% of all appeals in refugee matters, expulsions had already been executed before the appeal actually had been decided on.[52]Appeals against negative decisions really took off in the 1980s as the protection policy became more restrictive and even the *de facto* refugee status became difficult to obtain. Initially the Council of State had followed the IO in their judgement, but increasingly they opposed the position of the IO and recognized refugees that the IO had rejected. According to Jaap Hoeksma, then a UNHCR employee in the Netherlands, the Council of State improved the Dutch recognition decisions as the appeal body relied increasingly on UNHCR as a well-informed source to dismiss the insufficiently motivated IO decisions.[53]

Tab. 4. Decisions on asylum applications in the Netherlands, 1980-1989 [54]

	Recognition rate *de jure* (AO)	Recognition rate *de facto* (B) (IO + AO)	Recognition rate *de facto* (C) (IO)
1980 (N= 1030)	4,6%	15,2%	2,9%
1981 (N= 1470)	2,7%	15,3%	4,1%
1982 (N= 1650)	4,7%	52,2%	5,8%
1983 (N= 2480)	6,8%	39,2%	4,8%
1984 (N= 2110)	5,4%	26,1%	3,6%
1985 (N= 3610)	3,2%	11,8%	6,1%
1986 (N= 4240)	4,2%	13,3%	7,7%
1987 (N= 12020)	2,0%	3,7%	3,7%
1988 (N= 12160)	4,8%	1,7%	6,0%
1989 (N= 11780)	8,7%		9,2%

Notwithstanding the Council of State, a preference for *de facto* protection

In 1988 the Council of State saw no reason to maintain two *de facto* refugee statuses. According to them the *de facto* (B) refugee status was redundant as the *de facto* (C) status covered humanitarian grounds. The Council of State considered that the grounds for the Convention refugee status and the former *de facto* (B) refugee statuses coincided. The Minister felt obliged to follow the judgement of the Council of State. Thus the *de facto* (C) status became the sole *de facto* refugee status. The intention of the Council of State was to incorporate the former *de facto* (B) status into the *de jure* refugee status, which both, according to the Council of State were based on the Convention of Geneva. However, this did not happen as the IO granted

[51] The secretary of state, however, claimed in 1983 that this MUC procedure had already been abolished and that suspensive effects were only withdrawn when the asylum seeker came from a safe third country NATH. IND 1956-1985 (2309). Staatssecretaris van Justitie. Letter to Seeger R. (UNHCR NL). 5 August 1983.
[52] UNHCR NL, Letter to Takkenberg Lex, 27 October 1983, NATH, IND 1956-1985 (2309).
[53] Interview Jaap Hoeksma, 6.07.2021. Amsterdam
[54] UNHCR 2000, 2001; Fernhout, 1990.

asylum seekers increasingly, as illustrated by the table below *de facto* (C) refugee status. The reform did not lead to more frequent granting of the *de jure* refugee status (Spijkerboer 2014).

Whether this channeling of refugees toward the weaker *de facto* protection status was a decision of the Minister, the IO, or the AO is not addressed in the literature and we cannot discern it in the archival material we had at our disposal. The administrative courts tried to sideline the multiple *de facto* statuses, but the Dutch executive power refused to be inspired by this jurisprudence and decided to look for a means of retaining its discretionary power. They used loopholes in the Aliens Law to channel the kind of refugees who had been granted the *de facto* (B) status, now legally imbedded as a *de jure* status, to the only remaining *de facto* (C) status.[55] In our archival material the AO is fairly invisible. The AO was an official part of the IO and often was not mentioned by name; thus, we do not always know for sure whether initiatives were taken by the IO or the AO of the Minister of Justice. It could be that some initiatives for policy changes or individual case decisions concerning *de facto* statuses were in fact delegated to or opposed by the AO. However we found no evidence of this.

By 1991, the authority of the Minister of Justice in refugee matters increased considerably as the Minister of Foreign Affairs withdrew completely from the procedure to grant *de jure* refugee status. The Minister of Justice became the sole authority for granting the Convention refugee status. As mentioned before, the Minister of Foreign Affairs was less of an ally of UNHCR in refugee matters than in Belgium, as this ministry had regularly opposed the recognition of refugees for diplomatic reasons. From June 1990 onward the Minister of Foreign Affairs Hans van den Broek was in a violent dispute with UNHCR over the protection of war refugees from Sri Lanka. As Foreign Affairs had financed substantially UNHCR refugee reception in Sri Lanka, the Minister felt that UNHCR should not pressure the Dutch authorities to protect refugees from Sri Lanka in the Netherlands. The conflict escalated to such an extent that the Minister of Foreign Affairs threatened to discontinue subsidizing UNHCR. The Minister of Foreign Affairs even ordered the UNHRC to close its branch office on Monday, October 1, 1990, and it had to fire all its local staff.[56] This diplomatic crisis led Parliament to seriously reprimand the Minister of Foreign Affairs. The Prime Minister Lubbers officially invited UNHCR to return to the Netherlands. Due to this incident the Ministry of Foreign Affairs lost all its direct authority in refugee status determination matters. Their input in refugee policy remained limited to providing country of origin information to the AO. For recognition policy we have only a clear cut idea on the jurisprudence of the Council of State. The Council of State judged that the sole lack of protection by the authorities was insufficient to be recognized, thus asylum seekers fleeing a situation of civil war were not recognized as refugees. Status granting to these refugees took place on a case-by-case basis, but when the authorities in the country of origin were not able or willing to offer protection the Council of State considered third party persecution as persecution (Spijkerboer 1993b).

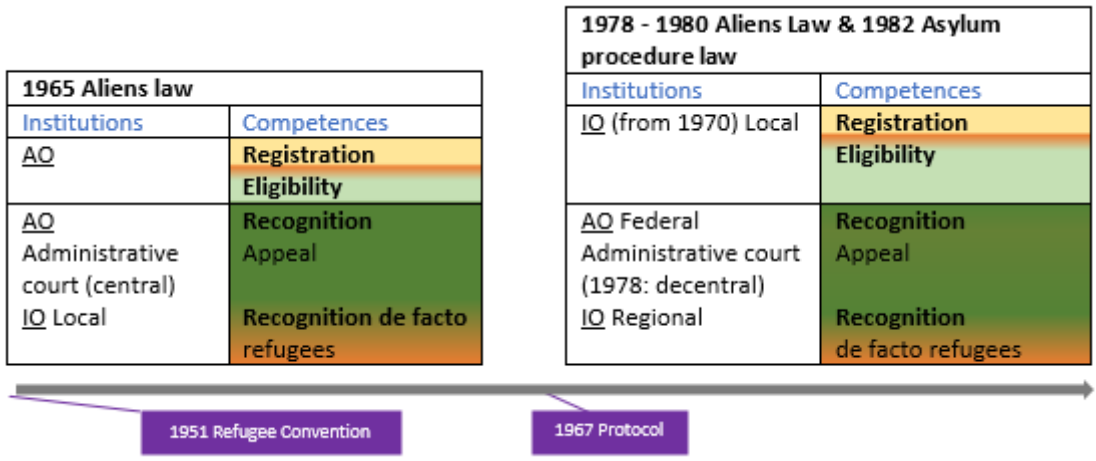
[55] Hoofd afdeling asielzaken, 'Gesprekspunten Ten Tijde van Bezoek van de Heer Moussali, Directeur Protection van de UNHCR', 1983, NATH, IND 1956-1985 (2305); Fraaij H. C. aan de Staatssecretaris, 'Nota: Portugese Asielzoekers', Ministerie van Justitie, NATH, IND 1956-1985 (1443); 'Het Begrip "toegelaten Vluchteling" Vermeld in Artikel 15 van de Vreemdelingenwet van 13 Januari 1965', 1967, NATH, 2.09.5027 (1443); Spijkerboer 1993b; Spijkerboer 2014.

[56] Interview Katelijne Declerck, 3.06.2021, Beersel (for more information on the interviewee and her time as UNHCR representative: 'Het laatste woord – Interview met Katelijne Declerck.' 2021. Tijdschrift voor Vreemdelingenrecht 2021 (1): 109–13); Interview Jaap Hoeksma, 6.07.2021. Amsterdam; Bennekom 2015, 428-430.

2.2.4. Germany: New interpretation of Constitution imposes a restrictive RSD, but no procedural experiments tolerated

Since 1953 in West Germany the asylum application had to be registered by the local aliens' authorities or the border policy. The AO, the *Bundesamt,* an independent agency within the orbit of the Ministry of Interior had to decide about these asylum applications.[57] Asylum applications were judged by an independent jury of one chairperson with a qualification in law and two lay members. Representatives of UNHCR were entitled to join these boards.[58] Legal action against a rejection of an asylum request could be taken to the administrative court in Ansbach and up to the Federal Constitutional Court. The courts interpreted art.16 (2) of the constitution in a manner that the right of asylum enshrined in the constitution covered also the Geneva Convention. This constitutional protection strengthened the application of the Geneva Convention and the AO had to follow these rulings. When in the 1960s the AO decided not to investigate an asylum application or reviewed it rather summarily, the *Bundesamt* was whistled back by the courts. The courts scrutinized the decision making of the AO and ruled that all asylum applications had to receive a fair treatment (Mayer 2018).

Fig. 3. Institutional timeline asylum determination Germany 1965-1990[59]



When the number of asylum requests started to rise in the second half of the 1970s organizational innovations were introduced in order to speed up the asylum decisions. Since 1978 the administrative court in Ansbach was no longer the sole appeal court, and since 1980, 24 administrative courts had obtained this authority. In 1980, the recognition juries of the AO were replaced by single decision makers who made decisions independently without directions from the AO or the Ministry of Interior. To speed up the decision-making process and to reduce administrative costs, the German AO no longer considered a hearing of the individual asylum seekers necessary to examine the protection needs of the asylum seeker. The collegiate decisions after an interview were thus replaced by individual decision-making based on the paper file (Kreienbrink 2013). The protection officers were also under considerable pressure.

[57] The West-German AO was called the *Bundesdienststelle*, from 1965 onward the *Bundesamt für die Anerkennung ausländischer Flüchtlinge,* Federal Office for the Recognition of Foreign Refugees.

[58] This right for UNHCR to assist in these boards was introduced in the asylum ordonnance of 1953. The Allied occupational forces had demanded such an international supervision and after long discussions the West German government eventually conceded in 1953 .This supervision by UNHCR was reaffirmed in the Aliens Law of 1965. Mayer 2018.

[59] See list of tables for the explication of the use of colors.

An internal regulation of the AO in 1984 set the target at 320 decisions per year. The quality of the decision making deteriorated and the administrative courts quashed many more decisions. In 1984, the former director of the *Bundesamt*, H.G. Dusch, considered it a mistake to have replaced the collegiate decision with single decision makers (Bosswick 1997).

In 1982 the legislative power decided that the local aliens authorities who registered the asylum applications could decide whether the application was manifestly unfounded. If they did so the asylum seekers could only appeal an expulsion decision and their case was never put before the AO. The Federal Constitutional Court considered this innovation to be unacceptable as it contradicted the right of asylum which the Basic Law guaranteed. Due to this judicial veto between 1988 and 1990 the German authorities concentrated their efforts on speeding up the decision making by doubling the staff at the AO. While the AO employed 350 persons in 1985 this rose to 915 in 1989 and 1200 in 1990.[60]

1983: Most Convention refugees only a suspension of deportation

As mentioned in the overview of legal doctrine, from 1983 onward a significant group of refugees was excluded from asylum in Germany. The Federal Administrative court had ruled in 1983 that Article 16 (2) of the Basic Law was the absolute reference for granting of asylum. Article 16 (2) only referred to a political motivation of a persecuting state. The highest Administrative Court had ruled that political persecution must emanate from or be imputable to the state. Many refugees being persecuted due to their religion, race, nationality or membership of a particular social group, but whose persecution was not directly the consequence of state action, were no longer entitled to asylum. The rejected asylum seekers, including the no longer recognized Convention refugees came under the purview of the local aliens' authorities. By the end of 1987 this group of not recognized 'convention refugees' was estimated by UNHCR to total 100.000 persons.[61] In the same year the German Parliament estimated the total number of *de facto* refugees, among them Convention refugees to amount to 290.000, of which half were refugees from the Communist bloc and half from the global South (Kleinschmidt 2018).

The local aliens' authorities were in charge of the expulsion of the rejected asylum seekers, but they had to take into account any legal, normative, humanitarian or technical hindrance to expulsion. When strictly personal elements (for example illness of the person), but also practical difficulties (for example embassy refused to grant a *laissez passer*) made a (forced) return impossible or difficult, the local aliens' authorities had to suspend the deportation and provide a solution for these unrepatriable irregular immigrants. Also, in the cases of the Convention refugees who had not been recognized by the AO and the courts, the local aliens' authorities had to take a legal constraint into account. The authorities had to respect the Geneva Convention's *non-refoulement* provision, and so many Convention refugees were tolerated as *de facto* refugees (Bosswick 1995; Nicolaus 1990). A broader normative constraint to expulsion was that the local aliens authorities also had the authority to evaluate whether their would-be expellees would be exposed to a serious danger to life of freedom upon return. The existence of widespread and indiscriminate violence in the country of origin could be a ground for suspension of the deportation of the rejected asylum seekers. The local aliens authorities could be relieved in this difficult assignment by the regional authorities. The minister of the interior of a *Land* had the authority to suspend the deportation of specifically defined groups of foreigners. They could thus resort to collective exceptions to deportation and grant all these

[60] IGC 1992, 45; Annual Protection Report of UNHCR-Germany, 23.1.1991, AUNHCR, 600.GFR - Vol.7 (G) - 1990-1991.

[61] Annual Protection Report of UNHCR-Germany, 23.1.1991, 10.4.1, AUNHCR, 600.GFR - Vol.7 (G) - 1990-1991.

non-repatriable foreigners a toleration permit.[62] These toleration permits were only valid for a few months and could be renewed time and again. This short-term toleration enabled the local aliens authorities to deport the alien as soon as the reason for the suspension of the deportation had ceased. These temporarily non-repatriable aliens lacked any formal residency status.

The local aliens' authority could be relieved of this difficult assignment by a decision of the regional authorities who could decide to suspend expulsion. West Germany had several thousands of war refugees from Lebanon whose asylum application had been rejected. This possibility to suspend their deportation became the focus of an intense political struggle in West-Germany and mainly in Berlin from 1983 onward. Among the war refugees from Lebanon there was a considerable number of stateless Kurds and Palestinians. The struggle to protect them mobilized civil society and in particular the two large Christian churches, who contested the restrictive German refugee definition and pleaded for a *de facto* refugee status as to prevent the deportation of rejected asylum seekers to an unsafe situation. By offering war refugees church asylum these refugees became highly visible.

In 1986 the German Ministers of the Interior decided to adopt a tougher stand as the number of asylum seekers increased and the 'abuse' had to be stopped. They decided to deport more rejected asylum seekers, including a return to countries in which violence was general. In Berlin the CDU minister of Interior had planned to deport minimum 370 war refugees from Lebanon, mainly Palestinians back "home". The protests in Berlin radicalized. Also, radial left groups joined the protest, their pro-Palestinian strand was also a motivation for their commitment. The administrative court in Berlin annulled the expulsion orders given that the forced return of Palestinians would expose them to a danger to their life or freedom. Under judicial and civil society protest the Berlin government of Christian-democrats and Liberals agreed to offer an amnesty. By October 1987, the Berlin regional government granted a residence permit to all war refugees from Lebanon residing in Berlin on May 14, 1987. Officially 1500 adults and 2000 children from Lebanon were protected. In December 1989, also the CDU government in Lower Saxony granted an amnesty for 753 *de facto* refugees. In other regions where the Socialists headed the regional governments, war refugees from Lebanon were not expelled. Probably the CDU/CSU governments in Bayern and Baden Württemberg started deportations what caused an internal movement of Lebanese war refugees from South to North Germany. The regional competence to suspend deportations of rejected asylum seekers undermined the tougher deportation policy which the German federal governments under Helmut Kohl were planning (Kleinschmidt 2018).

1990: More, but not all Convention refugees recognized

In 1990 a new Aliens Law provided for a collective regularization for all rejected asylum seekers who had been tolerated and who, on January 1, 1991, when the law went into effect, had been living in Germany for at least 8 years. The stay of roughly 120.000 long-stayers from Lebanon, from Sri Lanka (Tamils) and elsewhere was legalized (Kleinschmidt 2018: 256).[63] More important for the future, the new Aliens Law reintroduced the Geneva Convention into the Asylum Procedure. To bridge the gap between the refugee definition of the Geneva Convention and that of the Basic Law the 1990 Aliens Law introduced a status for claimants satisfying the national implementation of the *non-refoulement* obligation. Not Article 1 of the Geneva Convention, but Article 33 became thus the legal terms of reference for the AO. In German recognition policy the refugee was not the person with a 'well-founded fear of being persecuted', but a refugee was the person who could not be expelled because (s)he "would be threatened to his/her life or freedom'. In addition, the 1990 Law adopted a slightly more

[62] These toleration permits were called *Duldung.*

[63] Kleinschmidt (2018) mentions this was a decision of May 1991, but we found no confirmation of a second amnesty.

restrictive definition of refugee as German Aliens Law used the wording 'is threatened'. This implied that from January 1, 1991 onwards the AO (and the courts) had to investigate whether an asylum applicant was a politically persecuted person (art 16 (2) Constitution), and if the asylum seeker was rejected a second investigation had to determine whether a rejected asylum seeker should be given the benefit of protection due to the principle of *non-refoulement* of Article 33.[64]

The rejected asylum seekers who were allowed to stay in West Germany because of Article 33 *(non-refoulement*) of the 1951 Convention enjoyed full Convention rights. This meant that Convention refugees were no longer treated as *de facto* refugees but became *de jure* refugees who enjoyed the same rights as persons granted asylum in West-Germany. The only difference between their legal status and that of persons granted asylum on the basis of Article 16 of the Constitution was that the latter received upon recognition permanent residence permits, while the Convention refugees received a lesser residence status. They were given a permit valid for two years; after which there was a new consideration of the facts. After 8 years of stay with such renewable permits they qualified for a permanent residence permit.[65]

In 1991, from a total of 11,600 refugees recognized by the AO in that year, approximately 1000 refugees were granted only Convention refugee status. UNHCR-Germany had been hopeful that the new law would bring relief to its protégés, but they were disappointed in the passive attitude of the AO. This low number of Convention recognitions was indicative of the overly restrictive practice of the AO in interpreting the new provisions on *non-refoulement*. Their interpretation was almost exclusively based on principles developed in domestic law, thereby ignoring to a large extent the origin of the provision in the Convention of Geneva.[66] UNHCR-Germany supervised the asylum procedure closely. They intervened in a few cases that had come to their attention when irregularities relating to applications for asylum at the border or to a pending asylum claim had occurred and such persons had been deported. The German authorities took these complaints seriously and granted these expelled foreigners a visa for the purpose of re-entering Germany and covered their flight expenses.[67] However, the interventions of UNHCR on widening the interpretation of the Geneva convention had no result. UNHCR could not convince the AO or the administrative courts to broaden their interpretation of Article 33 of the Convention of Geneva by putting the subjective fear of persecution of asylum seekers central rather than focusing on the persecuting state.

1990: Protection competence beyond the Convention of Geneva attributed to the AO

From 1991 onward, the AO had to consider also whether the asylum seeker who was not recognized as a refugee was covered by a general principle of *non-refoulement*. The AO had to investigate whether there were normative obstacles to the deportation of the rejected asylum seeker. Before 1991, verifying whether personal, practical or normative difficulties made return impossible or difficult had been the competence of local aliens' authorities. From 1991 onward, the AO became responsible in each individual case for checking whether there were obstacles

[64] Also Convention rights were extended: an amendment of the Asylum Procedure Law enabled minor aged children and spouses of Convention refugees to apply for refugee status as well and to be granted Convention refugee status to the extent that they respectively had been born or married in the country of origin prior to the recognition of the spouse/parent as a refugee. Annual Protection Report of UNHCR-Germany, 23.1.1991. AUNHCR, 600.GFR - Vol.7 (G) - 1990-1991.

[65] Annual Protection Report of UNHCR-Germany, 23.1.1991, 13.1. AUNHCR, 600.GFR - Vol.7 (G) - 1990-1991; HCR Germany to UNHCR Headquarters, 12.8.1992, AUNHCR, 600.GFR - Vol.8 - 1991-1992.

[66] The reference to Article 33 of the 1951 Convention enabled the recognition of those who evoked subjective post flight reasons, cases which were not covered by Article 16 Basic Law. However the AO did not expand the refugee definition as for example "very rarely refugee women, for being a member of a social group suffering persecution are granted asylum" Internal telegram UNHCR, 2.7.1992, AUNHCR, 600.GFR - Vol.8 - 1991-1992.

[67] Annual Protection Reporting Exercise, 4.1992, 7.1.1. AUNHCR, 600.GFR - Vol.8 - 1991-1992.

related to the country of origin which made the return unacceptable from a normative point of view. The law of 1990 specified more clearly the normative constraints, referring mainly to Article 3 of the ECHR, i.e. the AO had to investigate whether the danger of torture, the death penalty, and exposure to degrading and inhuman treatment had to be prevented.[68] In those cases with a considerable and definite danger to the life or freedom of the rejected asylum seeker the deportation should not be carried out and the rejected asylum seeker had to be tolerated in Germany. These *de facto* refugees had to be explicitly tolerated by the local aliens' police for a maximum term of one year. This tolerance could be renewed. The tolerated alien had few rights: he had no right of family reunion and received only limited social benefits. As soon as the reason for the suspension of deportation had ceased they were to be deported.

This centralization of the policy to suspend deportation was to neutralize regional governments which were more prone to give in to civil society protests and could be headed by opposition parties. The amnesty decided in 1990 was the price Wolfgang Schäuble (CDU) was ready to pay for a centralization of the deportation ban mechanism. Rejected asylum seekers with a deportation ban were given a residence permit and after 2 years there was a new consideration of the facts. If the situation in the home country had not changed, the residence right was renewed automatically. Although this definition was individualized, the status was applied to groups like Tamils, Palestinians, Lebanese, Afghans, Iranians and Ethiopians.[69] In 1992 there was an official deportation ban for Afghanistan and also a *de facto* ban for refugees from Somalia and Kurds from Iraq due to the technical impossibility to repatriate them.

2.2.5. The Belgian subcontracting of recognition policy to UNHCR

Between 1952 and 1988, Belgium forfeited this national competence by outsourcing the refugee status determination to UNHCR. Belgian policy makers perceived this delegation as the logical outcome of the full acceptance of the new international refugee regime. The Netherlands also did so, but in a less formal manner. No other European country party to this new international refugee regime followed suit. They considered refugee status determination to be a national prerogative to which UNHCR at most could be involved in an advisory capacity. Belgium, as a liberal country that counted on international cooperation to counterbalance the little weight it could exercise on international affairs, had been an important promotor of the international refugee regime since the 1950s.

For Belgium, refugee policy had become an obligation resulting from an international commitment. Therefore, it was decided in the 1952 Aliens Law that the Minister of Justice would no longer be in charge of immigration policy, but rather the Minister of Foreign Affairs would become responsible for recognition policy. The Minister of Foreign Affairs delegated the authority of refugee status determination to UNHCR. This outsourcing was motivated internally by the argument that national interests would not be compromised if UNHCR decided to recognize a refugee in Belgium. That a state grants asylum not only provides protection to a refugee but, as a side effect, can also have a strong political overtone insofar as recognizing a refugee can be seen as judging another state. With the Belgian institutional setup, the authorities of the refugee's country of origin could not blame the Belgian authorities for the recognition decision.

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[68] Annual Protection Report of UNHCR-Germany, 23.1.1991, 3.11. AUNHCR, 600.GFR - Vol.7.- 1990-1991
The new Aliens Law aimed to increase the deportation of rejected asylum seekers and to restrict the issuance of tolerance permits to a minimum possible. The issuance of such tolerance permits was no longer within the discretion of the local aliens' authority. The new Aliens Law stipulated in which circumstances these permits could be issued: danger of torture, of death penalty or treatment with contravened human rights (Article 3 ECHR) Annual Protection Reporting Exercise, 4.1992, 16.1.1, AUNHCR, 600.GFR - Vol.8 - 1991-1992.

[69] This status was also granted to those whose asylum request had not be concluded in a reasonable time. Marx 1993.

Eligibility remained the purview of the Minister of Justice. The original criteria for eligibility were that the asylum application had to be lodged within one month after a regular immigration. There were no provisions for those who had immigrated in an irregular manner. Their access to the asylum procedure was completely dependent on the IO's goodwill which had total discretionary power. The legislature had not wanted the Minister, in fact the IO[70], to decide autonomously on the eligibility of asylum requests. Therefore, the Aliens Law had obliged the Minister to ask for non-binding advice from an independent advisory commission before they could dismiss an asylum request and expel the asylum seeker (Ecker & Caestecker 2022).

Can Algerian independence fighters be refugees?

Only in 1959 did administrative discretion become a politically decisive issue, when a few Algerian FLN-activists who had immigrated in an irregular manner spontaneously requested asylum directly at the UNHCR branch in Brussels. The Belgian authorities argued that UNHCR had not the competence to recognize the Algerians as refugees as their eventual persecution was not related to events prior to January 1, 1951. UNHCR retorted that art. 6B of their Statute defined their mandate to protect refugees as universal, but there was confusion whether their RSD authority in Belgium was based on 6A or 6B of their mandate. Anyhow the Minister of Justice in charge of eligibility denied the FLN activists access to the asylum procedure. The lawyers of the FLN activists appealed this decision to the Council of State[71]. They accused the Minister of having acted in breach of the law as he had not consulted the consultative commission. The Minister of Justice denied that asylum seekers had specific privileges that distinguished them from other immigrants. He emphasized national sovereignty by proclaiming that any immigrant could be expelled by the executive power at will. The Council of State agreed with the plaintiffs that denying a foreigner access to the asylum procedure violated the law and was annulled. The law stipulated that every asylum seeker's request, independent whether he or she had entered irregularly or not, had to be investigated in a serious manner. Part of this investigation, the Council of State stated, was that the Minister had to seek the advice of the advisory commission.

The experience with the Algerian refugees caused an awareness that asylum seekers had to be better protected by law. The Aliens Law was amended in 1964 by clearly stipulating that aliens who entered Belgium in an irregular manner could apply for asylum and that they had to be tolerated during investigation of their case. The Minister of Justice insisted however on exceptions to this rule to prevent abuse of these privileges which were meant only for genuine refugees. Asylum applicants with deceitful declarations as well as applications with no connections to the refugee criteria put in the Aliens Law could be dismissed. UNHCR opposed these exceptions as it compromised its recognition competence. As a compromise the IO had to ask each time it wanted to use the exception clause the agreement of UNHCR.[72]

The Convention of Geneva was only applicable to persecution related to events prior to January 1, 1951. However, the Belgian branch of UNHCR had been able to recognize Hungarian refugees in 1956. Shortly later, UNHCR recognized Jews from Egypt denationalized and expelled due to the French, British and Israel intervention in the conflict about the Suez Canal as refugees in Belgium. Later refugees from Cuba were also recognized without much ado. The question whether the events which had caused their persecution were to be situated

[70] *Dienst Vreemdelingenzaken/office des Etrangers*, called until 1980 *Vreemdelingenpolitie/police des étrangers*
[71] The *Conseil d'Etat/Raad van State* was created in 1948 to supervise all decisions of the state.
[72] 'Wet van 30 Maart 1964 Tot Wijziging van de Wet van 28 Maart 1952 Op de Vreemdelingenpolitie', 30.04.1964, NAB, BE-A0510: F1700 (842).

before 1951 had not been raised.[73] The Algerian case demonstrated that the cutoff date could be mobilized if the authorities felt the need to do so.

In 1964 the Minister of Justice, Vermeylen insisted to become competent for the recognition of asylum seekers which were beyond the purview of the 1951 Convention. Given that the Convention of Geneva was not applicable to them. The Minister of Justice obtained full competence over all asylum requests not related to events who had taken place before 1951. The IO was pleased with this competence as it armed them against unwanted immigrants, be they refugees in order to safeguard public order. From May 13, 1969 onwards, when the 1967 Protocol of New York came into force in Belgium UNHCR claimed successfully to have precedence in all asylum cases in Belgium (Caestecker & Ecker 2022).

The right of defense also for foreigners

In the 1970s, the legal status of foreigners residing in Belgium, including refugees, slowly improved. Until then foreigners could hardly appeal decisions of the IO. For asylum seekers, they could only appeal the ineligibility decision of the IO at the Council of State, however, only on legal grounds rather than on its merits and the appeal was not suspensive. New human rights norms took hold of policy makers according to which rights with respect to the right of defense, rights that had been largely reserved for nationals were extended to foreigners as well. This normative evolution found its culmination in the Aliens Law of 1980. Increasingly, the IO had to justify its decision and lost much of the administrative discretion it had previously enjoyed (Rea 2000). The appeal against the eligibility decisions became suspensive and the deceitful declarations as well as applications with no connections to the refugee criteria of the Convention of Geneva could no longer be evoked by the IO to refuse access to the asylum procedure.[74] This normative transformation caused great embarrassment to UNHCR as asylum seekers in Belgium did not have the right to appeal decisions denying them refugee status. UNHCR, as the sole agency in charge of recognition policy in Belgium, did not offer any of the guarantees ensured by Belgian law with respect to the right of defense, of motivation and appeal. The decisions of the UNHCR Representative as an international official were outside the purview of the Belgian *Council of State*. Lawyers criticized this lack of formal guarantees in strong terms. The Belgian authorities looked for a way to submit the asylum procedure to procedural due process. As a result, in 1982 UNHCR asked the Belgian authorities to be relieved of refugee status determination[75]. The danger that a decision taken by the UNHCR representative in Belgium would be brought to a Belgian court and be subjected to judicial review in spite of UNHCR's immunity from jurisdiction had to be prevented (Caestecker & Ecker 2022; Jaeger 1987: 78-80).

Due to the rising numbers of asylum seekers and the insufficient staff, UNHCR accumulated a backlog in the investigation of the merits of asylum cases. At the national level a new Aliens Law in 1984 was enacted, which aimed mainly at strengthening immigration control. It did not address refugee status determination, notwithstanding the UNHCR insisting several times that a proper Belgian procedure should be installed. It would take another four years before the Belgian authorities agreed on how they would organize refugee status determination themselves (Caestecker & Ecker 2022). In the meantime, Belgium financed the

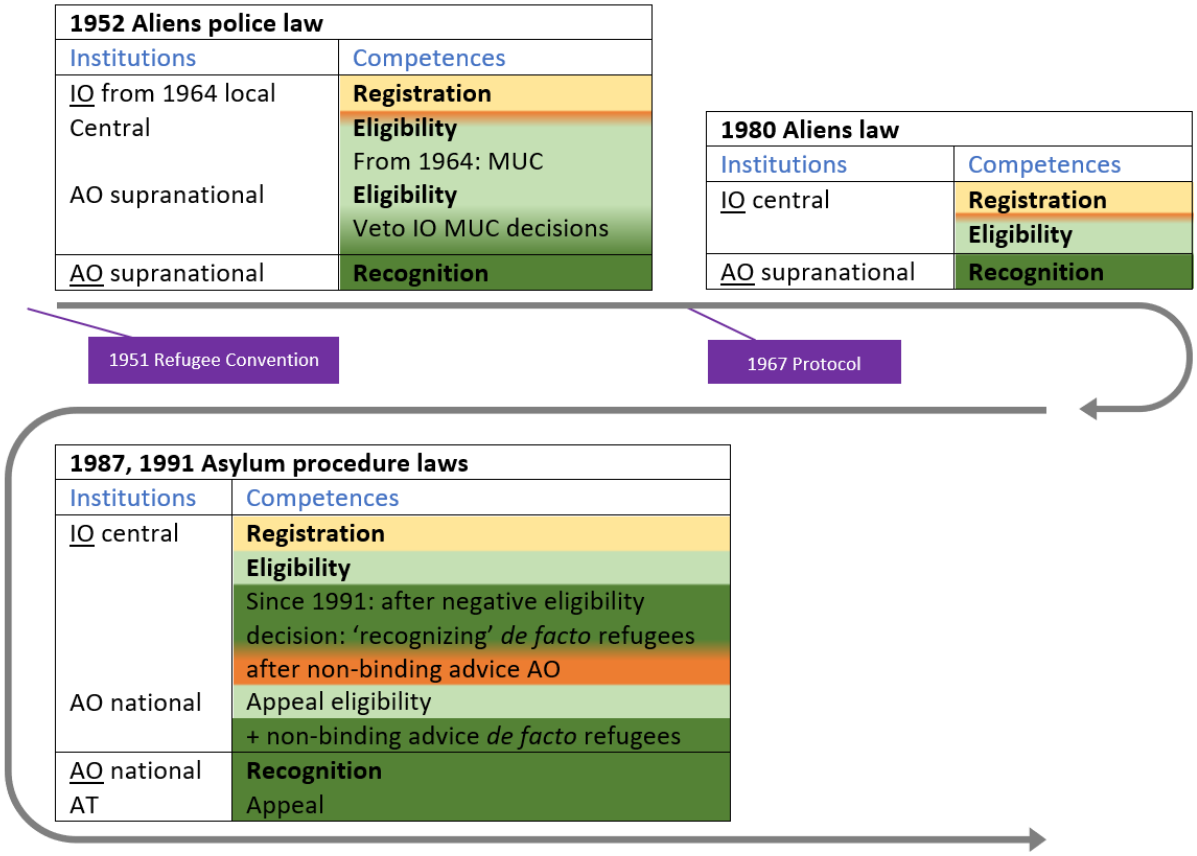
[73] Internal memo Ministry of Justice, 12.12.1961, AIO Brussels, 3, 249; Jaeger to UNHCR, Geneva, 21.2.1962, AUNHCR, 11_1-22_8_-- Algerians in Belgium.

[74] The appeal at an administrative court became suspensive, but the appeal at the Council of State was only in some cases suspensive: Kamer van Volksvertegenwoordigers. 1978. 'Ontwerp van wet betreffende de toegang tot het grondgebied, het verblijf, de vestiging, en de verwijdering van vreemdelingen'. Wetsontwerp 398 nr 1. Brussel: Belgische senaat. https://www.dekamer.be/digidoc/DPS/S0660/S06600309/S06600309.pdf.

[75] Tindemans to De Schryver, 28.03.1983, KADOC, Fonds Deschryver, nr. 9.2.2.1.1./6. See also on this discussion: Direction Bureau R, 1978, 'Note Sur La Procédure d'octroi de l'asile En Belgique', NAB, BE-A0510: F1700 (215); 'Rôle de La Délégation Du Haut Commissariat', 1978, NAB, BE-A0510: F1700 (215); Blero 1994.

hiring of about 20 temporary Protection Officers so that UNHCR could investigate the merits of the cases they had to review.[76] Still, during the 1980s immigration, including asylum requests had become a politically contentious issue. That requesting asylum provided uninvited immigrants access to Belgium, be they refugees notwithstanding a proclaimed migration stop, caused the stakes to become politically more important (Caestecker 1992: 99; Rea 2000).

Fig. 4. Institutional timeline asylum determination Belgium, 1952-1991[77]



In 1988 a Belgian AO takes over from UNHCR

In 1988, Belgium was finally equipped with its proper institutions for refugee status determination with respect to due process. A Belgian AO[78] took over the refugee status determination from UNHCR. It was classified as an independent agency with its own budget, and the (renewable) mandate of the Commissioner General lasted for five years.[79] This AO was integrated as an independent agency within the Ministry of Justice and, contrary to UNHCR, had to motivate its decisions not to grant protection to an asylum seeker.

Concomitant with the creation of these new institutions, access to the asylum procedure became more difficult. An experiment was launched on excluding asylum seekers from safe countries of origin, but the constitutional court considered this contrary to procedural equality.

[76] Interview Katelijne Declerck, 3.06.2021, Beersel
[77] See list of tables for the explication of the use of colors.
[78] The Belgian AO is called *Commissaris-Generaal voor Vluchtelingen en Staatlozen/Commissariat général aux réfugiés et aux apatrides.*
[79] The first Commissioner General was Marc Bossuyt, a professor of international law at the University of Antwerp. he left the AO to become judge at the Constitutional Court in 1997.

More successful was the introduction of a border procedure. The sudden increase in the number of requests for asylum in the middle of the 1980s happened primarily via the airport. Through a change in legislation in 1987, asylum seekers who asked for asylum at the airport were no longer automatically admitted to Belgian territory. They were interned in a transit center at the airport itself. Their eligibility for accessing the asylum procedure was immediately evaluated by the IO. When this office established that the asylum seeker was manifestly unfounded, and if the AO upon an eventual appeal concurred with this decision, the asylum seeker was forcibly returned to his country of origin. This selection at such a strategic post had immediate results: while in 1986, 85 percent of the asylum requests took place at the airport, by 1991 this figure had fallen to 3 percent. As Fig. 1. shows, however, the total number of requests for asylum did not fall; ways of entering Belgium other than through the main Belgian airport were used (Caestecker & Vanheule 2010).

The eligibility decision remained under the purview of the Minister of Justice, in fact the IO. Country of first asylum remained the basic concept for the eligibility decision of the IO. The concept of manifestly unfounded claims which the IO could use, with the agreement of UNHCR to dismiss asylum claims between 1964 and 1980 was rehabilitated in the revised Aliens Act of 1987. In order to prevent administrative discretion, only the Minister of Justice could evoke this to dismiss asylum applications. The explosion of asylum claims in the following years caused that the original intention to use this provision with restrain did not hold. The asylum seeker could appeal the eligibility decision of the Minister at the AO.[80] The Minister of Justice followed the non-binding advice of the AO in 84% of the cases in 1988, 89% in 1989, 92% in 1990, and 97.4% in 1991.[81] In the revised Aliens Act of 1991, the IO had full authority to invoke this rejection ground, but the AO retained the appeal procedure.[82]

The Belgian AO did apply a rather liberal interpretation of the Geneva refugee convention. The singled out-criterium did not have to be met to receive a *de jure* refugee status if the persecution was considered harsh enough. In this regard, civil war victims could be recognized on a case-by-case basis. No legal doctrine was developed concerning collective persecution. However, the practice of the Belgian AO did acknowledge collective persecution in some cases where being a member of a certain social group was almost sufficient in itself to be recognized (for example Pakistani Ahmadayas and Bengali Biharis). The AO qualified persecution by third parties as persecution under the Convention of Geneva if the authorities were unwilling to give protection (Carpentier 1993).

The long-awaited establishment of an asylum tribunal

As had been asked since the 1970s from 1988 onwards the decisions of the AO could be appealed at a newly erected administrative asylum tribunal.[83]The asylum tribunal, which was meant to start up in 1988, only really started to process appeals in April 1989. This caused a backlog before they even started. This backlog was hard to catch-up due to a shortage of staff, despite more AT staff over time. In 1989 the AT consisted of two chambers, each one being presided by one magistrate and having as members one civil servant of the ministry of justice, one civil servant of the ministry of Foreign Affairs, one lawyer, and a representative of the UNHCR. Given the bad start of the AT the Minister of Justice by 1990 openly questioned the

[80] Bossuyt, Marc. 1995. 'De asielprocedure in België: recente evolutie'; CGVS. 1988. 'Eerste Jaarverslag van de Commissaris-Generaal Voor de Vluchtelingen En de Staatlozen- Werkingsjaar 1988', p.137. https://www.dekamer.be/digidoc/DPS/K2048/K20484028/K20484028.pdf.;

[81] CGVS. 1991. Vierde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen'.

[82] CGVS. 1988. 'Eerste Jaarverslag van de Commissaris-Generaal Voor de Vluchtelingen En de Staatlozen-Werkingsjaar 1988'.p.11; CGVS. 1991. 'Vierde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen'. p.7-8.

[83] The Belgian administrative asylum tribunal was called *Vaste Beroepscommissie*/*Commission permanente de recours des réfugiés.*

need for such an appeal body. The savings entailed could be spend on other more urgent matters. In the political discussion article 13 of the ECHR, which provided for an effective remedy before a national authority in all decisions of the state affecting rights, was mobilized to save the AT. The whole reform of the Belgian asylum architecture was exactly about the right of defense of asylum seekers, and the government nearly lost that out of sight.

The AT was expanded over time; by the end of 1990 the AT consisted of 16 members in total. The new Aliens Law in 1991 provided for two French speaking and two Dutch speaking chambers and stipulated that the members of the AT should have a law degree and be at least 30 years of age. The representatives of UNHCR remained one of three members of the jury who decided about the appeals in asylum cases. The change of law also enabled a rejected asylum seeker when he appealed the negative decision to request a suspension of the expulsion order at the asylum court. The fact that an appeal was not automatically suspensive was criticized as merely creating complications. It would lead to an even higher workload, and once an applicant was removed, appeal was pointless.

A new competence for the AO: overseeing that IO did not expel refugees

The Aliens Laws of 1991 not only upgraded slightly the asylum tribunal, it also gave a new competence to the AO. The Law explicitly ordered the AO to advice the IO not to deport a foreigner whose asylum claim had been declared manifestly unfounded both by the IO and AO, but whose "life or freedom would be in danger" in their country of origin.[84] The initiative of this innovation came from the Minister of Justice as it was part of the draft he had prepared. In the parliamentary proceedings no explanation was given for this new authority and there is no discussion of this need for another protection base. During the hearings neither the head of the AO nor the representative of UNHCR mention this innovation.[85] The new competence of the AO passed silently, but it would turn out to be a crucial innovation.

2.2.6. France "modernized" its refugee policy without institutional reform

France, in line with a tradition going back to the French revolution, offered in the preamble of the French Constitution of 1946 asylum « *à toute personne persécutée en raison de son action en faveur de la liberté* ». However, in the early 1950s France was alienated from the international refugee regime as her candidate for adjunct director of UNHCR was not nominated. Hurt in its national pride, the French authorities still adhered to the international refugee regime of the Geneva Convention but made a reservation. Only refugees from Europe would be recognized in France. For the French authorities at the time, handing over the recognition of refugees in France to UNHCR --as Belgium, and, to a certain extent, the Netherlands, had done-- was out of the question. A first attempt to integrate the provisions for refugees in a regulation in 1945 had been opposed by the Council of State. This administrative court invoked the need for a particular set of regulations for these immigrants France wanted to welcome in a privileged manner. The Asylum Law of 1952 (and the decree of 1953) implemented the provisions of the Geneva Convention (Weil 1995; Burgess 2019).

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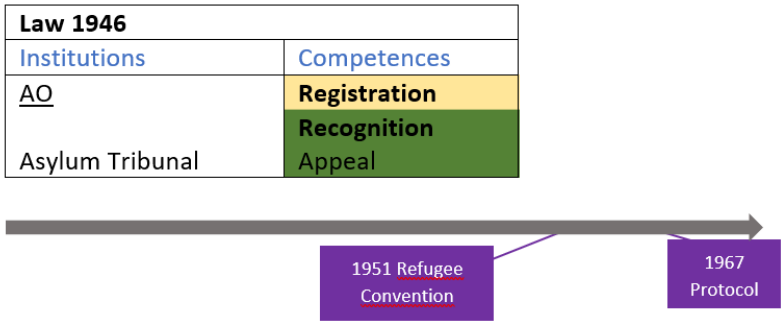
[84] This arrangement is called the '*niet*-terugleidingsclausule' or 'clause de non-reconduite'. Law of July 18, 1991 changed article 63/3 (NRC) of the Aliens Act. 18 JULI 1991. Wet Tot Wijziging van de Wet van 15 December 1980 Betreffende de Toegang Tot Het Grondgebied, Het Verblijf, de Vestiging En de Verwijdering van Vreemdelingen. 1991. https://www.ejustice.just.fgov.be/eli/wet/1991/07/18/1991009965/justel.; Wetsontwerp Tot Wijziging van de Wet van 15 December 1980 Betreffende de Toegang Tot Het Grondgebied, Het Verblijf, de Vestiging En de Verwijdering van Vreemdelingen. 1991. https://www.dekamer.be/digidoc/DPS/K2055/K20550947/K20550947.pdf.; CGVS. 1991. 'Vierde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen', p.17.

[85] PDS, 24.10.1990 for the hearings see respectively p.38ff. and 7 ff.

The asylum law of 1952 created an AO (OFPRA[86]) and an AT.[87] The legislator reactivated France's international stand by giving UNHCR a seat in the AT and by basing its organization on the IRO appeal court. The decisions were made by a jury of three persons who were only part time active for the AO: a representative of the Council of State, a representative of the AO and also a representative of UNHCR. The AT was entangled with the AO: the administrative staff of the asylum court were AO employees, the AT had no independent budget as the budget allocated to the AO covered also the expenses of the AT and the best illustration of this entanglement was the presence of the AO in the jury deciding about the decisions of the AO (Akoka 2012: 169–71) .

