Europe and Extraterritorial Asylum

Europe and Extraterritorial Asylum

PROEFSCHRIFT

ter verkrijging van
de graad van Doctor aan de Universiteit Leiden,
op gezag van Rector Magnificus prof. mr. P.F. van der Heijden,
volgens besluit van het College voor Promoties
te verdedigen op donderdag 7 april 2011
klokke 16.15 uur

door

Maarten den Heijer

geboren te Voorburg in 1979

Promotiecommissie:

Promotores:	prof. mr. P. Boeles prof. dr. R.A. Lawson
Overige leden:	prof. mr. H. Battjes (Vrije Universiteit Amsterdam) prof. mr. R. Fernhout (Radboud Universiteit Nijmegen) prof. mr. C.A.P. Hillion (Universiteit Leiden en Stockholm University, Sweden) prof. dr. G. Noll (Lund University, Sweden) prof. dr. P.A. Nollkaemper (Universiteit van Amsterdam) prof. mr. N.J. Schrijver prof. mr. P.R. Rodrigues

Lay-out: Anne-Marie Krens – Tekstbeeld – Oegstgeest

Table of contents

List of abbreviations

ACHR	American Convention on Human Rights
AJIL	American Journal of International Law
BYIL	British Yearbook of International Law
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Racial Discrimination against Women
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CERD	United Nations Committee on the Elimination of Racial Discrimination
ComAT	United Nations Committee against Torture
ComRC	United Nations Committee on the Rights of the Child
COREPER	Committee of Permanent Representatives
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	Court of Justice of the European Communities/European Union
EComHR	European Commission of Human Rights
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
EEC	European Economic Community
EEZ	Exclusive Economic Zone
EJIL	European Journal of International Law
EJML	European Journal of Migration and Law
EP	European Parliament
ETS	European Treaty Series
EU	European Union
EUROSUR	European Border Surveillance System
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
EXCOM	Executive Committee of the High Commissioner's Programme
FRY	Federal Republic of Yugoslavia
Frontex	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
HRC	United Nations Human Rights Committee
IAComHR	Inter-American Commission on Human Rights

IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLQ	International & Comparative Law Quarterly
ICTY	International Criminal Tribunal for the former Yugoslavia
IDP	Internally Displaced Person
IJRL	International Journal of Refugee Law
ILC	International Law Commission
ILO	Immigration Liaison Officer
ILO	International Labour Organization
IMO	International Maritime Organization
IOM	International Organization for Migration
LNTS	League of Nations Treaty Series
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
PCIJ	Permanent Court of International Justice
PEP	Protected Entry Procedure
RABIT	Rapid Border Intervention Teams
RPP	Regional Protection Programme
SAR	International Convention on Maritime Search and Rescue
SBC	Schengen Borders Code
SIA	Schengen Implementing Agreement
SOLAS	International Convention for the Safety of Life at Sea
TFEU	Treaty on the Functioning of the European Union
TRNC	Turkish Republic of Northern Cyprus
UDHR	Universal Declaration of Human Rights
UKHL	United Kingdom House of Lords
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNHCR	United Nations High Commissioner for Refugees
UNTOC	United Nations Convention Against Transnational Organised Crime
UNTS	United Nations Treaty Series
UNRIAA	United Nations Reports of International Arbitral Awards
VCCR	Vienna Convention on Consular Relations
VCDR	Vienna Convention on Diplomatic Relations
VCLT	Vienna Convention on the Law of Treaties
VRS	Army of the Republika Srpska (Vojska Republike Srpske)

1 Introduction

1.1 Thesis of the study

This study defends the thesis that when European states endeavour to control the movement of asylum-seekers outside their territories, they remain responsible under international law for possible wrongdoings ensuing from their sphere of activity. To substantiate this thesis, the study first conceptualises the relevant international legal framework governing external activity of states and the status of individuals who seek protection from a state but are outside that state's ordinary legal order. The study next examines how this legal framework governs and constrains current and unfolding European practices of external migration control.

1.2 Genesis of the study

The study was sparked by a proposal presented by the United Kingdom government to its European partners in 2003 to fundamentally change the system of asylum protection in Europe. In order to deter those who enter the European Union illegally and make unfounded asylum applications, the UK government proposed to establish protected zones in third, non-EU, countries, both in regions of the refugees' origin and along the transit routes into the EU, to which asylum-seekers, including those who had already arrived in the European Union, could be transferred to have their applications processed. Only those determined as refugee would be eligible for resettlement within the EU, while failed claimants were to be returned to their countries of origin or integrated locally.[1] The proposal aimed, amongst other things, to break the link between illegal immigration and asylum seeking, to reduce the burden on European states of rapidly fluctuating and unmanaged intakes of asylum-seekers, to scale down the numbers of failed asylum-seekers residing illegally

1 The United Kingdom proposal was forwarded by Prime Minister Blair in March 2003 as a concept paper to his European Council colleagues: Letter of 10 March 2003 by Prime Minister Tony Blair to His Excellency Costas Simitis, with attached document 'New International Approaches to Asylum Processing and Protection', reprinted in: House of Lords European Union Committee – Eleventh Report, 'Handling EU asylum claims: new approaches examined', 30 April 2004, Appendix 5.

in Europe, and to provide more equitable protection for genuine refugees. In an internal document, the British Home Office summarised the proposals as reflecting a 'pro-refugee but anti-asylum seeking strategy'.[2]

The British 'New Vision for Refugees' was widely reflected upon in political arenas across Europe and legal academia. Not only did the plans constitute a fundamental shift to traditional thinking about the reception of asylum-seekers in Europe (and were as such perceived as 'a serious challenge to the institution of asylum as we know it'[3]), they also raised a variety of legal and theoretical issues relating to the responsibilities of states under international law to protect refugees and other displaced persons. These concerned, in particular, the question whether obligations stemming from refugee law, and most notably the prohibition of return (or *refoulement*), would also apply to asylum-seekers not being within the territory of the European Union; the legal regime which would apply to the reception and processing in third countries; the extent to which European states could be held responsible for violations of international law taking place in those regional processing and reception centres; what the quality of protection in such centres should be; and under what circumstances responsibilities for the treatment of asylum-seekers could be transferred to international organizations or third countries.[4] A lack of clarity on those issues, it was submitted, would risk leaving the asylum-seekers in a legal vacuum.[5]

It soon became clear that the British proposal was too ambitious to enjoy the political support of a majority of the Member States of the European Union. Although the idea of processing all applications of asylum-seekers outside the EU's external borders has occasionally resurfaced in policy debates across Europe,[6] it has never featured as such in any of the policy agendas of the

2 This internal document, containing a more detailed version of the proposals, came into informal circulation in the beginning of March 2003: United Kingdom Home Office, 'A New Vision for Refugees', draft Final report, on file with the author. This document and the concept paper forwarded to the European Council are hereafter referred to as 'A New Vision for Refugees' or 'UK's New Vision'.

3 G. Noll, 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones', 5 European Journal of Migration and Law, (2003), p. 304.

4 Ibid; K. Wouters, 'EU Asylum Protection in the Region: questions of legal responsibility for the protection against *refoulement*', in: Bruin, R. (Ed.), *Niemandsland, opvang van vluchtelingen in de regio*, Amnesty International Nederland, Amsterdam, 2003, p. 55-83; Amnesty International, 'Unlawful and unworkable – Amnesty International's views on proposals for extra-territorial processing of asylum claims', IOR 61/004/2003, April 2003; Human Rights Watch, 'An Unjust 'Vision' for Europe's Refugees', 17 June 2003; House of Lords (2004), esp. paras. 75-101.

5 House of Lords (2004), para. 98.

6 In October 2004, on proposal of German Interior Minister Otto Schily, the EU Justice and Home Affairs Ministers discussed the idea of setting up EU transit centres in North African countries. Several Member States, including France, Belgium and Sweden, voiced strong

European Commission or the Council of the European Union which set forth the future strategic aims of the common policy in the field of asylum. In directly responding to the UK's New Vision, the European Commission underlined that any new approaches to the question of asylum 'should be built upon a genuine burden-sharing system both within the EU and with host third countries, rather than shifting the burden to them'.[7] The Commission further noted that '[a]ny new approach should be complementary rather than substituting the Common European Asylum System, called for at Tampere.'[8] This complementary nature was later endorsed by the European Council in the Hague Programme.[9]

But the UK's New Vision was not simply another radical proposal to address the asylum issue. The proposal is perhaps best characterized as the ultimate consequence of a policy rationale which has taken root in Western immigration countries over the last decades and which embodies the idea that burdens posed by illegal entries and false asylum claims can only be addressed effectively if policies are developed which manage or control the movement of migrants before they present themselves at the border of the state. Instead of following the traditional model of deciding upon rights of entry and residence of migrants in the course of spontaneous arrivals, European and other immigration countries have in recent years developed policies which give expression to this strategy of establishing a system of global migration and asylum management. The UK proposal thus fitted into a general trend under which Western states have increasingly sought to enforce their migration policies outside their borders.

In academic literature, various terms are used to describe this trend of pre-border migration enforcement: the outsourcing, externalisation, offshoring or extraterritorialisation of migration management, external migration governance, remote migration policing and others.[10] Typologies of the different policy

---

opposition to the plans. *Die Welt* 4 October 2004, 'Außenminister distanzieren sich von Schilys Asyl-Plänen'; *Euractiv* 5 October 2004, 'EU divided over African asylum camps'.

7 COM(2003) 315 final, p. 12.

8 Ibid. This view was shared by the Select Committee on European Union of the House of Lords: 'Rather than developing proposals for processing centres or regional protection areas, it would be preferable to devote resources to strengthening and accelerating asylum procedures in Member States and to ensuring high minimum standards at EU level. Furthermore, greater resources must be invested to strengthen the processing systems in countries of first asylum and to promote resettlement programmes. However, these efforts must not prejudice the capacity of EU Member States to consider fully asylum claims that are submitted in their territory', House of Lords (2004), para. 101.

9 Presidency Conclusions 4/5 November 2004, Annex I, 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union', para. 1.3.

10 V. Guiraudon, 'Before the EU Border: Remote Control of the "Huddled Masses"', in: K. Groenendijk, E. Guild and P. Minderhoud (eds), *In Search of Europe's Borders*, The Hague: Kluwer (2002); D. Bigo, and E. Guild, 'Policing at Distance: Schengen Visa Policies', in: D. Bigo and E. Guild, *Controlling Frontiers: Free Movement Into and Within Europe*, London:

instruments include the instalment of visa requirements, the posting of immigration officials at foreign airports, the imposition of sanctions on commercial carriers transporting improperly documented migrants, the interception of migrant vessels at sea and various forms of pre-inspection regimes.[11] Other measures which may be rubricated under this trend are capacity building programmes for migration management and refugee protection in countries of origin or transit, which may include the reception and processing of migrants and asylum-seekers in third countries.

A common feature of this type of measures is that migrants may encounter the state they wish to migrate to long before they arrive at that state's territorial border. The migrant may be required to first obtain a visa at a consular post of that state within his country of origin; he may be subjected to pre-boarding checks by immigration officers of a foreign state while at the airport in his country of origin; or he may be subjected to various types of enforcement measures while crossing the open seas. It is also possible that the migrant, while *en route*, does not encounter the foreign state directly through its agents posted abroad, but that he is indirectly confronted by immigration measures emanating from that state. He may, for example, be redirected to a reception centre staffed or funded by that state; he may be subjected to stringent checks by private carriers which perform enforcement activity normally appertainable to the state; or he may be subjected to border controls in his country of origin or countries of transit which are carried out by local agents who have been trained, funded or supplied with special equipment by the foreign state.

This process of relocating migration management and shifting responsibilities for controlling the border is drastically changing the nature of the border. It has been aptly posited that borders are no longer 'stable and 'univocal', but instead, 'multiple', shifting in meaning and function from group to group'.[12] Migration control no longer focuses exclusively on the geographical border as the ultimate threshold for a foreigner to be allowed entry into a state's sovereign legal order, but is exported to other countries so that persons may experience a foreign border while still within their country of origin.

Ashgate (2005); B. Ryan, 'Extraterritorial Immigration Control: What Role for Legal Guarantees?', in: B. Ryan and V. Mitsilegas (eds), Extraterritorial Immigration Control, Leiden/Boston: Martinus Nijhoff (2010), p. 3; J.J. Rijpma, *Building Borders: The Regulatory Framework for the Management of the External Borders of the European Union*, dissertation Florence (2009), p. 307 et seq; S. Lavanex, 'EU external governance in "Wider Europe"', 11 *Journal of European Public Policy* (2004), p. 683.

11 Guiraudon, in: Groenendijk, Guild and Minderhoud (2004), p. 195; A. Ataner, 'Refugee Interdiction and the Outer Limits of Sovereignty', 3 *Journal of Law and Equality* (2004), p. 12-14; M.J. Gibney and R. Hansen, 'Asylum Policy in the West: Past Trends, Future Possibilities', United Nations University Discussion Paper No. 2003/68, World Institute for Development Economics Research (2003), p. 5-7.

12 A. Kesby, 'The Shifting and Multiple Border and International Law', 27 *Oxford Journal of Legal Studies* (2007), p. 101.

After ample consideration, it was decided that this general trend of externalising migration policies, and the impact it has on the legal position of persons seeking access to protection in the Member States of the European Union, should be the focus of the present study.

1.3 SCOPE OF THE STUDY

The rationale for the proliferation of pre-border migration policies can be appreciated in different ways. The European Union and Western states commonly perceive pre-border enforcement as a necessary instrument to protect the border and control the entry of foreigners, in accordance with the right of states, as inherent in their sovereignty, to exclude aliens from their territory. As such, pre-border enforcement is seen to foster migration through 'regular' channels and to prevent the inflow of 'unauthorised' arrivals.[13] By intervening before a migrant can effectuate an irregular entry, legal and logistical burdens can be avoided, especially in respect of those migrants whose return may be difficult to enforce. It is further said that to regulate migration movements away from the border is conducive for the security and safety of the migrants themselves, for it may prevent, amongst other things, migrants from embarking upon perilous journeys on unseaworthy ships or as stowaways and it avoids the exploitation of migrants by human smugglers and traffickers.[14] Further, by obtaining prior permission, bona fide travellers may obtain legal certainty concerning their entry and/or residence status and may benefit from expedited controls once they present themselves at the border.

Others have considered practices of external migration control less favourably, in noting that states may employ such measures to the detriment of refugees seeking access to protection.[15] These authors point to the fact that states have an incentive to prevent asylum-seekers, be they genuine refugees or not, from reaching their borders, because it relieves them of financial and societal burdens incurred by the processing and granting of protection to asylum-seekers. The United Kingdom for example, has in the past decided to introduce visa requirements for particular countries coupled with pre-inspection regimes at airports in those countries precisely in response to an increase of asylum-seekers originating from those countries.[16] It has also been observed that states may deliberately seek to take measures outside their territorial jurisdictions so as to create a nebulous legal zone in which the state

13 On the use of terminology, see section 1.9 below.

14 European Parliament resolution of 18 December 2008 on the evaluation and future development of the FRONTEX Agency and of the European Border Surveillance System (EUROSUR) (2008/2157(INI)), recital (E, F, T); COM(2006) 26 final, para. 3.2.4.

15 M. Garlick, 'The EU Discussions on Extraterritorial Processing: Solution or Conundrum?', 18 *IJRL* (2006), p. 612-613; Gibney and Hansen (2003), p. 5.

16 Ryan, in: Ryan and Mitsilegas (2010), p. 9, 20-21.

can avoid its responsibilities under international law for the protection of refugees.[17]

Regardless of the underlying aims of external migration policies, it is scarcely disputed that refugees often travel by irregular means and that they are therefore prone to be affected by measures which aim to prevent unauthorised migrants from arriving at the state's border.[18] That external migration measures, be they specifically targeted at asylum-seekers or at irregular migrants in general, affect, as a matter of empirical reality, the free movement of persons seeking asylum, is acknowledged not only in legal and social studies, but also by the states employing these policies, the European Union and UNHCR.[19]

This study is not as such interested in the rationales behind the various pre-border strategies. Rather, it proceeds from the assumption that these strategies may in one way or the other impact upon the possibility of refugees to gain access to Europe. The key legal question which then rises is how these policies correspond to the specific rights of refugees to seek, claim and be granted international protection. In the ordinary situation of 'territorial asylum', where a person presents himself at the border or within the territory of a state and claims asylum, that state is obliged to grant protection, in accordance with international refugee and human rights law, to those who can either be defined as refugees or who can be brought within the ambit of complementary protection regimes which have developed around the prohibition of *refoulement* as established under general human rights law. This protective duty is not self-evident in the absence of a territorial linkage between the individual and the state. By operating outside its territorial boundaries, the state also steps out of its territorial sovereignty and its domestic legal order. This gives rise to issues of defining state competences, of defining the applicable law and of identifying the actor who can be held responsible for upholding individual rights. In examining the legal framework governing the relationship between the person seeking protection and the state employing such policies, the present study submits that, although questions of 'territorial asylum' differ in several

17 Guiraudon, in: Groenendijk, Guild and Minderhoud (2004), p. 195; Ryan, in: Ryan and Mitsilegas (2010), p. 35; R.A. Davidson, 'Spaces of Immigration "Prevention": Interdiction and the Nonplace', 33 *Diacretics* (2003), p. 6.

18 Ataner (2004), p. 10.

19 UNHCR has estimated that the proportion of asylum-seekers in mixed migratory flows arriving in Italy by sea was 50% in 2007 and 75% in 2008. The percentage of asylum applicants who were granted either refugee status or subsidiary or humanitarian protection was around 50%: UNHCR Policy Development and Evaluation Service, Refugee protection and international migration: a review of UNHCR's operational role in southern Italy, PDES/2009/05 September 2009, paras. 39-40. See, further: UNHCR EXCOM, 'Interception of Asylum-Seekers and Refugees', EC/50/SC/CRP.17 (9 June 2000), paras. 3-17; COM(2006) 733 final, para. 10; COM(2008) 67 final, para. 15. The various efforts of the EU, EU Member States and other Western states to incorporate refugee concerns in external instruments of migration control are extensively discussed in chapters 5-7.

respects from questions of 'extraterritorial asylum', international law continues to constrain the liberty of states in their dealings with internationally protected categories of migrants.

The subject matter of the present study is the general trend whereby European states engage in forms of external migration control and the legal implications of this trend in terms of obligations of European states towards persons seeking international protection. This trend may one the one hand consist of measures specifically targeted at and affecting persons who seek asylum; and on the other hand of measures of external immigration control which affect the more general category of irregular migrants, potentially including persons who seek asylum.

1.4 GOAL OF THE STUDY

The goal of the study is twofold. Firstly, and in its most concrete terms, the study aims to provide a legal response to a new empirical reality which may significantly impact upon rights of refugees and other forced migrants. The immediate goal of this study, therefore, is to provide a better understanding of the manner in which human rights and refugee law govern and constrain the discretions of states which employ various types of pre-border migration enforcement. There is, unfortunately, a marked discrepancy between the pace in which European states are implementing their external migration policy agendas and the speed with which the law catches up with that development. Many of the legal questions raised by the UK's new vision are of equal relevance for other forms of pre-border migration enforcement but have not, or only partially, been subjected to thorough scrutiny. The European Member States and the institutions of the European Union have on multiple occasions acknowledged that the legal framework applicable to the various external migration policies is insufficiently clear. In 2006, the European Commission communicated that an analysis should be made of the circumstances under which states must assume responsibilities under international refugee law when engaged in operations of sea border control and that practical guidelines should be developed in order to bring more clarity and a certain degree of predictability regarding the fulfilment by Member States of their obligations under international law.[20] In 2009, the European Commission reemphasised the need for a clarification of the international rules applicable to maritime controls, while also underscoring the necessity of conducting a study into the feasibility and legal and practical implications of joint processing of asylum applications both inside and outside the Union.[21] The multi-annual Stockholm Programme (2010-2014) repeated these concerns and further called for an

20 COM(2006) 733 final, esp. paras. 31-35.
21 COM(2009) 262 final, paras. 4.2.3.1 and 5.2.2.

exploration into possible avenues concerning access to asylum procedures targeting main transit countries.[22]

One of the most profound consequences of the contested nature of the applicable law to extraterritorial migration measures is that it may foster a development by which states simply refuse to acknowledge any international responsibility for the effects of their extraterritorial activities. In the context of interception and rescue activities carried out on the seas between Africa and Europe, various European governments have not only questioned but explicitly denied any responsibilities towards refugees subjected to those activities.[23] Although the present study does not purport to provide a detailed set of guidelines for each and every manner in which European states engage with asylum-seekers outside their territories, it does aim at formulating a general set of parameters which can provide the guidance that a rule of law must provide to enable states to understand and fulfil their obligations.

The goal of the study is, secondly, to identify how human rights law responds to a phenomenon whereby states, through a variety of avenues, engage in external activity and seek cooperation with other actors in pursuit of particular political objectives in the course of which the enjoyment of fundamental rights may be negatively affected. The increased European involvement in the regulation of migration movements around the world can well be perceived as a specimen of the wider international development, often explained from the notions of globalisation and interdependency, where governmental activity takes place across legal orders and involves a plurality of actors.[24] This interaction between jurisdictions and international actors complicates attempts to define the applicable law, to determine the responsible actor and, ultimately, to identify the consequences for individuals in terms of the scope and justiciability of their rights vis-à-vis the exercise of power. Apart from providing the normative framework for examining the extent to which unfolding European practices give rise to responsibilities under human rights and refugee law, the chapters discussing the ability of human rights law to respond to these atypical forms of state conduct aim at contributing

22 The Stockholm Programme, An open and secure Europe serving and protecting citizens, OJ 2010 C115/01, paras. 5.1, 6.2.3.

23 See, amongst others the observations of the Spanish government in the *Marine I* case, discussed in chapter 6, in which the government maintained that it did not bear responsibility under the Convention Against Torture for the alleged maltreatment of migrants in the course of a rescue operation at sea, because the incident took place outside its jurisdiction: ComAT 21 November 2008, *J.H.A. v Spain (Marine I)*, no. 323/2007, paras. 6.1-6.2. The Italian government has similarly submitted that its obligations under international and human rights law are not engaged in the context of border controls undertaken outside Italian territory: Human Rights Watch News Release 12 May 2009, 'Italy: Berlusconi Misstates Refugee Obligations'.

24 There is a wealth of legal literature on this development. For some perspectives see G. Palombella, 'The rule of law beyond the state: Failures, promises and theory', 7 *International Journal of Constitutional Law* (2009), p. 442-467.

to existing international legal theory on extraterritorial state activity, the protection of human rights and the allocation of responsibilities in situations of joint conduct.

1.5 Research questions and structure of the study

Several steps are in order to identify the manner in which international law governs the relationship between European practices of external migration control and persons who seek international protection.

It is necessary, first, to set out the international law regime on the delimitation of international obligations and the allocation of responsibilities for violations of human rights in circumstances where states become active, possibly through intermediary actors, in legal systems other than their own.

Chapter 2 of the study explores the general theory, case law and legal doctrine on the extraterritorial applicability of human rights. By focusing on the manner how the notions of 'territory' and 'jurisdiction' have been incorporated and applied in human rights law, the chapter presents a general outline for delineating the scope of a state's extraterritorial human rights obligations.

Chapter 3 explores those parts of the international law regime on the allocation of international responsibilities for wrongful conduct which are of relevance for situations where there is either a plurality of international actors or where there is another principal actor involved in the conduct. This regime of law mainly derives from the Law on State Responsibility and includes the doctrines of attribution of conduct to the state and derived responsibility of a state for wrongful conduct of another state. The chapter explores how these doctrines have been established under the Law on State Responsibility, how they are employed under human rights law and what their relationship is with substantive human rights obligations and especially the doctrine of positive obligations.

The research questions addressed in chapters 2 and 3 may be summarised as follows:

1. *How does international law, and in particular human rights law, respond to state activity affecting the enjoyment of rights of persons outside the state's territory?*
2. *How does international law, and in particular human rights law, allocate responsibilities for international wrongful conduct in which a plurality of actors is involved?*

It is necessary, subsequently, to identify those norms of international and European law which specifically address the status of asylum-seekers who are outside but subject to immigration measures employed by EU Member

States. This analysis focuses on the substantive obligations of states normally associated with the status and entitlements of persons requesting asylum.

Chapter 4 conceptualises the notion of 'extraterritorial asylum' under international law. Although the term 'asylum' is rarely defined in international law, it has traditionally been understood as encompassing both the situation of 'territorial asylum' – referring to asylum accorded by a state in its territory to nationals of another state – and 'extraterritorial asylum' – referring to asylum accorded in some other place, normally the territory of the state from which refuge is sought.[25] Because the international system of protection of refugees is organised in accordance with the notion that states should grant protection to those refugees who have presented themselves on their soil, contemporary refugee law discourse is predominantly occupied with defining the rights and duties of states and refugees in situations of territorial asylum. Although states may contribute to solutions to the refugee problem on a global scale, for example through the instrument of resettlement or general programmes of humanitarian relief, these efforts are not normally grounded in legally binding international arrangements. Traditionally, the matter of legal duties of states in situations of extraterritorial asylum has mainly received attention in the context of practices of so-called 'diplomatic asylum', a term which refers to a state granting protection to an individual within its embassy or consulate in a host state.[26] Current policies of relocating migration management do seem to warrant a legal restatement of the concept of extraterritorial asylum, which should respond not only to the traditional question of how grants of extraterritorial asylum should be accommodated with the sovereign rights of the host state, but also to the question to what extent and under what circumstances norms sprouting from general human rights and refugee law

25 In one of the few attempts to define the term 'asylum' in international law, the *Institut du Droit International* adopted a provision stipulating that asylum can refer both to protection inside and outside the granting state's territory: 'Dans les presented Résolutions, le terme "asile" désigne la protection qu'un Etat accorde sur son territoire ou dans un autre endroit relevant de certains de ses organes à un individu qui est venu la rechercher'. Institut de Droit International, Session de Bath 1950, 'L'asile en droit international public (à l'exclusion de l'asile neutre)', Article 1. On the dichotomy between 'territorial' and 'extraterritorial' asylum, see A. Grahl-Madsen, *The Status of Refugees in International Law*, Leiden: Sijthoff (1972), Vol. ii, p. 5-6; A. Grahl-Madsen, *Territorial Asylum*, Stockholm/London/New York: Almqvist & Wiksell International (1980), p. 1; F. Morgenstern, ''Extra-Territorial' Asylum', 25 *British Yearbook of International Law* (1948), p. 236. The use of the 'territorial'-'extraterritorial' dichotomy is not always consistent. Noll, taking the location of the individual as starting point, denotes all forms of protection outside the individual's country of origin as 'extraterritorial protection': G. Noll, *Negotiating Asylum. The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, The Hague/Boston/London: Martinus Nijhoff (2000), p. 18.

26 Morgenstern (1948); F. Morgenstern, 'Diplomatic Asylum', 67 *The Law Quarterly Review* (1951); Grahl-Madsen (1972), p. 45-56; S.P. Sinha, *Asylum and International Law*, The Hague: Martinus Nijhoff (1971), p. 203-271.

as applicable to situations of territorial asylum can be extrapolated to situations of extraterritorial asylum.

Chapter 5 then turns to the European dimension. It explores in what manner the European Union both stimulates and sets limits to Member State activity in the sphere of external migration control, it identifies how the relevant norms of refugee and general human rights law as identified in chapter 4 have been incorporated into the relevant EU instruments forming part of the 'external dimension of asylum and migration', and it seeks to determine the consistency and interrelation between these external EU instruments and the Union's internal rules on border control and asylum.
The research questions to be addressed in chapters 4 and 5 may be summarized as follows:

3. *How does international law regulate the rights of individuals requesting protection in situations of 'extraterritorial asylum'?*
4. *How does European Union law regulate the rights of individuals requesting protection in situations of 'extraterritorial asylum'?*

The final exercise of the study, undertaken in chapters 6 and 7, consists of a description and legal appreciation of current practices of external migration control. These two chapters may also be regarded as case studies which examine the conformity of contemporary policies of remote migration control with the legal standards as formulated in the previous chapters. Instead of exploring the entire range of external measures of migration control employed by EU Member States, it was decided to restrict this part of the study to the two arguably most topical and legally contested forms of external migration control: migrant interdiction at sea and the external processing of asylum applications.

Chapter 6 describes the various forms in which European states, sometimes in conjunction with third states, intercept, deter or 'push-back' migrants at sea and appreciates these practices in terms of international maritime law and norms of refugee and human rights law as identified in the previous chapters.

Chapter 7 discusses the phenomenon of external processing of asylum applications. In the absence of presently functioning European policies which involve the transfer of migrants to a foreign location and the subsequent processing of claims to protection, the chapter takes as its background the two most prominent non-European precedents of external processing: the programmes of external processing developed by the governments of Australia and the United States. These non-European practices are then transposed into the European legal framework, by assessing to what extent those programmes correspond with the human rights norms binding the EU Member States. From this assessment, conclusions are drawn as to the legal feasibility of the possible future creation of programmes of external processing in the European context.

The research questions to be addressed in chapters 6 and 7 may be summarized as follows:

5. *How does international law, and in particular human rights law, constrain the liberty of EU Member States to engage in migrant interdiction at sea?*
6. *How does international law, and in particular human rights law, constrain the liberty of EU Member States to relocate the reception and processing of asylum applicants to third countries?*

1.6 DELIMITATIONS OF THE STUDY

Delimitation 1: International refugee and human rights law

The law at issue in this study comprises those norms of international law which are of specific relevance for persons who seek, but who may be barred from receiving, international protection. The rights typically associated with the international protection of persons who flee their country are those set out in the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol. Complementary to the Refugee Convention, binding human rights instruments also protect persons seeking asylum against expulsion or return, including the International Covenant on Civil and Political Rights (ICCPR), the United Nations Convention against Torture (CAT) and, within the European legal order, the European Convention on Human Rights (ECHR). The cornerstone of the protection of asylum claimants under these treaties is formed by the prohibition of *refoulement*, which prohibits, in general terms, the forced removal of an individual to a territory where he runs a risk of being subjected to (flagrant) human rights violations.[27] The prohibition of *refoulement* is either explicitly provided for in these treaties (Article 33(1) Refugee Convention, Article 3 CAT), or implicitly derives from substantive human rights norms, in particular the prohibition of torture or inhuman or degrading treatment (Article 7 ICCPR, Article 3 ECHR).[28] Under European Union law, the term 'international protection' is used to collectively indicate protection which ought

27 K. Wouters, *International Legal Standards for the Protection from Refoulement*, Antwerp: Intersentia (2009), p. 25.

28 Other human rights than the prohibition of torture or inhuman or degrading treatment may also be construed as prohibiting *refoulement*. See, for a general discussion M. den Heijer, 'Whose Rights and Which Rights? The continuing Story of Non-Refoulement under the European Convention on Human Rights', 10 *EJML* (2008), p. 277-314; H. Battjes, 'The *Soering* Threshold: Why Only Fundamental Values Prohibit *Refoulement* in the ECHR Case Law', 11 *EJML* (2009), p. 205-219.

to be accorded to refugees and to those who can be qualified as 'subsidiary protection beneficiaries' under general human rights instruments.[29]

International refugee and human rights law not only protects against forcible removal or return, but also sets wider standards for the treatment of persons who (successfully) seek asylum. Articles 2-34 of the Refugee Convention set forth the rights (and duties) of those who can be defined as a refugee in accordance with Article 1 of the Refugee Convention. This collection of rights, which includes protection from *refoulement*, does not automatically accrue to any refugee, but distinguishes in applicability in accordance with specific levels of attachments of a refugee with a state. Further, the regime of refugee rights operates concurrently with the general system of human rights, which by its nature and purpose grants fundamental rights to everyone. Pronouncements made in this study on the circumstances giving rise to international protection obligations of European states are hence not only relevant for identifying whether a person may successfully claim protection from *refoulement*, but also warrant a further assessment of how and where the state should secure the fulfillment of its wider protection obligations.

Although the study focuses on the obligations of states under international refugee and human rights law, this body of law does not operate in a vacuum. A key aim of the study is to identify how international refugee and human rights law finds application in contexts other than the ordinary situation of 'territorial asylum'. This requires an appraisal not only of the scope and contents of relevant norms of international refugee and human rights law, but also of the interaction of these norms with specific other norms or regimes of law. Firstly, the study aims to identify how the relevant human rights norms find expression in the legal instruments adopted by the European Union, in so far as these instruments affect the legal status of persons who are outside the territory of the Union (chapter 5). Further, the study addresses the relationship between, on the one hand, international refugee and human rights law and, on the other hand: the law on state responsibility (chapter 3), the duty of states to respect the territorial sovereignty of other states (chapter 4) and international maritime law (chapter 6).

Delimitation 2: Persons seeking international protection

The persons in focus of this study are individuals who 1) are physically not present in the territory of one of the EU Member States and 2) seek international protection. It follows that the study does not deal with measures which are often categorised under the rubric of external migration policies but are

29 Council Directive 2004/83/EC, Article 2(a). Note that the personal scope of 'subsidiary protection' under EU law may be wider than protection which derives from human rights law.

enforced in respect of persons who are within the state of refuge, such as readmission or return agreements concluded with third countries.

Legal textbooks on refugee law ordinarily focus not on the legal status of asylum-seekers but on that of refugees or other persons who are entitled to international protection. This is because asylum-seekers, as opposed to refugees, do not have a special status under international law as such.[30] But because asylum-seekers may be refugees, and because formal recognition is not constitutive for having the quality of refugee, it is commonly accepted that persons claiming to be refugees must be treated on the assumption that they may be refugees.[31] In the ordinary situation, where an asylum-seeker presents himself in or at the border of the state, this implies that, at least until the claim to be a Convention refugee has been formally denied, an asylum claimant should be granted those entitlements of the Refugee Convention which do not depend on some form of legal attachment with the state, which includes protection from *refoulement*.[32] The European Court of Human Rights has, under a similar rationale, considered that any claim for protection under Article 3 of the European Convention on Human Rights necessarily requires a meaningful assessment before any action as regards possible deportation is undertaken.[33]

The notion that asylum-seekers should, at least during an initial period, be treated as refugees forms an important premise of this study. A key question surrounding the external migration policies is whether and how these policies should be arranged in order to meaningfully distinguish between persons who are entitled to international protection and other migrants. The search for appropriate solutions in this respect involves not only a determination of the circumstances under which a state is bound to grant protection to a person who claims asylum, but also involves the question of whether and how the state should arrange its policies so as to separate asylum-seekers from other categories of migrants. Especially in respect of measures of immigration control of collective nature, which impact upon 'mixed flows' of asylum-seekers and other irregular migrants, the proposition could be defended that the treatment of migrants should accord not only with the assumption that asylum-seekers may be refugees, but also with the assumption that migrants may be asylum-seekers. To accept this proposition may have serious repercussions for the manner in which coercive measures must be carried out.

---

30 This is different under European Union Law, where asylum applicants are accorded special status. See esp. Article 3(1) Council Directive 2003/9/EC.

31 UNHCR EXCOM Conclusion No. 6 (XXVIII) (1977), para. (c); UNHCR, 'Note on International Protection', A/AC.96/815 (31 August 1993), para. 11; G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, Oxford University Press (2007), p. 232-233; J.C. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press (2005), p. 158-159.

32 Hathaway (2005), p. 158-159.

33 ECtHR 11 July 2000, *Jabari v Turkey*, no. 40035/98, paras. 39-40.

Delimitation 3: The member states of the European Union

Although this study is concerned with policies and practices which have to a considerable extent become the subject of the competence of the European Union, the study will not deal with the question of the division of responsibilities between the European Member States and the European Union as an international organization, nor with the question whether and to what extent the European Union may be held internationally responsible for the manner in which it pursues its external asylum and migration agenda. The rationale behind this delimitation is that even though the competences of the European Union in the areas of asylum and migration control have substantially widened, in the vast majority of fields explored in this study – and this is extensively explained in chapter 5 – its present role consists primarily of facilitating intra-European cooperation and cooperation between European and third states. Within the EU's external dimension of asylum and migration, the Member States continue to enjoy a decisive amount of sovereign discretion in devising and enforcing the various immigration policies.

This does not mean that the present study disregards the expanding role and competences of the European Union within this policy area. Especially in the final chapters of the study, systematic attention is paid to the questions how the various European practices find their basis in European law, to what extent the relevant aspects of European law are in conformity with international standards and how European law may foster or channel the proper observance of international law. But in so far as conclusions are drawn in terms of human rights obligations and responsibilities for violations of those obligations, the Member States are the subjects of the study.

1.7 SOURCES OF THE STUDY

In conceptualising the international legal framework regulating the relationship between EU Member States and asylum-seekers in an extraterritorial context, the study has recourse to the generally accepted sources of international law as enumerated in Article 38 of the Statute of the International Court of Justice: 1) international conventions (in this study the Refugee Convention and human rights conventions and other treaties in so far as they interact with those conventions); 2) international custom (which in this study includes several norms laid down in the Articles on State Responsibility and possibly the right to grant 'diplomatic (or extraterritorial) asylum'); and 3) the general principles of law recognized by civilized nations. These three sources are also termed the principal, formal or 'actual' sources of international law.[34] Article 38 of

34 M. Shaw, *International Law*, Cambridge University Press, 6th Ed. (2008), p. 114; R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, 9th Ed. (1992), Vol. i, p. 24.

the Statute mentions as subsidiary means for the determination of rules of law: 4) judicial decisions and 5) the teachings of the most highly qualified publicists of the various nations. These subsidiary means do not necessarily articulate the law itself, but determine and elucidate the principal sources of international law, although they may also contribute to the further development of international law.[35] In respect of the European Convention on Human Rights, the judgments and decisions of the European Court of Human Rights, although formally only binding upon the State party to the dispute, fulfil a similar function as both identifying and contributing to the further development of, the rights set forth in the Convention.

Apart from the sources of international law listed in Article 38 of the ICJ Statute, which are all to a greater or lesser extent capable of instituting new norms of international law (or of developing the law), a great variety of sources contribute to the identification of existing international law. This study refers to judgments, decisions and advisory opinions of international and European courts (and, less frequently, domestic courts and arbitral tribunals); views and conclusions of human rights treaty monitoring bodies; scholarly writings; reports and other relevant materials. Resolutions, declarations or other texts setting forth codes of conduct which are not binding upon states but which may be referred to as 'soft law', are relevant only in so far as they inform the meaning or development of binding rules of international law.

In so far as the study identifies norms of international refugee and human rights law, judgments of the ECtHR, views of United Nations treaty monitoring bodies and pronouncements of UNHCR are accorded special importance. Although the views of UNHCR and treaty monitoring bodies are not formally binding, they are generally seen as authoritative interpretations of the law and often assented to by a large majority of states. Where relevant however, the study also has recourse to (divergent) state practices in identifying whether a particular development or interpretation of the law can be said to have achieved binding character.

1.8 Scientific context of the study

This study is not the first which explores the legal implications of practices of external migration control. This is hardly surprising, in view of the wide variety of measures which are being employed, their impact on the legal status of individuals and their legally and politically contested nature. In particular, legal academia have provided often timely responses to fresh attempts of

35 Jennings and Watts (1992), p. 41. Shaw emphasises that it is not always possible to make a strict distinction between primary and secondary sources of international law by pointing amongst others to the law-creating character of many judgments of the International Court of Justice: Shaw (2008), p. 71.

immigration countries to enforce migration policies away from their borders: such as in the context of the US and Australian schemes of migrant interdiction at sea and the external processing of asylum applications;[36] the broadening of visa regimes and the enactment of carriers' liability for the transport of improperly documented passengers in Europe and North America in the 1980s and 1990s;[37] and the more recent developments within the EU's external dimension on migration and asylum.[38]

Although existing legal research addresses many topics which are also at focus in the present study, there is as of yet no monograph which brings together in one context i) the general doctrines of international and human rights law applicable to external and multiple state activity, ii) the legal contents of the notion of 'extraterritorial asylum' and iii) selected European practices of external migration control. It is hoped that the compilation in one study of the different legal regimes governing European practices of external migration control allows for the drawing of conclusions which see to the interaction between the relevant legal regimes and surpass statements about the limits set by one particular legal norm or regime. At the outset, it is possible to identify three particular legal interactions which have as of yet not, or only scarcely been addressed in existing research. The first concerns the relationship between extraterritorial human rights and refugee law obligations and the duty of states to respect the territorial sovereignty of the other state (discussed in chapter 4). The second concerns the relationship between extraterritorial human rights and refugee law obligations and the (possible) extraterritorial applicability of EU law on border controls and asylum (chapter 5). The third concerns the relationship between rights of states to interdict migrant vessels at sea as set forth by the Law of the Sea and concomitant human rights obligations vis-à-vis the migrants found on board the interdicted vessel (chapter 6). In line with the goals of the study formulated in section

36 Eg S. Ignatius, 'Haitian Asylum-Seekers: Their Treatment as a Measure of the INS Asylum Officer Corps', 7 *Georgetown Immigration Law Journal* (1993), p. 119-148; H.H. Koh, 'America's Offshore Refugee Camps', 29 *University of Richmond Law Review* (1994), p. 139-174; M.E. Sartori, 'The Cuban Migration Dilemma: an Examination of the United States' Policy of Temporary Protection in Offshore Safe Havens', 15 *Georgetown Immigration Law Journal* (2001), p. 319-356; B. Frelick, '"Abundantly Clear: *Refoulement*"', 19 *Georgetown Immigration Law Journal* (2004), p. 245-276; C.M.J. Bostock, 'The International Legal Obligations owed to the Asylum-seekers on the MV Tampa', 14 *IJRL* (2002), p. 279-301; E. Willheim, '*MV* Tampa: The Australian Response', 15 *IJRL* (2003), p. 159-191; A. Francis, 'Bringing Protection Home: Healing the Schism Between International Obligations and National Safeguards Created by Extraterritorial Processing', 20 *IJRL* (2008), p. 273-313; S. Legomsky, 'The USA and the Caribbean Interdiction Program', 18 *IJRL* (2006), p. 677-695.

37 E. Feller, 'Carrier Sanctions and International Law', 1 *IJRL* (1989), p. 48-66; F. Nicholson, 'Implementation of the Immigration (Carriers' Liability) Act 1987: Privatising Immigration Functions at the Expense of International Obligations?', 46 *ICLQ* (1997), p. 586-634.

38 See *inter alia* the various contributions in special issue 3-4 of Volume 18 of the *International Journal of Refugee Law* (2006); and the contributions in Ryan and Mitsilegas (2010).

1.4, the effort undertaken in this work is not merely to enumerate the relevant obligations stemming from one legal regime or another. Rather, the study aims to identify how the relevant regimes of law interact and how they jointly inform the manner in which European states should treat persons in search for international protection in the course of external migration controls.

1.9 TERMINOLOGY

Migration law, including asylum law, is fraught with terminological issues. In the public domain, the terms foreigners, aliens, migrants, refugees and asylum-seekers are often used interchangeably and although migration law defines and demarcates the legal statuses of the various categories of migrants, questions of terminology remain apparent in legal literature and, indeed, in the law itself. In the above, reference was made to the legal distinction between asylum-seekers, refugees and other persons entitled to 'international protection (from *refoulement*)'. On occasion, this study uses the term refugee as a short-hand for all persons who are entitled to international protection, but will specifically refer to the relevant grounds and contents of protection where deemed necessary.

The study has not chosen to systematically distinguish between the terms 'irregular', 'unauthorised' or 'undocumented' migrants in denoting the more general category of migrants who seek entry into a state which has not expressly sanctioned their entry or stay. All these terms are commonly employed to refer to those migrants who depart without the admission documents required by the country of destination.[39] The study does however avoid using the term 'illegal (or clandestine) migrant' as far as possible. The term illegal migrant is often perceived as contributing to a negative social perception of the person in question and further as legally imprecise, because i) the law does not normally qualify persons, but particular activity as illegal (i.e. an act, but not a person can be illegal), because ii) 'illegality' is normally associated with criminal activity, while the violation of rules of entry or residence is not normally subject to penal sanctions, and because iii) a lack of possession of

39 Also see International Organization for Migration (IOM), *International Migration Law: Glossary on Migration*, Geneva: IOM (2004).

valid admission documents not necessarily precludes a migrant (and this is especially so in the case of refugees) from obtaining legal residence.[40]

40 For these and other criticisms of the term 'illegal' in connection to migrants, see M. Paspalanova, 'Undocumented vs. Illegal Migrant: Towards Terminological Coherence', 4 *Migraciones Internacionales* (2008), p. 82-83. The United Nations General Assembly recommended in 1975 that all UN bodies use the term 'non-documented or irregular migrant workers' as a standard to define those migrants workers that illegally and/or surreptitiously enter another country: United Nations General Assembly Resolution 3449 (XXX) of 9 December 1975, 'Measure to ensure the Human Rights and Dignity of All Migrant Workers'. In policy documents, the institutions of the European Union continue to employ the term 'illegal migration' in referring to persons wishing to enter the Member States without the required admission documents. For an overview and critique, see S. Carrera and M. Merlino, 'Undocumented Immigrants and Rights in the EU Addressing the Gap between Social Science Research and Policy-making in the Stockholm Programme?', Centre for European Policy Studies (CEPS) (2009).

2 The extraterritorial applicability of human rights

The question of the territorial, and therewith the personal, scope of a state's obligations under human rights treaties is central to discussions on external measures of immigration control. Because human rights are commonly presented as the foremost constraint to the state's liberty to control the entry of foreigners, any discussion on the legal framework governing external migration policies requires understanding of the conditions giving rise to the extraterritorial applicability of human rights. The current chapter explores the general theory on the (extra)territorial applicability of human rights. Chapter 4 more specifically addresses issues of personal and material scope of the prohibition of *refoulement* and the right to leave any country, including his own.

2.1 INTRODUCTION

In the year 1906, the Consolidated Mining and Smelting Company Limited of Canada bought a zinc and lead smelter located along the Columbia river in the city of Trail, Canada, which is close to the international border with the State of Washington. In the following decades, the capacity of the plant expanded rapidly and so did the amount of sulphur released from the plant. The harmful effects of the emissions were noticed in the State of Washington, where the land and trees of the Columbia River Valley, used for logging and farming purposes, were affected. After the government of the United States had filed complaints with the government of Canada, both countries agreed to put the dispute before a Mixed Arbitral Tribunal. In its final decision, reported on March 11, 1941, the Tribunal considered that

> 'under the principles of international law, as well as the law of the United States, no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.'[1]

---

1 Ad Hoc International Arbitral Tribunal 11 March 1941, *Trail Smelter Arbitration (United States v Canada)*, United Nations, *Reports* of International Arbitral Awards, Vol. III (United Nations publication, Sales No. 1949.V.2), p. 1965; re-printed in 35 *American Journal of International Law* (1941), p. 684-736. The history and legal legacy of the Trail Smelter Arbitration was

On this basis, the Tribunal considered Canada to be responsible for paying damages for harm in the United States from future smelter emissions. It is on the basis of the same 'principles of international law' that the International Law Commission (ILC) has now drafted the Articles on Prevention of Transboundary Harm from Hazardous Activities, obliging states to take all necessary measures to prevent or minimize the risk of harm from activities on its own territory to the territory of another state, also with regard to activities which are not as such prohibited by international law.[2]

In 2006, the European Court of Human Rights was faced with, on face value at least, quite a similar question of law. Mr Mohammed Ben El Mahi complained before the European Court of Human Rights that, as a Muslim, he had been discriminated against by Denmark, which had permitted the publication of a series of cartoons in the Danish newspaper *Jyllands-Posten*. Mr Ben El Mahi was joined in his complaint by the Moroccan National Consumer Protection League and the Moroccan Child Protection and Family Support Association – all of them based in Morocco. The applicants considered these cartoons to be offensive caricatures of the Prophet Muhammad, in particular the one showing him as a terrorist with a bomb in his turban. Like the Arbitral Tribunal in *Trail Smelter*, the European Court referred to 'relevant principles of international law' in deciding whether Denmark could be held accountable for the harmful effects these cartoons produced outside its territory. The European Court unanimously found that the application was inadmissible:

> 'The Court considers that there is no jurisdictional link between any of the applicants and the relevant member State, namely Denmark, or that they can come within the jurisdiction of Denmark on account of any extra-territorial act. Accordingly, the Court has no competence to examine the applicants' substantive complaints under the Articles of the Convention relied upon.'[3]

Offensive cartoons are not to be equated with toxic fumes, but the outcome of the two cases is strikingly different. It illustrates how, apparently, divergent 'principles of international law' govern questions of territorial scope of the state's obligations under human rights law. The special nature of human rights, and in particular the requirement that an individual must be 'within the jurisdiction' of the state, sets limits to the duty of states to secure human rights outside their own territory.

