Chapter 2
The working of international asylum law in European law

In this Chapter, I discuss whether and how far the Member States and Community institutions are bound to comply with international law on asylum when they adopt or apply European asylum law. Most international asylum law consists of treaty law binding the Member States (cf. paragraph 1.4.1). In paragraph 2.1, I address the question whether the transfer of powers on asylum matters to the Community (or the Union) has affected the scope or content of the Member States’ obligations under international law, and how the Member States should solve conflicts between their obligations under European law and those under international asylum law. In paragraph 2.2, I address the various ways how international law may work in the Community legal order: as treaty or customary law, as general principles of Community law or by reference to primary or secondary Community law. In paragraph 2.3, the Charter of Fundamental Rights (and its successor, Part II of the Constitution for Europe) is addressed as far as its provisions have bearing on rights or obligations under international asylum law. Each paragraph ends with a summary of conclusions; in paragraph 2.4, I make some concluding observations.

2.1 The Member States as states party to international treaty law

2.1.1 The Vienna Treaty Convention rules on treaty conflicts

Pacta sunt servanda
[79] By the Treaty of Amsterdam, the Member States transferred powers on asylum to the European Community. Did the transfer of power on asylum to the European Community have consequences for the scope of the Member States’ obligations under international asylum law? Relevant international law suggests that the Member States’ obligations under international law remained unaltered after the conclusion or entry into force of the Treaty of Amsterdam.

According to the basic rule on the issue, pacta sunt servanda, states must keep to their agreements.1 Changes to international asylum law can be brought only by the consent of all Contracting states, not by a treaty that only some of
those states conclude among each other. It is well-established customary law that *pacta tertiis nec nocent nec prosunt*, that is

“[a] treaty does not create either obligations or rights for a third State without its consent.”

The states party to the Treaty on European Community form only a minority of the states party to the Refugee Convention, the Convention Against Torture, the Covenant on Civil and Political Rights or even the European Convention of Human Rights. No consent was asked from, let alone granted by the other, “third” states for any change to obligations under these instruments when the Treaty of Amsterdam was concluded. Therefore, the obligations of the Member States under the relevant treaties on asylum remained unaltered after the conclusion or entry into force of the Treaty of Amsterdam.

**Conflicts**

[80] Thus, the Member States must comply with their obligations under international asylum law and these obligations are not altered by the Treaty of Amsterdam. But at least in theory, obligations under European asylum law may diverge from those under international asylum law. As a consequence, Member States may face conflicts between European asylum law and international asylum law. In this paragraph, I will discuss the rules on conflicts between European asylum law and international asylum law. The matter addressed here should be distinguished from the one addressed in Chapter 2.2: the question whether and if so, to what extent the Community is bound to comply with international law on asylum. That issue affects not only the acts of Community organs, but also acts of Member States as “executive agents” of the European Community. In this paragraph, I discuss the impact of Community law on the obligations of the Member States under international law, that is, in their capacity as states party to the instruments of international asylum law.

From the point of view of international law, in case of a conflict between an obligation under Community law and an obligation under, say, the Refugee Convention, the supranational character of the former is, in itself, not relevant: the conflict concerns obligations under two competing treaties, two instruments of international law. For relevant rules we may therefore turn to the Vienna Convention on the Law of Treaties. The applicability of these rules to the issue at stake presents no problems, as they codify, at least partially, customary law and international case-law. Further, the relevant rules are recognised and applied by the Court of Justice (see number [88]).