Since the 1950s, the examination of an asylum application lodged on French territory involved two stages: the registration of an asylum application and the recognition decision was a matter for the AO and an appeal against a negative decision of the AO was examined by the AT. The appeal had an automatic suspensive effect. The AT examined the appeal on facts and points of law. It could annul or confirm the negative decision of the AO.[88] The French RSD procedure offered, as the German RSD, the possibility to defend one's claim twice. The Prefectures in charge of immigration policy were under the administrative supervision of the Ministry of Interior, while the AO and AT were autonomous units, part of the Ministry of Foreign Affairs. The AO was led by a civil servant nominated for three years by the Minister of Foreign Affairs and had financial and administrative autonomy. The director of the AO was assisted –not directed- by a Council which was composed of representatives of the different ministries involved in immigration policy. Also, a representative of UNHCR and a representative of the NGO's which assisted refugees were part of the Council (Akoka 2020: 69-88). The AO was thus independent in taking individual decisions on asylum applications and was not taking any instructions from the Ministry of Foreign Affairs.

Fig. 5. Institutional timeline asylum determination France, 1946-1997 [89]



The refugees to recognize: French versus international legal texts

The Convention of Geneva was only applicable in France to persecution related to events in Europe prior to January first, 1951. In the UNHCR Statute defining the competence of UNHCR the UN organization became also competent for refugees as a result of events after 1 January

[86] *Office Français pour la Protection des Réfugiés et Apatrides* (Office for the Protection of Refugees and Stateless People)

[87] The French asylum tribunal was called the *Commission de Recours des Réfugiés*.

[88] Any decision of the French authorities can be appealed before the Council of State. The Council of State does not review all the facts of the case, but only some legal issues such as the respect of rules of procedure and the correct application of the law. If the Council of State annuls the decision of the AT, it refers to the AT to decide again on the merits of the case, but it may also decide to grant or refuse protection. The appeal before the Council of State has no suspensive effect when a negative decision of the AT was together with a removal order.

[89] See list of tables for the explication of the use of colors.

1951. UNHR had thus a universal mandate not limited in time nor in space. In the French asylum law of 1952, it was stipulated that the AO could, not only recognize Convention refugees, but also UNHCR refugees. As soon as the AO started operating the Council of the AO discussed its position and agreed to recognize not only Convention, but also UNHCR refugees. The latter they called *de facto* refugees and the only distinction between a Convention refugee and a *de facto* refugee was that the latter would not enjoy the most favorable treatment which put the Convention refugee almost on a par with French nationals for social rights. Both however were protected in France (Akoka 2020: 89-90). The dividing line between the two was not very clear. The Hungarian refugees in 1956 were recognized as Convention refugees. Shortly later, three thousand Jews from Egypt denationalized and expelled due to the Western intervention in the conflict about the Suez Canal were recognized by the AO, probably as Convention refugees. Also, Moroccan refugees and even refugees from Tibet seem to have been recognized by the AO, either as Convention or UNHCR refugees.[90] When France ratified the 1967 Protocol in 1971, these *de facto* refugees became also Convention refugees which enjoyed the most favorable treatment (Akoka 2020: 130). In exceptional cases, the French authorities decided for a collective recognition of refugees, as was the case for those fleeing the former French colony in wartimes - Lebanon (1975)- and as well as for those fleeing authoritarian regimes in South East Asia (1976-1983) –also former colonies-, Poland (1982) and Iran (1979-1985) (Weil 2004: 345; Akoka 2020: 174ff.).

French proudness in their model stops radical institutional reform, 1986-

By the 1980s immigration became, as elsewhere strongly contested, but, given the French tradition of granting asylum and the relative limited share of the European asylum flow to France, asylum was hardly focused upon. In 1982 a law was voted which provided for the possibility of rejecting asylum seekers at the border if it was obvious that their request was manifestly unfounded. In those cases, the eligibility procedure meant that the border police had to refer the case to the IO which, in turn, had to pass the case to the AO. A special AO's Border Division interviewed the asylum seeker and formulated an opinion as to whether the asylum request was to be considered manifestly unfounded, a decision not subject to any appeal (IGC 1992). Then only a decision could be taken whether the asylum seeker could enter French territory to lodge an asylum request.[91]

The restrictive turn in French immigration policy came only under the Government of Jacques Chirac and Interior Minister Charles Pasqua (1986-1988). Before 1986, the governments had only intervened to make the existing asylum procedures run smoothly by increasing the budget allocated to the asylum institutions. The AO and the AT could not cope with the rising number of asylum requests and, therefore, in 1983, the budget allocated to both the AO and the AT was increased (Weil 2004: 346f). The Chirac government focused on the rise of asylum applications as part of the reform of immigration policy. Pasqua abolished the Ministry of Immigration created by the previous government in which all ministries had a say, and strongly strengthened the position of the Ministry of Interior in immigration policy. He also weakened the influence of the judiciary in expulsion decisions at the advantage of his Ministry of Interior (Weil 1995). Pasqua also wanted to transfer the AO from the Ministry of Foreign Affairs to the Ministry of Interior as having the two agencies in the same Ministry would facilitate the communication between them and make the decisions more efficient. The proposal

[90] As Akoka (2020: 128) concludes more research is needed on this dividing line, but the practice of the AO was definitely not only dictated by the legal texts.

[91] At least this was the procedure in 1991. The evolution of the border procedure between 1982 and 1991 is unclear to us. Since 1987 the Minister of Interior had the competence to decide those cases and since October 1991 the AO interviewed systematically the asylum seekers in the airport. AN, 201001118/6; Weil 2004: 341; Clochard 2007.

did not find enough political support. The Minister of Foreign Affairs opposed this transfer and argued that the information of his ministry about the political situation in the countries of origin of the asylum seekers was vital for the AO.[92] Still the Minister of Interior obtained that he could instruct the AO to prioritize asylum requests which were manifestly unfounded or when the applicant was considered troublesome.[93] The AO had still to investigate the manifestly unfounded cases on its merits, but the appeal at the AT against a negative decision of the AO was in those case no longer suspensive.[94]

In fact, a much more drastic reform had been proposed. Pasqua had proposed to do away with the AO and leave only an administrative court to undertake an examination on the merits of the asylum application with an appeal possibility at the Council of State. The latter would only figure as Court de cassation, thus only verifying whether the law had been applied correctly. As the facts had only to be examined once the decision making would be accelerated. the proposal was refuted in an inter-ministerial meeting on December 18, 1986, The French RSD which offered twice the possibility to defend one's claim was internationally recognized as a model. The French policymakers considered the institutional set up of their asylum procedure as the translation of the French tradition of hospitality towards refugees. Therefore, the institutional architecture of the French asylum policy had not to be reformed.[95]

The French proudness in their asylum institutions meant the Minister of Interior could only implement changes at the margins. Still, anticipating an increase in the deportation of rejected asylum seekers, Pasqua had made a case for a humanitarian exception. The prefecture could grant a residency status to those asylum seekers who had been waiting for decision for a long time and who, in the meantime, had integrated well in French society. The Minister of Interior also prudently pleaded for an extension of the protection beyond the Geneva Convention. The leading civil servants of the Ministry of the Interior could grant an exceptional leave to remain if the would-be returnee would run a personal risk due to the situation in the country or origin. Informed by the representatives in France of UNHCR of such situations the Ministry of Interior and the Ministry of Foreign Affairs would take in tandem these exceptional decisions.[96]

The next government decided in 1988 to give the existing institutions the financial means to adjudicate the rising number of asylum requests. A large part of the budget raise was invested in the development of a system to verify systematically the fingerprints of asylum seekers in order to prevent multiple applications. Combatting fraud in the asylum system became a priority.[97] Further budget increases could be spent on the increase of staff but more resources were made dependent on the higher productivity of Protection Officers. The director opposed any increase of his staff's workload, twenty decisions a month was, according to him, already considerably higher than the workload of Protection Officers in the German, Swiss and Canadian AOs. Consultants criticized his work organization and the tensions mounted until the director resigned (Akoka 2020: 235-264, 2012: 374–376).

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[92] A draft of law was handed in at the Assemblée nationale in August, 5 1986 by De Benouville and Bechter. Ministère des Affaires Etrangères, Réflexion en matière de réfugiés, 14.9.1987, AN, 19970381/4.
[93] AN, 19970381/4.
[94] OFPRA et CRR, rôle et bilan d'activité 1992, AN, 19970381/4.
[95] AN, 19970381.
[96] Instructions, 5.8.1987. AN, 19970381/4.
[97] By 15.12.1989 the fingerprint database linked the AO with the *préfectures* all over France. By 1991 all *préfectures* had access to the database of OFPRA concerning the state of affairs of the asylum requests. That connection was not on the budget of the AO/AT, but on the budget of the Ministry of Interior. In 1996 the authorities wanted to mobilize this database of the AO for police purposes and in particular for facilitating deportations. Situation OFPRA, 1.11.1989, AOFPRA, Dir 1/9; AN, 19970381; Réunion interministérielle, 23.1.1996, AN, 19990200/8.

Tab. 5. Staff involved in procedures[98]

	AO	AT	Total
1981	94	5	99
1989	209	40	249
1990	272	241	513
1993	263	133	396 (152 PO)[99]

The new director of the AO, François Dopffer had less misgivings on increasing the productivity of his staff. In December 1989, the new director expressed the hope to have 5000 decisions in January 1990, 7000 in February, and to reach 18.000 decisions in March 1990, so to have the whole backlog absorbed by the end of the year. Anyhow, he planned to have more than 100.000 decisions by the end of 1990. He had political backing as the AO budget was increased to enable him to recruit a few hundred new Protection Officers in the second half of 1989. He embarked on an ambitious program to end the backlog. In 1990 the staff capacity of the AO had increased threefold to 500 employees.[100] The new protection officers who mostly had a (renewable) contract for one year came straight from university.[101] Their productivity was constantly monitored, but the figures on the decisions of individual employees were not systematically used to decide whether or not to retain an employee. The productivity figures, the director told his advisory council were mainly externally used to legitimize budget raises.[102] The new Protection Officers had to reduce the backlog by making decisions on claims solely based on the paper file. Also, the AT rarely invited asylum seekers to the court. Those asylum claims which were considered more difficult, such as those from Turkey and Sri Lanka and for which a personal hearing was deemed necessary were frozen.

'Modernization' of RSD created the non-repatriable rejected refugee

In 1990 and 1991, the AO had made 170,000 decisions of which 140,000 had been negative decisions. The higher output of the AO (and AT) reduced the backlog. The representative of UNHCR in Paris, Ruprecht von Arnim, supported this radical reform of the AO as he called it during the council a necessary 'modernization'. When his support during the council was published verbatim in French newspapers he was not amused. Still, the representatives of UNHCR were the only ones in the AO councils in 1990 who pleaded for caution. They asked that France would still provide protection to those asylum seekers who did not qualify for protection by the Convention of Geneva but whose return was risky.[103] Pleas which were lost in the drive to reduce the backlog. Notwithstanding cuts in the administration all over France, the budget of the AO (and AT) for 1991 was not reduced. In 1991 the number of decisions had decreased slightly as the 'easy' files had been processed, but the AO continued to receive ample funding. Seen the developments elsewhere in Europe, the French authorities, even after the

[98] IGC 1994: 13; IGC 1997: 112..

[99] PO were the A category, 46 were in the B category, and 198 were secretaries (C category).

[100] Probably the number of staff refer to people working in both the AO and the AT, except for the (part-time) judges of the AT

[101] Francis Lott proposed for social reasons to offer labor contracts of three year, by 1993 the contracts were for two years. Conseil d'administration OFPRA, 16.11.1992, 31.3.1993 and 26.9.1994, AOFPRA, Dir 1/11 and Dir 1/13

[102] Only by 2000 will the labor contracts of PO who underachieved (less than 2,5 decisions a day) not be prolonged. Akoka 2012: 426–27.

[103] Réunion du Conseil de l'OFPRA, 4.4.1990, 18.10.1990, AOFPRA, Dir 1/9. That this topic was hardly discussed in the advisory council was also due the vigilance of certain members, especially those form the Ministry of Interior that the council should not trespass its competences. The discussion had to be limited, according to these members to the refugee recognition based on the Convention of Geneva and the members of the AO did not contest this limitation of their competence. Réunion du Conseil de l'OFPRA, 4.7.1990, AOFPRA, Dir 1/9.

backlog had been absorbed by 1992, remained worried about a possible explosion in asylum requests and, therefore, did not cut in the funding of their asylum institutions.

François Dopffer, the director of the AO (9.1988-8.1991) saw his institution as the pivot in a new immigration policy. The AO was part of a centrally managed plan to reduce the inflow by a restrictive visa policy and to increase the outflow by deporting thousands of rejected asylum seekers.[104] He could convince the AT to align their procedures to his plans, but the head of the ministry of the Interior was taken aback by the director's boldness as he had not the administrative capacity to organize the expulsion of hundred thousand rejected asylum seekers.[105] Finally he did not have to deport them all. Thousand two hundred rejected asylum seekers, rallying under the slogan *sans papiers* started hunger strikes in 35 cities all over France. Similarly, to 1986, but now under pressure of these activists a humanitarian exception was provided for long stayers. Over 25,000 rejected asylum seekers could regularize their stay. Most these immigrants had waited for at least two years to have their status determination procedure been finalized.[106] On October 25, 1991 the Interior Minister sent a circular to the prefects in which he extended protection beyond the Convention of Geneva through a regular administrative procedure. All refugees whose application had been rejected by the asylum institutions but who however ran risk because of the general situation in their country or origin had to be exempted from deportation. He provided the possibility for these rejected asylum seekers to appeal to the prefect for protection. This circular letter referred to the jurisprudence of the Council of State and of the European Court of Human Rights and explicitly provided that Articles 3 and 8 of the ECHR must be taken into account before considering any measure of expulsion. The prefect could refer for those cases to the Minister. The Minister of the Interior was the only one competent to take a discretionary decision in these individual cases. Also, for a collective decision to suspend deportations for specific groups the Minister of the Interior was in charge. On December 8, 1991, the Minister decided, upon advice of UNHCR to suspend all deportations to Haiti and in the course of 1992 the authorities were in particular careful about deportations to Liberia, China, Sri Lanka, Ethiopia, Cambodia, Laos and Vietnam.[107]

The profound belief in the French asylum procedure permeated French policy making during the 1980s domestically but also in the international domain. UNHCR wanted to have the French as its ally in the Informal Consultations on Migration, Asylum and Refugees it had launched in 1985 with the Swedish authorities. Although France had participated it had kept a low profile. Jean-Marc Sauvé, director of the IO within the Ministry of Interiors was not very eager to be involved as he considered that UNHCR wanted France to join an European resettlement program which would increase the burden for France. He considered that all European states, and definitely also Italy should follow the French individualized recognition procedure. France had a fully developed asylum procedure and its recognition criteria were more liberal than other European countries. Asylum policy should be harmonized within the EEC, along the French model. Sauvé understood UNHCR's strategy as exchanging the individualized asylum procedure for a new solution to the refugee problem through collective resettlement programs. Also UNHCR's backing of a weaker protection status for refugees, the *de facto* refugee status was not to the liking of Sauvé, as this would provoke opposition of the NGO's, but also increase the burden for France. According to Sauvé, France should be

[104] From 1986 onward France had unilaterally suspended bilateral agreements on the free movement of persons. Lavenex 2001, 168.

[105] Handwritten note Jean-Marc Sauvé, sd.(end of 1988?). AN, 19970381.

[106] The circular letter Marchand-Bianco 23.7.1991 enabled those who had arrived in France before 1.1.1989 to apply for a regularization; Siméant 1998; Blanc-Chaléard 2013.

[107] We ignore how many rejected asylum seekers and other irregular staying aliens made use of this opportunity to apply for protection against deportation. We also do not know how many refugees' deportation was suspended and whether these beneficiaires received a legal stay. Ministère de l'Intérieur, Le droit d'asile en France, problèmes et évolutions récentes, 1992, AN, 201001118/6.

extremely cautious about joining an European concerted refugee policy under UNHCR leadership as this could increase the burden for France, but also "que nous ne renoncions aux guaranties lies à la mise en oeuvre de la procédure française". [108]

2.2.7. Austria, Italy and Greece transit countries[109]

Austria, Italy and Greece, because of their geological position, experienced large transit refugee flows through their territory in the post war period, refugees on their way to the more prosperous economies of Western Europe. All three countries were part of the international refugee regime, but they saw their role in that regime quite differently. While, during the Thirty Glorious Years (1945-1975), Austria had become an immigration country and had developed an immigration policy distinct from its refugee policy, Greece and Italy remained emigration countries with a hardly developed immigration policy. Even during the 1980s, Greek and Italian authorities did not grant asylum to the vast majority of people in need of international protection present on their territory and also Austria was rather reluctant to do so. During the 1990s they would take their responsibility in the international refugee regime as they had to live up to the expectations of the other members of the EC. All three integrated the asylum complex as part of the EC *acquis* in their administration as they wanted to be full-fledged members the European Community.

Austria, RSD by the police

Due to its geopolitical situation, Austria, as a neutral country during the Cold war, was mainly a transit country in the international reception of refugees from the East European communist states. As a member of the international refugee regime in which responsibility was shared between the member states, Austria fulfilled its role as a safe country of transit. In the 1960s Austria was also an immigration country as its economy needed considerable foreign workforce. Both flows of migrants, workers and refugees, were regulated by different legislation. The 1968 Asylum Act was the legal basis for refugee law in Austria, while general immigration policy was regulated by the Aliens Act.

When, in the early 1980s, after the proclamation of martial law in Poland, a large number of Poles applied for asylum in Austria, the country received generous UN support for the upkeep of these refugees in transit as other countries provided resettlement opportunities (Knoll 2021). However, when, from the middle of the 1980s onward, an increasing number of East Europeans, and in particular Romanians, applied for asylum in Austria (Fig. 1.), international support was no longer forthcoming. UNHCR was only willing to support the Austrians to integrate locally refugees, resettlement was no longer provided. The bloody revolution in Romania in 1989 caused a massive flight of refugees transiting through Hungary to reach Austria. Austria was no longer willing to receive the Romanians, and the Austrian army was called upon to stop these illegal entries at the Austrian-Hungarian border. Romanians managed to enter Austrian territory anyway and applied for asylum.[110]

In Austria the authority to adjudicate asylum cases was in the hands of the security police authorities *(Sicherheitsbehörden),* which was divided among several territorial jurisdictions. The asylum seekers were registered and interviewed by the police at the regional level, while civil servants at the federal level investigated for each individual case the reasons of the flight and decided whether protection was necessary. A mandatory interview with the decision maker was not considered necessary (Bauböck 1999: 107; IGC 1990). According to

[108] La position de la France concernant les consultations informelle et la définition du réfugié ; Sauvé Jean-Marc, report on conversation with Jonas Widgren, 21.12.1988, 21.12.1988. AN, 1970381/6.

109 This chapter has benefitted from the input of Evgenia Iliadou (Surrey) for Greece and Iole Pina Fontana and Francesca Longo (Catania) for Italy for which we are grateful

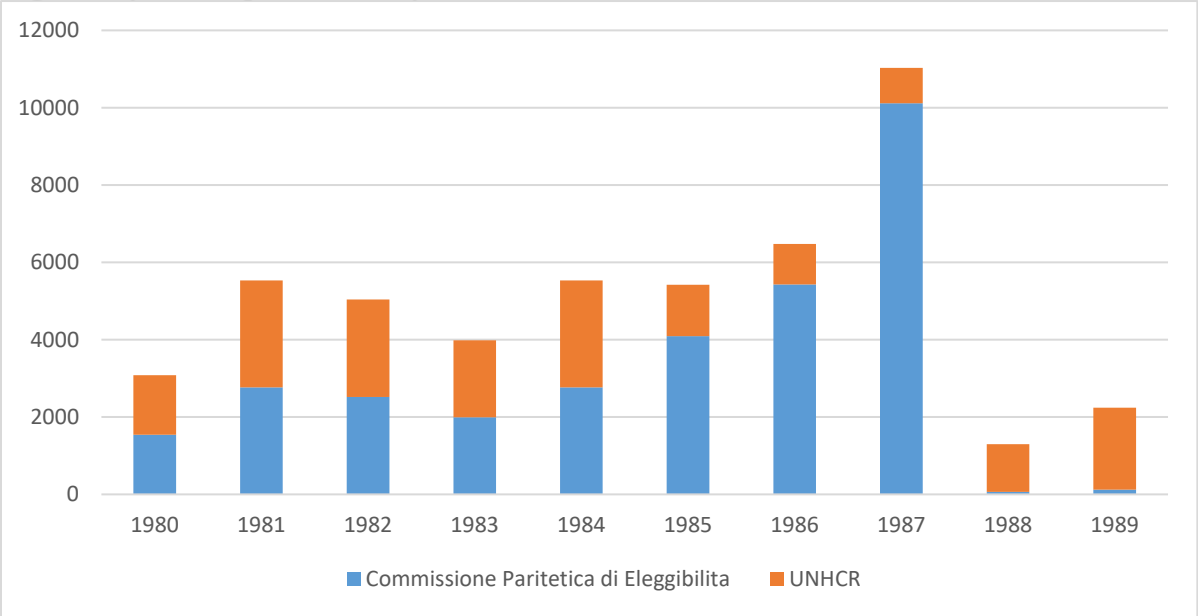
110 We have no information on the treatment of the asylum requests of the Romanian asylum seekers.

Kussbach (1994), this procedure resulted in divergent asylum policies and practices, but overall the security aspect was most dominant in the decision making.[111]
If asylum was rejected by the AO, this decision could be appealed internally. In the early 1980s the appeal was decided by an AT consisting of two members of the Ministry of the Interior and two representatives of UNHCR (Jaeger 1983a). However, by the end of the 1980s, the AT seems to have been solely composed of members of the Ministry of Interior.[112]

Italy: until 1990 an AO only for European refugees

European asylum seekers in Italy had their applications handled by the *Commissione Paritetica di Eleggibilita,* the Italian AO between 1952 and 1990. However, Italian authorities were unwilling to handle asylum applications from people originating from outside Europe and, when it acceded to the 1967 Protocol, Italy had retained their option for geographical restrictions included in the original Convention of Geneva. UNHCR was in charge of these asylum seekers, who constituted about half of the requests for asylum in Italy between 1980 and 1984, but after 1986 its share diminished as more and more East Europeans requested asylum in Italy.[113] The UNHCR mandated refugees were tolerated, but these UNHCR protected refugees were not allowed to work in Italy and they were excluded from public financial assistance.

Fig. 6. Asylum requests in Italy, 1980-1989



[111] The AO was called the Directorate of security (*Sicherheitsdirektion*) and was a department within the Ministry of Interior (*Innenministerium*) (Jaeger 1983a: 51).
[112] When the appeal decision was negative, the asylum seeker could appeal to the *Verwaltungsgerichtshof* (Administrative Court) for judicial review. According to Jaeger (1983a) an appeal against the decision of the Ministry of Interior at the Administrative Court was very rare.
[113] The figures of the staple graph are based on the UNHCR data, for the few asylum applications of Europeans in 1988 and 1989 listed in the graph they were not mentioned in the UNHCR figures, but are based on Eurostat data. Eurostat. 1996. 'Asylum Seekers in Europe 1985-1995'. Statistics in Focus 1. http://aei.pitt.edu/85131/1/1996.1.pdf.

In Italy, the number of asylum seekers and immigrants rose during the 1980s, part of its transformation into an immigration country. The Italian authorities wanted to keep out non-European asylum seekers who were not (yet) under the UNHCR mandate and expelled them when they were apprehended. Still, the need was felt to develop their immigration and asylum legislation. Two distinct drafts were discussed in Parliament, one on immigration and one on asylum. The drafts for a distinct law on asylum, which had been under preparation since 1997 were designed to introduce different refugee statuses. The Italian authorities adhered to the Convention of Geneva, but as their own Constitution also had a reference to asylum, this potential dual origin of refugee protection would be reflected in different refugee statuses. These drafts would never become law.

As mentioned before, Italy retained the geographical reservation in the Convention of Geneva and therefore excluded non-European refugees. In January 1990, however, under strong pressure of other EC member states, the Italian authorities dropped the geographical reservation (Joly 1999; Pastore 1999). Their concession to the other European countries to provide protection to non-European asylum seekers brought Italy a concrete benefit: Italy was able to join the Schengen Area in November 1990, which provided for the gradual abolition of checks at the EU common borders. The extension of the authority of the *Commissione Paritetica di Eleggibilita* led to a reorganization of the AO. Four geographical sectors were created, and a coordination body composed of the four presidents of these sections, four police prefects (*Questuri*), had to assure a common approach. This AO had no permanent members, each section was composed of four civil servants who were only part time involved in refugee recognition. One representative of the Council of Ministers who had to assure that the AO's policy was compatible with the country's immigration policy, one representative of the Ministry of Foreign Affairs in charge of the Country-of-Origin reports and two representatives of the Interior Ministry. UNHCR had the right to attend these meetings, but no longer did it have a vote in the RSD, it only could attend in an advisory function (Meneghini 1999: 248f.; IGC 1994: 5). Rejected asylum seekers could appeal at the Regional Administrative Court with suspensive effect. The parliamentary discussions on immigration law, finalized in the Martelli Law (1990), provided for a planned immigration in which provisions for asylum were not included as this would have to be the subject of a specific law. From 1990 onwards, the AO had to decide about asylum requests from all over the world.

Greece, a not committed member of the international refugee regime

The Greek authorities denied their commitments to the international refugee regime altogether. They refused to register asylum applicants, but instead directed them to UNHCR. Asylum seekers, whom the UNHCR had determined were under its mandate, were provided with refugee identity documents ('Blue cards') with which they could apply for temporary residence permits and were effectively protected against *refoulement*. UNHCR intervened whenever blue card holders were denied residence permits or were facing deportations.[114] The Greek authorities rarely proceeded with forcible expulsions of unwanted immigrants if they were refugees. Still, they were not allowed to work and were excluded from public financial assistance.[115] The authorities tolerated the irregular presence and work of refugees and irregular immigrants alike. Still, the authorities expected these Mandate refugees to register with resettlement agencies operating in the country and presumed that sooner or later they would leave the country for a final destination. At the end of the 1980s, Greece had started discussion of new asylum and immigration legislation, but it would take the Greece legislator several years to finalize their legislation.

[114] UNHCR Legal Factsheet Switzerland, 9.1991, AN, 19970381/6.

[115] UNHCR refugees in Greece had access to free medical care and their children were allowed to go to school. Stavropoulou 1994: 55; Jaeger 1983c: 215.

2.3. Protection for war refugees in the 1980s

By the 1980s, authorities in the Netherlands, Denmark and Switzerland had created new refugee statuses to circumvent the protection clauses of the Convention of Geneva. These so-called *de facto* refugee statuses were more prone to administrative discretion, and the rights accorded to protected persons were more restricted. What was the policy of the AO toward those refugees fleeing war and persecution?

2.3.1. Why the Council of Europe failed to expand the refugee definition

The issue of refugee protection has been on the agenda of the Council of Europe right from the beginning. The European Convention of Human Rights had been drafted within this forum. In 1977 the Committee ad hoc of Experts on the Legal Aspects of Refugees (CAHAR) started its work for the Council of Ministers. CAHAR was an inter-governmental committee composed of representatives of the Ministries of Interior and Justice. Representatives of UNHCR were admitted as observers. Its meetings were informal and confidential (Leuprecht 1989).

CAHAR convened regularly from 1977 onward and provided an intergovernmental dialogue on refugee and asylum policy in Western Europe. CAHAR drafted the juridical instruments, conventions and recommendations that the Committee of Ministers adopted. Instruments mainly meant to strengthen and harmonize the implementation of the international refugee regime. One of its main objectives was to improve cooperation among European states through a harmonized definition of the first country of asylum. There were important differences in the practices of member states to declare an asylum application ineligible because their country was not considered the first country of asylum. CAHAR proposed in 1981 common principles for a harmonized definition of first country of asylum. In their draft an important criterium was that when an asylum seeker was legally residing for more than hundred days on the territory of a state that country became his/her first country of asylum. This CAHAR proposal was however confronted with opposition from several member states who because of their geographic location were popular entry regions for Western Europe. In particular, Italy and Austria felt that with this definition of first country of asylum they would end up with having to examine the asylum applications of many more immigrants who only intended to pass through their country on their way to other countries in Western Europe (Lavenex 2001: 76-82).

CAHAR also undertook work on the legal questions relating to refugees. CAHAR prepared the Recommendation (81)16 on the Harmonization of National Procedures relating to Asylum which was adopted by the Committee of Ministers on November 5, 1981. This recommendation presented a series of principles to ensure that requests for asylum were dealt with effectively and objectively. These included the principle that all asylum requests should be taken by a central authority, that the applicant be given the necessary facilities for the presentation of his case (including the right of representation by counsel and the right to appeal) and that the applicant be permitted to remain in the country until a final decision was made on the asylum request.

In 1984 the Committee of Ministers adopted Recommendation (84)1 on the Protection of Persons Satisfying the criteria in the Geneva Convention who are not Formally Recognized as Refugees. It reminded member states that the principle of *non-refoulement* was generally applicable even to persons not formally recognized as convention refugees because they did not apply for refugee status or for other reasons were not formally recognized as refugee (Lambert 1995).

This successful endeavor made that CAHAR started to work on the issue of *de facto* refugees. It appears that UNHCR had succeeded in putting the need for protection of war refugees on the agenda in 1984, if not before. The experts had agreed on a recommendation to

the Council of Ministers to apply the *non-refoulement* principle to war refugees, who had not been recognized as Convention refugees, but the recommendation was never off the table. At the March 1985 CAHAR meeting both Weiss, *l'eminence grise* of UNHCR, and UNHCR expert Jackson insisted that this issue not be shelved, but the recommendation never left the CAHAR meetings. UNHCR insisted that the war refugees from Lebanon and Sri Lanka who did not qualify for protection based on the Convention of Geneva were to be evaluated on a case-by-case basis in terms of the fear of danger they could be exposed to and were to be protected accordingly. While all experts, including the German and Belgian experts, agreed to the necessity that states adhere to this principle, they considered it useless to pursue the matter, as any decision of the Council of Ministers was dependent on a unanimous vote. The opposition of Germany and Turkey (and probably also of Switzerland and Belgium) would obstruct any decision on protecting war refugees. The Belgian delegate had had instructions to keep a low profile in this matter, and he explained to his Minister that the principle of this recommendation as such was inacceptable for the Germans.[116] The German representative had explained that the German authorities could not agree with such a recommendation. Given the contemporary state of affairs, such a recommendation would be used by churches, lawyers, and lobby groups to intensify their pressure on the German authorities (see 2.2.4). That even the judiciary, at times, attributed more than a moral commitment to such a declaration also made such a recommendation, according to the German authorities unwanted.[117]

2.3.2. Refugees from the civil war in Sri Lanka

The arrival of Tamils in Europe, after a civil war broke out in Sri Lanka between the Tamil minority and the Sinhalese majority in 1983, was the start of a long lasting discussion whether the Tamils qualified for protection under the Geneva Convention. Maybe the decision-making in Europe on these requests was also influenced by racial considerations, but that many fled a situation of general violence and as certainly not all were political activists of the Tamil movement caused that the decision-making on granting protection to these refugees turned out to be a difficult one.

Ever since Sri Lanka gained independence in 1948, there have been conflicts between the Sinhalese and the Tamils. The 1978 Prevention of Terrorism Act (PTA) allowed the state to exercise far-reaching powers against anti-state actions and arbitrary arrests of Tamils was the result. The polarization between two groups took a violent course in 1983 when the conflict exploded. The violence was due to extremist Sinhalese groups and a part of the Tamil minority which organized themselves in a movement, the so-called 'Tamil Tigers' who were fighting for an independent Tamil state.

In 1984, UNHCR asked its member states not to return the rejected asylum seekers to Sri Lanka because of the civil war. At that time, UNHCR still agreed with an individual recognition procedure for Tamils. In May 1985 however UNHCR, due to the security situation in the country pleaded for a group recognition for Tamils (Franssen 2011: 35). UNHCR wanted to stimulate the discussion on war refugees and organized four informal consultations on the Tamils from Sri Lanka with European states during the summer of 1986. The defeat in CAHAR in March 1985 due to German, but also Swiss and Belgian opposition (see 2.3.1), meant that UNHCR looked for another forum for informal discussions. Discussions away from the public eye were deemed a more appropriate way of engaging the states in dialogue on this matter.

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[116] "Ce qui est en cause, ce n'est pas la manière de les formuler mais le seul fait de les formuler, pour des raisons identiques à ce qu'exprimait antérieurement l'auteur de la présente note qui n'a pas eu à s'exprimer à ce sujet lors de la présente réunion…. La formulation des principes mêmes admis étant jugée inopportune en la matière" Beeckmans De West Meerbeeck to the Minister of Justice, (9.1984 and) 3.1995. AIO Brussels, box 37, CAHAR.

[117] Verslag van de zitting van 5 tem 8 maart (1985) in Straatsbourg van de Nederlanse delegatie, AIO Brussels, box 37, CAHAR.

It was one of the first activities of what would become the Inter-governmental Consultations on Asylum, Refugee and Migration Policies. The IGC was a forum created in 1985 by the Swedish authorities and UNHCR. It was an informal, non-decision-making forum for inter-governmental information exchange and policy debate on all matters of relevance to the management of international migratory flows. The coordinator, Jonas Widgren (1944-2004) reported to the High Commissioner and he was located at the UNHCR premises in Geneva.[118] Representatives of Belgium, Denmark, France, Germany, Netherlands, Switzerland were engaged in this process, but these working sessions on the Tamils yielded little or no results.[119] Belgium and France kept a low profile in the IGC. In 1987 the conflict in Sri Lanka eased somewhat through the intervention of the Indian Peace-Keeping Force who tried to maintain the peace between the Sri Lankan government and the Tamil Tigers. Only in 1988 did UNHCR consider that the situation in Sri Lanka was safe enough to agree to the return of rejected asylum seekers from Western Europe.[120] The IGC in which several European countries had been fully engaged became the forum in which the return of Tamils to Sri Lanka was discussed. An experiment with the forced return of rejected asylum seekers from Sri Lanka, under the supervision of UNHCR was launched in 1988.[121]

In this overview we will analyze the recognition policy of the AO of European continental states towards war refugees from Sri Lanka. Since the late 1970s large number of Tamils have been arriving in Germany, from 1981 onward France and the next year onward also Switzerland registered numerous asylum applications from Sri Lanka. By 1984 the Tamils applied for asylum all over Western Europe, a considerable number of applications were registered in Denmark and the Netherlands. In the first half of the 1980s Tamils were largely protected in Germany, while Switzerland, Denmark and the Netherlands stalled making a decision, Switzerland clearly consciously, the others rather by default.

The West German AO recognized many asylum applicants from Sri Lanka as *de jure* refugees, based on the German constitution (and the Convention of Geneva). The AO recognized that the Tamils, in particular those active in separatist parties were victims of 'group persecution' and 'arbitrary police conduct'. Chandrahasan (1989: 70) underlines that, in 1984, not the AO but the courts were advocating recognition of the Tamil refugees, and that only when the courts set the line the AO followed. A different pattern is to be seen in France where the AO only recognized 10% of the asylum applicants from Sri Lanka until 1986. These applications were perceived as abusive as these refugees had no reliable identity documents and their stories were not considered credible. Most of them were rejected without the AO interviewing them personally, at times the AT changed the decision. [122]

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[118] Jonas Widgren started to become involved with the Organization for Economic Cooperation and Development's Working Party on Migration in the 1970s. From 1982 to 1987, Jonas Widgren served as Sweden's Secretary of State for Immigration and Equality between Women and Men. Miller (2020).

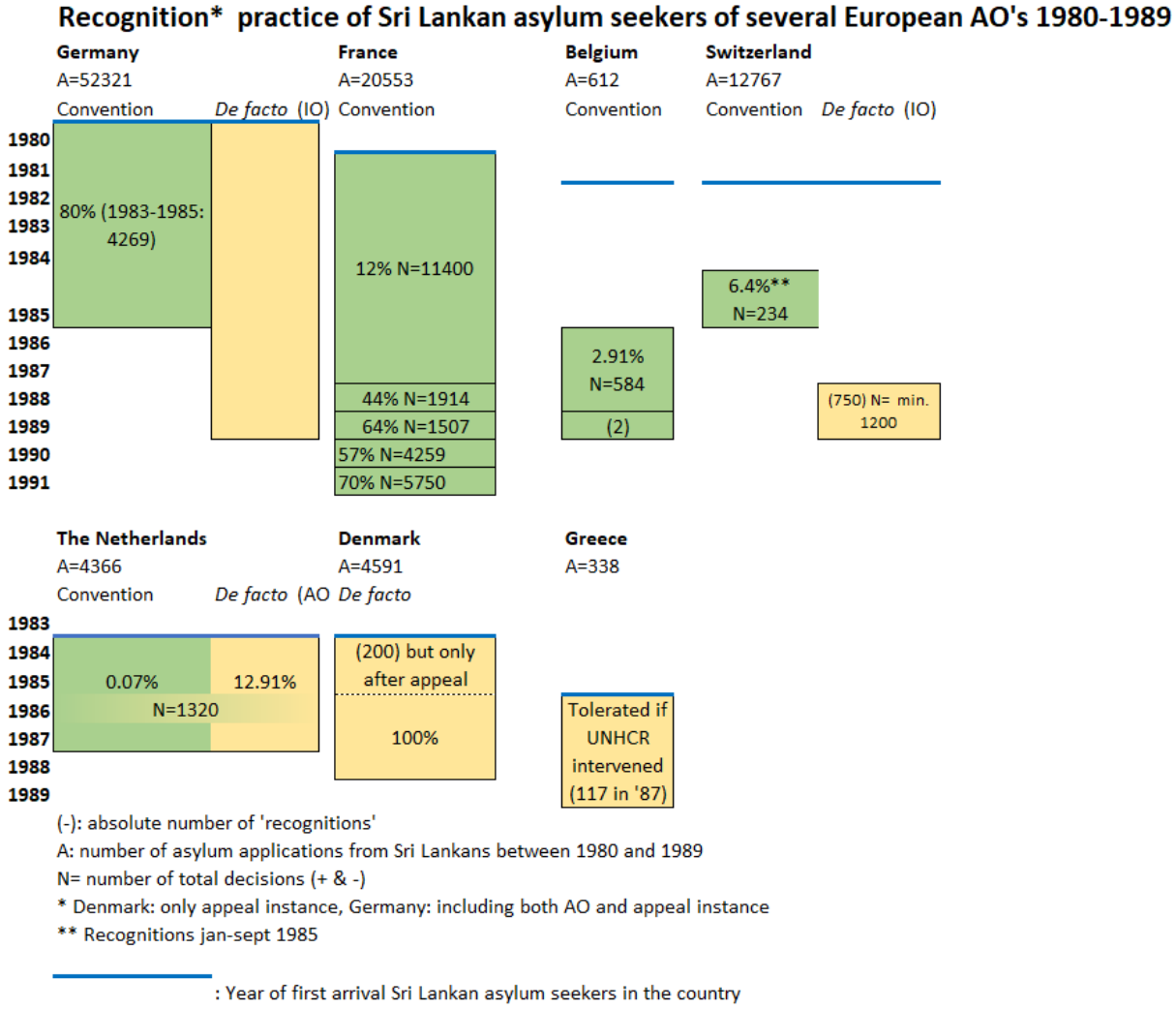
[119] We have not had any access to archival material concerning these workshops. Wall 2018, 34.

[120] UNHCR, 1994, 'Background Paper on Sri Lankan Refugees and Asylum Seekers', Geneva: Centre for Documentation on Refugees, AOFPRA, Folder 5-42 july-dec 1994; Franssen 2011: 32-38.

[121] Sauvé Jean-Marc, report on conversation with Jonas Widgren, 21.12.1988. AN, 19970381/6.; Wall 2018

[122] Secrétariat du Comité, 1985, 'Note Pour Monsieur Le Ministre Concerne: Mission de Th. Beeckmans de West-Meerbeeck, Directeur à La 18e Réunion Du CAHAR Qui a Eu Lieu Du 10 Au 13 Septembre 1985', AIO Brussels, Box 37, CAHAR; Peters P, 1985, 'Verslag Straatsburg, Agendapunt 6, Woensdag 6-3-1985. Bijlage 2 CAHAR', Straatsburg: Ministerie van Justitie, Archive IO Brussels, box 37, CAHAR; Akoka 2020: 226-227; Legoux 1995: 161-2.

Fig. 7. First instance* recognition practice of Sri Lankan asylum seekers of several European countries 1980-1989[123]



Denmark was slow in deciding, but finally the Tamils were considered as refugees, but they were not granted the *de jure* status but the *de facto* refugee status. By 1985 200 Tamils who had been denied protection by the AO were granted the *de facto* refugee status from the Danish AT and from then onwards Tamils were collectively protected by the AO.[124] Only in September

[123] France: Akoka 2020: 225-227; Legoux 1995: 162; Peters P, 1985, 'Verslag Straatsburg, Agendapunt 6, Woensdag 6-3-1985. Bijlage 2 CAHAR', Straatsburg: Ministerie van Justitie, Archive IO Brussels, box 37, CAHAR. Germany: Peters 1985; Chandrahasan 1985; Fullerton 1988. Switzerland: Parak 2005, 2019; Mc Dowell 1996; Secrétariat du Comité, 1985, 'Note Pour Monsieur Le Ministre Concerne: Mission de Th. Beeckmans de West-Meerbeeck, Directeur à La 18e Réunion Du CAHAR Qui a Eu Lieu Du 10 Au 13 Septembre 1985', AIO Brussels, Box 37, CAHAR. The Netherlands: Fullerton 1988; Walaardt 2011, 2012. Denmark: Peters 1985; Van den Broek, Hans. 1988. 'Asielaanvragen van Tamils'. 20899 nr. 4. 's Gravenhage: Tweede Kamer der Staten-Generaal. https://repository.overheid.nl/frbr/sgd/19881989/0000096013/1/pdf/SGD_19881989_0006265.pdf. Belgium: UNHCR Belgium. 1993. 'Recognition Register UNHCR (Belgium)'. NAB.; UNHCR 2001. Greece: Van den Broek 1988. Italy: Chandrahasan 1989, van den Broek 1988

[124] Peters P, 1985, 'Verslag Straatsburg, Agendapunt 6, Woensdag 6-3-1985. Bijlage 2 CAHAR', Straatsburg: Ministerie van Justitie, Archive IO Brussels, box 37, CAHAR; 'Asielaanvragen van Tamils'. 20899 nr. 4. 's Gravenhage: Tweede Kamer der Staten-Generaal. https://repository.overheid.nl/frbr/sgd/19881989/0000096013/1/pdf/SGD_19881989_0006265.pdf in which the Dutch minister Hans van den Broek reported in parliament in 1988 that Tamil asylum seekers in Denmark got automatically a *de facto* refugee status.

1988 the authorities changed their position and started to process each asylum application individually, including the possibility of a forced removal of rejected Tamil asylum seekers to Sri Lanka. For few Tamils the international flight alternative had been applied, but only for those who had lived for some time in Colombo (Vedsted-Hansen 1993). In the meantime, the attitude of West Germany and France had reversed. When in 1983 the Federal Administrative Court ruled that the Constitutional right of asylum was the only bases for German refugee policy and that, thus, only the state could be a persecutor, situations of civil war became less relevant for protection in Germany. In 1985 the Court applied its doctrine to the Tamul case. As Marx (1992: 159) explains, "the Federal Administrative Court found that the military actions of the central government were targeted against the Tamil population and the measures in principle fulfilled the general determination criteria, it ruled that they lacked the required political motivation, since the objective of military raids was to preserve the territorial integrity of the State". According to the court to protect the integrity of the State was a justifiable objective for a State and this implied that the means, even serious violations of human rights, used for this end were not considered as persecution with a political intent. The Federal Administrative Court ruled in addition that Tamils were not in need of protection as they were safe in the eastern and northern parts of Sri Lanka (Hailbronner 1993: 51). The AO followed the court and denied increasingly the Tamils refugee status (Fullerton 1988: 66; Chandrahasan 1989: 70). Still Tamil refugees were implicitly tolerated with a renewable 'temporary suspension of expulsion' each time valid for six months.[125] In France, on the other hand, by the mid-1980s the AT increasingly disagreed with the derogatory attitude of AO towards asylum seekers from Sri Lanka and annulled many of its negative decisions concerning Tamils. Only in the second half of the 1980s, the French AO started to consider these applicants increasingly as genuine refugees. In 1987 already 23% of the decisions were positive and the share of asylum seekers who were recognized as Convention refugees rose in the following years to reach even 70% by 1991 (Akoka 2020: 226-227).

