Producing Precariousness: 'Safety Elsewhere' and the Removal of International Protection Status under EU Law

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Abstract

This article examines recent trends in EU refugee law. It argues that within the EU there is a complex and technical set of rules and procedures that maintain the refugee in a position where protection can be easily denied or revoked. Engaging with the work of Judith Butler, I argue that this constant threat of removal exists on a 'continuum of precariousness'. Mapping a number of EU legal practices, I argue that the EU has expanded this precariousness in order to manage the movement of people, transforming laws, which were ostensibly for the protection of persecuted people, into a form of *post hoc* immigration control. I track how this process is deeply rooted in bureaucratic practices, which construct place, space and attachment through the law.

1. Introduction

In 2016, the EU announced an arrangement that significantly impacted on its refugee policy. Under the arrangement, 'all new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey.'[1] Under the scheme,

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[1] Council of the EU, 'EU Turkey Statement, March 2016', Press Release 144/16 <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/pdf> accessed 06 September 2018. .

the EU resettles a Syrian from Turkey to the EU for every Syrian returned to Turkey from the Greek Islands. The Syrians who are returned to Turkey are those deemed by Greece to have unfounded asylum claims. However, given the longstanding critique of the quality of Greece's refugee status determination(RSD) process, the scheme will likely enable the EU to deflect responsibility for those seeking international protection.

Under the scheme, Turkey is treated as if it is a 'safe third country' (STC). A STC is usually defined as a state an asylum seeker has passed through on her way to another state where she could have applied for asylum. Turkey however, is not bound by EU legislation establishing minimum or common standards of treatment of asylum seekers and refugees. The EU has therefore chosen to ignore the risks associated with such returns, in the pursuit of a more 'efficient' asylum system.

The scheme has come under a great deal of critical scrutiny, described as an illegal measure that flies in the face of the rules of the Common European Asylum System (CEAS).[2] However, in this article I argue that the deal can only be understood in the context of a longer-term project in which the EU has sought to place refugees and asylum seekers outside its jurisdiction, in both a physical and legal sense.

I argue that the EU has created a series of precarious legal statuses, under which refugees and asylum seekers are constantly at threat of removal. This precariousness exists even after the formal acquisition of legal status and so forms what I call a *continuum of precariousness*. This sense of 'removability' begins with the initial uncertainty as to whether refugee status will be granted and persists even after

[2] See for example, S Peers, 'The final EU/Turkey refugee deal: a legal assessment', (EU Law Analysis, 18 March 2016) <http://eulawanalysis.blogspot.co.uk/2016/03/the-final-euturkey-refugee-deal-legal.html> accessed 09 May 2017.

protection status has been secured. The granting of protection status therefore does not signal a shift to a more secure status, but to a new form of precarity.

The concept of the STC rests on an idea of 'safety elsewhere'. In this argument, the role of the EU is not to take in refugees, but rather guarantee their 'safety', whether inside or outside the EU. In this way, safety elsewhere speaks to the 'returnability' of the refugee, either directly to her country of origin, or indirectly to a third country. By evoking the idea of safety elsewhere, greater emphasis is placed on keeping the refugee outside the EU. This is also presented as a necessary part of protecting the immigration system from those 'undeserving' of protection.

This impetus to portray certain applicants as 'external' to the asylum system in turn creates laws and policies that tend to underplay the refugee or asylum seekers' level of attachment to the MS and over-emphasise attachment to their country of origin. Underlying these policies is an assumption that many asylum seekers will not be recognised as refugees or beneficiaries of subsidiary protection (BSPs) under the EU Qualification Directive (QD) and should therefore not be afforded an opportunity to settle in the host state. From the perspective of host states, this only creates another barrier to their removal at the point that their protection application is refused.

BSP is protection status established under the 2004 QD. Originally BSP was intended as a broad protection offered to a range of individuals with protection needs who did not precisely fit the refugee definition under Article 1 CSR. BSP status was ultimately restricted to those who would face 'a real risk of suffering serious harm if

s/he return to the country of origin'. The QD has since been recast, but as discussed here, many of the main problems of the original text persist.[3]

This article explores how, the 'temporariness' of the refugee or BSP status is also reinforced in the context of cessation and revocation proceedings. In recent years, many states have subscribed to this narrative of refugee status as revocable. The sense of uncertainty, linked to the possibility of revocation of status that pursues the refugee even after she is granted a protection status, means the distinction between the statuses of asylum seeker and refugee becomes less defined. The transition from asylum seeker to refugee does not lessen their 'removability' as it did in the past.

Thus, alongside the *continuum of precarity* there is also a *continuum of refugeehood*, in which refugee status is redefined as increasingly fluid.

This article looks at how the CEAS produces precariousness through a series of legal interventions. These interventions occur at the border, during an RSD, or even after the point when many would assume that they have secured a stable and long-term legal status. The refugee is always subject to precariousness.

While previous literature has explored how protection is externalised or made more temporary, this article examines these processes as part of a broader continuum. In its analysis, the article focuses less on the somewhat artificial distinctions made between asylum seeker, failed asylum seeker, refugee, and beneficiary of subsidiary protection. By taking this approach, I am able to track a number of patterns and trends in the way that precariousness is enforced, without the limitations imposed by

[3] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast QD)

focusing on technical categorisations. Categorisations, I argue, themselves enforce precariousness.

Section 2 explores the theme of precariousness as a symptom of the *continuum of refugeehood*, which is indicative of a particular kind of governmentality that reinforces precariousness. Section 3 considers *absolute* precariousness under the CEAS. The possibility of deportation and the inherent risk of *refoulement*, reveals that the administration of precariousness relies as much on the threat of absolute precarity, as it is by its full enforcement.

Section 4 emphasises that precarity exists on a scale or *continuum*. This is linked to how refugee status can be interpreted as temporary under a strict reading of cessation and revocation under the CSR. This more restrictive turn is evident from EU legislation, as discussed in sections 5 and 6. Section 7 brings the arguments about precariousness together by emphasising that they are dependent on a particular construction of space.

2. Precarious Status

2.1 The Continuum of Refugeehood and the Heft of Citizenship

Under the Refugee Convention (CSR), individuals are *recognised* as refugees if they satisfy the refugee definition in Article 1.[4] The UN refugee agency (UNHCR) emphasise that the determination process is not status *conferring*, but is *recognition* of a pre-existing status.[5] This challenges the idea of a clear distinction between the

[4] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS (CSR). UNHCR has stated that refugee status should be considered to be declaratory in nature. See, UNHCR, 'Note on Determination of Refugee Status under International Instruments', EC/SCP/5 (UNHCR: 1977).
[5] UNHCR, 'Handbook on Guidelines on Procedures and Criteria for Determining Refugee Status', (UNHCR: 2011) para 28.

status of asylum seeker and that of refugee. Indeed, the CSR never refers to 'asylum seekers'.