---

recently explored in R.M. Bratspies and R.A. Miller, *Transboundary Harm, Lessons from the* Trail Smelter *Arbitration*, Cambridge University Press (2006).

2 Articles 1 and 3 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities 2001, text adopted by the International Law Commission at its fifty-third session in 2001 (A/56/10).

3 ECtHR 11 December 2006, *Ben El Mahi a.o. v Denmark*, no. 5853/06.

Under the general regime of international law – primarily dealing with horizontal interstate relations – the question whether a state has committed an internationally wrongful act is normally answered on the basis of two elements: (a) whether specific conduct may be attributed to the state concerned, and (b) whether that conduct was in conformity with the obligations binding that state.[4] There is no rule of general character stipulating that these obligations can only be situated within the state's territory. This corresponds to the very purpose of international law to regulate interstate contacts and relations. Substantial material parts of international law, such as international humanitarian law, international maritime law and the law on diplomatic relations are premised on the understanding that states do act outside their territorial sovereignty and that when they do so, their activity should be subjected to common agreement. In accordance with this rationale, the International Law Commission has affirmed that 'the acts or omissions of organs of the State are attributable to the State as a possible source of responsibility regardless of whether they have been perpetrated in national or in foreign territory'.[5] And in its commentary on Article 29 Vienna Convention on the Law of Treaties, which holds that '[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory', the ILC has underlined that this provision does not exclude the 'obvious' possibility of extraterritorial application of treaties.[6] In so far

4 Article 2 Draft Articles on Responsibility of States for Internationally Wrongful Acts, text adopted by the International Law Commission at its fifty-third session in 2001 (A/56/10), annexed to UN General Assembly Resolution 56/83 of 12 December 2001.

5 Report of the International Law Commission on the work of its twenty-seventh session, *Yearbook of the ILC 1975*, Vol. II, p. 84.

6 Article 29 VCLT is primarily designed to prevent states, in the absence of specific territorial provisions or declarations such as federal-, metropolitan- or colonial clauses, from restricting the territorial application of a treaty to only a part of its territory. It transpires from the drafting history of the Vienna Convention that several governments had indeed feared that Article 29 VCLT could be read as excluding the possibility of extraterritorial application of treaties. But the ILC clarified that the provision does not 'cover the whole topic of the application of treaties from the point of view of space' and felt it unnecessary to insert a further paragraph stipulating the 'obvious fact' that treaties may apply outside the territories of the parties; see Summary records of the eighteenth session, *Yearbook of the ILC 1966*, Vol. I (Part Two), p. 46-47, 50; Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session, *Yearbook of the ILC 1966*, Vol. II, p. 213-214; Sir H. Waldock, Third report on the Law of Treaties, *Yearbook of the ILC 1964*, Vol. II, p. 12. On occasion, the rule laid down in Article 29 VCLT and, in conjunction with that rule, the system of territorial reservations or declarations made under a human rights treaty, is nonetheless advanced as argument against the possible extraterritorial application of human rights treaties: C. Rozakis, 'The Territorial Scope of Human Rights Obligations: the Case of the European Convention on Human Rights', Report Venice Commission, Strasbourg 30 Sept. 2005, No. CDL-UD(2005)022rep, p. 5; S. Kavaldjieva, 'Jurisdiction of the European Court of Human Rights: Exorbitance in Reverse?', 37 *Georgetown Journal of International Law* (2006), p. 534-537. The European Commission of Human Rights and the House of Lords have affirmed however that territorial declarations or provisions allowing

as international law does localize the enjoyment of the rights and obligations of a treaty in a specific area, such restrictions must follow from the particular wording or object of a treaty.

In the context of human rights law – primarily dealing with the vertical relationship between the state and the individual – the prevailing paradigm is however that human rights treaties only govern the relationship between a state and its subjects and the circle of a state's subjects is traditionally defined either with reference to nationality or the territory in which a person is present. It follows that, while under the law governing interstate relationships the determination of state responsibility for international wrongful conduct depends on an assessment of state activity in relation to the state's international obligations, under human rights law a further assessment is introduced: that of the relationship between the state and the individual. In many human rights treaties, this relationship has found expression in the requirement that victims of human rights violations must be within the 'jurisdiction' of a state.

Although the notion is currently widely accepted that a state which ventures abroad and affects the human rights of an individual situated outside its territorial borders may be held responsible under human rights treaties, the circumstances giving rise to such responsibility remain subject to controversy. This chapter aims to identify the key principles of international law governing the field of extraterritorial human rights obligations. In particular, the chapter focuses on the meaning of the notion of 'jurisdiction', which appears the crucial requirement for engaging a state's responsibility for extraterritorial human rights violations.

The chapter first sets out, in sections 2.2-2.4, the different purport of the concept of 'jurisdiction' in general international public law and human rights law. It is argued that the ordinary function of 'jurisdiction' within international law – which is primarily to allocate competences between states – is not to be equated with the specific delimiting function of the concept of 'jurisdiction' in human rights law. In section 2.5, a comparative analysis is made of the methods and criteria applied by international courts and human rights bodies in interpreting the term jurisdiction and in defining the extraterritorial reach of human rights treaties. In section 2.6, the analysis is broadened to human rights treaties which do not contain a general clause as to their personal or territorial application, with a view to determining whether a general doctrine on the extraterritorial application of all human rights treaties can be identified.

---

for territorial restrictions should not be interpreted as limiting the scope of the term 'jurisdiction' in Article 1 of the European Convention but merely as indicating the governmental entities which are bound by the Convention: House of Lords 13 June 2007, *Al-Skeini and Others v. Secretary of State for Defence*, [2007] UKHL 26, para. 86 ('In particular, there is an important difference between *the legal system* to which any Act of Parliament extends and the *people* and *conduct* to which it applies', emphasis in original); EComHR 26 May 1975, *Cyprus v Turkey*, nos. 6780/74, 6950/75, p. 136-137 at para. 9.

The chapter submits that, although not always consistent and operating on sometimes contradictory premises, international case law has moved towards the acceptance that human rights obligations serve as a code of conduct for all activity of a state, regardless of territorial considerations, and that exercises (or omissions) of factual power by the state which directly affect a person in the enjoyment of human rights are sufficient for considering that person to be under the jurisdiction of the state. Although it has been argued that this reasoning may overstretch the meaning of the term jurisdiction in international law, the chapter emphasises that the term jurisdiction fulfils different functions in general international law and human rights law, allowing for a different construction of that term within the human rights context.

2.2 THE CONCEPT OF JURISDICTION IN INTERNATIONAL LAW

In public international law, the concept of 'jurisdiction' is often understood as closely connected to the notion of sovereignty. Jurisdiction is described as an ingredient or an aspect of sovereignty: laws extend so far as, but no further than the sovereignty of the state which puts them into force.[7] Whereas 'sovereignty' is referred to as the general legal competence of states (or as the legal personality of statehood), 'jurisdiction' refers to particular exercises of sovereignty (or particular exercises by states of their legal personality). In this connection, 'jurisdiction' is essentially a right of states to regulate conduct, international law setting the limits to this right and domestic laws prescribing the extent to which states make use of this right.[8] A state may exercise 'jurisdiction' within the limits of its sovereignty, and is not entitled to encroach upon the sovereignty of other states.

The ordinary and essentially territorial notion of 'jurisdiction' may also be explained from its quality as an attribute of state sovereignty.[9] Since sovereignty is in the present world organized along territorial demarcations, the starting point of assessing 'jurisdiction' is also territorial. States are, as a rule, exclusively competent in respect of their territories and may not intervene in

---

7 F.A. Mann, 'The Doctrine of International Jurisdiction Revisited After Twenty Years', 186 *Recueil des Cours de l'Académie de Droit International* (1984), p. 20; I. Brownlie, *Principles of Public International Law*, Oxford University Press, 6th Ed. (2003), p. 105-106; M. Shaw, *International Law*, Cambridge University Press, 5th Ed. (2003), p. 572; R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, London: Longman, 9th Ed. (1992), Vol. I, p. 457.

8 Jennings and Watts (1992), p. 456-7. Mann (1984), p. 20. In his earlier treatise, Mann emphasized the function of jurisdiction as delimiting the *right* of states to exercise powers: F.A. Mann, 'The Doctrine of Jurisdiction in International Law', 111 *Recueil des Cours de l'Académie de Droit International* (1964), p. 9-15.

9 The terminology is taken from ECtHR 12 December 2001, *Banković and others v Belgium and others*, no. 52207/99, para. 61.

the territories of other sovereign powers.[10] In the *Lotus* case, the Permanent Court of International Justice stated this rule as follows:

> '[F]ailing the existence of a permissive rule to the contrary – [a state] may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.'[11]

Thus, when states would act within the territory of another state they will normally breach the rule of non-intervention and act beyond their jurisdiction. This may also be seen as an 'excess' or 'overstepping' of jurisdiction.

Two types of 'jurisdiction' are generally discerned. Legislative (or prescriptive) jurisdiction refers to the capacity to make decisions or rules. Enforcement (or executive) jurisdiction refers to the capacity to ensure compliance with those rules. One of the differences between the two manifestations of jurisdiction is that it is well-established in international law that legislative 'jurisdiction' may be based on other grounds than territorial considerations.[12] A state has – to a certain extent – the capacity to make laws concerning its own nationals living abroad, for example regarding the levy of taxes, the supply of state benefits or the recruitment of military conscripts.[13] Legislative 'jurisdiction' over nationals living abroad is not unfettered but remains subject to the rule of non-intervention. This implies that it will generally not be allowed for a state to impose upon its nationals, or other persons for that matter, who are resident in another country, obligations which run counter to the local laws of that country. If France were to prohibit its citizens living abroad to work on *Quatorze Juillet* this would most likely collide with the sovereignties of other states and be an unlawful exercise of 'jurisdiction'.[14]

But nationality is not the only legal title for exercising legislative 'jurisdiction' over foreign territories. Many states assert criminal 'jurisdiction' over non-nationals committing offences against their nationals living abroad, over offences against vital state interests, or over offences of serious concern to the international community as a whole.[15] Other examples of extraterritorial

10 Brownlie (2003), p. 297; Shaw (2003), p. 572; Mann (1984), p. 20.

11 PCIJ 7 September 1927, *S.S. 'Lotus' (France v Turkey),* PCIJ Series A. No. 10, p. 18-19.

12 See in particular M. Akehurst, 'Jurisdiction in International Law', 46 *British Yearbook of International Law* (1972-1973), p. 179.

13 According to Lowe: 'States have an undisputed right to extend the application of their laws to their citizens, wherever they may be. This type of jurisdiction has a longer history than jurisdiction based upon the territorial principle.' V. Lowe, 'Jurisdiction', in: Evans (2003), p. 339.

14 For a more comprehensive analysis of limits to legislative jurisdiction over foreign territories, see Akehurst (1972-1973), p. 188-190.

15 Also known as the passive personality principle, the protective principle and the universal principle.

legislative 'jurisdiction' concern anti-trust or bankruptcy laws regarding foreign economic activities producing effects within the legislating state. In the *Lotus* case the Permanent Court of International Justice held the competence of states to enact legislation on acts outside their territories not to be subject to a general prohibitive rule:

> 'Far from lying down a general prohibition to the effect that States may not extend the application of their laws and the 'jurisdiction' of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules (…). [A]ll that can be required of a State is that it should not overstep the limits which international law places upon its 'jurisdiction'; within these limits, its title to exercise 'jurisdiction' rests in its sovereignty.'[16]

While states may have the 'jurisdiction' to levy taxes on its own nationals living abroad or to try non-national criminals who have committed offences abroad, a state will normally not have 'jurisdiction' to enforce these legislative or judiciary measures without the consent of the other state.[17] A state may not simply enter into another state in order to collect taxes, recruit military conscripts or arrest criminals. This is what the PCIJ referred to when holding that failing the existence of a permissive rule to the contrary, a state may not exercise its power in the territory of another state.[18] Thus, enforcement 'jurisdiction' must be grounded in international custom or international agreement. There are, of course, many examples of states permitting other states to act within their territories. Under international custom and through bilateral and multilateral treaties, consular officers stationed abroad may perform a wide variety of functions such as the issue of passports, travel documents, and visa, or act as notary and civil registrar.[19] Under treaties concluded within the framework of the Council of Europe, European states are entitled to service writs, records of judicial verdicts or rogatory letters in other Member States and may Members States be obliged to comply with criminal judgments and

16 *S.S. 'Lotus'*, p. 19. See also the separate opinion of Judge Fitzmaurice in ICJ 5 February 1970, *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, ICJ Reports 1970, p. 104 at para. 70: 'It is true that, under present conditions, international law does not impose hard and fast rules on States delimiting spheres of national jurisdiction in such matters (...), but leaves to States a wide discretion in the matter. It does however (a) postulate the existence of limits-though in any given case it may be for the tribunal to indicate what these are for the purposes of that case; and (b) involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State'. For a comment: Mann (1984), p. 26-31.

17 Lowe, in: Evans (2003), p. 351; Mann (1984), p. 47.

18 *Supra* n. 11.

19 Various consular practices are now codified in the 1963 Vienna Convention on Consular Relations, 596 UNTS 261, see in particular Article 5.

orders of seizure and confiscation served in another Member State.[20] Under bilateral treaties, the Spanish *Guardia Civil* is allowed to patrol the territorial waters of Senegal for the purpose of intercepting illegal migrants, the Dutch police is allowed to continue the hot pursuit of drug traffickers crossing the Belgian border, and the United States exercises 'complete jurisdiction and control' in the Guantánamo Bay Naval Base under a lease established by the 1903 Cuban-American Treaty.[21] In all these examples, states enforce, either directly or indirectly, their domestic laws in the territory of another state. State intervention in the territory of another state is sanctioned by the competent authority: the other state. Extraterritorial enforcement 'jurisdiction' comes into being as a result of agreement.

In general international law therefore, the primary function of 'jurisdiction' is to allocate state competences and to determine whether a state is entitled to act. 'Jurisdiction' presupposes the existence of a legal title.

2.3 The concept of jurisdiction in human rights law

Although human rights treaties undoubtedly form an integral part of international public law, they operate somewhat differently than treaties governing inter-state relationships.[22] Whereas treaties entered into under the general regime of international law give rise to reciprocal rights and duties between states, human rights treaties do not only create interstate obligations, but, more importantly, give rise to a collection of one-way obligations a state owes to a particular set of individuals.[23] Whereas the addressee of an obligation under

20 See eg European Convention on Mutual Assistance in Criminal Matters, *ETS* 30 (1959); European Convention on the International Validity of Criminal Judgments, *ETS* 70 (1970); Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, *ETS* 141 (1990).

21 Agreement between Spain and Senegal to launch joint military police patrols, concluded on 21 August 2006 (see extensively chapter 6.2); Treaty between the Kingdom of Belgium, the Kingdom of the Netherlands and the Grand Duchy of Luxemburg on cross-border law enforcement, 8 June 2004; Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval stations, 23 February 1903.

22 B. Simma, 'How Distinctive Are Treaties Representing Collective Interest? The Case of Human Rights Treaties', in: V. Gowlland-Debbas (ed.), *Multilateral Treaty-Making*, The Hague: Martinus Nijhoff Publishers (2000), p. 87.

23 The Inter-American Court of Human Rights stated it as follows: 'modern human rights treaties (…) are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.' Inter-Am. Ct. H.R. 24 September 1982, The Effect of Reservations on the Entry into Force of the

general international law will normally be another Contracting State, the addressee of human rights obligations is a group of individuals the membership of which is variable and to some extent indeterminate. The legal bond of the individual with the Contracting State does not consist of an act of signature or ratification, but is subject to less tangible criteria reflecting a degree of attachment of the individual with the Contracting State. This legal bond may come into existence or come to an end as a result of circumstances relating to the individual, such as the fact of birth, death, immigration or emigration. It may also be the result of actions emanating from the state. By invading Kuwait in 1991 for example, Iraq was considered to have extended its human rights obligations under the ICCPR to the populace of Kuwait.[24]

Although there is no uniformity in methods whereby various human rights instruments try to capture, or legally define, the group of individuals to which states owe the human rights obligations set out in the treaty, the notions of 'jurisdiction' and 'territory' have an obvious appeal. The International Covenant on Civil and Political Rights speaks of 'all individuals within its territory and subject to its jurisdiction' (Article 2(1)); the European Convention on Human Rights speaks of 'everyone within their jurisdiction' (Article 1); the Convention on the Rights of the Child speaks of 'each child within their jurisdiction' (Article 2(1)); and the American Convention on Human Rights speaks of 'all persons subject to their jurisdiction' (Article 1(1)). But other treaties, such as the International Covenant on Economic, Social and Cultural Rights or the Convention on the Elimination of All Forms of Discrimination against Women do not contain a general provision limiting the scope of obligations either *ratione personae* or *ratione loci*, although some of the material provisions contained in these treaties do embody language from which a particular scope can be inferred. The Refugee Convention, for example, divides the various rights contained therein to refugees 'present in the State party's territory', refugees 'lawfully staying in the country of refuge', and refugees 'who have their habitual place of residence in the State party's territory'.[25]

It appears from the drafting histories of the various human rights conventions that the choice for the term 'jurisdiction' in delimiting their scope was not self-evident. While the Drafting Committee of the ICCPR had originally confined the scope of obligations of a state Party to 'persons under its jurisdiction', this requirement was subject to ongoing discussions during the preparatory stages. A US draft had substituted the words 'under its jurisdiction' for 'within its territory', but in 1949 a French proposal to replace the word

---

American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion OC-2/82, para. 29. In a similar vein: ECtHR 18 January 1978, *Ireland v United Kingdom*, no. 5310/71, para. 239.

24 HRC 10 October 1991, Fifteenth annual report, UN doc. A/46/40, para. 652.

25 Almost all substantive rights in the Refugee Convention specify to which category of refugees the protection applies. See in particular Articles 12-34 Convention Relating to the Status of Refugees, 189 UNTS 150 (Geneva, 28 July 1951).

territory for jurisdiction was provisionally adopted.[26] France had submitted that a state should not be relieved of its obligations to persons who remained within its jurisdiction merely because they were not within its territory.[27] At a practical level it was further argued that nationals residing abroad wishing to join associations within a Contracting State's territory should be able to rely on the ICCPR, as should nationals wishing to have access to the courts of their state and nationals invoking a right to enter their mother country as laid down in Article 12 (4) ICCPR.[28] On the other hand it was contended, in particular by the US, that a reference to 'jurisdiction' alone would neither suffice, since a state would normally not be able to protect (or enforce) the rights of persons living outside its territory who might be subject to its (legislative) 'jurisdiction'; in such cases action would be possible only through diplomatic channels.[29] In the final stages of the negotiations it was eventually decided to refer both to territory and jurisdiction – resulting in what later has been termed 'this awkwardly formulated provision'.[30]

During the preparatory stages of the European Convention, the first draft (which limited its applicability '*to all persons residing within the territories*'[31] of the Member States) triggered a proposal to replace the words 'residing in' by 'living in', so as to expand the reach of the future Convention. This proposal led to a second one:

> 'Since the aim of [the first,] amendment is *to widen as far as possible the categories of persons who are to benefit by the guarantees contained in the Convention*, and since the words 'living in' might give rise to a certain ambiguity, the ... Committee should adopt the text contained in the draft Covenant of the United Nations Commission: that is, *to replace the words "residing within" by "within its jurisdiction"* [...].'[32]

The choice for insertion of the term jurisdiction apears to have been inspired by the drafting process of the UN Covenants, the early stages of which took place at the same time, and where at that moment a reference to jurisdiction had been provisionally agreed upon. The proposal was approved by the Committee of Experts; later changes of Article 1 ECRH only related to other

26 See M.J. Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights*, Dordrecht: Martinus Nijhoff (1987), p. 53-54.

27 *Ibid*.

28 *Ibid*. Also see United Nations, Official Records of the General Assembly, Tenth Session, Annexes, A/2929, Part II, Chap. V, 1955, para. 4. For a commentary, see M. Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, Kehl am Rhein: Engel, 2nd Ed. (2005), p. 30-31, 43-45.

29 Bossuyt (1987), p. 54.

30 Nowak (2005), p. 43.

31 See *Collected Edition of the 'Travaux préparatoires' of the European Convention on Human Rights* (hereafter: *TP*) part II, p. 276 (8 Sept. 1949); emphasis added.

32 *Ibid.*, p. 200 (5 Feb. 1950), emphasis added.

elements of this provision.[33] Although the word 'territory' was reintroduced into the draft text of the ICCPR one year later, the corresponding provision in the ECRH remained unchanged.

Under the Convention on the Rights of the Child, the wordings chosen in the ECRH were eventually preferred above those of the ICCPR. The original draft of Article 2 of the CRC had delimited the scope of obligations of Contracting States to children 'in their territories'. In considering to opt for the wordings chosen in the ICCPR, it was indicated that the dual requirement of territory and jurisdiction could give rise to uncertainty, with as example mentioned the legal status of children who are within a state's territory but outside its 'jurisdiction', such as diplomats' children.[34] The Finnish delegation had subsequently proposed – 'in order to cover every possible situation' – to delete the reference to territories and keep only the reference to jurisdiction – 'such as in the European Convention'. The provision was, without further comment, amended accordingly.[35]

In interpreting the territorial scope of human rights treaties, various authors rely heavily on the *travaux préparatoires*, resulting in sometimes opposing propositions as regards the scope of respective treaties.[36] Although it is true that in the legislative history of the ICCPR, CRC and the ECRH different arguments were brought forward for inserting the notion of 'jurisdiction', one should be hesitant to infer from these variances alone that the purport of the word 'jurisdiction' differs among these treaties. The reasons submitted for insertion of the word 'jurisdiction' were of rather footloose nature and it is clear that the drafters shared similar concerns and did indeed pay close attention to the wordings chosen in other human rights treaties. Perhaps the main conclusion to be drawn from the preparatory works is not that they signify the exact envisaged personal scope of application, but rather that they reflect a common understanding that the notions of 'territory' and 'jurisdiction' do not necessarily coincide; and that states will sometimes encounter diffi-

33 *TP* part II, p. 236 and 260 (15 Feb. 1950); *TP* part IV, p. 218, for the text as adopted by the *Conference of Senior Officials* (15 June 1950).

34 S. Detrick, *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"*, Dordrecht, Martinus Nijhoff (1992), p. 147.

35 *Ibid*.

36 It has sometimes been derived from the *travaux preparatoires* that neither the ECHR nor the ICCPR should be interpreted as being extraterritorially applicable. Kavaldjieva concludes from the legislative history of the ECHR that the drafting Committee was mainly concerned with narrowing down the scope of territorial obligations from which she infers that jurisdiction should be interpreted as a territorial concept alone; Kavaldjieva (2006), p. 531-534. A similar reading of the *travaux* is given by the ECtHR in *Banković*, para. 63. Noll concludes that although the ECHR does have extraterritorial effect, the drafting history of the ICCPR strongly suggests that Contracting Parties were not prepared to give the Covenant extraterritorial scope, G. Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?', 17 *International Journal of Refugee Law* (2005), p. 557-564.

culties in ensuring human rights, in particular in situations of colliding state sovereignties.[37]

2.4 On the different functions of jurisdiction in general international law and human rights law

While under general international law the concept of jurisdiction serves to allocate state competences, in human rights law the term is used to define, as appropriately as possible, the pool of persons to which a state ought to secure human rights. These two different functions have also been described as the 'substantive' notion of jurisdiction as opposed to the 'remedial' notion.[38] It has transpired, in the time span of more than sixty years since the conclusion of the ICCPR and ECRH, that the various treaty monitoring bodies – and the European Court of Human Rights in particular – have encountered notorious difficulties in reconciling these two notions. On a conceptual level, it appears that these difficulties stem from two reasons in particular.

The first is that, in opting for the term 'jurisdiction', the drafters of the human rights conventions appear not to have dwelled on situations in which states would violate the sovereignties of other states, on situations in which state sovereignties would overlap or situations where there is no clear demarcation of competences at all.[39] This has left the present-day human rights practitioner, including the various monitoring bodies, with the rather peculiar presumption reflected in human rights treaties that states only act within clearly defined 'jurisdictional' bounds, and that it is only if states act in accord-

37 On this point, see also Mr. Tomuschat, former member of the Human Rights Committee: 'The formula was intended to take care of objective difficulties which might impede the implementation of the Covenant in specific situations. Thus, a State party is normally unable to ensure the effective enjoyment of the rights under the Covenant to its citizens abroad, having at its disposal only the tools of diplomatic protection with their limited potential. Instances of occupation of foreign territory offer another example of situations which the drafters of the Covenant had in mind when they confined the obligation of States parties to their own territory. All these factual patterns have in common, however, that they provide plausible grounds for denying the protection of the Covenant. It may be concluded, therefore, that it was the intention of the drafters, whose sovereign decision cannot be challenged, 'to restrict the territorial scope of the Covenant in view of such situations where enforcing the Covenant would be likely to encounter exceptional obstacles. Never was it envisaged, however, to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity against their citizens living abroad.' Individual Opinion appended to HRC 29 July 1981, *Lopez Burgos v Uruguay*, no. 52/1979,

38 A. Orakhelashvili, 'Restrictive Interpretation of the Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights', 14 *European Journal of International Law* (2003), p. 540.

39 Leaving aside emergency clauses, such as Art. 15 ECHR, which anticipate situations of war.

ance with those bounds, that individuals would fall under the scope of human rights protection. The main difficulty with this presumption is that it would risk denial of human rights protection in situations where states do act outside of their jurisdiction. How should, for example, reliance be placed on the term jurisdiction in the much commented upon case of *Banković*, where it could be argued that the NATO Member States lacked a legal title to bomb the television and radio station in Belgrade, but where the bombings nonetheless had drastic repercussions on the persons working in that station? It would of course greatly hamper the effective protection of human rights if the condition of an individual falling under a state's 'jurisdiction' in human rights law is understood as requiring that a state has legitimately exercised power for an individual to be able to benefit from human rights protection.

Although the *Banković* decision is not altogether illuminating in addressing this point, the European Court of Human Rights has in several other cases tacitly acknowledged that the remedial function of jurisdiction should prevail over the substantive – or allocating – function.[40] Other treaty monitoring bodies and the International Court of Justice have taken a similar approach. The fact that South Africa no longer had a legal title to administer the territory of Namibia, did not release it from its obligations towards the people of Namibia.[41] And by invading Kuwait, Iraq clearly violated the territorial sovereignty of Kuwait and overstepped its 'jurisdiction', but this did not preclude the Human Rights Committee from establishing that this unlawful exercise of 'jurisdiction' brought Kuwaiti citizens within the 'jurisdiction' of Iraq for the purposes of the ICCPR.[42] Accordingly, it is now commonly accepted that in situations of an overstepping of jurisdiction, the personal scope of human rights protection is not a question of legitimacy but of fact.[43] It is not relevant whether a state has a legal title to act, but it is relevant whether

40 See eg ECtHR 23 March 1995, *Loizidou v Turkey* (preliminary objections), no. 15318/89, para. 62: '[T]he responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory'; and ECtHR 16 November 2004, *Issa a.o. v Turkey*, no. 31821/96, paras. 69, 71. Also see EComHR 12 October 1989, *Stocké v Germany* (report), no. 11755/85, para. 167 ('An arrest made by the authorities of one State on the territory of another State, without the prior consent of the State concerned, does not […] only involve State responsibility vis-à-vis the other State, but [it] also affects that person's individual right to security under Article 5(1) . The question whether or not the other State claims reparation for violation of its rights under international law is not relevant for the individual right under the Convention.')

41 ICJ 21 June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (Advisory Opinion), ICJ Reports 1971, para. 118.

42 *Supra* n. 24.

43 This point is also stressed in Scheinin's appraisal of the extraterritorial effect of the ICCPR, who observes that 'facticity creates normativity'. M. Scheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights', in: F. Coomans and M.T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties*, Antwerp: Intersentia (2004), p. 73-81.

the link between the individual affected and the state is sufficiently close as to oblige the state to secure that individual's rights. In *Banković*, the ECtHR was thus right in its statement that extraterritorial exercises of 'jurisdiction' need 'special justification',[44] but when it has been established that a state acts extra-territorially, the question of justification becomes moot.

A second conceptual issue raised by the different functions of jurisdiction under human rights and general international law is that under the latter, the question whether a state is competent to enact legislation or to enforce its laws abroad will normally depend on the subject matter at issue. Hence, a person may well fall under the jurisdiction of state A in respect of subject matter X, but under the jurisdiction of state B in respect of subject matter Y. But the various human rights conventions have incorporated jurisdiction as a requirement that that an individual must fall 'within' – or, in the case of the American Convention on Human rights, 'be subject to' – the jurisdiction of a contracting state, which then enlivens a duty on the side of the state to ensure (all) the rights and freedoms set forth in the respective treaties.[45] This formulation may be taken as reflecting the presumptions, firstly, that an individual falls under the jurisdiction of either one state or another, and secondly, that the state within which jurisdiction the person is placed, is obliged to secure the full spectrum of human rights to that person.[46] Such presumptions are obviously problematic, as it may well be – and this will especially be so in extraterritorial situations – that activities of a state only affect a person within the sphere of one particular human right and not with regard to others and it may moreover be so that a state is simply not legally entitled or factually able to guarantee human rights across the full spectrum.

In *Banković*, the European Court of Human Rights adhered to a rather one-dimensional approach to this matter where it considered that the obligation to ensure persons within their jurisdiction the rights and freedoms of the Convention cannot 'be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question'.[47] But, adding to the conceptual confusion, in *Banković* and several other cases the general formula is also used that only extraterritorial acts which 'constitute an exercise of jurisdiction' can engage the protection of the European Convention.[48] This gives rise to the question whether it is the nature of the act of the state or rather the nature of the relationship between the state and the individual which

44 *Banković*, para. 61.

45 The ECHR, ICCPR and CRC merely require the contracting states to ensure (or secure) 'the rights'; while the ACHR expressly speaks of the 'free and full exercise' of those rights.

46 The second presumption is upheld by M.J. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', 99 *AJIL* (2005), p. 130.

47 *Banković*, para. 75.

48 *Ibid.*, para. 67; ECtHR 8 July 2004, *Ilascu a.o. v Moldova and Russia*, no. 48787/99, para. 314; *Ben El Mahi v Denmark*; ECtHR 30 June 2009, *Al-Saadoon and Mufdhi v the United Kingdom* (admissibility), no. 61498/08, para. 85.

should be decisive in the establishment of a 'jurisdictional link'. Problematic, further, is that by stating that it is only in exceptional cases that extraterritorial acts of states can constitute an exercise of jurisdiction, the Court appears to be caught up in some logical fallacy, as it is difficult to see – from the ordinary meaning of the term jurisdiction – which acts of a state done out of public authority, regardless of whether they are effectuated in- or outside the state's territory, do not constitute an assertion of its sovereignty and hence an exercise of 'jurisdiction'.

2.5 International case law on the extraterritorial application of human rights

It is now time to explore in more detail the relevant views and decisions of international courts and monitoring bodies on the criteria to be applied in giving extraterritorial effect to human rights. Regarding these criteria, international case law appears to distinguish between two types of situations. Under the first type, control over foreign *territory* as a result of occupation or otherwise, various international courts have accepted that by virtue of such control, a state is bound to respect its obligations under human rights treaties in respect of all activity it undertakes within that territory, rendering it unnecessary to separately establish whether a specific act brings the affected individual within the 'jurisdiction' of the occupying state (section 2.5.1). The second type, that of control over *persons*, comprises a variety of situations through which individuals may be brought within the 'jurisdiction' of a state as a consequence of a more or less incidental link between the individual and the state whose acts produce effects outside its territory (section 2.5.2). This latter category is particularly relevant for this study but, unfortunately, also subject to considerable dispute. Section 2.5.3 deals with what may develop into a *third* category, in which the state, also in the absence of an assertion of control or authority over a person in a foreign territory, may nonetheless incur positive duties vis-à-vis that individual.

2.5.1 Jurisdiction resulting from control over territory

Let us start our survey of this category of situations with what perhaps is a platitude. A state has 'jurisdiction' over territory when it is the sovereign power with regard to that territory. Amongst other things, this implies that a state ought to secure a governmental structure capable of securing human rights throughout its territory. In *Ilascu a.o. v Moldova and Russia,* in which the European Court not only was faced with the question whether detainees in the break-away region of Trandniestria, Moldova, were within the 'jurisdiction' of Russia by virtue of Russia's support for the rebel forces, but also had to

determine whether conversely, the detainees could still be considered to come within the 'jurisdiction' of Moldova, the Court considered that 'jurisdiction' is presumed to be exercised normally throughout the state's territory and that this presumption may be limited in exceptional circumstances only, in particular where a state is prevented from exercising authority in part of its territory.[49] The Court found that Moldova had lost effective control over the separatist regime but it stressed that this did not discharge Moldova from its positive obligation to take all diplomatic, economic, judicial or other measures that it is in its power to take to secure release of the applicants.[50]

In situations where a state, by invitation or force, assumes control over a foreign territory, there would seem to be an inherent logic for extending a state's human rights obligations to the persons resident in the occupied territory. This logic not only stems from the fact that activities of the controlling state may have a notable impact on those resident there, but also from the imperative that persons may otherwise be rendered void of meaningful human rights protection.

The question of applicability of human rights to an occupied territory can be considered from a multitude of perspectives. In the context of occupation by force, a recurring theme concerns the relationship between human rights law and international humanitarian law, whereby it has been suggested that the former only applies in times of peace while the latter forms the *lex specialis* in times of war.[51] A more general question is whether, by encroaching upon the territorial sovereignty of another country, a state should not simply assume the international obligations of the territorial sovereign and therefore abide by all rules, including international treaties, previously applicable to that

---

49 ECtHR 8 July 2004, *Ilascu a.o. v Moldova and Russia*, no. 48787/99, para. 312. Also see ECtHR 8 April 2004, *Assanidze v Georgia*, no. 71503/01, para. 139. A similar presumption was proposed in R.A. Lawson, 'Out of Control – State Responsibility and Human Rights: Will the ILC's Definition of the 'Act of State' meet the Challenges of the 21st Century?', in Castermans, Van Hoof & Smith (eds.), *The Role of the Nation State in the 21st Century – Essays in Honour of Peter Baehr* (1998), p. 113.

50 *Ibid.*, para. 331. Cf. *Banković*, where the ECtHR expressly rejected a 'gradual approach' to the concept of 'jurisdiction' as was proposed by the applicants in that case.

51 The prevailing doctrine, however, is that human rights law also applies in times of war and that, in situations of armed conflict, the protections under human rights and international humanitarian law complement one another. The applicable standard of human rights protection may be influenced by international humanitarian law as the applicable *lex specialis*. See *inter alia* ICJ 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (hereafter '*Wall Opinion*'), ICJ Reports 2004, para. 106; ICJ 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), ICJ Reports 1996, para. 25; ICJ 19 December 2005, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (hereafter '*Armed Activities on the Territory of the Congo*'), ICJ Reports 2005, para. 216; IACHR 29 September 1999, *Coard et al. v the United States*, Case 10.951, Report No. 109/99, para. 39-42. *Contra* M.J. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', 99 *American Journal of International Law* (2005), p. 119-141.

territory.[52] This proposition finds support in Article 43 of the Hague Regulations of 1907, obliging occupying powers to, unless absolutely prevented, respect the laws in force in the occupied country.[53] In *Armed Activities on the Territory of the Congo*, the ICJ considered this obligation to comprise the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.[54]

But the question of applicability of human rights treaties to occupied foreign territory is more often addressed from the perspective of the obligations flowing from treaties ratified by the occupying state itself. The European Court of Human Rights, UN treaty monitoring bodies and the International Court of Justice have all unequivocally accepted that by invading a territory and occupying it, a state becomes obliged to extend its human rights obligations to activities it undertakes in that territory.[55] Reference to specific human rights obligations was explicitly made by the ICJ in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, where it considered that, being the occupying power, Israel exercised territorial 'jurisdiction' over the Occupied Palestinian Territory, which was sufficient to engage the responsibilities of Israel under the ICCPR, CRC and ICESR regarding the human rights consequences of the construction of the Wall.[56] The advisory

52 Meron, mainly discussing applicability of ILO Conventions to occupied Palestinian territory, formulated the rules of thumb that 1) in case of prior application of a multilateral convention of a treaty to the territory in question, a state must respect the norms of that treaty; and 2) in case of the occupant but not the territorial sovereign having ratified a treaty, there is a presumption against applicability of that convention, but adding that the needs of the population must always be taken into account. T. Meron, 'Applicability of Multilateral Conventions to occupied Territories', 72 *American Journal of International Law* (1978), p. 550-551.

53 Regulations concerning the Laws and Customs of War on Land, annex to the Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907.

54 *Armed Activities on the Territory of the Congo*, para. 178.

55 Already before the explicit pronouncements of various international courts on the applicability of a state's human rights obligations to occupied territory, the ICJ had considered, in *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, that 'certain general conventions such as those of a humanitarian character' to which the occupying State is party, should apply to the persons resident in the occupied territory, see paras. 118-122.

56 *Wall Opinion*, para. 109. The ICJ brought forward three arguments in favor of extraterritorial applicability of the ICCPR: (1) the object and purpose of the ICCPR implicates that it would be natural that states exercising jurisdiction outside the national territory should be bound to comply with its provisions; (2) the HRC has consistently found the ICCPR to be applicable to states exercising jurisdiction on foreign territory; and (3) the *travaux préparatoires* of the ICCPR indicates that the drafters 'only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence.' In considering the ICESR applicable to Occupied Palestinian Territory, the ICJ reasoned that although the ICESR contains no

opinion confirmed the position repeatedly taken up by the HRC and the CESCR in respect of Israel's human rights obligations in the occupied Palestinian territories.[57] In establishing whether Israel was an 'Occupying Power', the ICJ merely referred to Article 42 of the Hague Regulations, which stipulates that 'Territory is considered occupied when it is actually placed under the authority of the hostile army'.[58] In *Armed Activities on the Territory of the Congo*, the ICJ further specified that the presence of military forces does not necessarily signify that an intervening state has become an occupying power. It must also be demonstrated that the intervening state has substituted its own authority for that of the local authorities.[59]

What is not entirely clear is whether the fact of occupation enlivens a duty to secure the full compliance with human rights treaty provisions throughout that territory, including for example the setting up of legal arrangements necessary for the fulfilment of all kinds of positive obligations; or that the state should merely ensure that its own agents operating in that territory act in accordance with human rights standards. In its advisory opinion on the Wall, the ICJ confined Israel's obligations arising from the ICCPR and ICESCR to activity undertaken by Israeli state organs within the occupied territories and not to activities of the Palestinian authorities. As regards the latter, the Court merely noted that Israel was under the obligation 'not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.'[60] These findings were in conformity – and indeed based upon – the HRC's concluding observations on Israel of 2003, where the Committee had considered that 'the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for *all conduct by the State party's authorities or agents in those territories* that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law.'[61]

But in its first concluding observations on Israel in 1998, the Committee had appeared to use broader language in noting that it was 'deeply concerned that Israel continues to deny responsibility *to apply fully the Covenant* in the

provision on its scope of application which may be explicable by the fact that the Covenant guarantees rights which are 'essentially territorial', 'it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction.' *Ibid.*, para. 112.

57 CESCR 4 December 1998, Concluding observations on Israel, E/C.12/1/Add.27, para. 6; CESCR 23 May 2003, Concluding observations on Israel, E/C.12/1/Add.90, para. 11; HRC 18 August 1998, Concluding observations on Israel, CCPR/C/79/Add.93, para. 10; HRC 21 August 2003, Concluding observations on Israel, CCPR/CO/78/ISR, para. 11.

58 *Wall Opinion*, para. 78.

59 *Armed Activities on the Territory of the Congo*, paras. 173, 177.

60 *Wall Opinion*, paras. 111-112.

61 HRC 21 August 2003, Concluding observations on Israel, CCPR/CO/78/ISR, para. 11, emphasis added.

occupied territories'.[62] This was despite Israel's insistence that the overwhelming majority of powers and responsibilities in the West Bank and Gaza had been transferred to the Palestinian authorities.[63] In *Armed Activities on the Territory of the Congo*, the ICJ also appeared to broaden the scope of obligations of Uganda beyond those concerning the own acts and omissions of its armed forces. It derived from Article 43 of the Hague Regulations a duty to 'restore and ensure' public order and safety in the occupied territory. And in respect of applicable human rights law, the responsibility of Uganda was found to be engaged not only for the acts and omissions of its own military forces, but also for 'any lack of vigilance in preventing violations of human rights (…) by other actors present in the occupied territory, including rebel groups acting on their own account'.[64] The rebel groups in question concerned various Congolese factions which received active support from the Ugandese army, but which functioned sufficiently autonomous as to preclude the possibility of attributing their activity to Uganda.

The issue of the precise scope of human rights protection to be accorded in a foreign territory has also been addressed under the European Convention on Human Rights, especially in a long series of cases concerning the Turkish occupation of northern Cyprus. In the 'early' Cyprus-cases, the former European Commission, in line with its decisions in cases concerning activities of state agents abroad,[65] considered that persons or property in Cyprus could be brought within the jurisdiction of Turkey, but only to the extent that Turkish armed forces, being agents of the Turkish state, 'exercised control over such persons or property' and in so far they 'by their acts and omissions, affect such persons' rights and freedoms under the Convention'.[66] But the European Court of Human Rights took the Turkish responsibilities in northern Cyprus to be wider. In the case of *Loizidou*, the Court referred to the object and purpose of the Convention and considered that having effective control over an area outside its national territory enlivens the obligation 'to secure, in such an area, the rights and freedoms set out in the Convention', while adding that it was immaterial whether this control was exercised 'directly, through its armed

62 HRC 18 August 1998, Concluding observations on Israel, CCPR/C/79/Add.93, para. 10

63 HRC 4 December 2001, Addendum to the Second Periodic Report, Israel, CCPR/C/ISR/2001/2, para. 8.

64 *Armed Activities on the Territory of the Congo*, para. 179.

65 See, *infra* notes 74-78 and accompanying text.

66 EComHR 26 May 1975, *Cyprus v Turkey*, nos. 6780/74 and 6950/75, para. 10; EComHR 10 July 1978, *Cyprus v Turkey*, no. 8007/77, para. 21. In the case of *Chrysostomos and others*, the Commission found the applicants' arrest, detention and trial in northern Cyprus, handled by the Turkish Cypriot authorities, acts which were not imputable to Turkey: EComHR 8 July 1993, *Chrystomos, Papachrysostomou and Loizidou v Turkey*, nos. 15299/89, 15300/89 and 15318/89.

forces or through a subordinate local administration'.[67] And more pronouncedly, in *Cyprus v Turkey*, the Court held:

> 'Having effective overall control over northern Cyprus, its responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey's "jurisdiction" must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey.'[68]

This reasoning has been upheld in all subsequent cases concerning the activities of the Turkish Republic of Northern Cyprus.[69]

A marked difference between the situation in northern Cyprus (and the eastern Congo) on the one hand, and the occupied Palestinian territories on the other is that the so-called Turkish Republic of Northern Cyprus (and arguably, the various rebel Congolese factions) could indeed be labelled as a subordinate administration, whereas the Palestinian Authority endeavours precisely to function as autonomously as possible from the Israeli authorities. Presumably, the reasoning of both the ICJ and the European Court must be that in respect of situations where effective control is exercised over foreign territory, a presumption is formed that the state is capable of ensuring the full application of its human rights obligations there, also in respect of the activities of a local entity. But this presumption may be considered not to apply if a local entity, such as the Palestinian Authority, functions autonomously from, and is inherently resistant to influence asserted by, the occupying state.[70]

---

67 *Loizidou* (preliminary objections), para. 62. Accordingly, in the merits phase the Court held the question whether Turkish forces were directly involved in the impugned denial of Mrs Loizidou's access to her property in northern Cyprus was not to be decisive for a finding concerning Turkey's responsibility. Instead, it found that by virtue of the Turkish army exercising effective overall control, Turkish responsibility was engaged also for the policies and actions of the local 'TRNC' administration: ECtHR 18 December 1996, *Loizidou v Turkey* (merits), no. 15318/89, para. 56.

68 ECtHR 10 May 2001, *Cyprus v Turkey*, no. 25781/94, para. 77.

69 Eg ECtHR 26 September 2002, *Andreou Papi v Turkey*, no. 16094/90; ECtHR 20 February 2003, *Djavit An v Turkey*, no. 20652/92, paras. 21-22; ECtHR 31 July 2003, *Eugenia Michaelidou Developments Ltd. a.o. v Turkey*, no. 16163/90, para. 28; ECtHR 31 March 2005, *Adali v Turkey*, no. 38187/97, paras. 186-187; ECtHR 3 June 2008, *Andreou v Turkey*, no. 45653/99; ECtHR 24 June 2008, *Solomou a.o. v Turkey*, no. 36832/97, paras. 50-51; ECtHR 24 June 2008, *Isaak v Turkey*, no. 44587/98, paras. 76-77.

70 The ECtHR's pronouncements on the question to what extent, and on what basis, Turkey should assume responsibility for the activities of the 'TRNC' are not entirely clear. See especially the *Loizidou* judgments, where the Court noted not only that effective control over foreign territory may be exercised through a subordinate administration (merits at para. 52, preliminary objections at para. 62), but also that this effective overall control would consequently implicate that Turkey becomes responsible for the activities of the subordinate

2.5.2 Jurisdiction resulting from control over persons

When a state is in control of a foreign territory, there are strong imperatives for considering the state bound to ensure the human rights of persons in that territory. Activities of the controlling state may obviously have a notable impact on the persons residing there and the very fact that a state is 'in control' logically implies that the state has it, at least to some extent, within its abilities to ensure the human rights of persons living there. Moreover, to consider the state not bound to respect human rights in that territory could result in the creation of a human rights vacuum, because the original sovereign will normally have become unable to fulfil its function as the human rights guarantor in that territory. By contrast, in situations of ad hoc activities of a state in foreign territory, or where activities of and within a state produce effects in foreign territories, the existence of a 'jurisdictional link' between the acting state and the affected individual may be less obvious.[71] Not only may it be less straightforward to establish that a state has impacted upon fundamental rights of persons, the persons so affected will normally be able to continue to rely on the protection of their own government, which is under a duty to protect its inhabitants also from outside interference by other states.[72]

International human rights bodies have, however, considered human rights conventions not to be without meaning in this context. In making some comparative observations on the manner in which the various international human rights bodies have adjudicated the matter, this section submits that in essence, two approaches are adhered to. Under the first approach, the requirement of 'jurisdiction' is understood as embodying nothing more (and nothing less) than just any exercise of state authority; while under the second approach the concept of 'jurisdiction' is conceived as giving expression to some predefined relationship between the state and the individual, other than the alleged human rights violation itself, which must exist for the state's human rights obligations to become engaged.

The first approach is most evidently present in the case law of the former European Commission of Human Rights and in that of the Human Rights

---

administration (merits at para. 56). This appears to be a circular form of argument and moreover not one which distinguishes all too clearly between questions of attribution and of jurisdiction. On this point extensively, M. Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties', 8 *Human Rights Law Review* (2008), p. 436-446.

71 The term 'jurisdictional link' was first introduced in *Banković*, para. 82, and repeated in *inter alia Ben El Mahi v Denmark*; and ECtHR 14 December 2006, *Markovic v Italy*, no. 1398/03, para. 50.

72 In the case of *Alzery*, in respect of activities of US agents on the territory of Sweden, the Human Rights Committee noted that 'at a minimum, a State party is responsible for acts of foreign officials exercising acts of sovereign authority on its territory, if such acts are performed with the consent or acquiescence of the State party', HRC 10 November 2006, *Mohammed Alzery v Sweden*, no. 1416/2005, para. 11.6.

Committee. The formula consistently used by the European Commission in various cases where state activity produced 'incidental' effects in foreign territories was that 'authorised agents of a State bring other persons or property within the jurisdiction of that State, to the extent that they exercise authority over such persons or property'; and that '[i]n so far as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged.'[73] Under this formula, affected individuals were deemed to fall under the jurisdiction of the acting state in situations concerning *inter alia* a prohibition imposed by the Swiss Federal Aliens' Police on a German citizen to enter Liechtenstein,[74] a decision of the Danish ambassador to allow the GDR police to recover a group of GDR nationals present in the Danish embassy in Berlin,[75] the arrest and recovery for prosecution purposes by law enforcement personnel of persons present in another country,[76] and the decision of the Swedish government to cover with concrete the wreck of a cruise ferry which had sunk in international waters while sailing under Estonian flag and carrying a substantial number of Swedish nationals.[77]

On reflection, and this is also evident from the wide variety of circumstances under which it was deemed to be met, the test adopted by the European Commission does not entail much of a threshold at all. We may assume that all acts of a state's agents constitute an assertion of that state's authority (with as possible exception acts of commercial nature) and thereby, in so far as persons are sufficiently affected by that act, bring persons within its jurisdiction. It did not matter for the Commission whether the exercise of authority consisted of a legislative or executive measure or an assertion of physical control, it did not matter whether the act was committed abroad or only produced effects abroad, and it did not matter whether the exercise of authority was duly sanctioned – or, an assertion of jurisdiction proper – under international law.[78] Hence, the approach of the Commission may be summarized as one in which States Parties must always act in conformity with the European

73 *Infra* notes 74-78. Also see, EcomHR 25 September 1965, *X v Federal Republic of Germany*, no. 1611/62; EComHR 15 December 1977, *X v United Kingdom*, no. 7547/76; EComHR 12 October 1989, *Stocké v Germany*, no. 11755/85, para. 166; and EComHR 18 January 1989, *Vearncombe v United Kingdom and Germany*, no 12816/87. For an extensive appraisal of the approach of the European Commission of Human Rights, see R.A. Lawson, 'Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights', in: Coomans and Kamminga (2004), p. 90-95.