Switzerland and the Netherlands followed another strategy, they first consciously did not decide at all. Until 1984, not one refugee from Sri Lanka had been recognized as the Swiss authorities were afraid that such a decision would constitute a pull factor and would cause even more asylum requests from Sri Lanka.[126] In October 1984, after a fact-finding mission in Sri Lanka by two senior police officers, the Swiss (cantonal) authorities had made the decision to deport Tamils, but shortly afterwards this decision was revoked due to the perception that the situation in Sri Lanka had deteriorated. Ultimately, in 1985, the newly created AO decided until October on 224 cases and 15 of them were recognized as refugees (see Fig. 7). Still many cases from Sri Lanka remained pending and it seems the AO hesitated to make a decision. The AO realized that even if they decided negatively the cases could not be closed as there were doubts whether it was safe for Tamils to return to Sri Lanka. In 1987 the cantonal authorities had agreed again to proceed with the repatriation of Tamils and in July 1987 the AO informed 1200 asylum seekers from Sri Lanka that their case had been concluded negatively. It was considered that given that these asylum seekers had been staying in Switzerland for years they could not be forced like other rejected asylum seekers to leave the country within 6 weeks. For humanitarian reasons the Tamils were admonished to leave Switzerland within nine months. In addition, at the federal level it was decided to force only those Tamils with a serious criminal record, mostly

[125] Secrétariat du Comité, 1985, 'Note Pour Monsieur Le Ministre Concerne: Mission de Th. Beeckmans de West-Meerbeeck, Directeur à La 18e Réunion Du CAHAR Qui a Eu Lieu Du 10 Au 13 Septembre 1985', AIO Brussels, Box 37, CAHAR ; Peters P, 1985, 'Verslag Straatsburg, Agendapunt 6, Woensdag 6-3-1985. Bijlage 2 CAHAR', Straatsburg: Ministerie van Justitie, Archive IO Brussels, box 37, CAHAR; Fullerton 1988; Chandrahasan 1988; Van den Broek, Hans. 1988. 'Asielaanvragen van Tamils'. 20899 nr. 4. 's Gravenhage: Tweede Kamer der Staten-Generaal. https://repository.overheid.nl/frbr/sgd/19881989/0000096013/1/pdf/SGD_19881989_0006265.pdf.

[126] IO to *Conseiller Federal* Rudolf Friedrich, 4.1.1984. Archives AO, quoted by Parak 2019: 112.

drugs dealers to return. The decision to make other Tamils whose asylum application was rejected return was temporarily frozen.[127] They were provisionally admitted and granted a humanitarian status, thus implicitly tolerated (McDowell 1996). The Swiss authorities hoped these Tamils would leave the country of their free will.

The Netherlands followed a similar strategy. Decisions took a long time and in April 1985 the authorities sent a fact-finding mission to Sri Lanka. The mission concluded that there was an Internal Flight Alternative (IFA) for Tamils in Colombo. These findings legitimized the rejection of asylum applications and their deportation.[128] The Dutch authorities wanted to deter new arrivals and were looking for manners to reject these asylum seekers from Sri Lanka on the spot. Different ways of dismissing these claims were envisaged: if prior to their arrival they had resided in a safe European country where protection was available, if they had presented a fraudulent claim, and if they had never experienced threats to their lives or liberty their immediate dismissal could be decided (Walaardt 2011, 2012; Chandrahasan 1989: 80). It does not seems the experiment of a blanked denial of asylum for Tamils upon arrival was ever tried out. The AO denied however that there was a group persecution of Tamils. By October 1987 the AO had decided in 1320 cases and among them hardly any of them was considered a *de jure* refugees, but 13% were granted *de facto* B and C refugee status (Franssen 2011: 37).[129] Still, no Tamil was forcibly removed. Although the Dutch authorities wanted to do so, they would only do so with the consent of UNHCR and UNHCR opposed this until 1988 (Franssen 2011: 32-38; Alink 2006).

In Switzerland, out of the 1200 asylum seekers who had been informed in July 1987 by the AO that they had been rejected, many stayed on. Lobby work of the refugee aid organizations, religious organizations and also the restaurant sector – a sector craving for workers and who had good experience with the Tamils- made the 4.400 Tamils who had applied for asylum before 1987 could regularize their stay in 1990 through a work permit program. For the 7000 who had applied for asylum between 1987 and 1990 the AO resorted to the old tactic of freezing most decisions. Given the backlog the easy to decide cases were a priority and asylum applications from Sri Lanka were not considered so, they were a headache for the Swiss authority and the AO. Still the Swiss authorities decided to expand the category returnable Tamils: the asylum requests from Sri Lanka of people who had a criminal record had to be decided, but also those who the Swiss authorities considered a nuisance (asocial, lack of cooperation) were to be decided and if it turned out those unwanted asylum seekers were not considered refugees they were to be 'returned home'. All the others were tolerated as asylum seekers and only in 1994 it was decided to regularize the stay of these 7000 people who had applied for asylum between 1987 and 1990. Very few Tamils from Sri Lanka were recognized as refugees.[130]

Belgium was confronted, from 1982 onward, with a few hundred refugees from Sri Lanka but only started to decide these cases by 1986. This was not a conscious decision, but rather by default as, only in 1986, the number of protection officers of UNHCR, who were in charge of RSD in Belgium, increased from a handful to more than twenty. They only recognized

[127] AO to IO of the cantonal authorities, 6.7.1987 in Parak 2019: 115.
[128] Alink 2006; Chandrahasan 1989; Walaardt 2011; Weiler and Wijnkoop 2011: 91.
[129] Franssen 2011, 33 mentions a recognition rate of only 6% (N= 3000), but we consider the N= 3000 an error, as on p.37 n N= 1320 fits better her story. Walaardt 2012, 265 reports a similar number (N= 1340).
[130] Between 1978 and 2004, about 50.000 Tamils from Sri Lanka had applied for asylum, but only 1200 asylum seekers were recognized as refugees; a recognition rate of 2%. Parak 2005 and 2019. In 1994 the same strategy of stalling was repeated: it was decided to freeze the applicants of Tamils handed in after 1992. In 2000 it was decided that also the latter, by then 10.000 people, could be regularized. Although the Swiss authorities and the AO were very hesitant about whether it was safe for Tamils to go home and finally regularized the stay of half of these Tamils very few were considered refugees. Parak 2019, 115-117.

very few of the Tamils as *de jure* refugees (UNHCR 2001b; UNHCR Belgium 1993). [131] At the Brussels branch office of UNHCR, the asylum seekers were asked to provide proof that they were individually targeted by the authorities. Merely fleeing collective violence was not sufficient for protection based on the Convention of Geneva.[132] Many rejected Sri Lankan asylum seekers got the order to leave the country although we ignore whether these irregular immigrants were forced to leave. In any case Belgium did not protect them with a de facto refugee status.[133] Also in Greece the asylum seekers from Sri Lanka turned to the UNHCR as the Greek authorities did not have a properly functioning AO. UNHCR turned down most asylum requests as they applied a strict interpretation of the Geneva Convention, but 'acknowledged' that Sri Lankans were not repatriable, due to unstable situation in their country of origin. The Greek government, merely tolerated them, in 1987 117 of them were supported by UNHCR.[134]

Conclusion

The asylum applications of war refugees and persecuted political activists from Sri Lanka received in continental Europe a very mixed welcome. While Switzerland and the Netherlands adopted a similar policy of deterrence, freezing applications and denying them refugee status they were very hesitant about whether it was safe to send Tamils 'home'. UNHCR played an important role in this prudent return policy, certainly for the Netherlands. By 1987, the Netherlands explicitly tolerated only 13% of the Tamils but refrained from expelling them. Switzerland on the other hand deported the most troublesome but implicitly tolerated most of the others. It took the Swiss a decade to regularize the stay of half of their Tamil asylum seekers. While Denmark had a consistent policy, Germany and France showed little consistency in their recognition policy and if the French or German AO recognized Tamils as Convention refugees, this was done after the AT or courts quashed their decisions to reject these claims.

As is illustrated by the Belgian and Greek cases, UNHCR did consider most of the Tamils from Sri Lanka not as Convention refugees, but between 1985 and 1988 they insisted in all countries to not return Tamils to Sri Lanka. Given the absence of a de facto status in France maybe the presence of representatives of UNHCR in the French AT was instrumental for the French change of course, but we have no information to confirm that. At least in the Belgian and Greek cases, UNHCR did not use its power of definition to recognize the majority of the Tamils as *de jure* refugees as the French did by the end of the 1980s. UNHCR put all its effort in preventing to send the rejected asylum seekers back to Sri Lanka. It even caused a serious diplomatic incident with the Dutch authorities. Denmark, the Netherlands and Switzerland provided a solution by tolerating them with a precarious *de facto* refugee status, or as in the cases of Germany a mere suspension of their expulsion order. No active or pro-active AO seem to have been advocating protection for these war refugees.

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[131] UNHCR Belgium, 1993, 'Recognition Register UNHCR (Belgium)', NAB; UNHCR 2001b

[132] Interview with a former protection officer of the Brussels branch office of UNHCR (anonymus, on file with the authors) Ghent 25.2.2022.

[133] Secrétariat du Comité, 1985, 'Note Pour Monsieur Le Ministre Concerne: Mission de Th. Beeckmans de West-Meerbeeck, Directeur à La 18e Réunion Du CAHAR Qui a Eu Lieu Du 10 Au 13 Septembre 1985', AIO Brussels, Box 37, CAHAR; Van den Broek, Hans. 1989. 'Vragen Door de Leden Der Kamer, Met de Daarop Door de Regering Gegeven Antwoorden.' 500. https://repository.overheid.nl/frbr/sgd/19881989/0000091103/1/pdf/SGD_19881989_0001418.pdf.

[134] Van den Broek, Hans. 1988. 'Asielaanvragen van Tamils'. 20899 nr. 4. 's Gravenhage: Tweede Kamer der Staten-Generaal. https://repository.overheid.nl/frbr/sgd/19881989/0000096013/1/pdf/SGD_19881989_0006265.pdf.; Sitaropoulos 2002

3. The European asylum institutions under pressure of the collapse of the Eastern European communist states, 1990-1993

The fall of the Iron Curtain caused a drastic increase in asylum applications. The asylum seekers, mainly from Eastern Europe in transition and in particular from disintegrating Yugoslavia and Soviet Union arrived in large numbers. While by 1988 the number of annual asylum applications in West Europe had slowly risen to 200.000, by 1992 slightly more than half a million asylum applications were registered. The frontline states, Germany and Austria received the lion share (70%).

Fig. 8. Asylum requests in nine states between 1990 and 1993[135]

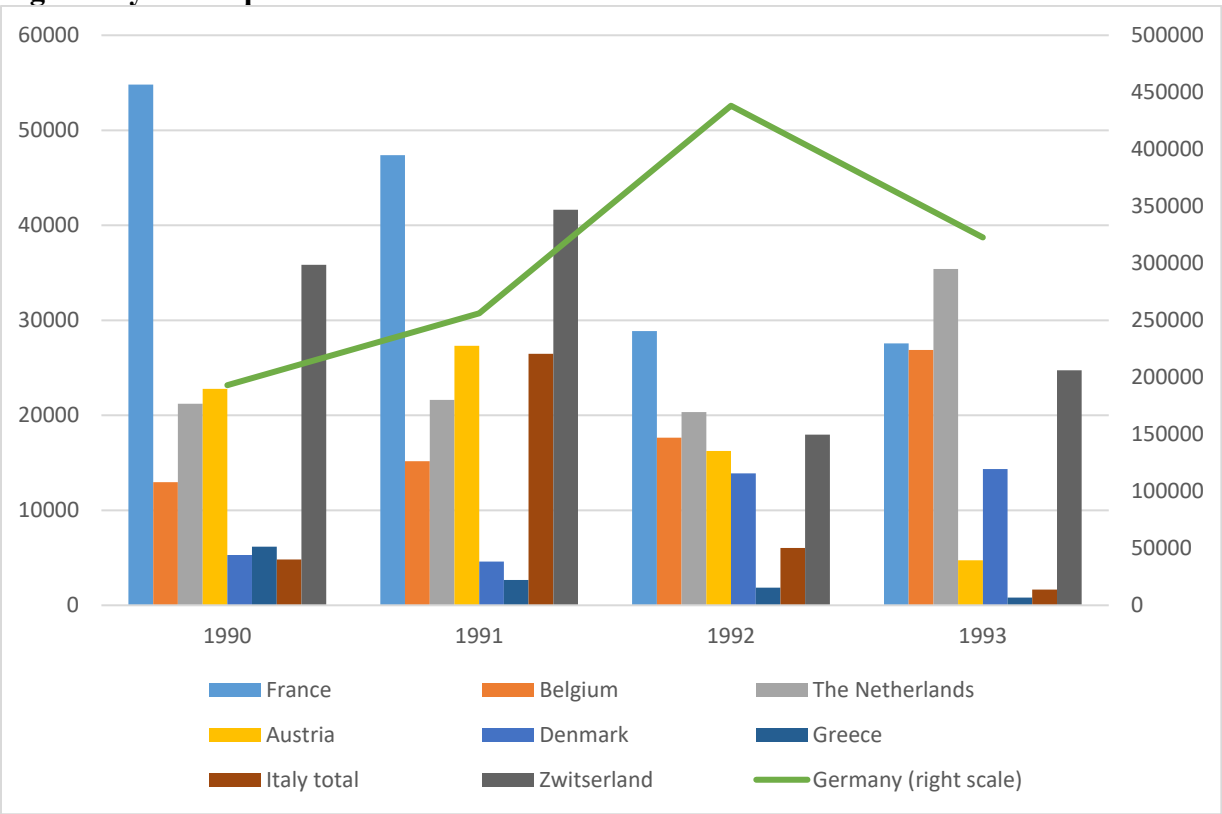

Fig. 8. depicting the asylum requests in our ten states between 1990 and 1993 illustrates Germany remained the main magnet for asylum seekers. In 1992 Germany registered 440.000 request, while France and Switzerland had by then halved its number. The French share declined from 15 to 5% and Switzerland from 10 to 3%. Also Austria had only 3% of the total asylum seekers in 1992 (6% in 1990). In 1993 also the asylum flows to Germany declined, but Belgium and even more so the Netherlands saw their number increase. Certainly when we take into account also then UK and Scandinavia the European countries were communicating vessels.

3.1. Schengen a laboratory for new solutions (1991-1993)

The Schengen agreement goes back to a Franco-German initiative in 1984. The first Schengen agreement was signed in 1985 by France, Germany and the Benelux. It was meant to promote the Single Market and thus to reduce control at the internal borders. In the second half of the

[135] As discussed in footnote 16, some figures might include subsequent and other type of applications (UNHCR 2021).

1980s the Schengen Group went beyond this objective and was used for intergovernmental cooperation to combat transnational crime, including illegal immigration. This whole process took place out the existing EC-framework but within informal and secretive intergovernmental negotiations. This pilot project, largely dominated by the ministries of Interior of these five countries aimed at strengthening control at the external borders and resulted in the Second Schengen Agreement (1990). The abolishment of internal borders became dependent on so-called compensatory security measures, mainly to control immigration of third country nationals, including asylum seekers. The rising number of asylum seekers was perceived as an increasing concern. The process of European integration was hijacked by actors who wanted to safeguard internal security. The asylum question became rather an issue of internal security than of human rights.

Intergovernmental co-operation on migration control was focused on preventing unwanted migration, through visa policy and carrier sanctions, the establishment of buffer zones on the east of Europe, the constitution of a database of inadmissible aliens (the Schengen Information System). The Schengen agreement required signatory states to establish carrier sanctions and to adopt a common visa policy. The Schengen states had agreed to a list of 133 states whose citizens need a visa to enter the Schengen territorium. In 1999 this became a regulation. In addition, the EU member states retained the right to require visa from countries others than those of the common list (Lavenex 2001: 167f). These measures made it much more difficult for refugees to reach the territory of continental European states to apply for asylum. The implementation of the 1990 Schengen agreements was delayed until 1995. In the context of the Maastricht negotiations the immigration and asylum matters were introduced as 'matters of common interest' together with criminal and police related issues. In the Maastricht Treaty (1992) these 'matters of common interest' remained outside the institutional and jurisdictional framework of the European Community institutions, but were managed by two intergovernmental pillars –one for Common Foreign and Security Policy and one for Justice and Home Affairs.

3.1.1. The Convention of Dublin and how to harmonize refugee recognition policy

The Schengen Convention had provisions dealing with the responsibility of contracting states for the processing of applications for asylum. Only one of the parties of the Schengen area should be responsible for handling an asylum request. The decisions to declare an asylum eligible was given a supranational dimension as part of intergovernmental management of immigration policy. The European coordination of this preliminary phase, in particular for the exclusion of an applicant from the asylum procedure in a member-state due to that country not being the first country of asylum went a step further with the Dublin Convention which was concluded on June 15, 1990 by the 12 member state of the European Community. This Convention on Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the EC was concluded in order to combat 'secondary movements' and to find a solution for refugees in orbit. The Dublin Convention came only in force in 1997 as a biding international instrument.

Seen that the interests of migration control were paramount in the Schengen group only belatedly the states involved in the Schengen process realized the need to harmonize refugee recognition policy. The Ad Hoc group on immigration which was created in 1986 to devise common measures against the misuse of asylum and which was composed of representatives of the Interior ministries of the twelve EC countries started quickly to cooperate with the Schengen Group. The Schengen group, dominated by the same ministries became only late an union-wide forum as the countries which were still then only emigration and transit countries, Italy, Spain, Portugal, Greece, were for several years not allowed to adhere. Italy was the first

to join the Schengen area in November 1990, followed by Portugal and Spain in June 1991. Greece was able to join the Schengen area in November 1992.

Although as well the Schengen group as the Working Group on Immigration discussed asylum policy UNHCR was kept out. Only at the end of 1989 for the Working Group and May 1990 for the Schengen group did UNHCR get the opportunity to express its concerns. The Schengen Agreement reaffirmed the obligations of the member states towards the Geneva Convention, but the European Convention of Human Rights was not mentioned. Also responsibility sharing, standards of protection and even non-refoulement as central concepts of the international refugee regime were not mentioned. What was mentioned was that member states could send back an asylum seeker to a third country without examining their applications in accordance with their national regulations. In 1990 both the Schengen Agreement and the Dublin Convention were signed by the twelve member states (Lavenex 2001: 87-100). The ratification of the Dublin Convention would take seven years.

In 1991 the Ministers responsible for immigration issued a report for the European Council Meeting in Maastricht in which they advocated further cooperation to tackle the significantly increased pressure of immigration, but also to increase the confidence in each other's asylum policy through the harmonization of status determination criteria (Lavenex 2001: 105). In October 1991 the Ad Hoc group on immigration[136] had made a first confidential inventory of the differences in the recognition policy of the twelve member states of the EC. The group concluded that for the harmonization of recognition policy attention, among others, has to be paid attention to "the moment when repressive measures which, though they are not directed against the person, nevertheless affect refugees… for refugee status whether the intention of the persecuting state matters… The extent to which a person can be considered a refugee if the government is prepared to offer protection, but is unable to do so". The Group had still no insight in among others whether the twelve states considered persecution during civil war as potentially qualifying somebody for protection. The conclusion of the document was: 'The need to develop quickly a total approach to the question of asylum and refugee policy in the Member States is becoming more and more urgent. Far-reaching harmonization of the material right of asylum in the shortest possible term would therefore seem to be desirable'.[137] No quick solution would be found.

Still overcoming these differences was hardly a political issue in the years to come. As is obvious from this report but also became clear from research at that time (Carlier 1997) there were significant differences among member states in refugee definition to the extent that refugees would be recognized in one state and rejected in another. It turned out that the member states were rather reluctant to harmonize asylum policy or even to share responsibility as was clear in the policies towards the refugees from ex Yugoslavia in the early 1990s (see 3.3.2). Constraints on national sovereignty were not readily accepted. By 1985 the proposal of harmonizing the concept of first country of asylum within the CAHAR had already been shelved, so an alternative to CAHAR had to be created a role to harmonize the substantive recognition of refugees was clearly unrealistic. The formal coordination about asylum policy took place at the EU-level, but it progressed at snail pace. A first step for substantive harmonization was the creation of the *Clearing House on Migration or Centre d'Information de Réflexion et d'Echange en Matière d'Asile (CIREA)* which was an information platform created in 1990 that provided comparative information on eligibility and recognition policy of different EU countries.

[136] The Ad Hoc Group on Immigration became after 1991 referred as the Steering Group on Asylum and Immigration.

[137] Ad Hoc Group immigration, memorandum from the Dutch Presidency 'Analysis of the correspondences and differences in the material right of asylum', 1.10.1991 in Spijkerboer 1993a, 89-94.

3.1.2. Eurodac: a computerized fingerprint identification system for asylum seekers

Related to Dublin was the project of a computerized fingerprint identification system for asylum seekers (EURODAC) to fight multiple asylum applications on an European scale and thus a tool to assure the single responsibility rule of the Dublin Convention. Also this project would take years to be implemented. In 1989 fingerprinting of asylum seekers was introduced in Belgium and France. A national database on fingerprints to prevent multiple applications was fully working by 1993 in both countries. In the meantime Austria, the Netherlands, Switzerland and Germany had embarked on setting up a national database. Refusal by an asylum seeker to be fingerprinted was in France even a ground for dismissing an asylum request. Until 1995 in Denmark only asylum seekers about whom there was some doubt as to his or her identity could be fingerprinted, in 1995 also Denmark decided to fingerprint them all (IGC 1994: 13; IGCC 1997: 120). These databases were still limited to the national space, exchange of information between states was still rare. The informal exchange of fingerprints between Switzerland and Austria in the early 1990s yielded 10% of the cases having applied for asylum in both countries (IGC 1994).

3.2. The Albanian flight to Greece and Italy in spring and summer 1991

Similar to Austria confronted with a massive flow of Romanian asylum seekers in 1990 the Greek and Italian authorities were in shock due to a single cause, the sudden Albanian inflow in 1991. The mass flight of Albanians to Italy challenged immediately the provisions of the new Italian immigration policy. In March 1991, at the time of the overturn of the communist regime slightly more than 18.000 Albanians requested asylum, the Central Commission for Recognition of Refugee Status examined during 4 sessions between March and June 1991 in an accelerated procedure these requests and considered only 645 of them as refugees (4%). A forced return to Albania of these large number of rejected asylum seekers seemed not to be appropriate. The lack of any humanitarian status in the Aliens Law obliged the Government to resort to a special administrative measure in order to manage the mass influx of the Albanians. The stay of those thousands considered not to be refugees was regularized under the condition that they had not committed any criminal acts. The Albanians not recognized as refugees got a residence and (renewable) work permit for one year. From June 1991 onwards however push backs prevented more Albanians to disembark in Italy and apply for asylum. By August 17, 1991 the about 20.000 persons who had arrived during the month of August 1991, including those who had asked for were forcibly returned. Those few who still managed to file their claim were as a rule disqualified as refugees by the Central Commission for Recognition of Refugee Status due to the so-called democratization of Albania which had made Albania a safe country of origin. In the summer of 1991 Italy developed a double path for dealing with the "crisis". On the one hand, the Italian government promised economic aid to the Albanian authorities and on the spot provided the country with essential good on the other hand, the government decided to consider Albania a safe country (Hein 1993, 1998; Ferrari 1996).[138]

Also Greece was confronted with this Albanian mass flight. Greek policy makers got in panic and the first Greek alien legislation voted by Parliament in 1991 became mainly a police law to stop irregular immigration (Baldwin-Edwards & Fakiolas 1998). It was not a comprehensive alien law which gave Greek immigration policy a normative basis as asylum was hardly mentioned

[138] The concept safe country of origin had no legal basis in Italian legislation.

3.3. Dismissing, speeding up or circumventing decision making in asylum requests (1991-1993)

Pre-entry measures were used to stem the flow of asylum seekers at the source, transit or at entry point. Visa requirements were used for a country specific approach. In the early 1990s France and Switzerland even introduced transit visa requirement as persons ostensibly transiting the country asked for asylum in the airport.[139]

Visa requirements have a direct impact on inflows from the affected countries, certainly when it is combined with carrier sanctions which were introduced by an increasing number of countries. Air companies introduced document inspection at place of departure as they no longer transported passengers when they were not properly documented (passport and if applicable visa). Carrier sanctions meant that transport companies were fined for the number of improperly documented aliens transported into a country. These fines were not levied when the undocumented asylum seekers was recognized as a refugee (Lavenex 2001: 169). This exception was only introduced to pay lip service to refugee protection as it does not seem that the authorities in their communication with the transport companies were eager to keep this flight possibility open for refugees. The authorities did also not offer any training to the staff of transport companies on how to recognize refugees. The authorities did provide training to the staff of airlines, but mainly to qualify them to distinguish forged visa and passports from genuine one. The airlines instituted documentation checks in the source countries and were assisted in this endeavour by IO staff of the West European destination countries. This remote border control was outsourced to private actors Many countries started to station immigration officers in source countries to assist the staff of these private companies. These immigration officers gave a so-called non binding advice to the staff of the airlines on who to refuse (Cruz 1991; Scholten & Minderhoud 2008).

Post-entry measures were introduced as well. Most states reduced the number of appeal instances, some imposed time limits on appellate bodies. The latter foundered in several countries as the judiciary was reluctant to accept these ever shorter time limits as this was considered an interference with judicial autonomy. Withdrawing the suspensive effect of filing an appeal was another strategy, this was in particular the case with pre-screening decisions. By 1990 most AO in the countries in our sample had seen a small increase in their staff. Only France had already allocated substantial more financial resources (and personnel) to its management of the asylum case load from 1988 onwards. From 1990 onward financial resources and personnel will be in all countries substantially increased. Information was computerized as well on asylum seekers and online access for protection officers for country of origin information (IGC 1994: 12). At the same time admissibility and accelerated procedures were introduced as it enabled respectively to dismiss asylum requests and quicker decision making.

3.3.1. Austria and Switzerland on the Danish track

In the 1980s Switzerland had already introduced an expedited procedure for manifestly unfounded claims. In order to further accelerate asylum procedures the Danish example was

[139] In 1993 France and Switzerland required airport transit visa for the following nationals: Angola, Bangladesh, Ethiopia, Ghana, Haiti, Somalia and Zaire. The French demanded also transit visa for nationals of Albania, while the Swiss demanded this also for the following nationals: India, Iran, Lebanon, Nigeria, Pakistan, Sri Lanka, Turkey except if they held a visa or residence permit for an EFTA, EC or North American country. For France this remained so certainly until 2006. IGC 1994: 1; IGC 2007: 169. According to Amnesty International & France Terre d'Asile (1997: 147) France demanded a transit visa in 1997 also for Afghanistan, Eritrea, Iran, Irak, Liberia, Nigeria, Libye, Pakistan, Sierra Leone and Sri Lanka.

introduced and 'safe third country' and 'safe country of origin' concepts were introduced in 1990 and 1991 respectively in Switzerland and in Austria.

The Swiss legislature decided in 1990 to dismiss applications from the asylum procedure, thus not considering the merits of the case if they came from a country which their government had decided to be a safe country.[140] Also in cases being manifestly unfounded and if the applicant had concealed his identity such a drastic decision was to be taken (IGC 1992: 79). In Austria a formal pre-screening procedure was introduced beginning in April 1990. It applied to asylum-seekers requesting asylum at border posts and at the Vienna Airport. The aim of the pre-screening procedure was to filter manifestly unfounded claims from other claims. The competent authorities for the pre-screening procedure were the district authorities (*Bezirksverwaltungsbehorden*) or the federal Police Directorates (*Bundespolizeidirektione*n). A negative pre-screening decision can be appealed to the regional Security Directorate (IGC 1990). In 1991 the Austrian legislature continued on this road.[141] Austria had completely revised the Asylum Act and the Aliens Act in 1991 which went into effect in June 1992 and which introduced the concept of safe third countries and safe countries of origin as a device to dismiss an application manifestly unfounded and not to be investigated (Löschnak 1993: 8ff.). In Austria already in 1990 a pre-screening procedure had been introduced at the border posts, including the airport for manifestly unfounded applications. Taking fingerprints of asylum seekers had also been introduced to prevent multiple applications.[142]

In both countries appeal against the dismissing of an asylum request was possible, but it was not suspensive which meant that asylum seekers had to wait abroad for a decision in their case. This implied that the asylum seekers did not receive a temporary residence permit when their asylum claim was investigated. However the Austrian Federal Constitutional Court forced the legislative branch to provide for an suspensive appeal. Switzerland could retain its non suspensive appeal, but in the border procedure the Swiss authorities were more conscious about the rights of asylum seekers as they only deported asylum seekers after they received the consent of UNHCR to do so. UNHCR had full access to the file and could also contact the asylum seeker.[143]

Swiss and Austrian AO fully established

In Austria and Switzerland this radical change in migration management went along with an institutional innovation in Refugee Status Determination (RSD). Although in 1985 the Swiss federal government had considered that within at most ten years the AO would cease to exist, in 1990 the authorities decided that "the increasing complexity of asylum policy" called for a

[140] In 1990 the Swiss Federal Council designated Poland, Czechoslovakia and Hungary as safe countries; in the spring of 1991 Bulgaria, Algeria and India were added; in 1992 Romania and Angola were also added but Algeria was dropped in February 1992. India, despite documented human rights violations, was added because an internal flight alternatives would, according to the Swiss authorities always exist given the size of the country and its federal structure. Hailbronner 1993: 43-44.

[141] The Austrian authorities also excluded from asylum the so-called 'post-flight reasons' *(Nachfluchtgriinde)* as was already the case in West Germany and Switzerland. When the asylum seeker after he entered on the territory of Austria deliberately acted in a certain manner to justify the grant of asylum his claims was dismissed. Kussbach 1994.

[142] Austria in Seminar on the Functioning of Asylum procedures arranged in the Context of the Inter-Governmental Consultation on Asylum Seekers in Europe and North America, 1990. UNHCR Legal Factsheet, 9.1991, AN, 19970381/6.

[143] Switzerland in Seminar on the Functioning of Asylum procedures arranged in the Context of the Inter-Governmental Consultation on Asylum Seekers in Europe and North America, 1990, UNHCR Legal Factsheet Switzerland, 9.1991, AN, 19970381/6.

permanent administrative body within the Ministry of Justice and Police.[144] This newly created AO was no longer dependent on the Police Office, but became a proper Office of the Ministry.[145] An AO which not only decided about asylum requests, but also registered asylum applications. As mentioned before at the start of their trajectory asylum seekers could register their application at centrally managed registration centers from 1988 onwards which were managed by the AO, this constituted a competition for the cantonal registration competence. The Swiss AO could recognize refugees as well *de jure* as *de facto*. The latter were provisionally admitted or temporarily protected. The administrative and personnel resources increased considerably. A priority were the asylum claims of 2,500 persons who came from so-called safe countries of origin: in June 1991 a special task force of two lawyers and six students was established to decide on these cases within a period of four months. These expedited rather collective procedures were however individualized when the so-called safety of a country was in jeopardy. Due to the political situation in Algeria from June 1992 onwards the Algerian asylum seekers were handled on a case by case basis (Hailbronner 1993: 45-50).

Another innovation was that the AO had also explicitly to decide whether the return to the country of origin of an asylum seeker they rejected was possible, permitted or reasonable. When the AO decided that expulsion was inacceptable, unreasonable or impossible the expulsion order had to be suspended temporarily. These non repatriable foreigners were explicitly or implicitly tolerated.[146] In cases of hardship and this upon demand of the cantonal authorities the AO could decide to grant these *de facto* refugees a permanent residency status.[147] The whole trajectory of an asylum seeker, including their expulsion when it was considered they did not need protection, was managed by the AO, a clear example of concentration in asylum matters.

Also in Austria the new legislation went along with an institutional reshuffling. An AO was created within the Ministry of the Interior under a government commissioner for refugee and migration affairs (Dahlvik 2018: 44; Kraler 2011, IGC 1990).[148] The AO had offices in the different regions of the country. The AO decided about recognition. A radical innovation for Austria of the 1991 legislation was that the AO obtained the competence for granting temporary residence permits who could not exceed one year for those rejected asylum seekers whose expulsion was impossible or legally inadmissible. Only in exceptional cases this residence permit could be extended, but for no more than another year. According to a staff member of the Interior Ministry at the time of the drafting quoted by van Selm-Thorburn (1998: 199) this paragraph was included "at the last moment, due to apparent foresight based on past experiences of conflicts in neighboring states, and mass exodus from Hungary in 1956, Czechoslovakia in 1968 and Poland in 1981". Kussbach (1994) detected a rather future oriented provision as he considered the legal impediments to deportation to spring primarily from article 3 of the European Convention of Human Rights, which provided that no one shall be subjected to torture or to inhumane or degrading treatment or punishment. A (rejected) asylum seekers could not

[144] There was a strong continuity in decision making as between 1989 and 1999 the head of the Ministry of Justice and Police remained Arnold Koller (CVP).

[145] The AO was called the *Office federal pour les réfugiés* (ODR*)/ Bundesamt für Flüchtlinge* (BFF). It had a staff of 250 in 1989, this increased to 350 in 1989-1990 and 500 by the end of 1991. IGC 1992: 82.

[146] It was not only a temporary protection as also technically unrepatriable rejected asylum seekers could benefit from this status.

[147] Also rejected asylum seekers with no need for protection can apply through the cantonal authorities for a humanitarian residence status because of hardship. Portner 2021: 105.

[148] The AO was called *Bundesasylamt* (Federal Asylum Office). Within this Directorate-Generale III B the AO was the department dealing with asylum, while the other three departments in this directorate-General III B were dealing with residence and citizenship affairs, electoral affairs and integration. III refers to Sektion III Pass-Staatsbürgerschaft-, Flüchtlings- und Fremdenwesen. Ostterreichischer Amtskalender of the Ministry of Interior, 1990/91 Wien: Osterreichischen Staatsdrückerei, p.123.

apply for this status, it could only be rendered ex officio. This temporary protection could also be granted by ministerial order (Brandl & Feik 2002; Kussbach 1994).

Notwithstanding earlier radical opposition of the Swiss government to any appeal by an external body, in 1990 the government created a AT which started operating in 1992.[149] The hesitation of the executive authorities was still manifest in the provision in the law introducing the AT that the government in extraordinary circumstances could interfere in its functioning. This AT was to alleviate the work load of AO and develop a jurisprudence in asylum matters, which could, it was hoped for increase the legitimation of the asylum policy (Miaz 2021: 56, 2017: 116). In Austria an (internal) appeal against its negative decisions was still possible at the Ministry of the Interior.[150] UNHCR was no longer a partner of the Austrian authorities in the appeal procedure, it retained only a general oversight possibility (Kussbach 1994).[151]

3.3.2. Flight of Bosnians in the wake of the Yugoslavian civil war, 1991-1995

Slovenia secured its independence with little casualties in its Ten-Day War in the early summer of 1990 against the Serb-controlled Yugoslav People's Army. The war between Serbia and Croatia was much more brutal and lasted until December 1991. About eighty thousand refugees from the war in Croatia left Yugoslavia and headed mostly for Germany and Austria. Most returned after the first phase of the war in Croatia which came to a close in late 1991.

In April 1992 the war in Bosnia-Herzegovina began, which lead to terrible fighting with Serbian and later Croatian forces seeking to gain territory for their new nation-states. It went along with ethnic cleansing of these territories they tried to annex. The Muslims in contrast to Serbs and Croats in Bosnia-Herzegovina had no safe state in the Yugoslav lands to which they could flee. The strategy of West European states was to provide so-called preventive protection with safe havens in Bosnia-Herzegovina such as Srebrenica and support also refugee reception in the other Yugoslav lands. Although Croatia and Slovenia took in some of these Bosnian refugees, they forced many to move on. The war in Bosnia-Herzegovina ended in late 1995 after Bosnian-Serb atrocities, most notably the massacre of about eight thousand Bosnian Muslim civilians at the Srebrenica, prompted NATO to conduct offensive operations against Bosnian Serb forces. The war reached its official conclusion with the Dayton Accords in December 1995.

In our analysis of the reception conditions in the different countries of Western Europe we will focus on the initial reaction of the authorities to the inflow of Bosnian refugees between 1991 and 1993.[152] Nearly six hundred thousand Bosnian refugees fled to member states of the European Union. This dispersion of the refugees was in no manner preordained. The authorities did not know how many war refugees from Yugoslavia would knock on their door and the eventual pull factor of their decisions was one of the considerations in the decision making. It turned out that states adjacent to the conflict and who had a sizable community of Yugoslavian descent were much more affected by this refugee flow than other states. Germany took in more than half of the six hundred thousand Bosnian refugees, but also Austria took into in a large share of these war refugees. Most of the other states of our sample would finally receive only a small number of war refugees.

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[149] The AT was called *Commission de recourse en matière d'asile* (CRA: Asylum Appeal Commission).

[150] Appeal was possible at the AT in the *Bundesministerium des Innern.*

[151] The law of 1991 stipulated explicitly that asylum-seekers may address themselves to UNHCR during the procedure at any time and UNHCR is authorized to ask for information, is entitled to look into the files, has the right to be represented at asylum proceedings, and may also contact asylum-seekers or refugees at any time.

[152] In many countries the authorities provided protective measures for a larger group than the Bosnian refugees, but the latter were always included. We will not discuss the changing definition of the groups protected. This is not a study of protection for war refugees from Yugoslavia per se, but an analysis to delineate the role of the AO in the decisions to provide protection to Bosnian refugees.

UNHCR and international coordination

In early 1992 the number of Bosnians fleeing the Yugoslav lands creased dramatically. These Bosnians made up the vast majority of the refugees who applied for asylum in states outside the former Yugoslavia. Already early 1992 UNHCR urged European states to grant Bosnians protection. In order to avoid non-admission policies UNHCR proposed in July 1992 formally that states admit Bosnian refugees under a temporary protection program which was to be framed outside the regular RSD procedures. Temporary protection combined respecting an international obligation –*non-refoulement* based on international law- and functioning in a pragmatic way by respecting within certain limits national discretion. UNHCR advocated a quick solution for Bosnian refugees and was convinced that European governments would be more willing to admit large numbers of people on the move who had been stranded within the former Yugoslavia when this happened outside the regular asylum procedure. Temporary protection was conceived as a way to grant Bosnians protection without making them apply for asylum: it saved the already overwhelmed European states' asylum systems from a huge influx of refugees and assumed that protection needed to be only temporary for the war refugees as they would return to their homeland once the war ended (Molnar 2019: 170). UNHCR proposed to grant the Yugoslavian war refugees a humanitarian permit to stay for one year in order to quickly give them clarity about their further stay in the country of asylum until the end of the civil war. UNHCR insisted that the status of temporary protection had to be attractive enough to make the war refugees not apply for regular asylum.[153] Programs of temporary protection were eagerly adopted. One of the advantages was that the reception of asylum seekers could be outsourced from the state to civil society. As Rainer Bauböck (1999: 123) stated "admission was premised upon the expectation that Churches, voluntary agencies and private families would take a large share of the responsibility for assisting and accommodating these refugees". Another advantage of a temporary protection was that this would enable the authorities, when the war was over to return these so-called displaced persons to their country of origin without the need to conduct any further administrative procedures. However the UNHCR proposal for temporary protection backfired when states accepted this program, while simultaneously remaining decided to implement non-admission policies towards Bosnian refugees by introducing visa requirements and denying visa to applicants from Bosnia. This became in particular acute in the winter of 1992 when 6000 camp inmates in Serb controlled territory were liberated and UNHCR looked for resettlement opportunities in the European Union. A consensus among the member states concerning responsibility sharing turned out to be difficult.[154]

In addition although UNHCR had insisted that temporary protection should not be used as a mean to preclude refugees when they would fall under the scope of the 1951 Geneva Convention from full refugee status, this was not heeded in some countries. Also burden-sharing programs had little response. Nearly six hundred thousand Bosnian refugees fled to member states of the European Union, but a proactive resettlement policy hardly influenced the dispersion of these refugees (Molnar 2019: 164-170; Barutciski 1996; van Selm-Thorburn 1998).

Fig. 9. shows the very variated response of our sample of states to these refugees in need of protection. This overview is mainly based on IGC 1995 in which each state provided information on its policy towards the war refugees from Yugoslavia. Certainly given that this report was meant to be public the information it contained had a public relations character. The process of decision making is not outlined and only the decisions, but not all of them, are enumerated. Some of the figures provided in this report were not very detailed or some states

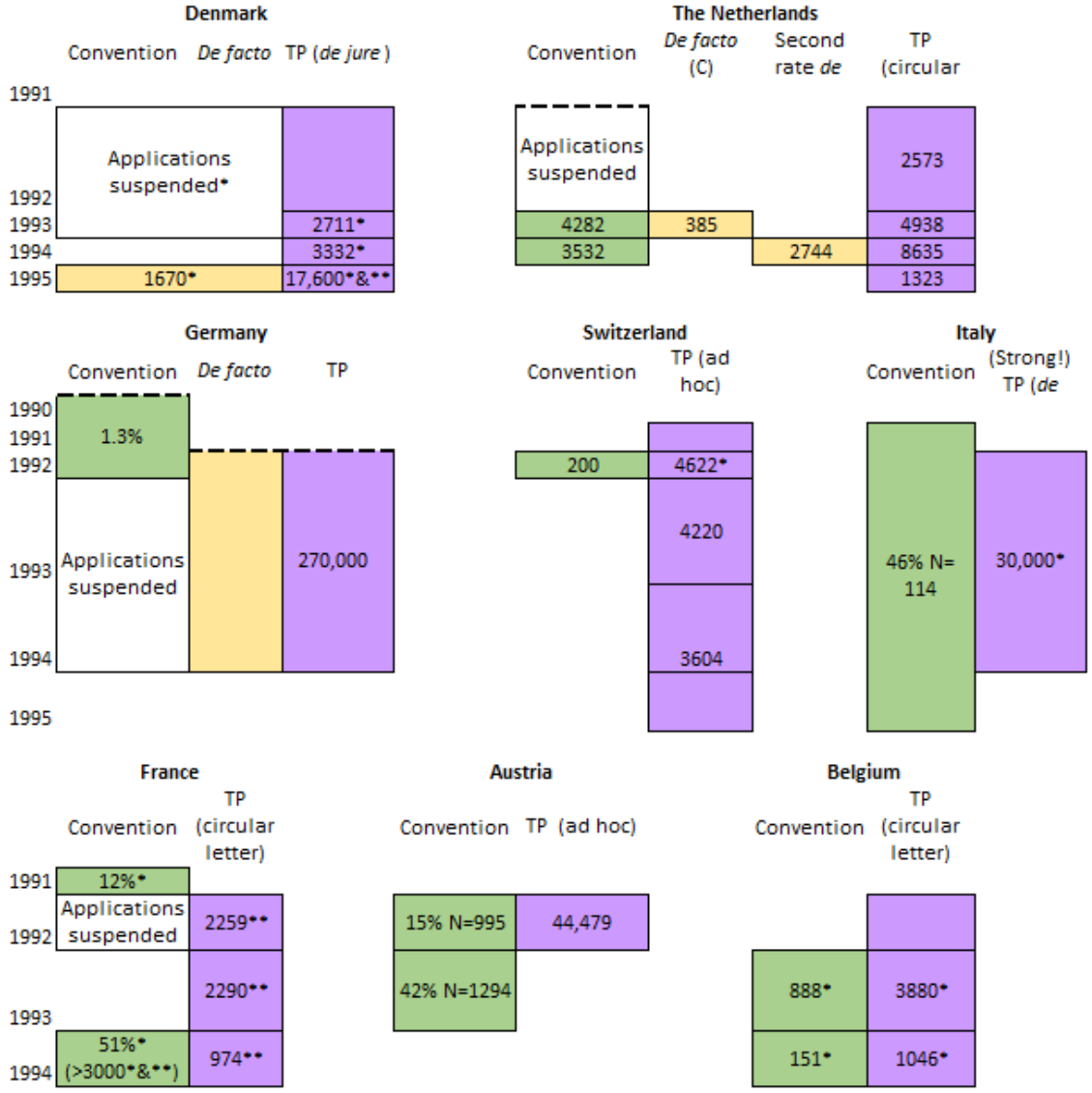
[153] HCR Germany to UNHCR Headquarters, 12.8.1992; Arbeitspapier zum Schutz von Kriegs- und Bürgerkriegsflüchtlingen, 30.6.1992. AUNHCR, 600.GFR - Vol.8 - 1991-1992.

[154] Conseil d'administration OFPRA 16.11.1992. AOFPRA, Dir 1/10 ; De Volkskrant, 28.10.1992.

stated inflated the figures of the number of people they protected.[155] Our archival documentation which was meant for internal use only provided us for some countries with more reliable or detailed figures and enabled us to add the Austrian case. Literature and archival documentation provided us with material to reconstruct the decision making process and we provide an overview of the insights we have. This is still on a case by case basis but some case studies like Germany and Denmark provide only a superficial overview. We hope with more material to provide later a fully developed analytical overview.

[155] Italy stated in IGC (1995: 129-130) that it received more than 56.000 war refugees, but according to UNHCR data the Italian authorities had registered 30.000 war refugees. UNHCR mentions that the authorities claimed that there were more than 10.000 unregistered Roma travelling in Italy which had fled the war in Yugoslavia too but who did not make use of the facilities offered by the Italian authorities. As this claim of a largely unregistered and very mobile Roma population from Yugoslavia could not be verified we chose for 30.000 war refugees protected by Italy. For the *de jure* refugees Italy mentions only 24 Bosnian applicants of which 11 were recognized, while the UNHCR referred to 114 decided applications in 1993-94. AUNHCR, 100-ITAL-YUG (a). For the Austrian figures AUNHCR, 100-AU-YUG and for more detail see 3.3.2.