'Asylum seeker' was a legal category established in response to the political call for a distinction between those refugees who have been verified as such and those who have not. In the EU, the distinction was not considered a key issue until efforts were made to 'harmonise' the treatment of refugees in the 1990s.[6] Since then, those seeking asylum are often divided into further subcategories and sub-classifications, usually linked to general predictions about the merits of their claims. These predictions are usually based on general assessments of the safety of the country from which they have travelled. An example of this is the lists of safe countries of origin drawn up at both MS and EU level.[7] With these countries, asylum applications are usually assumed to be 'manifestly unfounded'. The actual 'safety' of these countries is often contentious.[8]

Zetter refers to this process of sub-classification as 'bureaucratic fractioning'.[9] Bureaucratic fractioning is states' use of classifications in order to manage the process and patterns of migration.[10] Titles like 'asylum seeker' allow states to insert a new category under the guise of the establishing a process to determine who is a 'genuine' refugee. This sort of fractioning has become so embedded that it even applies to the legal label of refugee itself. This is evident when, for example, refugees attempt to access Australia by sea and are re-directed to 'excision zones. ' They are

[6] E Guild, 'The Europeanisation of Europe's Asylum Policy' (2006) 18 IJRL 630, 635
[7] See, M Hunt, 'The Safe Country of Origin Concept in European Asylum Law: Past, Present and Future', (2014) 26(4) IJRL 500-535
[8] As Costello notes, while there is some guidance from the Recast PD on how 'safe' countries should be selected, there is little transparency surrounding the decisions to designate at both EU and MS level. See C Costello, 'Safe Country? Says who?', (2016) 28 (4) IJRL 601-622, 607.
[9] R Zetter, 'More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization', (2007) 20 (2) JRS 172-192, 174. See also, T Zartaloudis, 'Asylum, Refugee and Immigration Law Studies: A Critical Supplement' in R Islam, J H Bhulyan (eds), *An Introduction to International Refugee Law* (1st edn, Martin Nijhoff 2013), 328.
[10] Zetter, ibid 174

afterwards prevented from coming to mainland Australia, even if recognised as being in need of protection.[11]

Sub-classification of status is also used by states as a way of organising refugees along the lines of their perceived 'deservedness'. Those who languish in refugee camps hoping to be granted permission to come to the host state are portrayed as deserving, while those who spontaneously arrive seeking protection are viewed as 'queue-jumpers'.[12] Similarly, those from designated safe countries of origin who make asylum claims are depicted as wasting resources.

These characterisations impact on perceptions of who is a 'real' refugee. Malkki states that with the creation of a universal refugee status, a universal image of the typical or 'ideal' refugee has also emerged. This refugee is seen as a victim of her circumstances, someone who has little or no agency over how the spectacle and narrative associated with her image is used.[13] This imaginary 'ideal refugee' not only affects the way that the refugee is represented in humanitarian campaigns, but also how refugees are characterised as 'deserving' or 'undeserving' of international protection.

A crucial aspect of bureaucratic fractioning, therefore, and one which has been under-explored, is that it involves creating a series of more precarious legal and administrative statuses to better manage refugees. The enforcement of

[11] Australia also operates the 'no-advantage' policy. Refugees who arrived by sea cannot come to Australia ahead of refugees processed in a transit country by UNHCR. See S Pickering and L Weber, 'New Deterrence Scripts in Australia's Rejuvenated Offshore Detention Regime for Asylum Seekers', (2014) 39 (4) Law and Social Inquiry 1006-1026, 1010.

[12] In Canada, the category of 'designated foreign national' was created under the Protecting Canada's Immigration System Act 2012. The status targets asylum seekers arriving to the state via maritime smuggling operations. The term 'queue-jumper' was often used in the parliamentary debates around the legislation. See, Canada, Parliament. House of Commons. Debates [Daily Edition], 41st Parl., 1st sess, March 16, 2012, p. 6415.

[13] L H Malkki,'Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization', (1996) 11 (3) Cultural Anthropology 377-404, 386

precariousness allows states to monitor and police the ongoing 'deservedness' of the protection status of which the refugee avails.

In this way, bureaucratic fractioning is one aspect of the *continuum of refugeehood*. We can best understand how this continuum functions through examining what Macklin describes as the *heft of citizenship*. For Macklin, the concept of statelessness is the 'antipodal reference point for citizenship' and statelessness is a 'limit concept against which citizenship defines itself.'[14] Yet there are many who inhabit legal statuses between total statelessness and full citizenship. The *heft of citizenship,* therefore, refers to the variable content of 'citizenship' available to those whose status is located somewhere between total statelessness and full citizenship.[15]

An equivalent 'heft' exists in the *continuum of refugeehood*, where the refugee must navigate her status from the time that she arrives in the state *in relation to* refugee status. This follows her movement from applying for refugee status where she must prove her refugeehood, to the point that she applies for citizenship, where the statements made in pursuit of refugee status may be once again considered in the decision whether to award her citizenship.[16]

While the diminished nature of protection status offered to refugees contributes to their *precarity*, this is further enforced through the possibility of that status being removed. This possibility is in itself used as a *tool of precariousness*. The desire to treat those who arrive by sea in a more punitive way is linked to a sense of anxiety

[14] A Macklin, 'Who is the Citizen's Other: Considering the Heft of Citizenship', (2007) 8 (2) *Theoretical Inquiries in Law* 333, 335

[15] ibid, 337. Sigona notes the shifting rules about registration mean that 'over time people move in and out of legal status.' N Sigona, 'Everyday statelessness in Italy: status, rights, and camps' 39(2) Ethnic and Racial Studies 263-279, 273.

[16] In the UK, naturalisation is dependent on the applicant satisfying the good character requirement. In *The Secretary of State for the Home Department v SK (Sri Lanka)* [2012] EWCA Civ 16, information that the applicant provided about his involvement in the LTTE in his asylum claim was later used as evidence of the absence of his good character in his naturalisation application.

about the *hypervisibility* of those seeking protection and access to the state in this way. Images of refugees and asylum seekers arriving in this way solidifies this sense of anxiety.[17]

2.2 Precarity as Governmentality

These ideas of *precarity* and *precariousness* have been most thoroughly explored by Butler. Butler states that the same conditions that make life possible are also those that make it inherently precarious. No life can be completely protected or secured because it is constantly exposed 'to social and political conditions, under which life remains precarious.'[18] Because there is no way to be totally insulated from precarity and precariousness, governance through precarity results in the creation of *hierarchies* of precariousness.[19] Certain groups are portrayed as 'forfeitable', with their very existence portrayed as a threat to other human life.[20] Butler explores this in relation to the ill-treatment and even killing of certain groups during times of war but it is also evident in reactions to groups that must move across borders.