74 EComHR 14 July 1977. *X. and Y. v Switzerland*, nos. 7289/75 and 7349/76.

75 EComHR 14 October 1992, *W.M. v Denmark*, no. 17392/90.

76 EComHR 24 June 1996, *Ramirez v France*, no. 28780/95; EComHR 2 October 1989, *Reinette v France*, no. 14009/88; EComHR 7 October 1980, *Freda v Italy*, no. 8916/80.

77 EComHR 8 September 1997, *Bendréus v Sweden*, no. 31653/96.

78 As regards this last point, in *Stocké* the Commission explicitly found the question whether Germany had illegitimately encroached upon the territorial sovereignty of France irrelevant for establishing whether the person affected by this activity fell under its jurisdiction: *Stocké v Germany*, para. 167. Also see *Bendréus v Sweden*.

Convention, irrespective of territorial constraints.[79] For individuals situated abroad to be able to rely on the Convention, they would merely need to show that they are sufficiently affected in their enjoyment of human rights – which does not appear to be a different test than the establishment of their status as 'victims' in the meaning of current Article 34 of the European Convention. Accordingly, the Commission's test may also be described as tantamount to, as the ECtHR would later put it in its *Banković* decision, an approach under which 'anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention', a reasoning which the Court forcefully rejected.[80]

The Human Rights Committee and the Inter-American system of human rights protection have proceeded from a rationale similar to that of the European Commission. The Human Rights Committee has repeatedly affirmed that 'it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory'.[81] Under this rationale, the Committee considered the apprehension and detention of Uruguayan nationals by Uruguayan security forces in the territory of Brazil and Argentine, with the connivance or acquiescence of local authorities, to bring the victims within the 'jurisdiction' of Uruguay.[82] This conclusion was based on the consideration that the term 'jurisdiction' in Article 1 of the Optional Protocol to the ICCPR refers not to the place where the violation occurred, but rather to the relationship between the individual and the state in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.[83] The Committee further affirmed that, for the question of enlivening a state's duties under the ICCPR in such a situation, it was immaterial whether the state was internationally competent to undertake the activity in the territory of another state.[84] In several other views, the Committee considered that the refusal by Uruguayan authorities to renew the passports of Uruguayan citizens living abroad 'is clearly a matter within

79 This is also the conclusion drawn by judge Rozakis from the Commission's case law: Rozakis, in: Venice Commission (2006), p. 61.
80 *Banković*, para. 75.
81 HRC 29 July 1981, *Celiberti de Caseriego v Uruguay*, no. 56/1979, para. 10; and HRC 29 July 1981, *Lopez Burgos v Uruguay*, no. 52/1979, para. 12.
82 *Ibid*.
83 *Ibid*.
84 *Celiberti de Casariego v Uruguay*, para. 10.3.

the 'jurisdiction' of the Uruguayan authorities' and that the authors were 'subject to the 'jurisdiction' of Uruguay' for the purpose of the ICCPR.[85]

The Human Rights Committee has not departed from this line of reasoning in later views. Worth mentioning is the case of *Ibrahima Gueye*, on the question whether retired Senegalese soldiers of the French Army residing in Senegal should be treated equally with French nationals in the enjoyment of their pension rights. The Committee considered that the authors were 'not generally subject to French 'jurisdiction', except that they rely on French legislation in relation to the amount of pension rights'. This was sufficient to bring the authors within the purview of the Covenant.[86] In General Comment 31, the Committee has now formulated as a general rule that 'a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.'[87] Although the comment speaks of 'power or effective control' as a general condition for engaging the protection of the Covenant, these terms did not feature in the Committee's views on the passport- and apprehension cases, nor in the view in *Ibrahima Gueye*.[88]

Under the Inter-American system of human rights protection, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have both considered that the obligation to uphold the rights of any person subject to the jurisdiction of each American state may refer to conduct with an extraterritorial locus, and that '[i]n principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control'.[89] In

85 HRC 23 March 1982, *Vidal Martins v Uruguay*, no. 57/1979, para. 7; HRC 31 March 1983, *Lichtensztejn v Uruguay*, no. 77/1980, para. 6.1; HRC 31 March 1983, *Montero v Uruguay*, no. 106/1981, para. 5; HRC 22 July 1983, *Nunez v Uruguay*, no. 108/1981, para. 6.1.

86 HRC 3 April 1989, *Ibrahima Gueye et al. v France*, no. 196/1983, para. 9.4. For other more recent pronouncements see: HRC 15 November 2004, *Loubna El Ghar v Libyan Arab Jamahiriya*, no. 1107/2002 (concerning the refusal of the Libyan consular authorities in Morocco to issue a passport to a Libyan citizen residing in Morocco); and HRC 30 July 2009, *Munaf v Romania*, no. 1539/2006 (concerning the transfer of an Iraqi-American national from the Romanian embassy in Baghdad to the multinational forces in Iraq).

87 HRC 26 May 2004, General Comment 31, CCPR/C/21/Rev.1/Add.13, para. 10.

88 The ramifications of the wording chosen in the general comment may be considerable, as illustrated by the dissenting opinion of Kälin in the case of *Munaf v Romania*: 'Thus, the test is not, as argued by the State party, whether it had "custody of" or "authority over" the author, or whether it relinquished custody of him to the MNF-I [the multinational forces in Iraq – author], but whether it had "power or effective control" over him for the purposes of respecting and ensuring his Covenant rights': Dissenting opinion on the Admissibility Decision of Committee member Mr. Walter Kälin appended to HRC 21 August 2009, *Mohammad Munaf v Romania*, no. 1539/2006.

89 *Coard et al. v the United States*, para. 37 (concerning the deprivation of liberty of citizens in and from Granada by invading United States armed forces); IACHR 29 September 1999, *Alejandre et al. v Cuba* (hereafter '*Brothers to the Rescue*'), case no. 11.589, report no. 86/99,

Brothers to the Rescue, the shooting down by the Cuban air force of two civilian aircraft in international space was sufficient to consider the aircrafts' unfortunate passengers to have been subjected to the 'authority' of Cuba, without there being any further special relationship between Cuba and the victims.[90]

But the proposition that human rights must always govern the extraterritorial conduct of states was challenged by the European Court of Human Rights in its *Banković* decision – rendered by the Court's Grand Chamber and unanimously. The ECtHR found the Convention not to apply to air-strikes by NATO member states which were also party to the Convention, on the television and radio facilities in Belgrade, because it was not persuaded that there was any 'jurisdictional link' between the victims of the air-strikes and the respondent states and that therefore the applicants and their deceased relatives were not 'capable of coming within the jurisdiction of the respondent States'.[91]

The *Banković* decision has been much commented upon elsewhere and need not be in full explored here.[92] It suffices to point to what was perhaps the most crucial consideration propounded by the Court in restricting the extra-territorial potential of the ECRH, namely that the rights and freedoms defined in the Convention cannot be 'divided and tailored in accordance with the particular circumstances of the extra-territorial act in question'.[93] The Court reasoned that such an approach would render the words 'within their jurisdiction' in Article 1 'superfluous and devoid of any purpose' because it would equate the jurisdiction requirement with the question whether a person can

---

para. 23 (concerning the shooting of two civilian aircraft by a Cuban jet fighter outside of Cuban airspace). Also see IACHR 13 March 1997, *The Haitian Centre for Human Rights et al. v. United States*, case no. 10.675, report no. 51/96, paras. 164-178 (in which several violations of the American Declaration of the Rights and Duties of Man were found on account of the US interception of Haitian refugees on the high seas); and IACHR 11 March 1999, *Victor Saldano v Argentina*, report no. 38/99, para. 17.

90 *Brothers to the Rescue*, para. 25.

91 *Banković*, para. 82.

92 See eg Lawson, in: Coomans and Kamminga (2004), p. 83-123; M. O'Boyle, 'The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on 'Life After Bankovic', in: Coomans and Kamminga (2004), p. 125-139; Orakhelashvili (2003); M. Happold, 'Bankovic v Belgium and the Territorial Scope of the European Convention on Human Rights', 3 *Human Rights Law Review* (2003), p. 77–90; Milanovic (2008); M. Gondek, 'Extraterritorial application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?', 52 *Netherlands International Law Review* (2005), p. 349-387; M. Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties*, Antwerp: Intersentia (2009), p. 169-178; Kavaldjieva (2006), p. 520-522; E. Roxstrom, M. Gibney and T. Einarsen, 'The NATO Bombing Case (Bankovic et al. v. Belgium et al.) and the Limits of Western Human Rights Protection', 23 *Boston University International Law Journal* (2005), p. 55-136; A. Ruth and M. Trilsch, 'International Decisions: Bankovic v Belgium (Admissibility)', 97 *American Journal of International Law* (2003), p. 168-172.

93 *Banković*, para. 75.

be considered to be a victim of a violation of rights guaranteed by the Convention.[94] Accordingly, the Court appeared to suggest that the notion of 'effective control' as established in its case law on Northern-Cyprus requires something more than a determination that (i) a state has asserted authority over a person present in a foreign territory; and that (ii) the person can be considered a victim of a violation of a Convention right. Although the Court did not elaborate on the contents of this required additional threshold, one may safely deduce that the Court did not deem every exercise of authority affecting a person's enjoyment of human rights sufficient to bring that person under its 'jurisdiction'. Some further relationship between the individual and the state is required which can be said to amount to a 'jurisdictional link' and which is made operational through the notion of 'effective control'. Several authors have concluded from this part of the *Banković* decision that the Court would at the least require that the exercise of state authority takes place over a certain duration and/or has overall repercussions on the person concerned.[95]

It appears however that the Court, without expressly recognising so, is slowly distancing itself from that doctrine, with several more recent decisions and judgments pointing towards a more generous understanding of 'jurisdiction'. In one of the first post-*Banković* judgments, in the case of *Issa*, the Court adopted the formula earlier used by the Human Rights Committee in referring to the 'fact' (sic) 'that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory'.[96]

This 'fact' (or rather principle) does appear to have been accorded decisive weight in more recent Strasbourg case law. What is particularly notable about the post-*Banković* case law of the ECtHR is that the 'effective control'-criterion has been applied rather arbitrarily. On the one hand, one could say that in several post-*Banković* decisions in which the ECtHR concluded that applicants were brought within the jurisdiction of a State Party, the power exerted by the state over the individual was of such an intrusive and all-encompassing nature that it indisputably amounted to an exercise of 'effective control'. Thus, in the cases of *Öcalan*, *Medvedyev* and *Al-Saadoon*, which all concerned the extraterritorial arrest and continuing deprivation of liberty, the Court en-

94 Ibid.

95 Rozakis, in: Venice Commission (2006), p. 64; Happold (2003), p. 87.

96 *Issa a.o. v Turkey*, para. 71; the formula was repeated in ECtHR 28 September 2006, *Isaak v Turkey* (admissibility), no. 44587/98; ECtHR 3 June 2008, *Andreou v. Turkey* (admissibility), no. 45653/99; and *Solomou a.o. v Turkey*, para. 45.

countered no difficulties in accepting that the applicants were within the state's jurisdiction.[97]

But in several cases concerning the use of force in foreign territories of a rather incidental nature, some of which display striking factual similarities with the case of *Banković*, the Court also accepted that the targeted persons were within the jurisdiction of a State Party. Notable are the cases of *Pad*, concerning fire discharged from Turkish helicopters just over the border with Iran, and *Solomou* and *Andreou*, where the Court reasoned that fatal gunfire discharged by Turkish-Cypriot forces in the neutral UN buffer zone in Cyprus had brought the victims within the 'authority and/or effective control' of Turkey.[98] Similar to *Brothers to the Rescue* but seemingly contradictory to *Banković*, the mere use of incidental force sufficed to bring the victims within the jurisdiction of the State Party.

There are, further, several cases in which the ECtHR accepted that the Convention applied to executive or adjudicative measures which were specifically directed at persons resident abroad – much in line with the passport-cases brought before the Human Rights Committee. In the case of *Haydarie*, concerning the Dutch government's refusal to issue a provisional residence visa to a person living in Pakistan, the Court expressly discarded the argument that the Convention could not apply because the applicant was outside the jurisdiction of the state refusing to issue the visa.[99] In *Minasyan and Semerjyan*

97 In the Chamber judgment in *Öcalan*, the Court noted that the material difference with *Banković* was that Mr. Öcalan was arrested and then had been physically forced to return to Turkey by Turkish officials; as a result he was 'subject to their authority and control'. In its Grand Chamber judgment, the Court confirmed this proposition and found it 'common ground' that arrest, followed by a physically enforced return, brought Öcalan within the jurisdiction of Turkey, ECtHR 12 March 2003, *Öcalan v Turkey* (Chamber), no. 46221/99, para. 93; ECtHR 12 May 2005, *Öcalan v Turkey* (Grand Chamber), no. 46221/99, para. 91. ECtHR 10 July 2008, *Medvedyev and Others v France* (Chamber), no. 3394/03, paras. 50-51; ECtHR 29 March 2010, *Medvedyev and Others v France* (Grand Chamber), no. 3394/03, para. 67 (referring to 'the full and exclusive control' exercised over the ship and its crew); ECtHR 30 June 2009, *Al-Saadoon and Mufdhi v the United Kingdom*, no. 61498/08, para. 88 (referring to the 'the total and exclusive *de facto*, and subsequently also *de jure*, control exercised over the premises where the individuals were detained').

98 In *Pad*, the ECtHR simply reasoned that since Turkey had already admitted that the fire discharged from its helicopters just over the border with Iran had caused the killing of the applicants' relatives, the alleged victims were within the jurisdiction of Turkey, ECtHR 28 June 2007, *Pad a.o. v Turkey*, no. 60167/00, paras. 54-55. See also *Solomou a.o. v Turkey*, paras. 50-51 and *Andreou v Turkey*. On the extraterritorial use of force and the question of jurisdiction, see further *Isaak v Turkey* (where the Court found that Turkey had violated Article 2 ECHR on account of the involvement of Turkish-Cypriot soldiers in the killing of Mr. Isaak in the neutral UNFICYP buffer zone); *Issa v Turkey*, paras. 74-77 (concerning the alleged killing by Turkish forces operating in northern Iraq of seven shepherds); and ECtHR 11 January 2001, *Xhavara a.o. v Italy and Albania*, no. 39473/98 (concerning the ramming by the Italian navy of a vessel carrying Albanian migrants).

99 ECtHR 20 October 2005, *Haydarie a.o. v the Netherlands*, no. 8876/04). Also see ECtHR 1 December 2005, *Tuquabo-Tekle v the Netherlands*, no. 60665/00, para. 26.

v Armenia, the Court found a violation of Article 1 of Protocol No. 1 ECRH on account of the Armenian authorities having expropriated and demolished a flat in Yerevan, in respect of the owners who were at that time living in the United States.[100] Likewise, in *Zouboulidis v Greece*, Article 1 of Protocol No. 1 ECRH was considered to have been violated due to the Greek authorities refusing to pay supplements to the expatriation allowance of a Greek diplomat living in Prague.[101] A final case worth mentioning in this connection is *Kovaèiè and others v Slovenia*, where the Court did expressly address the jurisdiction issue in respect of the impossibility of several Croatian citizens to withdraw currency from a Slovenian bank, which had partially been caused by legislative amendments adopted by the Slovenian National Assembly. The Court observed that:

> '[t]he applicants' position as regards their foreign-currency savings deposited with the Zagreb Main Branch was and continues to be affected by that legislative measure. This being so, the Court finds that the acts of the Slovenian authorities continue to produce effects, albeit outside Slovenian territory, such that Slovenia's responsibility under the Convention could be engaged.'[102]

The reasoning is noteworthy, as it indicates that the Court finds the Convention applicable also in respect of a legislative measure of *generally applicable nature* which directly affects a person resident abroad, and without employing the notion of '(effective) control' as delimiting criterion.

There are, in fact, many more decisions rendered by the ECtHR wherein violations (or interferences) of Convention rights are found in respect of persons resident abroad but where the issue of jurisdiction is not addressed at all.[103] A majority of these cases concern measures taken by a Contracting State within its own territory but which produce effects in respects of persons

100 ECtHR 23 June 2009, *Minasyan and Semerjyan v Armenia*, no. 27651/05.

101 ECtHR 25 June 2009, *Zouboulidis v Greece (No. 2)*, no. 36963/06.

102 ECtHR 9 October 2003, *Kovaèiè a.o. v Slovenia*, nos. 44574/98, 45133/98, 48316/99.

103 See *inter alia* ECtHR 25 October 2006, *Martin v the United Kingdom*, no. 40426/98 (where a British court-martial in Germany under the NATO Status of Forces Agreement was found to have been conducted in violation of Article 6 (1) ECHR); ECtHR 4 November 2008, *Carson a.o. v the United Kingdom*, no. 42184/05 (concerning the pension rights of British nationals who had emigrated and were formerly working in the UK); ECtHR 9 July 2009, *Tarnopolskaya a.o. v Russia*, no. 11093/07 (concerning pension rights of former USSR citizens who had emigrated to Israel); ECtHR 22 September 2009, *Stochlak v Poland*, no. 38273/02 (where violation of Article 8 ECHR was found in respect of a father resident in Canada on account of the Polish authorities' insufficient action to secure the return of his child who was abducted by the mother to Poland); ECtHR 12 October 2006, *Mayeka and Mitunga v Belgium*, no. 13178/03 (where the Court not only found a violation of Articles 3 and 8 ECHR on account of the Belgian authorities having failed to make proper arrangements for the arrival of a deported child in the Congo, but also in respect of the mother who was residing in Canada and who was not appropriately informed and consulted in respect of the decisions taken regarding her daughter).

who are at the material time resident abroad. Although it may seem self-evident that the Court holds the state as a matter of principle accountable for all executive or adjudicative measures taken within its ordinary territorial jurisdiction which directly interfere with a person's human rights (thus also in respect of a person who just happens to be (temporarily) resident abroad), these decisions do signify that the Court not always conditions the personal scope of human rights protection on an individual being within the state's physical or effective control. This having said, the Court's case law remains inconsistent. In the decision in *Ben El Mahi*, on the Danish cartoons, the Court found the refusal of the Danish public prosecutor to initiate criminal proceedings against the publishing newspaper not to engender a 'jurisdictional link' with the Muslim complainants, even though the complaint concerned state activity executed within its own territory which arguably directly affected the complainants residing in a foreign territory.[104] Although the Court's reluctance to accept that Mr Ben El Mahi could invoke the Convention may well have been influenced by a fear of opening the floodgates, it is unfortunate that the Court does not explain why the matter of banning a publication affecting Muslims living abroad is fundamentally different from the issuing of legislation which affects bank account holders in a foreign country. A relevant difference may be that in the cartoons case the publication was not directly targeted at the complainants, rendering the group of potential victims indeterminate. But this is a matter which is normally examined under the victim-requirement laid down in Article 34 ECRH, which already imposes the threshold that there must be a sufficiently direct link between the applicant and the damage allegedly sustained.[105]

Certainly, to accept that human rights are a guide to all the conduct of a state having an impact outside its borders can create all sorts of practical and legal issues. Although the precise motives underlying the *Banković* decision remain rather obscure, the Court's reluctance to simply accept that all forms of international activity remain covered by human rights standards may well

104 For a similar factual constellation see *Weber and Saravia v Germany*, where the Court eventually declined to pronounce itself on the question whether the legislative extension of powers of the German *Bundesnachrichtendienst* regarding the monitoring of telecommunications all around the world could bring the persons whose conversations had been recorded within the jurisdiction of Germany and thereby within the ambit of Convention protection. Instead of addressing the 'Bankovic-argument' brought forward by the German government, the Court found the complaints inadmissible because 'even assuming that the applications are compatible *ratione personae* with the Convention' the legislative amendments constituted a justified interference with their right to private life; ECtHR 29 June 2006, *Weber and Saravia v Germany*, no. 54934/00, para. 72.

105 Cf. ECtHR 27 July 2010, Aksu v. Turkey, nos. 4149/04 and 41029/04, paras. 32-34, concerning the publication of a book allegedly containing offensive statements in respect of persons of Roma origin. In considering the applicant to be a victim, the Court accorded decisive weight to the factor that the applicant was entitled to initiate compensation proceedings before domestic courts.

have been influenced by an understanding that states may find themselves ill-equipped to live up to each and every human rights standard when they engage themselves in activities in foreign countries. Difficulties may arise, for example, from an overlap or conflict with other standards, such as the laws in force in the other country; a lack of practical capabilities a state may have in guaranteeing human rights protection; or a perceived lack of willingness on the part of states to submit themselves to human rights standards when engaging in, for instance, peace keeping operations.[106]

But what also transpires from the post-*Banković* case law is that the European Court of Human Rights has shown itself both able and willing to accommodate this type of concerns with the imperative of effective human rights protection. A prominent case, in this respect, is *Medvedyev v France*, where the Court first accepted that a ship and its crew sailing under the Cambodian flag in international waters which was boarded by a team of French armed commandos on account of suspicions of drug trafficking, was being brought under the control of France and therefore its jurisdiction in accordance with Article 1 ECRH. But the Court also acknowledged, subsequently, that the operation took place under 'wholly exceptional circumstances' and considered these circumstances to justify the time it inevitably took for the French authorities to bring the persons placed under arrest before a judge.[107] A similar approach was adhered to by the Court in the admissibility decision in the case of *Al-Saadoon and Mufdhi*, concerning a potential conflict between the human rights obligations incumbent on the United Kingdom and the local laws in Iraq. As regards the question whether the United Kingdom's obligations under the ECRH in respect of the activities of its armed forces in Iraq could be modified or displaced by obligations it owed to Iraq, the Court considered this not to be a question 'material to the preliminary issue of jurisdiction', but one which needed to be addressed under the merits of the complaints.[108] In both these

106 As regards this latter argument, see for example the anxieties voiced by the governments of France and Norway in the case of *Behrami*. The Norwegian government submitted that extension of the European Convention to peacekeeping mission could deter states from participating in such missions. Jointly, the French and Norwegian governments contended that establishing separate liability under human rights law for states contributing to peacekeeping missions could jeopardize the necessary integrity, effectiveness and centrality of the mission. ECtHR 2 May 2007, *Behrami and Behrami v France and Saramati v France, Germany and Norway*, nos. 71412/01 and 78166/01, paras. 90-91.

107 *Medvedyev v France* (Grand Chamber), paras. 130-131.

108 *Al-Saadoon and Mufdhi* (Chamber), paras. 88-89. But see ECtHR 14 May 2002, *Gentilhomme a.o. v France*, nos. 48205/99, 48207/99 and 48209/99, para. 20, where the Court, in expressly noting that 'a State may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence', considered that the French refusal to allow certain children to enrol in French state schools in Algeria constituted an implementation of a decision imputable to Algeria, taken by the sovereign on its own territory and therefore beyond the control (and therewith the 'jurisdiction') of France. See, on a possible conflict between human rights protection in a foreign country and respect for the territorial sovereignty of that country more extensively, chapter 4.5.

cases, the ECtHR departed from a presumption of applicability of the ECRH to the situation on account of the factual involvement of the respondent state (i.e. the condition of jurisdiction was considered satisfied), and accommodated the special circumstances into its interpretation of the scope of the substantive norm at issue. This approach may serve to underscore that human rights law is sufficiently flexible to cope with various exceptional issues which may arise when human rights obligations are considered to be extraterritorially applicable, without it being necessary to simply deprive human rights treaties of meaning in those contexts.

It is now time to make two preliminary conclusions. The first is that, in virtually all cases concerning incidental foreign activity of the state, the term 'jurisdiction' has been perceived as a criterion giving expression to factual assertions of state sovereignty. Although there are various cases – such as the passport-cases before the Human Rights Committee or those concerning restitution proceedings in respect of property of foreigners before the ECtHR – in which state activity could be labelled as recognised assertions of 'jurisdiction' with extraterritorial implications under international law, it does not appear that the question whether a state has legitimately exercised jurisdiction is as such material for delimiting the personal scope of application of a human rights treaty. Rather, the various monitoring bodies have all confirmed that human rights protection should be based on the tenet that *de facto* activity gives rise to *de jure* responsibilities.[109]

Secondly, it is increasingly accepted by human rights bodies, either in fact or as a principle of law, that a state must always be guided by the human rights obligations it has entered into, thus regardless of territorial considerations. In propounding the much discussed 'effective control' threshold in its *Banković* decision, the European Court of Human Rights may have been guided by a fear of opening up an arena of indeterminacy, but in its later judgments and decisions the Court does appear to have taken a more practicable approach, in which it has not only (tacitly) acknowledged that the criterion of effective control is rather unworkable in its application to all the various forms in which states may more or less incidentally impact upon the fundamental rights of persons in other territories; but also that human rights law is sufficiently flexible to cope with various issues which are likely to come to the fore if states are considered bound by human rights in undertaking extraterritorial activity.

109 This is more or less how the ECtHR put it in the case of *Al-Saadoon*.

2.5.3 Jurisdiction and positive obligations

Extraterritorial migration controls not necessarily involve an easily identifiable act on the part of the state which may bring an individual within the state's 'jurisdiction'. As is extensively explored in chapters 5-7 of this study, a state may be involved in a less direct manner in the treatment of migrants in a foreign territory, for example through it having delegated powers to a private air carrier, through it having concluded border control arrangements with another state, or through the setting up of reception facilities which are managed by other actors. In the context of human rights protection, the question which may arise in such situations is whether the state should not, on account of its indirect involvement in the treatment of an individual, incur positive obligations towards that individual. Problematic however, is that the nature of duties to protect and to fulfill (or: positive obligations 'not to omit') may make it difficult to identify what specific conduct of the state would engender a 'jurisdictional link' between the state and the individual.

If one would approach this matter from the doctrine that states can only incur responsibilities under human rights treaties if victims can demonstrate that they have been placed under the effective control (or under the authority) of the state, this would most likely minimize the meaning of human rights in such scenarios. But, dwelling upon the concept of positive obligations in respect of foreign activity in its General Comments, the Committee on Economic, Social and Cultural Rights maintains, as a general formula, that it is incumbent upon states 'to prevent third parties from violating the right[s] in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law'.[110] Hereunder, it is shown that the ECtHR and ICJ have in their case law also been willing to accept that the notion of jurisdiction need not necessarily preclude a conclusion that positive obligations not accompanied with exercises of 'effective control' over persons abroad can nonetheless bring those persons within the jurisdiction of the state.

In the case of *Isaak* the ECtHR dealt with an incident that took place in the United Nations buffer zone on Cyprus, during which a Greek Cypriot man was kicked and beaten to death. Although the facts of the case were disputed, the Court accepted that both private citizens and at least four uniformed soldiers belonging to the Turkish or Turkish-Cypriot forces were involved in the incident. The Court held that Turkey had been under an obligation to actively protect Mr Isaaks' life:

110 CESCR 12 May 1999, General Comment No. 12 (The right to adequate food), para. 36; CESCR 11 August 2000, General Comment No. 14 (The right to the highest attainable standard of health), para. 39; CESCR 20 January 2003, General Comment No. 15 (The right to water), para. 35.

> 'the Court cannot ignore the fact that the Turkish or Turkish-Cypriot soldiers actively participated in the beating without making any attempt to apprehend Anastasios Isaak or to prevent the counter-demonstrators from continuing their violent behaviour. Thus, they manifestly failed to take preventive measures to protect the victim's life.'[111]

Presumably, the active presence of Turkish (or the subordinate Turkish-Cypriot) forces and therewith the immediate involvement of the Turkish authorities in the incident rendered it materially easier for the Court to conclude that Mr Isaak was indeed within the 'jurisdiction' of Turkey – even though he was not within Turkish 'effective control'. But there are other cases in which the ECtHR has also acknowledged the existence of positive obligations in respect of individuals present in a foreign country, without there being a direct presence or involvement of agents of the state.

In the case of *Ilascu*, concerning the continuing detention of Moldovan nationals who had been arrested by Russian soldiers and who were subsequently handed over into the charge of the Transdniestrian police, the ECtHR considered that there was 'a continuous and uninterrupted link of responsibility on the part of the Russian Federation for the applicants' fate', also in view of 'the effective authority, or at the very least the decisive influence' asserted by the Russian Federation over the separatist regime Transdniestria. The Court considered it of little consequence that the agents of the Russian Federation had not participated directly in the events complained of but observed that it had not made (positive) attempts to put an end to the applicants' situation throughout their period of detention. The Court concluded that the applicants came within the 'jurisdiction' of the Russian Federation for the purposes of Article 1 of the Convention.[112] The Court's acknowledgement of the existence of a jurisdictional link thus appears to be grounded in the dual elements of (1) the initial arrest and handover of the applicants and (2) the subsequent influence (and therewith the power to undertake positive action) asserted by Russia over the separatist regime. By analogy, this reasoning could also inform the duties of states in the context of external processing of asylum claimants – where persons requesting asylum are intercepted or otherwise apprehended and subsequently handed over to other actors with whom arrangements are concluded for status determination, repatriation and/or resettlement.[113]

The case of *Treska* concerned two Albanian men who claimed that the Albanian authorities had illegally taken possession of their family's villa in 1950. To make matters worse the Albanian authorities had sold the house in

111 *Isaak v Turkey*, para. 119. Also see the admissibility decision: ECtHR 28 September 2006, *Isaak v Turkey*, no. 44587/98.

112 *Ilascu a.o. v Moldova and Russia*, paras. 392-394.

113 See chapter 7.

1991 to the Italian government, which had vested its embassy in it. The Treska brothers brought a complaint against both Albania and Italy. As regards the claim directed against Italy, which had only entered into written contact with the applicants in respect of the restitution procedure, the European Court of Human Rights concluded that the brothers were not within Italian jurisdiction. But, on a general note, the Court did pronounce that:

> 'Even in the absence of effective control of a territory outside its borders, the State still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention (see *Ilascu and Others* …).'[114]

If taken at face value, the quote has quite striking consequences. Leaving aside all the subtleties and controversial line-drawing exercises of the past, the Court is simply saying that states should always do their best to secure the rights guaranteed by the Convention. An identical formula was used by the ECtHR in the case of *Manoilescu and Dubrescu v Romania and Russia,* also concerning restitution proceedings in respect of a building transferred into the possession of a foreign state.[115] In inquiring whether the responsibility of the foreign state, Russia, could be engaged under Article 1 of the Convention by any failure to comply with its positive obligation to secure the Convention rights to the complainants, the Court eventually concluded that this was not the case, but not because such a positive obligation did not exist, but rather because to require the Russian Federation to take positive action would run counter to the Russian State's entitlement to foreign sovereign immunity.[116]

That the concept of jurisdiction should not be taken as an obstacle in the consideration of positive extraterritorial obligations finds further confirmation in the Order indicating provisional measures of the ICJ in the *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination*. In that case, the ICJ was asked to address the extraterritorial

114 ECtHR 29 June 2006, *Treska v Albania and Italy*, no. 26937/04. Note that the reference to *Ilascu* is not entirely correct: the particular quote concerned Moldova's obligations in respect of events taking place *within* its territory.

115 ECtHR 3 March 2005, *Manoilescu and Dobrescu v Romania and Russia*, no. 60861/00, para. 101. Also see ECtHR 11 December 2008, *Stephens v Cyprus, Turkey and the UN*, no. 45267/06, concerning the inability of Mr. Stephens, living in Canada, to enter his house located in the UN buffer zone in Cyprus, because the Cypriot national guard had erected a defence post in the garden of his house. The Court firstly observed that in so far as the complaint was directed against Cyprus and Turkey, these states did not have effective control over the buffer zone in which the applicant's house was located. But the Court subsequently noted that the applicant had neither challenged 'a particular action or inaction by these States or otherwise substantiated any breach by the said States of their duty to take all the appropriate measures with regard to the applicant's rights which are still within their power to take'.

116 *Ibid.*, para. 107.

scope of the CERD in respect of alleged racial discrimination practiced and incited by the Russian authorities in several regions of Georgia, both before and in the aftermath of the Russian-Georgian conflict. The complaint related not only to the activities of Russian state agents operating within South Ossetia and Abkhazia, but also to possible duties of due diligence of Russia in respect of the separatist forces in those regions. The ICJ not only found the CERD to apply to Russia's actions within the territory of Georgia, but also held the obligations of Russia to include various duties of a positive nature, by ordering it *inter alia* 'to do all in [its] power to ensure that public authorities and public institutions under [its] control or influence do not engage in acts of racial discrimination'.[117]

It transpires from the judgments and decisions above that international courts are at the least receptive for claims relating to positive obligations in an extraterritorial setting. The state's responsibility to ensure and protect a person's human rights was in the above mentioned cases derived not from the oversimplified shorthand of effective factual control over the individual, but rather from the power, or capability of the state to positively influence a person's human rights situation. Although scant and hardly accompanied by a well-elaborated doctrine for addressing this type of situations, the available case law leaves room for an understanding that it is not the fact of the affected person having been directly affected or placed under the effective control of a state, but rather the relationship of the state with a particular set of circumstances being of such special nature, which is decisive in enlivening a state's positive obligations.

2.6 HUMAN RIGHTS TREATIES NOT CONTAINING A JURISDICTIONAL CLAUSE

Not all human rights treaties contain a restriction of a general nature relating to their personal or territorial scope. This may, on the one hand, be taken to reflect the idea that these treaties guarantee rights which are essentially territorial or, conversely, be taken to support the notion that the rights contained therein govern a state's conduct wherever it acts.[118] In more recent years,

117 ICJ 15 October 2008, *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)* (Order), ICJ Reports 2008, p. 353 at para. 149.

118 See, in this respect, the different starting points taken by the International Court of Justice in the *Wall Opinion*, para. 112 ('This may be explicable by the fact that this Covenant guarantees rights which are essentially territorial') and in the Order in the *Case Concerning Application of the International Convention on the Elimination of All Forms of racial Discrimination*, para. 109 ('the Court consequently finds that these provisions of CERD generally appear to apply (…) to the actions of a State party when it acts beyond its territory'). The outcome of the ICJ's analysis of the territorial scope of the ICESCR and CERD in the respective cases is however similar, as further explained below.

the International Court of Justice, the Committee on Economic, Social and Cultural Rights and the Inter-American Human Rights Commission have impliedly or expressly addressed the issue of the extraterritorial applicability of several human rights treaties not containing a jurisdictional or other general delimiting clause, in particular the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the American Declaration of the Rights and Duties of Man.[119] This section summarizes the relevant jurisprudence and subsequently explores how this jurisprudence relates to the doctrines developed under human rights treaties which do contain a general clause as to their personal or territorial scope.

The question of applicability of the ICESCR to extraterritorial state conduct was addressed by the CESCR in its concluding observations on Israel of 1998 and 2003.[120] In noting the failure of Israel to report on the situation of the Palestine people in the Occupied Territories, the Committee expressed the view that 'the Covenant applies to all areas where Israel maintains geographical, functional or personal jurisdiction', and that 'the State's obligations under the Covenant apply to all territories and populations under its effective control'.[121] In the *Wall Opinion*, the ICJ used fairly similar terms by holding the ICESCR to apply to territories over which a State party 'exercises territorial jurisdiction'.[122] It saw this position confirmed, amongst others, by Article 14 ICESCR, which speaks of parties to the Covenant which have 'not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education (…)'.[123]

In its judgment in *Armed Activities on the Territory of the Congo* the ICJ approached the question whether international human rights law would apply to the conduct of Uganda on the territory of the Congo more generally. It recalled its findings in the *Wall Opinion* and considered that 'international human rights instruments are applicable 'in respect of acts done by a State in the exercise of its jurisdiction outside its own territory', particularly in

119 Although the American Declaration of the Rights and Duties of Man is not a legally binding treaty, the jurisprudence of both the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights holds the Declaration to be a source of binding international obligations for the OAS' member states. While largely superseded in the current practice of the inter-American human rights system by the more elaborate provisions of the American Convention on Human Rights, which does contain a jurisdictional clause, the terms of the Declaration are still enforced with respect to those members of the OAS that have not ratified the Convention, most notably Cuba and the United States.

120 *Supra* n. 57.

121 *Ibid.* (1998), paras. 6, 8; *Ibid.* (2003), para. 31. Also see CESCR 12 May 1999, General Comment No. 12 (The right to adequate food), E/C.12/1999/5, para. 14: 'Every State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food (…).'

122 *Wall Opinion*, para. 180

123 *Ibid.*, para. 112. The ICJ also found it relevant that Israel had for more than 37 years been the occupying power.

occupied territories'.[124] On this basis, it found several provisions of the ICCPR, the African Charter on Human and Peoples' Rights (which does not refer to the concept of 'jurisdiction') and the Convention on the Rights of the Child to have been violated.[125]

In its Order indicating provisional measures in the *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, mentioned above, the ICJ had occasion to address the extraterritorial scope of the CERD, which, similar to the ICESCR, does not contain a general jurisdictional clause. In concluding the CERD to govern Russia's acts and omissions in the contested regions, the ICJ did not find it necessary to first establish that the Russian authorities asserted jurisdiction or some form of authority or control over the persons resident there:

> 'Whereas the Court observes that there is no restriction of a general nature in CERD relating to its territorial application; whereas it further notes that, in particular, neither Article 2 nor Article 5 of CERD, alleged violations of which are invoked by Georgia, contain a specific territorial limitation; and whereas the Court consequently finds that these provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory.'[126]

Three observations can be made: (1) the ICJ focussed exclusively on the 'actions' of state parties, and left issues of jurisdiction, control, and authority aside; (2) the ICJ seemed to operate a presumption that human rights treaties apply to extraterritorial acts of the state *unless* treaty provisions contain a specific territorial limitation; (3) the broad language suggests that, in the eyes of the ICJ at least, this approach is not limited to CERD, but applies to human rights treaties in general.

In the American regional context, the Inter-American Commission on Human Rights has on several occasions considered the American Declaration of the Rights and Duties of Man to apply to conduct of OAS member states in foreign territories.[127] In *Disabled Peoples' International v the United States* (1987) and *Salas and others v the United States* (1993), without specifically addressing the question of extraterritorial applicability of the Declaration, the Commission declared complaints concerning violations of several rights protected by the Declaration admissible in respect of the human rights consequences of US military operations in Grenada and Panama. In the *Haitian Interdiction* case (1997), more extensively discussed in chapter 4, again without

124 *Armed Activities on the Territory of the Congo*, para. 216.
125 *Ibid.*, para. 219.
126 *Application of the International Convention on the Elimination of all Forms of Racial Discrimination* (Order), p. 353 at para. 109.
127 IACHR 22 September 1987, *Disabled Peoples' International et al. v the United States*, no. 9213; IACHR 14 October 1993, *Salas and others v United States,* no. 10.573.

addressing the question of potential extraterritorial applicability issue as such, the Commission found violations of rights protected under Articles I, II, XVIII and XXVII of the American Declaration on account of the US interdiction of Haitian refugees at the high seas and their treatment in and repatriation from the US naval base in Guantanamo, Cuba.[128] It also concluded that the United States had breached its treaty obligations in respect of Article 33 of the Refugee Convention. In *Coard* (1999), also concerning the US military operations in Grenada in 1983, the Inter-American Commission explicitly confirmed the American Declaration of the Rights and Duties of Man to have extraterritorial application. The Commission held that 'each American State is obliged to uphold the protected rights of any person subject to its jurisdiction' and that this may also refer to 'conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad'.[129] In using an almost identical formulation in *Brothers to the Rescue*, the Commission found Cuba to have violated the right to life enshrined in Article I of the American Declaration, on account of the shooting down by the Cuban Air Force of two civilian aircraft in international airspace.[130]

Several observations are in order in respect of the case law presented above. In the first place, criteria and terminology used under human rights treaties which do refer to the term jurisdiction, have also been adopted by the various international bodies in determining the extent of a state's extraterritorial obligations under treaties not containing such a clause. Secondly, in respect of the exact standard to be applied in delimiting the territorial scope of treaties, a similar contrast in views, or at least a similar contrast in terminology, as apparent in respect of the human rights treaties discussed in the previous sections, comes to the fore: on the one hand, reference is made to the requirement of persons being subject to the 'jurisdiction' or '(effective) control' of the state, but on the other hand, the ICJ in particular appears to focus primarily on the 'actions' (or 'exercises of jurisdiction') of State Parties without referring to some further threshold. What also transpires from the ICJ's pronouncements, thirdly, is that it advocates a harmonised approach in considering the extraterritorial application of human rights treaties, whereby the nature (or object and purpose) of those treaties would in principle demand that State Parties must always comply with the provisions contained therein.[131] It follows from the available case law, in sum, that the issue of extraterritorial application of treaties not containing a jurisdictional clause has been treated in a similar vein

128 IACHR 13 March 1997, *The Haitian Centre for Human Rights et al. v. United States*, no. 10.675.
129 *Coard et al. v the United States*, para. 37.
130 *Brothers to the Rescue*, para. 23.
131 Reference to the object and purpose of human rights treaties was made in the *Wall Opinion*, para. 109.

as under other human rights treaties and that the issue does not appear to be governed by fundamentally different considerations.

There is, in itself, nothing wrong with such a harmonised approach. It resonates with the increasingly accepted notion that an integrated approach within human rights law should be adhered to and that there are no intrinsic differences between, for example, the categories of economic and social rights and civil and political rights.[132] Obviously, apart from textual differences, it is difficult to identify a rationale for treating the matter of extraterritorial application of one human rights treaty differently than that of another.

This having said, two reservations are in order. A first is that some human rights treaties do contain specific territorial limitations in respect of certain substantive rights.[133] This would most probably imply that although there may be a presumption that human rights treaties do apply to extraterritorial activity, this is different in respect of treaty provisions which are expressly (or impliedly) restricted in territorial scope. This was confirmed in the ICJ's order indicating provisional measures warranted under the CERD, where the Court found it relevant to note that the provisions invoked by Georgia did not contain a specific territorial limitation.[134] A second reservation is that there may, on the other hand, also be provisions in human rights treaties which contain an inherent international outlook.[135] The most prominent example is the ICESCR, which imposes the general obligation upon states to engage in international assistance and cooperation to realize the rights recognised in the Covenant.[136] This obligation is reiterated in several substantive provisions of the Covenant.[137] Whereas the matter of extraterritorial obligations under treaties safeguarding civil and political rights is generally confined to the question whether a state should incur, on account of its own acts and omissions, specific obligations vis-à-vis persons situated in another state, these 'international' obligations primarily refer to the duty to assist and cooperate with other states in the fulfilment of human rights, regardless of the establishment of some specific 'jurisdictional link' between the state and an individual

132 P. Alston and G. Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', 9 *Human Rights Quarterly* (1987), p. 156-222; and G.J.H. van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views', in: P. Alston and K. Tomasevski (eds.), *The Right to Food*, Dordrecht: Martinus Nijhoff (1984), p. 97-110.

133 See, for examples and a further discussion, chapter 4.3.

134 *Supra* n. 126.

135 F. Coomans, 'Some Remarks on the Extraterritorial Application of the International Covenant on Economic Social and Cultural Rights', in: Coomans and Kamminga (2004), p. 185-186; R. Künnemann, 'Extraterritorial Application of the International Covenant on Economic Social and Cultural Rights', in: Coomans and Kamminga (2004), p. 203-204.

136 This general obligation is laid down in Article 2(1) ICESCR. For an extensive discussion S.I. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation*, Antwerpen/Oxford: Intersentia, 2006, p. 83-98, 144-153.

137 See in particular Articles 11, 15(4) and 23 ICESCR.

situated in another state.[138] This implies on the one hand, that these obligations are much wider in scope and not as such dependant upon specific activity undertaken by a state. But on the other hand, because these obligations refer primarily to interstate cooperation, it may be difficult to construe these duties as regulating the conduct between a state and a particular individual situated in another country.

2.7 Final remarks

Discussions on the extraterritorial application of human rights have been burdened with a substantial amount of conceptual confusion, in particular in respect of the relationship between the meaning and functions of the notions of territory, jurisdiction and sovereignty within the body of human rights law. One of the aims of this chapter has laid with clarifying some of this conceptual confusion, by disconnecting, first and foremost, the meaning of 'jurisdiction' within human rights law from its ordinary meaning in public international law. This detachment allows for rethinking the concept of jurisdiction under human rights treaties.

To a considerable extent, two divergent approaches fight for supremacy in defining the term jurisdiction as a tool for delimiting the extraterritorial scope of human rights treaties. Under the first approach, which is most evidently present in the case law of the former European Commission and the Human Rights Committee, but also in some judgments and decisions of the European Court of Human Rights, human rights obligations serve as a code of conduct for all activity of a state, regardless of territorial considerations, in which the condition of jurisdiction is satisfied if an act or omission of a state affects a person to such an extent that he or she can be considered a victim of a human rights violation. The rationale behind this approach is as simple as it is appealing from the perspective of effective human rights protection: a state must always be guided by the human rights obligations it has entered into, which can only implicate that it may not do towards a person in another country what it may not do to persons in its own territory. But under the second approach, the condition of jurisdiction is translated into the criterion of 'effective control', which (presumably) embodies the notion that there must be a predefined relationship between the state and the individual, other than

138 M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, Oxford: Clarendon, 1998, p. 144. According to the CESCR it is 'in accordance with the provisions of the Covenant that international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard.' CESCR 14 December 1990, General Comment No. 3 (The nature of States parties obligations), para. 14.

the act affecting the individual's rights itself, for a state's extraterritorial human rights obligations to become engaged.

The chapter has submitted that the second approach is not necessarily in 'better' conformity with the international law notion of 'jurisdiction'. If understood as giving expression to factual exercises of the state's sovereignty, regardless of whether they trespass into another state's sovereign prerogatives, the term 'jurisdiction' may well apply to any conduct of the state, whereby that conduct can in itself be sufficient to bring an affected individual 'within' the state's jurisdiction.

Apart from conceptual confusion as to the appropriate meaning of the term jurisdiction in human rights law, a further problem identified in this chapter in regard of the second approach concerns the use of the criterion of (effective) control as a threshold, or mitigating mechanism, for engaging the state's extraterritorial human rights obligations. It does appear that the requirement of '(effective) control' is ill-equipped to adequately respond to the large variety of manners in which states may impact on fundamental rights of persons who remain outside their territory. A first complication is that it is not always clear what the object of control should be: territory, persons, property, factual circumstances, or any of the above?[139] A second question concerns the definition of control, or: when can a state be said to be in control of an object or a person? Must it be established that the state 'possesses' the person or object? Must it be established that the state has the ability to manage or direct the actions of the person or the object? Does one control a person by refusing him a visa or passport? Is someone within the cross-hairs of a military aircraft within the control of a state? Obviously, it is much easier to establish that a state controls an inert object such as a strip of land, than to find that the state effectively controls a human being – which has the tendency to engage in all sorts of activity of its own accord. To put it otherwise, the criterion of control *over persons* is a rather impracticable requirement and moreover one which is likely to discriminate in the sorts of human rights which it brings within the ambit of extraterritorial human rights protection.

This is not deny that to accept that human rights must always bind the state when it engages in foreign activity raises issues which merit serious consideration. Although the chapter has indicated that human rights law is sufficiently flexible to cope with a variety of challenges which may arise in the context of securing human rights in foreign jurisdictions, there are some issues which have as of yet not, or only scarcely, received attention in international case law.