Fig. 9. Recognition policy of some European countries towards Yugoslavian (if available specifically Bosnian) asylum seekers



* No distinction made between Bosnians and other ex-Yugoslavian nationalities
** The reported number is not the amount of decisions taken that year but the amount of people that are protected by the TP status at the end of the year. Therefore, it also includes people who got a decision in the previous years
N= number of total decisions (+ & -)

Since 1965 tourism from Yugoslavia to Western Europe had not been hindered with a visa obligation and many Croats and later Bosnians used this opportunity to flee to Western Europe. Yugoslavian citizens benefitted from a three-month visa-free stay, after which many of them received a renewal of their visa for 3 to 6 months. In some cases this permission to stay was extended on short notice. When the financial means were exhausted or the support of relatives was insufficient they applied for welfare at the local authorities. Then only the authorities had to respond to this protection need. Still the war refugees were not welcome. States started to recognize Bosnia-Herzegovina's statehood. Very quickly the citizens of the new state needed a visa to gain admission to the West European countries where they could find protection. Switzerland imposed a visa obligation already op January 1, 1992, Germany in April 1992, Belgium and the Netherlands in July 1992, France in August, 1992, Denmark in June 1993. Although Austria introduced only a visa obligation on April 15, 1995, in reality the border was

to a large extent closed for refugees from Bosnia by May 1992 (see further). Italy is the only country in our analysis that did not install a visa obligation for (ex-)Yugoslavians.

Germany excludes Bosnian refugees from the asylum procedure[156]

In the summer of 1992 already 200,000 war refugees had fled to Germany and were permitted to stay as tourists.[157] A federal deportation ban had been decided for Croatians and Bosnians in October 1992 which was prolonged in October 1993.[158] Many Bosnians lodged an asylum application, this was not always voluntarily. When they applied for support at the local authorities many were referred, due to the domestic regulation on the carrying of the costs concerning social aid, to the asylum procedure, even in cases where they did not want to apply for asylum.[159] Most of these asylum requests were rejected.[160] UNHCR insisted on temporary protection. The regions had the competence to grant a humanitarian permit to stay. The blanket allowance of this status, so without individual examination, would protect them for the duration of the conflict. However the federal Minister of the Interior had to give his consent.[161]

It was decided to tolerate ex-Yugoslavs straight away, while for all other nationalities to be tolerated, a mere suspension of deportation was only possible after the end of the asylum procedure. After July 1, 1993 Bosnians who applied for asylum, except for those who arrived directly by air were no longer eligible for asylum.[162] The Bosnian war refugees from former Yugoslavia were effectively excluded from access to asylum and in their vast majority locked into the precarious status of being tolerated (Bosswick 1995).

Austria experiments with a similar, national solution

As van Selm-Torburn (1998: 192-193) documents the initial reaction to the influx of Croats in 1991 was a successful example of short-term protection. By December 1991, 13,000 Croats had fled to Austria, in September 1991 the authorities had set up a special assistance program for these refugees which was run by the governments of the regions and co-financed by the federal authorities (respectively 35 and 65%). This assistance project was closed down in March 1992 and nearly all protected people returned, at most two thousand of them stayed put as due to political reasons they could not return. The program remained however open to a new group, the refugees from Bosnia-Herzegovina.

When the war started in Yugoslavia the Austrian government perceived its country as a transit country for refugees from the East, but the inflow of refugees from Croatia and later Bosnia had not met with offers of resettlement. As well multilateral fora as bilateral talks did not yield significant resettlement offers for the war refugees in Austria. Consequently the Austrian authorities aimed not only at limiting the influx, but also at not admitting the Bosnians to the regular asylum procedure and its assistance program.

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[156] This is only a first draft. The German policy towards war refugees from Bosnia will be later elaborated on.

[157] in April 1992 Germany had recognized Bosnia-Herzegovina's statehood and the citizens of the new state needed a visa to gain admission to the Federal Republic.

[158] HCR Germany to UNHCR Headquarters, 8.10.1993, p.3. AUNHCR, 600.GFR - Vol.10 – 1993.

[159] In 1991 29,2% of the asylum seekers in Germany were from Yugoslavia and during the first five months of 1992 39,6% were from (ex-)Yugoslavia, in total 136,865 requests. HCR Germany to UNHCR Headquarters, 12.8.1992. AUNHCR, 600.GFR - Vol.8 - 1991-1992.

[160] In 1993 only 59 Bosnians were recognized in 1993 by the German AO, but 1.913 were denied asylum that year (recognition rate 3%). Even when the sanctions for draft evasion were very harsh the AO did not consider this a persecution. Only if the severity of the sanctions would be related to specific groups or individuals for one of the grounds mentioned in Article 1 of the 1951 Geneva Convention the AO qualified this as persecution. Davy 1995: 64.

[161] HCR Germany to UNHCR Headquarters, 12.8.1992; Arbeitspapier zum Schutz von Kriegs- und Bürgerkriegsflüchtlingen, 30.6.1992. AUNHCR, 600.GFR - Vol.8 - 1991-1992.

[162] HCR Germany to UNHCR Headquarters, 13.8.1993, p.3. AUNHCR, 600.GFR - Vol.10 – 1993.

The care and maintenance scheme for Bosnian war refugees was very flexible and unbureaucratic. Date or arrival and origin were sufficient to qualify, no individual hearing was necessary. It was also a very informal arrangement, so no specific rules legalizing the presence of the war refugees in Austria were enacted. It was a less generous scheme than the care and maintenance scheme for regular asylum seekers which the federal authorities financed solely. War refugees received in average only 1/3 of the financial support which asylum seekers received. They were also not allowed to work. Similar to other aliens, including asylum seekers, they could only do jobs which local workers did not want to do. Similar to other asylum seekers the war refugees'mobility within Austria was restricted. From July 17, 1992 the refugees from Bosnia were, in contrast to asylum seekers, allowed to work but only in the secondary segments of the labor market.[163] The Bosnian war refugees temporarily protected were definitely worse off than a *de jure* refugee in Austria, as in line with the Convention of Geneva the *de jure* refugees had an unrestrained access to the labor market and could also travel freely in the country.

By May 4, 1992 the Austrian-Yugoslavian border was closed for refugees from Bosnia who had no sufficient means for their temporary stay as a tourist or a letter of sponsorship. Push backs were reported in the Austrian media in the beginning of May 1992. By the end of June 1992 20.378 refugees from Bosnia-Herzegovina were registered in Austria. The authorities estimated on unclear criteria that another 20.000 refugees were unregistered as they considered that many refugees were staying unregistered with their relatives in Austria. The Austrian authorities claimed that these forty thousand war refugees virtual exhausted the reception capacity of the country and decided to close the Austrian-Yugoslavian border by July 2, 1992. In their official statement the authorities underlined the necessity of a stop to its open-door policy as it had been misused by Serbia for the furtherance of it 'ethnic purification policy", but that war refugees with close relatives in Austria would still be welcome. The authorities could, depending on the reception capacity also authorize more refugees to enter.

In the next two weeks another 824 refugees, mostly elderly, children and women had been authorized by the border authorities to enter Austrian territory, but an unknown number of refugees were stopped at the border.[164] Notwithstanding the border guards people fleeing the war still entered Austria. By September 1992 the number of registered and supported war refugees from Bosnia-Herzegovina had increased to some 34.000 persons, most were accommodated with private hosts. The increase was to a large extent due to this pool of unregistered refugees who had been already in Austria before the border was closed and which the Austrian authorities had estimated to oscillate around 20.000 persons. These persons had initially been supported privately, but as time passed more and more applied for state support. The Austrian authorities decided to close the border even further: the border guards had to refuse access to Austria to all war refugees from Bosnia-Herzegovina who had been staying for more than two weeks in a third state.[165] On November 20, 1992 the border guards got the instructions to be even more strict. By January 1993 there were already 44.479 war refugees registered at the special assistance program for refugees from the former Yugoslavia, but the Austrian government estimated it gave protection to 73.000 refugees from Yugoslavia as they added the 4.358 asylum seekers from Bosnia and an lose estimate of 25.000 unregistered war refugees. The latter number remained the same as in June 1992, although at that time already UNHCR questioned this figure as a totally arbitrary number. By 1993 UNHCR clearly considered this number as a manner to inflate the number of people Austria gave protection to.

[163] Hans Staudinger, associate PO UNHCR, Survey on the status of refugees from ex-Yugoslavia in Austria, 19.11.1992. AUNHCR, 100-AU-YUG; Löschnak 2013: 8-9, 64-65.
[164] State of affairs on July 18, 1992.
[165] Widermann to Sicherheisdirektionen/Fremdenpolizeiliches Büro, 16.9.1992. AUNHCR, 100-AU-YUG.

According to UNHCR many unregistered and unassisted refugees had by then availed themselves of state support.[166]

In June 1993 the Austrian government issued an ordinance granting temporary residence permits to all Bosnian nationals who, as a result of the armed conflicts, had to leave their home country and entered Austria before July 1, 1993.[167] Bosnian nationals entering Austria after July 1, 1993 were temporarily permitted to stay but only if they had entered Austria in a regular manner. Those refugees who entered in an irregular manner were denied access to the special assistance program for refugees from the former Yugoslavia (van Selm-Thorburn 1998: 190-191). They remained illegal in the country and many of them have been issued with expulsion orders which, however, remained unexecuted.[168] By October 1993 the situation of the illegal entrants had not been resolved yet. UNHCR raised the issue with Manfred Matzkan of the Ministry of the Interior who answered that "he needs to talk to Minister, problem has to be decided politically. His suggestion: legalization of those who cannot be returned". It is unknown to us whether the latter Bosnian refugees received ever protection through the temporary protection program or whether they could apply for refugee status, but seen the practice of the AO this would only have been a solution for a very short time.

Recognition policy

By October 31, 1992 938 Bosnian refugees had applied for asylum. Their numbers had increased by January 1993 to 4.358 persons. By October 31, 1992 the recognition rate for Bosnians was only 5%: of the 567 decisions only three had been positive. The 564 rejected asylum seekers were released from the care and maintenance scheme for asylum seekers, but on the basis of an agreement between the Ministry of the Interior and the governments of the federal provinces they were denied access to the special assistance program for refugees from the former Yugoslavia.[169] Although the AO was competent to grant a temporary residence permit if a removal was, for legal or factual reasons, not possible, or the asylum seeker, for other important reasons, could not be expected to return to his or her home country it did not use this competence for Bosnian rejected asylum seekers throughout 1992. Numerous Bosnian asylum seekers withdrew their asylum application in order to qualify for the support of the special assistance program for those from Yugoslavia (Taucher 1995: 232).[170]

This refusal to grant access to the regular asylum procedure provoked the ire of UNHCR. Austria agreed in November 1992 to join the UNHCR sponsored resettlement campaign. They took in a quota of 205 persons (plus 197 spouses/children[171]) who had experienced severe persecution in detention camps, UNHCR reminded the Austrian government that these persons normally merit refugee status.[172] The Austrian authorities heeded the advice, the 152 refugees from Bosnia-Herzegovina which were recognized as Convention refugees in 1992 were nearly exclusive from among this group. In 1993 another 543 refugees

[166] G. Köfner, Number of refugees from former Yugoslavia in Austria 22.11.1992. AUNHCR, 100-AU-YUG.
[167] These temporary residence permits were due to expire on June 30, 1994 and in May 1994 the permits were extended to the end of 1994. Davy 1995.
[168] Humanitarian issues working group of the International Conference of the former Yugoslavia, Survey on the Implementation of Temporary Protection, 23.6.1994. Van Selm-Thorburn (1998: 191) quotes reports that some deportations, either directly or indirectly to Bosnia routed via Hungary have taken place.
[169] Hans Staudinger, associate PO UNHCR, Survey on the status of refugees from ex-Yugoslavia in Austria, 19.11.1992. AUNHCR, 100-AU-YUG.
[170] van Selm-Torburn (1998: 192) points out that this position was overturned by the High Court and that those on the special assistance program could remain on that program while their asylum claim was pending. We ignore when the judiciary intervened.
[171] Humanitarian issues working group of the International Conference of the former Yugoslavia, Survey on the Implementation of Temporary Protection, 23.6.1994, p.6 mentions indeed 200 cases and in total 600 persons.
[172] Sadako Ogata (UNHCR) to Franz Löschnak, Minister of the Interior, 11.1992. AUNHCR, 100-AU-YUG.

from Bosnia-Herzegovina were recognized as Convention refugees.[173] According to UNHCR by the end of 1993 2438 Bosnian refugees had applied for refugees status.[174] The UNHCR branch office concluded that mainly the quota refugees had been recognized and that only 293 spontaneous arrivals from Bosnia-Herzegovina were recognized as Convention refugees. The chances for spontaneous refugees from Bosnia-Herzegovina to be granted the refugee status were fairly slim.[175]

Davy (1995) analyzed a number of decision of the AO during the spring and summer of 1993 which denied asylum to Bosnian asylum seekers and the main argument evoked was that war-like situations were prone to human rights violations, but that individual persecution necessary for qualifying for Convention protection did not occur. The conditions of suffering, according to the AO were not directed against specific individuals or defined groups, but were rather rooted in the general circumstances prevailing during the war. Also when rejecting claims of draft evaders or deserters the Austrian AO underlined the legitimacy of the obligation to serve in the army. Calling upon its male citizens was part of the sovereign rights of the state. Enforcement of this obligation did not constitute persecution. The AO evoked this traditional line of reasoning, but this argument was not only used to legitimize the forced conscription in the army of the country of nationality. This was also the case when deserters (or draft evaders) had been forced to enlist in an irregular militia and even in another state's army (Davy 1995: 121-129). The most notorious cases which Davy quotes in which the AO denied any persecution in Bosnia-Herzegovina were two rejected female claims of applicants who had been raped by Bosnian Serb forces. In one of them the Asylum Office's opinion states "the fact that you have been raped … is irrelevant under Austrian law because if cannot be inferred therefrom that the perpetrators acted with persecutory intent. The acts… obviously committed by drunk soldiers on their own initiative… they do not constitute persecution". This quote illustrates that the AO willingly ignored the war politics among the rival ethno-nationalist groups in Bosnia and the persecution this entailed. The applicants were victimized by the Bosnian Serb policy of 'ethnic cleansing', they were not picked out at random, but for their affiliation with a certain ethnic group. The first reports on "ethnic cleansing", publicized in the summer of 1992, already mentioned that the atrocities included rape and other abuses of women. By February 1993 this was confirmed by the Special UN Rapporteur who stated that rape was used on a large scale to humiliate, shame, degrade and terrify the entire ethnic group. The reviewing court, the Administrative Court quashed in 1994 several of these decisions with the argument that harm inflicted by nongovernmental organizations is persecutory if there is no effective protection by the government (Davy 1995: 102; Taucher 1995: 240).

The Netherlands: swift and generous protection

In July 1992, due to the high influx from war torn Yugoslavia the Dutch authorities decided, although they had already a *de jure* and two *de facto* refugee statuses to create yet another *de facto* status specifically for war refugees from Yugoslavia. These refugees obtained a suspension of expulsion for 3 months, so much shorter than the one year residence permit for non European war refugees under suspension of expulsion as the minister of Justice had hoped for a quick end to the Yugoslavian war. However the suspension of expulsion of already 15.00 war refugees by 1994 had to be extended four times, to finally end in 1995. As the Dutch

[173] 543 Bosnian asylum seekers were recognized by the asylum agency of first and second instance, while 751 had been denied asylum in 1993. The relative high recognition rate in 1993 (42%) was, according to Davy (1995:64) due to the family members of Bosnian nationals who had been recognized as refugees and from whom no individual decision had to be made.

[174] We know the outcome of 2010 decisions, the probable 428 decisions taken in November and December 1992 were 149 positive decisions and 279 negative decisions.

[175] Statistics of Bosnian refugees in Austria, 14.4.1994. AUNHCR, 100-AU-YUG. By April 1998 a total of 4.477 Bosnians had applied for asylum of whom 1277 were recognized as Convention refugees. Franz 2003: 9.

authorities hoped for a quick solution to this new refugees crisis, the municipalities accommodated Bosnians separately in temporary reception centers which were more sober than those for regular asylum seekers. In this manner they, even more so than the non European war refugees, could relieve the regular, already largely overburdened asylum procedure as they had not even to request asylum at all. They could immediately be covered by the temporary protection program for Yugoslavian war refugees.

In 1993 the Dutch authorities realized that the Yugoslavian war would last and that the emergency approach was not appropriate anymore neither for the refugees, nor for Dutch society. On April 10, 1993 the Dutch AO finally started to investigate the asylum requests from Yugoslavia. In 1994 one of the branches of the AO was even fully dedicated to processing Yugoslavian asylum applications.[176] At the same time the Bosnian war refugees served as the incentive to the Dutch authorities to improve the protection of all war refugees, be they rejected asylum seekers with the creation of the 'second rate *de jure* status' in 1994 (Obdeijn & Schrover 2008: 330–32; van Selm-Thornburn 1998: 225-226). The Minister of Justice argued that the situation of the war refugees from Bosnia justified fully at least that protection. Still few Bosnians got this status as the AO decided that the Bosnians who all had been given a 'suspension of expulsion' at first, qualified for a *de facto* (C) status or even more so for the *de jure* refugee status.[177]

France

From the end of 1991 onward the ministry of interiors insisted that refugees from war torn Yugoslavia had to be discouraged from applying for asylum. These people just needed temporary protection until the war was over. Prefects in some departments ordered however irregular immigrated war refugees from Yugoslavia to leave France and increasingly war refugees applied for asylum to protect themselves and to have the means to support themselves. Temporary protection was promoted by UNHCR and was a device that as well the AO as the ministry of Interiors considered in the best interests of France.[178] Although the *de facto* refugee status had been opposed by the ministry of Interiors at the end of the 1980s, by 1991 the ministry considered it a manner to protect refugees with less obligations for the state (only temporary and less rights) and if France would not join "*la France risqué fort d'être pris court par les évolutions des exodes et devoir utilizer des instruments juridique inappropriés".*[179] France was however more anxious about developments in Algeria than in Yugoslavia. In Algeria it looked like the Islamic Salvation Front could win the first democratic elections in December 1991. The French asylum institutions were mentally preparing themselves rather for a mass flight from the South rather than from the East. They believed that about half a million non religious Algerians who opposed an Islamitic government or who would (be afraid to) be discriminated against by an Islamic state would flee to France. They would apply for asylum, but they would not qualify for Convention refugee status and therefor temporary protection seemed to be an appropriate tool to receive them.[180]

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[176] IND. n.d. 'IND 25 jaar: Interview Hilbrand Nawijn'. Accessed 17 March 2022. http://ind.nl:80/over-ind/25jaarind/Paginas/IND-25-jaar-Interview-Hilbrand-Nawijn.aspx.

[177] Staatssecretaris Justitie. 1994. '66ste Vergadering'. https://repository.overheid.nl/frbr/sgd/19931994/0000003659/1/pdf/SGD_19931994_0001070.pdf.; Franssen 2011, 40-44; Staatssecretaris Justitie. 1995. 'Vreemdelingenbeleid; Brief staatssecretaris met antwoorden op vragen van de vaste commissie van Justitie'. https://zoek.officielebekendmakingen.nl/kst-19637-147.html.; Tweede Kamer der Staten-Generaal. 1995. 'Verslag algemeen overleg over het asielbeleid'. https://zoek.officielebekendmakingen.nl/kst-19637-148.html.

[178] OFPRA Conseil d'administration, 21.4.1992. AOFPRA, Dir. 1/10-11.

[179] Ministère de l'intérieur, Problèmatique de l'asile temporaire. Eléments d'intervention pour le Ministre. (sd 10 or 11.1991). AN, 2010011187.

[180] Lott with agreement of Bresson, proposition for preventive action, 12.1991. AN, 2010011187.

Only in 1992 the Yugoslavian war refugees came to the fore as an issue to solve when the military coup in Algeria and the resulting civil war meant that the expected mass flight of non-religious Algerians did not materialize. On 23 march 1992 the public authorities decided in an interministerial meeting to freeze the Yugoslavian asylum applications; the AO had to stop interviewing them. The ministry of interiors was preparing a status of temporary protection which would cancel the expulsion orders of Yugoslavian war refugees for whom France was the first country of asylum offer and offer them a temporary stay. A bone of contention was the right to work, some considered this could become a dangerous pull factor?[181]

On August 3, 1992 a circular letter to the prefects stipulated that Yugoslavian war refugees could be protected for (renewable) periods of 3 months. During this period they were granted following a circular letter of the Minister of Social Affairs of September 12, 1992 access to the labor market.[182] Asylum seekers were excluded from the labor market, but the French authorities hoped that the right to work for the war refugees would make the status of temporary protection more attractive. If the war refugees did not work, they received public welfare on the same terms as asylum seekers.[183] The period of three months could be renewed if the prefects considered that the situation required so. No war refugees from Yugoslavia were to be expelled.[184] Contrary to the Swiss situation, in France war refugees had to apply for temporary protection themselves at the prefecture as is was not granted *ex officio*. A temporary protection status did not exclude the option to apply for regular asylum, but then one lost the right to work. By the end of 1992 2259 persons were covered by temporary protection (IGC 1995).

During the second half of 1992 onward the ministry of interiors insisted strongly that the war refugees from Yugoslavian were not the competence of the asylum institutions. Senior civil servants from that Ministry even considered that one should not even discuss these war refugees in the OFPRA council as this was not the institutional location to discuss this independent granting of collective asylum by the French state. War refugees did not qualify for protection based on the Convention of Geneva and were the sole competence of the Ministry of Interiors.[185] Still it was not forbidden to apply for regular asylum. In 1992 there had been 2300 Yugoslavians who applied for asylum, partly because it was until August 1992 the only manner to be protected. Only in January 1993 the AO (re)started to examine asylum requests again (IGC 1995).[186] By February 1993 about 1450 asylum applications of Yugoslavians remained undecided, but 872 applications had been decided by then, mostly negatively as their requests "were considered manifestly unrelated to the Convention of Geneva".[187] Were these negative decisions part of the campaign to direct the war refugees from Yugoslavia to temporary protection? If so, the AO recognized still a small minority as *de jure* refugees. It is possible that at that time French (non) recognition policy changed course due to the arrival in France of

[181] OFPRA conseil d'administration, 4.12.1991 and 8.7.1992. AOFPRA, Dir. 1/10-11.
[182] Rapport d'activité OFPRA, 1993. AOFPRA, Dir. 1/4.
[183] OFPRA conseil d'administration, 16.11.1992. AOFPRA, Dir 1/11.
[184] There were in the period envisaged no forced returns of Bosnians. The readmission agreements concluded with Slovenia and Croatia made the return of their citizens possible from respectively February 1993 and January 1995 onward. IGC 1995.
[185] OFPRA conseil d'administration, 16.11.1992. AOFPRA, Dir. 1/11; Farde Conseil d'administration OFPRA. AN, 19970381/6. "For Yugoslavian war refugees no asylum, but only *abri provisoire* until the war was over" Ministère de l'intérieur. Le droit d'asile en France, problèms et évolutions récents (sd end of 1992). AN, 2010011186.
[186] Suspending the processing of Yugoslavian asylum applications was legitimized in the official statement of the French authorities on temporary protection by the need to buy some time to properly investigate whether some people would qualify for a *de jure* Convention refugee status and not by the objective to protect the asylum system. IGC 1995: 104.
[187] "Un certain nombre de decisions ont put être prises (872 dont essentiellement des rejets) pour les personnes dont la situation ne relevait manifestement pas des dispositions de la Convention de Genève". Rapport d'activité OFPRA 1992. AOFPRA, Dir.1/4. We have no more information on this refusal of protection.

some of the camp inmates resettled by UNHCR. Maybe UNHCR used these resettled refugees, as they did also in Austria, as the Trojan horse to break the refusal of the authorities to process asylum applications of Yugoslavian war refugees. In fact the French authorities had granted these resettled war refugees from former Yugoslavians and who were staying in reception centers immediately temporary protection for 6 months (IGC 1995). Still the AO sent out teams of protection officers to decide about the recognition of these 330 persons (and their families).[188] These war refugees who had been detained because of their ethnicity or religion qualified as *de jure* refugees. By the end of March 1993 already at least hundred war refugees from Yugoslavia had been recognized as *de jure* refugees and the director-general of the AO mentions in the council a recognition rate of 51,5% (N= 202).[189] Whether UNHCR and/or the AO had pushed their interests in recognizing *de jure* refugees among the war refugees from Yugoslavia against the will of the Ministry of Interior or not we do not know. However probably by then the fear among the policy makers of a mass flight of war refugees must have evaporated. The introduction of a visa obligation for Bosnians to travel to France in August 1992, but also preventive measures in Yugoslavia itself had diminished the numbers of people fleeing Bosnia. There was no longer need for an emergency measure such as freezing the (positive) decisions of the AO for this group of refugees. Also the AO had no longer a backlog and had the resources to decide each asylum request in a rather short time span. By the end of 1993, according to the director-general of the AO the recognition rate of Yugoslavian asylum applications was 60%.[190] It seems the war refugees from Yugoslavia considered that the regular asylum scheme was better for them than the temporary protection scheme. In 1993 more Yugoslavians applied for asylum than in 1992 (3000 versus 2300), but by the end of 1993 only 31 more persons qualified for the temporary protection scheme than in December 1992. While in December 1993 2290 persons were under temporary protection, this dropped to 974 persons a year later (IGC 1995). The temporary protection schema has served its goal and the AO could reclaim its competences in the domain of asylum. Also the AT had stalled to make any decision in 1992. They legitimized this with the judicial problem due to the unclear nationality of the applicants. All judges of the AT decided however in the spring of 1993 –*sections réunies*- to deal with the ex Yugoslavian applications in a very liberal manner.[191]

Italy

In 1991 Yugoslavian citizens did not require a visa to travel to Italy, similar to most Western European countries. However this visa free travel remained the case throughout the conflict. Yugoslavian citizens could flee to Italy without having to apply for a visa beforehand. Initially the war refugees from Yugoslavian demanded asylum. By December 1991 the asylum application of a few Croatians had been decided; the AO did not recognize them as refugees as they were considered mere victims of civil war. Only one air force captain was recognized, as he had refused to take part in war actions against the civilian population.[192] The rejected asylum seekers were however offered temporary protection by the Italian government. First in December 1991 to Yugoslavians of Italian origin and from July 1992 for all Yugoslavian war refugees.[193] All these war refugees were, according to the quantitative limits' fixed by the

[188] OFPRA conseil d'administration, 16.7.1993. AOFPRA, Dir. 1/11.

[189] OFPRA conseil d'administration, 31.3.1993. AOFPRA, Dir. 1/11.

[190] Rapport d'activité OFPRA 1993, p.6. AOFPRA, Dir.1/4.

[191] Rapport d'activité OFPRA 1993, p.12. AOFPRA, Dir.1/4; OFPRA conseil d'administration, 16.7.1993. AOFPRA, Dir. 1/11.

[192] UNHCR Rome to Headquarters, 27.11.1991. AUNHCR, 100-ITA-YUG (a).

[193] In December 1991 the border guards got instructions not to stop war refugees from Yugoslavia from entering, as they were granted upon arrival-- if they did not apply for asylum--a humanitarian stay of 3 months, and those of Italian origin received a one-year residence permit. Decree law 350 of 24.7.1992 provided for a humanitarian status for all war refugees without distinction.. AUNHCR, 100-ITA-YUG (a)..

Council of Ministers to be granted a 60-day residence permit. Parliament however decided for a more generous reception of war refugees from Yugoslavia as the MPs abolished the possible maximum limit. The status was granted to any Yugoslavian who entered Italy due to the Yugoslavian conflict after 1 June 1991 and implied an one year residence permit on humanitarian grounds. [194] These permits could be renewed if deemed necessary.

If a war refugee obtained temporary protection, he/she could still apply for asylum. About 30.000 Yugoslavian war refugees fled to Italy during the war (1990-1995) and were temporarily protected. Only very few (314) asked for asylum (of which 24 Bosnians). The war refugees from Yugoslavia saw little reason to do so as with the temporary protection they had access to education and could reunite with their family in Italy. From May 1993 onward the war refugees were also entitled to work.[195] The limited attraction of an asylum application was also due to the slim chances to be recognized as a *de jure* refugee. By 1993 the recognition rate of Yugoslavian war refugees was only 17% (N= 223). (IGC 1994: 8-12).[196] This low recognition rate was due to the AO only qualifying them for *de jure* protection only if their suffering went further than the general suffering during war and if that was due to one of the grounds of persecution enumerated in the definition of Convention refugee (Hein 1993). Also considered the AO that non-state agent persecution did not qualify an asylum seeker as a refugee under the Geneva Convention (IGC 1995). On April 14, 1994 the minister of Social Affairs signed a 'directive' on behalf of the president of the Council of ministers, which elaborated the criteria and procedure of the temporary protection status provided by the law of September 1992. The ministries of Interior and Foreign Affairs were both responsible for temporary protection. The co-ordination between the two was guaranteed by the president of the Council of Ministers (IGC 1995: 127-133).

Denmark

A temporary protection status was legally established exclusively for war refugees from Yugoslavia in November 1992 in order to ease the overburdened asylum system. The new law lead to a suspension of the treatment of asylum application of Yugoslavian asylum seekers. Temporary protection was accompanied with a renewable 6 months residence permit. Family reunification was only possible in very rare cases because of humanitarian reasons. Yugoslavians under temporary protection were obliged to a stay in reception centers as they were not allowed to work in Denmark. They were only allowed voluntary work within the reception centers. Initially protection was only provided to those who were already in Denmark prior to the adoption of the law and to Yugoslavians who immigrated in the context of a resettlement campaign. Yet by a revision of the law in June 1993 also Yugoslavians who had arrived after November 1992 could be granted temporary protection. Moreover at the same time a visa requirement was introduced for Bosnian citizens. In June 1994 the educational and labor rights of the Yugoslavians improved, but they could only work in those occupations which local people shunned. Furthermore from then on Yugoslavians were allowed to reside in private accommodations.

From the end of December 1994 onward the Directorate of Immigration (IO/AO) stopped the freezing of Yugoslavian asylum applications, thus the asylum request of war refugees who had been temporarily protected for two years were processed. They could get a permanent residence permit if the protection need was at the time still present, or a *de facto/de jure* status if the person met the relevant criteria. If they were recognized as refugees (both de

[194] Parliament converted decree law 350 into law 390 on 23.9.1992. AUNHCR, 100-ITA-YUG (a).
[195] AUNHCR, 100-ITA-YUG (a).
[196] This is the data provided by the Italian authorities in IGC 1994. The UNHCR recognition rate for those fleeing the Yugoslavian civil war is considerable higher: of 46% in 1993 (N= 56) as well as in 1994 (N= 58). For 1991-1993 UNHCR mentions 221 asylum applications. AUNHCR, 100-ITA-YUG (a); Ferrari 1996.

jure as de *facto*) the status could be revoked in the first three years after its issuance if the grounds that justified the status granting were no longer applicable. Just as for the *de jure* convention and the *de facto* refugee status, it was the Directorate of Immigration (IO/AO) who was responsible for the granting of temporary protection. Their decision could not be appealed (IGC 1995: 72-85).

Belgium

The arrival of war refugees from Yugoslavia coincided with a change of government. From September 1991 a new government was installed and although the Minister of Justice, in charge of immigration policy was the same minister it was decided that the aliens police would be transferred to the Minister of Interiors but that was only a reality by July 1992. This institutional change made the political solution to the challenge which the Yugoslavian war refugees posed for the Belgian refugee policy lingered on and was only decided by September 1992.

In 1991 the AO had obtained the authority to advice the IO not to deport a foreigner whose asylum application was considered manifestly unfounded both by IO and AO, but whose life or freedom would be in danger when returned to his/her country of origin.

Shortly after the outbreak of the conflict the AO used the newly acquired competence to ask for some kind of protection for the war refugees from Yugoslavia whose asylum application they and the IO had declared ineligible. As they fled collective violence the AO considered that they did not qualify for protection under the Convention of Geneva, but the AO considered that they could not be returned to Yugoslavia because of the prevailing dangerous situation which would bring their life or freedom in danger. However, to the dismay of the head of the AO, this advice was not heeded by the IO and the war refugees were still ordered to leave the country.[197] The IO considered that the war refugees were exposed to the same dangers to which the whole population of Yugoslavia was exposed and that there was thus no reason to protect them. The IO pointed out that this had been also the reasoning of the IO and the AO in cases of war refugees who had applied for asylum and who had evoked only the general violence. War refugees were not protected by the Convention of Geneva and Belgium had thus no obligation to protected them.[198]

The AO advocated protection for these war refugees and decided to suspend the examination of applications in the recognition phase as it was according to Marc Bossuyt, then head of the AO'the *best protection we can offer to these refugees, because in most cases we would have to give an unfavorable opinion and then an order to leave the territory would follow, and as they cannot be returned the decisions only created more illegal immigrants'*.[199] For the applications on which the IO had decided that they were manifestly unfounded the AO decided to interpret the Geneva Convention "extraordinarily broad with a big benefit of the doubt for ethnic Albanians (Kosovo, Macedonia), mixed couples and draft evaders or deserters from the Federal Yugoslav Army" in order to legalize their stay as asylum seekers.[200] In other cases in which the AO could not oppose the decision of the IO, at least according to the IO the AO did freeze their decisions. According to the law the AO had to render its decision within seven days in these case and the IO complained that the AO did not respect this time period.[201]

On March 16, 1992 the AO insisted officially upon the Ministers of Justice and Interior to introduce a temporary protection statute for Yugoslav asylum seekers "to uphold the

[197] CGVS. 1992. 'Vijfde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen', p. 21-23; Pascal Smet, De terugleidingsclausule, CGVS 7.1995. p.27. Private archives Frank Caestecker; CGVS. 1993.
[198] IO, Nota voor de heer Minister van Justitie, 26.3.1992. AIO, Doos 32-2, 14-02-01.
[199] Dossiers ex-Joegoslaven blijven liggen. Voorlopige verblijfsvergunning gevraagd' *De Morgen*, 19.06.1992
[200] Bossuyt (AO) to Minister of Justice Wathelet, 16.3.1992. AIO, Doos 32-2, 14-02-01; *Fourth annual report of the CGRS (on operating year 1992)*, p. 19.
[201] IO, Nota voor de heer Minister van Justitie, 26.3.1992. AIO, Doos 32-2, 14-02-01.

humanitarian tradition of our country". Its arguments were threefold. Firstly, the war refugees found themselves in a precarious situation: certainly those whose request had been refused were in trouble during identity controls and did not receive any public welfare. Secondly, this statute could relieve the asylum institutions and third, UNHCR had recommended such a status. In June 1992 UNHCR joined the AO in a plea for temporary protection, they added that the refugee themselves but also their counsellors and aid organizations had increasingly been reaching out about the need for a settlement. In August 1992, UNHCR reminded Belgium that it had been one year since its first call to governments to provide temporary protection. On August 13, the Minister of the Interior responded the calls by extending the validity period of the expulsion orders until October 31, 1992 for people who were still on Belgian soil. If needed, this would be extended again.[202] Within the council of Minister of August 26, 1992 it was decided to grant temporary protection to asylum seekers from ex-Yugoslavia for three months and the right to work, provided that they discontinued their asylum procedure. A circular letter on 18 September 1992 by the Minister of the Interior and the Minister of Work announced this operation to the municipalities. The temporary protection was weaker than refugee status, but it gave an immediate, albeit temporary security and the provisions on work, health insurance, family allowances and living wages were more attractive than those of regular asylum seekers.

In November 1992, the temporary protection was improved as the validity of the residency permit was extended each time for six months. During 1993 the AO became dissatisfied with the manner the program was rolled out. A turf war between AO and IO started as the latter considered that AO had no competence concerning the temporary protection for Yugoslavian war refugees. The IO had sole authority and the individual decisions in these cases were confidential and could not be communicated to the AO. The IO notified that it had no idea about the number of people who were both in the asylum procedure and requesting or possessing the statute of Yugoslavian war refugee. The AO on the other hand did not know whether those in the asylum procedure were temporarily protected and also did not know whether there were people who had not requested asylum, but had requested (and obtained) temporary protection (Bossuyt, 1996. 256). Whether those temporarily protected had access to the asylum procedure is still unclear to us. When the temporary protection program started the war refugees from Yugoslavia could only qualify if they discontinued their asylum procedure. We ignore if temporary protection was incompatible with applying for asylum and we have no information on the eventual recognition rate of these war refugees.[203]

Switzerland

On September 23, 1991 the Swiss government decided to postpone any expulsion order for people originating from a conflict area within Yugoslavia. On December 18, 1991 a Temporary protection status was granted in a collective manner to Croatians and those who lived close to the Croatian/Bosnian border. One could not individually request a temporary protection status. It was the AO who was responsible for the granting of the temporary residence permits after rejecting individual asylum applications. When the government decided to collectively grant temporary residence to the Yugoslavian ware refugees because of humanitarian reasons; the AO then had to establish whether or not an individual belonged to this group.[204]

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[202] *Fifth annual report of the CGRS (on operating year 1992)*, p. 19-21.

[203] In April 1994, the Minister of Interior decided to regularize the stay of people from Yugoslavia who had been on the Belgian territory for more than two years, to end their insecure situation and relieve the overburdened AO (Bossuyt 1996: 258). By a circular letter of March 1, 1995 the temporary protection status ceased to exist and most of the temporarily protected war refugees could remain in Belgium (IGC 1995: 53-63).

[204] In 1992 the Temporary protection status was granted to 4622 Yugoslavians (89% of all TP statuses), in 1993 the Temporary protection status was granted to 4220 Bosnians (44% of all TP statuses), and in 1994 a temporary protection status was granted to 3604 Bosnians (38% of all TP statuses). Also citizens from Somalia, Turkey and Angola were at times granted temporary residence permit.

According to the government the non-refoulement obligation was not legally binding outside of the scope of the Geneva Convention. Temporary protection residence permits were valid for one year and were renewable as long as was required by the situation on site. Those who benefitted from temporary protection were accommodated in collective reception centers, had access to education but needed a separate labor permit to enter the labor market. From January 1, 1992 onwards a visa requirement was required from all (former) Yugoslavian citizens to travel to Switzerland, but family members of Bosnian residents in Switzerland mostly qualified for visa. The Temporary residence permits for Bosnians were extended multiple times, eventually until April 30, 1996. Although we have no information on recognition rates of Yugoslavian war refugees according to the Swiss authorities temporary protection was not substituting the *de jure* Convention refugee status and only served as a safety net for those who did not qualify for any other status but could yet not return (IGC 1995: 200-215). In total 18.000 Bosnian war refugees were protected in Switzerland, among them 5000 recognized as refugees (Parak 2019: 82-83).

Treatment of Yugoslavian war refugees in Europa: Provisional comparative summary

The not very welcome reception in Germany and Austria is surprising as both countries were well equipped for this challenge as their legislation had provided for the possibility to install a temporary protection scheme. Temporary protection as provided for in the 1991 Austrian legislation remained largely dead letter (Brandl & Feik 2002). In Germany the status of war refugee as provided for in the 1992 amendments was not implemented as the Federal Government and the State Governments could not agree on any financial burden sharing. The financial responsibility was still entirely with the State governments, but they insisted, in vain on participation of the Federal government.[205] The war refugee status remained dead letter. The Federal government did not budge on the financial implications, arguing that the regions would not face higher costs, since only the legal status of a number of aliens would be changed and that the expenses of the regions would decrease anyhow with the lower number of asylum seekers (with in addition also a decision to grant asylum seekers lower social aid payments).[206] There was definitely no political will in Germany to provide the Bosnian refugees a legal status.

Tab. 6. Overview of the introduction of temporary protection for war refugees from Yugoslavian, 1991-1992

	When temporary protection decided	Duration (months)	Right to work	Suspension of asylum requests
Netherlands	7.92	3	?	8.92-4.93
France	8.92	3	Yes	3.92-1.93
Italy	12.91-9.92	3 (12.91), 6 (7.92), 12 (9.92)	No until 93	Open
Belgium	8.92	3 (11.92: 6)	Yes	6.92-?.93
Denmark	11.92	6	No until 6.94	11.92-12.94
Austria	12.91	?	No until 7.92	Either or
Germany	?	?	?	6.93-?
Switzerland	12.91	12	No	Either or

[205] HCR Germany to UNHCR Headquarters, 21.10.1993. AUNHCR, 600.GFR - Vol.8 - 1991-1992.
[206] HCR Germany to UNHCR Headquarters, 13.8.1993, p.3. AUNHCR, 600.GFR - Vol.10 – 1993.

Austria and Germany were the first country to introduce protection systems parallel to the asylum system, a protection only meant to be temporary. The strong pressure on their borders explains that both countries were the pioneers. Also Italy was an early mover as it bordered Yugoslavia, but it took nine months before its temporary protection scheme got its final form of a one year residence permit and no ceiling on the intake of war refugees. Switzerland with a much smaller number of war refugees had also provided temporary protection with a one year residence permit before 1992 started. For the other countries the authorities took much more time to provide a solution to their war refugees from Yugoslavia. This mostly implied that many of their war refugees remained in the country as asylum seekers or as rejected asylum seekers in a legal limbo for a long time. These states of our sample decided, stimulated by UNHCR to copy the German and Austrian temporary protection scheme. Why did it take such a long time to provide all war refugees protection? Was the urgency of the matter no clear to the policy makers? Did they belief their regular asylum procedure was sufficient for this challenge? The Convention of Geneva could provide protection to (some of the) war refugees from Yugoslavia, and many of our states had already a *de facto* refugee status and some even a temporary protection scheme. UNHCR was in all countries insisting on introducing temporary protection as a quick responses to the humanitarian need. In certain countries UNHCR was backed with strong support within the state, as the Belgian example shows. The newly founded Belgian AO, although due to the limited staff having a huge backlog insisted from the very beginning of this crisis to provide a solution for the war refugees beyond the Convention of Geneva. Were the authorities not eager to sign a blanco cheque with an unknown number of people claiming protection or were they afraid of a temporary protection scheme functioning as a pull factor? That the introduction of temporary protection mostly coincided with imposing a visa obligation on Bosnian nationals points to migration control as an important explanatory factor. The Danish and Austrian example are also examples of the importance of migration control as they denied access to their temporary protection scheme to irregular immigrated war refugees after a cut-off date.

The Netherlands incrementally evolved towards a stronger protection for Yugoslavian refugees as in December, 1991 they only provided temporary protection on an ad hoc basis. By June, 1992 temporary protection for Yugoslavians was introduced. Next in line are Belgium and France which only granted both in August, 1992 temporary protection to Bosnian refugees. Denmark was the last and did put its law from November, 1992 into practice, providing a clear *de jure* temporary protection status to its recipients. Italy initially applied an hesitant ad hoc approach, but soon provided a very strong *de jure* temporary protection status by a legislative amendment in September 1992.

The authorities responsible for the granting of the temporary protection were quite divergent for the countries in our analysis. In Belgium, France and Germany, where the AO had a distinct institutional position it was the IO who was responsible for the granting of the temporary protection status. This was also the case in Italy (and probably also Austria) where although the AO was part of the Ministry of Interiors it were not those civil servants who decided about granting temporary protection. In the Netherlands and Denmark (where there was no clear distinction between the IO and AO) the IO/AO was responsible for the protection of Yugoslavian refugees. Only in Switzerland the AO was (partly) responsible for the issuance of temporary protection.

Most countries in our analysis provided at the start temporary protection for the war refugees for a only very short period of time of 3 months (albeit always renewable). The authorities expected the Yugoslavian crisis to be short-lived and wanted to be able to make the war refugees return on short notice. That was the case in France, the Netherlands, Italy and Belgium, while Denmark was more generous with 6 months. Belgium also granted 6 months permits from November, 1992 onwards. By then Italy had already upgraded its protection to a

one-year permit. Switzerland had provided an immediate protection of one year to Yugoslavian war refugees.

We see different approaches concerning the relation between the temporary protection arrangements and the regular asylum procedure. Belgium, the Netherlands, France, Denmark, and Germany suspended the assessment of asylum applications of (former) Yugoslavian citizens to ease the overburdened asylum procedure. Switzerland, Austria and Italy kept assessing Yugoslavian asylum applicants throughout the entire Yugoslavian crisis. Moreover, in some countries (the Netherlands, Germany, Austria, Denmark) one was even excluded from access to the ordinary asylum procedure if one accepted the temporary protection status. It was either or. From 1995 onwards, in Denmark one could only apply for asylum after one had ran through a two year period of temporary protection and the protection need was still persistent. In Belgium and France beneficiaries of temporary protection could still apply for asylum but is was discouraged as they were granted as war refugees access to the labor market, a favor which was denied to asylum seekers.[207] Only in Switzerland and Italy enjoying temporary protection did not mean one could not ask for asylum anymore. In Switzerland the arrangement was solely meant as a last resort for rejected asylum seekers. In Italy however, almost no one requested asylum as the Italian temporary protection status was almost as strong as the *de jure* refugee status. On the recognition policy of the AO are findings are still too incomplete to conclude anything.