In *Precarious Life*, Butler discussed the idea of precariousness in the context of the US state intervention in the Middle East, as well as the arrest and detention of alleged terrorists. Butler draws on the Foucauldian concept of governmentality in order to explain this. Governmentality is described as the 'mode of power concerned with the maintenance and control of bodies and person', it operates 'through policies and departments, through managerial and bureaucratic institutions, through the law, when the law is understood as a "set of tactics," and through forms of state power.'[21]

[17] A Neylon, 'Ensuring precariousness: The status of designated foreign national under the protecting Canada's immigration system act 2012', (2015) 27 (2) IJRL 297 – 326, 306
[18] I Lorey, *State of Insecurity: Government of the Precarious* (Verso 2015) 20.
[19] ibid.
[20] J Butler, *Frames of War: When is Life Greivable?* (Verso 2006) 31.
[21] J Butler, *Precarious Life: The Powers of Mourning and Violence* (Verso 2004), 52.

There is a clear line of continuity between Butler's description of governmentality, its role in the proliferation of indefinite detention, and the concept of the *continuum of precariousness*. In both examples, we can observe the use of the law as a tactic, as well as a heavy reliance upon bureaucratic practices to legitimise the decisions of policies made. As a tactic, law can be suspended in order to 'heighten the discretionary power of those who are asked to rely on their own judgment to decide fundamental matters of justice, life, and death.'[22]

There are a number of direct similarities between the management of refugees and asylum seekers and the indefinite detention of terror subjects. The common sense of crisis, anxiety, and powerlessness is used to justify emergency action. In the context of the use of indefinite detention, Butler states that the law is either suspended or used to constrain and monitor a 'given population.'[23] This suspension is carried out in order to protect and preserve the sovereign. With the *hypervisibility* of refugees and asylum seekers arriving to the EU by sea, there emerges an ever-increasing need to manage and control the movement of refugees and asylum seekers. In order to more efficiently manage the borders as well as those who are crossing them, bureaucratic and administrative instruments are drawn upon.

Similarly, the movement of refugees across borders is turned into a crisis to legitimise exceptional measures. While terror suspects may be subject to indefinite detention, asylum seekers are subject to the persistent threat of being returned to a third country. In both instances, states are presented with what appear to be impossible crises to reconcile. The response in both cases however is to suspend the previously accepted law, and replace it with a set of procedures that prioritise

[22] ibid, 54.
[23] ibid, 57.

management and security over individuals' humanity. Bureaucracy and administrative practices allow the EU and EU MS to manage and control asylum applicants and refugees in the name of 'efficiency'. This fixation on efficiency speaks to a need to protect the immigration system above those who would avail of its assistance. In this way, we can see how the classification and sub-classification of refugee and asylum seekers responds to the 'crisis' of refugee movement by heightening the precariousness of the refugee.

3. Protection against *Refoulement*: Considering the Limitations of Enforcing Precariousness

Along the *continuum of refugeehood*, the ultimate source of precarity is the possibility that the host EU MS may return the asylum seeker or refugee to her country of origin. A state's exercise of cessation, cancellation, or exclusion from refugee or another protection status puts the refugee in a position where they no longer have a clear legal status allowing them to remain. Once their status is removed, their right to remain in the state is reduced to a right not to be *refouled*, potentially linked to other human rights protections set out in the ECHR.[24]

Refoulement refers to instances where a person is returned to a country where she would suffer persecution or a threat to her life. States within and beyond the EU have created a wide range of legal and political structures that allow them to avoid their *non-refoulement* responsibilities, particularly under the rubric of the STC.

EU MS are bound to uphold the principle of *non-refoulement*, at international, ECHR and now EU level. Protection against *refoulement* is also provided for under,

[24] Someone who loses protection status may still be entitled to remain on the basis of their Article 8 or Article 3 rights under the ECHR. See H Lambert, '"Safe Third Country" in the European Union: An Evolving Concept in International Law and Implications for the UK', (2012) 26(4) JIANL 318-336.

among other instruments, the Convention against Torture, the ICCPR, as well as the CSR itself and *non-refoulement* is often cited as part of customary international law.[25] Despite this apparently robust framework, there remains a notable gap between theory and practice in the EU and MS's observance of *non-refoulement* obligations. This is particularly connected to the manner in which the border of the state is manipulated using concepts like STC, and internal burden shifting mechanisms like the Dublin Regulation.

There is a substantial amount of case law from the European Court of Human Rights (ECtHR) asserting that the protection against *refoulement* is supported by Article 3 of the ECHR, and that this protection is absolute.[26] While the ECtHR rules on violations of the ECHR, the operation of the CEAS has led the ECtHR to rule that States party to the ECHR have relied on the EU Dublin Regulation in a manner which violates Article 3 of the ECHR.[27]

The Dublin Regulation establishes which EU MS is responsible for the processing of an asylum application. A number of factors determine this, including evidence of whether an asylum seeker has been present, legally or illegally, in another MS prior to lodging an asylum claim with them. Since its introduction, the Dublin Regulation has been criticised for prioritising the return of asylum applicants to other MS over the interests and rights of those seeking asylum.[28] The Regulation has placed pressure on peripheral MS. The most prominent example of this is Greece, which inspired the creation of 'EU-Turkey' arrangement.

[25] S Taylor, 'Australia's Safe Third Country' Provisions - Their Impact on Australia's Fulfilment of Its Non-Refoulement Obligations', (1996) 15.
[26] See *Soering v. the UK*, ECtHR, Judgment of 7 July 1989, Appl. No. 14038/88, confirming non-refoulement is protected under Art 3 ECHR.
[27] *MSS v Belgium and Greece,* [2011] ECHR 30696/09.
[28] See, E Guild, C Costello, M Garlick, V Moreno Lax, S Carrera, 'Enhancing the Common European Asylum System and Alternatives to Dublin', Study for the European Parliament, LIBE Committee 2015, July 2015;.