Perhaps the most salient one concerns the liaison between the law on fundamental rights and the principle of state sovereignty. When states enforce their authority outside their borders, that enforcement, including the guar-

139 Also see Scheinin, in: Coomans and Kamminga (2004), p. 76.

anteeing of human rights, may conflict with sovereign interests of other states. This raises the question whether, on the one hand, the paradigm should prevail that states may simply not do abroad what they are not allowed to do at home and that therefore, all extraterritorial activity remains covered by the sending state's obligations incurred under human rights treaties; or that, on the other hand, the paradigm should prevail that when operating in foreign territories – and in the absence of any specific agreements on the matter – states should first and foremost respect the applicable law of the host state, including the relevant human rights standards, also if they differ from those incumbent on the sending state. To adhere to the first approach would correspond to the idea that human rights are universal and form a harmonized standard for the conduct of all states, while the second resonates with the principles of communal autonomy and self-determination and is most pertinently reflected in the doctrine of cultural relativism.[140] If one takes the case of *Al-Saadoon* for example, regarding the handover of an Iraqi criminal suspect who might face the death sentence, the opposing arguments would be that to prevent the Iraqi criminal justice system from having its course would amount to some form of moral imperialism, while to allow the death sentence to be carried out would constitute an affront to the universal aspirations of the right to life.[141] One could maintain, on the basis of the drafting history on the place and function of the term 'jurisdiction' within human rights treaties, that the term might serve precisely to prevent situations from arising where states would become obliged under human rights treaties to interfere in matters which essentially belong to the sovereignty of the other state. The present study will elaborate on this theme more extensively in chapter 4.5, in the specific context of grants of extraterritorial asylum, where the case of *Al-Saadoon* is put in comparative perspective with several other judgments on the reconciliation between human rights obligations and the territorial sovereignty of the host state.

Despite these doctrinal issues and the continuing controversy over the extraterritorial scope of human rights, this chapter has identified an emerging consensus among international courts and supervisory bodies that human rights constitute a paramount code of conduct for all state activity. In the vast majority of cases discussed in this chapter, the rationale was upheld, in fact or in principle, that the creation of so-called legal black holes in the system of human rights protection must be prevented and that this is most effectively done by bringing state activity, wherever it takes place, under the ambit of the state's human rights obligations – and without adherence to the rather rigid criterion of 'effective control'. This is an important conclusion in the

140 For a general discussion see, J. Donnelly, 'Cultural Relativism and Universal Human Rights', 6 *Human Rights Quarterly* (1984), p. 400-419.

141 On this debate J.H. Wyman, 'Vengeance Is Whose: The Death Penalty and Cultural Relativism in International Law', 6 *Journal of Transnational Law & Policy* (1997), p. 543-570.

context of this study. It allows for the assumption that, when engaged in practices of external migration control, human rights do govern and constrain the external activity of European states. In chapters 5-7, it is examined in more detail what the consequences of this conclusion are for the manner in which European states should arrange the various external migration policies.

3 The responsible actor

3.1 Outline of the chapter

Under the assumption that the mere setting of conditions of entry and residence and the controlling of the territorial border are insufficiently effective in achieving the political aims of immigration policies, European states increasingly rely on other states and actors in controlling migration movements towards their territories. The increased involvement of European states in the control of migration outside Europe has not only been described as a process of 'extraterritorialisation' or 'externalisation', but also in terms of 'privatisation', 'cooperation' and 'outsourcing'. This process may involve the delegation of powers to private parties, such as carriers, the transfer of powers to another state, or the setting up of a variety of cooperation arrangements in the sphere of migration control. The central purpose of this chapter is to lay down a conceptual legal framework for determining the circumstances under which states can be held internationally responsible for extraterritorial violations of human rights, which have, partly or in whole, been committed in conjunction with other actors.

The chapter explores three distinct but complementary mechanisms for arriving at the international responsibility of a state for violations of international law involving a plurality of actors. The first is the notion of attribution, which bridges acts of natural persons to the state and thereby serves to identify what conduct should be regarded as an 'act of state'. The rules on attribution form part of the so-called secondary rules of international law, as laid down in the International Law Commission's Articles on State Responsibility.[1] The second concept to be discussed, also laid down in the ILC Articles on State Responsibility, is that of derived responsibility, which holds that a state can be held separately but dependently internationally responsible on account of its involvement in the wrongful conduct of another state. A third avenue for allocating international responsibility is the doctrine of positive obligations, which articulates, amongst other things, that a state can incur a

1 Draft Articles on Responsibility of States for Internationally Wrongful Acts, text adopted by the International Law Commission at its fifty-third session in 2001 (A/56/10), annexed to UN General Assembly Resolution 56/83 of 12 December 2001, in which the Assembly took note of the Articles and recommended them to the attention of Governments (hereafter 'ILC Articles' or 'ILC Articles on State Responsibility').

duty to engage in preventive or protective conduct in respect of activity of another actor. Positive obligations are commonly perceived as not forming part of the law on state responsibility, but as duties inherent to a state's primary, or substantive, international obligations. The chapter will indicate however, that the doctrine of positive obligations constitutes a necessary complement to the secondary rules of state responsibility, as it signifies that, even in the absence of a possibility of attributing conduct to a particular state or of establishing its derivative responsibility, a state may still, on account of its own involvement in a particular set of circumstances and the influence it wields over another actor, incur a positive duty to prevent or remedy wrongful conduct.

It is useful, for reasons of conceptual clarity, to set out that the question of the applicability of human rights law to the foreign activity of states as discussed in the previous chapter must be conceptually distinguished from the allocation of responsibility for international wrongful acts, which forms the topic of the present chapter. In the *Tehran Hostages* case, the ICJ held that it had to look at the conduct of the Iranian hostage takers which had overrun the US embassy in Tehran in 1979 from two points of view: 'First, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable.'[2] This is the basic rule for establishing the international responsibility of a state, now laid down in Article 2 of the ILC's Articles on State Responsibility: for a state to be held responsible for an internationally wrongful act, (a) the act (or omission) must be attributable to the state, and (b) the act (or omission) must constitute a breach of an international obligation of that state. The extraterritorial application of human rights treaties is essentially a matter falling under the second condition: if an individual cannot be said to fall within a state's jurisdiction, the state does not have the obligation to secure that person's human rights and there is consequently no question of a breach of an international obligation of that state.[3] In other terms, where the doctrine of attribution serves to isolate those acts and omissions which may be considered 'acts of the state' (and belongs to the secondary rules of public international law), the concept of 'jurisdiction' isolates those individuals which come within the purview of human rights obligations a state has entered into (and belongs to the field of a state's primary

2 ICJ 24 May 1980, *United States Diplomatic and Consular Staff in Tehran,* Judgment, I.C.J. Reports 1980 p. 3, para. 56.

3 Also see R.A. Lawson, 'Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights', in: F. Coomans and M.T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties*, Antwerp: Intersentia (2004), p. 86.

obligations).[4] The law on state responsibility, which includes rules on attribution and derivative responsibility, does not deal with the scope and contents of a state's international obligations, but with the circumstances under which a state can be considered to act in breach of those international obligations and with the question what the consequences of the violation should be.[5]

Yet, as will be explained throughout the chapter, especially in the context of extraterritorial human rights violations involving a plurality of actors, questions of primary and secondary international law tend to become blurred. This is so because, firstly, the issues of determining whether a person falls within the jurisdiction of one state or another and to which state particular conduct should be attributed often require an assessment of the same factual circumstances and the application of analogous legal criteria. Secondly, the doctrine of positive obligations tends to trespass into the field of secondary international law, because human rights courts have often derived duties in respect of conduct of other international actors from the substantive scope of the state's human rights obligations, thereby not only complementing, but also potentially displacing, relevant rules laid down in the Articles on State Responsibility.

The chapter takes the following approach. It follows the structure of the International Law Commission's (ILC) Articles on State Responsibility, by discussing, firstly, the rules of attribution which are most relevant for this study (section 3.2): i) attributing conduct of individuals to the state; ii) attributing conduct of one state to another state; iii) attributing conduct of joint organs to a state. It will next discuss the notion of derivative responsibility and in particular the international law concept of 'aid and assistance' (section 3.3). In exploring the provisions of the ILC Articles, which have not attained the status of treaty law, it is especially identified how they have been applied in international case law (the ICJ and ECtHR), and how the mechanisms of attribution and derived responsibility relate to the doctrine of positive obligations.

Throughout the chapter, some preliminary conclusions are drawn on the manner in which international law governs the allocation of international responsibilities to states which engage in cooperation on or the outsourcing of their migration policies. The conclusions of the chapter further serve as a basis for delimiting the responsibilities of states in discussing state practices of external migration control in chapters 6 and 7.

---

4 For a critical observation on the use of the 'primary' and 'secondary' language see: U. Linderfalk, ' State Responsibility and the Primary-Secondary Rules Terminology – The Role of Language for an Understanding of the International Legal System', 78 *Nordic Journal of International Law* (2009), p. 53-72.

5 See, extensively, J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press (2002), p. 14-16.

Before embarking upon this exercise, several preliminary remarks are in order. The first is that this chapter deals exclusively with state responsibility. The subjects of the law on state responsibility are obviously states, but there may be other international legal persons who are subjects of international law. The better overarching term for the whole legal framework dealing with the establishment and consequences of responsibility for international wrongful acts is the law on 'international responsibility'.[6] Within this overarching framework, attempts are undertaken to codify the law on responsibility of international organisations;[7] and with regard to individuals, the adoption of the Rome Statute of the ICC has provided an authoritative body of rules on individual criminal responsibility. But because this study deals primarily with the accountability of individual states active in regulating the movement of migrants outside their borders, this chapter explores the law on state responsibility only.

A second preliminary remark is that this chapter focuses on state responsibility for human rights violations *committed abroad or producing effects abroad*. In this connection, it is necessary to point out that the law on state responsibility does not distinguish between conduct occurring inside or outside a state's territory. As was also noted in the introduction of the previous chapter, the International Law Commission has affirmed that 'the acts or omissions of organs of the State are attributable to the State as a possible source of responsibility regardless of whether they have been perpetrated in national or in foreign territory'.[8] This is in conformity with the observation above that the question whether a state's international obligations should entail its responsibility also as regards conduct outside its territory will ordinarily be determined by the contents of the obligation, i.e. a question belonging to the 'primary rules' of international law. Nonetheless, it will be shown in this chapter that the element of territory may influence the application of various rules on state responsibility. One of this chapter's aims is to identify the circumstances under which that is so.

A third preliminary remark is that the chapter deals only with international responsibility for violations of *human rights*. Again, the starting point must be that the application of the law on state responsibility does not differentiate between various fields of substantive international law. The International Law Commission, legal doctrine and international case law confirm that the rules on state responsibility apply to every internationally wrongful act, including

6 J. Crawford and S. Olleson, 'The Nature and Forms of International Responsibility', in: M. Evans (ed), *International Law*, Oxford University Press (2003), p. 446-448.

7 For the text of the Draft Articles on Responsibility of International Organizations adopted by the ILC on first reading see, Report of the International Law Commission on the work of its sixty-first session, UN GAOR, 64th Sess., Sup. No. 10, UN Doc. A/64/10 (2009), p. 19.

8 Report of the International Law Commission on the work of its twenty-seventh session, *Yearbook of the ILC 1975*, vol. II, p. 84.

violations incurred under human rights treaties.[9] The case law of the European Court of Human Rights was in itself an important source of inspiration in the course of the ILC's drafting of the Articles on State Responsibility.[10] But this does not mean that human rights bodies are bound to apply the ILC Articles,[11] and occasionally human rights bodies and in particular the Strasbourg courts have embarked upon alternative paths of reasoning. This chapter expressly aims – where relevant – to identify and to account for these divergences.

3.2 INDEPENDENT RESPONSIBILITY

3.2.1 Attribution and the act of state

Although often implied, rules of attribution are central to international law. This is because states are legal persons and can only act through natural persons. Without the concept of attribution, states would not only be incapable of acting, they could neither be held accountable for wrongdoings resulting from those acts.[12] One may also formulate it as follows: because the state itself is an abstraction, we need a legal construction to bridge acts of persons with the state; and that construction is the concept of attribution. Attribution allows us to think that a state, as if it were a natural person, is capable of acting.

Rules on attribution are central to international law, but subject to controversy. Three things are clear from the outset: there is not one rule defining the conditions for attribution; applying one rule or another depends on the

9 See note 155 *infra*. See further M.D. Evans, 'State Responsibility and the European Convention on Human Rights: Role and Realm', in: M. Fitzmaurice and D. Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions*, Oxford: Hart Publishing (2004), p. 140. B. Simma, 'How Distinctive Are Treaties Representing Collective Interest? The Case of Human Rights Treaties', in V. Gowlland-Debbas, ed., *Multilateral Treaty-Making: The Current Status of Challenges to and Reforms Needed in the International Legislative Process*, The Hague: Martinus Nijhoff (2000), p. 87. And, for a discussion: R.A. Lawson, *Het EVRM en de Europese Gemeenschappen. Bouwstenen voor een aansprakelijkheidsregime voor het optreden van internationale organisaties*, Deventer: Kluwer (1999), p. 217-222; R.A. Lawson, 'Out of Control. State Responsibility and Human Rights: Will the ILC's Definition of the 'Act of State' Meet the Challenges of the 21st Century?', in: M. Castermans, F. van Hoof and J. Smith (eds.), *The Role of the Nation State in the 21st Century: Human Rights International Organisations and Foreign Policy: Essays in Honour of Peter Baehr*, The Hague: Kluwer Law International (1998), p. 98-101.

10 This is very much apparent also from the final commentaries to the Articles, which frequently refer to Strasbourg case law.

11 Note however that several of the ILC Articles have been proclaimed to reflect – or to have contributed to the establishment of – customary international law, see further *infra* section 3.3.2. at n. 133.

12 J. Griebel and M. Plücken, 'New Developments Regarding the Rules of Attribution? The International Court of Justice's Decision in *Bosnia v. Serbia*', 21 *Leiden Journal of International Law* (2008), p. 602.

specific circumstances of a situation; and the rules to be applied are often contested in case law and legal doctrine.[13] The ILC has drawn up altogether 8 different rules for attribution in its Articles on State Responsibility, and has drafted additional rules for attributing acts to international organisations. Not all these rules are discussed here. With a view to the particular topic of this study, the three situations addressed in connection to the international law on attribution are: situations in which acts of natural persons or groups of persons should be attributed to a state (section 3.2.2); situations in which acts of one state should be attributed to another state (section 3.2.3); and situations where joint activity of states can be attributed separately to one or all of the states involved (section 3.2.4).

3.2.2 Attribution of acts of natural persons and groups of persons to the state

The rules on attribution of conduct to a state are premised on the theory that a state should not be held accountable for the conduct of all human beings or entities connected to a state on account of, for example, having the nationality of that state or being within its territorial sovereignty, but that a state is only internationally responsible for conduct in which the organisation of the state is, in one way or another, itself involved.[14]

Based on the ILC articles and international case law, especially that of the International Court of Justice, we may distinguish four core rules of attributing conduct of persons or entities to a state. These concern: responsibility for acts of *de jure* state organs, responsibility for acts of *de facto* state organs, responsibility for acts of private persons, and responsibility for conduct directed or controlled by a state.

---

13 Ibid, p. 603.

14 See, for the underpinning of this theory, C. Eagleton, *The Responsibility of States in International Law*, New York University Press (1928), p. 76-77; I. Brownlie, *Systems of the Law of Nations: State Responsibility, Part I*, Oxford: Clarendon Press (1983), p. 132-166; and most extensively R. Ago, Fourth Report on State Responsibility, *Yearbook of the ILC 1972*, Vol. II, p. 95-126. In the Commentary to the ILC Articles this basic rule is stated as follows: 'Thus the general rule is that the only conduct attributed to the state at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State', Text of the draft articles with commentaries thereto, Report of the International Law Commission on the Work of Its Fifty-third Session (hereafter 'Commentary to the ILC Articles', UN GAOR, 56th Sess., Sup. No. 10, UN Doc. A/56/10 (2001); *Yearbook of the ILC 2001*, vol. II (Part Two), p. 38. Also see PCIJ 10 September 1923, *Case of Certain questions relating to settlers of German origin in the territory ceded by Germany to Poland*, Advisory opinion, PCIJ Series B, No. 6, p. 22 ('States can act only by and through their agents and representatives'). See further *infra* section 3.2.2.4.

3.2.2.1 Attribution of acts of de jure and de facto state organs to the state

The most basic – and hence, also the most latent – rule of attribution is that a state is responsible for the acts of all its organs. According to Article 4 ILC ('Conduct of organs of a State'):

> '1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.'

This basic rule reflects two notions. The first is the principle of unity of the state, from which it follows that the conduct of all state organs, regardless of their function or position in the state, is attributable to the state. The second is that only if a person or entity acts in its capacity as a state organ, it can engage the responsibility of the state.[15] This latter notion is expressly laid down in Article 7 of the ILC Articles, dealing with *ultra vires* acts, which holds that all conduct of state organs or persons empowered to exercise elements of governmental authority are acts of states, also if it concerns an abuse of authority or an act in contravention of superior orders, *provided that the organ acts in a governmental capacity*.

The key question under Article 4 ILC Articles is how to define a person or entity as state organ. The second paragraph of Article 4 holds that a state organ '*includes* any person or entity which has that status in accordance with *the internal law* of the State'. In the *Genocide case*, the ICJ referred to state organs classified as such by the internal laws of the state as *de jure* state organs.[16] This classification will ordinarily depend on the characterisation of an entity as a state organ in domestic law, but may also follow from the legal embedding of an organ in a state, by taking account of the legal powers conferred upon the entity and the position it has in the constitutional structure of the state.[17] Relevant indicators, on a more practical level, may be such matters as by whom a person or body is appointed, to whom the person or body is subordinated,

---

15 Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 42. The requirement that the organ must act in its governmental capacity did feature expressly in the draft articles proposed by Special Rapporteur Ago, but was later omitted. See R. Ago, Third report on State responsibility, *Yearbook of the ILC 1971*, vol. II (Part One), p. 243 (see Article 5: '… are acting in that capacity …').

16 ICJ 26 February 2007, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, paras. 386, 388; also see Commentary to the ILC Articles, *Yearbook of the ILC 2001*, vol. II (Part Two), p. 42.

17 Ibid.

by whom its salaries are paid and, ultimately, whether the person or entity is endowed by law with exercising public authority of the state.[18]

In its commentary, the ILC underlines that the internal laws of a state are not solely decisive in classifying an entity as state organ, by noting that sometimes, 'the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading.'[19] Examples of state organs falling outside the ordinary constitutional framework of the state may be militias, religious authorities or political parties functioning parallel to the state.[20] The ILC refrains, in its articles and commentary, from dwelling upon the appropriate test to establish whether an entity is a *de facto* state organ, but the ICJ, most explicitly in the *Genocide case*, affirmed that conduct of persons or entities *de facto* operating as an agent of the state, is also to be attributed to the state:[21]

> '[P]ersons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument.'

As to the rationale of this rule, the ICJ considered that 'it is appropriate to look beyond the legal status alone, in order to grasp the reality of the relationship between the person taking action and the state' and that states should not be allowed 'to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious'.[22] The test of 'complete dependence' was drawn from its earlier judgment in the *Nicaragua* case, in which the ICJ had found it necessary to determine whether or not the relationship between the *contras* in Nicaragua and the United States government 'was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Govemment.'[23] This was found not to be the case, because 'the evidence available to the Court indicates that the various forms of assistance provided to the contras by the United States have been crucial to the pursuit of their activities, but is insufficient to demonstrate their *complete dependence* on United States aid.'[24] In the *Genocide* case, the requirement of

---

18 Ibid.
19 Commentary to the ILC Articles, *Yearbook of the ILC 2001*, vol. II (Part Two), p. 42. Also see Brownlie (1983), p. 136.
20 Ibid.
21 *Genocide Case*, paras. 391-392; ICJ 27 June 1986, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua. Merits, Judgment*, I.C.J. Reports 1986, p. 14 at para. 109.
22 *Genocide Case*, para. 392.
23 *Military and Paramilitary Activities in Nicaragua*, para. 109.
24 Ibid, para. 110, emphasis added.

complete dependence of the Army of the Republika Srpska (VRS) on the Federal Republic of Yugoslavia was neither met, because the VRS retained 'some qualified, but real, margin of independence' and because notwithstanding the strong political, military and logistical relations and the very important support without which the VRS 'could not have conducted its crucial or most significant military and paramilitary activities', did this not 'signify a total dependence of the Republika Srpska upon the Respondent'.[25]

It appears from the relevant passages in *Nicaragua* and the *Genocide* case that the ICJ considers it inappropriate to classify an entity as a *de facto* state organ if it remains able to function in certain respects autonomous from the state. In *Nicaragua*, the Court attached particular relevance to the possibility that the *contras* could still embark upon certain activities without the support provided by the United States.[26] In paragraph 111 of the judgment, the ICJ held: 'Nevertheless, adequate direct proof that all or the great majority of contra activities during that period received this […] support has not been, and indeed probably could not be, advanced in every respect.' And shortly before, in paragraph 108, the Court had considered that the evidence available to it did not warrant a finding 'that all contra operations reflected strategy and tactics wholly devised by the United States.' Equally, in the *Genocide* case, the ICJ considered it decisive that the VRS was not deprived of 'any real autonomy' and that it retained a 'real margin of independence'. Accordingly, it is required that the entity has no real autonomy and that the type and degree of control is qualitatively the same as the control a state exercises over its own organs.[27]

This rather high threshold must probably be explained from the far-stretching legal implications of equating an entity with state organs. The state becomes responsible for all acts of the entity, regardless of whether the entity acted contrary to state instructions and regardless of any consideration of influence or control asserted by the highest state officials over the specific act complained of.[28] To apply a lower threshold would imply that the state *could* become responsible also for acts which could have been initiated without its involvement, running counter to the basic rule that a state should not be held

25 *Genocide Case*, para. 394.

26 It should be observed that the Court in *Nicaragua* did not make a very clear distinction between its application of the 'complete dependence' test and the 'effective control' test. This is also apparent from the Appeals judgment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Tadić*, where the argument advanced by the Prosecution that the ICJ in *Nicaragua* had applied both an 'agency' test and an 'effective control' test was labeled as a 'misreading of the judgement of the International Court of Justice': ICTY 15 July 19, *Prosecutor v. Tadić* (Appeals chamber), no. IT-94-1-A, paras. 107 and 111-114.

27 Also see M. Milanović, 'State Responsibility for Genocide', 17 *EJIL* (2006), p. 577.

28 According to the ICJ: 'so that all their actions performed in such capacity would be attributable to the State for purposes of international responsibility', *Genocide Case*, para. 397.

responsible for persons or entities not acting on its behalf, or otherwise without its involvement.

The 'complete dependence' test as applied in the Genocide case has been criticised for dealing with relationships of the state with private persons or entities which are meant to fall under one of the other attribution rules, namely that of 'effective control' (Article 8 ILC Articles), to be discussed hereunder.[29] Given the differences in threshold and legal implications of the attribution rules of Articles 4 and 8 ILC Articles, this criticism is unpersuasive, although it must be underlined that the boundaries between the two attribution rules are not always clear. Moreover, both the *Nicaragua* and the *Genocide*-case concerned the peculiar issue of activities of (para)military forces established and active abroad. The test of 'complete dependence' and the criteria applied by the Court for determining the existence of such dependence may therefore be seen as setting precedence only for a particular set of circumstances.

3.2.2.2 Attribution of acts of private persons or entities

The second rule to be discussed here concerns the attribution of conduct of private persons or entities to the state. According to Article 5 ILC (Conduct of persons or entities exercising elements of governmental authority):

> 'The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.'

This provision is meant to take account of semi-public legal persons or parastatal entities which cannot be considered *de jure* or *de facto* state organs but which have been endowed with certain public functions. Examples of such entities mentioned in the ILC Commentary are private security firms acting as prison guards and, notably, private or state-owned airlines exercising delegated powers in relation to immigration control or quarantine.[30]

---

29 Griebel and Plücken (2008), p. 613-614. This also appears to be the view taken by the ICTY Appeals chamber in *Tadić*, which, in determining whether private persons can be regarded as *de facto* state organs, referred only to the notion of 'control' and not that of dependence: 'Consequently, it is necessary to examine the notion of control by a State over individuals, laid down in general international law, for the purpose of establishing whether those individuals may be regarded as acting as *de facto* State officials. This notion can be found in those general international rules on State responsibility which set out the legal criteria for attributing to a State acts performed by individuals not having the formal status of State officials', *Tadić* (Appeals chamber), paras. 98, 114.

30 Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 43. Also see EComHR 12 October 1989 , *Stocké v Germany* (Report), no. 11755/85, concerning a police informer who was considered to have acted on behalf of the German authorities and where the conduct was accordingly attributed to Germany (esp. para. 168).

The essential difference between situations covered by Articles 4 and 5 is that under the former, all acts of a state organ are attributable to the state – unless it concerns acts done in a personal as opposed to governmental capacity – while under Article 5 it is recognised that an entity may only partially exercise 'elements of governmental authority'. Accordingly, under Article 5 of the ILC Articles, responsibility of the state is engaged only in so far as it concerns acts for which the entity has been empowered to exercise governmental authority and not for private or commercial activity in which the entity can engage of its own accord.[31]

Similar to the attribution of conduct of state organs to the state, Article 5 covers all conduct done in the exercise of governmental authority, implying that it also covers conduct involving an independent discretion to act; and that it is not necessary that the conduct complained of was carried out under the control or under express instructions of the state.[32]

In the context of this study, Article 5 ILC Articles is especially relevant in respect of carrier sanctions, where private carriers are prohibited from transporting improperly documented aliens and obliged to return aliens who are refused entry into the state.[33] The rule of Article 5 ILC Articles signifies that (i) the implementation of these obligations ought to be regarded as an exercise of governmental authority, also when the carrier has discretion in the manner of implementation, and that (ii) this implementing activity is attributable to the state.

3.2.2.3 Attribution of conduct directed or controlled by a state

The two rules described above have an important element in common: the state is responsible for all acts of the persons acting as an agent of the state, provided that they do act in that capacity, regardless of whether the agent acted within the limits of its competency and regardless of any consideration of influence or control asserted by the highest state officials over the act concerned. This is different with a third and the most controversial rule on attribution of conduct of persons or entities to a state, the attribution of conduct to a state on account of a state organ giving instructions or exercising control over non-state organs resulting in the commission of acts in breach of its international obligations. Under this rule, it is not the quality of being an 'agent' of the state which is decisive for establishing state responsibility, but the factual relationship between the state and the conduct complained of. According to Article 8 ILC Articles (Conduct directed or controlled by a State):

---

31 Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 43.
32 Ibid.
33 See, extensively, chapter 5.2.2.2.

> 'The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.'

Article 8 speaks of three disjunctive standards for this 'incidental' attribution of private conduct to the state: acting under instructions, acting under the direction, or acting under the control of the state. Especially the element of control has given rise to divergent views on its proper application. The discussion essentially evolves around the question whether it should suffice for attributing conduct of a private entity to the state that the state has asserted 'overall' or 'decisive' influence or control over a private entity or that it is required that the state has specifically directed or controlled the conduct complained of. The latter standard was adhered to by the ICJ in the *Nicaragua* and *Genocide* cases, while in other cases the International Criminal Tribunal for the Former Yugoslavia (ICTY) and ECtHR have upheld the 'overall control' or 'decisive influence' standard. It is submitted hereunder that (i) the more lenient standard of 'overall control' may risk attributing conduct to a state in which it is not involved, potentially overstretching the international responsibility of the state; but that (ii) the wielding of overall influence or control over an entity may nonetheless give rise to international responsibility by virtue of the scope and contents of a state's positive obligations. Although the relevant case law mainly involves the responsibility of states for wrongful activity of military factions which are active in another state and is therefore not directly of relevance for this study, the discussion is of theoretical significance, because it indicates how the rules on attribution and the doctrine of positive obligations constitute separate but conjunctive avenues for delimiting the international responsibility of the state.

In *Nicaragua*, after having discarded the possibility of equating the Nicaraguan rebels (the so-called contras) with organs of the United States, the next question was whether the United States, because of its financing, organising, training, equipping and planning of the operations of the contras, was nonetheless responsible for violations of international humanitarian law committed by those rebels.[34] The Court held that a high degree of 'control' was necessary for this to be the case:

> 'United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua.

34 But see also *Diplomatic and Consular Staff in Tehran*, para. 58.

> (…) For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.'[35]

Accordingly, and in line with the text of current Article 8 of the ILC Articles ('in carrying out the conduct'), the ICJ required not only that a state has directed, instructed or effectively controlled the operations of a military or paramilitary group, but also that this involvement of the state had a direct bearing on the specific conduct complained of. In his separate opinion, judge Ago, the former special rapporteur of the ILC on State responsibility, subscribed to the Court's approach and stressed the exceptional nature of this attribution rule:

> 'Only in cases where certain members of those forces happened to have been specifically charged by United States authorities to commit a particular act, or carry out a particular task of some kind on behalf of the United States, would it be possible so to regard them [as persons acting on behalf of the United States – author]. Only in such instances does international law recognize, as a rare exception to the rule, that the conduct of persons or groups which are neither agents nor organs of a State, nor members of its apparatus even in the broadest acceptation of that term, may be held to be acts of that State. The Judgment, accordingly, takes a correct view when, referring in particular to the atrocities, acts of violence or terrorism and other inhuman actions that Nicaragua alleges to have been committed by the *contras* against the persons and property of civilian populations, it holds that the perpetrators of these misdeeds may not be considered as having been specifically charged by United States authorities to commit them unless, in certain concrete cases, unchallengeable proof to the contrary has been supplied.'[36]

The Nicaragua-test[37] was held to be unpersuasive by the ICTY in the *Tadić* case.[38] The ICTY advanced, in respect of acts committed by individuals forming part of a hierarchically structured group, the more lenient standard of the state wielding overall control over that group:

> 'One should distinguish the situation of individuals acting on behalf of a State without specific instructions, from that of individuals making up an organised and hierarchically structured group, such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels. Plainly, an organised group differs from

35 *Military and Paramilitary Activities in Nicaragua*, para. 115.

36 *Military and Paramilitary Activities in Nicaragua*, *Separate opinion of Judge Ago*, para. 16.

37 The *Nicaragua*-test is often referred to as the 'effective control'-test. This designation is not entirely appropriate, as effective control over the operations in the course of which the alleged violations were committed was examined by the Court in close collaboration with the other factors currently mentioned in Article 8 ILC Articles, i.e. the factors of 'instructions' and 'direction'.

38 *Tadić* (Appeals chamber), para. 115.

> an individual in that the former normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority. Normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group. Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State.'[39]

The ICTY reasoned that having overall control over the group is sufficient to engage the responsibility of that state for the group's activities, and this is regardless of whether or not each of these acts were specifically imposed, requested or directed by the state.[40] 'Clearly', the ICTY added, 'the rationale behind this legal regulation is that otherwise, States might easily shelter behind, or use as a pretext, their internal legal system or the lack of any specific instructions in order to disclaim international responsibility'.[41] As to the precise standard of this overall control-test, the ICTY considered as follows:

> 'The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of de facto State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.'[42]

Several legal commentators welcomed the approach of the ICTY.[43] Further, as was also advanced in legal writings, the ECtHR, in its cases on the Turkish involvement in Northern Cyprus and Russian activity in Moldova, appears to have proceeded from a similar assumption that overall control suffices for the attribution of conduct of a private group to a state.[44]

In the case of *Loizidou v Turkey*, concerning the Turkish occupation of Northern Cyprus and the subsequent establishment of the 'Turkish Republic of Northern Cyprus' (the TRNC), the Court was confronted with the dual question whether the victims of human rights violations in Northern Cyprus fell under the 'jurisdiction' of Turkey in the meaning of Article 1 ECRH and whether the acts of the TRNC could be attributed to Turkey. After reiterating

39 Ibid, para. 120.
40 Ibid, para. 122.
41 Ibid, para. 123.
42 Ibid, para. 137.
43 A. Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', 18 *EJIL* (2007), p. 649-668; Griebel and Plücken (2008), p. 601-622; M. Spinedi, 'On the Non-Attribution of the Bosnian Serbs' conduct to Serbia', 5 *Journal of International Criminal Justice* (2007), p. 829-838.
44 See especially Cassese (2007), p. 658-659, at n. 17 and 18.

that a State Party's obligations can also be incurred for acts and ommissions producing effect outside that state's territory, the Court considered:

> 'It is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercises detailed control over the policies and actions of the authorities of the "TRNC". It is obvious from the large number of troops engaged in active duties in northern Cyprus that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the "TRNC". Those affected by such policies or actions therefore come within the "jurisdiction" of Turkey for the purposes of Article 1 of the Convention. Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus.'[45]

Although the Court does not distinguish all too clearly between the issues of attribution and jurisdiction and refers to effective control over territory instead of the TRNC, its reasoning appears to be that having effective control over Northern Cyprus means not only that all persons living there are brought within Turkish jurisdiction, but also that the TRNC can only be deemed to function as a subordinate local administration, i.e. as a *de facto* state organ of Turkey, implying that all the policies or actions of the TRNC are to be attributed to Turkey. The Court in any regard makes clear that detailed control over the particular acts of the TRNC was not required for acts of the latter to be attributed to Turkey. This reasoning was upheld in *Cyprus v Turkey*.[46]

In the case of *Ilascu a.o. v Moldova and Russia*, the European Court examined more closely the relationship between the state and the local administration, thereby bringing the applied criteria more in line with those applied by the ICJ in the *Nicaragua* case. The ECtHR held the Russian Federation to be fully responsible for the continuing illegal detention of the applicants and the ill-treatment they suffered at the hands of the separatists on the territory of Moldova. The Court considered it of 'little consequence' that agents of the Russian Federation had not participated directly in the events complained of; and instead considered that because the separatist regime in Trandniestria was set up with support of Russia and remained under the 'effective authority,

45 ECtHR 18 December 1996 *Loizidou v Turkey* (merits), no. 15318/89, para. 56. Also see ECtHR 23 March 1995, *Loizidou v Turkey* (preliminary objections), no. 15318/89, paras. 52 and 62.

46 ECtHR 10 May 2001, *Cyprus v Turkey*, no. *25781/94,* esp. para. 77: 'Having effective overall control over northern Cyprus, its responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey's "jurisdiction" must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey'.

or at the very least under the decisive influence, of the Russian Federation', and in any event because it 'survives by virtue of the military, economic and political support given to it by the Russian Federation', there was a 'continuous and uninterrupted link of responsibility on the part of the Russian Federation for the applicants' fate'.[47] The ECtHR did not however explicitly consider that the acts of the separatists should be attributed to Russia but referred to the positive obligation incumbent on it to put an end to the applicants' situation.

The ICJ, however, upheld the *Nicaragua*-standard in the *Genocide Case* (2007), and faulted the ICTY for engaging itself in matters pertaining to the law on state responsibility 'which do not lie within the specific purview of its jurisdiction' and for applying a test which was seen as overly broadening the scope of state responsibility.[48] It underlined that the rule embodied in Article 8 ILC Articles is substantially different from those enunciated in Articles 4 and 5: should it be accepted that the instructions given to, or direction or control asserted over the persons carrying out the conduct is sufficient to attract the state's responsibility, this does not mean that the perpetrators are to be characterised as organs of the state – implying that all their acts are to be attributed to the state – but merely that a state's responsibility is engaged for its own organs having issued instructions or asserted control resulting in other persons committing an international wrong.[49] Further, the Court explained at length why the overall control test is unsuitable for establishing state responsibility for acts committed by persons who cannot be equated with state organs:

> 'It must next be noted that the "overall control" test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. (…) [A] State's responsibility can be incurred for acts committed by persons or groups of persons – neither State organs nor to be equated with such organs – only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article

47 ECtHR 8 july 2004, *Ilascu a.o. v Moldova and Russia*, no. 48787/99, paras. 382, 392-394.

48 *Genocide Case*, para. 403.

49 Ibid, para. 397. According to some authors, by emphasizing that responsibility is incurred by reason of instruction or control asserted by its own organs, the ICJ apparently abolished Article 8 as a rule of attribution proper; see Griebel and Plücken (2008), p. 605. Although the Court's wordings in paragraph 397 may be taken to allow for such a reading, it is doubtful whether the Court intended to make that point. Its firm pronouncements on the issue were primarily aimed at emphasising that if the conditions of Article 8 ILC Articles are fulfilled, this does not transform the controlled or instructed persons into state organs, without delving explicitly into the question whether the acts of the latter should in that case be attributed to the State or not. Indeed, in paragraph 419, the ICJ explicitly considers that, should it have been established that genocide would have been committed on the instructions or direction of the State, 'the necessary conclusion would be that the genocide was attributable to the State'.

> 8 cited above. This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the "overall control" test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility.'[50]

Several observations are in order in respect of the case law above. It is firstly notable that the ICTY (and the ECtHR in the Cyprus cases) not only favours a different standard of control – at least in so as far as it concerns control over organised (military) groups – but that it also submits that the fact of being under such control brings with it that the group must be regarded as a *de facto* state organ, implying that all the group's acts are to be attributed to the state. Given the more general nature of the control asserted by the state – not necessarily related to a specific act – this is a logical conclusion, but it does raise the question how this overall control-test relates to the existing rules codified in Articles 4 and 5 of the ILC Articles, which lay down the specific requirements for classifying natural persons as state organs. Rather than refining (or expanding) the attrubition rule of Article 8 ILC Articles, the ICTY appears to present an altogether new rule, which, in its legal implications at least, bears more resemblance with Articles 4 and 5 of the ILC Articles, but stretches substantially the circumstances for attribution mentioned under those Articles, and in particular the 'complete dependence'-test as formulated by the ICJ.[51]

Secondly, although seemingly contradictory, the divergent approaches taken by ICJ and ICTY do not appear to reflect a different perception on the nature of the law on state responsibility. We may summarize the rationale of the ICJ behind attributing acts of individuals to the state as one in which there indisputably must exist a connection between the state's conduct and its international responsibility.[52] An approach must be adhered to in which it is ruled out that acts are attributed to the state which could well have been committed without its involvement.[53] This implies that persons, or groups of persons

---

50 Ibid, para. 406.

51 Indeed, some of the cases brought forward by the ICTY in support of its 'overall control test', appear to have more resemblance with situations covered by Articles 4 and 5 – and possibly Articles 9 and 11 – of the ILC Articles than Article 8. The ICTY referred, for instance, to the *Kenneth P. Yaeger* case, in which the Iran-United States Claims Tribunal had concluded that the local revolutionary committees had acted as de facto State organs of Iran because, amongst others, they had performed *de facto* official functions and that Iran could not tolerate the exercise of governmental authority by actors and at the same time deny responsibility for wrongful acts committed by them, Iran-United States Claims Tribunal 2 November 1987, *Kenneth P. Yeager v Islamic Republic of Iran*, Partial Award No. 324-10199-1, reprinted in 17 *Iran-United States Claims Tribunal Reports* (1987), p. 92.

52 *Genocide Case*, para. 145.

53 *Military and Paramilitary Activities in Nicaragua*, para. 115.

retaining some element of autonomy should not be regarded as *de facto* agents of the state and that their conduct can only engage the international responsibility of the state if there is some form of direct involvement of the state (in the form of instructions, directions or effective control) in particular conduct of that person or group. Cassese, on the other hand, giving voice to the reasoning behind the *Tadic* judgment, asserts that the latter test is inconsistent with another 'basic principle underpinning the whole body of rules and principles on state responsibility', namely that 'states may not evade responsibility towards other states when they, instead of acting through their own officials, *use* groups of individuals to undertake actions that do damage to other states'. Therefore, 'states must answer for actions contrary to international law accomplished by individuals over which they systematically wield authority'.[54] But, this reasoning equally reflects an understanding that states should be held responsible for acts committed on its behalf. The difference between the approaches of the ICTY and ICJ is that the ICJ departs from an urge to prevent the state being held responsible also for other acts; while the ICTY and the ECtHR depart from an urge to ensure that a state is *indeed* so held responsible. Hence, it is the test to arrive at the establishment of state responsibility which is contested, rather than the nature of the law on state responsibility.

This brings us to the third and final observation, which is that both tests may not be sufficiently apt to single out those acts for which the state should be held responsible. The problem with the 'overall control' test is that it simply accrues all acts of the controlled entity – also acts exercised in its own autonomy – to the state, whereas the problem with the test propounded by the ICJ is that it does not seem to attach legal implications to all the intricate forms in which a state may be involved in the activities of a private entity – through wielding influence, asserting general control or the provision of all kinds of support. It is in this connection that it should be observed that the attribution rules laid down in the law on state responsibility are not solely decisive for holding states accountable for their involvement in conduct of other actors. The fact that activity of a particular entity cannot be attributed to a state does not necessarily imply that the state cannot incur responsibility for its involvement in that activity. It may well be that the primary, or substantive, international obligations incumbent on the state give rise, on account of its own acts or omissions, to the state's responsibility. This point is especially salient within human rights law, where the doctrine of positive obligations may serve to establish the concurrent, or derived, responsibility of the state in respect of conduct of another actor. Hereunder, it is explained that the rules of attribution laid down in Part I of the ILC Articles and the doctrine of positive obligations serve as separate but conjunctive avenues for delimiting the international

54 Cassese (2007), p. 654, 661, emphasis in original.

responsibility of the state when it is involved in the activities of a private entity.

3.2.2.4 Positive obligations and due diligence

In order to better appreciate the divergent approaches of, let us say, the ICJ upon the one hand, and the ICTY and the ECtHR on the other, regarding the question of attributing conduct of private persons to the state, it is necessary to examine the doctrine of positive obligations, and especially the relationship of that doctrine with the law on state responsibility.

One can say that until fairly recently, the existence of duties of prevention and due diligence in connection to acts of private persons were deemed to form an integral part of the law on state responsibility, or at least, axioms delineating the extent to which states could be held internationally responsible for misconduct of private individuals. Somewhat simplified, two schools of thought can be said to have persisted into modern thinking on state responsibility for acts of individuals.[55]

The first school is that of *culpa*, in which the presumption is that a state can become responsible for the acts of individuals only through complicity. Grotius, commonly associated with this school, discarded the medieval principle of 'collective responsibility' according to which the state was regarded as a collectivity, whose members were responsible for the acts of any one member, implying that injury done by a member to a member of another state would enliven the responsibility of the whole state.[56] Instead, Grotius formulated the principle that acts of private individuals can normally not be ascribed to the state, unless a state can be held complicit for international wrongs of individuals through the notions of *patientia* (toleration) and *receptus* (refuge).[57] The term *patientia* refers to a state knowing that an individual has the intention to commit a wrongful act against a foreign state, and where the state fails to take action to prevent the act from being comitted while it possesses the power to do so. The term *receptus* refers to the requirement of the state either to punish or to extradite private persons who are known to have committed crimes against foreign states. Failing to comply with the requirements of

55 This dictinction is drawn from R. Ago, Fourth Report on State Responsibility, *Yearbook of the ILC 1972*, Vol. II, p. 120-124; and F. Przetacznik, *Protection of officials of foreign states according to International law*, Dordrecht: Martinus Nijhoff (1983), p. 197 et seq. For an extensive overview of the doctrines of due diligence in relation to state responsibility, including the many subdivisions within the various schools of thought, see J.A. Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law', 36 *N.Y.U. Journal of International Law and Politics* (2004), p. 265-306.

56 On the origins and proponents of the theory of collective responsibility, see extensively Hessbruege, note above, p. 276-281.

57 Hugo Grotius, *De Jure Belli ac Pacis* (1625), translated by A.C. Campbell, Kitchener: Batoche Books (2001), Book II, Chapter 21, para. ii (p. 215-216).

patientia and *receptus* would, in the Grotian theory of culpa, imply that a state participates in the guilt of the individual – because 'knowledge implies a concurrence of will'[58] – from which it, in modern terminology of state responsibility, would follow that the act is to be attributed to the state as a basis for its international responsibility.

The theory of culpa was followed by many writers,[59] but gradually gave way to another line of thought in which the element of culpa, or fault, was discarded as essential component of state responsibility. In this school of thought, identified by Ago as the one to which the very large majority of modern writings belong, state responsibility is derived directly from a duty of the state to exercise due diligence over individuals who are subject to its sovereignty. Triepel, for example, considered that the state, if it remains passive towards an individual injuring another state, does not become an accomplice of the individual, but is responsible only for its own failure to exercise due diligence, implying that the responsibility of the state is enlivened for its own omissions and not for the act of the individual.[60] Another writer belonging to this school is Eagleton, who stipulated that 'the state is never responsible for the act of an individual as such: the act of the individual merely occasions the responsibility of the state by revealing the state in an illegality of its own – an ommission to prevent or punish, or positive encouragement of, the act of the individual.'[61] Summarizing this school of thought, Ago held the basic rule to be as follows: 'the state is internationally responsible only for the action, and more often for the omission, of its organs which are guilty of not having done everything within their power to prevent the individual's injurious action or to punish it suitably in the event that it has nevertheless occurred.'[62]

The main difference between the two schools of thought lies in the question of equation of the act of the individual with that of the state. What the theories have in common, and what is important for our present purposes, is that they both depart from an understanding that the state is not just bound to abstain from committing internationally wrongful acts, but that it also has the duty, inherent to its capacity of being the sovereign power and thereby to constrain the actions of its subjects, to prevent them from committing international wrongful acts. Having spent the vast part of his Fourth Report on State Responsibility on reviewing countless judicial decisions and legal writings addressing the relationship between private acts and state responsibility, Ago proposed, on the basis hereof, the following provision to be incorporated in the Articles on State Responsibility:

---

58 Ibid.

59 Among whom Pufendorf and Vattel. For more extensive references see esp. R. Ago, Fourth Report on State Responsibility, *Yearbook of the ILC 1972*, Vol. II, p. 121-122 and Hessbruege (2004), p. 281-292.

60 H. Triepel, *Völkerrecht und Landesrecht*, Leipzig: Siebeck (1899), p. 333-334.

61 Eagleton (1928), p. 77.

62 R. Ago, Fourth Report on State Responsibility, *Yearbook of the ILC 1972*, Vol. II, p. 122-123.

> *'Article 11. – Conduct of private individuals*
> 1. The conduct of a private individual or group of individuals, acting in that capacity, is not considered to be an act of the State in international law.
> 2. However, the rule enunciated in the preceding paragraph is without prejudice to the attribution to the State of any omission on the part of its organs, where the latter ought to have acted to prevent or punish the conduct of the individual or group of individuals and failed to do so.'[63]

This provision was eventually not adopted by the International Law Commission, because it was felt that it could trespass into the field of 'primary rules', i.e. the rules that place obligations on states, and did therefore not necessarily belong to the rules determining whether those obligations have been violated and what the consequences of such violations should be.[64] This was, of course, not to mean that the ILC denied the existence of a doctrine of positive obligations or due diligence, but rather that it perceived the scope of a state's positive duties to be intrinsically linked to the contents of the obligation at issue. Special Rapporteur Crawford defended the ommittance of references to the nature of various obligations in the Draft Articles, by noting, amongst other reasons:

> '[T]he most important point is that the extent or impact of the law on state responsibility depends on the content and development of the primary rules, especially in the field of the obligations of the state with respect to society as a whole. There has been a transformation in the content of the primary rules since 1945, especially through the development of human rights. But it is the case, overall, that the classical rules of attribution have proved adequate to cope with this transformation. This is so because of their flexibility and because of the development, as part of the substantive body of human rights law, of the idea that in certain circumstances the state is required to guarantee rights, and not simply to refrain from intervening.'[65]

It is, of course, true that obligations of prevention and protection have gradually been incorporated into human rights law. It is also true that on the basis of such obligations the ICJ in the *Genocide* case did consider the Former Republic of Yugoslavia to have violated the Genocide Convention, namely by doing nothing to prevent the massacres occurring in Srebenica.[66] But this violation was not based on a general obligation on states to prevent the commission by other persons or entities of acts contrary to certain norms of general international law, but on the explicit reference in Article 1 of the Genocide Conven-

63 Ibid, p. 126.
64 Summary records of the twenty-seventh session, *Yearbook of the ILC 1975*, Vol. I, p. 214; also see J. Crawford, First report on State responsibility, *Yearbook of the ILC 1988*, Vol. II, p. 6-7, esp at para. 16.
65 J. Crawford, 'Revising the Draft Articles on State Responsibility', 10 *EJIL* (1999), p. 439.
66 *Genocide Case*, para. 438.

tion to the substantive obligation incumbent on Contracting Parties to 'undertake to prevent and to punish' genocide.[67]

This leaves us with two remaining questions to be addressed. The first is to what extent, and on what basis, a general theory of due diligence in relation to activities of individuals can be said to exist and in particular, whether such duties also exist with regard to conduct outside a state's territory. The second is how this theory relates to the approaches of the ICJ, the ICTY and the ECtHR in the cases mentioned in the previous section.

Regarding the first question, and limiting ourselves to human rights obligations, we may depart from two assumptions. The first is the one arrived at in the previous chapter that a state's human rights obligations are not necessarily confined to a state's own territory. The second is that many, if not all, human rights are seen to bring with them duties of prevention and due diligence.[68] As to the question of a state's positive obligations outside its territory, it is useful to refer briefly to the approach of the ICJ regarding the obligation to prevent genocide, as it provides insightful considerations regarding the nature and basis of a state's positive obligations outside its territory, which may well apply to obligations other than the duty to prevent genocide alone.