3.3.3. Radical Reform of German asylum governance (1992-1993)

The Danish, Austrian and Swiss dismissing of asylum applications through a pre screening procedure was imitated by West-Germany, the German political process was very complex. In West-Germany the rising number of asylum seekers became a political issue and conservative politicians considered Article 16 (2) of the German Constitution as the pull factor which made it impossible to manage efficiently the inflow of asylum seekers. Already in 1985 an interministerial commission was devoted to the possibility to revise the article, but no consensus could be found. It would take seven years before Article 16(2) would be amended. Article 16 had a strong normative value as it symbolized the break of the German Federal Republic with the horrors of the nazi past. Amending article 16 was finally accepted as it was defined as a support for a common European asylum policy. To adapt the German asylum policy to the perceived lower standards of other member states of the EC was so-called necessary to build a common European asylum policy (Lavenex 2001). During this lasting political discussion not only the immigration of asylum seekers had soared, also ethnic Germans left Eastern Europe and the Soviet union en masse as exit restrictions had been loosened. Together these two flows in 1990 amounted to 800,000 immigrants. In the wake of the German unification[208] the feeling of crisis was exacerbated by an escalation of xenophobic violence, partly induced by the apparent impasse due to the constant wrangling of the policy makers about the constitutional 'solution'.

The Social Democratic opposition finally agreed in 1992 on a compromise amending Article 16 (2). A clause was added to Article 16 of the Basic Law that limited Germany's

[207] Concerning access to the labor market, Italy was the most liberal country in our analysis as beneficiaries of temporary protection had from 1993 onwards unrestricted access to the labor market. As mentioned earlier, in France and Belgium those who enjoyed temporary protection could enter the labor market if they did not apply for asylum. In the Netherlands there was a phased access to the labor market. In the other countries of our analysis (Germany, Switzerland, Austria, Denmark) the access to the labor was restricted and conditional (IGC 1995; van Selm-Thorburn 1998).

[208] West Germany became Germany in 1990.

obligation to the politically persecuted.[209] Asylum was no longer a subjective right, but a favor granted by the state. The Basic Law amendment was accepted by a two/thirds majority in the *Bundestag.* This rather symbolic concession to restore state sovereignty was part of a whole package of reform in immigration and migrant policy which parliament agreed to. By July 1993 all these reforms were implemented and changed German asylum policy profoundly.[210]

Asylum seekers from safe countries dismissed or decided in an accelerated manner

The most radical innovation was that all those who entered Germany via a safe third country – any European country, including the East European countries Poland and the Czech Republic- were not admitted to the asylum procedure.[211] It was a blind use of the concept of safe third country, blind in the sense that it was not checked whether the asylum seeker would get a fair chance to lodge the asylum request in the safe third country.

All asylum seekers arriving at a land border post were thus denied access to German territory as they had passed through a safe third country. The only legal entry for asylum seekers was entering Germany by an airplane which had taken off from a non-neighboring country. Only these immigrants' asylum requests were still accepted. If they had been in transit in a country neighboring Germany they still could be returned to this safe third country. For many asylum seekers only the illegal entry remained: by entering illegally and concealing the entry route could an immigrant still request asylum in Germany. Before they had applied for asylum these irregular immigrant could be apprehended by the local aliens police who had to return them to the safe third country. When immigrants who had irregularly entered the country requested asylum, the AO had to ascertain whether the asylum seeker had entered Germany from a safe third country. If so the IO could order their return to this safe third country.

For all those who had succeeded to enter German territory, albeit illegally the German authorities could only return them to the safe third country if that country agreed to receive this third country national. Such agreements existed with all countries to the West of Germany, but for those coming from the East readmission agreement had to be negotiated. With Poland an readmission agreement was quickly agreed upon (May 7, 1993), while it took more than a year after also the Czech Republic agreed to do so (November 9, 1994).

Another, also radical innovation was the list of safe countries of origin. The German Parliament had to agree to this list of countries.[212] The asylum seekers of these countries who were able to lodge an asylum request were not excluded from the asylum procedure, but their request was handled in an accelerated procedure and the burden of proof was on the asylum seeker. An asylum seeker from a safe country of origin had to refute the presumption of the German legislative power that the respect for the rule of law and the general political situation made it unlikely that persecution, inhumane or debasing punishment or treatment is taking place in that country. The plan was to deny these requests for asylum from safe countries of origin en masse with a standardized motivation and without a hearing. However on July 27, 1993 the Federal Constitutional Court ruled that the examination of the request from a safe country of origin required both a hearing of the applicant as well as a detailed statement of why the

[209] Constitutional asylum based on art. 16, paragraph 2, of the Basic Law was amended and renumbered in Art. 16a. Paragraphs were added specifying those who do not qualify for requesting asylum, that is those entering from a safe third country, or those from a state in which there is 'neither political persecution nor inhuman or degrading treatment or punishment'

[210] For this chapter the following publications were relied on: Stokes 2019; Bosswick 1995; Thränhardt 1996; Poutrus 2019.

[211] Dismissal of an asylum request was called *unbeachtlich.*

[212] The first list of safe countries of origin listed Bulgaria, the Czech Republic, Gambia (until 22.7.1994 because of a coup d'état in that country), Ghana, Hungary, Poland, Romania, Senegal and Slovakia. The AO decided on 3.9.1995 to no longer consider Senegal a safe country of origin. Note à l'attention de Doublet, 23.2.1996, AN, 19990268/8.

individual request was rejected. The rebuttal of the presumption of a safe country of origin had to be examined with the required care.[213] The Constitutional Court required an extensive judicial review as to the facts and the law in every particular case.

Another accelerated procedure introduced in July 1993 was the airport procedure. In the vision of the architects of the German reform ports were quasi the only border posts where asylum seekers could enter Germany in a legal manner and lodge an asylum request. Those asylum seekers who arrived at an international airport in Germany and who came from a safe country of origin or were not able to identify themselves by submitting a valid passport or passport substitute were not allowed to enter the country, but were kept in an extraterritorial part of the airport, thus not officially entering Germany. In three days' time, a decision on entry to the country was to be made by the protection officer of the AO. (S)he had to render a decision based on his/her interview with the asylum seeker. When this express procedure was negatively concluded as a manifestly unfounded claim the rejected asylum seeker could be further detained in this extraterritorial zone until the deportation was organized. If the PO decided differently, be it a decision to further investigate the case the asylum seeker could, similarly to an asylum seeker from a country which was not on the safe list, enter German territory to wait for a decision on his/her asylum claim.

Centralization of decision-making

Most importantly was the decision to centralize the asylum procedure. A centralization which was made possible by the physical decentralization of the AO. While before the asylum applications were handled exclusively in the central office of the AO, in 1993 46 sub-offices all over Germany had to decide about asylum applications. This had the advantage that the towns were the branch office of the AO was located was mostly also the seat of the administrative courts and this proximity facilitated decision making. It also enabled the asylum requests to be lodged and processed close to where the asylum seekers lived.

All asylum applications had to be made at these 46 branches of the *Bundesambt*, the border police and the local police were no longer qualified to register applications. In these offices a computerized fingerprinting system which identified the asylum seekers had to prevent multiple applications. Asylum seekers had to stay for at least six weeks up to three months in a reception center, while their asylum applications were processed. While there was only one reception camp for each region in 1990, the number of camps in Germany increased to 46 in 1991, falling short of the expected 80 camps.[214] Appeals were also to be processed during this period by administrative judges located at these camps. The intention of the German legislator was to facilitate access for asylum seekers to the AO and speed up the decision making. This sole physical decentralization of the AO was counterbalanced by a training and regular meetings at the headquarters.

The AO had to investigate whether asylum seekers were refugees according to the Convention of Geneva and article 16 (2) of the Basic Law. As was the case since the Aliens law of 1965 the Protection Officer of the AO made a decision on the merits of the application and this required a personal hearing of the applicant. As Jürgen Baste explains "the decision of protection officers on recognition was conceived as quasi-judicial in nature as they decided on their own initiative. They were not incorporated in the bureaucratic hierarchy of the AO and they were not bound by instructions issued by a superior. Hence, neither the head of the AO, a politically appointed administrator nor the Minister of Interior could decide who to recognize as a refugee. In order to ensure uniformity of decision-making outcomes and to avoid a gap in

[213] HCR Germany to UNHCR Headquarters, 13.8.1993, AUNHCR, 600.GFR - Vol.10 – 1993.
[214] Annual Protection Reporting Exercise, 4.1992, 1.1.1. AUNHCR, 600.GFR - Vol.8 - 1991-1992.

legal responsibility the Federal Representative for Asylum Affairs was created".[215] The German minister of the Interior appointed this Federal Representative who was bound by the Minister's instructions to ensure standard decision-making in the AO. The decisions of the autonomous individual protection officers (*Einzelentscheider)* came under the purview of this office. The purpose of the Federal Representative was to bring an action against supposedly 'wrongful' decisions of protection officers at the administrative courts. Most importantly the Federal Representative had also to promote harmonization of the court rulings by appealing against supposedly 'wrongful' judgements by the administrative courts (*Verwaltungsgericht*) at the higher administrative courts and the Constitutional court. The Federal Representative for Asylum Affairs could lodge complaints against decision of the AO and the administrative courts which he considered deviant (Knipping & Saumweber-Mayer 1995: 273).

The German authorities centralized the asylum procedure and it seems the German authorities wanted no longer to have the UNHCR looking over their shoulder. In the asylum procedure law of 1993 the possibility for UNHCR to assist in hearings and the decision making was omitted.[216] The German authorities considered also that the tradition that UNHCR had full have access to asylum seekers' files at the AO was no longer compatible with Germany's strict data protection regulation.[217]

Impressive resources were mobilized to make this reform succeed. While the *Bundesambt* employed 1,100 persons in 1992 it was supposed to increase in one year time its staff to 5.549 employees. Also the administrative courts had to recruit a high number of judges. Two other instruments were part of the asylum compromise, a regularization and a status for war refugees. For war refugees the 1992 amendment compromise had provided for a special status, outside of the asylum proceedings. They would be given a temporary residence permit which excluded them from the asylum proceedings for the duration of the temporary protection. The temporary status prohibited the filing or pursuing of an asylum application.[218] Also a regularization was agreed upon: about 30.000 asylum seekers from countries with high recognition chances (longstayers from Afghanistan, China, Iraq, Iran, Laos, Libya and Myanmar) could apply for this amnesty until December 31, 1993.[219]

Since 1991 the AO had to investigate obstacles to deportation. This became more important as the authorities of the regions who were still in charge of these deportations got much more resources to deport foreigners.The asylum compromise had provided for more grounds to detain irregular immigrants for longer terms (up to 18 months) in order to be able to deport them. The law distinguished in its provisions for impediments to deportation between the local aliens' authorities, closer to the individual case, which had to decide whether there were barriers which might prevent deportation in an individual case, while it was up to the AO to decide about more general raisons like the situation in the home country which prevented deportation. The AO was bound by instructions on obstacles to deportation and the Federal Representative for Asylum Affairs had no competence to disqualify these decisions (Knipping & Saumweber-Mayer 1995, 273; Renner 2002). The source of instructions which the PO

[215] Jürgen Bast to the authors, 3.5.2022. The Federal Representative for Asylum Affairs was called the *Amt des Bundesbeauftragten für Asylangelegenheiten.*

[216] Bundesgesetzblatt 1993, p. 1361ff.. This statement still has to be scrutinized as the IGC 1994: 9 states that UNHCR can still assist in the interviews.

[217] HCR Germany to UNHCR Headquarters, 13.12.1991, Annual report for 1991. AUNHCR, 600.GFR - Vol.8 - 1991-1992

[218] HCR Germany to UNHCR Headquarters, 21.10.1993, AUNHCR, 600.GFR - Vol.10 - 1991-1992.

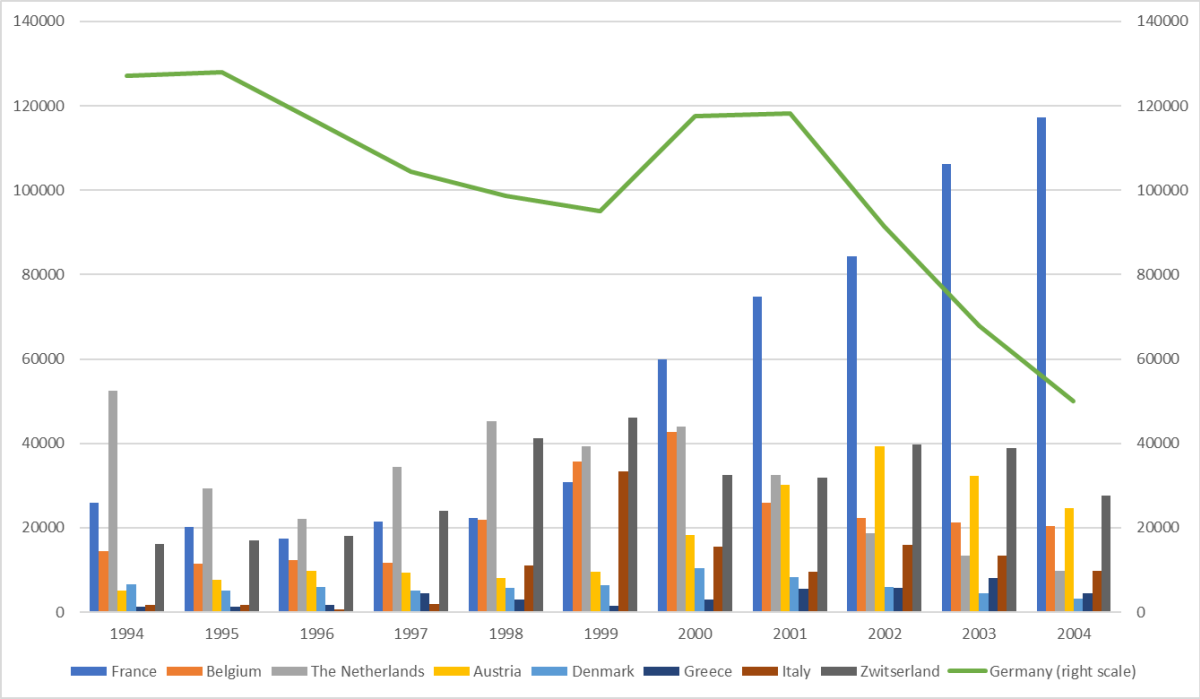
[219] UNHCR was not thrilled by this proposal as those who had no valid national passport would risk to end up with tolerance permits, the others with a residence permit for 2 years which could be prolonged on discretionary basis by the local aliens authorities. UNHCR advised them to pursue their cases at the AO as a recognition as a refugee provided them with a permanent residence permit. HCR Germany to UNHCR Headquarters, 13.8.1993, AUNHCR, 600.GFR - Vol.10 – 1993.

received could be a decision by the Federal Ministry of the Interior. The regions still had the competence to suspend the deportation of specifically defined groups of foreigners. They could decide for a deportation stop for at most six months, for extending it they needed the consent of the Federal Minister of the Interior. Only the Federal Ministry of the Interior could decide about a prolongation. There was centralization of policy in the case of longer toleration, shorted toleration could still differ from state to state (Marx 1993).

4. A new asylum regime adapted to the deportation turn in immigration policy, 1994-2004

After 1993 the annual number of asylum applications in continental West Europe dropped considerably, they were almost halved in number by 1999. Eastern Europe, Scandinavia and Great Britain became more important as destinations for asylum-seekers.[220] Europe knew a stabilization in the annual number of asylum applications as no major crisis generated large numbers of refugees. No individual country of origin was producing more than 10% of all asylum applications as the asylum flows within continental Western Europe also changed directions. The German share shrank to a third of all asylum seekers arriving in continental West Europe by 1999, which coincided as Fig. 10. illustrates with a rise in the share of other countries, in particular the Netherlands and Switzerland, while France's share hardly rose.

Fig. 10. Asylum seekers, 1994-2004[221]



The drop in asylum applications was the result of a deliberate policy. Pre-entry measures were used to stem the flow of asylum seekers at the source, transit or at entry point and turned out to be very effective to keep asylum seekers travelling by air out. Visa requirements were used for a country specific approach.[222] The experience in the 1990s showed that this pre-entry measure

[220] This was a statement without Scandinavia being involved.

[221] As discussed in footnote 16, some figures might include subsequent or other types of applications (UNHCR 2021).

[222] For example, as mentioned before (see 3.3) France and Switzerland had imposed airport transit visa on some nationalities. By 1997 Switzerland required still airport transit visa only for the nationals of Iraq and Libya. For nationals of Afghanistan, Angola, Bangladesh, Bosnia Herzegovina, Croatia, Ethiopia, Federal Republic of Yugoslavia, Ghana, India, Iran, Lebanon, Macedonia, Nigeria, Pakistan, Somalia. Sri Lanka, Turkey and Zaire only if they did not hold a visa or residence permit for an EFTA, EC or North American country (IGC 1997: 325). According to Amnesty International & France Terre d'Asile (1997: 147) France demanded a transit visa in 1997 for Afghanistan, Eritrea, Iran, Irak, Liberia, Nigeria, Libye, Pakistan, Sierra Leone and Sri Lanka. In 2007 the French required transit visa for nationals of Albania, Angola, Bangladesh, Ethiopia, Ghana, Haiti, Somalia, Zaire. IGC 2007: 169.

of an individual country redirected the asylum seekers to neighbouring countries. Little distinction was made in this pre-entry measures between immigrants and refugees. The Schengen group considered that for the EC visa requirements would be only effective if there would be a common concerted effort about which nationalities were subject to visa requirements.

The effectiveness of carrier sanctions had been proven and the Schengen treaty made carrier sanctions mandatory for all countries. Carrier sanctions were introduced in all our European continental countries that sanctioned the companies if they transported passengers when they were not properly documented. The transport companies obtained liability waivers, partly through negotiation, partly through court cases. The authorities could waive the fines if that transport company showed willingness to prevent insufficiently documented immigrants from arriving at the border. Training courses were offered to the airlines. Instituting documentation checks in the source countries was also much appreciated, certainly if they listened to the so-called non-binding advice of the immigration officers stationed in those countries. The authorities also stimulated the airlines to copy the identity documents of their passengers at the time of embarkation so that destroying these documents en route was less effective (Rodenhäuser 2014; Baird 2017; Scholten & Minderhoud 2008). Carrier sanctions had been and were still effective when dealing with air transport, but it was much more difficult to implement fines on transport companies who moved people across land borders. Certainly when border controls were abolished within the Schengen area this instrument became totally ineffective.

As a result of carrier sanctions, border procedures and the introduction of pre-screening procedures at the airports the share of asylum applications made in the airport dropped while those filed within the country increased.

This trend meant that asylum procedures within the country gained significance in the management of the asylum flows. Admissibility and accelerated procedures were applied to all applications irrespective of where the application was filed. The criteria applied for these specific procedures were common to all countries in our sample, respectively first country of asylum and manifestly unfounded applications. Additional criteria had been introduced by Denmark at the end of the 1980s and by the Central European countries (Switzerland, Germany, Austria) in the early 1990s. These countries dismissed applications as asylum seekers who came from a safe third countries and safe countries of origin.

Post-entry measures were also introduced. As well regular social assistance as the authorization to work were increasingly denied. Benefits were only provided in kind, rather than in cash form. Authorizing asylum seekers to work would make them less of a burden on national resources, but it was considered to work as a pull factor.

Accelerated procedures mostly exclude in-depth interviews. The admissibility and accelerated procedures involved the regular protection officers who had to filter out manifestly unfounded cases, but asylum seekers with any ground to refugee status should be allocated to a regular procedure. In most countries the interviewer and the decision-maker were the same person, but in some countries (for ex. Denmark) they were distinct and the decision-maker could invite the applicant for a second interview if any clarification was required.

As outlined Denmark started to experiment very effectively with the concept safe third countries in 1990, followed by Austria, Switzerland and Germany and, as Costello (2016: 605) argues, '[i]nformal horizontal policy dynamics ensured the quick spread of these practices'. By the end of the decade virtually every Western European state implemented a safe third country policy (Byrne, Nell & Vedsted-Hansen 2004). The fora for such a spreading of practices was the Schengen group and the Intergovernmental Consultations on Migration, Asylum and Refugees (IGC). Although the latter had been created in 1985 to coordinate refugee protection programs, by mid-1991 the member states of IGC decided they would rather be located away

from UNHCR premises, with the coordinator, Jonas Widgren no longer reporting to High Commissioner but to the member States. Still, according to Wall repeating time and again that the senior policy makers insisted that "the Geneva convention in all situations must be valid and respected. In no case it was conceivable to refrain from carefully scrutinizing an application because of the volume of applications or because of staffing or financial constraints. Hence, a continued reform of procedures was necessary, without infringing upon their fairness and correctness. The necessity of allowing the applicant to be heard on their application, and to be provided with interpretative and legal assistance where required. Measures aimed at making asylum procedures fairer tended to focus on improvements to the decision-making process" (Wall 2018). This uncritical summary drawing a linear improvement in immigration and asylum policy does not dwell on the tensions between the states involved in the ICG and UNHCR which would lead to the rupture between IGC and UNHCR.[223] That the European states were interested in dissuading uninvited immigrants, also if they came from countries with notorious human rights abuses rather than in protecting refugees caused tensions within the IGC. The application of the concept safe third countries was one of the reasons for the rise in for-profit smuggling necessary for refugees to get the opportunity to apply for asylum. Also the greater importance attached to deportation of rejected asylum seekers must have created tensions. Heavy handed deportation practices made victims: Semira Adamu in 1998 and Markus Omofuma the next year were during their deportation suffocated at the hands of respectively the Belgian and the Austrian police. Already in 1992 the Dutch police had inflicted severe brain damage on Constatin Rudaru during his deportation. At the same time the role of the asylum offices became more important as they had to assure that when unwanted immigrants were interned and deported no refugees would fall victim of this policy.

4.1. European policy making from Schengen to Amsterdam

From 1991 onwards national parliaments started to ratify the Schengen Convention. The removal of border controls did not begin until the Schengen Agreement entered into force on March 26, 1995, five years after its signature. All EU member states, except for UK and Ireland had joined the initiative. The high level of requirement for efficient external border control delayed the implementation of the Schengen Agreement in Italy (until October 1, 1997) and Austria (until October 1, 1998).

The ratification of the Dublin Convention signed in 1990 took even longer. On September 1,1997 the Convention entered into force (Lavenex 2001: 116). EURODAC, the tool with the fingerprints of applicants for asylum union wide which would facilitate the implementation of the Dublin Convention was even more contentious. The Northern EU-countries wanted it to encompass also fingerprints of irregular immigrants, be they apprehended at the border or within the territory of a member state while the Southern states, traditional transit states, wanted it to be only a database of those who applied for asylum as irregular immigrants found on their territory on the way to Northern Europe should not be their

[223] The forum has been, when it existed thirty years the subject of a commemoration book by Wall (2018). Wall (2018:48) quotes Mike Bisi, deputy coordinator of IGC (2000-2009) who evokes that in the beginning of IGC "there was often a feeling of tension in the air, especially between the participating states and UNHCR", but the author does hardly elaborate on these tensions. This intergovernmental forum extended beyond Europe, as also Australia, Canada (both from 1987 onwards), and the US (from 1990) joined the organization. However in 1997 France ceased to participate in the IGC. This secretive organization still does not allow independent researchers access to its archives of the 1980s. The author used a "wealth of material from the IGC archives that—owing to the privacy that this publication describes as one of IGC's 'core operating principles'—is not in the public domain" (Wall 2018: 6). We only got access to archival material of this organization through the archives of the Belgian and French authorities. Jonas Widgren got into conflict with UNHCR and quitted the IGC. He helped to create the International Center for Migration Policy Development in Vienna in 1993, founded by Austria and Switzerland and became its Director General. Miller 2020.

responsibility. In 2000 the Northern countries won the day, although only the fingerprints of asylum seekers were determinant for deciding which state is responsible for an asylum claim (Lavenex 2001: 117).

A substantive approach to refugee recognition which had started with a survey in 1991 was not pursued until the summer of 1994 when the German Presidency put it on the agenda. It only led in 1996 to a joint position which reflected the lowest common denominator between member states. The definition was aligned to the German concept of refugee as it limited the application to persons who were persecuted by the state or were the (private) persecution was tolerated even instigated by the state (Lavenex 2001).

In the Amsterdam Treaty adopted in June 1997 on the progressive establishment of an 'area of freedom, security and justice co-operation on migration was shifted into the Community frame-work. The Amsterdam treaty transferred the asylum and immigration matters from the third to the first pillar. The Treaty which came into force in May 1999 incorporated the Schengen acquis in the EU framework via protocol. The transgovernmental processes dominated by law and order civil servants was reined in. The 'communitarization' of asylum and immigration had its limits as the role of EC institutions was limited due to decisions requiring unanimous voting in the Council of Ministers and as the role of the ECJ was circumscribed. The Ministers of Foreign Affairs, the European Parliament but also Italy or Greece who had not been treated as equal partners in the Schengen negotiations were satisfied with the turn of events. A new directorate was created within the Commission, the Directorate General on Justice and Home Affairs, but for the first five years intergovernmental decision making were being maintained. The Amsterdam treaty was still a continuation of previous policy making. It contained a list of measures to be adopted within a time frame of five years, among others minimum standards for asylum procedures, implementing temporary protection and a common interpretation of the refugee definition. For the latter the Amsterdam Treaty acknowledged the existence of other refugees (and displaced persons) than Convention refugees (Lavenex 2001: 126-142; Guiraudon 2003).

The Amsterdam Treaty underlined its adhering to the ECHR. The European Convention of Human Rights which was adopted under the auspices of the Council of Europe in 1951 and in particular its article 3 has given the notion refugee a broader definition.[224] This article limited the ability of European states to deport refugees to countries where these aliens could be exposed to torture or other "inhuman or degrading treatment or punishment". Article 3 ECHR became a judicial restraint on the deportation of refugees and other aliens who were on EU-territory.

The Amsterdam treaty enabled states to opt-out. Denmark did no longer participate and could choose to participate or remain outside with respect to every measure undertaken in this field. Denmark as a member of the Schengen region retained the right to implement those follow-up decisions regarding the Schengen *acquis* which met their national interest. These decisions will no longer fall under EU-law, but will be implemented as international accords, falling outside the scope of ECJ jurisdiction (Lavenex 2001: 128).

4.2. National Case studies

The pressure to increase the productivity of protection officers of the asylum office caused that the quality of the decisions deteriorated. The appeal authorities recalled increasingly more

[224] Since 1994 any person who feels their rights have been violated under the Convention by a state party can take a case to the European Court of Human Rights and the decisions of the Court are legally binding in the EU. Prior to the entry into force of Protocol 11 (adopted in 1994) , individuals did not have direct access to the Court; they had to apply to the European Commission on Human Rights, which if it found the case to be well-founded, would launch a case in the Court on the individual's behalf. Protocol 11 abolished the Commission, enlarged the Court, and allowed individuals to take cases directly to it.

negative decisions. Overall the asylum offices became bureaucratized as they re-organized themselves following bureaucratic ideals of routinized and standardized decision-making, quantitative targets, hierarchical organization and internal control (Akoka 2020; Kreienbrink 2013; Probst 2011; Dahlvik 2018).

Seen the developments elsewhere in Europe the French authorities remained for several years wary about a possible explosion in asylum requests (Lavenex 2001: 165). Belgium and the Netherlands saw this happening and by 1993 Belgium had as many asylum seekers as France while the Dutch had that year even considerable more asylum requests than France. The French number of asylum requests which had exploded in 1989 knew a linear decline until 1996.

4.2.1. Germany in the midst of reform

In January 1993 UNHCR did a last tentative to influence the German decisions on its renewed asylum policy by sending out a high profile delegation for three days to Germany to meet with several German authorities. UNHCR was worried about the potential European and universal implications a drastic change of the German policy towards refugees may have. Although safe countries was an important issues in these meetings UNHCR insisted also on discussing the refugee definition with the German authorities. In these meetings UNHCR insisted strongly on the importance to reintroduce the refugee definition of article 1 of the Geneva Convention as a material basis for the granting of asylum in Germany, while the German authorities denied the existence of discrepancies between art. 16 Basic Law and art.1 of the Geneva Convention. This discrepancy had been a topic during the formulation of the party compromise, with the Bavarian Christian Social Union opposing the suggestion to reaffirm German commitment to the Geneva Convention and the Social Democrats supporting it. The Social Democrats dropped finally this demand during the interparty discussions. UNHCR still continued in its negotiations with the German authorities to insist on this point and referred time and again to refugees from Bosnia and Somalia who, according to UNHCR could be covered, in their large majority by the definition of the Geneva Convention while art. 16 Basic Law did not provide them protection. UNHCR even went several times in more detail on cases of raped women of Bosnian and Somalian origin who would qualify for refugee status if Germany agreed to fully adhere to the universal definition of refugee of the Convention of Geneva. The German authorities refused to enter in this discussion and referred to the special status for refugees from civil war areas as their solution to the latter issue.[225]The *Staatssekretär* of the Ministry of Justice, Ingo Kober stated that "civil war refugees are not rejected, but accepted as such, but they cannot apply for asylum as long as they have the civil war status. There is, however, a need to allow access to the procedure when the civil war status is revoked." Kober also clarified that the question whether a person from such a war stricken area was allowed to choose between the civil war status and the asylum procedure, when arriving, was not decided yet. UNHCR stated that they will not demand that such refugees must have access to the asylum procedure if and as long as they receive an adequate status.

The reform of asylum policy in July 1993 quickly resulted in a spectacular drop in the number of asylum seekers in Germany (see Fig. 8. and Fig. 10.).[226] Still Germany remained the country with most asylum applications as asylum seekers resorted to the assistance of smugglers to enter the country. For all those asylum seekers who had succeeded in entering German

[225] Note for the file regarding the meetings with German Government officials during the mission of Messrs. Leonardo Franco, Ulrich von Blumenthal and Michael Petersen to Bonn, 13-15.1.1993. AUNHCR, 600.GFR - Vol 9 (part2.) – 1991.

[226] The drop in asylum applications was to a certain extent also cosmetic as subsequent asylum applications and applications by *réfugiés sur place* were no longer calculated for the figures. They only counted first applications of newly arriving immigrants.

territory, albeit illegally, the German authorities wanted them to be returned to the safe third country through which they had come to Germany.[227] Asylum seekers were not eager to cooperate and concealed their itinerary. Germany was surrounded by a belt of safe third countries, either EU or non EU countries (Finland, Austria, Norway, Poland, Czech Republic, Switzerland) and theoretically only asylum seekers arriving by plane were still eligible to claim asylum (IGC 1994: 12). However, for the neighboring countries to agree to receive these third country nationals the German authorities had to provide proof that they had passed through these countries. Most of the persons who requested asylum in Germany destroyed their papers so that they could not be send back to a safe third country, but for those who had still a passport the return to the neighboring country they had stayed before they came to Germany was not so easy. Schengen as the border free internal zone meant that passports of third country nationals were no longer marked when they entered or left a neighboring country. So even for those asylum seekers with a passport it became more difficult for the German authorities to convince neighboring countries to take back their third country nationals except for those apprehended in the immediate border regions. For those travelling from Poland, the Czech Republic and Switzerland the administrative routine was upheld and they could still be returned (Renner 2002).

The AO and an (unexperienced) staff to tackle the backlog

A not very selective recruitment campaign succeeded in having the staff expand to 3,947 employees by January 1994 and 4,650 by the end of the year.[228] A part of this staff was employed in six Asylum Decision Centers who were set up to overcome the backlog of 460.000 cases. First they concentrated on the 80,000 Romanian and Bulgarian asylum seekers, but soon asylum seekers from other countries (Liberia, Albania, Zaire..) were also processed in these centers. Although the same legal provisions as in the normal procedure were applied, the decision-making process was different. Elsewhere, asylum seekers were interviewed by the same officer who later on decided on the case, in these Asylum Decision Centers the asylum seekers were first interviewed by a screening officer and subsequently the decision on the case was made by the deciding officer, on the basis if the interview notes of the screening officer. In this way the deciding officers could produce more decisions. By law the deciding officers had to have the rank of at least 'semi-superior' officer (*gehobener Dienst*) that was not required for the screening officers, Most of the latter were former army or postal services employees and to prepare them for this task they had received one week of training.[229]

In the 46 sub-offices the vast majority of deciding officers were new and inexperienced. Often also the head of sub-offices were new, many of them being high-ranking civil servants from others sectors of the administration. These new officers obtained a one-week training in the headquarters of the AO to prepare them for their task. The deciding officers no longer had an interview of the local aliens authorities in the file; consequently, they had to start their interviews with a questionnaire dealing with personal data, travel route etc. and only after half

[227] Safe third countries were all EC states and other states in which the application of the Geneva Convention (1951) and the ECHR is guaranteed. Statute law named the following safe third countries: Norway, Poland, Sweden, Switzerland and the Czech Republic. Finland, Austria and Sweden had joined the EU on 1 January 1995 and were thus considered safe as other EC states. When the Convention applying the Schengen agreement, including the asylum law provisions took effect on March 26 1995 the countries part of the Schengen area applied the Schengen responsibility procedure (as of March 1997 this applied to Belgium, France, Luxemburg, Portugal and Spain). Since September first, 1997 the date the Dublin Convention entered into force it has replaced the Schengen provisions on asylum.

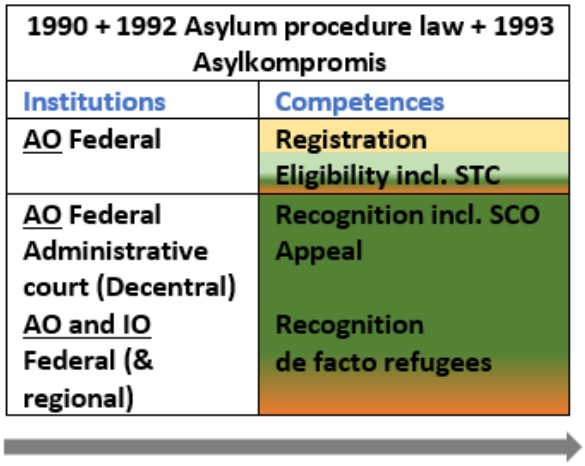
[228] The staff of 4,650 consisted of 950 protection officers and 3,700 persons to handle administrative tasks (IGC 1994: 12)

[229] Leiss and Gregoritisch, report on activities and experiences of UNHCR's revolving officers in Germany (11.1992-7.1993) p.7. AUNHCR, 600.GFR - Vol.10 - 1993

an hour could they tackle the claims for protection of the asylum seeker. Each sub-office screened about 30 countries of origin. This implied that each deciding officer had to be able to interview asylum seekers from the most diverse countries. At the start of the reform the sub-offices were not connected yet with the extensive country of origin material available at Headquarters.[230] The impression of two UNHCR officers who had been investigating the new procedure by visiting the new offices of the AO all over Germany during the first half of 1993 was that emphasis was laid on the quantitative output rather than on the quality of the decisions.[231] UNHCR spoke of the frequently appalling quality of the decisions of the AO.[232] The institutional setup of the asylum procedure had provided for a quality control through the Federal Representative for Asylum Affairs. The Federal Representative had the power to appeal against any decision of the protection officers and the administrative courts either to grant asylum (or provide protection against expulsion) or to refuse protection. In reality the Federal Representative appealed exclusively against (positive) recognition decisions, and never against decisions to refuse protection. Hence, as Jurgen Bast explains "the "public interest" that this institution was meant to serve was to prevent the AO and the administrative courts from taking too lenient decisions on asylum recognition".[233]

Due to the decrease of asylum applications the number of field offices was reduced to 36 as of December 31, 1996 and the total staff counted 2,600 of which 560 protection officers. The number of field offices was reduced further to 21 in 2008 (IGC 2007: 209). Of the cases decided by the AO in 1994 19% were considered manifestly unfounded (N= 352,572), in 1995 26% (N= 127,937) and in 1996 13% (N= 116,367) (IGC 2007: 204). The AO handled the asylum applications from the safe countries of origin in an accelerated manner with the burden of proof on the asylum seeker.[234]

Fig. 11. Institutional timeline asylum determination Germany, 1991/1993



[230] Leiss and Gregoritisch, report on activities and experiences of UNHCR's revolving officers in Germany (11.1992-7.1993) p.4-8. AUNHCR, 600.GFR - Vol.10 - 1993

[231] Leiss and Gregoritisch, report on activities and experiences of UNHCR's revolving officers in Germany (11.1992-7.1993) p.5. AUNHCR, 600.GFR - Vol.10 – 1993.

[232] HCR Germany to UNHCR Headquarters, 13.8.1993, p.3. AUNHCR, 600.GFR - Vol.10 – 1993.

[233] Jürgen Bast to the authors, 3.5.2022; Leiss and Gregrotisch, report on activities and experiences of UNHCR's revolving officers in Germany (11.1992-7.1993) p. 3. AUNHCR, 600.GFR - Vol.10 - 1993.

[234] By 1995 the list of safe countries of origin was Bulgaria, the Czech Republic, Ghana, Hungary, Poland, Romania, Senegal and Slovakia. From 3.9.1995 onwards Senegal was no longer considered a safe country of origin, but in 2009 seen that most of the safe countries of origin had become part of the EU only (again) Senegal and Ghana were on the list (IGC 2009: 170).

Different kinds of protection

As mentioned before art. 16 Basic Law was the point of reference for German recognition policy. This meant a stricter refugee definition than article 1 of the Geneva Convention as a material basis for the granting of asylum. In the 1990s however the impact of the Geneva Convention on German recognition policy became stronger. One of the reasons was that the German parties realized that only this universal refugee definition was able to provide the basis for a European harmonization of asylum law. The Immigration act of 2004 sought to put the Geneva Convention into the focus of analysis in the process of recognizing a refugee (Bank 2007: 124).

Those refugees who did not qualify on the basis of (the German interpretation of) the Convention of Geneva could be tolerated as non-deportable aliens or they could be granted temporary protection. The latter provision in the 1992 compromise was applied for the first time in 1999 for 13,000 refugees from Kosovo. It took such a long time to be implemented as the financing of this special status could not be sorted out. There was no political will to find a compromise between the federal government and the federal states. Only in 1999 when Germany succeeded to limit the number of war refugees from Kosovo on its territory an arrangement was found (Bosswick 1995; Hailbronner 2002: 494; van Selm 2000).

Another solution for refugees who did not qualify for Convention status was that the AO ordered them to be tolerated because of being non deportable. Although the ECtHR based on article 3 ECHR put the persecution or violence central for raising a collective obstacle to deportation, the German jurisprudence focused also on the author of this violence/persecution. Only state or quasi state actors could by their action raise collective obstacles to deportation and in situations of general violence without any state protection the individual threat to life or liberty could only be evoked in cases of extreme danger involving a very probability of imminent death or severest injury upon return. No de facto protection was granted if the danger to which the asylum seekers was exposed rose our of a situation to which the entire population or a segment of the population was exposed e (Renner 2002; Bank 2007: 116 & 121).

This tolerance of non deportable rejected asylum seekers usually had to be renewed every three months and did not grant access to the labor market and limited the freedom of movement to the local district. The tolerated alien did not have a right of family reunion and received only, similar to asylum seekers limited social benefits. Toleration was not a legal residence status but a mere suspension of deportation. According to the law, toleration was limited as a rule to a maximum of one year, but in practice the toleration has frequently been renewed for many years. By the end of October 2000 265,525 persons were tolerated, among them 44% rejected asylum seekers. Thirty one percent of these 265,525 persons had been tolerated for more than 4 years, contrary to the spirit of the legislation (Hailbronner 2002: 515ff.; Henning 2001: 29). Several attempts to find an agreement to issue legal residence status to these tolerated foreigners who had been living a long time in Germany failed, mainly due to the opposition of the conservative CDU/CSU Ministers of Interior of the regions Bavaria, Saxony, and Lower Saxony (Bosswick & Borkert 2007).

Tab. 7. Germany's decisions on two statuses, 1995-2003 (IGC 2009: 188)

	De jure refugees	*De facto* refugees[235]
1995 (N= 141407)	17%	3%
1996 (N= 150652)	16%	1%
1997 (N= 120108)	15%	2%
1998 (N= 103020)	11%	3%
1999 (N= 92592)	11%	2%
2000 (N= 74883)	15%	2%
2001 (N= 81504)	28%	4%
2002 (N= 86952)	8%	2%
2003 (N= 67705)	5%	2%

As mentioned above the nature of the obstacles to deportation were already contentious, but also the division of labor between the local aliens' authority and the AO, regional and federal institutions in assessing obstacles to deportation caused numerous disputes between policy makers at these two levels of government (Hailbronner 2002: 514f.). When the AO did not raise obstacles to deportation the local aliens' police (and administrative courts) could do so. According to Henning (2001) the AO and the administrative courts, depending on the region made different decisions. To overcome this heterogeneity in 1996 the federal authorities and the regions decided on a common procedure for collective obstacles to deportation in the so-called *Härtefallregelung* (March 29, 1996). It was agreed that a region would only make use of this possibility in exceptional cases, and this always in consultation with the other regions and the federal authorities. A federal decision on non-deportation had to be prolonged if eleven of the sixteen regions made the request. This decision did not change the very heterogeneous practice throughout Germany (Böcker & Vogel 1997; Henning 2001).

In 2002, the AO was reorganized as it was attributed competence in the domain of integration of immigrants, but also in the program of voluntary return, the coordination of Jewish immigration from Russia, the steering of labor migration and it had to run the centrally information database on foreigners. At the same time the protection officers or "Entscheider" lost their independence as they were incorporated into the hierarchy of the AO. They became henceforth fully responsible to, and centrally steered by the head of this institution and the Ministry of Interior. The recognition decision was not considered quasi-judicial anymore, but rather administrative in nature. This implied that the Federal Representative for Asylum Affairs was abolished (Kreienbrink 2013: 12).

4.2.2. Austria

Austria used the concept of safe third countries extensively to dismiss asylum requests. All countries bordering Austria were considered safe third countries and even transit through these countries was enough to return the asylum seekers to this neighboring country (Stacher 2001: 225). In 1995 Austria joined the European Community and this implied that within the Schengen zone its internal land borders could no longer be controlled.

In 1997 the asylum law was revised with an extension of protection, but also a restrictive change. The 1997 Asylum Act contained a very short time limit for appeal against a negative decision for being manifestly unfounded or coming from a safe third country (including Dublin cases). The Federal Constitutional Court considered these provisions to violate Constitutional

[235] *De facto* refugee status is referred in IGC 2009: 188 as complementary protection and other authorizations to remain, while the *de jure* refugee status refers to refugee and asylum status. We ignored other decisions defined as withdrawing claims, abandoned claims or claims otherwise resolved, so the total of decisions (n) is referring to the two protection statuses and the rejected asylum seekers.

Law, which led to amendments of the Asylum Act. The 1998 amendments prolonged the time in which a decision could be appealed. Using the safe third country was from October first, 1998 when Austria applied the Dublin Convention based on EU procedures.

Different kinds of explicit protection

The 1997 asylum law gave the AO not only the decision power for recognizing refugees, but the AO also had ex officio to give advice on whether the return of an asylum seeker they had rejected to his/her country of origin was legally inadmissible or (technically) possible. If the AO qualified the enforcement of the expulsion decision unacceptable the expulsion order of these refugees was suspended. These *de facto* refugees had however few, if any rights. In the legislation it was not clearly stipulated whether the AO was to issue a residence to those it granted a *de facto* refugee status. They were merely officially tolerated. In 2001 the Constitutional Court decided that these refugees should be granted a residence permit. In the period between 1998 and 2002 1782 rejected asylum seekers received a de facto refugee status (Brandl & Feik 2002). The 1998 amendments also included a provision that gave the Federal Ministry of the Interior the possibility of designating, by ministerial order, safe countries of origin (Brandl 2002: 109).

From 1998 onwards negative decisions could be appealed to the Independent Federal Asylum Review Board.[236] This deciding body in second instance not bound by ministerial instructions is also competent in the domain of de facto refugee status. Mainly in the domain of internal flight alternative and nonstate persecution, this appeal border contested the practice of the AO as too restrictive and strengthened the protection of refugees (Brandl & Feik 2002).

4.2.3. Belgium

Similar to other countries Belgium started to look for a means to dismiss asylum applications or at least to make more speedy decisions. A more decisive action against the rejected asylum seekers stood high on the political agenda. The first closed centers were opened who detained irregular immigrants, but also asylum seekers who had manifestly unfounded claims or who filed an asylum claim to avoid a deportation measure. Interning asylum seekers meant that their cases could be dealt with rapidly and the chances of them disappearing following a negative decision were reduced.