In *MSS v Belgium and Greece* the ECtHR found that Greece was in violation of its Article 3 ECHR obligations.[29] This was both because of the conditions in which refugee applicants were being held and because of the poor quality of RSD decisions. The Court held Belgium was also in violation of its Article 3 obligations because it ought to have known that asylum applications were not being properly assessed. Anyone returned to Greece from Belgium under the Dublin Regulation could be subject to *refoulement*. This practice of returning people to a state where they are likely to be *refouled* is known as *chain refoulement*.[30]

STC concepts under the CEAS are 'deflection activities', which 'turn on generalised assessments of safety of the state to which the asylum seeker is transferred.'[31] 'Deflection' in this sense refers to the outsourcing of border controls. This is a tool of precariousness whereby the control of the border is shifted outward. In theory, a state that deflects responsibility must ensure that asylum seekers receive some sort of RSD. However, the standard of these RSDs often fall well below those accepted in the CEAS, such as in theEU-Turkey arrangement. These tactics underscore the ease with which the asylum seeker can be removed from the territory of the EU MS…All these measures emphasise that while the asylum seeker is under EU control, this does not automatically mean that she can claim rights protection under EU law or the ECHR. From the perspective of the MS, she is considered to be *elsewhere*,

[29] *MSS v Belgium and Greece*, above n27.
[30] 'Chain deportation' is used in a German case from 1993 about an Iraqi woman who had travelled to Germany via Turkey and Greece. See, Decision of the Federal Constitutional Court, 13 September 1993, *NVwz-Beilage* 2 (1993), 11, cited in R Marx and K Lumpp, 'The German Constitutional Court's Decision of 14 May 1996 on the Concept of "Safe Third Countries" – A Basis for Burden-Sharing in Europe?'(1996) 8 IJRL 419-439, 422
[31] C Costello, Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored', (2012) 12 (2) HRLR 287-339, 338.

outside the concern of the state. As McNamara notes, the application of these processes creates a 'divergence between State control and State responsibility.'[32]

Gammeltoft Hansen and Hathaway point out that these deflection tactics amount to a new embodiment of *non-entrée*. *Non-entrée* is when states prevent refugees from ever reaching their jurisdiction in order to prevent them from benefitting from the states *non-refoulement* obligations.[33] Previously, states employed a variety of tactics in order to prevent refugees from leaving their home state to enter their jurisdiction. These tactics included prohibitive visa policies and the re-designation of airports as 'international zones', where states maintained that many international obligations did not apply.

More recent policies rely on 'cooperation-based' approaches where politically weaker states are coerced to relocate potential refugee applicants. Gammeltoft-Hansen and Hathaway call this the conscription of 'countries of origin and of transit to effect migration control on behalf of the developed world.'[34]

In her work on the use of islands as these sort of 'grey zones' Mountz refers to sites where 'liminal populations' are kept where they are 'neither home nor arrived, not able to legally become refugees or asylum-seekers because … distance from sovereign territory.'[35] The space that the refugee inhabits within the host state becomes a liminal zone when her protection status ceases or is revoked. While she may be protected from removal to her country of origin on the basis of a state's *non-refoulement* commitments, her actual legal status in the host state is reduced to a

[32] F McNamara, 'Member State Responsibility for Migration Control within Third States – Externalisation Revisited', (2013) 15 Eur J M L 319-335, 319.
[33] T Gammeltoft-Hansen and J Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence', (2014) Law and Economics Working Papers, Paper 106, 11.
[34] Gammeltoft-Hansen and Hathaway, ibid, 10
[35] ibid

condition of intense precarity. She carries this liminal zone *with her*, at least until a decision is made as to whether her return is considered to be 'safe'. In this way, the construction of space, territory, geography, and how it relates to the legal status of the refugee, are crucial to the reinforcement of the precarious status of the refugee.

4. Locating refugee status on the *continuum of precariousness*

Refugee status does not guarantee indefinite protection. In the CSR, refugee status only applies until the individual is able to acquire a more permanent form of protection. At the same time, refugee status has often been referred to as a surrogate form of citizenship. [36] It is therefore is somewhere between a temporary protection status and a more long-term secure status akin to citizenship.

The CSR envisages two potential long-term outcomes for the refugee. Either she returns to her country of origin once the persecution she fled has subsided, or she assimilates to the country of asylum and naturalises there.[37] Recent trends in states both within and beyond EU indicate they favour the former scenario. Many states now view cessation and revocation of protection status as a convenient form of *post-hoc* immigration control.

In general, cessation describes the process by which refugee status comes to an end because it has been demonstrated that the need for protection has abated. As UNHCR has stated, the content of article 1C expresses 'the consideration that international protection should not be granted where it is no longer necessary or

[36] See for example, *Horvath v Secretary of State for the Home Department* [2000] 3 All ER 577, 580-81 and *Canada v Ward* [1993] 2 S.C.R 689, 716-17, both cited in D Anker, 'Refugee Status and Violence Against Women in the "Domestic" Sphere: The Non-State Actor Question' (2000) 15 Georgetown Immigration Law Journal 391-402, 399.
[37] Article 34 CSR.

justified.'[38] UNHCR however also states that cessation provisions 'should be interpreted 'restrictively'[39] or 'strictly'.[40]

Article 1C establishes the conditions under which a refugee under which cessation will take place. Article 1C (1-4) refers to cessation where the refugee acts to indicate that she no longer needs the protection of the host state. Article 1C (1) refers to situations where the refugee voluntarily re-avails of the protection of her country of nationality, Article 1C (2) refers to when the refugee voluntarily re-acquires her nationality, having previously lost it. Article 1C (3) states refugee status may be deemed ceased where the refugee has acquired the nationality of a new country. Article 1C (4) refers to the cessation when the refugee has voluntarily re-established herself in her country of origin. Articles 1 C (5) and (6) refer to cessation on the basis of a change in circumstances in the country of origin, where the conditions that caused the refugee to leave have ceased to exist.

Cessation determinations should only be applied after careful interrogation as to whether the alleged cessation is sustained and meaningful. Since a refugee is awarded her status on an individual basis, cessation should also be individually pursued. Mass-cessations therefore do not adequately scrutinise the effect of returning all those individuals. While an assessment of the general standard of human rights in the country of origin should be carried out before cessation, the country of asylum must also consider whether the fear of persecution that caused the individual refugee to flee continues to exist. UNHCR Guidelines on cessation state

[38] UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees', HCR/IP/4/Eng/REV.1, para 111.
[39] ibid, para 116.
[40] UNHCR, 'Note on the Cessation Clauses', UNHCR EC/47/SC/CRP30 (1997) para 8. See also, S Kneebone and M O'Sullivan, 'Article 1C', in A Zimmermann, J Dörschner and F Machts (eds) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) 481, 485.

that the change in circumstances must be fundamental, durable, and result in effective protection being available in the country of origin.[41]

Cessation of refugee status is distinct from cancellation and exclusion from refugee status. Cancellation is the removal of status because the status was obtained fraudulently.[42] Cancellation implies that refugee status *never existed in the first place*. While there is no direct reference to cancellation in the CSR, it has been read into the text by UNCHR as well as States Party to CSR.[43]

Exclusion from refugee status occurs because of actions taken by the refugee that indicate that she is not deserving of refugee status.[44] Article 1F CSR sets out the exclusion provisions. These provisions apply to the refugee at the point that she first seeks the protection of the CSR. Article 1F specifically refers to an applicant's involvement in war crimes and crimes against humanity. As Hathaway points out, Article 1F prevents the inclusion of refugees who would threaten 'the integrity of the international refugee regime'.[45] The standard for exclusion based on Article 1F should therefore be set quite high. As discussed here however, the formulation of the QD which incorporates the CSR into EU law, undermines the idea that exclusion only applies prior to any RSD. Revocation of refugee status is also linked to the content of Article 1F.[46] The key difference between exclusion and revocation is that exclusion applies prior to the RSD and revocation applies at some point after the RSD.