The substantive obligations, *inter alia*, not to commit and to prevent and punish genocide enumerated in Articles I and III Genocide Convention were considered by the ICJ as 'not on their face limited by territory', but to apply 'to a State wherever it may be acting or *may be able* to act in ways appropriate to meeting the obligations in question.'[69] As to the extent of that ability in law and fact, the Court set out to determine the specific scope of the duty to prevent in the Genocide Convention. Regarding this duty, the ICJ found the notion of 'due diligence' to be of critical importance and it defined the parameters of this notion as follows:

> 'Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another,

67 Ibid, para. 429, in which the ICJ made clear that it did not 'purport to find whether, apart from the texts applicable to specific fields, there is a general obligation on States to prevent the commission by other persons or entities of acts contrary to certain norms of general international law.'

68 For a general overview, see eg A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford: Hart Publishing (2004); B. Conforti, 'Exploring the Strasbourg case-Law: Reflections on State Responsibility for the Breach of Positive Obligations', in: M. Fitzmaurice and D. Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions*, Oxford: Hart Publishing (2004), p. 129-137; and, for a theoretical underpinning, H. Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy*, Princeton University Press (1980), p. 52-53; and H. Shue, 'The Interdependence of Duties', in: P. Alston and K. Tomasevski (eds.), *The Right to Food*, Dordrecht: Martinus Nijhoff (1984), p. 83-85.

69 *Genocide Case*, para. 183, emphasis added.

> is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide.'[70]

As to the moment on which the duty of due diligence comes into being, the Court considered decisive 'the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.'[71]

Applying these parameters to the facts of the case, the Court attached particular importance to the close links which existed between the FRY and the VRS and the ability of the former to exert influence over the latter. Given this position of 'influence' and the fact that the Belgrade authorities must have been 'aware' of the serious risk that tragic events were to happen in Srebrenica, the Court concluded:

> 'In view of their undeniable influence and of the information, voicing serious concern, in their possession, the Yugoslav federal authorities should, in the view of the Court, have made the best efforts within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might at least have been surmised. (…) Yet the Respondent has not shown that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed. It must therefore be concluded that the organs of the Respondent did nothing to prevent the Srebrenica massacres, claiming that they were powerless to do so, which hardly tallies with their known influence over the VRS.'[72]

It must be repeated that the Court expressly refrained from laying down a general framework applicable to duties to prevent certain acts.[73] The crime of genocide is obviously of special nature and the duty of states to prevent it is likely to require vigilance of the highest standard, which not necessarily applies to all human rights obligations. Nonetheless, the parameters used by the Court in defining the scope of the duty to prevent are worth noting. The duty of prevention is not based on a territorial limitation, but on the ability,

---

70 Ibid, para. 430.
71 Ibid, para. 431. Cf. ICJ 9 April 1949, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, I.C.J. Reports 1949, p. 18-22; and *Military and Paramilitary Activities in Nicaragua*, para. 116.
72 Ibid, para. 438.
73 Ibid, para. 429.

or capacity to act; this capacity is, on the one hand, measured in legal terms (i.e. a state must always act within the limits of international law); and on the other hand measured in terms of influence over, or links between, the state and the acting individual(s).

This basic approach of the Court is in conformity with existing theories on state responsibility in relation to acts of individuals. While it is obvious that a state can be held responsible for its own acts, also if committed abroad – whereby the territorial locus is relevant primarily with regard to determining the substantive reach of a state's obligations – with regard to omissions of the state, or duties of due diligence, the notion of territory may be more pertinent, as a state will not always be equally capable to act outside its territories as it is within its territories. It is probably for this reason that reference to a state's territory is often made as a basis of a state's responsibility for a failure of due diligence.[74] But, as various authors have stressed, this reference must be understood from the presumption that the state ordinarily has the power to regulate activity in its territory. Eventually, it is either the act of the state or the power or capacity to act which gives rise to international responsibility, with the notion of territory merely functioning as a presumption that the state is able to act.[75] Eagleton, in this regard, emphasised the importance of the criterion of 'control' in explaining a state's duties of due diligence within its territory: 'Since international law must prevail within each state, all states in consequence thereof are burdened with the obligation of respecting the rights, within their own territories, of other states or their members. The responsibility of the state for the acts of individuals is therefore based upon the territorial control which it enjoys, and which enables it, and it alone, to restrain and punish individuals, whether nationals or not, within its limits'.[76] The disconnection between territory and responsibility is perhaps most evidently present in the work of Brownlie, who emphasises that responsibility may stem both from harmful acts (or omissions) occurring outside state territory and from acts (or omissions) within a state's territory which produce harmful

74 See, amongst others, the references in Brownlie (1983), p. 165.

75 See eg Grotius, who based the responsibility of a State for a failure to prevent individuals from doing harm to foreign states on 'the power' it has prevent it, n. 57 *supra*. Vattel stipulated that a State ought not to permit 'those who are under his command to violate the precepts of the law of nature'; E. de Vattel, *Le Droit des Gens ou Principes de la Loi Naturelle* (1758), translated by C.G. Fenwick, Washington: Carnegie Institution (1916), book II, chapter VI, para. 72. Anzilotti based a State's responsibility towards other States on a State's 'sphere of activities', D. Anzilotti, 'La Responsabilité Internationale des États: A Raison des Dommages Soufferts par des Étrangers', 13 *Revue Générale de Droit Public* (1906), p. 290. And Ago derived State responsibility for acts of individuals on a State's organs being guilty 'of not having done everything *within their power* to prevent the individual's injurious action', R. Ago, Fourth Report on State Responsibility, *Yearbook of the ILC 1972*, Vol. II, p. 123, emphasis added.

76 Eagleton (1928), p. 77-78.

consequences outside state territory.[77] Like Eagleton, Brownlie refers to the notion of 'control' as a basis of state responsibility, whereby duties of the state regarding activities within its territorial sovereignty are derived from 'the actual or presumed control the state has over its own territory.'[78] Brownlie saw this proposition confirmed by the ICJ advisory opinion regarding the occupation by South Africa of Namibia, in which the Court had held South Africa responsible for the consequences of this occupation, by reasoning that 'physical control of a territory, and not sovereignty or legitimacy of title, is the basis for state liability for acts affecting other states.'[79]

Based on the above, we may conclude that the question of private persons being inside or outside a state's territory is primarily relevant in terms of state responsibility in so far as it has a bearing on the question whether it affects the capability of the state to act. A state is presumed to wield influence – in the broadest meaning of the term – over persons inside its territory, but this is only a presumption, whereby a state may, on the one hand, lack control, or power, to constrain the acts of individuals within its territory[80] and, on the other hand, assert a relevant degree of control (or power or influence), over individuals outside its territory.

In the *Genocide* case the ICJ made a strict distinction between the question of attributing conduct of the VRS to the Former Republic of Yugoslavia and the duty of the FRY to prevent the VRS from committing genocide. In *Nicaragua*, after having concluded that alleged violations of humanitarian law committed by the *contras* could not be attributed to the United States, the ICJ nonetheless found it relevant that the United States must have been aware of the allegations of breaches of humanitarian law made against the contras, for this could have an impact on the lawfulness of the actions of the United States in connection to the *contras*. Eventually, the Court concluded that the United States had 'encouraged' the commission by the *contras* of acts contrary to humanitarian law, by producing and disseminating a manual on guerilla warfare, which amongst others justified the shooting of civilians, without however connecting this finding to a breach of the United States' obligations under international humanitarian law.[81]

---

77 Brownlie (1983), p. 165, 180-188.

78 Ibid, p. 181.

79 ICJ 21 June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16 at para. 118.

80 Cf. *Corfu channel*, p. 18: 'The State may, up to a certain point, be bound to supply particulars of the use made by it of the means of information and inquiry at its disposal. But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.'

81 *Military and Paramilitary Activities in Nicaragua*, paras. 116-122.

In the previous chapter, it was indicated that the European Court of Human Rights has also applied the doctrine of positive obligations to several cases concerning influence wielded over individuals in a foreign territory. The formula used in the cases of *Treska* and *Manoilescu* that 'Even in the absence of effective control of a territory outside its borders, the state still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention' corresponds to the theoretical considerations made above and the approach taken by the ICJ in the *Genocide Case*.[82] It supports a conclusion that the duty to take preventive or other positive action in respect of human rights interferences taking place in a foreign territory derives primarily from the influence a state wields over a particular situation and therewith the 'power', or capability, it has to prevent the occurrence of human rights violations. The establishment of the scope of this duty requires an inquiry, on the one hand, of the substantive international obligations of the state and the duties of due diligence inherent in them; and, on the other hand, an examination of the legal and factual capabilities of the state to change the course of events.

This leads to the conclusion that any useful comparison of the manner in which courts have established the international responsibility of the state on the basis of certain links between the states and (groups of) individuals situated in a foreign location, must not simply be based on an assessment of the manner in which the courts have applied the various attribution rules. It must also have regard to the question whether the courts have properly ascertained the existence of potential positive duties inherent to a state's international obligations and whether such duties were engaged as a result of the influence wielded by the state over the individuals. In this regard, the ICJ's more stringent approach in *Nicaragua* and the *Genocide Case* regarding attribution is well sustainable, so long as it does not neglect duties inherent in the wielding of influence. But likewise is the overall control test propounded by the ECtHR defendable, in the sense that it rightly attaches positive duties to the finding that a state wields a certain degree of control or influence over acts committed by individuals abroad.

3.2.3 Attribution of state conduct to another state

The second category of situations falling under the rules of attribution which are relevant for this study are those where a state places one of its organs at the disposal of another state. Under operations of sea border control coordinated by the EU external borders agency Frontex for example, guest

82 See chapter 2.5.3.

officers of one EU Member State may be placed within the command structure of another Member State. EU Member States have further concluded agreements with third countries allowing for the conducting of joint sea patrols in the territorial waters of third countries or the posting of immigration officers in a third country, in order to assist in controlling the border.[83] The question raised by such arrangements is whether the activity of guest officers should be attributed to the host or the sending state.

According to Article 6 ILC Articles (Conduct of organs placed at the disposal of a State by another State):

> 'The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.'

The ILC Commentary stresses that this rule applies to exceptional situations and that, if the rule applies, the conduct is to be attributed only to the state at whose disposal the organ is placed and not to the state whose organ it is.[84] The latter rule was confirmed by the ICJ in the *Genocide case*.[85]

On its wording, Article 6 ILC appears to require, primarily, that the organ is exercising 'elements of the governmental authority' of the other state. This could be taken to mean that responsibility must be allocated to the receiving state if the organ acts in the name of that state or at its behest. The ILC Commentary however, notes that the words 'placed at the disposal of' are the essential condition for attributing conduct of the organ to the other state, whereby this condition is strictly interpreted as requiring not only that the organ must act with the consent, under the authority of and for the purposes of the receiving state, it must also act in conjunction with the machinery of that state and under the latter's 'exclusive direction and control, rather than on instructions from the sending state'.[86] The conditions of actually being under the authority of the receiving state and acting in accordance with the receiving state's instruction featured expressly in an earlier version of the Draft

---

83 See extensively chapters 5 and 6.

84 Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 44. Also see R. Ago, Seventh report on State responsibility, *Yearbook of the ILC 1978*, Vol. II (Part One), p. 53.

85 *Genocide Case*, para. 140 ('Furthermore, the Court notes that in any event the act of an organ placed by a State at the disposal of another public authority shall not be considered an act of that State if the organ was acting on behalf of the public authority at whose disposal it had been placed.').

86 Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 44. Also see Report of the International Law Commission on the work of its twenty-sixth session, *Yearbook of the ILC 1974*, Vol. II (Part One), p. 287; and Report of the International Law Commission on the work of its twenty-seventh session, *Yearbook of the ILC 1975*, Vol. II, p. 83.

Articles.[87] This strict standard is explained from the premise that states should only be held responsible for their own acts and omissions and that therefore the state organ must be under the genuine and exclusive authority of the receiving state.[88] Decisive, in other words, are the system within which the activities of the organ are performed and the authority actually responsible for the acts at the time they were performed.[89]

International jurisprudence confirms that the threshold for applying this rule is high. In the case of *X. and Y. v Switzerland* – which is noteworthy in the context of this study for it concerned the delegation of immigration control functions to another state – entry bans imposed by the Swiss aliens police on persons residing in Liechtenstein were held to be attributable to Switzerland.[90] The agreements in force between the two countries provided that the administration of matters concerning the entry, exit, residence and establishment of foreigners was entrusted to the Swiss authorities and that Liechtenstein had only the powers and functions corresponding to those Swiss cantons enjoyed in these matters. The argument of the Swiss government that its aliens police was merely exercising the public functions of Liechtenstein and that therefore its conduct could not be attributed to Switzerland was dismissed, because the aliens police functioned exclusively in conformity with Swiss law and there was no distinction in competences between acts concerning Liechtenstein and Switzerland. A similar conclusion was reached in the case of *Xhavara v Italy*, where the ECtHR considered that the conduct of the Italian navy policing the high seas and territorial waters between Albania and Italy pursuant to a treaty concluded with Albania, could not engage the responsibility of Albania. The treaty provided, amongst others, for the Italians to inspect migrant vessels in Albanian territorial waters, to verify the identity of the passengers and to order back the ships to Albanian ports.[91] And in *Vearncombe v the United Kingdom and Germany*, the European Commission concluded that the noise nuisance emanating from the British shooting range in Berlin-Gatow could only be attributed to the United Kingdom and not to the Federal Republic of Germany, for the shooting range was constructed entirely under the control of the British Military Government.[92]

By contrast, in the case of *Drozd and Janousek v France and Spain*, the ECtHR held that conduct of French and Spanish judges carrying out judicial functions in Andorra, could not be attributed to France and Spain. The judges did not function in their capacity as French or Spanish judges, and French or Spanish

87 R. Ago, Third report on State responsibility, *Yearbook of the ILC 1971*, vol. II (Part One), p. 274.
88 Ibid, p. 268.
89 Ibid, p. 269.
90 EComHR 14 July 1977, *X. and Y. v Switzerland*, nos. 7289/75 and 7349/76.
91 ECtHR 11 January 2001, *Xhavara and Others* v. *Italy and Albania*, no. 39473/98.
92 EComHR 18 January 1989, *Vearncombe a.o. v the United Kingdom and the Federal Republic of Germany*, no. 12816/87.

courts had no power of supervision over judgments and decisions rendered by the judges.[93] Although the task of the ECtHR was confined to the question of possible attribution to Spain or France and not to Andorra, we may assume that the requirements for attributing the conduct of the organ of one state to another as pronounced in Article 6 ILC were in this case fulfilled.

It follows from the above that the mere exercise of elements of the governmental authority of the other state is not sufficient for attributing conduct to the other state. Not only must the organ act 'on behalf' of the other state, it must also form part of the machinery of that state and it must be subject to that state's instructions – and not to that of the lending state.

If conduct of a state organ taking place in the territory of another state cannot be attributed to the latter state, the latter state is in principle not to be held responsible. In a provisionally adopted version of the Draft Articles, the ILC had considered it necessary to explicitly rule out any idea that the territorial state is in some way responsible solely because the specified conduct of organs of a foreign state took place in its territory:

> *'Article 12. Conduct of organs of another State*
> 1. The conduct of an organ of a State acting in that capacity, which takes place in the territory of another State or in any other territory under its jurisdiction, shall not be considered as an act of the latter State under international law.
> - 2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that referred to in that paragraph and which is to be considered as an act of that State by virtue of articles 5 to 10.'[94]

Thus, if the organ remains under the orders and exclusive authority of the state to which it belongs, its acts and omissions cannot be attributed to the state on whose territory the conduct takes place.[95] Much in line with our previous statements regarding obligations of due diligence in connection to acts of private persons however, the ILC qualified this rule by underlining that the territorial state always remains responsible for its own acts and omissions, also those relating to the conduct of the other state:

> '[I]t is important to remember that, although the conduct of organs of a State acting in the territory of another State can in no event be attributed *as such* to the territorial State, the latter could nevertheless incur international responsibility for acts committed on the occasion of and in connexion with the conduct of such foreign organs. Those would not, of course, be acts of the organs of the foreign State, but acts of the organs of the territorial State, for example if they were unduly passive in their conduct in the face of acts prejudicial to a third State committed within the frontiers

93 ECtHR 26 June 1992, *Drozd and Janousek v France and Spain*, no. 12747/87, para. 96.
94 Report of the International Law Commission on the work of its twenty-seventh session, *Yearbook of the ILC 1975*, Vol. II, p. 83.
95 Ibid.

> of the territorial State by an organ of a foreign State. In other words, the actions of foreign organs in the territory of a State, while not attributable to that State, may in certain cases afford a material opportunity for the territorial State to engage in conduct which might entail its international responsibility.'[96]

This approach was followed by the ECtHR in the case of *Ilaşcu*, where it considered that even though the exercise of authority by Moldova was limited in part of its territory, it was under a duty 'to take all the appropriate measures which it is still within its power to take' to ensure respect for fundamental rights and freedoms within its territory;[97] and by the HRC in the case of *Alzery v Sweden*, where Sweden was found to have failed to comply with its duty not to consent to or acquiescence in ill-treatment performed by foreign officials in its territory and therefore to have acted in violation of Article 7 ICCPR.[98]

The conclusion that attribution of conduct of an organ to the receiving state requires the organ to have been placed in the receiving state's command structure is particularly relevant for the various forms in which EU Member States have arranged joint missions of sea border control. In chapter 6 below, it is explained that the cooperation with third countries does generally not foresee in European 'guest officers' operating under the (exclusive) command of third states. In operations coordinated by the EU's border agency Frontex however, guest officers may as a rule only perform tasks and exercise powers under instructions of the host Member State, which constitutes an important indicator for attributing their activities to the host state.[99]

3.2.4 Attribution of joint conduct to the state

3.2.4.1 Multiple state responsibility

Multiple states can be held responsible for a single event.[100] Under the law

96 Ibid, p. 84.

97 *Ilascu a.o. v Moldova and Russia*, paras. 313, 331.

98 HRC 10 November 2006, Alzery v Sweden, no. 1416/2005, para. 11.6. Note that the Human Rights Committee attributed the conduct of the American officials to Sweden, rather than established the responsibility of Sweden on the basis of its own omissions, i.e. a failure to prevent the maltreatment. Also see European Commission for Democracy through Law (Venice Commission), Opinion on the international legal obligations of Council of Europe Member States in respect of secret detention facilities and inter-State transport of prisoners, Opinion no. 363/2005, Strasbourg, 17 March 2006, doc. CDL-AD(2006)009, paras. 66, 116-120.

99 See, extensively, chapter 6.5.

100 This is confirmed in Article 47 ILC Articles, which articulates that where several states are responsible for the same internationally wrongful act, 'the responsibility of each state may be invoked in relation to that act'. According to the ILC Commentary, in such cases 'each state is separately responsible for the conduct attributable to it' and 'responsibility is not

of state responsibility, we may distinguish three categories of situations in which the responsibility of two or more states may be engaged. The first is where a plurality of states have acted independently in relation to an event, consisting of an injury to a third party, and where the acts can be attributed to the respective states under one of the attribution rules. Because the rules on attribution are not mutually exclusive, it is perfectly conceivable that such situations may arise.[101] International jurisprudence provides abundant examples of situations where two or more states were held internationally responsible for a single incident.[102]

The second situation giving rise to a plurality of responsibility is where one state participates in the internationally wrongful act of another state. These have also been termed situations of derived responsibility, and are discussed in section 3.3. of this chapter below.

The third situation, to be discussed in the present section, is where two or more states truly act in concert, and where the joint act engages the responsibility of all states contributing to the act. Typically, the existence of multiple state responsibility in situations of concerted action has been addressed in the context of states setting up common organs, such as joint administrations of foreign territories, joint commercial ventures or intergovernmental executive bodies not having the status of international organisations. But apart from common organs, one can also imagine situations in which states engage in joint activity or collaborative conduct of a more ad hoc character, such as in the sea border patrols conducted by vessels with a mixed crew of Spain and North African officials, the carrying out of joint expulsion flights by two or more Member States of the European Union, or the joint management of facilities for external processing of migrants.[103] These latter situations must

---

diminished or reduced by the fact that one or more other states are also responsible for the same act'; Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 124.

101 Ibid; R. Ago, Seventh report on State responsibility, *Yearbook of the ILC 1978*, Vol. II (Part One), p. 53.

102 See eg the cases of *Ilascu a.o. v Moldova and Russia* and *Alzery v Sweden* referred to in the previous section. In *Corfu Channel*, Albania was held responsible for damages caused to United Kingdom vessels by mines in Albanian waters, even though the mines had not been laid by Albania (but, in all probability, by Yugoslavia). In *Celiberti de Caseriego v Uruguay*, the Human Rights Committee held Uruaguay to have violated Article 9 ICCPR on account of its security forces having arbitrarily arrested and detained Mrs. Celiberti and her two children in Porto Alegre, Brazil, while this operation was found to have been carried out 'with the connivance' of the Brazilian police: HRC 29 July 1981, *Celiberti de Caseriego v Uruguay*, no. 56/1979, paras. 9-10. Also see HRC 29 July 1981, *Lopez Burgos v Uruguay*, no. 52/1979, para. 12. And, in the context of a joint procedural duty of states to investigate cross-border human trafficking: ECtHR 7 January 2010, *Rantsev v Cyprus and Russia*, no. 25965/04.

103 In the context of joint conduct of ad hoc nature, the ILC commentary speaks of two or more states which 'combine in carrying out together an internationally wrongful act in circumstances where they may be regarded as acting jointly in respect of the entire operation.

then be distinguished from situations where identical offences are committed in concert by two or more states, for example a joint military invasion into a third state, where each state acts through its own organs and where, consequently, each state is to be held responsible for its own conduct.[104]

3.2.4.2 Attributing joint conduct to a state

Holding states responsible for joint conduct or conduct of a joint organ not having the status of international organisation does not appear to give rise to particular problems under the law on state responsibility. It is not a situation expressly addressed in the ILC Articles, but, according to the International Law Commission, the solution is implicit in them: 'according to the principles on which those articles are based, the conduct of the common organ can only be considered as an act of each of the States whose common organ it is. If that conduct is not in conformity with an international obligation, then two or more States will have concurrently committed separate, although identical, internationally wrongful acts'.[105] This approach is upheld in the present commentary to the ILC Articles[106] and finds confirmation in international case law and arbitration.[107]

Although responsibility for joint activity or acts of common organs is not disputed as such, the determination of responsibility in these situations is not entirely without its difficulties. A first obstacle, which may come to the fore

In that case the injured state can hold each responsible state to account for the wrongful conduct as a whole', Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 124.

104 R. Ago, Seventh report on State responsibility, *Yearbook of the ILC 1978*, Vol. II (Part One), p. 54.

105 Ibid.

106 Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 44, 64, 124.

107 In the *Eurotunnel Arbitration*, concerning the recovery of damages incurred by the Eurotunnel company from the United Kingdom and France governments on account of their alleged failure to prevent clandestine migrants from disrupting the operations of the tunnel beneath the English Channel, the Arbitral Tribunal considered the Intergovernmental Commission created by the UK and France to supervise the operation of the tunnel to be a joint organ of the two states, whose decisions require the assent of both states and where action taken by this Commission in breach of applicable international agreements would engage the responsibility of both state, *Eurotunnel Arbitration*, Partial Award of 30 January 2007, para. 179. In the *Case concerning certain phosphate lands in Nauru*, the ICJ found the trusteeship for Nauru not to have an international legal personality distinct from the states having been designated as the 'Administrative Authority' – i.e. Australia, New Zealand and the United Kingdom – and held that Australia could be sued alone for claims relating to the administration of the territory, even though the responsibility for the administration was shared with two other states. ICJ 26 June 1992, *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections*, ICJ Reports 1992, p. 257-259, esp. paras. 45, 48. Also see the separate opinion of Judge Shahabuddeen, p. 283-284, who endeavors to connect Australia's accountability to existing pronouncements of the International Law Commission on state responsibility for acts of common organs.

in all cases where the establishment of the international responsibility of one state involves the scrutiny of the responsibility of another state, is the *Monetary Gold* principle, which articulates that the adjudication by an international court upon the responsibility of a state not party to the proceedings runs counter to the principle of international law that an international court can only exercise jurisdiction over a state with its consent.[108] The *Monetary Gold* principle is essentially a procedural barrier for obtaining redress before an international court and does not diminish the scope of a state's responsibilities as such.[109]

A second issue which has come to the fore is whether the principle of joint and several liability applies to compensation obligations arising from a determination of responsibility. Again, this is a matter which is primarily relevant for obtaining redress and not one touching upon the preliminary question of a state's international responsibility. Although Article 47 (2) ILC Articles expressly leaves open the question of distributing compensation obligations between the wrongdoing states, it has been argued that the principle of joint and several liability forms part of international law.[110]

Thirdly and most pertinently, it is not entirely clear when organs acting on the behalf of two or more states must be considered as joint organs. If it is accepted that responsibility for acts of common organs is not a matter warranting special attention under the ILC Articles, it would be sound to assume that an organ can be labeled as a common organ only if its acts can be attributed to more than one state in accordance with the existing attribution rules.[111] This would mean that an organ created by two or more states is to be considered a common organ if it can be regarded as a state organ of each of them under, for example, Articles 4 or 5 ILC Articles; or that an existing state organ which is put at the disposal of another state in accordance with the terms of Article 6 ILC Articles, can be considered a common organ if it

---

108 ICJ 25 June 1954, *Monetary Gold Removed from Rome in 1943, Preliminary Questions*, ICJ Reports 1954, p. 32; ICJ 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, p. 392, para. 88; ICJ 13 September 1990, *Land Island and Maritime Frontier Dispute (El Salvador/Honduras)*, ICJ Reports 1990, p. 92, para. 56.

109 In *Nauru*, the ICJ clarified that the *Monetary Gold* principle will only preclude the ICJ from adjudicating upon a claim if the legal interests of a third state form 'the very subject-matter of the decision that is applied for', *Nauru*, para. 54.

110 See esp. J.E. Noyes and B.D. Smith, 'State Responsibility and the Principle of Joint and Several Liability', 13 *Yale Journal of International Law* (1988), p. 225-267; J. Crawford, Third report on State responsibility, 10 July 2000, UN Doc. A/CN.4/507/Add.2, paras. 272 and 276. In the *Corfu Channel* case, Albania was ordered to pay the full extent of the damages suffered by the United Kingdom: ICJ 15 December 1949, *Corfu Channel case (Assessment of the amount of compensation due from the People's Republic of Albania to the United Kingdom of Great Britain and Northern)*, ICJ Reports 1949, p. 244.

111 This appears to be the ILC's approach: see esp. J. Crawford, Third report on State responsibility, 10 July 2000, UN Doc. A/CN.4/507/Add.2, para. 267.

additionally remains to function as an organ of the lending state, for example because it continues to receive instructions from, or continues to operate within the machinery of the sending state.[112] In accordance with the notion that there must always be a connection between the international responsibility of a state and its own sphere of activity, this may well imply that an organ, but the same holds true for other forms of collaborative conduct, can only be labeled as 'joint' when the activity complained of was carried out in accordance with the instructions of all states involved and that all responsible states had it in their power to prevent the alleged misconduct.

That there is a threshold for considering collaborative conduct as joint for establishing the responsibility of multiple states finds support in the inadmissibility decision in the case of *Saddam Hussein v 21 Contracting States to the ECRH*, where the ECtHR was not prepared, without more, to hold the respondent European countries responsible on account of their support for and/or taking part in the coalition which had invaded and occupied Iraq and in the course of which Saddam Hussein had been captured and allegedly been maltreated. Even though one respondent state, the United Kingdom, was accepted to have played a major part in the invasion and occupation of Iraq, the ECtHR considered that the responsibility of any of the respondent states could not be invoked 'on the sole basis that those States allegedly formed part (at varying unspecified levels) of a coalition with the US, when the impugned actions were carried out by the US, when security in the zone in which those actions took place was assigned to the US and when the overall command of the coalition was vested in the US.'[113] The Court found it of particular importance that the applicant had not indicated which respondent state (other than the US) had any – and if so, what – influence or involvement in his arrest and detention.

In the early case of *Hess v United Kingdom* (1975), the legal and factual embedding of the common organ was more precisely circumscribed. The complaint in that case concerned the long and secluded detention of Rudolf Hess in the Allied military prison in Berlin-Spandau. The supreme authority over the prison was vested in the four allied powers, with the executive authority consisting of four governors acting by unanimous decisions. Administration and supervision was at all times quadripartite, and instructions of the governors were carried out by prison staff appointed by the governors. The prison was guarded in monthly turns by military personnel of the four allied powers. The complaint was lodged against the United Kingdom alone.

---

112 In this vein also S. Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq', in: P. Shiner and A. Williams, *The Iraq War and International Law*, Oxford: Hart (2008), p. 203-204, who argues that although it is not necessary for the organ to act on the joint instructions of both states, each of the states must retain (at least some) control over the action of the organ.

113 ECtHR 14 March 2006, *Saddam Hussein v Albania and twenty other states*, no. 23276/04.

The European Commission of Human Rights first considered the United Kingdom to act as 'a partner in the joint responsibility which it shares with the other three powers'.[114] From this wording, one could be inclined to conclude that *Hess* is a schoolbook example of a case where conduct of a common organ gives rise to the responsibility of each of the participating states. The European Commission of Human Rights, nonetheless, found the complaint inadmissible, because it was 'of the opinion that the joint authority cannot be divided into four separate jurisdictions and that therefore the United Kingdom's participation in the exercise of the joint authority and consequently in the administration and supervision of Spandau Prison is not a matter "within the jurisdiction" of the United Kingdom, within the meaning of Art. 1 of the Convention.'[115]

This is a prominent yet unsatisfactory example of how the notion of jurisdiction under human rights law may interrupt the ordinary application of the law on state responsibility. Under the reasoning of the European Commission of Human Rights, the fact that conduct of a common organ, which may be in violation of a person's human rights, can be attributed to a state is insufficient for holding a state responsible. It is additionally required that the injured person finds himself within the jurisdiction of the state acting through the common organ, and this is, according to the Commission, simply not possible, because a joint authority cannot be divided into separate jurisdictions.

It is rather unfortunate that the Commission does not explain why the activities of a joint authority, which presumably exercises joint jurisdiction, cannot bring a person under the separate jurisdiction of each the states involved – rather than under none of them. From the perspective of the international law meaning of the notion of jurisdiction, the United Kingdom was perfectly within its right – as were the other allied powers – to block any decision concerning the detention regime which would raise issues under the ECRH. Possibly, the European Commission proceeded from the assumption that the requirement of 'jurisdiction' is indissociable and cannot be shared between two or more states, but this reasoning does not imperatively follow from the text of Article 1 ECRH (which merely requires a person to fall under a state's jurisdiction – not excluding the possibility that a person may fall under the concurrent jurisdiction of another state) and is difficult to reconcile with later pronouncements of the ECtHR in, amongst other cases, *Ilaşçu* (where the detainees were considered to fall both within the jurisdiction of Russia and Moldova) and *Treska* (where it was not excluded that both Italy and Albania could incur obligations towards the expropriated applicants).[116]

Of course, the case of *Hess* does point to a problem which is likely to come to the fore in all situations where states act through a common organ: due

114 EComHR 28 May 1975, *Hess v United Kingdom*, no. 6231/73.
115 Ibid.
116 See section 3.2.2.4. above.

to the very nature of the organ, a state does not have it in its exclusive power, but depends on the willingness of other states, to bring about a change in the activities of the organ. Should the obligation at issue have been to immediately release Rudolf Hess, it may well be that the United Kingdom had neither the factual nor legal power to comply with such an obligation. But this argument would, in line with our observations on positive obligations in chapter 2.5.3. and section 3.2.2.4. above, seem to require a more in depth assessment of the nature of the obligation at issue and the legal and factual capabilities the United Kingdom had at its disposal to undertake particular action. In the case of *Hess*, the primary request of the applicant, his wife Ilse Hess, had been for the Commission 'to press the United Kingdom to step up its efforts to secure renegotiation of the Four Power Agreement in order to obtain the release' of her husband. Although the Commission's competence was confined to reviewing whether the ECRH had been complied with and did not extend to asserting 'pressure' on Contracting States, a reasoning under the doctrine of positive obligations is well sustainable that because the United Kingdom was legally and factually capable of exerting influence, it should therefore had taken steps to prevent possible violations under Articles 3 and 8 ECRH from occurring.

3.3 Derived responsibility for aiding and assisting another state

3.3.1 Derived responsibility

The previous sections dealt with the international responsibility of states for conduct which is attributable to them and which constitutes an international wrong. As such, these rules and principles are well apt to be applied to situations of collaborative conduct of states, by way of holding each state independently responsible for conduct attributable to it, regardless of whether another state is also to be held responsible. There may however also be situations, and these are termed by the ILC as 'exceptions to the principle of independent responsibility',[117] where a state's international responsibility derives from, or depends upon, the conduct of another state. These situations, interchangeably denoted as situations of indirect,[118] derived,[119] dependent[120] or accessory[121] responsibility, have in common that a state has

117 Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 65.

118 R. Ago, Seventh report on State responsibility, *Yearbook of the ILC 1978*, Vol. II (Part One), p. 52; J.D. Fry, 'Coercion, Causation and the Fictional Elements of Indirect State Responsibility', 40 *Vanderbilt Journal of Transnational Law* (2007), p. 615.

119 Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 65; G. Nolte and H.P. Aust, 'Equivocal Helpers – Complicit States, Mixed Messages and International Law', 58 *ICLQ* (2009), p. 5.

120 Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 64.

not itself carried out the breach of international law, but where it has been involved, in one way or the other, in international wrongful conduct of another state and where, on account of that involvement, the state should separately assume responsibility. Chapter IV of the ILC Articles on State Responsibility deals with situations of derived responsibility and covers: (i) the situation where one state assists another in the commission of an international wrongful act (Article 16 ILC); (ii) the situation where a state directs and controls another state in the commission of an international wrongful act (Article 17); and (iii) the situation where one state coerces another to commit an international wrongful act (Article 18). One particular question raised by the incorporation of these categories of derived responsibility in the ILC Articles is how they correspond to the doctrine of positive obligations under human rights law, which may also entail a duty to undertake preventive or protective action in respect of human rights violations committed by another state.

Because Article 17 and 18 foresee in the rather atypical situations of imbalanced state relationships where one state dominates, threatens, or uses force against another state, they are not of immediate relevance to this study.[122] Far more pertinent is the first situation, that of 'aid and assistance', as many forms of cooperation in controlling migration embody the provision of all kinds of assistance by states at the receiving end of migration flows to countries of origin or countries of transit. This assistance can be financial, can take the form of the supply of surveillance and coast watching equipment, can consist of the training of border guards or of general programmes of capacity building. The argument has been made, most notably, that through assisting third states in closing the border, European states might facilitate the violation of refugee and other migrants' rights and therefore be complicit in the violation of those rights.[123] This section explores the contents of the international law concept of 'aid and assistance', or 'complicity',[124] and tries to establish, in particular, under what circumstances states can be held responsible for providing aid

121 M. Brehm, 'The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law', 12 *Journal of Conflict & Security Law* (2008), p. 384.

122 In respect of Article 17 ILC Articles ('direction and control'), the ILC Commentary mentions that the term 'control' refers to domination over the commission of the wrongful act and not simply the exercise of oversight and that similarly, the word 'directs' does not encompass incitement or suggestion but 'actual direction of an operative kind', Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 69.

123 Eg Human Rights Watch, 'European Union Managing Migration Means Potential EU Complicity in Neighboring States' Abuse of Migrants and Refugees', New York, October 2006; A. Fischer-Lescano, T. Löhr and T. Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law', 21 *IJRL* (2009), p. 280.

124 Originally, the notion of complicity featured in the work of the ILC, but was eventually dropped in favor of the more factual connotation of 'aid and assistance', in order to avoid inappropriate analogies with the term complicity in domestic law. Report of the International Law Commission on the work of its thirtieth session, *Yearbook of the ILC* 1978, Vol. II (Part Two), p. 102.

which is, or may be, used to commit human rights violations. It is submitted that the notion of aid and assistance is scarcely developed within international law and that, specifically within human rights law, questions pertaining to the provision of aid and international cooperation are more typically addressed under the doctrine of positive obligations.

3.3.2 Aid and assistance

Unfortunately, there is surprisingly little international jurisprudence on the legal meaning and contours of the notion of aid and assistance in international law.[125] Scholarly writings are more readily available, but these neither display a firm consensus on the status of the concept in international law, nor on its precise contents.[126] We may nonetheless depart from the understanding that aid and assistance has at least some basis in international law. In his Seventh report on state responsibility, rapporteur Ago saw the existence of the norm confirmed by various examples, such as a state placing its territory at the disposal of another state to make it possible for that state to commit an act of aggression against a third state; the provision of means for the closure of an international waterway; the facilitation of the abduction of persons on foreign soil; and assistance in the destruction of property belonging to nationals of a third country.[127] Other examples mentioned are Security Council resolutions calling upon states not to render aid to activities of regimes previously held to be in violation of international law, such as the call upon states not to render assistance to the regime in Southern Rhodesia – which was labeled as a racist and therefore illegal regime – and the appeal on states not to provide Israel with 'assistance to be used specifically in connection with settlements in the occupied territories'.[128]

On the basis hereof, and by 'evoking the intention of progressive development of international law', the ILC sought to formulate a general rule on the

125 The most explicit pronouncement on the notion of 'aid and assistance' was made by the ICJ in the *Genocide Case*, paras. 419-424.

126 For comprehensive exercises, see especially J. Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility', 57 *British Yearbook of International Law* (1986), p. 77-131; B. Graefrath, 'Complicity in the Law of International State Responsibility', 29 *Revue Belge de Droit International* (1996), p. 370-380; K. Nahapetian, 'Confronting State Complicity in International Law', 7 *UCLA Journal of International Law & Foreign Affairs* (2002), p. 99-127; V. Lowe, 'Responsibility for the conduct of other states', 101 *Japanese Journal of International Law* (2002), p. 1-15; G. Nolte and H.P. Aust, 'Equivocal Helpers – Complicit States, Mixed Messages and International Law', 58 *ICLQ* (2009), p. 1-30.

127 R. Ago, Seventh report on State responsibility, *Yearbook of the ILC 1978*, Vol. II (Part One), p. 58.

128 UN Security Council Resolution 232, 16 December 1966, UN Doc. S/INF/21/Rev. 1, para. 5; UN Security Council Resolution 465, 1 March 1980, UN Doc. S/INF/36, para. 7. On these examples and others, see extensively Quigley (1986), p. 83-95.

responsibility of states for their participation in wrongful acts of other states.[129] This was despite the suggestion of some members of the ILC to limit the application of the concept to a particular set of international obligations, such as those relating to the prohibition of the use of force.[130] Special rapporteur Crawford, when reviewing the provisionally adopted draft articles in 1999, admitted that the examples on which the ILC had earlier based a general norm of aiding and assistance were rather narrow and questioned whether the norm actually had a place in the draft articles.[131] Also in view of the explicit recognition of the prohibition to act in complicity with regard to specific prohibited conduct such as genocide or the use of force, the question remains valid to pose whether the existence or not of a norm of non-complicity is a matter belonging to the rules on state responsibility or rather to the field of a state's primary obligations.[132] Very much alike to the scope of a state's positive obligations, there is merit to the argument that not only the existence of a norm of non-complicity, but also the criteria for its application, may vary from one substantive obligation to another. The argument could further be advanced that instances of derived responsibility are essentially species of the more general duty of due diligence, under which for example, a prohibition to facilitate or render aid for the commission of a wrongful act forms part of wider preventive or protective duties under a particular human rights provision.

In view of the above, it does not come as a surprise that the international customary law status of 'aid and assistance' is also disputed. Contrary to the attribution rules laid down in chapter II of the ILC's Articles, which are widely pronounced as embodying rules of customary international law, opinions on the status of a general rule of complicity in international law remain divided, although the ILC and a majority of authors have argued in favor of such a status.[133] And the ICJ, albeit cursory and without further explanation, noted in the *Genocide* case that the notion of 'aid and assistance' is a category belonging to the customary rules constituting the law of state responsibility.[134] This is not the place to review these pronouncements. But it is sound to approach the international law concept of 'aid and assistance' with caution, especially

129 R. Ago, Seventh report on State responsibility, *Yearbook of the ILC 1978*, Vol. II (Part One), p. 59; Report of the International Law Commission on the work of its thirtieth session, *Yearbook of the ILC* 1978, Vol. II (Part Two), p. 103.

130 See esp. the discussions in: Summary records of the thirtieth session, *Yearbook of the ILC 1978*, Vol. I, p. 233, 240 (Riphagen, Ago); Report of the International Law Commission on the work of its thirtieth session, *Yearbook of the ILC* 1978, Vol. II (Part Two), p. 104.

131 J. Crawford, Second report on State responsibility, *Yearbook of the ILC 1999*, Vol. II (Part One), p. 49 (para. 177).

132 Ibid, p. 49, 51 (paras. 175, 187). Also see Graefrath (1996), p. 372.

133 For discussions, see: Quigley (1986), p. 81-107; Nahapetian (2002), p. 101-104; Nolte and Aust (2009), p. 7-10; Graefrath (1996), p. 378

134 *Genocide Case*, para. 419.

in so far as it aspires to embody a rule applicable to all international obligations. The ILC formulated the rule on aid assistance as follows:

> 'A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
> (*a*) that State does so with knowledge of the circumstances of the internationally wrongful act; and
> (*b*) the act would be internationally wrongful if committed by that State.'

The scope of Article 16 is limited in several ways. First, assistance or aid must be given which enables another state, or which makes it materially easier for another state, to commit an international offence.[135] According to the ILC Commentary, 'there is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to the act.'[136] The notion of aid and assistance itself is not defined and may therefore be very broadly interpreted. The ILC has referred to the examples of economic aid, the use of a state's territory or military bases, overflight, military procurement, the training of personnel and the provision of confidential information.[137] Further, the provision of aid of a legal or political nature, such as the conclusion of treaties which may facilitate the commission by the other party of a wrongful act, may come under the ambit of aid or assistance.[138] It is said that precisely because virtually all conceivable forms of support and interstate cooperation can be brought under Article 16 ILC Articles, the other conditions of Article 16 warrant strict application.[139]

A second condition is that the conduct complained of must be equally opposable to the acting and the assisting state, i.e. must constitute a breach of an international obligation of both states. In view of their universal application, this condition will ordinarily not pose problems under human rights treaties. Neither however, should the regional nature of other human rights treaties such as the ECRH be automatically taken to obstruct application of the notion of aid and assistance in respect of wrongful conduct carried out by a non-Contracting Party: Article 16 ILC does not require the act to be opposable to both states under the *very same* international obligation – it is merely

135 R. Ago, Seventh report on State responsibility, *Yearbook of the ILC 1978*, Vol. II (Part One), p. 58 (at para. 72).
136 Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 66 (at para. 5). Graefrath speaks of aid which must be 'substantial', Graefrath (1996), p. 373.
137 J. Crawford, Second report on State responsibility, *Yearbook of the ILC 1999*, Vol. II (Part One), p. 50 (at n. 349).
138 Report of the International Law Commission on the work of its thirtieth session, *Yearbook of the ILC* 1978, Vol. II (Part Two), p. 102.
139 Graefrath (1996), p. 374. It has been argued, moreover, that there should be a de minimis threshold for prohibited aid or assistance: Nolte and Aust (2009), p. 10-13.

required that the international wrongful conduct would also be wrongful if committed by the assisting state itself.[140]

The most troublesome and debated aspect of the concept of complicity as it has been laid down in Article 16 ILC is the requirement that the state has provided assistance 'with knowledge of the circumstances of the international wrongful act'. In itself, this could simply be understood as requiring that the assisting state is aware that the assistance will indeed facilitate an international wrongful act. But in the Commentary to the Articles, and throughout its work on the topic, the ILC has insisted that Article 16 ILC not only imposes the requirement of *knowledge*, but also that of *intent*: 'the aid and assistance must be given with a view to facilitating the commission of the wrongful act'.[141] And: 'A State is not responsible (…) unless the relevant State organ intended to facilitate the occurrence of the wrongful conduct.'[142] It is not entirely clear whether the ILC considers the element of intent to simply be demonstrated by proof that a state had knowledge of the circumstances or that it perceives intent as a separate condition referring to the motives which inspire the actions of assisting state, i.e. requiring that it is established that the assisting state had the express purpose to facilitate the commission of a breach of international law.[143] The ICJ, in addressing Article 16 ILC in the *Genocide* case, refused to pronounce itself on the question whether Article 16 ILC encompasses an intent requirement by noting that 'the least' that is required is that an organ or person acts knowingly of the crime to be committed.[144]

---

140 This corresponds to the rationale of Article 16 that a state should not be allowed to do by another what it cannot do by itself. Also see Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 66 (at para. 6).

141 Ibid, at para. 5. The commentary to former Article 27 of the Draft Articles stated it as follows: 'As the article states, the aid or assistance in question must be rendered "for the commission of an internationally wrongful act", i.e. with the specific object of facilitating the commission of the principal internationally wrongful act in question. Accordingly, it is not sufficient that aid or assistance provided without such intention could be used by the recipient State for unlawful purposes, or that the State providing aid or assistance should be aware of the eventual possibility of such use. The aid or assistance must in fact be rendered with a view to its use in committing the principal internationally wrongful act.' Report of the International Law Commission on the work of its thirtieth session, *Yearbook of the ILC* 1978, Vol. II (Part Two), p. 104 (at para. 18).

142 Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 66 (at para. 5).

143 In his Seventh report on state responsibility, Ago appears to equate the requirements of knowledge and intent: 'The very idea of "complicity" in the internationally wrongful act of another necessarily presupposes an intent to collaborate in the commission of an act of this kind, and hence, in the cases considered, knowledge of the specific purpose for which the State receiving certain supplies intends to use them.' R. Ago, Seventh report on State responsibility, *Yearbook of the ILC 1978*, Vol. II (Part One), p. 58 (at para. 72). Notably, Crawford, in a footnote in his Second report, also reduces the requirement of intent to proof of knowledge: 'The proposal in the text retains the element of intent, *which can be demonstrated by proof of rendering aid or assistance with knowledge of the circumstances*'. J. Crawford, Second report on State responsibility, *Yearbook of the ILC 1999*, Vol. II (Part One), p. 51 (at

The insistence of the ILC on the requirement of intent may be regarded as surprising, not only because any reference to that requirement is absent in the text of Article 16 ILC, but also because the ILC has conscientiously avoided throughout its Articles on State Responsibility to refer to any element of fault or culpability, by noting that such requirements form part of the substantive – or primary – obligations of states and that the Articles should not lay down any presumption as regards subjective or objective standards for breaches of an obligation.[145]

On the one hand, the condition of intent under Article 16 ILC has been forcefully opposed by a variety of writers for it is seen to give rise to all sorts of problems which risk making the whole concept of complicity unworkable. One is that it is inherently problematic to conceive of the state as an actor capable of making conscious decisions and that it is virtually impossible to determine the state of mind of a state.[146] Another is that a requirement of intent could allow states to circumvent responsibility by simply omitting to make any public statements declaring their intent.[147] And thirdly, a requirement of intent would seriously narrow the scope of the norm, because states will seldom act out of the specific motivation or desire to commit international wrongs, less still to violate human rights, but are more likely prepared to incur the occasional breach of certain obligations while being in the pursuit of some perceivably higher aim.[148] These arguments support an understanding of the intent requirement that it should not refer to the mental motives underlying the assistance but rather to the threshold that it is established that the assisting state knows about the wrongful manner in which the assistance will be used.

On the other hand, the ILC's emphasis on the intent requirement has been explained from the view that there must be a certain threshold for triggering responsibility in accordance with Article 16 ILC, because otherwise all sorts of international cooperation which are in themselves generally beneficial, may attract the assisting state's responsibility.[149] A strict literal reading of Article 16 ILC would not obstruct the conclusion for example, that a state is to be held responsible for development aid it provides to another state in the knowledge that a small portion of that aid may well be used contrary to human rights.

---

n. 362), emphasis added.

144 *Genocide Case*, para. 421.

145 Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 34-35 (with further references). Also see R. Higgins, *Problems and Process: International Law and How We Use it*, Oxford University Press (1994), p. 160-161.

146 Quigley (1986), p. 111. This corresponds to the notion that international law is not normally concerned with the specific motivations of one or more State officials, but rather with the objective sufficiency or insufficiency of State action.

147 Graefrath (1996), p 375; Nahapetian (2002), p. 126.

148 A. Boivin, 'Complicity and beyond: International law and the transfer of small arms and light weapons', 87 *International Review of the Red Cross* (2005), p. 471; Quigley (1986), p. 111; Nahapetian (2002), p. 126.