The Aliens Law of 1991 introduced a 'safe country of origin' mechanism, which was inspired by the Swiss who applied a similar arrangement. [237] It meant that if an asylum seeker came from a country of origin of which at least five per cent of the asylum applications came from in the previous calendar year and less than 5% of these applications were recognized, there was an increased burden of proof concerning the eligibility decision. The IO did use this mechanism, but never as the only rejection ground. The AO explicitly did not oppose this mechanism, but in its advice looked only to the merit of the case.[238] Still, some NGO's requested an annulment of the relevant legal provisions of this arrangement in 1992 at the Constitutional Court.[239] Indeed, the Constitutional Court annulled the legal provisions as they

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[236] The second instance court was called the *Unabhaengiger Bundesasylsenat* (UBAS). An appeal against UBAS may be made to the Administrative Court (*Verwaltungsgerichtshof).* As we ignore whether the members of the UBAS were appointed for life, we do not know if it is an asylum tribunal or court.

[237] Called the '*dubbele 5% regel'*, or '*double critère des 5%*'.

[238] At the end of 1991 the IO used this rule for asylum applications from Ghana, India, Pakistan, and Poland. On 3 February 1992 the head of the AO let the minister of Justice know that the provision could be invoked for Romania, Ghana, India, Yugoslavia, Pakistan, and Nigeria. Yet as the situation in Yugoslavia had changed by then, the AO advised the minister not to apply the mechanism for Yugoslavian applications. CGVS. 1991. 'Vierde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen werkingsjaar 1991'. p.19-20; CGVS. 1993. 'Zesde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen werkingsjaar 1993'. p.11.

[239] Called *Arbitragehof/Court d'arbitrage* and from 2007 onwards *Grondwettelijk Hof/Court Constitutionel*

judged that the increased burden of proof for only one category of aliens went beyond what was necessary to achieve the intended purpose.[240]

On July 15, 1992 the Minster of Interior was handed over authority on immigration policy from the Minister of Justice.[241] The extreme right party Vlaams Blok demanded absolute control of unwanted immigration and gained an important following in Flanders with this issue. The government decided for a more effective deportation policy, which became the litmus test for the capacity of the state to impose its will on international migration.

In May 1993 the Aliens Law was changed again. A national computerized system of fingerprints of asylum seekers was introduced to prevent multiple applications. Asylum requests were dealt with much more quickly by a considerable increase in staff at the IO and the AO. The latter had its staff increased from 30 in 1990 to 200 in 1993. Still, as elsewhere, most attention went to repatriating rejected asylum seekers. The law of May 1993 introduced the possibility of interning asylum seekers who were already on Belgian territory and had appealed the negative decision of the AO. While waiting for the processing of their appeal they would be detained in a closed center, and upon a negative conclusion of the appeal the authorities could immediately process their removal (Caestecker & Vanheule 2010).

In 1993, the revised Aliens Law stipulated that the Minister could no longer bypass the decisions of the AO in the eligibility phase. From purely advisory, the AO's power became that of a decision-maker (Vanheule 2007: 144). The position of the AO had been strengthened: also in the border process, the AO could reverse a decision of the IO not to accept an asylum claim. In September 1998 the political agenda regarding deportation changed suddenly. On 20 September 1998 the recourse to heavy handed deportation practices had a casualty: during her deportation the Nigerian rejected asylum seeker Semira Adamu was suffocated in an airplane in the Belgian airport Zaventem at the hands of the Belgian police. The architect of the deportation policy, Minister of Interior Louis Tobback, resigned and several police officers received suspended sentences for involuntary murder in December 2003. It led to some soul searching, and the humanitarian dimension of immigration policy gained more attention.[242]

Institutional evolution of the AO

The staff of the AO increased considerably. In 1988 when the AO was founded, only 22 civil servants with tenure track were attached to this service; in 1993 the tenure track positions were doubled among whom 18 were at the university level, which is the level of protection officers. Most staff increase, however, was with personnel with a temporary contract. In 1990 the AO had 14 workers with a temporary contract, but the Ministry of Defense provided 16 conscripts to the AO. The number of conscripts put each year at the disposition of the AO increased to 36 from 1991 onwards. In 1994 there were 319 staff members with a temporary contract and the Minister of Defense no longer provided personnel as conscription had been abolished.[243] Anyhow, the AO had not used the quota of conscript to its full extent as it had turned out that the investment in training and the high turnover among these conscripts (military service lasted only 8 months) was less advantageous than hiring contract labor. Also, the turnover of contracted labor was high, which meant that due to problems of replacement the allocated

[240] CGVS. 1992. 'Vijfde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen werkingsjaar 1992'; Arbitragehof nr. 20/93, 4 maart 1993. Accessed on 22/03/2022 at https://www.const-court.be/public/n/1993/1993-020n.pdf. p.20.

[241] CGVS. 1992. 'Vijfde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen'; Caestecker & Vanheule 2010.

[242] Statewatch. 2012. 'Five Police Officers on Trial over the Death of Semira Adamu in 1998'. 28 March 2012. https://www.statewatch.org/news/2003/december/statewatch-news-online-five-police-officers-on-trial-over-the-death-of-semira-adamu-in-1998/.

[243] On 28/05/1993 the Council of Ministers decided to expand the staff of the AO with 186 people, all of them with a temporary contract.

quota was not always used to its full extent. In 1995 the quota of contract labor was reduced to 217, and it went slowly down to 190 contract workers in 1998. Protection officers were recruited almost exclusively among the staff with university degrees. Among the civil servants, half were university graduates, while among the contract workers this was even higher at 60%.[244]

In 1997 Luc de Smet, a former UNHCR employee at the Brussels branch of UNHCR and until then adjunct Commissioner General became Commissioner General as the first Commissioner General, Marc Bossuyt, left for the Constitutional Court. From 1998 onwards the number of asylum applications went up and the backlog increased. No new personnel was put at the disposal of the AO, because the productivity of the existing staff declined. Luc de Smet insisted on having more personnel, but no re-enforcement was granted. Finally, with the exploding number of asylum seekers in 2000, Luc De Smet threw in the towel. In September 2001 Pascal Smet who had been adjunct Commissioner General since 1998 took over.[245] When Pascal Smet became Secretary of State in the government of the Brussels-Capital Region Dirk van den Bulck became the new Commissioner General (2003-2022).[246]

The transformation of the asylum tribunal into an asylum court

In 1993 the law was changed so that an appeal at the asylum court was always finally automatically suspensive. UNHCR resigned voluntarily from the AT. However, the new Aliens Law stipulated explicitly that UNHCR could at any moment advise on individual cases. The advice of UNHCR was not binding, but the AO or the asylum court had, however, if they did not heed this advice motivate their different position in their final decision.[247] The departure of UNHCR from the AT was used to reform the AT into an asylum court with professional judges. The 16 judges got a first mandate of 5 years after which they would be appointed for life.[248] The asylum court had full jurisdiction, meaning they gained authority both to investigate the case on its merits and to grant the refugee status themselves (Carlier & Vanheule 2010; Strubbe 2011). In 1993, as mentioned before, the asylum court (together with the AO) was transferred from the Ministry of Justice to the Ministry of Interior. The decision of the AO and the administrative court could be further appealed, on legal grounds rather than on its merits, to the Council of State.

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[244] Caestecker 2001 and the annual reports of the AO. By the end of 1995 only 21 of the 40 anticipated tenure track vacancies were effectively taken, by the end of 1996 30, and by the end of 1998, 33. CGVS. 1995. 'Achtste jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen werkingsjaar 1995'. p.47; CGVS. 1996. 'Negende jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen werkingsjaar 1996'. p.58.

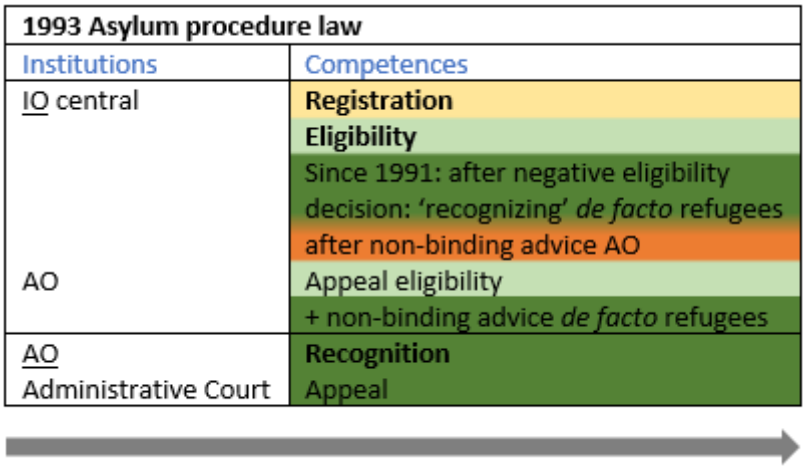
[245] Pascal Smet had been protection officer at the AO and later became adviser on asylum matters of several ministers of Interior.

[246] Dirk van den Bulck had been an adviser to the Ministers of Interior (1992-1998) and then a judge at the asylum court. In 2003 he became adjunct Commissioner General.

[247] Belgische Senaat. 1993. 'Wetsontwerp tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen'. Wetsontwerp 903/1. Kamer van Volksvertegenwoordigers. https://www.dekamer.be/FLWB/PDF/48/0903/48K0903001.pdf; CGVS. 1992. 'Vijfde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen'.

[248] The appointment of the members of the asylum court happened by the minister of Interior after consulting the Council of Ministers. CGVS. 1991. 'Vierde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen'. p.18.; CGVS. 1992. 'Vijfde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen'; Strubbe 2011. In 1995 and 1996 some side chairs of AT quit and had to be replaced. The Minister of Interiors established a non-binding advisory committee (through a MB) to start a selection procedure. Candidates were nominated to the ministry after a written and oral exam after which the minister made his final decision.

Fig. 12. Institutional timeline asylum determination Belgium, 1993



Tab. 8. gives an overview of the recognition policy of the appeal body between 1989 and 1998: seven percent of the decisions of the AO were overturned.[249]

Tab. 8. Recognition policy of asylum tribunal (1989-1992) and asylum court (1993-1998)[250]

	De jure refugee status
1989 (N= 95)	9,5%
1990 (N= 194)	13,4%
1991 (N= 371)	6%
1992 (N= 1938)	7,4%
1993 (N= 1377)	6,8%
1994 (N= 1641)	5,9%
1995 (N= 1537)	7,6%
1996 (N= 1547)	7,6%
1997 (N= 3438)	4,1%
1998 (N= 2982)	8,1%

[249] We have no information whether the two institutions had conflicting views on protection.

[250] CGVS. 1990. 'Derde Jaarverslag van de Commissaris-Generaal Voor de Vluchtelingen En de Staatlozen-Werkingsjaar 1990'. p.23; CGVS. 1992. 'Vijfde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen werkingsjaar 1992'. p.37; CGVS. 1993. 'Zesde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen werkingsjaar 1993'. p.22; CGVS. 1995. 'Achtste jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen werkingsjaar 1995'. p.27; CGVS. 1996. 'Negende jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen werkingsjaar 1996'. p.35; CGVS. 1998. 'Elfde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen werkingsjaar 1998'. p.29; Strubbe 2011. The asylum court also got appeal requests from UNHCR recognition decisions, which they refused to process as they declared themselves lacking authority.

Recognition policy: AO and article 3 of ECHR

As mentioned before early 1991 the AO had obtained the authority to advice the IO not to deport a foreigner whose asylum application was considered manifestly unfounded both by IO and AO, but whose life or freedom would be in danger when returned to his/her country of origin. With the creation of a status of temporary protection in August 1992 for Yugoslavian war refugees this humanitarian problem had been solved.[251]

Making abstraction of the Yugoslavian case, there was definitely a hesitation on the part of the AO to use its new authority to advise the IO not to deport a foreigner whose asylum claim had been declared manifestly unfounded both by the IO and AO but whose "life or freedom would be in danger" in their country of origin. In its detailed annual reports of 1992 and 1993, the AO did not mention how many ineligible asylum seekers they had asked protection for and whether this was decided collectively for certain nationals. Very few decisions of ineligibility were accompanied by a non-return advice. In 1992 and 1993 17 Liberian cases and three Somalian cases are documented, but in 1992 and 1993 the AO mostly advised the IO to return ineligible asylum seekers from Liberia not to Liberia but to its neighboring countries, while in 1994 the AO increasingly asked the Minister of Interior to judge whether a return was acceptable.[252] The expansion of the authority of the AO was not to the liking of the then Commissioner General.[253] He disliked the jurisprudence of the ECtHR, which condemned European states for expelling undocumented aliens-- among them rejected asylum seekers-- as their state would potentially treat them in a inhumanitarian and degrading manner. He opposed the indirect and virtual character of the rulings of this 'activist' court (Bossuyt 2003, 2010).

From 1994 onwards the AO more often used the authority granted by the law to grant non-return advice in ineligible cases. The AO at the same time reformulated the legal mandate into a respect for article 3 ECHR. The AO informed the IO as to the reasons precluding deportation because of a threat of torture, death penalty, or other grounds provided in the ECHR. From September until December 1994 the AO advised the Minister not to return 50 ineligible asylum seekers from war-torn Angola. From 1994 onward it was also used systematically for ineligible asylum seekers from Soudan, Somalia, and Liberia. In the first half of 1996, in the case of 97 older Armenian males who had been drafted in a brutal manner for the conflict in Nagorna Karabach and whose asylum request had been rejected, the IO was also given a recommendation not to return them.[254] From January 1998 onward this recommendation was

[251] For more details see 3.3.2.

[252] The AO confirmed the ineligibility of 449 Liberian and 37 Somalian cases in 1992 and 1993 and in respectively 64 and 88 cases the AO contested the ineligibility decision of the IO. In only 4% and 8 % of the ineligible decisions of the AO the institution opposed the return to Liberia and Somalia respectively. The decision of the AO to confirm the ineligibility decision could also be motivated by the fact that these ineligible asylum applicants were not truly from Liberia or Somalia or by them not showing up for the interview, but we have no information on the different reasons why the AO denied them access to the asylum procedure. Pascal Smet, de terugleidingsclausule, CGVS 7.1995. Private archives Frank Caestecker. We want to thank Laïs De Rynck who in her master thesis for UGent, Global Studies in 2021 provided us with these data on ineligibility decisions.

[253] Interview Marc Bossuyt, 14.10.2011, Brussels.

[254] Pascal Smet, de terugleidingsclausule, CGVS 7.1995 together with a counting operation at the end of June 1996 by Frank Caestecker, then CGVS-employee on the use of this protection instrument by the IO in the first half of 1996. For 1997 figures in Rapport to Parliament, 18.11.1997. Private archives Frank Caestecker. See also De Gryse (2001: 140). For 1994, 1995, first half of 1996 and first nine months of 1997 this was used for respectively 12, 79, 11 and 3 persons from Sudan, 27, 100, unknown and 16 from Liberia and from Somalia 3 in 1994 and 1 in 1997. The first nine months of 1997 the AO advised not to return in total 53 ineligible asylum seekers of which 9 and 16 were from Sierra Leone and Liberia respectively. All other rejected asylum seekers, which according to the AO should not be returned in 1997, were individuals from a total of 10 countries. All except four of the 53 were tolerated in Belgium; the four were deported because of danger for public order.

used for ineligible asylum seekers from Algeria, and in 1999 the AO was opposed to the return to Angola, Sierra Leone, Sudan, and Colombia.[255]
During this time there seems to have been a shift in the decision making at the AO. Initially, the AO only focused on the Convention of Geneva, but due to its advisory role in preventing unauthorized returns of ineligible asylum seekers in the light of article 3 ECHR, the protection mandate of the AO expanded. This broader mandate 'contaminated' the decisions of the AO on eligibility. It seems the AO declared more asylum seekers, who the IO had considered ineligible, eligible not because of the Convention of Geneva, but because of article 3 ECHR. When the Belgian recognition policy was questioned in the wake of the death of Semira Adamu the then Commissioner General Luc De Smet retorted that he evaluated all asylum requests in the light of the Convention of Geneva as well as article 3 of the ECHR.[256]

From 2002 onward the new Commissioner General, Pascal Smet, decided pro-actively to advise the Minister of Interior on the return decision not only in the eligibility stage, but also in the recognition stage. This seemed logical to him in particular for those asylum seekers whom the AO had declared eligible because of article 3 ECHR but had finally decided not to recognize as Convention refugees. The Council of State had clearly stipulated in its ruling of 27 February 2001 that the asylum court, in contrast to the AO, was not authorized to take into account article 3 ECHR.[257] Therefore, he decided that the negative decisions concerning recognition had to be supplemented with advice not to return the person if that was contrary to article 3 ECHR. The Commissioner General decided to judge each decision not to recognize an asylum seeker also in light of article 3 ECHR. He argued that the law did not prohibit him from adding a humanitarian clause to his decisions. The law mandated him to give his advice on nonreturn together with his decision on ineligibility, but he had no legal mandate to give such advice in the recognition phase. He could always add to his decisions what he called a humanitarian clause. For persons fleeing war-like situations, but also for others who would qualify for protection based on article 3 ECHR but whom the AO did not consider to be Convention refugees, the decision rejecting their asylum claim had to be supplemented with a humanitarian clause pleading for not returning those persons.[258]

The AO decided in 2002 pro-actively to point to a protection lacuna in Belgian refugee policy. All these *de facto* refugees were merely tolerated. Their order to leave the territory was not suspended: these *de facto* refugees were tolerated in an extremely precarious manner. There was still no legislation in Belgium granting these *de facto* refugees a legal status. The Belgian policy makers put off a final solution for *de facto* refugees pending a settlement at the EU level.[259] At supranational fora Belgium had been criticized for the lack of a solution for their *de facto* refugees. In 1996, the AO attended the Intergovernmental Consultations on Asylum, Refugee and Migration Matters in Berlin and the Meeting of European Government Experts on Current Refugees Issues in Zürich, during which temporary protection was highlighted.[260] UNHCR also insisted that the Belgian authorities should do better for those refugees. In Belgium itself the precarious stay of *de facto* refugees had been strongly criticized for a few

[255] For the period after 1997 we have no quantitative data except for an overall number in Sarolea and Carlier, 2002, 314. In 2001 the AO opposed the return to the North and Centre of Irak as well as Sierra Leone. Also some people from Sri Lanka and Roma from Kosovo were, according to the AO not to be returned.
[256] CGVS, Communiqué de presse, 26.9.1998. Private archives Frank Caestecker.
[257] Council of State, 93.573 quoted by Pascal Smet, Horizontale Richtlijn 10 artikel 3 EVRM, 14.3.2002. Archive Belgian Committee for Help for Refugees.
[258] Pascal Smet, Horizontale Richtlijn 10 artikel 3 EVRM, 14.3.2002. Archive Belgian Committee for Help for Refugees.
[259] CGVS. 1998. 'Elfde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen'. pp.141-143.
[260] CGVS. 1998. 'Elfde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen'. pp.139, 145.

years. Early 1998 the NGOs in refugee assistance launched a campaign for asylum for war refugees, but it received little political response.[261]

The change of Minister of Interior after the death of Semira Adamu meant that some modest initiatives were taken for a more humanitarian policy. In the fall of 1998 two circular letters on "foreigners who, as a result of exceptional circumstances and regardless of their will, temporarily cannot comply with an order to leave the territory" provided them with a temporary stay, each time with three months, under strict conditions.[262] The regularization was open to a larger group of persons: not only refugees but also people who because of technical or medical reasons could not return as well as asylum seekers who were waiting unreasonably long for a decision in their asylum request could apply. If these asylum seekers and tolerated undocumented immigrants were regularized, they would qualify for welfare and after three years a more secure stay would be possible. These circular letters mentioned the group of *de facto* refugees, but it was emphasized that the AO's advice that they should not be returned did not imply an automatic acceptance for regularization; a case-by-case approach was necessary, but it eased the burden of proof on the persons concerned.[263] Parliament evaluated immigration policy between October 1997 and June 1998 and one of its recommendations was to provide a better legal status to these *de facto* refugees.[264] In 1999 the individual requests for regularization proceeded apace, but in the published figures no specification was given as to the number of *de facto* refugees regularized. In 2000 a collective regularization campaign was launched that mentioned *de facto* refugees as an explicitly primordial target group.[265] Twenty thousand undocumented aliens were regularized by 2003. In the meantime, calls for a truly additional protection scheme were refuted by the Belgian authorities. They referred to the Treaty of Amsterdam. The Treaty called for a status at the EU level on temporary protection for mass influx within five years.[266] Still in July 2002 the Minister of Interior decided to grant the *de facto* refugees, those for whom the AO had opposed their return, a monthly suspension of their expulsion order until the AO agreed to their return. A proposal to grant them first a temporary stay of 6 months and then a yearly residence permit had been refuted.[267]

In the mean time following the Kosovo crisis (see 4.3.2.) the Belgian asylum institutions were heavily criticized. After the end of the war in Kosovo asylum seekers from Kosovo continued to arrive. In 1999, 12,330 of the 48,108 total asylum applications were from Kosovo. Many of them had come from Germany when the temporary protection program was stopped there. The rather late reaction in Belgium to the end of the war and the lifting of protection elsewhere in Europe created a peak in asylum applications.[268] This crisis caused the government to question the institutional setup of asylum policy. The autonomy of the AO was considered

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[261] Discussienamiddag OCIV. 5.06.1997. Personal archive Frank Caestecker.

[262] The circular letter of 9.10.1998 and 15.12.1998. Belgisch Staatsblad 14.11.1997; CGVS. 1998. 'Elfde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen'. p.83.

[263] Circular letters of 10/10/1997 and 15/12/1998. CGVS. 1998. 'Elfde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen werkingsjaar 1998'. pp.83, 136-143.

[264] Van den Bossche, Luc & Jan Peeters. 1998. 'Nota Aan de Ministerraad: Evaluatie van Het Asielbeleid in België'. Personal archives Frank Caestecker.

[265] CGVS. 2000. 'Dertiende jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen werkingsjaar 2000'. https://www.cgvs.be/sites/default/files/jaaverslagen/jaarverslag_2000_nl.pdf.

[266] CGVS. 1998. 'Elfde jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen'. p.93. In 1997, the AO had already called upon the Minister of Interior to give more attention to the *de facto* refugees. Although the Minister had provided opportunities for regularization, the AO asked for highlighting the specific situation of the *de facto* refugee group more explicitly. CGVS. 1997. 'Tiende jaarverslag van de commissaris-generaal voor de vluchtelingen en de staatlozen werkingsjaar 1997'. p.10

[267] Correspondance between AO, IO and Minister of Interior, 7.2002. Personal archives Frank Caestecker.

[268] Duquesne, A. 'Omzendbrief van 02/09/1999 betreffende de opheffing van het bijzonder statuut van tijdelijke bescherming voor kosovaren'. Belgisch Staatsblad. 2 September 1999. https://etaamb.openjustice.be/nl/omzendbrief-van-02-september-1999_n1999000714.html.

detrimental to an efficient immigration policy. The bad communication between the IO and AO was blamed for the exceptional peak in asylum applications. Fully integrating the AO in the IO would make for a more efficient decision -making process in the asylum procedure. In this manner the minister of Interior would formulate general guidelines that the AO had to implement in individual cases, without the minister intervening in individual decisions. The AO would decentralize in three regional branches, all bound by ministerial instructions.[269] The discussions on reform of the institutional setup in asylum policy lasted for four years at the top political level, but in the end nothing happened. The appointment of a new government in 2003 with a new Minister of Interior and a drop in asylum applications in the following years did away with the need for reform.[270]

4.2.4. Switzerland

By 1994 the centralization of the registration of asylum request was successful as the filling of applications in the country was done by eight registration centers. Many asylum seekers were dismissed from the asylum procedure as they came from a safe third country. Many of those whose request was registered went through an accelerated procedure. In the first half of the 1990s probably about 60% of the asylum cases were handled in an accelerated procedure, which meant that 40% of the asylum seekers were not interviewed by protection officers (IGC 1994: 6-7; 1997: 332). From 1999 onward lack of identity papers without an acceptable explanation was also a reason for dismissing an asylum application (IGC 2007).[271]

The AO becomes the IO

With a staff of 250 in1989, the AO was expected to deal with about 12,000 cases per year. Following substantial staff increases up to 350 in 1989-1990 and 500 in 1992, the Office was expected to be able to deal with an annual number of 20,000 cases in 1990 and about 37,000 in 1992. As the number of arrivals in 1989 was more than 24.000 the backlog increased. However, from 1991 to 1993 it was possible to considerably increase the number of expedited cases so that it virtually corresponded to the number of new arrivals and since 1992 the number of expedited cases has been higher than the number of new arrivals resulting in a decrease of the backlog. By 1997 the staff was reduced to 450 and the backlog totaled 16,380 cases (IGC 1997). The AO increasingly dominated asylum policy. From 1988 onward the cantonal authority for registration was in competition with the centrally managed registration centers. By 2006 only 35% of the asylum applications were still registered by the cantons, and in 2008 the cantonal registration of asylum applications was abolished (Mainz 2017; Parak 2019). By that time the AO had been merged with the Department of Immigration, Integration, and Emigration and had become the Federal Department of Migration.[272] A full circle had passed as the AO, created as a specific institution within the Ministry of Justice and Police in 1979 to distinguish Swiss immigration policy managed by the foreigners' policy from refugee policy, merged with the IO.

In 1995 and 1996 respectively 1531 and 2399 asylum applications were dismissed (UGC 1997: 334). The asylum seeker whose request was dismissed at the airport could only

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[269] 'Nota Ministerraad. Nieuwe Asielprocedure'. 2000. Box 37, CAHAR. AIO Brussels.; CGVS. 'Jaarverslag 2000'. pp.21-22.

[270] CGVS. 2003. 'Jaarverslag 2003'. p.7.

[271] Until May 1995 no social support has been available for undocumented asylum seekers for a certain time period (IGC 1997: 326).

[272] The *Schweizerisches Bundesamt für Auswanderung, Integration and Auswanderung* was a department of the Ministry of Justice and Police. Already by the end of the 1990s a merger had been considered but it took until 2005 to be consolidated. Portner 2021, 110. Federal Department of Migration was called *Office federal des migrations/ Bundesamt für Migration.*

be sent back to their country of origin if UNHCR agreed to this return. The advice was asked for 34% of those applications in 1994 (N= 293), 58% in 1995 (N= 473) and 50% in 1996 (N= 702) (ICG 2007: 332).

In 1990 an AT had been created.[273] The government never resorted to the provision in the law instituting the AT that the government in extraordinary circumstances could interfere in its functioning. In 1993 55% of the rejected asylum seekers appealed the decision of the AO and 1.5% were repealed (IGC 1994: 7; 1997:332). In 1995 38% of the rejected asylum seekers appealed this decision at the AT of which 9% were repealed, in 2006 resp. 47% and 10% (ICG 2007: 332). The decision of the AT could be challenged before the Highest Administrative Court. In 2007 the AT became a court

Not only Convention refugees

As mentioned before, the "provisionally admitted persons" were *de facto* refugees covered by either an explicit (*de facto* refugee status) or an implicit toleration (humanitarian status). The humanitarian status went beyond refugees as the AO and the cantonal aliens' police could also grant a humanitarian permit on other grounds than the need for protection, such as medical reasons, not being repatriable due to reasons beyond the will of the individual[274] or asylum seekers whose request was not decided upon after three years. The authorities had granted mostly humanitarian status since the 1980s. This continued until 1992 when more *de facto* and *de jure* refugee statuses were granted. This change was probably due to the promotion by UNHCR of temporary protection as a solution to the war refugees from Yugoslavia. Kälin (2001) explains the large number of *de facto* refugees to the restrictive definition of Convention refugee that the AO and AT adhered to, following the German doctrine of state persecution

[273] The AT was called the *Asylrekurskommission/ Commission suisse de recours en matière d'asile*

[274] Refers to asylum seekers who were stateless or without any identity documents and to whom the authorities of his/her country of origin refused to issue such papers.

Tab. 9. Switzerland decisions on four statuses, 1988-2002[275]

	De jure refugee status	*De facto* refugee status	Humanitarian status
1988	363 (680)	312	2036
1989	707 (654)	277	1950
1990	593	127	4879
1991	770	168	14029
1992 (N= 24583)	6% (1395)	21% (5155)	6% (1454)
1993 (N= 23048)	17%	42%	4%
1994 (N= 22290)	13%	52%	4%
1995 (N= 16885)	15%	56%	4%
1996 (N= 17678)	13%	32%	4%
1997 (N= 17375)	15%		
1998 (N= 15319)	13%		
1999 (N= 30399)	7%		
2000 (N= 28439)	7%		
2001 (N= 15799)	14%		
2002 (N= 16026)	11%		

The AO had to grant provisional admission, now also called temporary protection to rejected asylum seekers in cases where expulsion or deportation was technically impossible, unlawful, or unreasonable. The latter referred to refugees fleeing indiscriminate violence, who were therefore not directly persecuted as individuals but who were victims of a general situation of violence, usually a civil war. As Tab. 10. illustrates, during the 1990s the status was mostly granted to Tamils from Sri Lanka, those fleeing the Yugoslavian civil war, and the violence in Angola and Somalia.[276] In 1992 5155 aliens were granted temporary protection of whom 89% were fleeing the war in Yugoslavia. In 1993 nearly a thousand people were covered by this temporary protection with a Bosnian share of 44% and in 1994 again nearly a thousand with the Bosnians only a share of 38% (IGC 1995: 200-215).[277] Those who were temporarily protected were usually allowed to stay for a first period of 12 months.[278] They received welfare as asylum seekers and needed an authorization for working. Family reunification was mostly not possible. The canton of residence had authority to renew this residence permit as long as

[275] For the period 1992-2002 we refer to IGC 2009: 359, where it was explicitly stated that the figures refer to first instance decisions and that the dismissed asylum applications were not incalculated in the rejections. The n refers to decisions taken either (*de jure* or *de facto*) protection, tolerance because of compassionate grounds or rejections. In IGC 1994: 14 the *de facto* status is called a status of temporary protection and the figures are similar to IGC 2005: 200-215 on temporary protection. The figures in brackets refer to the figures for the 1980s published in Seminar on the Functioning of Asylum procedures arranged in the Context of the Inter-Governmental Consultation on Asylum Seekers in Europe and North America, 1990, AN, 19970381/6. In 1992 there were 1730 Convention refugees according to IGC 1994, but only 1132 according to IGC 1997: 334 and 1395 according to IGC 2009: 359. The fluctuation in the numbers of Convention refugees the next years went all kind of directions. For this table we used the numbers of IGC 2009: 359. In IGC 2009: 359 the rejections included the temporary Admissions, so we deducted those for the years we knew the number of de facto refugees and humanitarian status (1992-1996) to calculate the share of decisions for protection and compassionate grounds. We also took the ones of IGC 1997 which were hardly different from those of IGC 1994. For temporary protection see 3.3.2.

[276] Documentation-Réfugiés, Supplement to No. 213, 30 March-12 April 1993 quoted by Lambert 1995: 136-140. IGC 2005: 200-215 refers also to cases from Turkey.

[277] It seems these figures refer to new cases, without the decisions to prolong the residence permits of older cases.

[278] We do not know whether until 1991 the period of stay agreed to for a provisionally admitted persons was one year or shorter, but by 1992 it was one year. If it is a longer period than before it can be attributed to the UNHCR promotion of temporary protection (of one year).

protection was needed. The residence permit could be withdrawn at any time depending on the situation in the country of origin, but also if they committed a crime or an offence in Switzerland[279] (Lambert 1995: 136-140; IGC 1994: 15; Ruedin & Efionayi-Mäder 2014).

Tab. 10. Countries most represented among de facto refugees and those with humanitarian status in Switzerland (not including temporarily protected)[280]

	1994-2000	2001-2007
Sri Lanka	21.000	3.000
Serbia/Kosovo	7.000	10.000
Iraq		4.000
Somalia	5.000	3.000
Bosnia-Herzegovina	2.000	3.000
Angola	2.000	2.000

By the end of 1992, 14,800 refugees and other foreigners resided in Switzerland with a humanitarian status and about 5000 with a *de facto* refugee status.[281] The numbers living with these precarious statuses increased to total 30,000 in 1995 (Ruedin & Efionayi-Mäder 2014). As temporary protection was extensively used by the Swiss authorities parliament demanded a legal imbedding of the status. This procedure was very time consuming and costly although it was obvious that many of these refugees could not return home. Moreover the Swiss wanted to be prepared for similar situations in the future. The Swiss parliament eventually requested the government to prepare a legal provision for temporary protection. The latter installed a Commission of Experts to prepare such law, but we ignore the results of this campaign (IGC 1995: 200-215).

By early 1999 the number of temporarily protected refugees had dropped to 16,000. In that year 20,000 war refugees from Kosovo were also temporarily protected in Switzerland, but only for a few months. All immigrants, mostly asylum seekers who had arrived before 1993 and were still in Switzerland in 2000, could apply for a regularization and 16,700 foreigners, among them many refugees could legalize their stay. The cantonal authorities could turn these temporary permits into permanent residence permits depending on financial self-sufficiency and integration into Swiss society. Many elderly as well as single women and families had a hard time qualifying for permanent residence permits. A reform in 2007-8 granted *de facto* refugees access to the labor market and the opportunity to reunite with their family. As mentioned before about 18.000 had been authorized to stay in Switzerland between 1992 and 1996 under the protection of a decision of the Federal Council to grant temporary protection to war refugees from Bosnia-Herzegovina and in 1999 20,000 war refugees from Kosovo were also temporarily protected in Switzerland. Not all these 38,000 refugees from ex-Yugoslavia returned home; some qualified for the regularization for long stayers. The number of temporily protected aliens nearly doubled in 2000 to 28,000 persons and their number oscillated around 25,000 in the next decade (Ruedin & Efionayi-Mäder 2014).

[279] Between 1994 and 2014 133,000 persons had been provisionally admitted. By 2014 15% of them had left the country voluntarily and 0.4% were deported. Ruedin & Efionayi-Mäder 2014: 4.
[280] Ruedin and Efionayi-Mäder: 2014: 18.
[281] Figures from the AO, February 1993 quoted in Lambert 1995: 140.

4.2.5. The Netherlands

After Germany started to dismiss a large part of the asylum requests, the flows of asylum seekers changed direction, and the Netherlands became one of the preferred destinations of those who came to Europe (Fig. 10.). Thus, the Netherlands embarked on a strategy of concentration, speeding up of decision making and dissuasion. In 1994, similar to Switzerland and Denmark in 1986 and Germany in 1993, the Dutch authorities decided that the registration of asylum applications, including the first interview, should no longer take place all over the country in the different local IOs. They concentrated (the registration of) asylum seekers in a few centers. Registration was done by the AO in first two centers, later, by 2001 in four centers. The Dutch authorities also decided that the processing of more asylum claims had to be done in fast-track procedures. This procedure had been introduced in 1974 with the concept of manifestly unfounded applications but it was only legally embedded in 1994. Inspired by Germany, two additional grounds were added by which an application could be treated in an accelerated manner: asylum seekers from Safe Countries of Origin and those who came from a Safe Third Country. In 1995 the Safe Third Country principle (and the Dublin agreement) was adopted in Dutch migration management.[282] Asylum requests of asylum seekers coming from a Safe Third Country could be dismissed, but in practice this concept was not often applied. In line with developments elsewhere, the mere transit through a third country was not sufficient for the return to that country (Doomernik, Penninx, & Amersfoort 1996: 29; Grütters 2003: 60; Spijkerboer & Vermeulen 2005: 17). The fast-track procedure had no second interview, no internal review possibility, and appeal was not automatically suspensive.

For the regular procedure there was an internal review possibility that had existed since 1965, meaning that when the AO made a negative decision the minister (probably delegated to the central IO in practice) could still decide otherwise. The impact of this corrective mechanism in favor of refugees was modest in practice in the 1970s and 1980s[283]. From 1994 onward, however, the IO corrected almost one third of the AO's decisions on a yearly basis.[284] When an asylum claim was rejected by the IND (AO/IO) an appeal was possible, but even these appeals did not always suspend the deportation order.[285]

In 2000 a new Aliens Act was codified in which the criteria for regular residence permits were not clearly defined. There also remained a lot of unsettled issues in refugee matters to be arranged through royal decrees and circular letters. Administrative discretion had large leeway (Böcker et al 2012). The most important change was that from then onward all applications could be treated in the fast-track procedure, as opposed to only decisions based on the safe countries or the claims considered manifestly unfounded. The fast-track procedure was used in at least 60% of all the cases by mid-2002, which almost always ended in a rejection. The fast-track procedure only had a non-suspensive marginal appeal possibility with the Council of State. The Minister in charge expressed the ambition to raise the share of fast track procedures to 80%.[286] This had not been the intention of the legislature, yet the frequent use of the fast-

[282] The list of Safe Countries of Origin was prepared by the Minister of Justice. We ignore whether the AO had any say in the establishment of this list, nor to what extent this concept was used in practice. In 1995 Poland, Switzerland, and the Czech republic were considered Safe Third Countries (Grütters 2003: 296). In 1996 this list consisted of all EU and EER countries and in addition Bulgaria, Hungary, Poland, Romania, Slovakia, Czech Republic, Ghana, and Senegal. Doomernik, Penninx, and Amersfoort 1996, 29. Being from a Safe Third Countries was not considered as a 'manifestly unfounded' criteria, but could be used as an ineligibility ground.

[283] Interview Jaap Hoeksma, 6.07.2021. Amsterdam; for the 1970s and 1980s: Swart 1978; Fernhout 1990.

[284] It is not entirely clear whether this number concerns only asylum decisions of the AO or is referring to all IO decisions concerning migration. Van Ess, Henk, and John Oomkes. 1998. 'Portier van het asielbeleid is doodziek'. Leidsch Dagblad, 5 December 1998, p.41.

[285] Grütters 2003, 51–61. For a more detailed description of the Dutch asylum procedure in 1994 see: IGC 1994

[286] Human Rights watch. 2003. 'Fleeting Refuge: The Triumph of Efficiency over Protection in Dutch Asylum Policy'. Vol. 15, No. 3 (D). https://www.hrw.org/sites/default/files/reports/nether0403.pdf ; Bakker 2002: 149.

track procedure did hold up in court. The Aliens Law of 2000 abolished the internal review possibility, which since 1994 had had an important impact on the decisions in asylum cases. The AO acquired the final say on recognition decision in first instance. Moreover, from then onward an appeal had a suspensive effect, except in the fast-track procedure and in the marginal appeals from the Council of State[287] (Grütters 2003: 53, 57).

IO/AO an internally autonomous agency

In 1994 as part of a general administrative reform movement in the Netherlands the IO/AO was reorganized. Whereas previously the IO/AO had been an integral part of the Ministry of Justice, it became an internally autonomous agency called *Immigratie and Naturalisatie Dienst* (IND). The purpose of this reform was to separate policy development, which was to stay at the Ministry of Justice, and policy implementation, which would be done at the IND.[288] The new IND (IO/AO) director Hilbrand Nawijn said about the establishment of the IND: 'You have to separate policy from implementation'.[289] The IND (IO/AO) decentralized its organization by having branch offices in the different regions of the Netherlands; each branch office carried out both IO and AO tasks. The distinction between the IO and AO was still ambiguous: Slightly less than half of the IND (IO/AO) staff was exclusively working for the AO. The other 50% to 55% worked for both the IO and AO within the IND (IO/AO) (Grütters 2003: 143). Within the AO there was a distinction between the protection officer who conducted the asylum interview and the one who took the decision. The former had no specific legal training and did all kinds of cases as for them there was no geographical specialization.[290] Due to the unexpectedly large increase in the number of asylum seekers the staff of IO and AO together expanded from 856 FTE in 1993 to 2,823 FTE by the end of 1999. A lot of the staff was hired on a temporary basis.[291] The IND did not provide data on each division's staff but according to Grütters (2003: 171) about half of the staff was allocated to the AO. The IND used a distinctly more businesslike style than before. In its yearly reports they describe themselves as a company to be managed. Moreover, production standards became central in its operational management.[292]

The newly established IND (IO/AO) had a rough start because of the total reorganization and an initially largely inexperienced staff confronted with ever increasing asylum claims. Between 1994 and 1998 the courts corrected about 20% of the AO rejections. The malaise caused the head of the IND (IO/AO) to resign in 1996, but his successor only stayed on for 2 years.[293] In 1997 the Minister of Justice admitted that there was a large gap between the intended policy and policy implementation. The IND (IO/AO) allegedly appropriated too much policy freedom-- a practice that could tacitly go on for a long time because of the lack of a

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[287] Appeal before the Council of State was the only appeal possibility in the fast-track procedure and the second appeal in regular procedure.

[288] IND. 1995. 'Jaarverslag IND 1994'. The reception of asylum seekers, which before 1994 was under the authority of the Ministry of Welfare, became a jurisdiction of an internally autonomous agency within the Ministry of Justice.

[289] Hilbrand Nawijn was head of the AO between 1982 and 1984, head of the IO between 1984 and 1988, and head of the IO/AO between 1988 and 1994. Nawijn added: 'Politics must be able to keep an eye on things, but there must be room for your own business operations... The aliens policy has a great involvement factor in society and I therefore don't mind being accountable to politics. I also send a lot of information to my political superiors, which leads to mutual understanding.' Nawijn, Hilbrand. n.d. 'Document Reis Door de Tijd: Van DVZ Naar IND: Bijdrage Hilbrand Nawijn'. AIND. Z-336. A93/3448/369703, Bakker 2002.

[290] IGC 1994

[291] In 1996, 1997, and 1998 the IO/AO had employed respectively 32%, 22%, and 12% of its staff on a temporary appointment. Grütters 2003, 95.

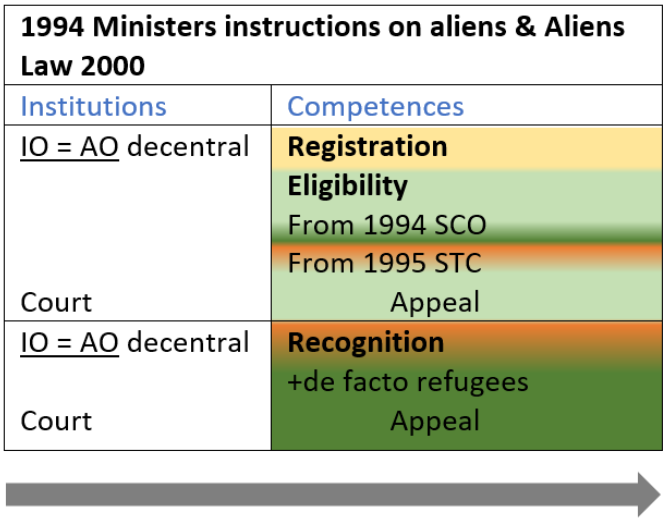
[292] IND. 1995. 'Jaarverslag IND 1994'; IND. 1999. 'Jaarverslag IND 1998'; IND. 2000. 'Jaarverslag IND 1999'.

[293] Van Ess, Henk, and John Oomkes. 1998. 'Portier van het asielbeleid is doodziek'. Leidsch Dagblad, 5 December 1998, p.41; IND. n.d. 'IND 25 jaar: Interview Peter Veld'. Overzichtspagina. Accessed 2 March 2022. http://ind.nl:80/over-ind/verhalen/Paginas/IND-25-jaar-Interview-Peter-Veld.aspx.

control mechanism over the organization. The minister lost her grip on the organization as a consequence of the enormous growth of the IO/AO in a relatively short time frame.[294] By 1998, however, the IO/AO claimed to perform better as more protection officers acquired experience and more on-the-job training was provided. As the years passed, more protection officers got tenure track.[295] Also, the AO increasingly became more separated from the IO within the agency. In 1998 a new separate regional branch that only conducted AO tasks was created.[296]

The Aliens Law of 1994 changed the institutional set-up of refugee appeal as well. Appeals were no longer handled by the Council of State but by separate Aliens Chambers at regular courts. Since these courts were spread all over the country, a separate chamber was set up to monitor the unity of justice. This reform was not implemented with the deliberate intention of sidelining the administrative court, which had exercised an expansive influence on refugee recognition, but for the sake of a general reform of the administrative law courts. For efficiency reasons the authorities did not want two different appeal bodies as the asylum procedures were considered to last too long. Thus, the administrative court's appeal instance was 'sacrified'.[297]

Fig. 13. Institutional timeline asylum determination the Netherlands, 1994/2000



A new unit within the IND (IO/AO) was created in 1995 to defend their decisions in the regular court. Before, the Ministry of Justice was defended by the general 'country lawyer' (*Landsadvocaat*) to represent them before the court. A lawyer unit within the IND (IO/AO) was supposed to increase the quality of decisions as the distance separating protection officers from the lawyers was shortened. According to Grütters (2003: 63) the new unit 'lost' more cases in

[294] Van Ess, Henk, and John Oomkes. 1998. 'Portier van het asielbeleid is doodziek'. Leidsch Dagblad, 5 December 1998, p.4.1.; Van Ess, Henk, and John Oomkes. 1998. 'Wanbeleid bij immigratiedienst'. Leidsch Dagblad, 5 December 1998, p.1.

[295] IND. 1995. 'Jaarverslag IND 1994'; IND. 1999. 'Jaarverslag IND 1998'; IND. 2000. 'Jaarverslag IND 1999'; Grütters, 2003

[296] This separate AO branch was specialized in processing the growing number of asylum seekers from Irak and Afghanistan. AO branch wanted to treat these requests more collectively. IND. 1999. 'Jaarverslag IND 1998'; Leidsch Dagblad. 1988. 'Nieuwe afdeling IND', 21 July 1988, p.3.