[41] UNHCR, ibid.
[42] UNHCR, 'Note on the Cancellation of Refugee Status' (*UNHCR*, November 2004) 2. <http://www.refworld.org/pdfid/41a5dfd94.pdf> accessed 09 May 2017.
[43] ibid.
[44] UNHCR Standing Committee, 'Note on the Exclusion Clauses', UN doc EC/47/SC/CRP.29, 30 May 1997, para 3.
[45] J Hathaway, 'The Michigan Guidelines on the Exclusion of International Criminals', (2013) 35(1) Michigan Journal of International Law 3-14.
[46] UNHCR, 'Cancellation of Refugee Status', UN Doc PPLA/2003/02, March 2003, 38.

The QD however refers to the 'revocation' of both refugee and subsidiary protection status for a much broader range of reasons than those linked to Article 1F. This encourages MS to assume a logic of exclusion from the outset, and to proactively apply revocation of protection to a range of circumstances they may not have in the past. The broader definition of revocation under the QD indicates a narrative of 'deserving' and 'undeserving' refugees, that goes well beyond that set out in the CSR.

5. Cessation, Exclusion, and Cancellation Under the Qualification Directive

Cessation, exclusion and cancellation are specific and separate categories in the CSR. The QD departs from this, using 'revocation' as a catch-all term, applied to different kinds of status removal. At the same time, the QD also differentiates between refugees and BSPs, with BSPs subject to a greater degree of precariousness.

5.1. Normalising the removability of protection statuses

While the CSR sets out provisions for the removal of status, the decision to enforce these provisions is left to the discretion of the state. Under the QD however, removal of refugee and BSP statuses is not only incorporated into a broader range of provisions, but is *compulsory* in certain contexts. These provisions underline the precariousness of the refugee and the BSP, even after the granting of protection status.

Owing to how states record statistics in relation to asylum and refugee status, it is difficult to identify whether there has been a significant rise in the number of revocations and cessations since the introduction of the QD.[47] However, a number of examples from Germany raise questions about how MS view the cessation and

[47] These figures are not published with other asylum statistics. See UNHCR, ibid, 3.

revocation of protection statuses. ECRE estimate that between 2003 and 2008, the refugee status of about 18,000 Iraqis in Germany was removed due to Germany's cessation policy.[48]

The German authorities asserted that the change in circumstances was durable and fundamental because the Hussein regime had been removed.[49] They did not take account of on-going instability in the region and 'general issues of safety, other than the likelihood of renewed persecution, had not been taken into account at all.'[50]

The German Federal Administrative Court subsequently referred questions relating to the application of the cessation and revocation provisions to the CJEU.[51] In *Abdulla & Others v. Bundesrepublik Deutschland*, the Grand Chamber rejected the argument that a refugee's status could cease without taking account of additional circumstances affecting the individual upon return. While the Grand Chamber determined that Germany had applied the concept of cessation too narrowly, it also stated cessation could be allowed where protection could be accessed from a non-State Party actor in the country of origin. This aspect of the judgment has been heavily criticised.[52]

Arguably, in the above example the state interpreted refugee status as a context specific legal status that must inevitably end. This use of cessation reveals the preoccupation that the German state had with the sustained management and

[48] ECRE, 'Five years on Europe is still ignoring its responsibilities towards Iraqi refugees', (*ECRE*, March 2008) <http://www.refworld.org/pdfid/47e1315c2.pdf> accessed 09 May 2017.
[49] T Syring, 'Beyond Occupation: Protected Persons and the Expiration of Obligations' (2010 -2011) 17 ILSA Journal of International and Comparative Law 417-436, 426.
[50] ibid
[51] *Abdulla & Others v. Bundesrepublik Deutschland* 2010 ECR 1-01493. See also, UNHCR, 'UNHCR public statement in relation to Salahadin Abdulla and Others v. Bundesrepublik Deutschland pending before the Court of Justice of the European Union, C-175/08; C-176/08; C-178/08 & C-179/08'(*UNHCR*, August 2008) <http://www.refworld.org/docid/48a2f0782.html> accessed 10 August 2017.
[52] See M O'Sullivan, 'Territorial Protection: Cessation of Refugee Status and Internal Flight Alternative Compared', in S. Juss (ed) *The Ashgate Research Companion to Migration Law, Theory and Policy*, (Ashgate 2013).

control of refugee bodies, beyond the point at which they have been formally recognised as refugees by the state.

Such *post-hoc* management of refugee arrivals has occurred in Germany previously. Following the disintegration of the former Yugoslavia, Germany only granted many of those seeking protection a sub-refugee status known as 'duldung'. These protection statuses were created on an *ad hoc* basis, existing for as long as the conflicts that caused the refugees to flee lasted.[53]

Sardelic points out that this, as well as other statuses in Austria, influenced the development of the EU Temporary Protection Directive (TPD).[54] While the TPD was never invoked by the EU Council, it remains available to MS following the arrival of large numbers fleeing a conflict. The legislation provides for an immediate temporary protection status in lieu of the usual RSD. TPD status is differentiated from the refugee or BSP statuses in the QD because it only exists for a maximum period of two years and thereafter cannot be renewed. TPD statuses may also collectively come to an end at any time if a Council decision is adopted to that effect.[55] Examining the use of *ad hoc* temporary statuses by Germany in the post-Yugoslav context and the implementation of cessation provisions against Iraqi refugees in 2008, it is clear that there is an enduring tendency towards enforcing temporariness and precariousness *en masse*.

This illustrates a persistent view that a refugee's ongoing right to remain in the state of asylum must be constantly interrogated. In certain emergency scenarios,

[53] J Sardelic, 'From Temporary Protection to Transit Migration: Responses to Refugee Crises along the Western Balkan Route' RSCAS Working Paper 2017/35, 8.
[54] ibid.
[55] Article 6.1, Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

temporary protection must be granted for practical reasons. However, the 2008 example indicates a shift, where full refugee status is removed *en masse* in a manner more like the TPD than the content of the CSR, on which the QD is based. The mass-application of cessation in 2008 therefore opened up the possibility for refugee status to assume the characteristics of a temporary protection status, without a temporary protection status being formally introduced into law.

5.2 The language of removability of protection status in the QD

Article 11(1)(e) QD establishes the ceased circumstances provisions under EU law, which mirror Article 1C(5) CSR. Unlike the CSR, MS are then bound under Article 14 QD to 'revoke' refugee status if there is a ceased circumstances determination. Under Article 14, the MS must revoke the protection status of those who fall into certain categories. Framing revocation this way indicates pressure to pursue removal of protection statuses where previously they may have refrained from doing so under the terms of the CSR.