149 Nolte and Aust (2009), p. 15; Graefrath (1996), p. 376.

Because practically every form of contact with another state which is engaged in human rights violations may be labeled as assistance, the category of situations to be brought under Article 16 ILC could thus become practically infinite. It is probably for this reason that the ILC has underlined, in discussing the 'knowledge' requirement, that there must not only be a 'clear and unequivocal link' between the aid or assistance and the subsequent wrongful conduct,[150] but also that it is not sufficient that the state is, or ought to be, aware of the 'eventual possibility' of such a use.[151] Rather, it is required that it is *established* that the assisting state *knows* that its aid *will* be put to wrongful use.[152] Others have also stressed that, in view of the broad concept of assistance and the great variety of situations in which states cooperate with one another, the link between the aid and the wrongful activity should not be too remote.[153] Adherence to a standard of some obvious link between the aid and assistance is also in conformity with the examples relied upon by the ILC in the drafting stages.[154] In these examples, the assistance was used primarily or specifically to commit the act in question and it was a certainty rather than a probability that the assistance rendered would be used for committing the act.

Having – somewhat – clarified the various elements of Article 16 ILC, it is now time to turn more specifically to the issue of aid or assistance in relation to obligations stemming from human rights treaties. In this connection, the ILC has repeatedly affirmed that the provision on aid and assistance also applies to human rights treaties.[155] A profound problem remains nonetheless that the concept has scarcely been acknowledged by human rights treaty monitoring bodies. To be sure, the concept of complicity may be said to have found recognition in human rights law, but under other terms than those referred to in Article 16 ILC. For example, in the course of the United States program of extraordinary renditions and secret detentions following the September 11 attacks, several European states were found to be 'complicit'

150 J. Crawford, Second report on State responsibility, *Yearbook of the ILC 1999*, Vol. II (Part One), p. 50 (at para. 180); Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 66 (at para. 5).

151 Report of the International Law Commission on the work of its thirtieth session, *Yearbook of the ILC* 1978, Vol. II (Part Two), p. 104 (at para. 18). Also see Nolte and Aust (2009), p. 10-12, 14, who speak of a requirement of 'certainty'.

152 Ibid. Also see *Genocide Case*, para. 432: '(…) an accomplice must have given support in perpetrating the genocide *with full knowledge of the facts*' and that it is not sufficient that 'the State has been aware, or should normally have been aware, of the serious danger that acts (…) would be committed', emphasis added.

153 Nolte and Aust (2009), p. 10-12; Boivin (2005) p. 471; Nahapetian (2002), p. 106. Graefrath (1996), p. 374.

154 See n. 127 and 128 *supra*.

155 Commentary to the ILC Articles, *Yearbook of the ILC 2001*, Vol. II (Part Two), p. 67 (at para. 9); Report of the International Law Commission on the work of its thirtieth session, *Yearbook of the ILC* 1978, Vol. II (Part Two), p. 105 (at para. 22); Report of the Commission to the General Assembly on the work of its fifty-first session, *Yearbook of the ILC 1999*, Vol. II (Part Two), p. 71 (at para. 262).

in violations of human rights, in particular on account of the permitting of the unlawful transportation of detainees through their territory; and by allowing the secret detention of persons on their territory.[156] But these issues were not – and need not be – addressed under the terms of Article 16 ILC, but typically dealt with under well-developed doctrines under the various substantive human rights obligations, such as the obligation of states not to expose persons within their territory to ill-treatment meted out in the territory of another state; or the obligation to protect persons within their territory from harm emanating from a third party.[157] It transpires from these examples and others that, at least in so far as a victim of human rights violations is present on the territory of the assisting state, the doctrine of positive obligations is an adequate and sufficient tool for arriving at the state's responsibility.

It may however be more problematic to make operational duties of due diligence in respect of instances of facilitating wrongful conduct which is carried out by and in the territory of another state. In those situations, the notion that the state has special protective duties towards persons present in its territory is absent and it may consequently be more difficult to bring a victim under the scope of a state's positive obligations. One of the few examples of a situation involving the rendering of aid to another state having adverse human rights consequences in the other state brought before a human rights body is the case of *Tugar v Italy*, concerning an Iraqi mine clearer by profession, who stepped on a mine which had been laid by Iraq and was illegally sold to the Iraqi government by a private Italian company.[158] Relying on Article 2 ECRH, Tugar submitted that the Italian government had knowingly allowed the supply of anti-personnel mines to Iraq which were likely to be used indiscriminately. The European Commission of Human Rights found the complaint inadmissible, because there was 'no immediate relationship between the mere supply, even if not properly regulated, of weapons and the possible indiscriminate use thereof in a third country, the latter's action constituting the direct and decisive cause of the accident which the applicant suffered'. It followed that the 'adverse consequences of the failure of Italy to regulate arms transfers to Iraq were too remote to attract the Italian responsibility'.

Although Tugar had phrased his complaint in terms resembling the international law concept of complicity, the European Commission understood

156 Parliamentary Assembly of the Council of Europe, Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states (Report), Doc. 10957, 12 June 2006; European Parliament, Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, P6_TA(2006)0316, 6 July 2006; House of Lords and House of Commons Joint Committee on Human Rights, Allegations of UK Complicity in Torture (Report), HL Paper 152, HC 230, 4 August 2009.

157 Also see HRC 10 November 2006, *Alzery v Sweden*, no. 1416/2005.

158 EComHR 18 October 1995, *Rasheed Haje Tugar v Italy*, no. 22869/93.

the complaint as one relating to a lack of protection of his right to life and Italy's positive obligation to appropriately regulate the arms trade. Should the *Tugar* case have been assessed in the terms of Article 16 ILC Articles, possibly relevant questions would have been whether the failure to regulate the arms trade contributed to the commission of the wrongful act, whether Italy could be said to have intended to assist Iraq or whether Italy was aware of the circumstances under which the mines would be put to use. The Commission applied a more straightforward test in simply noting that there was no 'immediate relationship' between the supply of weapons and their indiscriminate use and that the consequences were therefore too remote to attract Italy's responsibility. In terms of the notion of aid and assistance under international law, this reasoning does raise questions however, because the concept of aid and assistance is premised on the very idea that the responsibility of the assisting state derives from another state being the 'direct and decisive cause' of a violation. The Commission's reasoning may hence render the whole concept of aid and assistance virtually meaningless under human rights law, at least in those situations where the victim has never been inside the territory of the assisting state.

To summarise, it appears that under human rights law a distinction must be made between situations in which the victim of a violation of human rights is inside or outside the territory of the assisting state. In situations where the victim is present inside the assisting state's territory, it will ordinarily not be necessary to rely on the international law concept of aid or assistance to attract the assisting state's responsibility, because the responsibility directly hinges upon a state having acted in violation of its substantive duty to protect individuals within its territory. In situations where the victim is outside the assisting state's territory, this protective duty is more difficult to establish, implying that the notion of aid and assistance as laid down in the ILC Articles could be instrumental in fleshing out the nature of the relationship between the act of facilitation and the eventual wrongful act. There is however scarce case law confirming this proposition.

Further, even within the terms of Article 16 ILC Articles, the notion of aid and assistance would probably be too small a basis for holding EU Member States internationally responsible for forms of assistance to third countries in the course of migration control which involve, for example, the financing of reception schemes or border controls or the training of foreign officials. The requirement of a clear and unequivocal link between the facilitating act and the subsequent wrongful conduct and in particular the requirement that the assisting state knows that the aid will be put to wrongful use renders it problematic to consider general programmes of aid as giving rise to the responsibility of the assisting state. Although assistance in the form of the provision of patrol boats or money to third states engaged in *gross* or *systemic* violations of refugee and migrant rights could be construed as giving rise to the facilitating state's responsibility (under the reasoning that the latter state knew or

ought to have known that the aid would be put to unlawful use), it is less likely that assistance facilitating only *occasional* wrongdoings can also be brought under the ambit of Article 16 ILC Articles. Assuming that it must yet be proven that third states with whom European countries cooperate are engaged in systematic violations of migrant rights, it is henceforth problematic to label assistance rendered in the form of money, technical equipment or training as unlawful.

3.4 FINAL REMARKS

This chapter has shown that international law provides multiple mechanisms for allocating international responsibilities to states in situations where international wrongful conduct involves a plurality of actors. The chapter has underlined that the rules on attribution and derived responsibility laid down in the ILC's Articles on State Responsibility should not be assessed in isolation, but in conjunction with obligations inherent in the state's substantive, or primary, international obligations, especially those stemming from the doctrine of positive obligations. It follows that, in the determination of the responsibility of the state for wrongful conduct involving multiple actors, three separate but conjunctive questions may come to the fore: whether the act is actually committed by an agent of the state or should on some other account be attributed to the state; whether the state should be held separately responsible for wrongful activity which cannot be attributed to it but to which it has decisively or materially contributed; or whether the state, on account of its involvement in the circumstances giving rise to the wrongful conduct, has acted in breach of its protective or preventive duties inherent to its substantive international obligations.

A question which remains to be addressed is how the various rules for connecting a state's activity to internationally wrongful conduct as discussed in this chapter relate to the conclusions of the previous chapter, which described the personal scope of a state's human rights obligations in an extraterritorial context. It was said in the introduction to this chapter that the law on jurisdiction must be distinguished from the law on state responsibility. As Higgins has postulated: the law of jurisdiction is about *entitlements to act*, the law on state responsibility is about *obligations incurred when a state does act*'.[159] Higgins' postulation obviously refers to jurisdiction in its ordinary meaning under public international law. From that understanding, the relationship between the notions of jurisdiction and state responsibility does not appear to give rise to particular problems: a state may not be entitled to act, but when it does act, it is accountable for the consequences.

159 R. Higgins, *Problems & Process. International Law and How We Use it*, Oxford: Clarendon Press (1994) 146, emphasis in original.

But it was concluded in the previous chapter of this book that, under human rights law, the notion of jurisdiction has primarily been construed as implying a criterion of factual control by the state over the affected individual. As is also evidenced by case law discussed in this chapter, the construction of 'jurisdiction' as a factual criterion has tended to complicate the relationship between the delimitation of the personal scope of a state's human rights obligations and the law on state responsibility.

This is so because, firstly, in human rights law the term 'jurisdiction' gives expression to the link which must exist between the state and the individual and hence tends to leap over the various attribution rules which connect the state to particular activity. Because a 'jurisdictional link' between the state and the individual will normally depend on a state having engaged in certain conduct affecting the individual, it can well be that the concept of attribution is a prerequisite for the establishment of this jurisdictional link: in extraterritorial situations persons will normally only be brought under the jurisdiction of a state if they are sufficiently affected by an act of that state (or brought under the control of that state) – and that act (or assertion of control) has to be attributable to that state in the first place.[160]

Secondly and more fundamentally, because the term jurisdiction in human rights law deals with the wider link between the state and the individual, it may also replace or even defeat the rules associated with the allocation of state responsibility. It was described in this chapter that the regime on state responsibility has developed specific rules for attributing, for example, conduct of joint organs to a state and for holding states responsible for aid and assistance which is used by another state in violation of international law. These rules aim to ensure that states do not divest themselves of responsibility in situations where their involvement with a violation of an international norm may be indirect but nonetheless of such a decisive or materially important nature that it is appropriate to hold the state responsible. Important rationales behind these rules are further that a state should always be held responsible for the consequences of its own sphere of activity – also when that activity is linked in a less direct manner to wrongful conduct – and that a state should not be allowed to do through another actor what it cannot do by itself. But the notion of jurisdiction under human rights law, and especially a rather

160 The case of *Stocké* may serve to illustrate this point. In that case, the European Commission of Human Rights, in respect of the conduct of a private police informer returning against his will a person present in France to Germany, developed the following general principle: '(…) authorized agents of a State not only remain under its jurisdiction when abroad, but bring other persons "within the jurisdiction" of that State to the extent that they exercise authority over such persons'. Thus, only if it could first be established that the police informer was an agent of the state, did the question of 'jurisdiction' arise. It follows that attribution is not only a requirement for establishing state responsibility, it *may* also be a requirement for establishing 'jurisdiction'. EComHR 12 October 1989, *Stocké v Germany* (Report), no. 11755/85, para. 166.

narrow outlook on that notion, may obstruct this application of the law on state responsibility. If the proposition is adhered to that the condition of 'jurisdiction' necessarily requires that the state is directly involved in activity affecting an individual, or that the state's activity directly affects an individual (or simply that the individual is under the state's control), some of the rules on state responsibility, but also the application of the doctrine of positive obligations, may become simply inapt to be applied to extraterritorial human rights violations, because these rules see precisely to circumstances where there may only be an indirect link between the individual and the acting state. It is therefore important to recall the conclusion of the previous chapter that more recent case law of the ECtHR and ICJ on positive obligations in an extraterritorial setting appears to proceed from a more generous understanding of the jurisdiction requirement, which was not seen to obstruct a reasoning under which a state can still incur a duty to ensure and protect a person's human rights even in the absence of effective factual control over an individual. This outlook on the jurisdiction requirement leaves room for accommodating the often intricate forms of international cooperation and assertions of state influence over other international actors, to which not only the doctrine of positive obligations, but also the law on state responsibility, have endeavored to provide appropriate legal solutions.

In chapters 6 and 7 of this study, it will be shown that the various mechanisms for allocating international responsibility as discussed in the present chapter provide useful guidance for delimiting the responsibilities of European states when they engage in external migration controls in conjunction with other actors.

4 Extraterritorial asylum under international law

4.1 Outline of the chapter

Traditionally, before the advent of human rights law, legal issues arising from extraterritorial asylum were predominantly addressed in the context of 'diplomatic asylum', a term which refers to asylum in embassies or other premises of a state located in the territory of another state.[1] Legal discourse on diplomatic asylum chiefly focused on the potential friction arising out of grants of extraterritorial asylum between the state granting asylum and the territorial state. Because extraterritorial asylum may constitute an affront to the territorial sovereignty of the other state, it was seen to give rise to questions of legitimacy under international law.

Both the maturation of human rights law and current policies of relocating migration management warrant a legal restatement of the concept of extraterritorial asylum. Firstly, the various manifestations of pre-border migration management question the extent to which existing discourse on diplomatic asylum can be extrapolated to a more general theory on the legality of extraterritorial asylum. Secondly, the present-day importance of human rights, including the acceptance that human rights obligations may bind a state when it is active in a foreign territory, require a determination of whether there can be circumstances under which the petitioned state is under a human rights obligation, vis-à-vis an individual, to grant protection and how such an obligation can be accommodated with possible concurrent and conflicting obligations the petitioned state may have vis-à-vis the territorial state. In extraterritorial situations, the scope of these protection duties is informed not only by the duty of *non-refoulement*, but also involves the preliminary issue of whether and under what circumstances the asylum-seeker should be granted the right to physically bring himself within the territorial jurisdiction of the desired state, for example by allowing him to present himself at the border of that state. This is often referred to as the right to seek asylum, understood as the right to relieve oneself from the authority of one country in order to be able to request territorial asylum with the authorities of another.

---

1 F. Morgenstern, ''Extra-Territorial' Asylum', 25 *BYIL* (1948), p. 236-261; F. Morgenstern, 'Diplomatic Asylum', 67 *The Law Quarterly Review* (1951), p. 362-382; A. Grahl-Madsen, *The Status of Refugees in International Law* (Vol. II), Leiden: Sijthoff (1972), p. 45-56; S.P. Sinha, *Asylum and International Law*, The Hague: Martinus Nijhoff (1971), p. 203-271.

The chapter aims at reconceptualising the international law notion of extraterritorial asylum by exploring the applicability and interoperability of the rights and obligations which regulate the triangular relationship between the individual requesting protection, the territorial (or host) state and the petitioned non-territorial (or sending) state. The relevant rights are subdivided under the headers of 'the right to grant asylum' (section 4.2), 'the right to obtain asylum' (section 4.3) and 'the right to seek asylum' (section 4.4). The analysis undertaken in this chapter constitutes the international framework defining the right of extraterritorial asylum within which specific policies of external migration control, to be discussed in the following chapters, must be situated.

The right to grant asylum, explored in section 4.2., is understood as the right of the non-territorial state, vis-à-vis the territorial state, to confer asylum upon an individual situated in the latter state. Although the relationship between the state granting asylum and the state whose national is granted asylum is currently scarcely addressed in international refugee law discourse – and for a large part considered immaterial as a consequence of the principle of territorial sovereignty coming to prevail[2] – it remains of primordial importance in extraterritorial situations, precisely because those situations are characterised by the impossibility of the state addressed by the asylum-seeker to invoke the shield of territorial sovereignty. Section 4.2. explores the extent to which international law has recognised the institution of diplomatic and other forms of extraterritorial asylum, how the institution of extraterritorial asylum involves a reconciliation of potential conflicting claims of humanitarianism and territorial sovereignty, and how the law on diplomatic and consular relations may influence the legality and/or feasibility of grants of diplomatic asylum. It should be noted here that this section deals only with grants of asylum *within the territory of another state*. The other typical situation of extraterritorial asylum, namely at sea, is addressed in chapter 6, which discusses questions of competing state competences in the specific context of the Law of the Sea.

Under the right to obtain asylum, in section 4.3, it is examined under what circumstances individuals have a right to obtain asylum from the non-territorial state. This question concerns the right of asylum in its modern (human rights) understanding: under what conditions can an individual claim entitlement to protection? In situations where an individual requests protection from another state than the one in which he is, a topical issue is whether international obligations protecting against *refoulement* have equal bearing in territorial and extraterritorial situations and what the nature of the relationship between the petitioned state and the individual must be to enliven human rights obligations on the side of the former. This exercise mainly constitutes

2 This has now been confirmed in Article 1 of the United Nations General Assembly Declaration on Territorial Asylum, see n. 6 *infra* and accompanying text.

a *specialis* of Chapter 2, where the general issue of the extraterritorial applicability of human rights was addressed. Section 4.3. discusses relevant case law and legal doctrine on the specific question of the extraterritorial implications of the prohibition of *refoulement*.

Section 4.4. explores the scope and contents of the right to seek asylum. In situations of 'territorial asylum' – where a persons requests protection with and within the desired state of refuge – this right is often considered of marginal importance, because the duty to protect the individual will stem directly from the prohibition of *refoulement* and concomitant human rights obligations. Where a state is confronted with an asylum-seeker in the territory of another state however, and especially when it employs migration control activities aimed at preventing an individual from reaching its own borders, the right to seek asylum may well constitute a necessary prequel for the individual to bring himself in a position to claim territorial asylum. A problem with conceptualizing the right to seek asylum remains that, although pronounced in Article 14 of the Universal Declaration on Human Rights, it is not as such codified in human rights treaties. Section 4.4. traces the outlines of the right to seek asylum with reference to the right to leave a country and will in particular address the questions when extraterritorial activities of a state can be brought under the scope of the right to leave and how the specific plight of persons seeking asylum informs the contents of the right to leave.

The final section 4.5 addresses the friction which may arise between the duty of the sending state to respect the territorial sovereignty of the host state as discussed in section 4.2 and possible concurrent duties to respect the human rights of persons in need of protection as discussed in sections 4.3 and 4.4.

4.2 The right to grant asylum

4.2.1 State sovereignty and extraterritorial asylum

The distinction between territorial and extraterritorial asylum has long standing in international law. The notion of territorial asylum was traditionally understood as the right of states to grant asylum to aliens on their territory, which may be asserted vis-à-vis the pursuing state.[3] In this vein, the right to grant asylum has often been linked to the right to refuse extradition.[4] In the *Asylum Case*, the International Court of Justice equated the right of a state not to extradite aliens present in its territory with the right to grant asylum and confirmed that this right is a normal exercise of territorial sovereignty:

3 A. Grahl-Madsen, *Territorial Asylum*, Stockholm: Almqvist & Wicksel International (1980), p. 2.

4 A. Grahl-Madsen, *The Status of Refugees in International Law* (Vol. II), Leiden: Sijthoff (1972), p. 4-5, 23.

> 'In the case of extradition, the refugee is within the territory of the State of refuge. A decision with regard to extradition implies only the normal exercise of the territorial sovereignty. The refugee is outside the territory of the State where the offence was committed, and a decision to grant him asylum in no way derogates from the sovereignty of that State.'[5]

The Declaration on Territorial Asylum adopted by the UN General Assembly in 1967 affirms that the grant of asylum is a peaceful and humanitarian act, a normal exercise of state sovereignty, and that it shall be respected by all other states.[6] The competence of states to grant asylum on their territory may thus be seen as stemming directly from the principle of territorial sovereignty and the derivative notion of states having exclusive control over the individuals on its territory. While this principle is usually invoked in recognising the power of states to exclude aliens, its reverse implication is that states are also free to admit anyone they choose to admit.[7] It follows that the right to grant territorial asylum is subject only to extradition treaties and other overriding rules of international law.[8]

Since it cannot benefit from the shield of territorial sovereignty, the grant of extraterritorial asylum is a different matter. The question whether states are entitled to grant asylum outside their territories has most frequently been addressed in the context of so-called 'diplomatic asylum', referring to asylum on the premises of embassies and legations, but it may also include asylum in warships, military camps or other military facilities.[9] As will be further explored hereunder, the legal principles underlying the question of legitimacy of diplomatic asylum do essentially not differ from those applicable to other forms of extraterritorial asylum, the main difference being that certain diplomatic and consular immunities apply only to the former.

The problem with accepting a right on the side of states to grant extraterritorial, or diplomatic, asylum has been aptly articulated in the *Asylum Case*:

---

5 ICJ 20 November 1950, *Asylum Case (Colombia v Peru)*, I.C.J. Reports 1950, p. 274. The *Asylum Case* evolved around the question whether Columbia had legitimately granted asylum to Dr. Victor Haya de la Torre, who was charged with the crime of military rebellion by the Peruvian government, in its embassy in Lima. The incident gave rise to two further decisions of the Court: ICJ 27 November 1950, *Request for interpretation of the Judgment of November 20th, 1950, in the asylum case*, I.C.J. Reports, p. 395 (declared inadmissible); and ICJ 13 June 1951, *Haya de la Torre Case*, I.C.J. Reports 1951, p. 71.

6 UN General Assembly, Declaration on Territorial Asylum, 14 December 1967, A/RES/2312(XXII), Article 1.

7 See, more extensively, F. Morgenstern, 'The Right of Asylum', 26 *BYIL* (1949), p. 327.

8 Ibid, p. 328, Grahl-Madsen (1972), p. 30.

9 The 1954 Caracas Convention on Diplomatic Asylum mentions asylum granted in legations (defined as any seat of a regular diplomatic mission, the residence of chiefs of mission, and the premises provided by them), war vessels and military camps or aircraft; Convention on Diplomatic Asylum (28 March 1954) 18 *OAS Treaty Series* No. 18, Article 1. Also see Convention of Havana on Right of Asylum (20 February 1928) 132 *LNTS* 323, Article 2; and Montevideo Treaty on Political Asylum and Refuge (4 August 1939), Article 2.

> 'In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.'[10]

In Latin America – described (35 years ago) as a continent 'where today's government officials may be tomorrow's refugees, and *vice versa*'[11] – the problem that extraterritorial asylum will normally encroach upon the sovereignty of the territorial state has to some extent been relieved by the accepted practice that states do not interfere with one another's grant of diplomatic asylum and that persons granted diplomatic asylum are allowed safe-conducts out of the country to the territory of the state granting asylum. These practices have – under strictly defined conditions – been codified in several regional treaties.[12] The general outline of these treaties is that diplomatic asylum may only be granted in urgent situations and for the period indispensable to ensure safety of the person seeking asylum[13]; that states may only grant diplomatic asylum to persons who are sought for political reasons as opposed to common criminals[14]; and that the territorial state may at all times request that the

10 *Asylum Case*, p. 274-275.

11 Grahl-Madsen (1972), p. 57.

12 See in particular the 1928 Havana Convention; Montevideo Convention on Political Asylum, 26 December 1933, 37 *Pan-Am. T.S.* 48; 1939 Montevideo Treaty on Political Asylum and Refuge; and the 1954 Caracas Convention. Judge Read, dissenting in the *Asylum Case*, described the Latin-American practice on diplomatic asylum in the following terms: 'The "American institution of asylum" requires closer examination. There is – and there was, even before the first conventional regulation of diplomatic asylum by the Conference at Montevideo in 1889 – an "American" institution of diplomatic asylum for political offenders. It has been suggested, in argument, that it would have been better if the institution had been concerned with ordinary people and not with politicians, that it is unfortunate that political offenders were protected from trial and punishment by courts of justice during the troubled periods which followed revolutionary outbreaks, and that it would have been a wiser course for the republics to have confined the institution to protection against mob violence. That is none of our business. The Court is concerned with the institution as it is. The facts, established by abundant evidence in the record of this case, show that the Latin-American Republics had taken a moribund institution of universal international law, breathed new life into it, and adapted it to meet the political and social needs of the Pan American world.' *Asylum Case*, p. 316-317.

13 1928 Havana Convention, Article 2; 1954 Caracas Convention, Article V.

14 1928 Havana Convention, Article 1; 1939 Montevideo Treaty, Article 3; 1954 Caracas Convention, Article III. This condition has created the problem – which gave rise to the *Asylum Case* – that the states concerned may disagree about the correct characterization of persons as 'common criminals' and the concomitant question which state should be competent to qualify the offence as political in nature. The 1954 Caracas Convention was drafted with a view to clarify these and other ambiguities found by the ICJ in the Havana Convention in the *Asylum Case*.

person granted asylum is removed from its territory.[15] The conventions do not give rise to an individual entitlement to receive asylum and petitioned states are thus free to refuse asylum also when the grant would be lawful vis-à-vis the territorial state.[16] Although some of the regional conventions speak of beneficiaries as 'refugees', this term does not correspond to the definition of a refugee in the Refugee Convention: the right to grant asylum is enlivened only in respect of political offenders or, alternatively, persons fleeing from mob violence.[17]

Outside of Latin-America, attempts to codify the institution of diplomatic asylum have remained inconclusive. The topic did feature on the agenda's of the United Nations General Assembly and the International Law Commission, but both ultimately decided to remove the item without adopting resolutions or recommendations.[18] The *Institut de Droit International* did adopt at its Bath session in 1950 a resolution on asylum, which recognises the legality of extraterritorial asylum also against acts of violence emanating from the local authorities, but this resolution must be seen as an attempt at developing, rather than codifying, the law on asylum.[19] In the 1970s, the International Law Association discussed a set of acceptable principles regarding diplomatic asylum which lead to the adoption of a Draft Convention on Diplomatic

15 1928 Havana Convention, Article 2; 1939 Montevideo Treaty, Article 6; 1954 Caracas Convention, Article XI.

16 1954 Caracas Convention, Article II.

17 Article VI of the 1954 Caracas Convention also covers individuals being sought by private persons or mobs over whom the authorities have lost control.

18 The issue of diplomatic asylum was discussed by the UN General Assembly at its 29th and 30th sessions but the debate was inconclusive. A report of the Secretary-General on the topic forwarded to the General Assembly mentioned that only seven of the 25 States which had presented their views were in favor of drawing up an international convention on the topic; see UN. Doc. A/10139. By its resolution 3497 (XXX) of 15 December 1975, the General Assembly decided to give further consideration to the question at a future session, but this decision was not followed up. In resolution 1400 (XIV) of 21 November 1959, the General Assembly requested the International Law Commission to undertake the codification of the principles and rules of international law relating to the right of asylum. Regarding diplomatic asylum, the Commission concluded in 1977 that the topic did not appear at that time to require active consideration by the Commission; see *Yearbook of the International Law Commission*, 1977, vol. II (Part Two), para. 109.

19 Institut de Droit International, Session de Bath 1950 (Resolution I), 'L'asile en droit international public (à l'exclusion de l'asile neutre)', Article 3 (2). The third and most comprehensive part of the resolution was devoted to establishing rules on extraterritorial asylum. The resolution recognizes and delimits the legality of extraterritorial asylum by laying down that asylum can be given 'à tout individu menacé dans sa vie, son intégrité corporelle ou sa liberté par des violences émanant des autorités locales ou contre lesquelles celles-ci sont manifestement impuissantes à le défendre, ou même qu'elles tolèrent ou provoquent. Ces dispositions s'appliquent dans les mêmes conditions lorsque de telles menaces sont le résultat de luttes intestines'. Grahl-Madsen questions whether this resolution must be seen as *lex lata*; Grahl-Madsen (1972), p. 49.

Asylum. This draft, neither of legally binding nature, followed closely and elaborated upon the principles set out in 1954 Caracas Convention.[20]

The fact that a right to grant diplomatic asylum has not been recognized outside Latin America does not preclude a state from offering refuge to persons seeking shelter. It only implies that a grant of refuge remains subject to the territorial sovereignty of the host state. This means that if the territorial authorities do not object to the grant of protection, the grant is perfectly legal. There might be other situations in which a grant of asylum does, by its nature, not derogate from the sovereignty of the territorial state. Thus, it has been contended that to provide asylum to persons fleeing from mob-violence against which the territorial authorities cannot offer protection, does not impinge upon the prerogatives of the territorial state.[21] From a similar rationale, it is stated that to provide protection in situations of general political upheaval, in which justice is not adequately administered, does not oppose the rule of non-intervention.[22]

In other situations however, should the territorial state object to refuge or demand surrender of the person requesting asylum, the extraterritorial state will ordinarily not be entitled to grant asylum.[23] The ICJ in the *Asylum Case* underlined that 'the safety which arises out of asylum cannot be construed as a protection against the regular application of the laws and against the jurisdiction of legally constituted tribunals'.[24]

Being subject to the territorial sovereignty of the host state implies, further, that the state wishing to grant protection requires the consent of the territorial state if it wishes to arrange for a safe-conduct out of the country. It has frequently occurred that territorial states have refused to grant safe passage, rendering the extent of protection dependant on the limited facilities diplomatic missions have at their disposal.[25] This can be problematic, especially if faced

20 The International Law Association discussed the topic of diplomatic asylum in close connection to territorial asylum. For discussions and text of the draft convention, see International Law Association, Legal Aspects of the Problem of Asylum, Part II: Report, 55 *International Law Association Reports of Conferences* (1972), p. 176-207.

21 Grahl-Madsen (1972), p. 46; Morgenstern (1951), p. 376; P. Porcino, 'Toward Codification of Diplomatic Asylum', 8 *New York University Journal of International Law and Politics* (1976), p. 446-447; R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, 9th Ed. (1992), Vol. I, p. 1084. This appears also the view of the ICJ, see *Asylum Case*, p. 282-283.

22 Morgenstern (1951), p. 377. To this effect also the dissenting judges Read, Badawi Pasha and Azevedo in the *Asylum Case*, p. 312, 320, 333-335.

23 Grahl-Madsen (1972), p. 46.

24 *Asylum Case*, p. 284. Note that, although phrased in terms of general applicability, this remark was made against the backdrop of the 1928 Havana Convention.

25 Even under the Havana Convention of 1928 and the Montevideo Treaty of 1939, it was disputed whether the territorial State was obliged to accede to a request for a safe-conduct out of the country if diplomatic asylum was granted on proper grounds. The ICJ held that the treaty obligations entered into by Peru did not mean that Peru was legally bound to allow a safe conduct; *Asylum Case*, p. 279. Article XII of the 1954 Caracas Convention on

with large numbers of persons requesting protection,[26] and can moreover result in situations of protracted nature, such as the case of Cardinal Mindszenty, who was offered shelter in the US embassy in Budapest after the Soviet Union put down the popular uprising in Hungary in 1956 and who left the embassy only 15 years later after Pope Paul VI had ordered him to come to Rome and after the Hungarian President had formally guaranteed his safe departure.[27] Another peculiar example is the case of the Dutch anti-apartheid activist Klaas de Jonge, who was arrested by the South-African police in 1985 but managed to escape to the Dutch embassy in Pretoria where he was granted refuge. When the embassy planned to move to another building, the South-African authorities refused to allow de Jonge to travel on South-African territory, resulting in him being left behind in the abandoned building under the protection of the Dutch military police where he stayed for two further years.[28] It is for these and other constraints that grants of diplomatic asylum outside Latin America have been referred to as cases of tolerated stay or temporary refuge rather than asylum proper.[29]

4.2.2 Extraterritorial asylum as humanitarian exception to state sovereignty

All this does not detract from the fact that extraterritorial asylum is essentially about reconciling the principle of territorial sovereignty with claims of humanitarianism.[30] It could be upheld that, if confronted with conflicting claims of humanitarianism and state sovereignty, exceptional circumstances may make it legitimate for diplomatic missions to refuse surrender. Morgenstern has

---

Diplomatic Asylum does contain an obligation on the side of the territorial State to allow departure for foreign territory, except in situations of *force majeure*.

26 A notable example is the overflowing of West German embassies in Prague and Budapest by East-German citizens in 1989, who demanded passage to the west. The embassy in Budapest was forced to take out a lease on a nearby building to house the throngs of East Germans arriving every day. The embassy occupations played a significant role in the Hungarian decision to open its borders to the west, and with it, the fall of the Berlin Wall. The situation of North Koreans attempting to reach South Korea by seeking asylum in foreign embassies and consulates in China resembles the plight of the East Germans. The number of North Koreans seeking diplomatic refuge has risen steadily since the mid 1990s, resulting in the Chinese taking ever more security measures around embassy compounds. In October 2003, South Korea temporarily closed its consulate in Beijing where around 130 North Koreans had taken refuge.

27 According to the US Government, the decision to grant refuge to Cardinal Mindszenty was taken 'under highly exceptional and most unusual circumstances and on urgent humanitarian grounds at a time of foreign aggression against Hungary', see M. Whiteman, *Digest of International Law*, Vol. 6 (1968), p. 451.

28 For an account, K. de Jonge, *Dagboek uit Pretoria*, Amsterdam: van Gennep, 1987.

29 Grahl-Madsen (1972), p. 49. According to Porcino, 'the allowance of safe passage transforms temporary refuge into permanent asylum'; Porcino (1976), p. 438.

30 Morgenstern (1948), p. 236.

stated that '[i]t probably cannot be maintained that asylum can never be granted against prosecution by the local government'.[31] Likewise, Grahl-Madsen does not rule out that in a case of 'the most compelling considerations of humanity', heads of diplomatic missions may refuse to surrender a person.[32] And Riveles, in discussing the fate of the Durban Six, discussed below, has argued that '[i]t should be recognized that a State has the permissible response of granting temporary sanctuary to individuals or groups in utter desperation who face repressive measures in their home countries.'[33]

In *Oppenheim's International Law*, it is also mentioned that 'compelling reasons of humanity may justify the grant of asylum'.[34] It refers, amongst others, to the judgment in the *Asylum Case*, in which it was stated that:

> 'In principle, therefore, asylum cannot be opposed to the operation of justice. An exception to this rule can occur only if, in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims. Asylum protects the political offender against any measures of a manifestly extra-legal character which a government might take or attempt to take against its political opponents.'[35]

Although this consideration may be taken as suggesting that asylum may be granted also against measures of the territorial state which are of 'manifestly extra-legal character', it must also be underlined that the ICJ's remarks served to interpret the terms of the 1928 Havana Convention. It is henceforth doubtful whether the ICJ intended to make a statement which has meaning outside that particular context.

Some authors, supporting the existence of a rule that exceptional humanitarian pressures justify a grant of diplomatic asylum, have referred to the widespread practice of grants of diplomatic asylum throughout the world, possibly warranting a conclusion that a right to grant diplomatic asylum has established itself as customary international law. It is true that, on occasion, states have granted asylum to fugitives, also in clear opposition to local rules or demands of the host state. The Canadian government for example, chose to grant refuge to six US diplomats on Canadian diplomatic premises during the Tehran hostage crisis and to subsequently arrange for their covert departure from Iran, which it later justified by maintaining that it 'upheld rather than

---

31 Morgenstern (1951), p. 376.

32 Note that where Grahl-Madsen at p. 46 first suggests that this exception may even be invoked vis-à-vis the authorities of the territorial State, he concludes at p. 77 by saying that this 'office of humanity' may not be exercised vis-à-vis the lawful organs of the territorial State; Grahl-Madsen (1972), p. 46-47, 77.

33 S. Riveles, 'Diplomatic Asylum as a Human Right: The Case of the Durban Six', 11 *Human Rights Quarterly* (1989), p. 158.

34 *Oppenheim's International Law* (Vol. I) (1992), p. 1085.

35 *Asylum Case*, p. 284.

violated international law', since the events at the US embassy were considered to constitute an attack on the entire diplomatic corps in Iran and consequently any embassy was entitled to assist American personnel.[3637] Another example is the case of the Durban Six, which evolved around six prominent members of the South-African anti-apartheid movement who had been served detention orders and who sought refuge at the British consulate in Durban in 1984. The British consulate complied with their request and promised it would not force them out of the consulate, although the authorities also made clear that they would not intervene on their behalf with the South African authorities and that they could not stay indefinitely. After the embassies of the United States, France, the Netherlands and the Federal Republic of Germany had later denied to offer sanctuary, the Durban Six decided to depart voluntarily resulting in the immediate arrest of five of them in front of the consulate building.[38]

But a majority of legal opinion appears to agree that the practice of diplomatic asylum is not uniform and of too inconsistent character to constitute a rule of international custom.[39] Some countries, such as Japan,[40] reject the doctrine altogether, and other countries – and this point is also illustrated by the divergent responses of Western governments in the case of the Durban Six – apply different and sometimes arbitrary considerations in choosing to grant asylum. Neither is there the required conviction among states that the practice reflects a norm of international law.[41] Even though countries such as the United States and the United Kingdom have on occasion granted refuge in opposition to demands of the territorial state, both countries have denied that there exists a legal right to that effect.[42] The rather inconsistent and

36 For the Canadian position, see L.H. Legault, 'Canadian Practice in International Law during 1979 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs', 18 *Canadian Yearbook of International Law* (1980), p. 304-305. For a legal comment, see: C.V. Cole, 'Is There Safe Refuge in Canadian Missions Abroad?', 9 *IJRL* (1997), p. 662.

37 Legault (1980), p. 304-305.

38 For a factual background and legal appraisal see Riveles (1989), p. 139-159.

39 Morgenstern, in particular, has forcefully rejected the proposition that a right to grant diplomatic asylum is part of customary law; Morgenstern (1948), p. 241-246. Also see Porcino (1976), p. 445-446; Sinha (1971), p. 238; B. Gilbert, 'The Practice of Asylum in Legations and Consulates of the United States', 3 *AJIL* (1909), p. 585; A.M. Rossitto, 'Diplomatic Asylum in the United States and Latin America: A Comparative Analysis', 13 *Brooklyn Journal of International Law* (1987), p. 114.

40 See eg the position of Japan in General Assembly discussions on the desirability of a convention on diplomatic asylum. UN Doc. A/C.6/SR.1506 (1974), statements of Mr. Yokota from Japan.

41 Also Porcino (1976), p. 445.

42 In surveying the 19th and 20th century practice of diplomatic asylum by the United Kingdom and United States, Sinha observes that although both countries have on occasion authorized asylum on humanitarian grounds, neither country has claimed that there is a right to grant diplomatic asylum. Sinha (1971), p. 212-217. For the American position, see further Rossitto (1987), p. 111-135.

contradictory manner in which states have asserted a right to grant protection on humanitarian grounds detracts from the view that such a right has established itself as customary international law. It does appear that political considerations, rather than clearly outlined humanitarian principles, guide the practice of offering refuge.

It can be concluded that granting extraterritorial asylum by way of humanitarian exception in opposition to demands of the territorial state has a weak legal basis. Such grants must be considered a derogation of the territorial sovereignty of the host state and therefore require specific entitlement under international law. In the absence of provisions of international treaty law or a rule of international customary law recognising a right to grant extraterritorial asylum in exceptional humanitarian circumstances, one avenue for underpinning its legality would be to construct the right in accordance with the larger doctrine on humanitarian intervention in international law, within which progressive attempts are made to formulate the circumstances and conditions permitting intervention in the domestic affairs of another state. This is a much contested debate and not one which is the particular focus of this study.[43] Moreover, modern discourse on humanitarian intervention may be deemed to be of only modest importance for the specific question of extraterritorial asylum, because grants of extraterritorial asylum will normally not involve the use of force nor involve action specifically undertaken with a view to interfere in the domestic affairs of the other state.[44]

A second avenue for informing the legal basis of a humanitarian exception to the duty to respect the territorial sovereignty of the host state could consist of accommodating the rule of non-intervention with specific human rights obligations a sending state may incur vis-à-vis an individual requesting protection in the host state. In theory, human rights obligations of the sending state vis-à-vis an individual may complement the duties the sending state owes vis-à-vis the host state. The scope of a state's human rights obligations towards persons claiming protection in a foreign territory is further explored in sections 4.3 and 4.4. Section 4.5 specifically addresses the question of whether and

---

43 For some views: W.M. Reisman, Sovereignty and Human Rights in Contemporary International Law, 84 *AJIL* (1990), p. 872-873; A. D'Amato, 'The Invasion of Panama Was a Lawful Response to Tyranny', 84 *AJIL* (1990), p. 516-524; L. Henkin, 'An Agenda for the Next Century: The Myth and Mantra of State Sovereignty', 35 *Virginia Journal of International Law* (1994), p. 115-118; S. Chesterman, *Just War or Just Peace? Humanitarian intervention and international law*, Oxford University Press (2001); P. Hilpold, 'Humanitarian Intervention: Is There a Need for a Legal Reappraisal?', 12 *EJIL* (2001), p. 437-467.

44 Porcino has argued that the protection of human rights warrants recognition and codification of the right to grant asylum, by emphasising that the grant of asylum in an embassy is only a 'passive' infringement on the rights of the sovereign: the foreign state does not enter the territory of the sovereign state uninvited, and does not apply force or behave aggressively towards the territorial state. Accordingly, the state granting refuge makes only limited incursion on the host state's sovereign prerogatives: Porcino (1976), p. 446.

under what circumstances human rights may displace the obligations of the sending state vis-a-vis the territorial state.

4.2.3 Immunities and extraterritorial asylum

Although commonly addressed in the context of refuge in diplomatic missions, the problem of reconciling humanitarian claims with the principle of territorial sovereignty is a central issue for all forms of extraterritorial asylum. The legal principles applicable to the institution of extraterritorial asylum discussed above thus apply regardless whether asylum is granted in embassies, consulates, military bases or other facilities. They are equally valid for contemporary practices of pre-border migration control where the sending state is confronted with asylum claims in a foreign territory. The main difference between diplomatic asylum and other grants of extraterritorial asylum is that the law on diplomatic immunities applies to the former and not necessarily to the latter. This means that although normally the territorial state has every right to put an end to illegal grants of asylum on its territory, asylum-seekers in diplomatic premises or other privileged facilities may be immune from incursions by the territorial state. This section explores to what extent the law on diplomatic and consular relations facilitates extraterritorial grants of asylum.

Historically, the bond between diplomatic asylum and the privileged position of diplomatic envoys was stronger than it is in current times. Early scholars such as Grotius explained the legality of diplomatic asylum from the fiction of exterritoriality[45] – holding that the ambassador's premises are inviolable for they are outside the territory of the host state and placed in that of the sending state.[46] One of the first to reject this fiction was van Bynkershoek, in positing that the ambassador's immunities are functional and that the ambassador's premises may not be used to offer refuge to criminals.[47] Although no longer seen as valid, the fiction of exterritoriality has on occasion resurfaced in defending the legality of diplomatic asylum.[48] Other writers

45 In the law on diplomatic relations, the terms extraterritoriality and exterritoriality are used interchangeably, although the latter term appears to prevail.

46 Hugo Grotius, *De Jure Belli ac Pacis*, 1625 (translated by F.W. Kelsey, Oxford: Clarendon Press, 1925), Book II, Chapter 18, Section IV, para 5: '[B]y a similar fiction, ambassadors were held to be outside the limits of the country to which they were accredited. For this reason they are not subject to the municipal law of the State in which they are living.'

47 C. van Bynkershoek , *De Foro Legatorum Liber Sigularis*, 1744 (translated by G.J. Laing. Oxford: Clarendon Press, 1946), Chapter XVI, p. 79-80.

48 Dissenting in the *Asylum Case*, Judge Alvarez posited that the fiction of exterritoriality is the basis for diplomatic asylum in Latin America and that accordingly, asylum is considered not to intervene in the sovereign prerogatives of the host State; *Asylum Case*, p. 292. This view is difficult to reconcile with the fact that even in Latin America, diplomatic asylum is deemed legitimate in limited circumstances only.

have considered the practice of diplomatic asylum as having a legal basis in the diplomatic function or in the privileges of diplomatic missions.[49] This argument has also met opposition, under the reasoning that diplomatic privileges and immunities serve freedom and security in discharging diplomatic functions and that granting asylum is not part of those functions, but on the contrary, may jeopardize relations between the sending and receiving state.[50]

The Vienna conventions on diplomatic and consular relations do not categorize asylum as one of the recognised diplomatic or consular functions.[51] The topic of asylum was expressly omitted from both treaties, for it was at that time under consideration of the UN General Assembly.[52] This leaves us with a somewhat unclear legal status of the institution of diplomatic asylum under diplomatic and consular law. An implied reference to asylum can nonetheless be found in Article 41 (3) Vienna Convention on Diplomatic Relations (VCDR), which includes as recognized functions of the mission those functions laid down in special agreements concluded between the sending and receiving State. This clause was inserted precisely to accommodate for conventions on diplomatic asylum in force in Latin America.[53] Although this

49 For an overview, see Sinha (1971), p. 20-27.

50 Van Bynkershoek stated it as follows: 'All the privileges of ambassadors which they use in accordance with the tacit agreement of nations have been instituted for the sole purpose of enabling them to perform the duties of their office without delay and without hindrance from anyone. But they can do this safely even if they do not receive or conceal criminals and refrain from perverting (…) the jurisdiction of the prince in whose country they are. But these things are of such a kind that they scarcely call for serious discussion.' Van Bynkershoek was of the opinion that ambassadors should open their houses to the pursuit and seizure of criminals and that the sovereign states, to that purpose, have a perfectly valid legal basis for entering it by force. Van Bynkershoek (trans. 1946), Chapter XXI ('Does the house of an ambassador afford asylum?'), p. 114-115. See further Sinha (1971), p. 24-26.

51 See Vienna Convention on Diplomatic Relations, 18 April 1961, 500 *UNTS* 95, Article 3; and Vienna Convention on Consular Relations, 24 April 1963, 596 *UNTS* 261, Article 5.

52 Under both Conventions, a provision on asylum was proposed which would prevent states to offer shelter to persons charged with an offense under local law. Both were defeated under the reasoning that the subject of asylum was not intended to be covered. An additional reason for not taking in such provision in the VCCR was that it might be deduced *a contrario* that the right of asylum did impliedly exist under the VCDR. For references, see E. Denza, *Diplomatic law: commentary on the Vienna Convention on diplomatic relations*, Oxford University Press (2008), p. 141 and L.T. Lee, *Consular Law and Practice*, Oxford: Clarendon Press (1991), p. 398. Regarding the VCDR, see further the discussions in the ILC: Summary records of the ninth session, *Yearbook of the ILC 1957*, vol. I, p. 54-57.

53 Summary records of the ninth session, *Yearbook of the ILC 1957*, vol. I, p. 144 at para. 63. Denza infers from the drafting history that the clauses 'other rules of general international law' and 'special agreements in force between the sending and receiving states ' both intended to cover asylum in diplomatic premises, implying that the prohibition to use premises for other than recognized functions would also be waived in circumstances where diplomatic asylum is permitted under customary international law, Denza (2008), p. 471-472. It does not follow from the ILC discussions however that it was contemplated that diplomatic asylum formed part of customary international law.

clause was not taken up in the Vienna Convention on Consular Relations (VCCR), the absence is compensated by Article 5 (m), which lists as residual category of consular functions those functions 'entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State'. This provision may be taken as not only allowing for the conclusion of agreements on consular asylum, but also as recognising asylum as consular function if it does not come in conflict with local laws or does not meet the disapproval of the receiving state, subject to the condition that asylum is granted with the consent of the authorities of the sending state.

In the absence of special agreements, the question of asylum under both Conventions depends, on the one hand, on the duties to not interfere with domestic affairs and to not use diplomatic and consular premises in any manner incompatible with recognised diplomatic or consular functions,[54] and, on the other hand, on the inviolability of diplomatic and consular premises.[55] It is clear that offering shelter to persons seeking to evade justice is in violation of the duty not to interfere with local laws. Using diplomatic or consular buildings to offer shelter to refugees may further come within the ambit of Article 41 (3) VCDR or 55 (2) VCCR, if the situation of asylum is considered 'incompatible' with the functions of the mission.[56] The element of 'incompatibility' has been interpreted as prohibiting activities which fall outside the diplomatic and consular functions and which constitute a crime under the law of the receiving state.[57] It may further be argued that even if not constituting a crime under local law, grants of refuge which meet disapproval of the territorial state are an affront to friendly relations and therefore incompatible with diplomatic and consular functions as laid down in Articles 3 (e) VCDR and Article 5 (b) VCCR.