[297] The supervision of the detention of asylum seekers had always been handled by the regular courts, similar to several other European courts, but this was used in the Netherlands as an argument to give the regular courts authority in many matters of alien law, including asylum. Grütters 2003; Interview Groenendijk, Kees. 10.09.2021. Ghent.

appeal than the 'country lawyer' did before. Although this probably was the consequence of the reorganization, as the new staff of the new unit still had to be trained and not necessarily (entirely) attributable to shabby work of the IND (IO/AO).

In 2002 the internal autonomous agency IND (IO/AO) was transferred from the Ministry of Justice to the newly created Ministry of Aliens Affairs and Integration with Minister Hilbrand Nawijn, former head of the IND (Grütters 2003: 50). The AO within this agency got a stronger autonomous position and was managed by its own directors. The division of tasks between the two bodies became more clearly defined. The decentralized IND (IO/AO) structure was no longer based on regions but on processes: Asylum being one process (AO) and other migration related tasks being another process (IO). Some branch offices only handled IO tasks, while others solely handled AO tasks. The AO and IO had their own separate 'middle management teams' although they were still supervised by the head of the IND who had the final responsibility over the whole organization. According to Groenendijk and Strik, an optimal recognition of refugees was not the goal of this strict division between the AO and IO. On the contrary, the division between the IO and AO created possibilities to be stricter in the recognition of refugees.[298]

The 2000 Aliens law also had consequences for appeal as it reintroduced the Council of State in the asylum procedure, but this time only as second appeal instance. The Aliens Chambers from the regular courts were still in charge of the first appeal, however, the separate chamber within the regular court that monitored the unity of justice ceased to exist, as the Council of State took over this task (Grütters 2003: 44). The legislature did not originally intend a fully-fledged additional appeal possibility with this reintroduction of the Council of State. The intention was that the Council of State would in fact only be able to act if a large number of cases received a negative decision without further justification (Ficq 2001: 61–69). While the Council of State had a liberal reputation between about 1976 and 1994, this was not the case for at least the first 10 years after its reintroduction in the asylum procedure in 2000. Many of the old Council of State members had retired by that time and had been replaced by new judges. The Council of State often only tested marginally, claiming 'the IND (IO/AO) was the expert in this field that we should trust'.[299]

Refugees shelved in different kinds of protection statuses

The Netherlands had since the immediate post war period experimented with by ad hoc refugee statuses. As was the case with the *de facto* status granted in the 1970s and 1980s it is not entirely clear whether the IO or the AO was responsible for the granting of most *de facto* statuses between 1990 and 2002.[300] Most of the time both literature and circular letters refer to 'the minister/ministry of justice' (before 1994) or IND (after 1994) as deciding actor, so it could be that in practice this task was delegated to the IO or the AO.[301]

As Tab. 11 shows, most of the time the Ministry of Justice seemingly preferred *de facto* statuses as a solution since the Ministry retained full control over the stay of these war refugees and had done so for a long time. The *de jure* refugee status was only granted to a minority of the recognized refugees. By 1990 the Netherlands applied two refugee statuses: the *de jure* status and the *de facto* (C) status. The *de facto* (C) status was initially a status granted as part

[298] Strik, M. H. A. 2011. Besluitvorming over Asiel- En Migratierichtlijnen. De Wisselwerking Tussen Nationaal En Europees Niveau. Den Haag : Boom Juridische uitgevers. https://repository.ubn.ru.nl/handle/2066/92850; Interview Groenendijk, Kees. 10.09.2021. Ghent.

[299] Interview Groenendijk, Kees. 10.09.2021. Ghent.

[300] Only for the *de facto* (C) status we know for sure that the IO was responsible. Asylum Branch of the ministry of Justice. 1983. 'Asiel in Nederland'. Afdeling Asielzaken. IND 1956-1985 (2305). NATH.

[301] If we are not sure whether the IO or AO was responsible for the granting of the *de facto* status; we write 'IO/AO' as deciding institution, although it is almost certain that it was only one or the other.

of the regular aliens policy.[302] It became a 'catch all' status over which the Minister of Justice (in practice the central IO) enjoyed large discretion. In the context of asylum, it was granted to asylum seekers who the IO considered unrepatriable based on the 'general living conditions' and in particular on the security situation in the country of origin. However, due to the increasing number of asylum seekers rejected who appealed this decision, the asylum procedure got jammed.

Early 1990 the IO/AO started to relieve the asylum procedure by granting a collective suspension of expulsion order to all those persons who had been rejected by the AO but whose country of origin was considered unsafe for a forced return. Rejected asylum seekers who were considered to be non-repatriable, due to the situation 'home' were to be explicitly tolerated. The head of the IO/AO said about these asylum seekers: '*They are here and they may not stay. Yet we do not dare to send them back'*. It was decided to temporarily tolerate all rejected asylum seekers from Afghanistan, Iran, Iraq, Ethiopia, Somalia, Liberia, Lebanon, and Sri Lanka.[303] The Dutch authorities were wary that this decision would have a 'pull-effect' and therefore it was decided not to make this list of countries public. Yet, already in March 1990 the head of the IO/AO, Nawijn, blabbed in an interview with the press, admitting the existence of such a list. From then onward the parliament insisted that the Minister of Justice would report on this list and periodically the list was discussed, albeit confidentially in parliament. In 1990 a suspension of expulsion order only meant that the rejected asylum seekers would not be expulsed on 'short term'. By tolerating the war refugees, the authorities hoped they would refrain from further proceedings and relieve the courts. These tolerated refugees often had no other choice then to remain in the (overcrowded) asylum centers and were denied access to educational institutions and the labor market.

In the summer of 1990, the IO/AO suggested that the *ad hoc* arrangement should be transformed into a program integrated more structurally in their policy. The IO/AO suggested granting the non-repatriable war refugees a one year (renewable) residence permit and after 5 years a permanent residence permit. The ministry of Wellbeing and Culture considered that 3 years temporary protection was long enough, henceforth they should be given a permanent residence permit. The IO/AO also proposed enabling the tolerated refugees to leave the asylum reception centers and move to a municipality that would be in charge of their upkeep. The Ministry of Social Affairs and Labor opposed this for fear of a pull effect and insisted on having these asylum seekers removed. The Ministry of Interior approved the proposal and retorted that these people should be able to work and thus would not constitute a burden on the municipalities. (Franssen 2011: 38-41; Van Eijl 2011: 143).

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302 The *de facto* (C) status, being part of the regular migration, could be revoked under the same conditions as other aliens: a) if he/she provided false information, b) if he/she has not enough means of subsistence, c) if he/she has violated the public peace or order, d) if the permit is granted under restrictions that are no longer applicable or violated. Scholten, Y. Wet van 13 januari 1965, houdende nieuwe regelen betreffende de toelating en uitzetting van vreemdelingen, het toezicht op vreemdelingen die in Nederland verblijf houden, en de grensbewaking. Staatsblad van het Koninkrijk der Nederlanden. 2 februari 1965. https://cmr.jur.ru.nl/cmr/Vw/Vw65/Stb.1965.40.pdf

303 The initial list of countries has never been published, but the countries were published by a newspaper, de Telegraaf, who referred to inside information. Six of these countries were among the top ten asylum countries in the Netherlands. During the political discussion 'the Ministry of Justice' was considered to be the author of this list, but the countries were called 'Nawijn-landen' (Nawijn-countries) referring to the head of the IO/AO Hilbrand Nawijn so probably he had considerable input in the making of this list. We ignore whether the Ministry of Foreign Affairs had any say in the drafting of this list. However, indirectly they must have had an impact as they provided the Country of Origin Information. The criteria for adding or removing a country to the list were not clear. Aarts, Milco, and Angelo Vergeer. 1990. 'Recht Op Een Uitkeuring? Nooit van Gehoord!' De Telegraaf, 3 March 1990; Franssen 2011: 11, 38; Van Eijl 2012.

Tab. 11. Decision making in asylum cases in the Netherlands, 1990-2004.[304]

	Recognition rate *de jure* (AO)	Recognition rate *de facto* (C) (IO)	Recognition rate second rate *de jure* (IO)	Limited residence permits (absolute numbers)	Permanent residence permits (absolute numbers)
1990 (N= 10550)	6,5%	8,2%	NA		
1991 (N= 17240)	4,5%	11,1%	NA		
1992 (N= 32090)	15,3%	21,5%	NA		
1993 (N= 30770)	33,6%	15,2%	NA		
1994 (N= 51490)	12,9%	24,6%	?		
1995 (N= 28220)	28,3%	22,0%	15,3%		
1996 (N= 57760)	15,3%	12,8%	12,8%		
1997 (N= 30770)	21,5%	16,8%	16,8%		
1998 (N= 26140)	9,0%	13,7%	35,0%		
1999 (N= 60920)	2,5%	5,7%	14,0%		
2000 (absolute numbers)	1810	4790	3130		
2001 (absolute numbers)	440	1570	810	7230	530
2002				8080	750
2003				8350	1410
2004				6120	4050

Eventually in 1991 a circular letter formalized suspension of the expulsion order. In the final compromise war refugees were denied access to welfare, but received a permanent residence permit (a *de facto* (C) status) after three years of temporary protection. The central IO/AO issued a suspension of expulsion order, which was valid for one year but could be renewed if the situation in the country of origin had not improved. The 'flip side of the coin' was that from then onward the one-year suspension of the expulsion order was only granted under the condition that the asylum seeker revoked his/her asylum application. The authorities wanted a watertight guarantee that the courts would no longer be bothered by these war refugees. Seemingly, in 1990 the toleration of all war refugees had not convinced them all to stop appealing the initial negative decision of the AO at the Council of State. The changes of 1991 improved to a certain extent their living conditions. Still, they often had no other choice but to remain in the asylum centers, but in the first year these refugees were granted access to basic education. In year two they could follow a professional training and from year three onward they were authorized to have a gainful employment, which enabled them to leave the asylum centers (Franssen 2011: 38-41).

The strict condition to revoke the asylum application was attenuated in a circular letter in 1992, which only required them to 'suspend' the application. Moreover, this circular letter elaborated on the distinction between the *de facto* (C) status and mere suspension of the expulsion. In order to qualify for the *de facto* (C) status it was stipulated that the asylum seeker had to demonstrate that they ran a 'real' and 'individual' risk upon return to be a victim of

[304] Dutch Minister of Justice, 1994; UNHCR 2000, 2001; Statline, 2007. Many of the *de facto* refugees whose expulsion orders were temporarily suspended ultimately got a humanitarian status on appeal based on the length of the procedure. Archives Dutch IO Z-336. A94 3621 725675. HSBO. Letter to Leden MT. 'Plan van Aanpak Voor de Oude Zaken van Gedoogden Waarin Het Gedoogaanbod Is Gedaan', 28 February 1994. 1994. Not included in these figures are the refugees fleeing ex-Yugoslavia (1990-1994) who did not have to apply for asylum as they were protected from August, First 1992 onward under a separate 'temporarily suspended expulsion order'.

violation of article 3 of the ECHR. The suspension of expulsion could be granted if, in view of the (human rights) situation in the country of origin, a return 'could' result in a violation of art. 3 ECHR and this risk was not an individual, but a collective risk (Franssen 2011; Spijkerboer 2014: 68). Few war refugees availed them of the opportunity to obtain a suspension of expulsion: of the 7,701 people who got offered this opportunity in 1992 and 1993, only about 200 people accepted the offer. Many of those who refused the offer still appealed and got a *de facto* (C) status, not based on protection needs but on the length of the procedure. The Dutch temporary solution for the war refugees from Yugoslavia made the refugee policy in the Netherlands even more fragmented: they were granted a suspension of expulsion not for one year, but only for three months and they could get this status upon arrival, they did not need to apply for asylum first.[305]

Several academics and members of parliament did not understand the need for suspension of expulsion as a new, weak kind of protection as the *de facto* (C) status was available. The Council of State agreed with the critics as they judged in several appeal cases that the difference between these two protection schemes was too unclear; additionally, they ruled that suspension of expulsion had no legal basis. In June 1993 the IO/AO realised that the arrangement was unsustainable because of the Council of State's jurisprudence and no longer issued suspensions of expulsion. In February 1994 all war refugees whose expulsion order was suspended were transferred to a *de facto* (C) status.[306]

The establishment of a second rate de jure status

The Ministry of Justice did however not want to give up its practice of suspension of expulsions orders. Taking into account the criticism of the Council of State, the Aliens Act of 1994 upgraded the suspension of expulsion into a 'second rate *de jure* status', both for Yugoslavians as for other nationalities who previously qualified for a suspension of expulsion order. The Bosnian war refugees served in particular as the incentive for the authorities to improve the protection of war refugees (Obdeijn & Schrover 2008: 330–32; van Selm-Thornburn 1998: 225-226). This 'second rate *de jure* status' implied a three-year residence permit that could be issued to foreigners who, in the opinion of the Minister of Justice, due to the particularly harsh situation in their country of origin, could not be forced to return.[307] As was the case with the suspension of expulsion, it could be revoked when there were no more obstacles to expulsion and it was granted in a collective manner. There was immediate yet limited access to the labor market. After three years the status could be traded for a *de facto* (C) status, a status not explicitly mentioned in the alien law, but which came with a permanent residency permit.[308]

The IO could still suspend ad hoc expulsion orders on an individual basis. A system was worked out whereby the Minister would grant this 'second rate *de jure* status to certain nationalities whenever a pattern of such decisions by IO among this group became discernable.' The Minister had a fairly wide margin of discretion in introducing and discontinuing this policy of upgrading protection. The examples of Somalia between 1995 and 1999 illustrate how protection was adapted to the everchanging circumstances in the country (see further). From

[305] For more details see 3.2.2.

[306] Anyhow, most of them had already been in this procedure for two years and would have qualified for a *de facto* (C) status after one more year. HSBO. Letter to Leden MT. 1994. 'Plan van Aanpak Voor de Oude Zaken van Gedoogden Waarin Het Gedoogaanbod Is Gedaan'. 28 February 1994. AIND Z-336. A94 3621 725675.; Staatssecretaris Justitie. Letter to Head IND. 1995. 'Brief Aan Staatssecretaris van Hoofd IND', 10 February 1995. AIND Z-336A95/3703/747446.; Fransen 2011; Spijkerboer 2014; Van Eijl 2012.

[307] Called *beleidsmatig niet-verwijderbare asielzoekers* by the Ministry of Justice.

[308] Secretary of State of the Ministry of Justice. 1993. 'Circulaire'. https://cmr.jur.ru.nl/cmr/tbv/tbv82/93/tbv-82-1993-88.pdf; Dutch IO. 1999. 'B7/15.2.2 Gedoogden En Ontheemden: De Voorwaardelijke Vergunning Tot Verblijf'. Ministry of Justice. https://cmr.jur.ru.nl/cmr/vc/vc94/DeelB/B7/B7-15.pdf; Franssen 2001; Dutch IO 1999; Doomernik, Penninx & Amersfoort 1996, 31.

1994 onward the appeal bodies only assessed decisions marginally. Yet, toward the end of the 1990s because of the on-again-off-again-policy of the Minister, the courts sometimes imposed on the executive power mandatory 'second rate *de jure* status' policy (Spijkerboer 2014).

The use of many different refugee statuses throughout several decades led to ever longer asylum procedures as *de facto* refugees always tried to improve their status through appeal, to achieve the stronger *de jure* Convention status. The executive authorities had, however, whenever a choice had to be made between flexibility and legal certainty, chosen flexibility (van der Molen Kuipers 2016: 59). Both the IND (IO/AO) and appeal instances, as well the Council of State until 1994 as the Aliens Chambers of the regular courts afterwards felt this political choice to be detrimental to the interests of the people concerned. In the early 1990s the Council of State had demanded a more clear cut rule of law approach for the protection of these war refugees who the AO did not consider refugees. The executive power had yielded to this demand by upgrading simple tolerance of war refugees to a new status codified in the Aliens Law. Codification diminishes administrative discretion, but the executive authorities made the law somewhat flexible so that administrative discretion hardly diminished. Even the regular courts who in 1994 became the successor to the Council of state in the asylum appeal and who had been reluctant to intervene, at times imposed a more stable policy.

In 2000 the new Aliens Law brought all *de jure*, *de facto* refugees as well as humanitarian statuses together in one refugee/humanitarian status, above all to avoid endless appeals.[309] When a refugee was recognized, based on the Convention of Geneva or the ECHR, (s)he was granted a residence permit initially limited in time, but after three years this could be upgraded to a permanent residence permit. Asylum seekers who because of humanitarian reasons got this status were given the same rights as refugees (Spijkerboer & Vermeulen 2005).

4.2.6. France

Jean-Marc Sauvé, director of the IO at the ministry of Interiors pointed out to Charles Pasqua when he returned as Minister of Interior in 1993 that a lot of progress had been realized in the last years in the acceleration of the processing of asylum requests, the repression of illegal stay and the prevention of unwanted immigration by a strict visa policy and border policy, but that the deportation of unwanted immigrants had been much less successful. These unwanted immigrants refused to return and therefor they destroyed their identity documents and as their consulates refused to grant them a laissez-passer they could not be returned. These to be deported immigrants could also mobilize a part of French civil society. Sauvé lamented "Une opinion prompte à se mobiliseren sur des actions ponctuelles de défense d'étrangers faisant l'objet de decisions d'éloignement, soit au nom du respect des situations individuelles soit au nom d'une situation générale prevalent dans les pays d'origine….Ces actions de defense peuvent dépasser le simple réseau associative de défense des étrangers et compter sur des soutiens "illustres"". He also complained about the "jurisprudences extrêment protectrices pour les étrangers, mais très contraignantes pour les autorités administratives… les risques de contentieux (au niveau national et européen) génèrent dans les préfectures notamment un très lourd suivi des dossiers individuels". Domestic courts limited the state's actions to control the identity of unwanted immigrants and to detain them and the forced return was thwarted by the jurisprudence of the ECHR which prohibited "des traitements inhumains ou dégradants en cas de renvoi d'un étranger dans son pays d'origine". He insisted strongly on reaffirming a strict

[309] Ministerie van Justitie. 2000. 'Wet van 23 november 2000 tot algehele herziening van de Vreemdelingenwet (Vreemdelingenwet 2000)'. Officiële publicatie. Ministerie van Justitie. 7 December 2000. https://zoek.officielebekendmakingen.nl/stb-2000-495.html.

state control over migration flows as the world they lived in underwent important economic and political changes which could provoke disorderly population movements.[310]

The return of Charles Pasqua as Minister of Interior in 1993 led to reforms which restricted access to the asylum procedure and enhanced expulsion measures. Pasqua was however forced by the judiciary to take the standards of the ECtHR into account and some of his measure to make expulsion more effective had to be watered down. Among others he had to accept appeals at the administrative courts against the expulsion decisions. For the first time in France, the strict separation between refugee and immigration policy was not respected. The legislation which parliament voted related as well to migration control as to protection of refugees. This was contrary to the French self perception as the country of asylum. Pauti (1999: 127f.) called it the banalisation of refugee law. The adoption of the Schengen treaty did break more French exceptionalism. Joining the Schengen region was contingent on compensatory measures for the safeguarding of external border control. France had to adopt instruments such as carrier sanctions, a common visa policy and the safe third countries concept.

The possibility to dismiss an asylum claim because of coming from a safe third country was introduced for those applying at the border. At airports, ports but even railway stations asylum seekers were interned in newly erected internment centers and without any substantive examination of their claim they could be returned to a 'safe third country'. The practice at the border is not very well known, also because there was initially no external oversight. Only in 1995 UNHCR and selected NGO's got access to these centers. The Council of State in its ruling of December 1996 criticized the extensive use of the safe third country rule at the border. Dismissing an asylum request because the immigrant came from a safe third country was only applicable, according to the Council of State when that third country is a member state of the Schengen area. The Constitution had been adapted to the Dublin Convention, but its provision guaranting a subjective right to request asylum was still applicable for the asylum application of immigrants who travelled from other countries. These immigrants' asylum request could not be dismissed like that (Lavenex 2001:171-178; Bousquet 2006). Still when the asylum request was taken into account in the border procedure, it demanded first a decision on admission to French territory. In the asylum procedure at the border an interview for those detained in the airports of Paris was organized by the AO as the numbers involved were limited (2% of the annual asylum requests). The AO had to judge whether the case was not manifestly unfounded. In 1992 73% of the asylum seekers who were judged in the border procedure could leave the (air)port to await the final decision in France, 45% in 1993-94, 41% in 1995, 49% in 1996 (Amnesty International and France Terre d'Asile 1997: 152; IGC 1997:172).

The AO lost ground to the Ministry of Interior in the case of asylum requests considered fraudulent or abusive. The Pasqua law of 1993 had given the prefects authority in the screening of requests for asylum. While during the 1980s the prefect could refuse a temporary residence permit to an asylum seeker in cases of a threat to public order, a fraudulent or abusive claim or the applicant used it to avoid an impending expulsion this did not prevent the AO to investigate the case as any other case. In 1993 the prefect obtained the authority to deny access to the asylum procedure for Dublin cases and for the other cases to whom he could as before refuse a temporary residence permit,. Banning them for the asylum procedure could be concomitant with an expulsion order. The first draft had given the prefect full authority to do so, but finally the law stipulated that he had to await for the decision of the AO for its execution. The AO had to examine these requests in an accelerated procedure while the asylum seeker was detained in an administrative detention center. In the mid 1980s the then Minister of Interior Pasqua had already set up such a procedure informally, but by 1993 it became a formal procedure and the

[310] Jean Marc Sauvé to Directeur du Cabinet, 6.4.1993. AN, 19970381/6.

numbers involved probably increased. In 1994 there were 516 such cases, 620 in 1995 and 581 in 1996 (Amnesty International & France Terre d'Asile 1997: 180).

The AO wanted in 1994 to base its eligibility decisions increasingly on an interview, but due to a lack of resources this ambition could not be realized. Sending protection officers to the administrative detention centers all over the country was not feasible for the AO, also as they were not allocated resources for such missions.[311] Appeals against the decision of the AO could be lodged with the AT, but without suspensive effect and this to the dismay of the AT.[312]

The AO in the shadow of the AT as symbol of French human rights standards

During the emergency operation to reduce the backlog, the AO had not bothered about its reputation. The French refugee policy had lost legitimacy in particular among the NGOs involved in refugee assistance. From 1992 onward the AO started to work on its public relations.[313] The office emphasized internally that protection had been neglected. The AO provided more training to the PO and insisted that the remaining asylum claims, due to their higher complexity, had to be investigated more seriously, including interviewing the asylum seekers.[314] The AO wanted to legitimize its recognition policy. Different state authorities continued to insist on higher productivity. The AO had to organize their work more efficiently, with the intent of cutting costs by remaining very selective in who to interview. Within the AO however there was a consensus that the share of decisions based on interviews had to increase. Also, the Ministry of the Interior was in favor of more asylum seekers to be interviewed as rejected asylum seekers who appealed the expulsion decisions at the administrative court had less chance to have the expulsion decision reviewed if they had been interviewed by the AO. In general, it was felt among the policy makers that having more asylum seekers interviewed increased the legitimacy of the asylum policy. The share of decisions of the AO based on an interview increased from 17% in 1990 and 26% in 1991 to 50% in 1992.[315] By then the French AO did not think it worthwhile to follow what they considered the German exaggeration to interview all asylum seekers. The director of the AO considered that manifestly unfounded and abusive applications could still be decided without an interview.[316] The AO linked this notion of clearly unfounded applications to the concept of safe countries of origins, as claims from Poland, Hungary, and Czechoslovakia from 1991 onward, from Benin and Cap Verde from 1992 onward, from Chile from 1994 onward and from Romania from 1995 onward were treated as clearly unfounded applications for whom no in depth interview was necessary. The AO based its judgement on an extensive interpretation of the cessation clauses of article 1C of the Convention of Geneva which refers to a change of circumstances in the country of origin to suspend protection. The AO used this provision in the Convention of Geneva in an extensive manner by deciding to consider new asylum seekers from these countries as manifestly unfounded and to be handled by the accelerated procedure.[317] Still by 1994 the AO had

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311 Conseil d'administration OFPRA, 26.9.1994. AN, 19970381/6; Conseil d'administration OFPRA, 29.11.1995. AOFPRA, Dir. 1/14.

312 Compte rendu de l'entretien entre M.Bordry, conseiller technique, et de M.de Bresson, 7.5.1993. AN, 19970381/6; Lavenex 2001: 174.

313 This shift in strategy was probably also linked to the nomination of Francis Lott as new director of the AO in August 1991, serving until May 1996. Jean-François Terral was his successor and remained Director until June 2000. https://www.ofpra.gouv.fr/fr/histoire-archives/galeries-d-images, accessed 24.2.2022.

314 Conseil d'administration OFPRA, 5.12.1990, 21.4.1992, 2.11.1992**.** AOFPRA, Dir. 1/9-11.

315 Conseil d'administration OFPRA, 23.10.1991; Lott, information note OFPRA, 13.11.1992, AOFPRA, Dir.1/10 ; Conseil d'administration OFPRA, 26.9.1994. AN, 19970381/6.

316 Francis Lott, Rapport au Conseil d'administration OFPRA, 2.11.1992, AOFPRA, Dir.1/11.

317 The AO had collectively suspended refugee status from nationals from these countries respectively in 1991, 1992 and 1994 based on the cessation clauses of article 1C of the Convention of Geneva which states that the

increased its share of decisions based on an interview to 55% and the ambition of the director was to increase that share further to 75%, but it dropped in 1995 to 40%.[318]

Pressure on the AO mounted. While in 1996 the average asylum application was decided in three months, the government wanted to reduce the time necessary to process an application to three weeks. A possible instrument for accelerated decision making in asylum cases, even dismissing claims was safe countries of origin, but there was still strong opposition to the use of this instrument. The then Minister of Foreign Affairs opposed the use of the concept of safe countries of origin because it could create diplomatic frictions. However, the practice of the AO to use article 1C of the Convention of Geneva to decide to treat new applications from the countries where refugees residing in France had been suspended of protection as manifestly unfounded was condoned by the Minister. In particular, the large number of Romanian asylum applications were quickly examined on the paper file by the AO without a personal interview.[319]

In the mid 1990s the external advisers, mainly from the Ministry of Finance who had an important influence on the allocation of resources, had disagreed with the ambition of the AO to interview most of the asylum seekers. They opposed this so-called waste of resources and did not consider the decrease of the staff to 400 employees in 1994 to be problematic. They also insisted on a more flexible geographical expertise among the protection officers. Given that the countries of origin of the asylum seekers could change quickly an outspoken geographical specialization was not efficient.[320] Although they agreed that interviewing each asylum seeker strengthened the legitimacy of the asylum system, they considered that the AT should interview all its plaintiffs and that for the AO this was not necessary.

Tab. 12. Staff involved in procedures[321]

	AO	AT	Total
1993	263	133	396 (152 PO)[322]
1994	208	127	385
1995	239	125	364
1996	219	107	326 (125 PO)[323]

In 1994 the AT saw an increase in its budget that by 1995 enabled the court to interview all the asylum seekers who appealed a rejection by the AO**.** The AT became the main focus of reform which had been one of the advices of the National Consultative Commission on Human Rights, a consultative body attached since 1984 to the Prime Minister's Office. This reform also aimed at improving the legal doctrine. The decree of July 3, 1992 had created *les sections réunies* which brought regularly all the judges together to settle questions of principle. Seeing the increasing number of judges since 1989, it was deemed necessary to harmonize the

asylum state must ensure that the changes are effective, fundamental, and durable before proceeding to withdraw recognition of refugee status. IGC 1994: 6, IGC 1997: 173.

[318] Conseil d'administration OFPRA, 26.9.1994. AN, 19970381/6; Conseil d'administration OFPRA, 19.12.1994. AOFPRA, Dir.1/13; IGC 1994: 8.

[319] Réunion interministérielle, 23.1.1996; Minister of Foreign Affairs to Minister of Interior, 1996. AN, 19990260/8; Amnesty International & France Terre d'Asile 1997: 180.

[320] Conseil d'administration OFPRA, 26.9.1994 and 29.5.1995. AN, 19970381/6. While in the early 1990s and before the AO had mainly functioned with contractual personnel, by the mid 1990s the staff was increasingly on a tenure track. By the turn of the century the core of the staff was tenure track civil servants and contractual personnel was hired for alleviating the peak in asylum requests (Akoka 2020: 276-278; 2012: 411-430).

[321] IGC 1994: 13; IGC 1997: 112..

[322] PO were the A category, 46 were in the B category, and 198 were secretaries (C category).

[323] PO were the A category, 43 were in the B category, and 122 were secretaries (C category).

jurisprudence of the AT. [324] In the meantime the staff of OFPRA had further diminished, which by 1999 had forced the institution to decide on only 37% of the asylum requests after an interview. By 2000 45 supplemental staff members were hired and the staff again reached 400 (Delouvin 2000). By then the reformed and better equipped AT increasingly annulled decisions of the AO. The director of the AO had stated in 1995 that he closely followed the jurisprudence of the AT and that the low rate of annulation was to a certain extent testimony of this close relationship.[325] From 1994 onward the AT's annulation rate oscillated around 5% but it increased in the following years to 8% (IGC 1997: 177).

Territorial and constitutional asylum: hardly protection fragmentation

In 1998 the Aliens Law was reformed (Reseda Law) The provisions concerning asylum in the Pasqua law were taken out of the Aliens Law and introduced in the Asylum Law in line with the French tradition. At the same time two new protection statuses, supplementary to the protection *de jure* were introduced, territorial and constitutional asylum. The constitutional asylum for 'fighters for liberty' was rather a cosmetic operation as 'fighters for liberty' mostly qualified for the Geneva Convention. The Constitutional asylum seems to have served a nationalistic agenda and to underline French exceptionalism rooted in its revolutionary history.[326]

Fig. 14. Institutional timeline asylum determination France, 1993-2007

Pasqua Law 1993 and Reseda law 1998	
Institutions	Competences
IO Decentral	**Registration**
AO	**Eligibility** Border procedure (from 1982 onwards) MUC (from 1993 onwards)
AT	Appeal (non suspensive)
AO	**Recognition** + since 1998: constitutional asylum
AT	Appeal
Minister of Interiors	**Recognition de facto refugees** Since 1991 informal Since 1998 formal + upon recommendation of AO

Territorial asylum was a formalization of an already existing protection possibility. The circular letter of the Interior Minister on October 25, 1991 had opened the possibility for rejected asylum seekers to appeal at the prefecture if they believed the (forced) return to their country of origin

[324] De Bresson, the president of AT was for example not convinced that the high recognition rate of Tamils from Sri Lanka was justified. Conseil d'administration OFPRA, 26.9.1994. AOFPRA, Dir.1/13; Since 1991 asylum seekers could apply for free legal support for their appeal at the AT, but only those who entered France in a legal manner could qualify. Amnesty International & France Terre d'Asile 1997: 188-190.

[325] Conseil d'administration OFPRA 17.12.1995. AOFPRA, Dir.1/14.

[326] The AO and AT granted constitutional asylum and the status was similar to Convention refugees. The AT only granted constitutional asylum to one (Algerian) case in 1998 and to three cases in 1999. Delouvin 2000; Pauti 1999: 104f.; Combarnous 2001: 78-79.

would be a threat to their life or liberty or a danger for a breach of art 3 ECHR.[327] The prefect had to refer the claim to the Minister of the Interior, who could take a discretionary decision on the matter. In rare cases the Minister made a political decision that a war or situation of collective violence was a serious reason preventing *refoulement*, although the individual was not under the scope of the refugee definition of the Convention. As mentioned before (3.3.2) temporary protection had been provided to Yugoslavians from August 1992 onwards. Although the préfets had quite some discretionary power this protection had been instructed through circular letters of the Minister of Interiors. For other nationalities the préfets could provide temporary protection on a case by case basis if upon return to their country of origin there was a threat to the life or liberty of the person or a danger for a breach of art 3 ECHR. In practice, only Rwandese and Algerians were temporarily protected in this way (IGC 1995). In those cases a temporary authorization to stay was issued. There was no status attached to being such a *de facto* refugee. The only right the person had was that of being protected against *refoulement* until the situation improved in his country of origin. They received a suspension of their expulsion for three or six months, without the right to work (Lambert 1995: 126ff.). The protection of these *de facto* refugees was totally discretionary. There were no criteria and no mean of legal redress.

According to Weil (1995: 15-17) the AO pro-actively, it was not provided for in the legislation, informed the Minister if an asylum seeker they rejected was not deportable due to a situation of war or collective violence in his/her country of origin. In the archival material we found proof of this allegation but only related to Algerians. In December 1991 the AO had pled for a status of temporary protection for the Algerians who would flee from Algeria if the FIS won the elections.[328] In the annual report of 1993 the AO reports that they are being confronted with a number of asylum applications from Algerians who evoke real and serious fear for persecution by the FIS. However, they cannot recognize them as Convention refugees as they are not persecuted by the state. Nevertheless, the AO decided to interview them and to investigate in depth their cases, which enabled the AO 'to negotiate in the best possible manner their possibilities for asylum and stay in France'.[329] It is possible that this intervention made the Minister of Interior decide on December 22, 1993 to grant an Algerian a leave to remain, accepting that his 'life, liberty and security were at risk as a result of the activities of Islamic groups'. This would set a precedent and, according to Delouvin (2000), between 1994 and 1998 about three to four thousand Algerians benefited from this form of tolerance. The AO seem to have intervened consistently at the ministry of Interior on behalf of these Algerian refugees who they refused en mass the *de jure* status. The AO mentioned a recognition rate of 1% for the Algerians.[330]

In 1998 this subsidiary protection was enshrined in the new Alien Law. It gave the Minister of Interior, after consultation with his colleague of Foreign Affairs, the power to grant territorial asylum to foreigners 'whose life or liberty is threatened in their countries' or who have been 'exposed to treatment contrary to article 3 of the European Convention on Human

[327] Lambert 1995 mentions a (forced) return to the country of origin that would be contrary to Article 33 of the 1951 Convention.

[328] Note of Lott on a possible mass flight from Algeria, 11.1991. AN, 2010011187.

[329] Rapport d'activité 1993, Afrique de Nord. AOFPRA, Dir.1/4.

[330] Conseil d'administration OFPRA, 29.11.1995. Directot François Lott of AO explained that very few Algerians were being recognized "dans la mesure ou la Convention de Geneve ne s'applique pas selon les organes français chargés de la reconnaissance de la qualité de réfugié si les autorités publiques du pays d'origine n'ont pas encourage ou toléré des persécutions. Les cas sérieux de menaces avérées sont signalées à l'attention de la DLPAJ en vue de recherche d'une solution dans une formule asile territorial." Conseil d'administration OFPRA, 29.5.1995. AN, 19970381/6 (Farde Conseil d'administration OFPRA, 20.11.1995).

Rights'.[331] According to Weil (2004: 348) AO did not get the authority to decide on territorial asylum because the government feared its 'liberalism'.

Subsidiary protection got an upgrade as the beneficiaries were granted a (renewable) residency permit for one year. AO and AT obtained the authority to inform the Minister if an asylum seeker they rejected could qualify for territorial asylum. In 1998, after the law came into force, 30 cases were submitted by OFPRA to the Minister of the Interior (Delouvin 2000). The French asylum institutions, AO and AT, continued to be reluctant to provide protection in situations of indiscriminate violence. They considered that a general situation of indiscriminate violence in the country of origin could not justify protection in the absence of a clearly individualized risk of persecution or serious harm upon return. While the risk had to be by definition personal to the applicant, such a risk could be caused by a collective treatment to a whole group of persons. The issue was not whether the claimant is more at risk than anyone else in his/her country, but rather whether he/she was personally at risk because of his/her membership of a particular group (Chetail 2007: 95). Probably those cases where the AO and AT could not delineate individualized risk were forwarded to the Minister for territorial asylum. The Ministry of Interiors received many more requests directly from applicants.

In 1998 there were in total 1,339 requests for territorial asylum but only decisions on 224 persons of whom 8 were protected (3.6 %). In 1999, of 6,000 applications at most 10% received protection. Between 2000 and 2003 the number of requests exploded: in 2003 there were 28.000 applications and only 0,3% were accepted (Combarnous 2001: 79ff.; Clochard 2007: 333; Mazzella 2005). According to Tiberghien (2021: 28) 1,100 persons received territorial asylum between 1998 and 2003 which meant an acceptance rate hovering around 1%.

Tab. 13. Share of decisions on two protection statuses, France 1992-2003[332]

	De jure refugee status	Subsidiary protection
1992	37% (N= 14347)	
1993	31% (N= 16331)	
1994	26% (N= 18275)	
1995	23% (N= 20239)	
1996	20% (N= 22203)	
1997	17% (N= 24167)	
1998	19% (N= 22405)	3,6% (N= 224)
1999	19% (N= 24151)	10% (N= 6000?)
2000	17% (N= 30278)	?
2001	12% (N= 40779)	?
2002	13% (N= 50206)	?
2003	10% (N= 66344)	0,3% (N= 28,000)

4.2.7. Denmark

Denmark continued to dismiss asylum applications on the basis of coming from a safe third country. In 1997 Denmark joined the Schengen region and used the Dublin principles, but the central IO stuck to the administrative practice to dismiss applications from countries on their

[331] The Decree of 25 June 1998 mentioned that this protection should be limited to non-state persecution. This limitation was, however, cancelled by the Council of State on 26 January 2000.
[332] IGC 2009, 163; Clochard 2007, 402.

own 'safe third country lists' without any further assessment of the safety if these countries.[333] As the IO had done before 1989, the safe country concept was again used for mere transit situations. When the applicant submitted his/her application, a civil servant from the IO's 'rapid decision unit' first made a decision whether the case would be handled through the regular procedure or dismissed on the grounds of coming from a safe third country. However, if a case was dismissed the applicant was referred to that country explaining that the application was refused on procedural grounds and not on its merits. An appeal with the Ministry of Interior against such a removal decision was possible yet without suspensive effect (Hvidtfeldt & Schultz-Nielsen 2018: 48–50; Vedsted-Hansen 2001).

In 1994 a fast-track procedure without appeal was introduced for 'manifestly unfounded cases'. Since 1994 a manifestly unfounded procedure was applied to individuals, but also collectively to all nationals of countries which the Danish authorities considered safe such as EU member states, Switzerland, the Nordic Countries, Lithuania, Poland, Czechoslovakia, Slovakia, Hungary, Romania, Bulgaria, Russia, Benin , Ghana, Niger Senegal, Tanzania, Japan, New Zealand and Australia. [334] In the case the asylum request is expected to be dealt with in a manifestly unfounded procedure the detention of an asylum seekers became possible in 1995(IGC 1997: 118). In this accelerated procedure both the AO and the Danish Refugee Council interviewed the asylum seeker and decided whether it was a manifestly unfounded application (IGC 1994: 5). The purpose of this new procedure was to spend less time on hopeless applications. It seems the central IO applied this concept in an expansive manner, as the Danish Refugee Council increasingly opposed its judgment. While the veto rates before 1994 oscillated around 20%, this increased to 35% in 1994, 40% in 1995, and 45% in 1996. It dropped again in 1997 to 25%, increased to 30% in 1998, dropped to 17% in 1999, and increased again to 21% for the first half of 2001. While the Danish Refugee Council agreed to a quick (negative) decision for applications that were clearly abusive or unrelated to the criteria of the Convention of Geneva, they opposed cataloguing cases in this manner on the basis, for example, of the assessment of individual credibility. A veto of the Danish Refugee Council meant that the case was no longer to be investigated in an accelerated procedure but according to the regular procedure, which implied that the central IO had to properly investigate the case on its merits and that the applicant could appeal an eventual negative decision, an appeal which suspended the order to leave the country (Vedsted-Hansen 2001: 69, 110).

The AO and refugee policy in political turmoil, certainly after 2001

Denmark's AO was a division within the Aliens Directorate, a branch of the Ministry of Interior. This directorate was sub-divided into two divisions, one of which handled asylum cases, but also visa, residence, and work permits. The other division dealt with registration and reception centers (IGC 1994: 2). In the regular procedure the asylum seeker was interviewed twice by the police of the local IO, once briefly for registration and a more thorough interview later regarding the protection need. The AO did not interview the asylum seeker themself (IGC 1994: 6). In 1995 these interviews were transferred to the central IO in a decision to concentrate all asylum matters centrally. In October 1995 the Danish Immigration Service was created as a branch within the Ministry of the Interior (IGC 1997: 119). In 1996, the total number of administrative personnel and decision-makers at the Danish Immigration Service was 370 persons. By 2008 the Danish Immigration Service had become a directorate of the Ministry of Refugee, Immigration and Integration Affairs (IGC 2009: 128).

[333] In 1997 the following countries were on the list (beyond the EU countries as these were part of the Dublin convention): Norway, Iceland, Switzerland, USA, Canada, and Hungary. The latter only for some nationalities. In 2001 also Poland was on that list. IGC 1997: 124. 1997 The Danish authorities used also the intensity of the connection to the third country or to Denmark to decide whether they would process an asylum application.

[334] This is het list of countries used in 1996 and quoted in IGC 1997: 125.

By the mid 1990s a procedure was introduced by the Danish Parliament following controversy over two individual cases where the applicants did not qualify for residence under any of the existing provisions of Danish Law, but the Parliament was strongly of the view that returning them to their country of origin would have been wrong. Since then a rejected asylum seeker could apply at the Ministry of Interior for a humanitarian stay on a non-asylum basis (IGC 1997: 130). In 1998 the Aliens Act was amended and the criteria to obtain a *de facto* status were reclarified. The substantive grounds had to involve a 'well-founded fear of persecution or similar injustice'.[335] In 1999 a temporary protection status was created for the war refugees from Kosovo who were granted a renewable permit of six months, which suspended the asylum application for maximum 2 years (Hedetoft 2006; Hvidtfeldt & Schultz-Nielsen 2018: 48–50).

The asylum seekers rejected by the AO could appeal at the AT.[336] In 1995, the AT, which had been composed of seven members (of whom two were appointed by the Danish Refugee Council and the Danish Law Society's Council, the Ministries of Social Affairs, Foreign Affairs, and the Interior nominate one member each) was reduced to five members. The Ministry of Social Affairs did no longer participate in the AT. The Danish Refugee Council could only appoint one member while before two (IGC 1994: 6). An appeal against the decision of the AT was possible at the Courts of Justice, but it was not suspensive and only considered the lawfulness of the decision (IGC 1997: 103).

Tab. 14. Danish decisions on two statuses, 1992-2004 (IGC 2009: 119)

	De jure refugee status	*De facto* refugee and humanitarian statuses[337]
1992 (N= 4570)	14%	37%
1993 (N= 4886)	14%	32%
1994 (N= 5680)	12%	21%
1995 (N= 22010)	22%	62%
1996 (N= 6943)	14%	54%
1997 (N= 7108)	12%	42%
1998 (N= 6107)	15%	43%
1999 (N= 5514)	17%	42%
2000 (N= 7046)	17%	32%
2001 (N= 8739)	21%	31%
2002 (N= 8951)	13%	16%
2003 (N= 3453)	14%	8%
2004 (N= 2155)	5%	5%

By 2001 the triumph of a nativist policy

Refugee and immigration matters became heavily politicized throughout the 1990s, receiving extra impetus through the foundation of the Danish People's Party (DPP) in 1995, which mobilized electoral support exclusively on the immigrant issue. The parliamentary discussion of two individual cases in the mid 1990s had been used to galvanize xenophobic support. This politicization dominated the electoral campaigns of 1998, 2001, and 2005. The strong support

[335] Within the first three years the *de facto* status can be revoked if the situation in the refugee's home country significantly improved (IGC 1997: 130).

[336] In 1994 the suspensive effect of an appeal to the Ombudsman was removed (as well as a request for resumption of a decision) (IGC 1997: 118).

[337] It is referred as in IGC 2009: 119 as complementary protection and other authorisations to remain.

for DPP's anti-immigrant rhetoric has meant that, by and large, all parties in the Danish Parliament have chosen to prioritize the immigration and integration issue in their policy statements and legislative proposals. In November 2001, after an electoral campaign solely dominated by the immigration issue, the Social Democratic-Radical (i.e., social liberal) Party coalition was ousted and a Liberal-Conservative government came to power. This new government created a new ministry, the Ministry for Refugees, Immigrants, and Integration, whose new powers were previously within the Ministry of Interiors. The new coalition deliberately wanted to decrease the number of immigrants and refugees.

In 2002 the *de facto* refugee status was defined more restrictively as to be granted only if "*being returned to the home country would place the foreign national at risk of execution or of being subjected to torture or inhuman or degrading treatment or punishment"*. As Tab. 14 illustrates this caused in drop in *de facto* statuses granted. *De jure* refugees, similar to *de facto* refugees, were first granted seven years of temporary protection and only then could they claim the protection of the *de jure* status (Mansouri, Leach & Nethery 2010: 136).