The 'revocation provisions' - Articles 14 and 19 QD (which applies to BSP) - *oblige* an MS to revoke the refugee status of a refugee or BSP whose status is deemed to have ceased under Articles 11 and 16 QD (cessation of BSP. Articles 14 and 19 therefore provide for the enforcement of the cessation grounds established in Articles 11 and 16. Under Article 11(2) and Article 16(2) QD, MS must confirm that the change in circumstance in the country of origin was 'of such a significant and non-temporary nature' that the refugee or BSP's fear of persecution 'can no longer be regarded as well-founded.' The QD establishes an *obligation* to revoke the status of BSPs and refugees in these circumstances. An MS that might not have pursued cessation of refugee or BSP status is now *bound* to do so. By phrasing revocation of status as a

mandate, greater emphasis is placed on the removal of status than on the actual safety of a possible return.

An EU Parliament report highlights the negative effect of this framing, arguing that it 'results in incorrect practical application of cessation thereby prematurely denying protection to persons who continue to be in need of it.'[56] Further, the report notes in some cases MS do not establish whether the risk of persecution has ceased on an individual basis.[57]

Revocation provisions in the QD also extend the *scope* of exclusion provisions. Under the QD, exclusion from refugee or BSP status can occur both prior to and after protection status is granted.

6 The QD and the BSP: 'Deservedness' and developing a bureaucratic approach to exclusion

Articles 12 and 17 QD are exclusion clauses. Like Article 1F CSR, Article 12(2) QD excludes someone from refugee protection if they are found to have committed a crime against peace, a war crime, or a crime against humanity as defined in the international instruments.[58] Article 12 (2) (b) also excludes those who have committed a serious or non-political crime outside the country of asylum before being recognised as a refugee. Article 12(b) however significantly extends the temporal scope of the exclusion clauses in the CSR, covering crimes committed in the state of asylum prior to lodging a protection application. Article 12(2)(b) then goes

[56] European Parliament, Setting up a Common European Asylum System: Report on the application of existing instruments and proposals for the new system, PE 425.622, (August 2010) 39.
[57] ibid.
[58] Article 12(2) QD echoes Article 1(F)(A) and (C) CSR. The post-status determination removal of refugee or BSP status on such grounds are the only instances under the QD that can accurately be referred to as 'revocation' under the UNHCR definition.

on to state that 'particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes.'

Guild and Garlick state that the term 'particularly cruel actions' dramatically widens 'what acts could be seen to constitute "serious non-political crimes"'.[59] Also, because there is no definition of what 'particularly cruel actions' involve, there is potential for subjective, arbitrary, and inconsistent interpretation of this provision.[60] Article 12(3) stipulates that those excluded on the basis of Article 12(2) includes those who carry out acts, or those who *incite* the carrying out of such acts – extending the scope of the provision even further.

As noted above, Article 17 QD sets out the grounds for exclusion from BSP status, but extends the temporal scope of the exclusion clauses beyond what is expressed for refugees in the CSR, applying even after status has been granted. The QD therefore takes a provision originally intended to divert undeserving applicants from the RSD process, and creates another ground for the revocation of an *existing* protection status.

Article 17 reiterates the grounds for exclusion for BSPs on the basis of international crimes as well as exclusion on the basis of acts contrary to the UN Charter that are also referred to Article 12 (for refugees).[61] Under Article 19, MS are however *obliged* to revoke BSP status, where Article 17 applies. To put this in context, if a recognised refugee is convicted of a serious crime in the MS of asylum, under the QD, that MS has discretion as to whether it will remove her refugee status. However, if a BSP

[59]E Guild and M Garlick, 'Refugee Protection, Counter-Terrorism, and Exclusion in the European Union', (2011) 29(4) RSQ 63, 72
[60] ibid.
[61]This echoes the content of Article 12 QD, which applies to those with refugee status.

commits a crime of equivalent gravity, the MS *must* revoke the BSP's protection status.

Article 17(1)(d) QD states that a person is excluded from BSP status if she 'constitutes a danger to the community or to the security of the Member State in which he or she is present.' She is also excluded from the protection of the QD if she has committed a serious crime (Article 17 (1)(b)) – echoing Article 33(2) CSR. Article 33(2) limits the extent of States Parties' *non-refoulement* obligation under the CSR. Article 33(2) permits the state to *refoul* a recognised refugee, in to whom:

> … there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Article 19 allows for the revocation of BSP status for reasons relating to the security of the state, as well as the BSP's deservedness of protection status. Similar to the application of Article 33(2) CSR, the QD does not require the MS to establish that if returned to her country of origin the former BSP will face serious harm.[62] However, while Article 33(2) does not *require* the removal of the protection status, Article 19 does, maintaining the BSP status as a particularly precarious under EU law.

The particular vulnerability of BSP status to removal in the context of the 'security' exclusions has been confirmed in MS courts. For example,in a 2010 decision by the Council for Alien Law Litigation (CALL) in Belgium, the CALL had to decide whether a BSP could benefit from more favourable rules on the revocation of protection

[62] It is acknowledged that the state would nonetheless be bound by Article 3 ECHR. In addition, the rights provided by the European Charter of Fundamental Rights must not fall below the level established by the ECHR.

status, or whether the terms of Article 19 QD were mandatory. [63] The applicant had been convicted of heroin trafficking and imprisoned for 30 months. Following this conviction, the Office of the Commissioner General for Refugees and Stateless Persons (CGRS) revoked his BSP status. The applicant asserted that the relevant provision of the Alien's Act was more favourable than the QD, and that MS were entitled to use this reading, even after the introduction of the Directive. This position was supported by UNHCR.[64]

The CALL did not accept this argument. They maintained that Article 17(1) and (2) and Article 19(3)(a) and (b) were framed in mandatory terms. In order to support this position, the CALL referred to the preparatory documents of the Belgian legislator at the time that the QD was drafted. The CALL noted that at this time, the Belgian legislator had supported the contention that the provisions should be applied mandatorily.

The outcome of this judgment is striking considering a similar decision from Germany made around the same time.[65] The German case concerned the equivalent provisions, as applied to someone with refugee status. Like the Belgian case, the German case concerned a person who had previously acquired protection status and was now facing revocation of that status because of crimes carried out in the state of

[63] *X v Commissioner General for Refugees and Stateless Persons*, Council for Alien Law Litigation, 22 July 2010, Nr. 46.578 (Translated synopsis sourced on European Database of Asylum Law) <http://www.asylumlawdatabase.eu/en/case-law/belgium-%E2%80%93-council-alien-law-litigation-22-july-2010-nr-46578> accessed 2 August 2017.