While diplomatic and consular asylum in opposition to demands of the local State may thus be considered an abuse of privileges and immunities, the inviolability of diplomatic premises remains a potent tool for sending states to refuse to answer calls for surrender. The prohibition to enter diplomatic premises laid down in Article 22 (1) VCDR does not allow for exception, imply-

54 Articles 41, paragraphs 1 and 3 VCDR and Articles 55 paragraphs 1 and 2 VCCR.

55 Articles 22, paragraph 1 VCDR and 31, paragraph 2 VCCR.

56 The original draft of the VCDR had held that the premises of the mission shall be used *solely* for the performance of the diplomatic functions, whereas the final text merely prohibits use which is *incompatible* with those functions. See Summary records of the ninth session, *Yearbook of the ILC 1957*, vol. I, p. 143 at para. 55. Where the original text could have been interpreted as prohibiting asylum on diplomatic premises *per se* – only allowing for derogation in case of special agreements; the standard of incompatibility is obviously more lenient.

57 B.S. Murty, *The International Law of Diplomacy, The Diplomatic Instrument and World Public Order*, Dordrecht/Boston/London: Martinus Nijhoff (1989), p. 417.

ing that once an embassy has granted asylum, the territorial state is effectively debarred from terminating the grant of refuge.[58] It is due to the inviolability of diplomatic premises that territorial states opposing refuge have often seen no other option than to acquiesce in the situation and, in order to prevent protracted stays and the political frictions flowing from it, have been willing to grant safe conducts out of the country, also in situations where criminal charges had been imposed on the fugitive.[59]

Under the Vienna Convention on Consular Relations, the inviolability of consular premises is considerably more limited. Article 31 (2) prohibits the receiving state to enter that part of the consular premises which is used *exclusively* for the purpose of the work of the consular post.[60] This could be taken to mean that, if the receiving state has reason to believe that the consulate is used for other purposes, it is permitted to enter the building and to arrest persons charged with an offense.[61] It follows that consular grants of asylum are more susceptible to termination and that consulates are less appropriate locations for persons seeking asylum.[62] Grahl-Madsen concludes that the limited inviolability of consular premises makes a grant of refuge 'precarious at best'.[63]

Under general principles of treaty law a reasoning would be possible that a grant of asylum interfering with local laws is a fundamental breach of the VCDR or VCCR which relieves the receiving state from its own obligations under these conventions vis-à-vis the sending state. Accordingly, the receiving state would be able to legitimately assert a right to enter the premises in order to ensure recover.[64] The ICJ in the *Tehran Hostage* case made clear however that the rules of diplomatic and consular law constitute a self-contained regime which foresees the possible abuse of diplomatic privileges and immunities and specifies the means at the disposal of the receiving state to counter any such abuse.[65] The two recourses mentioned by the Court are to declare members of the diplomatic or consular staff *persona non grata* – which will obviously not succeed in terminating a grant of asylum – and to break off diplomatic relations altogether and call for the immediate closure of the offending mission.[66] Although effective, the latter option is notoriously drastic and will normally not be considered politically opportune. In situations where premises

58 Article 22 paragraphs 1 and 3 VCDR.
59 See for example the Soviet conduct in respect of its citizens which had been granted asylum in United States embassies, in: Rossitto (1987), p. 120-127.
60 Emphasis added.
61 Lee (1991), p. 387.
62 Ibid, p. 398.
63 Grahl-Madsen (1972), p. 50.
64 Article 60 paragraph 2 (b) Vienna Convention on the Law of Treaties.
65 ICJ 24 May 1980, *United States Diplomatic and Consular Staff in Tehran*, I.C.J. Reports 1980, para 86.
66 Ibid, para. 85.

are used for the sole purpose of sheltering refugees, a third option might further be to withdraw the diplomatic status from those premises.[67]

Apart from refuge in diplomatic and consular premises, there are other situations in which extraterritorial grants of asylum can benefit from immunities. The most topical situation is refuge granted on board warships or other public vessels. Under international maritime law, warships and government ships operated for non-commercial purposes enjoy complete inviolability.[68] In the case of warships in the territorial sea of another state not complying with the laws of that state, the only remedy for the coastal state is to require the vessel to leave the territorial waters.[69] The result of the absolute inviolability of warships is that the legal situation regarding asylum is similar to that of refuge granted on diplomatic premises, the main difference being that the warship may sail away with the refugee on board. Because the problem of requesting a safe-conduct out of the country is not present, a grant of 'full-fledged' asylum is better possible.

Other immunities than those of diplomatic and consular envoys or warships will often depend on the particulars of bilateral or multilateral treaties, such as Status of Forces Agreements. These immunities will not be discussed here.

4.2.4 Interim conclusion

A grant of asylum by one state in the territory of another state is subject to the sovereignty of the latter state. This will not pose problems as long as the territorial state does not object to the grant, or in situations where persons fear maltreatment from non-state actors or for other reasons falling beyond the scope of local laws. If the person seeking refuge is fleeing from the authorities of the territorial state however, granting asylum is likely to infringe upon the sovereignty of that state. States do not have to tolerate such incursions on their territories.

The option of granting refuge in diplomatic premises is a distinct form of extraterritorial asylum. If granted in opposition to demands of the territorial state, it remains problematic from a legal point of view, but its practical feasibility is much enhanced by the inviolability of diplomatic premises. It could well be argued that it is the system of diplomatic immunity and in-

67 The reasoning would be that premises solely used for other purposes than the diplomatic mission cannot be defined as "premises of the mission" under Article 1 (i) VCDR. On this option, see Denza (2008), p. 471.

68 Article 8(1) Convention on the High Seas, 29 April 1958, 6465 *UNTS* 450; Article 32 United Nations Convention on the Law of the Sea (UNCLOS), 10 December 1982, 1833 *UNTS* 396. Criminal jurisdiction may be exercised on board government ships operated for commercial purposes, see Article 27 UNCLOS.

69 Article 23 Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958, 516 *UNTS* 205; Article 30 UNCLOS.

violability, rather than a legal right to grant diplomatic asylum, which has made the practice of diplomatic asylum a perpetuating phenomenon also outside Latin America. Inviolability constitutes a legal obstacle to redress illegal grants of asylum and hence gives rise to incentives on the part of the host state wishing to terminate a grant of asylum to find alternative solutions. This, together with the humanitarian and often passive nature of grants of diplomatic asylum, may explain why diplomatic asylum, also if constituting an affront to local laws, is often tolerated and only rarely spurs bilateral frictions.

4.3 THE RIGHT TO OBTAIN ASYLUM

Human rights obligations of a state vis-à-vis an individual requesting protection with that state are first and foremost informed by the prohibition of *refoulement*, laid down in Article 33 Refugee Convention, Article 3 CAT, Article 3 ECRH and Article 7 ICCPR.[70] The potential extraterritorial applicability of the prohibition of *refoulement* has, precisely in view of the proliferation of practices of external migration control (and in particular interdictions at sea), been subject to growing attention in legal literature.[71] It was also a key issue in the two arguably most topical judgments on the legality of practices of external migration control: the 1993 judgment of the United States Supreme Court in *Sale*, concerning the interdiction at sea and summarily return of Haitian refugees, and the 2005 judgment of the House of Lords in *Roma Rights*, on the refusal of British immigration officers stationed at Prague Airport to grant leave to enter the United Kingdom to Roma asylum-seekers of Czech nationality.[72] Both courts concluded against any potential legal duty deriving from Article 33 Refugee Convention in respect of aliens found outside a state's territory. The House of Lords neither found Articles 2 and 3 ECRH to enliven

70 This section does not deal with other treaties containing a prohibition of *refoulement*, nor with other provisions of the ECHR and ICCPR which may be construed as also prohibiting *refoulement*.

71 Current legal textbooks on international refugee law contain specific reference to the (extra-)territorial locus of the prohibition of *refoulement*: J.C. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press (2005), p. 335-342; G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, Oxford University Press (2007), p. 244-253; K. Wouters, *International Legal Standards for the Protection from Refoulement*, Antwerp: Intersentia (2009), p. 48-56, 203-216, 372-376, 435-438. For contributions dealing specifically with the issue see, amongst many others, G. Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?', 17 *IJRL* (2005), p. 543-573; S. Legomsky, 'The USA and the Caribbean Interdiction Program', 18 *IJRL* (2006), p. 677-695; and various contributions in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control. Legal Challenges*, Leiden/Boston: Martinus Nijhoff (2010).

72 U.S. Supreme Court 21 June 1993, *Sale v. Haitian Centers Council*, 509 US 155 (hereafter '*Sale*'); House of Lords 9 December 2004, *Regina v Immigration Officer at Prague Airport and another* ex parte *European Roma Rights Centre and others*, [2004] UKHL 55 (hereafter '*Roma Rights*').

a duty to protect the persons seeking asylum. The reasoning entertained in the judgments attracted considerable criticism in legal commentary and contrasted the position taken by UNHCR.[73] The judgments also raise questions in view of several pronouncements of human rights treaty monitoring bodies that the prohibition of *refoulement* does apply to the transfer or handover of persons in and to another state.[74]

The issue of territorial application of the prohibition of *refoulement* forms part of the wider debate on the territorial scope of human rights, described in Chapter 2. Although the notion that a state is not discharged of its human rights obligations when operating beyond its territories has now established itself as a general rule, it presupposes that a specific human rights obligation does lend itself to extraterritorial application.[75] The question of territorial effect of the prohibition of *refoulement* rests therefore not only upon general human rights theory but also on the potential existence of explicit or implied territorial restrictions in the various provisions laying down a prohibition of *refoulement*. Not all human rights, due to their nature or wording, can be taken

73 Koh considered the *Sale* case 'not lost in the legal but the political arena' : H.H. Koh, 'Reflections on *Refoulement* and *Haitian Centers Council*', 35 *Harvard International Law Journal* (1994), p. 20; Henkin referred to the judgment as an 'eccentric, highly implausible interpretation of a treaty': L. Henkin, 'Notes from the President', *ASIL Newsletter*, September-October 1993, p. 1. UNCHR, which had filed amicus curiae briefs in both *Sale* and *Roma Rights*, considered the Supreme Court's judgment 'a setback to modern international refugee law' and 'a very unfortunate example': UNHCR EXCOM, 'UN High Commissioner for Refugees Responds to US Supreme Court Decision in Sale v Haitian Centers Council' (released 22 June 1993), excerpts published in 32 *International Legal Materials* (1993), p. 1215. UNHCR has repeatedly affirmed that the prohibition of *refoulement* applies wherever a state operates – including at the frontier, on the high seas or on the territory of another state: UNHCR, 'Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of refugees and its 1967 Protocol', Geneva, 26 January 2007, para 43; UNHCR, EXCOM, 'Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach', UN Doc. EC/50/SC/CRP.17, 9 June 2000, para 23. For further commentary see eg Legomsky (2006), p. 686-691; G.S. Goodwin-Gill, 'The Haitian *Refoulement* Case: A Comment', 6 *IJRL* (1994), p. 106-109.

74 The Inter-American Human Rights Commission considered Article 33 Refugee Convention to apply to the Haitians interdicted on the high seas and found the United States Government to have breached its treaty obligations in respect of Article 33: IACHR 13 March 1997, *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Report No. 51/96, paras. 157-158. More recently, other treaty monitoring bodies have concluded that the prohibition of *refoulement* (or: the wider duty not expose a person to ill-treatment) has no territorial limitations, see the cases of *Al-Saadoon and Mufdhi*, *Munaf v Romania* and *Marine I*, discussed in sections 4.3.2 and 4.3.3 below.

75 In this vein also ICJ 15 October 2008, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* (Order), I.C.J. Reports 2008, p. 642, para. 109, where the Court cumulatively observed that there was no territorial restriction of general nature in the International Convention on the Elimination of All Forms of Racial Discrimination nor a specific territorial limitation in the provisions at issue. See also chapter 2.6.

to have extraterritorial implications. Article 14 ICESCR, for example, contains an explicit territorial limitation in that it obliges a state party to secure compulsory primary education 'in its metropolitan territory or other territories under its jurisdiction'. Another example is Article 22 (2) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, prohibiting expulsion 'from the territory of a State Party'. There may further be implied territorial restrictions to the scope of a human right. In the context of the removal of aliens, the word 'expulsion' has traditionally been understood as referring only to a formal measure of the state to remove an alien from its territory who had previously been lawfully staying there.[76] Similarly, the practice of exile, or banishment, has been defined as an order imposed on criminals to depart out of the country and not to return to it.[77] To construe such terms as applying also to state conduct undertaken outside the state's territory would contravene the provisions' ordinary meaning, from which departure is only possible if not doing so would lead to a result which is 'manifestly absurd or unreasonable'.[78]

It is probably in this context – and this argument applies to the Refugee Convention in particular – that it has been submitted that the obligation of *non-refoulement* pertains to issues of admission to and expulsion from a state's territory only, and that it cannot therefore be read as regulating the conduct of states outside their borders.[79] Should this view be correct, the prohibition of *refoulement* may be considered as *lex specialis* not subject to the general rule that human rights obligations can also bind states when operating beyond their borders. Hereunder, a comparative analysis is made of the text and nature of the prohibitions of *refoulement* established under the Refugee Convention, CAT, ECRH and ICCPR. Specific merit is paid to legal discussions surrounding the *Sale* and *Roma Rights* judgments. It is argued that, although the prohibitions of refoulement established under Article 33 Refugee Convention and Article 3 CAT are indeed equipped with specific delimiting terminology not present under the more generally framed protective duties under the ECRH and ICCPR, none of the prohibitions of *refoulement* contain language which opposes a reading in line with general human rights theory that they can apply, as a matter of principle, to external activity of states.

---

76 The European Court of Human Rights employs the term expulsion however also in regard of removals from a state's territory raising issues under Article 3 ECHR regardless of previous legal residence. See further *infra* n. 92 and accompanying text.

77 Hobbes defined the term exile as follows: 'Exile (banishment) is when a man is for a crime condemned to depart out of the dominion of the Commonwealth, or out of a certain part thereof, and during a prefixed time, or for ever, not to return into it'. Thomas Hobbes, *Leviathan. The Matter, Form and Power of a Commonwealth Ecclesiastical and Civil* (1651), (translated A. Martinich, Broadview Press (2002)), Part II, Chapter 28, p. 235.

78 Articles 31 and 32 VCLT. On the 'manifestly absurd or unreasonable'-test, see R.K. Gardiner, *Treaty Interpretation*, Oxford University Press (2008), p. 329-330.

79 In this vein: *Roma Rights*, para. 64.

4.3.1 Extraterritorial application of the prohibition of *refoulement* under the Refugee Convention

The Refugee Convention does not contain a general provision outlining its personal scope but sets out a hierarchy of attachments of the individual with the state in delimiting the personal scope of application of the various rights contained therein.[80] Some rights accrue to all refugees 'present within a state's territory',[81] other rights are reserved to those 'lawfully within the state'[82] and still others can only be invoked by refugees who have their 'habitual residence' in a contracting state.[83] This continuum of legal attachments reflects the intention of the drafters of the Refugee Convention that not all refugees should be able to claim all benefits contained in the Refugee Convention – and in particular not those refugees who had 'imposed themselves upon the hospitality of [reception] countries',[84] and that some rights should only be granted after the legal position of the refugee was regularised.[85]

While a majority of rights contained in the Refugee Convention specifically refer to the required level of attachment of the refugee with the state, some core rights, including the prohibition of *refoulement* laid down in Article 33(1), are not equipped with any qualification as to the required legal or physical relationship between the state and the refugee.[86] Logically, this unqualified nature gives rise to an assumption that these rights have a broader personal scope than other Convention rights and do not necessarily depend on any of the attachments mentioned under the other Convention rights. This assumption finds support in the Convention's drafting history, from which it transpires that these rights were considered so central to refugee protection that they had to be accorded to all refugees.[87]

In defining the territorial scope of the prohibition of *refoulement* laid down in Article 33(1) Refugee Convention, we may depart from the understanding that it applies to all refugees present on a state's territory. At the other extreme end of the territorial scale, it does not appear that Article 33(1) can be invoked by persons still within their country of origin. Because Article 33(1) only applies to refugees, and because only persons outside their country of nationality can be defined as refugees, a textual interpretation of the prohibition of *refoulement* dictates that it cannot apply to persons who remain inside their

80 For an extensive overview see Hathaway (2005), p. 156-192.
81 Articles 4 (freedom of religion), 27 (right to identity papers), 31(1) (prohibition to impose penalties for illegal entry) Refugee Convention.
82 Articles 18 (right to self-employment), 26 (freedom of movement), 32 (prohibition of expulsion save on grounds of national security or public order).
83 Articles 14 (artistic rights and industrial property), 16(2) (access to courts).
84 Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC/32/SR.7, 23 January 1950.
85 Hathaway (2005), p. 157.
86 Also see Articles 3, 13, 16(1), 20, 22, 29 and 34.
87 Hathaway (2005), p. 157, 160-164.

country of origin.[88] The incorporation of this territorial restriction in the refugee definition is normally explained from the principle of territorial sovereignty: a state should not be obliged to grant protection if it constitutes an interference in the domestic affairs of another state.[89]

Discord arises as to the applicability of Article 33(1) between these two territorial extremes. Does it apply to the activity of a state in a third state? Does it apply to activity at the high seas? And does it apply to refugees who are at the threshold of entry, namely at the border but not yet within the territory of the state? In *Sale*, the US Supreme Court concluded that the text of Article 33 makes clear that it does not govern State Parties' conduct outside their national borders, although it was seen to cover exclusion at the border, an interpretation which in the Court's view is confirmed by the negotiating history of the Convention.[90] In *Roma Rights*, the House of Lords concurred with the Supreme Court's finding that the Refugee Convention lacks any provision requiring a State to abstain from controlling the movements of people outside its border and took this to imply that Article 33(1) Refugee Convention neither applies to rejection at the frontier.[91] It is notable that, although the House of Lords saw its own interpretation of Article 33(1) confirmed by the earlier judgment of the US Supreme Court, the line of reasoning of both courts differs markedly. Not only did the courts apply divergent rules on treaty interpretation, the courts also arrived at opposing outcomes on two crucial issues, namely the applicability of Article 33(1) to rejections at the border and the ordinary meaning of the term 'return'. In scrutinizing the merits of both judgments hereunder, it is submitted that both decisions rely on a doubtful

88 Article 1 (A)(2) Refugee Convention. According to the UNHCR Handbook: 'It is a general requirement for refugee status that an applicant who has a nationality be outside the country of his nationality. There are no exceptions to this rule. International protection cannot come into play as long as a person is within the territorial jurisdiction of his home country.' UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, January 1992, UN Doc. HCR/IP/4/Eng/REV.1, para. 88. Also *Roma Rights*, para. 64.

89 See, more extensively, chapter 8.1.

90 *Sale* at 181-182.

91 *Roma Rights*, esp. paras. 17, 64, 70. At first glance, the potential applicability of Article 33(1) Refugee Convention to the situation at Prague Airport case appears problematic, because the Roma asylum-seekers were of Czech nationality and still within their own country and could therefore not be properly defined as refugees. It was nonetheless submitted by the appellants that the actions of the immigration officers violated the principle of 'good faith' in implementing the Refugee Convention; that the acts had defeated the 'object and purpose' of the prohibition of *refoulement*; and that the principle of *non-refoulement* had established itself as a rule of customary international law which applied regardless of the place where the State would undertake to expose refugees to persecution or other forms of ill-treatment. See, for an extensive exposé of these arguments the letter amicus curiae filed by UNHCR, 'R (ex parte European Roma Rights Centre et al) v. Immigration Officer at Prague Airport and another (UNHCR intervening)', reprinted in 17 *IJRL* (2005), p. 432-440.

interpretation of the meaning of the term 'return' (*'refouler'*) and an unconvincing reading of the *travaux préparatoires*.

4.3.1.1 The judgments in Sale and Roma Rights

The text, ordinary meaning and special meaning

In ascertaining the territorial scope of state obligations under Article 33(1), the US Supreme Court and the House of Lords both addressed at length the appropriate meaning of the words 'expel or return (*'refouler'*)'. The word 'expel' did not give rise to controversy. Both courts noted that the term is generally understood as referring to the deportation of aliens who are already present in the host country and can therefore not cover acts undertaken outside a state's territory.[92] This view is supported in various legal commentaries.[93] Discord did arise with regard to the verb 'return'. In line with Article 31(4) of the Vienna Convention on the Law of Treaties – holding that a special meaning shall be given to a term if it is established that the parties so intended – the Supreme Court referred to the parenthetical reference in Article 33(1) to the French verb *'refouler'* and concluded that 'return' has a legal meaning narrower than its common meaning. Because the French word *'refouler'* is not an exact synonym for the word 'return', and is commonly translated as 'repulse', 'repel' and 'drive back', the Supreme Court took these translations to imply that 'return' means a 'defensive act of resistance or exclusion at a border, rather than an act of transporting someone to a particular destination.'[94] Accordingly, the US Supreme Court found the Refugee Convention to be applicable to the rejection of refugees at the border, but not applicable to the physical transportation of refugees who have never presented themselves at a state's national borders.[95]

---

92 *Sale* at 180. *Roma Rights*, para. 17.

93 It seems that we can still subscribe the view of Grahl-Madsen, that 'the term "expulsion" refers to a formal measure which is used against aliens who have so far been lawfully staying in the country'; A. Grahl-Madsen, *Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37)*, written in 1963, re-published by UNHCR, October 1997 (under Article 33, Comments, para. 2); Also see P. Weis, *The Refugee Convention, 1951. The Travaux Préparatoires Analysed with a Commentary by the Late Dr Paul Weis*, Cambridge University Press (1995), p. 328, 334-335. But see G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, Oxford University Press (2007), p. 206, who submit that the term 'expel' has no precise meaning in general international law. It is also noteworthy that various provisions of human rights treaties refer to 'expulsion' explicitly in connection to a state's 'territory': eg Article 22(2) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and Article 3 (1) Protocol 4 ECHR. These references must either be seen as tautological or as acknowledgement that expulsion not necessarily occurs from a state's territory alone. Also see n. 76 *supra*.

94 *Sale* at 181-182.

95 Ibid.

The House of Lords also accepted that the word *'refouler'* may have a different dictionary definition than the word return, but reasoned that the putting of the French word *'refouler'* between brackets in the English text was done to clarify the meaning of the word *'refouler'* rather than 'return'. According to Lord Bingham of Cornhill, the requirement of Article 31(4) VCLT that a special meaning is to be given to a term if it is established that the parties so intended was pertinent, because 'the parties have made plain that "*refouler*", whatever its wider dictionary definition, is in this context to be understood as meaning "return".'[96] And because the term 'return' was considered only applicable to measures imposed on refugees within the territory but not yet resident there, Article 33(1) not only has no bearing on refugees outside a state's territory, but neither on refugees who are rejected at the border.[97]

The explanation of the Supreme Court for the inclusion of the term *'refouler'* in the English text is more plausible than the one of the House of Lords. If the intention of the Convention drafters had indeed been to make clear that the French word '*refouler*' was to have no different meaning than the English word return, one should have expected the drafters to clarify the French version of the treaty by inserting the English word return between brackets, rather than the other way around. It indeed appears from the negotiating history that the drafters were primarily occupied with finding an appropriate translation for the French word '*refouler*'. This term had also featured in the 1933 Refugee Convention, of which only the French language version was authentic, and which had been translated in the unauthentic English version as 'non-admittance at the frontier', and with reference to the French word *'refouler'* between brackets.[98] In discussing the meaning of the term 'return' during one of the last sessions of the conference of plenipotentiaries in 1951, the United Kingdom delegate had remarked that the Style Committee had considered that the word return was the nearest equivalent in English to the French word '*refoulement*', from which the delegate deduced that the word 'return' had no wider meaning than the French term '*refouler*'. Upon this remark, the president had proposed to insert the French word '*refouler*' in brackets in the English text, as had also been done in the 1933 Convention.[99] In line with Article 31(4) VCLT, we may hence assume that the parenthetical reference in Article 33(1) to the French verb *'refouler'* suggests that return has

96 *Roma Rights*, paras. 17-18, per lord Bingham of Cornhill; Lord Hope of Craighead appears to share this interpretation, see para. 70.

97 Ibid. Both Law Lords derived this narrow interpretation of the word return from early legal commentaries to the Refugee Convention.

98 Convention relating to the International Status of Refugees, 28 October 1933, 159 *LNTS* 200, Article 3.

99 Statements of Mr. Hoare from the United Kingdom and Mr. Larsen (President), UN Doc. A/CONF.2/SR.35, p. 21-22.

no meaning different than the word '*refouler*', an interpretation confirmed by the preparatory works of the treaty.[100]

In elaborating upon the ordinary meaning of the term '*refouler*' – and hence, the special meaning of the term 'return' – an interpretation that it includes exclusion at the border appears valid. Grahl-Madsen has explained:

> 'The word "refoulement" is used in Belgium and France to describe a more informal way of removing a person from the territory and also to describe non-admittance at the frontier. It may be applied to persons seeking admission, persons illegally present in a country, and persons admitted temporarily or conditionally, in the latter case, however, only if the conditions of their stay have been violated.'[101]

As noted above, the statement that '*refoulement*' includes exclusion at the frontier is supported by the 1933 Refugee Convention, where the word '*refoulement*' in the official French text was translated as 'non-admittance at the frontier'.[102] It was further expressly stated during the drafting of the 1951 Convention that the practice of '*refouler*' – unknown to English-speaking countries – consisted of non-admittance orders enacted by police measures.[103]

What remains problematic in the US Supreme Court's judgment, is that the Court defines the ordinary meaning of the term '*refouler*' not merely by referring to its literary connotation, but by additionally assuming that '*refoulement*' is not known to apply to practices beyond the border. Hathaway has aptly observed that this is simply reflective of the empirical reality that at the time the Convention was drafted no country had ever attempted to deter refugees outside its borders, from which it not automatically follows that the term '*refouler*' cannot be used to describe such practices.[104] Indeed, it does not appear from the French dictionary that '*refouler*' has any geographical connotation.[105] This flaw in the Court's deductive reasoning was also addressed by the dissent in *Sale*:

---

100 Article 32 VCLT.

101 Grahl-Madsen (1963/UNHCR 1997) (under Article 33, Comments, para. 2).

102 Lord Bingham of Cornhill, referring to the commentary of Grahl-Madsen, nonetheless concluded that the word '*refouler*' in the 1933 Convention was not used to mean 'refuse entry', *Roma Rights*, para. 13. This appears to be a misreading however: the explicit requirement formulated in the 1933 Convention that the prohibition of *refoulement* applies only to refugees who have been authorized to reside regularly adjusts the scope of the provision rather than the meaning of the term *refoulement*.

103 Statements of Mr. Giraud (Secretariat) and Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.21 (2 February 1950), paras. 14-15; Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.20 (1 February 1950), para. 47.

104 Hathaway (2005), p. 337.

105 The Cambridge Klett Compact Dictionary (2003) gives the following translation: 1. (repousser: attaque, envahisseur) *to push back*; (foule) *to drive back*; (intrus) *to turn back*; (demande) *to reject* 2. (réprimer) *to hold back*; ~ sa colère *to keep one's anger in check*; (pulsion) *to repress*; (souvenir) *to suppress*; (larmes) *to choke back*.

> 'I am at a loss to find the narrow notion of "exclusion at a border" in broad terms like "repulse," "repel," and "drive back." Gage was repulsed (initially) at Bunker Hill. Lee was repelled at Gettysburg. Rommel was driven back across North Africa. The majority's puzzling progression ("refouler" means repel or drive back; therefore "return" means only exclude at a border; therefore the treaty does not apply) hardly justifies a departure from the path of ordinary meaning. The text of Article 33.1 is clear, and whether the operative term is "return" or "refouler," it prohibits the Government's actions.'[106]

The negotiating history

The Supreme Court concluded that 'the text of Article 33 cannot be reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory', and saw this textual analysis confirmed in commentaries to the Convention and by statements made during the Convention's drafting history. The House of Lords also referred to the Convention's drafting history, but appeared to do so not in order to confirm its textual interpretation of Article 33(1), but because the meaning of the provision was in doubt, in which case recourse may be had to the *travaux préparatoires* to determine the meaning of the terms of a treaty (Article 32(a) VCLT).

The Supreme Court referred to contributions made by the Swiss and Dutch delegates during the conference of plenipotentiaries, which had both expressed the view that the provision on *non-refoulement* should apply only to those who are already admitted into a country ('expel') and those who are already within a country but not yet resident there ('return').[107] The Dutch delegate had stated that he had gathered that the general consensus of opinion was in favor of this interpretation.[108] If taking the statements of the Dutch delegate for granted, this would mean that the Supreme Court's observation that 'return' must be understood as applying *inter alia* to exclusion at the border is also to be discarded. The Swiss and Dutch statements have not been without ramifications. Not only were they relied upon by the Supreme Court to deny extraterritorial effect of Article 33; the commentaries of Robinson and Grahl-Madsen, long taken as authoritative – and on which especially the House of Lords relied upon in its interpretation of the word 'return' – denied extraterritorial applicability of the Convention by referring precisely to these statements.[109]

---

106 *Sale* at 192-193.

107 Ibid, at 184-186.

108 For the statements of the Swiss and Dutch delegates, see UN Docs. A/CONF.2/SR.16, p. 6 (11 July 1951) and A/CONF.2/SR.35 (25 July 1951), p. 21-22.

109 N. Robinson, *Convention Relating to the Status of Refugees, Its History, Contents and Interpretation*, Institute of Jewish Affairs, New York (1953), see esp. p. 139 at footnote 275; and Grahl-Madsen (1963/UNHCR 1997) (under Article 33, Comments, para. 3). It is worth noting how Grahl-Madsen grapples with the peculiar results of his own narrow territorial approach: 'And if the frontier control post is at some distance (a yard, a hundred meters) from the actual frontier, so that anyone approaching the frontier control point is actually in the

There are two reasons to treat the delegates remarks with caution. First, the declarations made by the Swiss and Dutch appear to have been instigated by a fear that Contracting States would be compelled to allow mass migrations across their frontiers.[110] Indeed, the Dutch delegate had only wished 'to have it placed on the record that the Conference was in agreement with the interpretation that the possibility of mass migration across frontiers or of attempted mass migrations was not covered by article 33', to which no objections were made.[111] Accordingly, the only interpretation placed on the record (but not voted upon[112]) was that Article 33(1) was considered not to cover mass migrations – not that return only applies to those already within a country but not resident there.

Secondly, the rather isolated comments of the two delegates stand in sharp contrast with the views on this particular issue taken by the Ad Hoc Committee on Statelessness and Related Problems, which prepared the draft text forwarded for adoption to the Conference of Plenipotentiaries. The Ad Hoc Committee had extensively debated the provision laying down the prohibition of *refoulement* and had achieved consensus on the substance of the obligation. In discussing differences in state practice as regards deportation and non-admission, the US delegate had stated that the Convention ought to apply to persons who asked to enter the territory of the contracting parties and that

country, he may be refused permission to proceed farther inland, but he must be allowed to stay in the bit of the territory which is situated between the actual frontier line and the control post, because any other course of action would mean a violation of Article 33 (1).' In an effort to explain why these results – which Grahl-Madsen admits may seem strange from a logical point of view – are nonetheless not devoid of merit, Grahl-Madsen continues by giving an even more bewildering statement: 'It must be remembered that the Refugee Convention to a certain extent is a result of the pressure by humanitarian interested persons on Governments, and that public opinion is apt to concern itself much more with the individual who has set foot on the nation's territory and thus is within the power of the national authorities, than with people only seen as shadows or moving figures "at the other side of the fence." The latter have not materialized as human beings [sic], and it is much easier to shed responsibility for a mass of unknown people than for the individual whose fate one has to decide.'

110 Mr. Zutter, the Swiss delegate had remarked that Switzerland would only be willing to accept the provision on non-refoulement if the other delegates accepted his interpretation that the word return applied solely to refugees who had already entered a country but were not yet resident there and that '[a]ccording to that interpretation, States were not compelled to allow large groups of persons claiming refugee status to cross its frontiers.' Statement of Mr. Zutter from Switzerland, UN Doc. A/CONF.2/SR.16, p. 6 (11 July 1951). The Dutch delegate similarly communicated: 'article 28 [current Article 33 – author] would not have involved any obligations in the possible case of mass migrations across frontiers or attempted mass migrations.' And: 'The Netherlands could not accept any legal obligations in respect of large groups of refugees seeking access to its territory.' Statements of Baron van Boetzelaer of the Netherlands, A/CONF.2/SR.35 (25 July 1951), p. 21-22.

111 Ibid, Statement of Baron van Boetzelaer of the Netherlands.

112 The dissent in *Sale* observed that the fragments of the negotiating history referred to by the majority 'were never voted on or adopted, probably represent a minority view, and in any event do not address the issue in this case', *Sale* at 198.

'[w]hether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even of expelling him after he had been admitted to residence in the territory, the problem was more or less the same.'[113] The Israeli delegate confirmed this view by declaring that '[t]he Article must, in fact, apply to all refugees, whether or not they were admitted to residence; it must deal with both expulsion and non-admittance, and must grant to all refugees the guarantees provided in the draft (…).'[114] The Belgian delegate explained that 'the term 'expulsion' was used when the refugee concerned had committed some criminal offence, whereas the term '*refoulement*' was used in cases when the refugee was deported or refused admittance because his presence in the country was considered undesirable.'[115] The UK delegate concluded that the notion of *'refoulement'* could apply to (1) refugees seeking admission, (2) refugees illegally present in a country, and (3) refugees admitted temporarily or conditionally.'[116] Suspending the discussion, the chairman observed that 'it had indicated agreement on the principle that refugees fleeing from persecution should not be pushed back into the arms of their persecutors'.[117]

Although one could contend that in using the *travaux* as means of treaty interpretation greater weight should be accorded to declarations made during the Conference on Plenipotentiaries than in the Ad Hoc Committee, the unequivocal and concerted nature of statements made in the latter undermines the House of Lords' observation that the *travaux préparatoires* yield 'a clear and authorative' answer to the question of territorial scope of Article 33.[118] It is regrettable that, while relying heavily on the *travaux*, the House of Lords and US Supreme Court failed to take note of these earlier discussions.[119]

Object and purpose

It is not surprising that the judgments in *Sale* and *Roma Rights* have attracted widespread criticism. Apart from apparent flaws in the courts' lines of reasoning, various commentators have submitted that the conclusion that Article 33(1) cannot have extraterritorial application sincerely jeopardizes the effective meaning of the prohibition of *refoulement*, because it would allow states to simply circumvent their obligations by going forth and seize aliens outside

113 Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.20, 1 February 1950, paras. 54-56.

114 Statement of Mr. Robinson of Israel, ibid, para. 60.

115 Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.21, 2 February 1950, para. 15.

116 Statement of Sir Leslie Brass of the United Kingdom, ibid, para. 16.

117 Statement of Mr. Leslie Chance of Canada, ibid, para. 26.

118 *Roma Rights*, para 17.

119 It remains unclear why no weight was accorded to those earlier proceedings. In its letter *amicus curiae* to the Supreme Court in *Sale*, UNHCR did refer to statements made in the Ad Hoc Committee, Office of the United Nations High Commissioner for Refugees, 'The Haitian Interdiction Case 1993, Brief *amicus curiae*', re-printed in 6 *IJRL* (1994), p. 100.

their borders and return them to persecution, a course of conduct striking at the heart of the provision's basic purpose and the humanitarian intentions of the Refugee Convention.[120] These authors underline that the essential purpose of Article 33 is to prevent refugees from ending up in the country they were fleeing to escape.[121]

Both in *Sale* and the *Roma Rights* case, the applicants had advanced that the object and purpose of Article 33(1) would militate against the conduct complained of. In the *Roma Rights* case, it was also contended that the principle of good faith, referred to in Article 26 and Article 31(1) VCLT, would oppose state conduct that would prevent the Refugee Convention of being triggered. The US Supreme Court admitted that to gather fleeing refugees and return them to the one country they were fleeing to escape, 'may violate the spirit of Article 33', but reasoned that 'a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent'.[122] Because it had already concluded that the text of Article 33(1) could not reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, the object and purpose of the treaty were too meager a basis for establishing a finding to the contrary. The House of Lords concurred with this reasoning and additionally observed that the facts of the *Roma Rights* case differed on a crucial point from the plight of the interdicted Haitians. The Haitians were clearly outside Haiti, their country of nationality, and could therefore be defined as refugees, while the Roma were still within their own country and could not be so defined.[123] Accordingly, the House of Lords understandably concluded that to rely on the principle of good faith in considering the Refugee Convention applicable to the Roma asylum-seekers, would impose new obligations on State Parties in conflict with the clear Convention wording that protection is only to be assured to persons who are in countries that are not their own.[124]

120 See the dissent in *Sale*, at 197. Also see H.H. Koh, 'The "Haiti Paradigm" in United States Human Rights Policy', 103 *Yale Law Journal* (1994), p. 2417; Hathaway (2005), p. 318.

121 This also transpires from the drafting sessions of the Ad Hoc Committee on Statelessness and Related Problems. The Canadian chairman had gathered that there was agreement among the delegates on the principle that 'refugees fleeing from persecution on account of their race, religion, nationality or political opinions should not be pushed back into the arms of their persecutors', Statement of Mr. Chance of Canada, UN Doc. E/AC.32/SR.21, 2 February 1950, para. 26. In commenting upon the *Sale* judgment, Louis Henkin, former US delegate in the Ad Hoc Committee, had found it 'incredible that states that had agreed not to force any human being back into the hands of their oppressors intended to leave themselves free to reach out beyond their territory to seize a refugee and return him to the country from which he sought to escape'. Henkin (1993), p. 1.

122 *Sale* at 183.

123 *Roma Rights*, paras. 18, 21, 26, 64

124 Ibid, para. 63.

4.3.1.2 Interim conclusion

Following the VCLT rules on treaty interpretation and the considerations above, the most plausible approach for interpreting the territorial scope of Article 33(1) Refugee Convention would be to conceive the term 'return' in accordance with the French term *'refouler'*, which translates as defensive or exclusive acts and which is not necessarily restricted to conduct undertaken within the state's territory (Article 31(4) VCLT). That Article 33(1) includes rejection at the border and outside the border is in line with the object and purpose of the provision (Article 31(1) VCLT). Because the meaning of the terms *'refouler'* (and hence, 'return') and the object and purpose of the provision shed sufficient light on the question of territorial scope, it is not necessary to have recourse to the preparatory work of the treaty (Article 32 VCLT), which in any event does not yield a clear answer to the anticipated territorial scope of the provision. This interpretation finds further contextual support in the phrase not to return a refugee 'in any manner whatsoever' laid down in Article 33(1) Refugee Convention, which reflects the notion that the form or manner of the act amounting to expulsion or return is immaterial and that it may cover a great variety of measures by which refugees are expelled, refused admittance or removed.[125]

It does however not follow that Article 33(1) Refugee Convention can apply to all excluding acts vis-à-vis refugees undertaken outside the state's territory. Firstly, as mentioned above, the provision does not cover persons still within their country of nationality or habitual residence. Secondly, it follows from the words '*to* the frontier of territories' that only acts of return (or other defensive acts) taking place *outside* the territory where persecution is feared can come within its ambit. This not only affirms the finding that the Refugee Convention is anyhow not applicable to persons still within their country of origin, but also means that Article 33(1), which can also protect against persecution in

125 E. Lauterpacht and D. Betlehem, 'The scope and content of the principle of *non-refoulement*: Opinion', in: E. Feller c.s. (eds), *Refugee Protection in International Law. UNHCR's Global Consultations on International Protection*, Cambridge University Press (2003), p. 112. Hathaway (2005), p. 317-322. Note however that the formula 'in any manner whatsoever' does not detract from the requirement that the act must still qualify as an act of 'expulsion' or 'return ('refouler')'. It is unclear, for example, whether the act of extradition, in form and manner very similar to the act of expulsion, comes within the ambit of Article 33 Refugee Convention. Lauterpacht and Betlehem infer from the wordings 'in any manner whatsoever' that Article 33 also covers extradition: Lauterpacht and Betlehem (2003), p. 112-113. Goodwin-Gill and McAdam note that although the preparatory work indicates that Article 33(1) did not prejudice extradition, state practice indicates that *non-refoulement* also protects refugees from being extradited. This conclusion is however mainly based on developments under the ECHR, CAT and ICCPR; Goodwin-Gill and McAdam (2007) p. 257-262. Under the ECHR, the word expulsion is expressly understood not to cover extradition: 'With the exception of extradition, any measure compelling the alien's departure from the territory where he was lawfully resident constitutes "expulsion" for the purposes of Article 1 of Protocol No. 7'; ECtHR 12 February 2009, *Nolan and K. v Russia*, no. 2512/04, para. 112.

a third country,[126] cannot literally be construed as applying to excluding acts undertaken *within* a third country where persecution is feared: one cannot return (or 'drive back') a person *to* the territory of a third state if that person already finds himself in that territory. It appears, in other words, that Article 33(1) Refugee Convention can only apply to activity which involves the crossing of the border of the state where the persecution takes place.

4.3.2 Extraterritorial application of the prohibition of *refoulement* under the Convention Against Torture

The Convention Against Torture does not contain a general clause setting out the personal or territorial scope of the treaty, but several provisions in the CAT limit their application to 'any territory under a State Party's jurisdiction'.[127] These terms have been interpreted by the Committee Against Torture much in line with the approaches of the ECtHR and HRC set out in Chapter 2 of this book. In response to the position recently taken up by the US government that Article 2 CAT (the obligation to prevent torture), applies only to US territory and not to the detention facilities located in Guantánamo Bay, Cuba, the CAT considered that

> 'the provisions of the Convention expressed as applicable to "territory under the State party's jurisdiction" apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world.'[128]

A similar formula is now included in General Comment No. 2, on the scope of Contracting States' obligations under Article 2 CAT.[129] It may be noted that although Article 2 CAT speaks of jurisdiction over *territory*, the Committee speaks of jurisdiction – in the sense of effective control – over *persons*. To some

126 This follows from the words 'the frontiers of territories where (…).' See E. Lauterpacht and D. Betlehem, 'The scope and content of the principle of *non-refoulement*: Opinion', in: E. Feller c.s. (eds), *Refugee Protection in International Law. UNHCR's Global Consultations on International Protection*, Cambridge University Press (2003), p. 122.

127 This wording is found in Articles 2(1), 5(2), 11, 12, 13 and 16 CAT.

128 Conclusions and recommendations of the Committee against Torture, United States of America, CAT/C/USA/CO/2, 25 July 2006, para. 15.

129 ComAT, General Comment no. 2, CAT/C/GC/2, 24 January 2008, para 16: 'The Committee has recognized that "any territory" includes all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law. The reference to "any territory" in article 2, like that in articles 5, 11, 12, 13 and 16, refers to prohibited acts committed not only on board a ship or aircraft registered by a State party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control.'

extent, this interpretation corresponds with the treaty's preparatory work. The original obligation to prevent torture had prevented torture from being practiced 'within its [a State Party's – author] jurisdiction',[130] but these words were replaced with the words 'any territory under its jurisdiction', under the reasoning that nationals (who for some purposes may be considered to fall under the state's legislative jurisdiction) living in another country should not be able to rely on such protection.[131] It was nonetheless underlined that 'any territory under its jurisdiction' could also refer to acts taking place in such foreign locations as ships, aircrafts and occupied territories.[132] Similar to the discussions in the preparatory stages of the ECRH and ICCPR therefore, the preparatory work of the CAT suggests that the drafters were well aware of the limits to a state's capacity to provide human rights protection abroad, but that they also agreed that when states would embark upon extraterritorial adventures, the CAT would not automatically be void of meaning.[133]

Article 3 CAT explicitly prohibits *refoulement*. The provision was partly modeled after Article 33 Refugee Convention and is equipped with similar terminology.[134] It prohibits states to 'expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'. Article 3 CAT does not contain a reference to the jurisdiction or territory of the State Party, but the references in other Convention provisions to territories under a state's jurisdiction support a contextual understanding that Article 3 CAT may also apply extraterritorially. This was confirmed by the Committee in its view in the *Marine I case*, concerning the Spanish rescue and processing of a group of migrants whose ship had been in distress close to the shores of Senegal and who were subsequently brought to an abandoned fish processing plant in Mauritania. The Committee considered that its interpretation of the concept of jurisdiction as reflected in General Comment No. 2 is applicable in respect not only of Article 2, but of all provisions of the Convention, and that 'such jurisdiction must also include situations where a State Party exercises, directly or indirectly, de facto or de jure control over persons in detention'.[135] It observed that Spain maintained control over the persons on board the *Marine I* from the time the vessel was rescued and throughout the identification and repatriation process that took place at the plant in Mauritania and that, by

130 GA Res. 3452 (XXX) of 9 December 1975 and UN Doc. E/CN.4/1285.

131 UN Doc. E/CN.4/L. 1470, para. 30.

132 Ibid. For a commentary and further references, see M. Nowak and E. McArthur, *The United Nations Convention Against Torture. A Commentary*, Oxford University Press (2008), p. 92.

133 See chapter 2.3.

134 On the drafting of Article 3 CAT and its relationship with Article 33 Refugee Convention, see G. Noll, *Negotiating Asylum. The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, The Hague/Boston/London: Martinus Nijhoff (2000), p. 435-437 and Nowak and McArthur (2008), p. 134, 195.

135 ComAT 21 November 2008, *J.H.A. v Spain (Marine I)*, no. 323/2007, para. 8.2.

virtue of that control, the alleged victims were subject to Spanish jurisdiction for the purpose of the complaints regarding possible onward removal of the migrants to the conflict in Kashmir in violation of Article 3.

The extraterritorial application of Article 3 CAT was also addressed by the Committee Against Torture in the context of the transfer of detainees held in custody by United Kingdom military forces in Afghanistan and Iraq to the Iraqi and Afghan authorities. Regarding these transfers, the Committee observed that 'the Convention protections extend to all territories under the jurisdiction of a State Party and considers that this principle includes all areas under the de facto effective control of the State Party's authorities'. Specifically referring to the prohibition of *refoulement*, the Committee recommended that 'the State Party should apply articles 2 and/or 3, as appropriate, to transfers of a detainee within a State Party's custody to the custody whether de facto or de jure of any other State.'[136]

It was concluded above that the wording of Article 33 Refugee Convention makes it difficult to bring persons under its ambit who are still within the country from which the threat with persecution emanates. This limitation is also present under Article 3 CAT, which speaks of 'expel, return ("refouler") or extradite a person *to another State* where (…)'.[137] A literal reading would implicate that Article 3 CAT can only apply to situations where a person is outside the country from which the threat stems: one can simply not transfer someone to a place where he already is. This was also the United Kingdom's position in response to the Committee's recommendations on the transfer of detainees held captive in Iraq and Afghanistan.[138] Nowak and McArthur endorse the Committee's approach however by holding that '[t]aking into account the purpose of the absolute prohibition of *refoulement*, the term 'another' State should in fact be interpreted as referring to any transfer of a person from one State jurisdiction to another'.[139] It is indeed notable that, different from Article 33 Refugee Convention, Article 3 CAT does not speak of return 'to the frontiers of territories' but of return 'to another State'. One could accordingly contend that because the word state not necessarily refers to a territorial entity but may also refer to all the organs making up a state, Article 3 CAT can be applicable to all situations where a person is transferred

136 Conclusions and recommendations of the Committee against Torture, United Kingdom, CAT/C/CR/33/3, 10 December 2004, paras. 4(b) and 5(e).

137 Emphasis added.

138 The UK government argued that '[a]lthough a detainee may be physically transferred from UK to Iraqi custody, there is no question of expulsion, return (refoulement) or extradition to another State, as referred to in Article 3, all of which include an element of moving a person from the territory of one State to that of another', Comments by the Government of the United Kingdom of Great Britain and Northern Ireland to the conclusions and recommendations of the Committee Against Torture, CAT/C/GBR/CO/4/Add.1, 8 June 2006, para. 14.