4.2.8. Italy[338]

In the 1980s two distinct drafts were being discussed in Parliament, one on immigration and one on asylum. Only the first became law in 1990: an immigration law among others addressed the procedure to meet foreign labor needs of the Italian economy. Due to the social alarm raised in public opinion by the Albanian crisis (see 3.3), the draft asylum law was never approved. The immigration law per force addressed only the basic aspects of Italian refugee policy so that Italy could become a member of the Schengen zone. The most urgent aspects of asylum policy were regulated: asylum seekers had to request asylum, either at the border or at the local offices of the national Police of the Ministry of Interior.[339] Asylum seekers then obtained a temporary residence permit with which they were eligible for social support. The request was to be decided by the National Commission for the Right of Asylum. This Commission had a staff of 30 persons and had four chambers, each dedicated to a specific geographical area. The four presidents of the chambers had to meet at least twice a week to assure the unity of jurisprudence. A Questore (Préfet de police) presided over each chamber in which four other civil servants were members. A civil servant of the Presidency of the Government had to coordinate the activities of the National Commission with Italy's immigration policy. The Commission also had a representative of the Ministry of Foreign Affairs as well as two representatives of the Ministry of Interior (representing the security police and the refugee department). UNHCR, in contrast to the previous AO, no longer had input into the decision making, but the organization could still attend meetings of the AO, but only in an advisory capacity (Meneghini 1999: 248f; IGC 1994: 6).

Between 1993 and 1996 the recognition rate was 10 (N= 1561), 17 (N= 1621), 17 (N= 1705) and 29% (N= 543). (IGC 1997: 225-232). Rejected asylum seekers could appeal the decision of the AO at the Regional Administrative Tribunals with suspensive effect, but only for procedural matters. In the early 1990s, 9% of the applicants appealed the initial decision and 10% of them had a negative decision annulled. This rose to 23% appeals but only 2,4% in 1993 and no in 1994 (IGC 1994: 4; 1997: 225-232). The decisions of the Regional Administrative Tribunals were, in turn, appealable at the Council of State, but without suspensive effect. Only for matters of law was an appeal possible at the Supreme Court. Asylum seekers could also appeal a negative decision to the President of the Republic

There has been no research on the impact on AOs recognition policy of the different members of the Commission. Yet it seems there was a common strategy. For example, the

[338] The chapter has benefitted from the generous input of Francesca Longo and Iole Pina Fontana (University of Catania) who shared their insights into Italian immigration and refugee policy with us. See also Longo (2018).
[339] The local office of the National Police was called the 'Questura' office.

restrictive recognition policy and even the dismissing of most requests during the Albanian 'crisis' was fully supported by the Minister of Interior Napolitano as well as the Minister of Foreign Affairs Dini. They both intervened together before the parliamentary committees of the Senate and of the House of Representatives and discussed the common approach adopted in terms of trying to cooperate with Albania to stem irregular flows and to allow returns, while at the same time trying to provide a selective humanitarian or temporary protection to Albanians.[340]

For the 2,445 decisions concerning Somalian asylum seekers between 1990 and 1993, the recognition rate was 9%. For the same time period, there were only 223 asylum requests from Yugoslavia and the recognition rate was 17% (IGC 1994: 8-12).[341] The small number of asylum requests from Yugoslavia between 1990 and 1993 was the result of another solution beyond the Geneva convention offered to the about 30.000 Yugoslavian war refugees who fled to Italy. Similar to the Albanian crisis procedure, the Italian authorities had issued a special decree that offered those people a humanitarian status, first in December 1991 to Yugoslavians of Italian origin and from July 1992 for all Yugoslavian war refugees.[342] Another special decree issued by the Italian authorities on September 9, 1992 offered a similar protection to Somalian nationals. From then onward hardly any Somalian refugees or for that matter any Bosnian refugees requested asylum, but they applied to the Ministry of Interior through the Questura for temporary protection. Those fleeing Somalia and Bosnia-Herzegovina received a residence, work, and study permit for one year, renewable upon request as long as a safe return was not possible (Hein 1993). Although this temporary protection did not preclude them from applying for *de jure* asylum, few did so. The chances were slim to be protected by the Geneva Convention. The AO denied many war refugees like Croatians, Bosnians, and Somalians the *de jure* protection. The AO qualified them for *de jure* protection only if their suffering went further than the general suffering during war and if they were persecuted by a state-agent and due to one of the grounds of persecution enumerated in the definition of Convention refugee (Hein 1993, IGC 1995: 127-133). The lack of any humanitarian status in the Italian Aliens Law obliged the Government to resort to this ad hoc legislation or special administrative measures in order to govern the mass influx of these war refugees.[343]

In 1998 there was a comprehensive overhaul of the Aliens Law, introducing a temporary protection status and a humanitarian status. The humanitarian status was dependent on a recommendation of the National Commission for the Right of Asylum to the Questura for asylum seekers who were not recognized as Convention refugees. The Questura was not bound by this recommendation as it had the deciding power to grant this status (Paoli 2018; Zincone & Gregorio 2002). In 1998, 9,830 persons benefitted for this status, as did 860 persons in 1999

[340]Comunicazioni del Governo sulla questione dei profughi albanesi. Senate, 29.8.1997. https://www.senato.it/service/PDF/PDFServer/DF/15668.pdf. Accessed 15.4.2022.

[341] This is the data provided by the Italian authorities in IGC 1994. The UNHCR recognition rate for those fleeing the Yugoslavian civil war is considerable higher. They have a recognition rate of 46% for 1993 (N= 56) as well as for 1994 (N= 58). For 1991-1993 UNHCR mentions 221 asylum applications. AUNHCR, 100-ITA-YUG (a); Ferrari 1996.

[342] In December 1991 the border guards got instructions not to stop war refugees from Yugoslavia from entering, as they were granted upon arrival-- if they did not apply for asylum--a humanitarian stay of 3 months, and those of Italian origin received a one-year residence permit. Decree law 350 of 24.7.1992 provided for a humanitarian status for all war refugees without distinction. All these war refugees 'according to the quantitative limits' fixed by the Council of Ministers were to be granted a 60-day residence permit. Parliament converted decree law 350 into law 390 on 23.9.1992, provided for a (renewable) annual permit and abolished the possible maximum limit. In May 1993 the war refugees were entitled to work. AUNHCR, 100-ITA-YUG (a). See for more detail: 3.3.2.

[343] Such an ad hoc arrangement had been created for refugees from Yugoslavia, Albania, Somalia and also Rwanda (IGC 1995)

(Nascimbene & Guilini 2002: 575 ff.).[344]Granting temporary protection became a decision of the Council of Ministers in cases of conflict, environmental disaster, and other events of particular gravity. Such a decision was taken in 1999 by the Council of Ministers for the Kosovo war refugees (see 4.3.2).

4.2.9. Greece[345]

As mentioned before, after the Greek policy makers had been confronted with the Albanian mass flight in the spring and summer of 1991 an Aliens Law was passed, which gave the police extensive power to combat irregular immigration (see 3.2). There were hardly any provisions on asylum. UNHCR criticized this Alien Law with its sole focus on criminalization of immigration as 'draconian'.[346] Greece was able to join the Schengen area in November 1992. The lacuna in its Aliens Law was filled in 1993 with a Presidential Decree, which made the Ministry of Public Order in charge of the Greek asylum procedure. The Hellenic police were in charge of the first instance procedure at the border. The authority responsible for asylum applications in Greece was the Directorate for Immigration and Aliens of the Hellenic Police. It was a centralized asylum system as all asylum applications were registered in Athens at the headquarters of the Hellenic Police Directorate for Immigration and Aliens. Rejected applicants could file an appeal at an Asylum Tribunal at the Ministry of Public Order with suspensive effect. The AT was composed of four members: the legal counsellor to the Ministry of Public Order, two representatives of the Ministry of Foreign Affairs (a Legal Counsellor of the Special Legal Service and a Senior officer of the diplomatic corps), and a senior police officer.[347] The decision was made by the Ministry on the advice of the AT. UNHCR was not represented among the advisers of the Ministry, but their representative could always attend the meetings of this commission.[348] Between 1993 and 1996 the recognition rate of the 5,060 asylum applicants was, according to the Greek authorities, about 12%.[349]

In 1996 a more comprehensive alien law was passed that also included refugee protection measures. Similar to developments in the other EC countries, an accelerated procedure for claims considered manifestly unfounded as well as a border procedure was introduced. Also, the concept of safe third countries was added as an instrument to dismiss asylum applications. The Hellenic police remained in charge of the first instance decisions, but the composition of the AT was extended with two additional members, i.e., a representative from the Athens Bar Association appointed by its Board of Directors and the Legal Protection Officer of the Office of the UNHCR in Greece.[350] UNHCR also required the facility to visit any asylum seeker in detention or kept in the border zone in the (air)ports. Between 1997 and 1999 the recognition rate rose, from 9% in 1997 (N= 4,380), to 11% (N= 2,950) and even 27% in

[344] We have no information whether the 10,690 concerned were refugees and whether the humanitarian status was an explicit or implicit from of refugee protection.

[345] The chapter has greatly benefitted from the input of Evgenia Iliadou (University of Surrey) who made an extensive literature survey on Greek immigration and refugee policy.

[346] Sitaropoulos 2000, 107; UNHCR, *Yearbook of Refugee and Migration Law (in Greek)*; Sitaropoulos, "Modern Greek Asylum Policy and Practice in the Context of the Relevant European Developments."

[347] United States Committee for Refugees and Immigrants, "U.S. Committee for Refugees World Refugee Survey 1997 - Greece."

[348] Grèce, Nouvelle legislation relative aux réfugiés. AOFPRA, Dir 5/41.

[349] Antonopoulos 2006: 142. The author does not mention whether these figures include both first instance and appeal decisions or not.

[350] The Presidential Decree 61/1999 defined the RSD. Refworld, "Greece: Presidential Decree No. 61 of 1999, Refugee Status Recognition Procedure, Revocation of the Recognition and Deportation of an Alien, Entry Permission for the Members of His Family and Mode of Cooperation with the United Nations High Commissioner," 1999, https://www.refworld.org/docid/3ae6b4d830.html; Skordas 1999.

1999 (N= 1,530). The Presidential Decree 61/1999 of 6 April 1999 specified the refugee status determination procedure. Police and civil personnel of the Ministry of Public Order were assigned for the examination of asylum applications. The interview was conducted by a policeman with an officer's grade in co-operation, if possible another officer or civil employee with a higher education degree would attend too. The interviewer has to assess, taking into account the benefit of the doubt, whether the claim falls under the Convention of Geneva (or is manifestly unfounded). This advice has then to be passed to his superiors within the ministry who state their opinion on the proposals made by the interviewing officer and submit both opinions to the Directorate for Immigration and Aliens of the Hellenic Police (at the Ministry of Public Order). For the AT, the asylum seeker accompanied by his/her legal representative could be interviewed a second time and the decisions of the Committee had to be made by a majority; a split vote was settled by the vote of the legal counsellor to the Ministry of Public Order, who was the chairperson of the AT (Skordas 1999). Notwithstanding these concessions to refugee protection, concerns continued to be raised for the mismanagement of the asylum system and its negative consequences upon refugees (Antonopoulos 2006: 142).

By the end of the 1990s it was obvious that the recently devised Greek immigration policy did not serve the goal of mastering immigration. The presence of irregular migrants, particularly refugees, had to be taken into account. A regularization operation was launched in 1997, but due to overly strict criteria and the lack of confidence in the Greek state among the irregular immigrants, the operation failed (Triandafyllidou & Veikou 2002). To embed asylum policy within an immigration policy that was not so exclusively focused on controlling and policing irregular entries turned out to be extremely challenging. The Greek state was not able -or seemed not willing- to make its immigration policy serve the goal of controlling immigration as well as protecting refugees. The Hellenic police retained vast powers in the management of the asylum system. Still, the police, in particular the border offficals but even the Protection Officers were hardly trained in the human rights mission that was allotted to them. Serious allegations were raised about denial of access to international protection and arbitrary deportations. The asylum system was clearly dysfunctional (Sitaropoulos 2000; UNHCR 2008: 3).

4.3. War refugees

During this time period asylum applications of war refugees increased. In his report we analyse the response to the arrival of war refugees from Somalia and Kosovo. We are only juxtaposing the protection policy of some countries and we will provide a full overview with a comparative analysis in a latter version of this report.

4.3.1. Somalian war refugees

Tensions between the different Somalian clans have been present since the creation of Somalia in 1960. When former president Siad Barre (reigning since 1969 after a *coup d'état*) lost power in 1991, due to a tug war between more than a dozen clans to gain control of state authority the situation became very unstable. While overthrowing the president, whose political strategies were based on repression and ethnic favoritism, should have improved basic human rights, new conflicts and human rights violations followed instead. By late 1991 it was clear that there was no government left. The discussion of who were to control the country from then on tore Somalia apart. Between 1988 and 1999 more than 800,000 Somalians fled the country. An additional difficulty was that the clans could no longer be assigned to one specific area, but increasingly spread across the country as they increasingly took the shape of socio-economic and political organizations based on kinship. This meant that there were hardly any regions fully controlled by one clan. Thus no one could ensure the protection of civilians from attacks of other clans. Between 1993 and the beginning of 1994 there was a small chance of

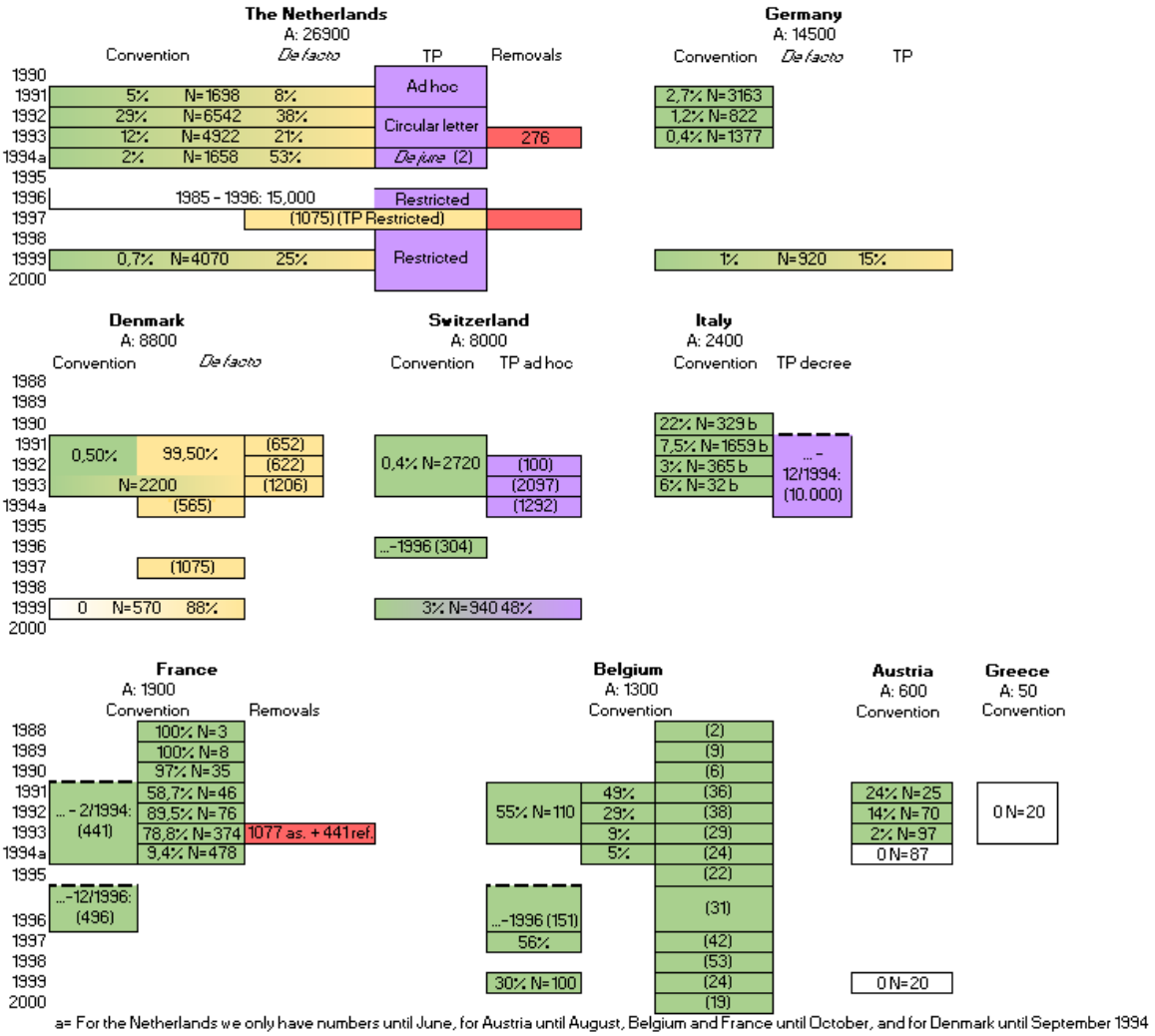
improvement as several clans were negotiating for reconciliation. On March 24, 1994 the main 15 clans even signed a cease-fire agreement. However the follow-up meeting regarding the cease-fire agreement never took place. By June, 1994 the fighting's between the warring clans restarted. More peace negotiations followed during 1996-1998, some of them seemed to give hope for improvement. However there was still no permanent settlement of the conflict. Despite these reconciliation efforts, in some parts of the country (mainly the South) the situation even worsened. By 1999 after almost a decade of fighting there were still no prospects for a definitive solution to the conflict (UNHCR 1994, 1999).

As we did for Sri Lanka and Yugoslavia, in this report we mainly focus on the start of the conflict, covering the initial reactions of the countries of destination when Somalian asylum seekers started to arrive. This is for pragmatic reasons as our main archival sources cover the period 1990-1994, but for some countries we have found additional material for the late 1990s. Since 1990 asylum applications of Somalians in Europe have been on a rise. Between 1989 and 1993 Somalians accounted for 2 to 3 percent of all asylum applications in Europe.[351] According to UNHCR several governments claimed to provide Somalian asylum seekers (regular) residence permits if they did not qualify for a *de jure, de facto* or temporary protection (UNHCR 1999).

The Netherlands was the most popular country of destination for Somalian asylum seekers, followed by Germany and Denmark. As is shown in Fig. 15. there was a lot divergence between European countries in the policy approach towards Somalian asylum seekers. While in the 1980s most countries still granted some refugees from Somalia a *de jure* or *de facto* status, we see a decrease of recognition rates throughout the years from the moment the former Siad Barre regime fell. Many governments used the lack of state authority as a reason to not provide a refugee status. While some countries decided to apply temporary protection status for Somalians, feeling it would be inhumane to make Somalian citizens return to an area of conflict, most of them did not. In this overview we provide a country-by-country approach and we hope in a latter version to offer a more analytical, comparative overview.

[351] UNHCR. 1994. 'Background Paper on Somali Refugees and Asylum Seekers'. Geneva: Centre for Documentation on Refugees. AOFPRA, folder 5-42 July-December 1994.

Fig. 15. Recognition policy towards Somali asylum seekers between 1990 and 2000 in 9 European countries[352]



a= For the Netherlands we only have numbers until June, for Austria until August, Belgium and France until October, and for Denmark until September 1994
b= 'N' includes renunciations
A= number of Somalian asylum applications 1990-1998 (for Greece: 1989-1994)
N= number of total decisions (+ & -)
(-): absolute number of 'recognitions'
as.= asylum seekers, ref.= refugees

[352] Sources for the Netherlands: Böcker & Doornbos 1998; Dutch AO. Réponse de la délégation néerlandaise. AOFPRA. Folder 5-42 July-Dec 1994; Grütters 2006; Hirsch Balin, E. M. H. 1994. *Vaststelling van de begroting van de uitgaven en de ontvangsten van hoofdstuk VI (Ministerie van Justitie) voor het jaar 1994*. Accessed 28/04/2022. https://repository.overheid.nl/frbr/sgd/19931994/0000003271/1/pdf/SGD_19931994_0000718.pdf; UNHCR 1998, 1999, 2000. Germany: UNHCR 1999, 2000; German AO. *Réponse de la délégation allemande*. AOFPRA. Folder 5-42 July-Dec 1994. Denmark: Danish AO. *Réponse de la délégation danoise*. AOFPRA. Folder 5-42 July-Dec 1994; UNHCR 1994, 1998, 1999, 2000. Switzerland: IGC 1995; UNHCR 1994, 1999, 2000. Italy: Ferrari 1996; IGC 1995; Italian AO. *Réponse de la délégation italienne*. AOFPRA. Folder 5-42 July-Dec 1994; UNHCR 1999. France: French AO. 1994. *Evolution du nombre de premieres demandes et du taux d'accord de 1991 a 1994 (10 premiers mois)*. AOFPRA. Folder 5-42 July-Dec 1994 ; French AO. *Réponse de la délégation française*. AOFPRA. Folder 5-42 July-Dec 1994; UNHCR 1999. Belgium: Belgian AO. Réponse de la délégation belge. AOFPRA. Folder 5-42 July-Dec 1994; CGVS. 2002. 'Veertiende En Vijftiende Jaarverslag Werkingsjaren 2001 En 2002'. https://www.cgvs.be/sites/default/files/jaaverslagen/jv2001-2002_cgvs_nl.pdf.
UNHCR 1994, 1998, 2000. Austria: Austrian AO. *Réponse de la délégation autrichienne*. AOFPRA. Folder 5-42 July-Dec 1994; UNHCR 2000. Greece: UNHCR 1994

The Netherlands

During 1990 and 1998 the largest share of Somali asylum applications (within Europe) was lodged in the Netherlands, about 26,900 applications. In 1994 The Netherlands even received half of all Somalians applying for asylum in Europe (UNHCR 1994, 1999). Between 1990 and 1994 the AO denied *de jure* refugee status to many of those fleeing the violence of a civil war, be it in Yugoslavia, Africa, or Asia. Somalia was the most outspoken case as it was obvious that the state had failed in that country. Only if an asylum seeker fleeing the Somalian civil war could prove an individual risk could (s)he qualify for *de jure* status. The AO acknowledged that it was hard to establish whether there was in fact an actual authority in Somalia, yet they assumed there was one. The AO judged that there was no group persecution of Somalians. This policy lasted throughout the 1990s and was repeated in an instruction in 2000.[353] As Fig. 15. and Fig. 16. show, in the period 1990-1994, if the Dutch authorities qualified Somalians for protection this was mainly with a *de facto* (C) status or temporary protection (from 1992 onwards through circular letters). The AO granted *de facto* (C) status in particular to female Somalian asylum seekers who evoked the risk of persecution if they were members of a local minority group or risked genital mutilation. In the latter case the AO referred in 2000 to article 3 ECHR for recognizing them as refugees.[354]

Those who were rejected by the AO were not expelled to Somalia as the country was mentioned on the list of countries to which expulsions were suspended.[355] From 1994 onward the Somalian asylum seekers qualified for the second rate *de jure* status. This recognition policy is better known as it was communicated through circular letters of which the majority are publicly accessible now. Despite their frequent application the IO was not very transparent about their *de facto* (C) status policy toward Somalians. Probably the general *de facto* (C) policy was attributed to asylum seekers who they considered unrepatriable based on the 'general living conditions' and in particular on the security situation in the country of origin. The 'second rate *de jure* status' could be granted to Somalian asylum seekers depending on the region or clan/family.[356] Fig. 15. and Fig. 16. show an on-again off-again second rate *de jure* refugee status policy from 1994 onwards. However (as is also the case for 1990-1994) the Dutch IO/AO did not report how many Somalians did benefit from these temporary protection arrangements.

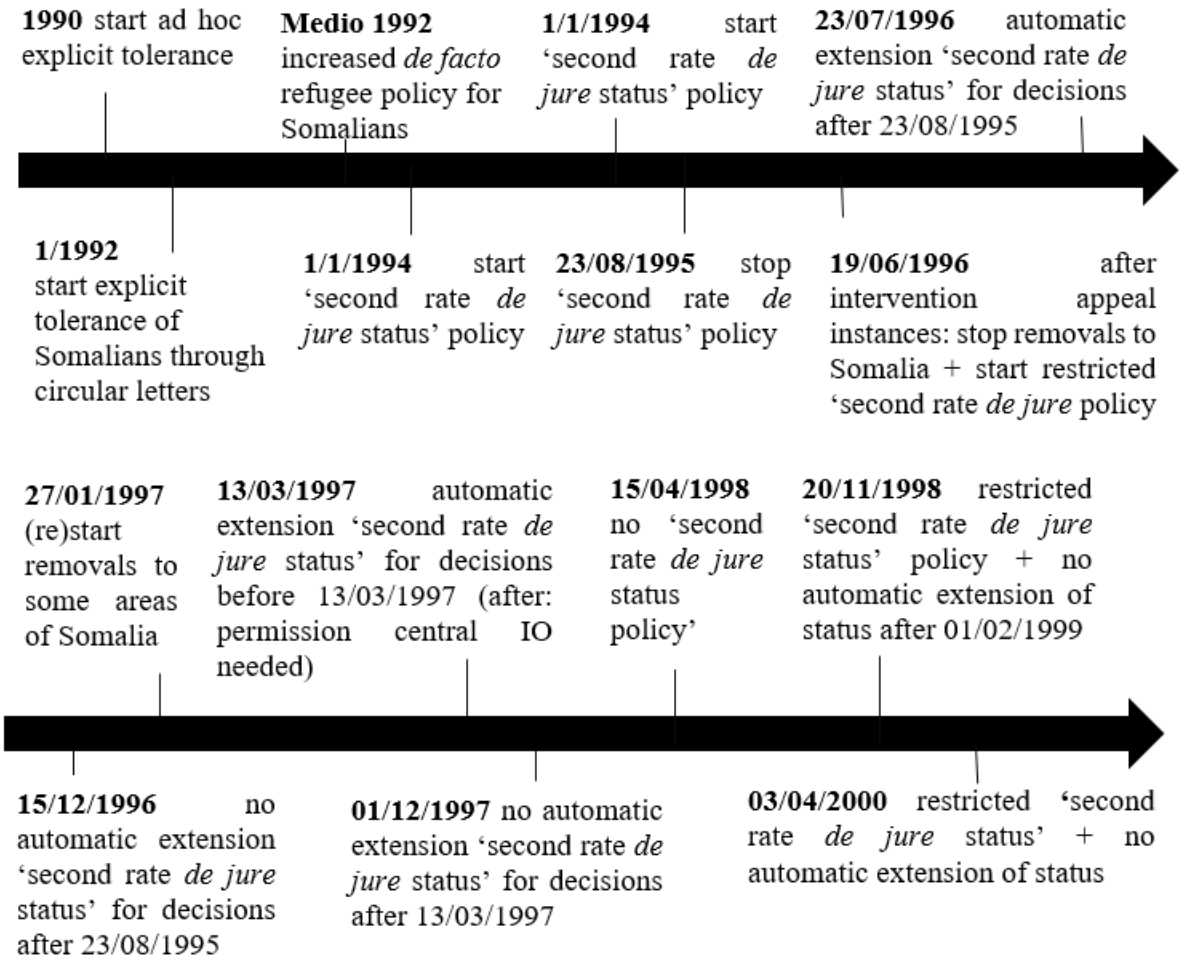
[353] For Somalia 1991-1994: Grütters 2006; 'Nota van de Nederlandse Delegatie'. 1994. Folder 5-42 july-december 1994. AOFPRA. We ignore whether in these decisions domestic factors played a role. For Somalia 1995 onwards: Grütters 2006 and circular letters 1996/2, 1996/8, 1996/13, 1997/4, 1997/13, 1998/9, 1998/29 all available at https://cmr.jur.ru.nl/cmr/tbv/tbv94/ and werkinstructie 224 available at https://cmr.jur.ru.nl/cmr/tbv/tbv94/00/ . On 21/04/2000, the head of the IND (IO/AO) Dirk Schoof (1999-2003) repeated this in a circular letter outlining the policy towards Somalian asylum seekers. Those who profiled themselves politically or military against a clan could be persecuted by that clan and could thus qualify for *de jure* Convention status. Werkinstructie 224 available at https://cmr.jur.ru.nl/cmr/tbv/tbv94/00/ accessed 21.3.2022.

[354] We assume this policy started before 2000, but it was mentioned in the circular letter of 21/04/2000 mentioned above.

[355] 'Nota van de Nederlandse Delegatie'. 1994. AOFPRA. Folder 5-42 july-december 1994. We ignore the reasoning behind the different decisions i.e., granting (C) status or suspension of expulsion.

[356] Circular letter, 21/04/2000 of the head of the IND (IO/AO) Dirk Schoof (1999-2003) Werkinstructie 224 available at https://cmr.jur.ru.nl/cmr/tbv/tbv94/00/ accessed 21.3.2022.

Fig. 16. Dutch second rate *de jure* status policy towards Somalian asylum seekers 1990-1999



Germany
During 1990-1998 Germany received 14,500 Somali asylum applications, being the second largest country of destination for Somali asylum seekers in Continental Europe (after the Netherlands). Their recognition policy will be analyzed in a later version.

Denmark
In Denmark Somalians (and other nationalities in civil war situations) did rarely qualify for a *de jure* Convention refugee status. Yet after a change of regime in 1990 the Danish AT referred many pending cases back to the Danish IO/AO as the AT judged the Somalian situation was not evaluated properly. The single fact that one belonged to a certain social group was not enough to acquire the *de facto* refugee status, however, as was the case with Somalians, it reduced the burden of proof. After 1990 most Somalians got a *de facto* refugee status rather quickly as most cases never reached the Danish AT (Vedsted-Hansen 1993). The Danish Immigration Service performed a fact-finding mission to Somalia in April 1997 in order to get a better view on the situation on-site.

Switzerland
The Swiss AO applied the Geneva Convention very restrictive as almost no Somalian seemed to qualify for a *de jure* Convention refugee status. However it seems that between 1990 and

1998 at least half of Somalian asylum applicants got temporary protection in Switzerland.[357] As already mentioned in the discussion of the treatment of Yugoslavian war refugees in Switzerland, temporary protection was an ad hoc protection decided by the AO and for a group protection this decision was in agreement with the Swiss government. The Swiss authorities agreed that Somalians could not expulsed (IGC 1995).

Italy

On September 9, 1992 rejected Somali asylum seekers were granted collectively a 'temporary permission to stay' to enable them to stay in Italy and to work or study. These permits were renewable as long as the Somalian situation prevented their return. The humanitarian residence permits were granted by the provincial Police Headquarters (*Questure*). The Somali could apply for this temporary protection directly at the Questure and new arrivals did no longer apply for asylum, although this temporary protection did not preclude them from applying for *de jure* protection. The ministries of Interior and Foreign Affairs were both responsible for the granting of the temporary protection permits. The co-ordination between the two was guaranteed by the president of the Council of Ministers. The Italian government did not want to grant Somalians a permanent protection as they expected them to return soon (IGC 1995: 127-128; Hein 1993). By December 31, 1994 at least 10,000 Somalians who had resided previously in Switzerland (some of them illegally) got temporary protection (Ferrari 1996).

France

Before 1993 there were few asylum request from Somalia. In 1993 in France Lyon became the place of settlement of a growing number of Somalian asylum seekers who mostly originated from Mogadishu and had been members of the local elite. The AO considered that about a third of the Somalian asylum applicants in Lyon were not of actual Somalian nationality. In their asylum applications the actual Somalians referred only to the bad general situation in the country. Due to poorly substantiated claims and the absence of legal or de facto authorities the AO felt they had no choice but to reject these applications and the recognition rates dropped steeply by 1994. However the AO realized that it would be impossible to actual remove these rejected Somalians and thus an alternative solutions had to be found for them, eventual in collaboration with UNHCR and IOM. In appeal from the end of 1993 onward the AT agreed with AO as it judged that the insecurity for individuals as a result of the conflict in Somalia did not fall within the scope of the Geneva Convention. According to the AT, the objectives of the parties in the conflict, which are more akin to banditry, did not allow to apply the provisions of the Geneva Convention.[358] In the next years following the French jurisprudence.[359] By 1994 Somalian asylum applications were rejected en masse.[360]

The published jurisprudence on victims of civil war of the AT attest to what Luc Legoux (1995: 24) called the byzantine character of asylum jurisprudence. According to the published jurisprudence of the AT, the tribunal ruled in the 1980s that victims of civil war were not

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[357] This is a rough estimate, as we know that in 1992, 1993, 1994 and 1999 combined 3940 Somalians got temporary protection (not having figures of 1990, 1991, 1995-1998) knowing that between 1990 and 1998 8000 Somalians asked for asylum.

[358] Conseil d'administation, 1993-1994. AOPRA Dir 3/13-15. In November, 1993; the French AT stated: '*the fears expressed by Somalian nationals are linked to the general climate of insecurity that prevails in this country where, after the disappearance of all legal power, clans, sub-clans and factions of one and the same ethnic group are struggling to create or extend areas of influence within the national territory without, however, being in a position to exercise an organised power in these areas that would make it possible, if need be, to regard them as de facto authorities'*. This means the Somalian situation does not fall within the scope of the Geneva refugee convention. French AO. *Réponse de la délégation Française*. Folder 5-42 July-Dec 1994.

[359] AOFPRA. Folder 5-42 July-Dec 1994.

[360] French AO. *Réponse de la délégation Française*. AOFPRA. Folder 5-42 July-Dec 1994.

considered to be refugees according to the Convention of Geneva as there was no targeted persecution of the individual, in the early 1990s the AT put the subjective fear of persecution central and considered that victims of indiscriminate violence could fall within the scope of the Geneva Convention, while at the same time the AT in other rulings stated that persecution had to emanate from state authorities or quasi state authorities (Tiberghien 1987, 1992, 1993). By 1994 the Somalian asylum seekers were denied the protection of the Convention of Geneva as the AO as well as the AT considered that gangs without any political motivation were at the root of persecution and violence and that no state authority was present.[361] It was claimed that persecution had to emanate from an authority, even the persecution due to being member of a (minority) clan was not exercised by any factual authority. Only Somalians political active or active in NGO's and because of those activities persecuted could qualify for protection.

This restrictive interpretation of the Convention of Geneva became an important bone of contention in French jurisprudence. Although we have no clear overview of the vagaries of the asylum institutions there were some importance changes of course. In December 1997 the Council of State, who was the guardian of the legality of the AT's decisions, held that the French protection was warranted against the risk to the asylum seeker's life or liberty -- whether or not the asylum seekers' treatment in violation of Article 3 of the European Convention of Human Rights had emanated from state authorities did not matter. France had to protect also persons who were persecuted by groups of persons unrelated to the public authorities as long as the state authorities were unable to provide appropriate protection.[362] Nonetheless, the AT still frequently denied refugee status because the general situation in the country of origin did not give rise to a clearly individualized risk of persecution. In September 2004 the AT recognized that persecution may also come from Somali clans. Since then the French asylum institutions had considered Somali as a situation of anarchy without any legal or de facto authorities. In subsequent decisions the AT explained that the current transitional government did not exercise effective control over the Somali territory and thus could not provide protection against persecution from clans (Chetail 2007: 94-96).

Belgium: War refugees from Somalia

The AO considered that civil war as such did not qualify an asylum seeker for a *de jure* status. The Somalian asylum requests were considered difficult as the AO acknowledged that the Somalian state authority was disintegrated and that in these situations one could qualify for a *de jure* status if factual protection was totally absent in one's region. Between 1988 and 2002 the Belgian AO granted 353 Somalians a *de jure* refugee status. In the CIREA meeting in 1994 the AO reported that most Somalian asylum seekers were, contrary to France, mostly lowly educated. Moreover in the same meeting they stated (just as the French AO) that most applicants also only referred to the general disruption due to civil wars. By 2002 some female Somalians, likes female refugees from Guinea, were recognized as refugees due to the fear of female genital mutilation, thus not because of the fact of the mutilation itself, but because they invoked a current fear relating to this mutilation or the risk of being mutilated (again) either for themselves or for their children. In 2003 the AO acknowledged that some Somalian clans were in fact victims of collective persecution, which was an exception for the AO as they rarely applied this concept. Asylum seekers from these clans could thus qualify for a *de jure* status (Fig 7.).[363] The asylum court agreed by and large with the policy of the AO that in Somalia in some situations

[361] Rapport d'activité 1993, p.6. AOFPRA, DIR 1/14; Situation particulière en Somalie, sd AN, 19970381: CIREA 6-12.1994 meetings on Somalia, AOFPRA, Dir 5/42.

[362] Conseil d'Etat, 1 December 1997, case 184053, Kechemir; Amnesty International and France Terre d'Asile 1997, 191-193; Chetail 2007.

[363] CGVS. 2002. 'Veertiende En Vijftiende Jaarverslag Werkingsjaren 2001 En 2002'. p.46, 73; CGVS. 2003. 'Zestiende Jaarverslag Werkingsjaar 2003'. p.47.

collective persecution had taken place against which there was no protection. In individual cases they even extended it to other clans (and families) as the AO's negative decision was by 2002 overruled by the court in 28 cases.[364]

Austria
While in 1991 the Austrian AO still recognized about a quarter of the Somalian asylum seekers as *de jure* Convention refugees, the recognition rate gradually decreased to finally 0% in 1994.[365]

Greece
Greece only got 50 applications from Somalian asylum seekers between 1989 and 1994. Between 1991 and 1993 the Greek AO decided about 20 applications, which were all rejected. We have no information about the reasoning behind these rejections.[366]

4.3.2. Kosovo

In 1999 a new refugee crisis had exploded in Kosovo. On March 9, 1999 UNHCR asked governments to stop sending back rejected asylum seekers from Kosovo.

Italy: Granting temporary protection was decided on May 12, 1999 by the Council of Ministers for the Kosovo war refugees.

Switzerland: In 1999 20,000 war refugees from Kosovo were also temporarily protected in Switzerland, but only for a few months.

Germany: 'Germany responded quickly to the increased in refugee from Kosovo, which meant that the initiative and control lay with the government. The relative quick resolution of the conflict was matched by a rapid push by the Interior Ministers of many regions to return the Kosovans as quickly as possible, facilitated and encouraged by reconstruction grants. (Schuster 2003: 220).

Denmark: In 1999 a temporary protection status was created for the war refugees from Kosovo who were granted a renewable permit of six months, which suspended the asylum application for maximum 2 years.

With the war in Kosvo in Belgium the IO and AO froze their asylum applications from Kosovo because repatriation was impossible. Due to the lack of an institutionalized system of temporary or additional protection again *ad hoc* measures were necessary. In the spring of 1999 Belgium accepted 1200 persons for resettlement and granted them temporary protection through an *ad hoc* Displaced Persons status. The Belgian authorities extended this *ad hoc* Displaced Status to refugees from Kosovo as well to those who had reached Belgium spontaneously.[367] When the

[364] 'Réfugiés et Guerre Civile Réunion C.I.R.E.A. Jurisprudence de La Commission Permanente de Recours Des Réfugiés'. 1994. AOFPRA. Folder 5-42 July-December 1994
[365] Austrian AO. *Réponse de la délégation autrichienne*. AOFPRA. Folder 5-42 July-Dec 1994.
[366] UNHCR. 1994. 'Background Paper on Somali Refugees and Asylum Seekers'. Geneva: Centre for Documentation on Refugees. AOFPRA. Map 5-42 July-December 1994.

[367] Van Den Bossche, L. 'Omzendbrief van 17/05/1999 betreffende de kosovaarse familieleden van in belgie verblijvende personen'. Belgisch Staatsblad. 17 May 1999. https://etaamb.openjustice.be/nl/omzendbrief-van-17-mei-1999_n1999000452.html.; Smet, M., M. De Galan, L. Van Den Bossche, and J. Peeters. 'Omzendbrief van 11/05/1999 betreffende de uitbreiding van het toepassingsgebied van het bijzonder statuut van tijdelijke

circular letter of September 2, 1999 ended this program, 5406 people had benefitted from this temporary scheme: 1200 persons had been resettled, 2823 were spontaneous asylum seekers, and 1383 were family members.

Conclusion

Already by the 1980s the law and order perspective on international migration largely dominated policy making to the detriment of a generous protection for refugees. Thus before the demise of the Communist bloc and in its wake the large scale migration from Eastern Europe the international humanitarian approach had lost ground. Denmark, Switzerland and Austria were leading the way, followed with great difficulty by Germany. Dismissing asylum claims, but also acceleration of the asylum procedure through tools as border procedure, MUC, STC, SCO, but also quick recognition decisions without interviewing the asylum seeker were the hallmarks of the new policy.

The feeling of an impending immigration crisis was aggravated in particular by the sudden flight from Yugoslavia and Albania. In Italy and Greece the legislative preparation for a balanced Aliens Law, which provided as well space for refugee protection as gave the state the tools to implement a selective immigration policy was on its way, but the section of refugee protection was chucked away by the (perception of an) Albanian avalanche. The Yugoslavian refugee crisis on its turn provided policy makers with the opportunity to (further) experiment with circumventing *de jure* protection based on the Convention of Geneva. From 1992 onwards the support for a refugee protection light strongly increased. At the same time the breakthrough of Article 3 of the ECHR implied a strengthened protection for refugees.

This is the background for our investigation into the institutional place and role of the Asylum Offices. This report traces the development of asylum offices as decision makers in asylum matters. It shows how asylum offices became an intrinsic part of the institutional landscape of the state in each of our countries. This working document provide us with strong foundations for a comparative analysis to unpack the changing role and place of this institution in the different country case studies. Policy makers in Germany and Belgium gave already in 1990 confidence to their AOs for interpreting article 3 of the ECHR in favor of refugee protection, while in France the executive power hesitated for more than a decade to do so and retained this competence within its proper hands until 2006.

Our analysis of recognition policy points out the great variation in responses to protection needs. It provides numerous examples of a passive attitude of the AO towards the need of protection of refugees –the German and Austrian AO in the early 1990s-, but also active and even pro-active policies –the Belgian and French AO respectively in the early 21th century and the early 1990s. That we have a clearer insight in the attitude of the latter institutions is due to their greater autonomy, while the strategy of those asylum offices which were merely an administrative unit within a larger department is more difficult to disentangle. Their decision making remained opaque. In our exploration of the governance of international protection we therefor will pay more attention to compare the results of the recognition decisions, in particular of war refugees. For our comparative approach the attitude of the AOs towards war refugees from Sri Lanka, Bosnia, Somalia and Kosovo will be pursued in more depth to find out about similarities and differences. In the third and last year of the Protect research project we will be working on deliverables which will refine our analysis in order to be able us to answer the questions we started this project with. Did the AO with their protection officers fulfill their duty to protect? Was the extent they did so influenced by the institutional position of the AO?

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List of Abbreviations

600.GFR: 600.GFR - Protection and General Legal Matters – General Protection - Germany Federal Republic
AIND: Archives Immigratie en Naturalisatiedienst
AIO Brussels: Archives Immigration Office Brussels
AN: Archives nationales Paris
AOFPRA: Archives Office français de protection des réfugiés et apatrides
AT: Administrative tribunal
AUNHCR: Archives United Nations High Commissioner for Refugees Geneva
AO: Asylum office
CAHAR: Committee ad hoc of Experts on the Legal Aspects of Refugees
CIREA: Clearing House on Migration or Centre d'Information de Réflexion et d'Echange en Matière d'Asile
ECHR: European Convention of Human Rights
ECtHR: European Court of Human Rights
EP: European Parliament
EU: European Union
EURODAC: European Asylum Dactyloscopy Database
FSM: forum Suisse pour l'étude des migrations
IGC: Inter-governmental Consultations on Asylum, Refugee, and Migration Policies in Europe, North America, and Australia.
IO: Immigration office
KADOC: Katholiek Documentatiecentrum Leuven
MUC: Manifestly Unfounded Claims
NAB: National Archives Brussels
NATH: National Archives The Hague
PO: Protection Officer
RSD: Refugee Status Determination
RESEDA: Loi relative a l'entre et sejour des etrangers en France (1998)
SCO: Safe Country of Origin
STC: Safe Third Country

List of Figures and tables

Clarification figures 2-5, 11-14: Meaning of the colour code

	What institution(s) are responsible for the registration of the asylum applications?
	What institution(s) are responsible for the eligibility examination of asylum applications? + What institution(s) are responsible for appeal in case of ineligibility?
	What institution(s) are responsible for the assessment of the merits of asylum applications (recognition)? + What institution(s) are responsible for appeal in case of non-recognition?
	The place/relationship of immigration policies with(in) asylum polices

Meaning of (blurred) boundaries: defining competences
Some institutional settings of asylum policies are more prone to let elements of different policy objectives play a part in primary objectives than others. The risk of this phenomena is represented by the blurred colour transitions in the timelines.

Consulted archives
AIND: Archives Immigratie en Naturalisatiedienst (NL)
AIO Brussels: Archives Immigration Office Brussels (BE)
AN: Archives nationales Paris (FR)
AOFPRA: Archives Office français de protection des réfugiés et apatrides (FR)
AUNHCR: Archives United Nations High Commissioner for Refugees Geneva (CH)
KADOC: Katholiek Documenatiecentrum Leuven (BE)
NAB: National Archives Brussels (BE)
NATH: National Archives The Hague (NL)

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