[64] UNHCR, 'UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the Content of the Protection granted (OJ L 304/12 of 30.9.2004)' (*UNHCR*, January 2005) at 13 <http://www.unhcr.org/43661eee2.pdf> accessed 2 August 2017.

[65] '*Turkish Nationals' v Bundesrepublik Deautschland vertreten durch das Bundesamt fur Migration und Fluchtlinge*, High Administrative Court of Niedersachsen, 11 LB 405/08 (11 August 2010), (Translated synopsis sourced at European Database of Asylum Law) <http://www.asylumlawdatabase.eu/en/case-law/germany-%E2%80%93-high-administrative-court-niedersachsen-11-august-2010-11-lb-40508> accessed 2 August 2017.

asylum. The High Administrative Court of Niedersachsen had to consider whether a conviction the applicant had received as a juvenile could be used as grounds to revoke refugee status as an adult. The court held that the corresponding provisions of the QD, Articles 14(4) and 14(5), were optional provisions.

These decisions reveal the troubling divergence in treatment between BSPs and refugees under the QD. While one may claim that there is a distinction between the revocation of BSP status for a drug conviction with a 30 month prison sentence and a conviction received while a juvenile, this is not the central concern. The most pressing point is that the courts are afforded the *discretion* to determine whether to revoke protection status of a refugee but not when they consider the fate of a BSP.[66]

This distinction between BSPs and refugees underscores the influence of bureaucratic fractioning on the management of asylum seekers and refugees in the EU. The comparable precariousness of BSPs' legal status reinforces their position as one that is even more loseable than refugee status. The QD goes to particular lengths to ensure that the distinction in treatment between the BSP and refugee are not only maintained, but emphasised. This is particularly ironic since, when the Recast QD was proposed, a key goal was to ensure that BSP status would not be a preferred or superior status, but one which would cater to a different purpose, under the umbrella of 'international protection status'. In practice, BSP's are treated as *less deserving* refugees, and thus subject to greater managerial intrusion.

[66] While the cases discussed relate to the original 2004 QD, the relevant provisions remain unchanged in the Recast QD.

7. Taking precarious legal status to its limit? The Procedures Directive.

The processes related to the management and removal of status are rooted in a particular 'spatial imaginary'. At their core, the refugee is imagined 'elsewhere' - whether that be at 'home' in the country of origin, or in a STC. This 'safety elsewhere' reasserts the precariousness of asylum seekers' legal status at the border, but also while they await their RSD. All of these processes overlap to form a powerful management apparatus. This is clearest in the Procedures Directive (PD), where the *threat* of cessation is used to prevent the *entry* of the asylum seeker.

Established in 2005, the PD was originally intended to create minimum standards for procedures on 'granting or withdrawing refugee status'. By establishing 'minimum standards', the PD predictably sparked a race to the bottom. It was also criticised for normalising exceptional measures like safe countries of origins and STC.[67] The PD has since been revised[68] and includes a number of positive changes.[69] In general however, the recast PD entrenches the key problems with the original directive, with STC and safe countries of also remaining key features. Some argue that these concepts have now become almost mandatory.[70]

New provisions in the recast PD also establish an even more precarious legal status under the CEAS, by drawing on the idea of 'safety elsewhere' and principles associated with cessation.

[67] C Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection? (2005) 7 Eur JML 35-69, 52
[68] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast PD)
[69] C Costello and E Hancox, The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum-Seeker and the Vulnerable Refugee, in eds V Chetail, P de Bruycker, F Maiani, *Reforming the Common European Asylum System* 375-445, 388.
[70] V Chetail, 'Looking Beyond the Rhetoric of the Refugee Crisis: The Failed Reform of the Common European Asylum System', (2016) 5 EJHR 584–602, 600.

Under Article 31(4) of the recast PD, MS may prevent refugee and BSP applicants from receiving a status determination procedure if they believe that the circumstances that caused the applicant to flee her country of origin are temporary. Article 31(4) stipulates that MS must review the supposed temporary nature of the circumstances every six months. While there is no explicit reference to a time limit specifying how long the MS is permitted to maintain the refugee in this indeterminate status, under Article 31(5) all status determinations must be concluded in 21 months.

Importantly, Article 31(4) signifies the first overt support by the EU of the application of cessation criteria *prior* to the application of inclusion clauses, contrary to the intended purpose of the Article 1C(5) CSR.

Someone targeted under Article 31(4) PD may well have a valid claim to refugee or subsidiary protection status. They are however precluded from making such a claim. It is clear that the provision is another tool to manage the entry of protection applicants into the EU. By fusing determination and cessation procedures, Article 31(4) reinforces temporariness as a means of reducing the overall number of protection status applicants, regardless of need.

UNHCR has stated that, RSD and 'cessation procedures should be seen as separate and distinct processes.'[71] This distinction is important to ensure states do not use cessation as a way to avoid their responsibilities. This is exactly the risk with Article 31 (4) PD. The applicant is not turned away at the border, but she is not formally recognised as a protection applicant either. She inhabits a sort of limbo, as a sub-category along the *continuum of precariousness*.

[71] UNHCR Expert Roundtable, 'Summary Conclusions: cessation of refugee status' in E Feller and V Turk (eds), *Refugee Protection in International Law UNHCR's Global Consultations on International Protection* (CUP 2003) 545-550, 550.

7.1 Deconstructing Spatial Narratives through the Application of Law

Earlier in the article I highlighted how important physical presence in a MS is for those seeking protection to access basic rights protections, including *non-refoulement*. Article 31(4) recast PD demonstrates a key disjuncture between physical presence in a MS and whether that presence is recognised under law. Under Article 31(4), the applicant's connection to the host state is presented as tenuous, while her connection to the country from which she has fled is emphasised. From the perspective of the MS, the applicant never truly inhabits its territory. The focus is on outward connections to another space.[72]

We can see other examples of being untethered to place. Mezzadra and Neilson discuss a protest where the slogan '*né qui né altrove*' was used.[73] The slogan translates as 'neither here, nor elsewhere'.[74] Neilson notes that this aptly describes the constant re-location that the asylum applicant faces when subject to STC procedures.[75] Similarly, it conveys the indeterminacy faced by those subject to Article 31(4) recast PD.

Article 31(4) draws our attention to the concept of 'spatial responsibility'. Spatial responsibility speaks to the idea that those who experience suffering in a geographically remote location are considered 'distant strangers'.[76] The tools of externalisation allow the MS to disconnect from the asylum seeker who is territorially present in the state. This is achieved by legally re-establishing her in either her country of origin or to the STC that the MS wishes to send her. Even

[72] See D Massey, *World City* (Polity Press 2007) 7.
[73] S Mezzadra and B Neilson, 'Né qui, né altrove—Migration, Detention, Desertion: A Dialogue'(2003)2(1) *Borderlands E-Journal* < http://www.borderlands.net.au/vol2no1_2003/mezzadra_neilson.html> accessed 2 August 2017.
[74] ibid, para 11.
[75] ibid.
[76] J Popke, 'Poststructural ethics: subjectivity, responsibility and the space of community' 27 (3) (2003) Progress in Human Geography 298-316, 300.

though she may be physically present in the MS, the state makes a series of representations that situate her place of *true* belonging elsewhere.

Puumala and Pehkonen, quoting Jean-Luc Nancy, have stated that 'the body without asylum is always "about to leave, on the verge of movement, a fall, a gap, a dislocation."'[77] This is particularly true of the applicant subject to Article 31(4) who faces a unique level of uncertainty. In her movement across the border to a MS, her body has been politicised in a different way to those with access to asylum procedures. From the perspective of the state, not only is her identity inscribed with the circumstances that caused her to flee their country of origin, her legal status is also dependent on those circumstances' perceived permanence.

Borders and places of detention are often described as sites where categories of exclusion may be dispensed.[78] However, Article 31(4) recast PD demonstrates another way bodies may be ordered on the basis of geopolitical concerns. Article 31(4) reveals that territorial ambiguity may be ascribed not just to a *place* within a border, but also to a *body* within a border. Those designated under Article 31(4) are situated at the limits of identifiable categories. They are neither fully present in the state of asylum nor fully absent from their country of origin.

Maintaining people in this interim state is not an unintentional side effect of the legislation. It is a deliberate tactic of precarity. Article 31(4) of the PD is merely symptomatic of the broader trends set out in this article - indicative of the increasingly creative ways in which the border is constructed and solidified around the refugee and the protection applicant.

[77] E Puumala and S Pehkonen, 'Corporeal Choreographies between Politics and the Political: Failed Asylum Seekers Moving from Body Politics to Bodyspaces', (2010) 4 International Political Sociology 50-65, 59)
[78] See S B Coutin, 'Confined Within: National Territories as Zones of Confinement', (2010) 29(4) Political Geography 200-208, 205.

8. **Conclusion**

To return to the EU-Turkey statement, we can see that far from an aberration, it is another clear example of the institutionalisation of safety elsewhere, which further reinforces the precarity of refugee status. At the same time, the *form* of the agreement represents a newer type of shifting responsibility.

The EU-Turkey statement has been subject to a number of legal challenges disputing its validity. The central argument was that the statement exposes asylum seekers to the risk of *chain refoulement*.[79] Emphasising this issue, the applicants pointed out that as far as the ECtHR is concerned, Greece does not provide an adequate asylum assessment. Decisions made about the return of individuals to Turkey from Greece therefore cannot be guaranteed to be safe.

However, when the General Court made a declaration on the cases, the issues raised by the applicants were not actually addressed. Rather, the Court stated that it did not have jurisdiction to hear the case. The Court stated that the EU press release describing the deal in March 2016 was inaccurate since the arrangement was not between the EU and Turkey, but rather between individual MS and Turkey. Accordingly, the Court determined it did not have jurisdiction under Article 263 TFEU.

The outcome of this case draws our attention again to Butler's discussion of the suspension of law as a tactic to produce *precarity*. By denying it has jurisdiction, the Court suspends the application of EU law. This is despite the fact that until this point, EU institutions appeared to be directly involved in the arrangement.

[79] Council of the European Union, Information Note on Cases before the General Court of the European Union - T-192/16 NF v. European Council,T-193/16 NG v. European Council, T-257/16 NM v. European Council 7 June 2016 <http://www.statewatch.org/news/2016/jun/eu-council-turkey-agreement-challenges-9897-16.pdf> accessed 2 August 2017.

It is interesting to see how the EU selectively invokes the idea of the sovereign state, independent of the EU, when it suits the particular narrative that it is trying to advance at any particular moment. This further emphasises the unpredictability of EU law from the perspective of the precarious. It is clear that when the applicants try to use EU law in order to demand certain rights, the issues that they complain of are no longer accepted as the law, but as individual discretionary decisions of certain MS.

This article has highlighted the various ways that MS have used jurisdictional questions as a means of deflecting responsibility for the protection of asylum seekers, refugees, and BSPs. The EU-Turkey statement is itself a deflection technique, but so is the EU's refusal to accept responsibility for the arrangement. With the decision of the General Court in relation to the arrangement, responsibility for it has been given to MS, who themselves have structures in place to avoid responsibility. It is clear that the shifting of responsibility between MS and the EU is circular, persistent, and ultimately quite difficult to predict. What is certain from these shifts is that vulnerable groups like asylum seekers and refugees are maintained in a state of precariousness.

In this article, I described how the refugee and the BSP's legal statuses exist along a *continuum of precariousness*. This precariousness is enforced by framing refugee and BSP as statuses that could at any point be rescinded, taken away. This article has examined tools used to ensure the insecurity of status along the *continuum of precariousness*. The refugee or BSP's claim to rights linked to her presence in the state of asylum is problematized. The possibility that she may be returned to her country of origin is often over-emphasised.

This is achieved through a number of devices – for example, by over-stating the level of attachment that the refugee has to her country of origin and by drawing on concepts like cessation to use the law to re-position the refugee in her country of origin. Controlling the bodies of refugees is a key concern of both MS and the EU. By constantly re-establishing the *precarity* of the refugee and the BSP, the state can reassert a level of control that it feels it has lost.

The way in which refugees and BSPs are subjected to the removal of their protection status is often an administrative exercise. The bureaucratic nature of revocation or cessation tends to absolve the MS of a sense of responsibility. Given that removal of these statuses is formulated as an efficient method to apply *post-hoc* immigration control measures, the implications that these processes have on individuals and the risks that they open them to become lost in the machinery of the process. As shown here however, this idea of administrative efficiency is not only limited to the processes applied to the removal of refugee and BSP status, it goes to the heart of the CEAS itself, the obligation of *non-refoulement*.

The EU-Turkey arrangement is not therefore a radical departure from the existing practices under the CEAS. It is merely another way in which the EU draws on the idea of uncertainty and *precariousness* as a tool of management and control. It draws upon a well-established policy of pushing EU borders outwards, in a way that actually absolves MS of any responsibility to those seeking protection.

Therefore, while one could make policy recommendations with respect to, for example, a greater parity of treatment between refugees and BSPs, or a more robust framework to prevent excessive use of revocation powers, such recommendations will always fall short. The way in which categories of asylum and refugeehood are

organised and justified under the CEAS will always provide the opportunity to avoid responsibility to those in need of protection when there is a perceived overriding political incentive to do so.

Enforcing precariousness is therefore the key tool used by the EU and MS to 'manage' refugee movements and it will continue to be for the foreseeable future.