139 Nowak and McArthur (2008), p. 199.

from the organ of one state to another, regardless of any territorial considerations. This suggestion remains problematic nonetheless, because the placement of the adverb 'where' immediately after the term 'State' in Article 3 CAT would appear to indicate that, in the context of Article 3 CAT, the term state has a geographical rather than a functional meaning (otherwise the adverb should have been 'which'). To wit, one could maintain that departure from the strict literal meaning of Article 3 CAT is justified by the purpose of the absolute prohibition of torture and the fact that the drafters of the CAT had probably not contemplated situations in which *refoulement* would take place in an extraterritorial setting. Construing Article 3 CAT in this way appears moreover better possible than under the Refugee Convention, because the CAT was not designed as an instrument to address the problem of persons having fled their country of origin, but to maximize the effectiveness of the struggle against torture throughout the world.[140]

4.3.2 Extraterritorial application of the prohibition of *refoulement* under the ECRH and ICCPR

The difference in approach of, on the one hand, the House of Lords and the US Supreme Court in interpreting the extraterritorial applicability of Article 33 Refugee Convention, and, on the other hand, the Committee Against Torture in interpreting Article 3 CAT, is remarkable to say the least, given the similarity in wording of both provisions. This difference also points to the broader jurisprudential development in which human rights treaty monitoring bodies have construed the body of international human rights as having extraterritorial implications. On a general level, one may indeed contrast the presumption against extraterritoriality propounded by the House of Lords and the US Supreme Court in regard of Article 33(1) Refugee Convention not only with the position taken by the Committee Against Torture, but also with the considerably more lenient position of the ECtHR and HRC in matters involving extraterritorial acts of states as described in chapter 2. This difference in approaches may be explained from the explicit reference in the ECRH and ICCPR to the term jurisdiction, which is generally accepted to be not necessarily confined to a state's territory; and from the fact that Article 33 Refugee Convention speaks specifically of 'expel' and 'return', terms which are traditionally used only in relation to the deportation of persons from a state's territory. But it is perhaps also appropriate to acknowledge that, in interpreting treaty terms, human rights monitoring bodies have tended to attribute primary importance to a teleological interpretation focused on the object and purpose of the treaty. Meron and others have observed that this 'teleological bias' of human rights

140 See the CAT's preamble ('Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world').

courts has on occasion resulted in the ordinary meaning of treaty terms being overridden and the legislative history or preparatory work ignored.[141]

In the context of extraterritorial state activity, the Human Rights Committee's interpretation of the terms 'within its territory and subject to its jurisdiction' laid down in Article 2(1) ICCPR is perhaps the most salient example of this development. While it has been (tacitly) acknowledged by the Human Rights Committee – and explicitly in legal discourse[142] – that a literal reading of this provision can only imply that 'territory' and 'jurisdiction' are cumulative requirements for attracting a state's obligations under the ICCPR, the Human Rights Committee, in a course later adopted by the International Court of Justice,[143] has discarded this ordinary grammatical meaning by concluding that 'it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State Party to perpetrate violations of the Covenant on the territory of another state, which violations it could not perpetrate on its own territory.'[144] One may continue to oppose this approach as being *contra legem* or as constituting an affront to the mainstream of international treaty law.[145] Nonetheless, the essentially convergent views of the different human rights treaty bodies and the confirmation thereof by ICJ, allow us to presently depart from the understanding that human rights treaties, including the ICCPR, bind states with regard to persons in foreign territories who can be considered to fall within the jurisdiction of that state.

Because the rights and freedoms defined in human rights treaties benefit anyone within the jurisdiction of a Contracting State, it may be assumed that extraterritorial acts of *refoulement* can bring potential victims within the ambit

141 T. Meron, *The Humanization of International Law*, Leiden/Boston: Martinus Nijhoff (2006), p. 193.

142 See esp. Noll (2000), p. 440; Noll (2005), p. 557.

143 ICJ 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 2004, paras. 108-111; ICJ 19 December 2005, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, para. 216.

144 HRC 29 July 1981, *Delia Saldias de Lopez v. Uruguay*, no. 52/1979, para. 12.3. In justifying this departure from the text of Article 2(1) ICCPR, the Committee referred to Article 5 (1) ICCPR, which stipulates that: '[n]othing in the present Covenant may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant'. Article 5 ICCPR, a provision otherwise rarely invoked, is reminiscent of the good faith argument brought forward by the applicants in the *Roma Rights* case. Tomuschat however, found Article 5 ICCPR to be incorrect as a basis for affirming the applicability of the Covenant outside a State's territory and instead suggests that construing the words "within its territory" pursuant to their strict literal meaning must be rejected because that would lead to 'utterly absurd results'. See Individual opinion appended to the Committee's views of Mr. C. Tomuschat.

145 Noll (2005), p. 558-564, who, while acknowledging the HRC's divergent position on the matter, maintains that '[t]he expansion of Article 2(1) ICCPR (…) is hard to justify in dogmatic terms', and that the Committee's interpretation 'runs counter to the ordinary meaning of its terms (an 'and' not being synonymous to an 'or')', at p. 563.

of a Contracting State's obligations. In *Roma Rights*, Lord Bingham of Cornhill expressed doubts as to whether the functions performed by British immigration officers at Prague airport could be said to be an exercise of jurisdiction 'in any relevant sense', but eventually discarded the *refoulement*-argument based on Articles 2 and 3 ECRH by submitting that the agreed facts did not disclose any threat to treatment sufficient to engage Articles 2 and 3.[146] It is remarkable that where the Law Lords scrupulously addressed the issue of extraterritorial applicability of Article 33 Refugee Convention – which even broadly interpreted could not benefit the Roma asylum-seekers since they had not left their country of origin and could accordingly not be defined as refugees – they only succinctly touched upon the relevance of the ECRH, which has a considerable less disputed capacity for giving rise to extraterritorial obligations. What is also remarkable is that the issue of jurisdiction apparently plaid a role in establishing whether Articles 2 and 3 ECRH were applicable to the case, but was not deemed relevant in concluding that the United Kingdom had violated the prohibition of discrimination under various international treaties, with explicit references to Articles 2 and 26 ICCPR, Article 14 ECRH, Article 2 ICERD *and* Article 3 Refugee Convention.[147]

Article 3 ECRH and Article 7 ICCPR have been construed by the ECtHR and HRC as implicitly containing a prohibition of *refoulement*. Article 3 ECRH and Article 7 ICCPR do not make mention of such acts as expulsion or return, do not refer to a location to which the transfer of persons is prohibited, but simply and boldly pronounce that no one is to be subjected to torture or inhuman or degrading treatment or punishment. Accordingly, the nature of a state's obligations under Article 3 ECRH and Article 7 ICCPR is substantially different from that under Article 3 CAT and Article 33 Refugee Convention. The prohibition of *refoulement* under the ECRH and ICCPR would not appear to hinge on the question whether an act can be labeled as 'expulsion' or 'return'; nor on the question whether a person is actually outside the state from which the threat with ill-treatment stems.

The rationale for reading a prohibition of *refoulement* into Article 3 ECRH was articulated by the ECtHR as follows:

> 'In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms (…). Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective (…). In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with

146 *Roma Rights*, para. 21.

147 *Roma Rights*, paras. 98-100, per Baroness Hale of Richmond. Like Article 33, Article 3 Refugee Convention does not refer to a required level of attachment between the refugee and the state.

> "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society" (…).
> The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture [Article 3 CAT- MdH] does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention. It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.'[148]

Accordingly, with references to the object and purpose of both the Convention as a whole and Article 3, a prohibition of *refoulement* is inserted in the European Convention. This is notwithstanding the fact that neither the text nor the drafting history indicates that Article 3 was envisaged to apply to such situations, notwithstanding that it concerns acts taking place outside a country's territory, notwithstanding that it concerns acts committed by or under the responsibility of another state, and notwithstanding that it concerns conduct which is yet (and may indeed prove never) to materialize.

In *Soering*, the key criterion for engaging a State's responsibility was formulated as there 'having been shown substantial grounds for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.'[149] On a more general note, the Court added that the extraditing Contracting State's liability is incurred 'by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.'[150] These considerations put the prohibition of *refoulement* under Article 3 ECRH much in line with the Court's doctrine on positive obligations, and in particular the duty to protect, requiring states to take measures designed to ensure that individuals within their jurisdiction are not subjected to treatment contrary to Articles 2 and 3. Under this doctrine, states are required to undertake reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge, regardless of whether the ill-treatment stems from private persons, from state organs or from naturally occurring

148 ECtHR 7 July 1989, *Soering v the United Kingdom*, no. 14038/88, paras. 87-88.
149 Ibid, para. 91.
150 Ibid.

illnesses.[151] These categories are also covered by the protection against *refoulement*.[152] And similar to cases concerning expulsion or extradition (or foreign cases), the existence of a 'real risk' of treatment contrary to the Convention has in domestic situations been considered decisive in enlivening a duty on the side of the state to undertake protective measures.[153]

Accordingly, the case law of the European Court is highly supportive of a general rule that, whenever it is known or when it ought to have been known that an individual within the jurisdiction of a Contracting State is exposed to a real risk of ill-treatment, it is incumbent on that state to take steps to prevent that risk from materializing. Decisive, in this regard, for engaging a state's duty to protect is not the form or manner in which the risk materializes, nor the manner in which the state can negate this risk (be it through providing police protection,[154] through providing necessary medical services,[155] by removing abused children from parental care,[156] through not releasing a dangerous criminal from prison,[157] or, indeed, by not expelling a person) but whether the state has taken reasonable and appropriate preventive measures to remove the risk of ill-treatment, or at the least to alleviate that risk to such a level that it is no longer 'real' or 'immediate'.

So construed, the prohibition of *refoulement* under the ECRH and ICCPR is essentially an obligation to shield a person from harm. This protective duty is well apt to apply regardless of territorial considerations, provided that a person is within the jurisdiction of a Contracting State. In the context of Article 2 ECRH, the right to life, the ECtHR has confirmed that states may also incur protective duties in respect of persons outside their national boundaries.[158] The ECtHR has affirmed that the same rationale applies to situations where a state transfers or hands over a person in and to a potentially maltreating state. In the case of *Al-Saadoon and Mufdhi*, further discussed in section 4.5 below, the ECtHR found the physical transfer of two Iraqi detainees held in a British military facility in Iraq to the custody of the Iraqi authorities to have breached the United Kingdom's obligations under Articles 2 and 3 of

151 ECtHR 28 October 1998, *Osman v the United Kingdom*, no. 23452/94, para. 115. ECtHR 10 May 2001, *Z. a.o. v the United Kingdom*, no. 29392/95, para. 73; ECtHR 4 May 2001, *Kelly a.o. v the United Kingdom*, no. 30054/96, paras. 94-95; ECtHR 9 June 1998, *L.C.B. v the United Kingdom*, no. 23413/94, para. 38.

152 ECtHR 29 April 1997, *H.L.R. v France*, no. 24573/94 (non-state organs); ECtHR 27 May 2008, *N. v the United Kingdom*, no. 26565/05 (natural illness).

153 *L.C.B. v the United Kingdom*, para. 38; ECtHR 10 October 2000, *Akkoc v Turkey*, nos. 22947/93 and 22948/93, para. 81; ECtHR 28 March 2000, *Mahmut Kaya v Turkey*, no. 22535/93, para. 89; *Osman v the United Kingdom*, para. 116.

154 *Osman v the United Kingdom*, para. 115-121.

155 *L.C.B. v United Kingdom*, paras. 36-41.

156 *Z. a.o. v the United Kingdom*, para. 74.

157 ECtHR 24 October 2002, *Mastromatteo v Italy*, no. 37703/97, para. 69.

158 ECtHR 11 January 2001, *Xhavara a.o. v Italy*, appl. 39473/98. ECtHR 24 June 2008, *Isaak v Turkey*, appl. 44587/98.

the Convention and Article 1 of Protocol No. 13 because there were substantial grounds for believing that the applicants would face a real risk of being sentenced to death and executed.[159] A similar reasoning, although no finding of a violation of the ICCPR, was adopted by the Human Rights Committee in the case of *Munaf v Romania*, concerning the handover of an Iraqi-American dual national from the Romanian embassy in Baghdad to the multinational forces in Iraq who was subsequently sentenced to death. The Human Rights Committee held its previous jurisprudence in *refoulement*-cases to also apply to the circumstances of this case, but considered that the Romanian authorities could not have known that the complainant would face criminal charges.[160]

To conclude, the prohibition of *refoulement* established under the ECRH and ICCPR articulates the essential protective duty of a State Party to not expose a person within its jurisdiction to a real risk of ill-treatment. If established that a person can be considered to be within the state's jurisdiction, the state becomes bound to comply with this protective duty, regardless of whether the person is on the territory of that state, in his country of origin or in a third state from which the threat with ill-treatment stems. This is not to exclude however, that the limited practical and/or legal capabilities a state in certain foreign situations may have, can inform (or displace) the substance (or material scope) of a state's protective duties.[161]

4.4 THE RIGHT TO SEEK ASYLUM

4.4.1 The right to seek asylum in international law

There is no common understanding of 'the right to seek asylum' in international law. Although pronounced in Article 14 of the Universal Declaration of Human Rights (together with the right to 'enjoy' asylum), the right to seek asylum was not codified in binding human rights treaties adopted under the auspices of the United Nations or regional organizations, with the exception of Article 12(3) of the African Charter on Human and Peoples' Rights.[162] Possibly, the right to seek asylum could be read into the broadly formulated 'right to asylum' laid down in Article 18 of the EU Charter of Fundamental Rights.[163]

159 ECtHR 2 March 2010, *Al-Saadoon and Mufdhi v the United Kingdom*, no. 61498/08.
160 HRC 21 August 2009, *Mohammad Munaf v Romania*, no. 1539/2006, paras. 14.2, 14.5.
161 See, in general, chapter 2.5.2; and specifically with respect to situations where human rights obligations may conflict with obligations vis-à-vis the host state, section 4.5.
162 Article 12(3) African Charter on Human and Peoples' Rights: 'Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.'
163 OJ 2007 C303/01. See further chapter 5.3.3.

Although lacking a clear basis in treaty law, legal scholars have employed the right to seek asylum as informing a variety of rights associated with the institution of asylum, albeit in divergent manner. Some perceive the right to seek asylum as covering the entire range of rights associated with receiving a proper status determination in and from the desired state of refuge,[164] while others connect the right to persons who try to flee from persecution but who are subjected to deterrent mechanisms preventing them from reaching and successfully claiming asylum in a safe country.[165] Notably, most authors derive from the right to seek asylum obligations of destination countries vis-à-vis asylum-seekers instead of what could perhaps be its most obvious and immediate significance: a right to escape from persecution – which is first and foremost exercisable vis-à-vis the country which one attempts to flee.

It transpires from the drafting history of Article 14 UDHR that the right to seek asylum was perceived as a right to escape persecution and that this right did not prejudice the right of the petitioned state to deny asylum. The Drafting Committee, responsible for preparing the text of the UDHR, had recommended to include a provision stipulating that "Everyone has the right to escape persecution on grounds of political or other beliefs or on grounds of racial prejudice by taking refuge on the territory of any State willing to grant him asylum", a right which could be read as exercisable by both the individual and the state granting asylum vis-à-vis the country of persecution but which falls short of endowing the individual with a right to be granted asylum.[166] Later discussions in the drafting sessions predominantly concerned the question of whether the provision on asylum should not explicitly recognize a right of the individual to be granted asylum by another state. A majority of representatives in the Working Group of the Commission on Human Rights was in favor of including such a right and provisionally agreed upon the formula that "Everyone has the right to seek and be granted, in other countries, asylum from persecution."[167] During the final negotiations In ECOSOC however,

164 D. Stevens, 'The Asylum and Immigration Act 1996: Erosion of the Right to Seek Asylum', 61 *The Modern Law Review* (1998), p. 207-222; K. Coffey, 'The Due Process Right To Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy', 19 *Yale Law and Policy Review* (2001), p. 255-291; E. Ferris, 'Internal Displacement and the Right to Seek Asylum', 27 *Refugee Survey Quarterly* (2008), p. 76-92; H. O'Nions, 'The Erosion of the Right to Seek Asylum', 2 *Web Journal of Current Legal Issues* (2006)

165 M. Kjaerum, 'Article 14', in: A. Eide et al. (eds), *The Universal Declaration of Human Rights. A Commentary*, Oslo: Scandinavian University Press and Oxford University Press (1992), p. 221-224; B. Frelick, ''Preventive Protection' and the Right to Seek Asylum: A Preliminary Look at Bosnia and Croatia', 4 *IJRL* (1992), p. 439-454; T. Gammeltoft-Hansen and H. Gammeltoft-Hansen, 'The Right to Seek – Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU', 10 *EJML* (2008), p. 439-459.

166 UN Doc. E/CN.4/21, Annex F. For commentaries to the drafting of Article 14 UDHR see A. Grahl-Madsen, *The Status of Refugees in International Law*, vol. II, Leiden: Sijthoff (1972), p. 100-102; H. Lauterpacht, *International Law and Human Rights*, Hamden: Archon Books (1968 reprint), p. 421-422; Gammeltoft-Hansen and Gammeltoft-Hansen (2008), p. 442-446.

167 UN Doc. E/CN.4/SR.57, p. 11.

several delegations firmly opposed any reference to a right to be granted (or to obtain) asylum because it was felt that states were not under a general obligation to admit to their territories all persons fleeing from persecution.[168] The United Kingdom delegation instead proposed to refer to the right 'to seek and to enjoy asylum', with the term 'enjoy' referring to an individual right of asylum which is subject to approval of the petitioned state. Even though some delegations opposed this formula because there was 'no point in a guarantee of enjoying asylum unless there was also established the right to obtain it', subsequent proposals to insert some form of moral obligation to grant asylum were all defeated.[169]

Noting the explicit disclaimer of an intention to assume an obligation to grant asylum, Lauterpacht concludes that Article 14 of the Declaration is 'artificial to the point of flippancy' and that it would be confusing 'to refer in this connection to the "right of asylum" – a phrase implying that it is a right belonging to the individual'.[170] Rather, as is also underlined by Grahl-Madsen, Article 14 of the Declaration refers primarily to the right of states to grant asylum to non-nationals – the right to offer refuge and resist demands for extradition as discussed in section 4.2.1 – and a corresponding duty of respect for it on the part of the state of which the refugee is a national (which primarily finds reflection in the word 'enjoy').[171] In so far as Article 14 UDHR does provide for a right which can be labeled as a human right, it is the mere right to *seek* asylum – a right which, according to Grahl-Madsen, does not say much more than the right to leave any country including his own, as already secured by Article 13 (2) UDHR.[172]

The right to seek asylum is taken here as giving expression to the right of persons fearing persecution to make use of their right to leave a country for the specific purpose of trying to obtain asylum. Although the right to seek asylum and the more generally applicable right to leave a country are only scarcely touched upon in international refugee law, they would appear to have special significance in the context of extraterritorial migration controls, precisely because those controls may prevent persons from approaching a destination country in order to apply for asylum. In the absence of self-standing legal

168 UN Doc. A/C.3/253, UN Doc. A/C.3/SR.121, see in particular statements by Mrs. Corbet from the United Kingdom; cf. UN Doc. E/800.

169 UN Doc. A/C.3/244, Statement of Mr. Pavlov from the Soviet Union.

170 Lauterpacht (1968), p. 422 at n. 72.

171 Ibid; Grahl-Madsen (1972), p. 101.

172 Ibid. In this vein also Kjaerum, in: Eide (1992), p. 224-225: 'The right to seek asylum has, in fact, one of its basis in the 'right of emigration'', referring to Article 13(2) UDHR, Article 12(2) ICCPR and Protocol No. 4 to the ECHR. *Contra*, Gammeltoft-Hansen and Gammeltoft-Hansen (2008) p. 446, who, after a lengthy review of the drafting history of Article 14 UDHR posit that the right to seek asylum should be perceived as a procedural right: the right to be allowed access to an asylum procedure, which should be guaranteed by the receiving state.

provisions giving substance to the right to seek asylum, this section describes the contents of the right to seek primarily by analogy to the conditions under which the right to leave can be asserted. Particular attention is paid to the following questions: under what circumstances can refusing leave to migrants in general, and asylum-seekers in particular, be considered in breach of the right to leave? What is the relationship between measures of entry control and the right to leave? Can the right to leave only be invoked vis-à-vis the territorial state or also against a state employing extraterritorial border measures?

4.4.2 The right to leave in international law

Although often not codified in national constitutional charters, the freedom to leave any country, including his own, is a historical norm in human society, and has found expression in virtually all modern human rights treaties.[173] The right to leave is pronounced in Article 12(2) ICCPR, Article 2(2) Protocol 4 ECRH, Article 22 American Convention on Human Rights and Article 12 African Charter of Human and Peoples' Rights. It has also been codified in treaties guaranteeing human rights for specific categories of persons, including the Refugee Convention, the Convention relating to the Status of Stateless Persons and the International Convention on the Protection of the Rights of All Migrant

173 The origins of the right to leave can be traced back to the Magna Carta of 1215 which stipulated that 'All merchants may safely and securely go away from England, come to England, stay in and go through England, (…)' and that 'Every one shall henceforth be permitted, saving our fealty, to leave our kingdom and to return in safety and security, by land or by water (…)', Articles 41 and 42. Grotius also connected the right to leave to the idea of free trade. He defended the axiom that '[e]very nation is free to travel to every other nation, and to trade with it', by observing that nature had not supplied every place with all the necessaries of life and that, given the need for mutual exchange of resources and services, '[n]ature has given to all peoples a right of access to all other peoples', Hugo Grotius, *The Freedom of the Seas*, originally published 1608, trans. by R. Van Deman Magoffin, New York: Oxford University Press (1916), Ch. 1. Vattel recognised the right of a citizen 'to quit his country', which in some cases he regarded as absolute: '[t]here are cases in which a citizen has an absolute right to renounce his country, and abandon it entirely – a right founded on reasons derived from the very nature of the social compact.' Vattel distinguishes the right to quit a country from the right of emigration, which he also sees as a natural right with which the state may not interfere: '[i]f the sovereign attempts to molest those who have a right to emigrate, he does them an injury; and the injured individuals may lawfully implore the protection of the power who is willing to receive them.' E. de Vattel, *The Law of Nations*, originally published 1758, trans. J. Chitty, Philadelphia: Johnson (1867), Bk. 1, Ch. XIX, paras. 223-226. For modern appraisals of the right to leave, see eg R. Higgins, 'The Right in International Law of an Individual to Enter, Stay in and Leave a Country', 49 *International Affairs* (1973), p. 342; S. Juss, 'Free Movement and the World Order', 16 *IJRL* (2004), p. 292; H. Hannum, *The Right to Leave and Return in International Law and Practice*, Dordrecht/Boston/Lancaster: Martinus Nijhoff (1987), p. 4; C. Harvey and R.P. Barnidge, 'Human Rights, Free Movement, and the Right to Leave in International Law', 19 *IJRL* (2007).

Workers and Members of Their Families.[174] Discrimination with respect to the right to leave is prohibited under Article 5(d) of the International Convention on the Elimination of All Forms of Racial Discrimination. Of the relevant treaty monitoring bodies, it are predominantly the HRC and ECtHR which have examined the scope of the right to leave in significant detail.

The right to leave is pronounced in the exact same terms in Article 12 (2) ICCPR and Article 2(2) Protocol 4 ECRH: Everyone shall be free to leave any country, including his own.[175] The HRC and ECtHR have interpreted the right to leave broadly and have affirmed that the right to leave is a self-standing norm, the enjoyment of which does not depend on the purposes of travel.[176] Apart from travel bans or border-police measures preventing persons from leaving a country,[177] the HRC and ECtHR have accepted that that the confiscation, refusal to issue or refusal to renew a passport can also come within the ambit of the right to leave. According to the ECtHR '[a] measure by means of which an individual is dispossessed of an identity document such as, for example, a passport, undoubtedly amounts to an interference with the exercise of liberty of movement'.[178] The Human Rights Committee has explained that '[s]ince international travel usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents.'[179] Although passports are indeed the *sine qua non* of the right to leave,[180] analogous considerations apply to all identity

174 Refugee Convention, Article 28; Convention on Stateless Persons, Article 28; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 8.

175 This is not a coincidence. While the original draft of Article 2 (2) Fourth Protocol to the ECHR spoke of the right 'to leave any State', the Committee of Experts decided to substitute the word 'State' for 'country', by referring to the text of Article 12 (2) ICCPR. The difference appears marginal, although it was considered that the term 'country' could also apply to regions which could not be designated as states. Council of Europe Committee of Experts, 'Explanatory reports on the Second to Fifth Protocols to the European Convention for the Protection of Human Rights and Fundamental Freedoms', Doc. H (71) 11, Strasbourg (1971), para. 10.

176 HRC, General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9, para. 8. ECtHR 13 November 2003, *Napijalo v Croatia*, no. 66485/01, para. 73.

177 Eg ECtHR 23 May 2006, *Riener v Bulgaria*, appl. 46343/99, para. 110 (travel ban); ECtHR 17 July 2003, *Luordo v Italy*, appl. 32190/96, para. 92 (travel ban). With regard to the former East-German border-policing regime, see ECtHR 22 March 2001, *Streletz, Kessler and Krenz v Germany*, appls. 34044/96, 35532/97 and 44801/98, paras. 98-101.

178 *Napijalo v Croatia*, para. 69. Also see ECtHR 31 October 2006, *Földes and Földesné Hajlik v Hungary*, no. 41463/02, para. 33; ECtHR 22 May 2001, *Baumann v France*, no. 33592/96, para. 62; ECtHR 21 December 2006, *Bartik v Russia*, no. 55565/00, para. 36.

179 HRC, General Comment 27, para. 9.

180 Harvey and Barnidge (2007), p. 7

and travel documents necessary for exercising the right to leave, such as exit visa.[181]

Other infringements of the right to leave may consist of the imposition of various legal and bureaucratic barriers, such as exceedingly high fees for travel documents,[182] the obligation to describe precisely the envisaged travel route,[183] the requirement to be in the possession of a return ticket,[184] or such far-reaching measures as a prohibition on women to leave without the consent of their husband.[185] It has also been considered that to make departure of a mentally deranged offender conditional on the receiving country placing that offender in a mental hospital may fall under Article 2 (2) Protocol No. 4 ECRH.[186]

The expression *any country* in Article 12 (2) ICCPR and Article 2(2) Protocol 4 ECRH is important and implies, firstly, that the right to leave is applicable to nationals and aliens alike, which also follows from the word 'everyone'.[187] Secondly, and of particular importance for this study, the expression has been interpreted as obliging states not only to secure the right to leave from their own territories, but also from that of territories of other states. In *Peltonen v Finland*, the European Commission of Human Rights held the right to leave to be applicable to a situation in which a Finnish national had already left Finland for Sweden and when the Finnish authorities consecutively took measures which prevented him from leaving Sweden.[188] Similarly, the Human Rights Committee has repeatedly accepted that that to refuse a passport to a national living abroad can impede a person from leaving that other country and therefore come within the ambit of the right to leave.[189] In *Peltonen v Finland*, the European Commission did not address the question whether

181 On exit visas, see HRC 26 April 2005, Concluding observations on Uzbekistan, CCPR/CO/83/UZB, para. 19; HRC 24 April 2001, Concluding observations on Syrian Arab Republic, CCPR/CO/71/SYR, para. 21; HRC 18 November 1996, Concluding observations on Gabon, CCPR/C/79/Add.71, para. 16.

182 HRC 19 November 1997, Concluding observations on Iraq, CCPR/C/79/Add.84, para. 14.

183 HRC, General Comment 27, para. 17.

184 Ibid.

185 HRC 1 April 1997, Concluding observations on Lebanon, CCPR/C/79/Add.78, para. 18.

186 EComHR 4 October 1989, *I.H. v Austria*, appl. 10533/83, par. 11. For a situation of compulsory care preventing a person from leaving his country see also EComHR 13 October 1993, *Nordblad v Sweden*, appl. 19076/91.

187 To this effect, see eg HRC Concluding Observations on Lebanon, 1 April 1997, CCPR/C/79/Add.78, para. 22; and HRC 18 November 1996, Concluding observations on Gabon, CCPR/C/79/Add.71, para. 16, concerning the confiscation of passports of foreign workers and exit visa requirements imposed on foreign workers, respectively.

188 EComHR 20 February 1995, *Peltonen v Finland*, no. 19583/92.

189 HRC 15 November 2004, *Loubna El Ghar v Libya*, no. 1107/2002, para. 7.3.; HRC 29 July 1994, *Peltonen v Finland*, no. 492/1992, para. 8.4; HRC 23 March 1982, *Vidal Martins v Uruguay*, no. R.13/57, para. 7; HRC 31 March 1983, *Montero v Uruguay*, no. 106/1981, para. 9.4; HRC 31 March 1983, *Lichtensztejn v Uruguay*, no. 77/1980, para. 8.3; HRC 22 July 1983, *Nunez v Uruguay*, no. 108/1981, para. 9.3.

Peltonen actually was 'within the jurisdiction' of Finland for the purposes of Article 1 ECRH. The Human Rights Committee, on the other hand, has explicitly accepted that nationals living abroad who are refused a passport, come within the jurisdiction of the refusing state.

In the case of *Baumann v France*, the ECtHR considered that 'the right to leave implies a right to leave for such country *of the person's choice to which he may be admitted*'.[190] Although this reasoning could be taken as to imply that a right to leave only exists in so far as another country is willing to accept a person,[191] the better interpretation is that the Court indicates that the right to leave can also be interfered with in situations where a person may be able to leave for one particular country, but is prohibited from going to another.[192] This is also apparent from the earlier Commission decision in the case of *Peltonen v Finland* – from which the quote in Baumann was taken – in which the denial to issue a passport to mr. Peltonen was considered to constitute an interference with the right to leave, even though the refusal did not prevent him from leaving Sweden for another Nordic country. It is from a similar rationale that the Human Rights Committee has frequently stressed that ad hoc travel documents such as *laissez-passers* or safe conducts out of the country are no adequate substitutes for a passport, since they only allow for travel to one particular destination.[193] According to the Human Rights Committee: 'the right of the individual to determine the State of destination is part of the legal guarantee'.[194]

In line with the interpretation that an interference of the right to leave does not depend on there being another country willing to grant entry, the ECtHR has on multiple occasions stated that measures making it impossible for persons to travel abroad must be considered as automatically restricting the right to leave, also when the person concerned has no inclination to travel abroad. Thus, in *Napijalo v Croatia*, the Court held that to deny the use of an identity document to the applicant which, 'had he wished', would have permitted him to leave the country, restricted his right to liberty of movement.[195] And in *Luordo v Italy*, the Court found an order to stay in a place of residence

190 *Baumann v France*, para. 61, emphasis added. The formulation was repeated in *Földes and Földesné Hajlik v Hungary*, para. 32; *Napijalo v Coatia*, para. 68; *Bartik v Russia*, para. 36.

191 G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, Oxford University Press (2007), p. 381; V. Moreno Lax, 'Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees', 10 *EJML* (2008), p. 352.

192 On the relationship between the individual right to leave and the right of the state to control entry, see section 4.4.3 below. It does not transpire from the case of *Baumann* or from later judgments of the ECtHR that the question of whether another country is in fact prepared to allow entry is material for applicability of the right to leave.

193 *Loubna El Ghar v Libya*, para. 7.2; *Nunez v Uruguay*, para. 9.2; *Lichtensztejn v Uruguay*, para. 8.2; *Vidal Martins v Uruguay*, paras. 6.2, 9; *Montero v Uruguay*, paras. 9.2, 10.

194 HRC, General Comment 27, para. 8.

195 *Napijalo v Croatia*, para. 73. Also see *Bartik v Russia*, para. 36.

to be in violation of Article 2 Protocol No. 4, '[e]ven though there is nothing in the case file to indicate that the applicant wished to move away from his place of residence or was refused permission to do so.'[196] Apparently, the mere fact of being unable to travel a fortiori constitutes an interference with the right to leave.[197]

Because the right to leave encompasses departure from any country where a person is, because it covers departure to any country of the person's choice, and because a state's obligations are not necessarily confined to its own territories but may extend to the territories of other states; it would logically follow that states may also interfere with a person's right to leave by imposing measures of immigration control which have the effect of preventing a non-national from leaving another country. Although the case law referred to above on measures having the effect of preventing persons from leaving another country concerned restrictions imposed on nationals living abroad, there is nothing in the text of Articles 12(2) ICCPR and 2(2) Protocol No. 4 ECRH which prevents non-nationals present in a foreign country from also coming within the potential ambit of a state's obligation to respect the right to leave. The Human Rights Committee has endorsed this view in its General Comment on Article 12 ICCPR by inviting States to 'include information in their reports on measures that impose sanctions on international carriers which bring to their territory persons without required documents, where those measures affect the right to leave another country'.[198] And in its concluding observations on Austria, the HRC expressed concerns about certain features of Austria's law on asylum-seekers and immigrants, amongst which 'sanctions against passenger carriers and other pre-frontier arrangements that may affect the rights of any person to leave any country, including his or her own.'[199] This supports the proposition that immigration policies having effects in other countries *can* (but see below) be construed as infringements of the right to leave another country.

196 *Luordo v Italy*, para. 96.

197 This position was nonetheless contested by dissenting judges Costa, Bratza and Greve in the *Baumann* judgment, who pointed out that the contested measures 'must also have actually interfered with the right to liberty of movement', and that, because the seizure of Baumann's passport had not deprived him of his right to leave France and because it had never been alleged that he was prevented from leaving Germany, there was no causal link between the impugned seizure and the applicant's freedom of movement. Joint partly dissenting opinion judges Costa, Bratza and Greve in *Baumann v France*.

198 HRC, General Comment 27, para. 10.

199 HRC 19 November 1998, Concluding observations on Austria, CCPR/C/79/Add.103, para. 11.

4.4.3 The right to leave and the right to enter

It was posited above that a state may interfere with the right to leave also if no other state is in fact willing to grant entry. The question may be posed, conversely, whether a state, by refusing *entry* into its territory, may also interfere with a person's right to leave the territory of *another* state. It is, indeed, sometimes argued that measures of immigration control imposed by countries of destination have a negative impact, or may even nullify, a person's right to leave his country of residence. Juss, stressing that 20th century restrictions on migration are a departure from the historical norm of free movement, posits that immigration barriers render the right to leave practically meaningless.[200] Nafziger argues that the right to leave imposes an implicit obligation on territories not to entirely deny entry to foreign nationals.[201] And Dummett goes so far as to state that an individual authorized to leave his country but not accepted by any other country would see his right to emigration violated.[202] Although it is certainly true that the practical meaning of the right to leave depends on a corresponding right to be allowed entry into another country, one must, for a number of reasons, be careful in construing immigration restrictions as infringements of the right to leave. Such pronouncements risk neglecting that the rights to enter and to leave are firmly set apart in human rights law and subject to different principles of international law.

First, one must not confuse the right to leave with a right to emigrate. The latter is not a right in international law. Although the HRC states that the freedom to leave covers 'departure for permanent emigration', this pronouncement must be understood from the HRC's insistence that the right to leave is to be secured regardless the purpose of travel, and that it may not, for example, be made dependent on whether a person intends to return or not.[203] Conceptually, the difference between a right to emigrate and the right to leave is that the former encompasses not only the activity of leaving but also that of (permanent) settlement in another country. It is clear that the possibility of obtaining permission to settle in another country is a totally different matter than the act of leaving a country. It may well be that persons who will not be able to enter a country for purposes of settlement, are able to enter that country for other purposes, such as business or family visits.[204]

---

200 Juss (2004), p. 294.

201 J.A.R. Nafziger, 'The General Admission of Aliens Under International Law, *AJIL* Vol. 77 (1983), p. 842.

202 A. Dummett, 'The Transnational Migration of People seen from within a Natural Law Perspective', in: B. Barry and R.E. Goodin (eds), *Free Movement. Ethical Issues in the Transnational Migration of People and of Money*, New York: Harvester Wheatsheaf (1992), p. 169-180.

203 HRC, General Comment 27, para. 8.

204 Hannum concludes that, in combination with the right to return to one's own country, the right to leave must be interpreted as embodying a right to travel: Hannum (1987), p. 20.

Secondly, rights can exist without possibilities – and vice versa. While the possibility to leave a country can very well be dependent on another country allowing entry (unless one wishes to sail the Seven Seas), the right to leave is not in principle affected by the unwillingness of other countries to allow entry. To be sure, a person could still endeavor to make lawful use of his right to leave in order to try to gain illegal entry. Vattel, therefore, after positing that there is not only a right of citizens 'to quit' their country but also a 'right to emigrate', rightfully submits that this is not a 'full' right 'but imperfect with respect to each particular country', because the citizen 'must ask permission of the chief of the place; and, if it is refused, it is his duty to submit'.[205] Such interpretation does not render the right to leave nugatory. While one may perceive the right to leave as an 'imperfect', 'half' or 'dormant' right when no other country is willing to open its doors, its *practical* consequences get in full swing once another country is willing to grant entry.

Thirdly and most fundamentally, the problem with construing entry restrictions as potential infringements of the right to leave is that this would in effect transform the right to leave into a qualified right of entry into another state which would then only be subject to the restrictions permitted under Articles 12 (3) ICCPR and 2(3) Protocol No. 4 ECRH.[206] Such interpretation would seriously transgress upon the axiom that states have, subject to their treaty obligations, exclusive control over the admittance of aliens into their territory. To account for the latter problem, Nafziger has submitted that the right to leave would seem to require states, *taken together*, to respect the right by not totally barring entry.[207] This view corresponds with the one of Vattel, when he speaks of the right as perfect in the general view but imperfect with respect to individual countries. The reasoning would be, accordingly, that the international community as a whole is under the duty to complete the right to leave by allowing entry into at least one its constituents. As Nafziger admits however, construing the right to leave as imposing a corresponding duty of entry on the international community at large would have practical meaning only if that duty is made more concrete and specific, by negotiating and formulating agreements giving expression to the notion that a state has a qualified duty to admit aliens.[208] And as long as such agreements do not exist, it remains problematic to construe the right to leave as more than a right engaging the responsibility of individual states, in which the starting point is that each state is primarily to guarantee this right to those within their own territories.[209]

---

205 de Vattel (1758), Bk. 1, Ch. XIX, par. 230.

206 See also *Lichtensztejn v Uruguay*, para. 8.3 and *Nunez v Uruguay*, para. 9.3: 'On the other hand, article 12 does not guarantee an unrestricted right to travel from one country to another. In particular, it confers no right for a person to enter a country other than his own.'

207 Emphasis added.

208 Nafziger (1983), p. 842-847.

209 Goodwin-Gill and McAdam (2007), p. 382.

4.4.4 Extraterritorial migration control and the right to leave

The question remains whether this reasoning – i.e. entry controls should not be construed as coming within the scope of the right to leave – should also apply to pre-frontier border control arrangements, which sort their practical or legal effect already within the territory of the country of departure. There is as of yet only scarce legal authority addressing the issue. Although, as noted above, the HRC has accepted that carrier sanctions and other pre-frontier arrangements do attract a state's duties under the right to leave, the ECtHR, in *Xhavara v Italy*, considered the ramming of an Albanian migrant boat by an Italian coast guard vessel in international waters not to raise an issue under the right to leave because the aim of the Italian operation was not to prevent Albanians to depart from their country, but rather to prevent their entry into Italy:

> 'La Cour relève que les mesures mises en cause par les requérants *ne visaient pas à les priver du droit de quitter* l'Albanie, *mais à les empêcher d'entrer* sur le territoire italien. Le second paragraphe de l'article 2 du Protocole n° 4 ne trouve donc pas à s'appliquer en l'espèce.'[210]

Although *Xhavara* concerned measures undertaken in the high seas instead of on the territory of another country, the statement of the ECtHR could be taken as a general rule that measures which have the goal of preventing entry can simply not come within the scope of the right to leave. If this is indeed correct, it would follow that the entire range of pre-border control measures employed by a country – which, we may assume, all have the aim of preventing unsolicited migration into the state's territory in one way or the other – cannot attract applicability of the right to leave. But the pronouncement of the Court is rather crude and difficult to reconcile with the ordinary approach of the Court under which the purpose for taking a particular measure is not considered relevant for delineating the material scope of a particular human right, but rather for determining whether an interference can be deemed to serve a 'legitimate aim' and hence justifies a restriction of the right. It is, on a general note, anathema to human rights law to refer to the goal of a measure in order to define the scope of a particular right, because many infringements of human rights may come about for other reasons than to expressly deprive a person of his fundamental rights.

A more meaningful distinction between measures which essentially fall within the state's sovereign prerogative to control the entry of aliens and measures which interfere with the right to leave another country would be to construe measures of entry control as coming within the ambit of the right to leave only if the measure already sorts its legal or practical effect in the

210 ECtHR 11 January 2001, *Xhavara v Italy*, no. 39473/98, emphasis added.

country of departure. If a control measure is implemented within the territorial boundaries of another country, resulting in the legal and/or practical impossibility for a person to leave that country, there is little doubt that the measure interferes with the right to leave. But when the measure sorts its practical or legal effect only at the threshold of entry into the state of destination, the measure should be examined in the sphere of the right of the state to set limits to the entry of aliens. In the case of visas, for example, a person who is refused a visa will not normally be prevented from leaving his country of origin for the non-issuing state, although he will be refused entry at the moment he presents himself at the border of that state. Should that state however enforce the visa obligation already within the country of origin – for example by making use of pre-clearance controls – the person is effectively prevented from leaving his country. In the latter situation, immigration control not only prevents a person from effectuating an illegal entry, but has the additional effect (and aim) to obstruct the person from leaving the other country and would thus interfere with his right to leave.

Although this distinction seems sound and practicable, there may also be intermediate situations where measures of entry control sort their primary effect outside the territory of the country of departure but which may additionally compel the person concerned to return to that country. In respect of enforcement activities at sea for example, migrant vessels may be intercepted at the high seas and immediately returned to the territorial waters or ports of the country of embarkation. Could the migrants then contend that – perhaps as soon as their boat would re-enter the territory of the country they intend to leave – the intercepting state would infringe their right to leave? And if one would accept this line of reasoning, should it then also be accepted that every forcible return of a migrant, by which the expelling state ensures that the migrant is physically returned to his country of origin, interferes with that person's right to leave – perhaps as soon as the airplane transporting him enters the territory of the country of origin?

It cannot be denied that such lines of reasoning would stretch the right to leave to proportions hitherto unexplored. Nonetheless, those intermediate situations may lend themselves for meaningful further distinction. There are, for example, notable differences in nature between extraterritorial border measures and measures of forcible expulsion or removal. In the context of forcible returns, migrants have already left their country proper, have been granted the opportunity to claim a right of entry in another country and, if that claim was denied, will often have first been granted the opportunity to voluntarily leave the country. All this does not seem to interfere with a person's right to leave. It is only after it has been established that the migrant has no right to stay and when that migrant does not leave on its own accord, that the state enforces its immigration laws by forcibly returning a person to his country of origin. In the context of sea border controls on the other hand, when migrants are immediately and forcibly returned as soon as they have

crossed the border of the territorial sea, a person's right to leave his country is deprived of any meaningful effect and the preventing of departure constitutes an essential element of the enforcement activity. As is explained in the section below, it does not follow from this reasoning that such controls are necessarily in *violation* of the right to leave, but rather that the interference must find justification in the particular circumstances of the case.

4.4.5 Permitted restrictions to the right to leave

Different from the prohibition of *refoulement* under Articles 3 ECRH and 7 ICCPR, the right to leave is not absolute. Although external migration controls restricting persons from leaving another country may well serve a legitimate purpose and can hence find justification in international law, the cardinal implication of the finding that such measures may interfere with the right to leave is that they should comply with the requirements of Articles 2(3) Protocol No. 4 ECRH and 12(3) ICCPR.[211] This has profound consequences for the manner in which such controls must be conducted: they are exported from the realm of a state's discretionary powers regarding entry and admittance, and placed in the regime of human rights scrutiny in which it must be assessed whether a person's right to leave is affected, whether the restrictions are taken in pursuit of a legitimate aim, whether they are in accordance with the law, and whether they can be considered necessary and proportionate. A general framework for assessing the legitimacy of restrictions under Article 12 ICCPR is set out in General Comment 27 of the HRC. Although more scarce than under other qualified rights, the available case law of the ECtHR on permitted restriction under Article 2(3) Protocol No. 4 ECRH indicates that the test to be applied is similar to that under other provisions.[212]

What follows from these requirements, in particular, is that restrictions which are applied outside a legal and procedural framework and implemented not on an individual but general basis are problematic. The quality of law-doctrine requires the law not only to establish the grounds for restricting the right to leave but also to protect against arbitrary interferences, which implies that the law 'must indicate the scope of any such discretion conferred on the

211 It is said, in the context of the ECHR, that the right to leave a country does not have a very broad effective scope, because practically all conceivable motives on the part of the authorities to refuse a person this right can be brought under the permitted restrictions: Van Dijk, F. van Hoof, A. van Rijn et al (eds), *Theory and Practice of the European Convention on Human Rights*, Antwerpen/Oxford: Intersentia (2006), p. 942. This argument is not very persuasive, as the permitted restrictions under Articles 2(3) Protocol No. 4 ECHR and 12(3) ICCPR do essentially not differ from those listed under other qualified human rights.

212 See, in particular, *Bartik v Russia*, *Luordo v Italy*, *Napijalo v Croatia*, *Földes and Földesné Hajlik v Hungary*, *Riener v Bulgaria*.

competent authorities and the manner of its exercise with sufficient clarity.'[213] It follows from the requirements of necessity and proportionality that restrictions must be assessed in the light of the individual circumstances of the case, implying that restrictive measures must always take account of the particular situation of each individual subjected to the measure.[214] Further, the right to an effective remedy requires allegations of violations of the right to be subject to the possibility of thorough and effective scrutiny by the responsible authorities.[215]

In view of current practices of external immigration control, several more specific remarks are in order. Firstly, as regards the requirement of 'legitimate aim', it can be observed that the aim of immigration controls conducted in foreign countries which may prevent foreigners from leaving that country not necessarily corresponds with that of border checks and border surveillance conducted along the state's own territorial border. These latter, 'regular' controls are normally conducted as a measure of immigration enforcement, to prevent illegal entry and to prevent persons from circumventing border checks.[216] Pre-border controls, on the other hand, have been described as primarily aiming at reducing the potential burden posed by 'failed' migrants altogether: by preventing persons who are unlikely to have a right of entry from presenting themselves at the border, the risk of having to incur administrative, financial and social costs as a result of processing asylum-seekers and not being able to enforce the removal of failed asylum-seekers or other categories of migrants is minimized.[217] If it can be established that this is indeed the aim of a particular measure of pre-border control, the question rises under what legitimate aim the measure must fall. Notably, the aim of 'economic well-being' of the country, which is frequently referred to by the European Court as justification of measures of immigration control interfering with

213 ECtHR 2 August 1984, *Malone v the United Kingdom*, no. 8691/79, paras. 66-68; ECtHR 24 March 1988, *Olsson v Sweden (No. 1)*, appl. 10465/83, para. 61; ECtHR 20 June 2002, *Al-Nashif v Bulgaria*, 50963/99, para. 119 ; ECtHR 24 April 2008, *C.G. a.o. v Bulgaria*, no. 1365/07, para. 39. For the application of these requirements to restrictions on the right to leave, see in particular *Riener v Bulgaria*, paras. 112-113.

214 The ECtHR has derived a duty on the side of the authorities under Article 2 of Protocol No. 4 'to take appropriate care that any interference with the right to leave one's country should be justified and proportionate throughout its duration, in the individual circumstances of the case': *Riener v Bulgaria*, para. 128. Similarly, the Human Rights Committee speaks of the application of restrictions which, 'in any individual case', must be based on clear legal grounds and meet the test of necessity and proportionality, HRC, General Comment No. 27, para. 16.

215 Article 13 ECHR; Article 2(3) ICCPR.

216 This is also the manner in which border controls are defined in the Schengen Borders Code, see Articles 2 (9)-(11) EC Regulation 562/2006.

217 In this vein: *Roma Rights*, para. 2, where the posting of British immigration officers at the airport of Prague was explained from the background of there being an 'administrative, financial and indeed social burden borne as a result of failed asylum-seekers'.

a person's family life,[218] is no recognised legitimate aim under Articles 12(3) ICCPR and 2(3) Protocol No. 4 ECRH. While the prevention of having to tolerate persons without a legal residence status may be deemed to be for the benefit of 'public order' (which is explicitly mentioned as a legitimate aim for restricting the right to leave), it is more difficult to apply this reasoning to the goal of reducing economic and social costs involved in processing and harboring migrants.[219]

Secondly, one of the problems identified in the context of measures of migration control employed in territories of foreign countries is that they do not always have a clear legal basis, that the agents involved in these controls have rather wide discretionary powers and that no legal remedies are offered to persons refused leave to enter. This appears to be the case, for example, with regard to interception and diversion measures undertaken by European states in territorial waters in third countries, which fall beyond the scope of domestic statutes or European law and are grounded in bilateral agreements which are often outside the public domain.[220] Similar concerns have been voiced with regard to controls conducted by private air and sea carriers and by immigration or border guard officers stationed in foreign countries.[221] In respect of the conduct of immigration officers stationed at Prague airport, the House of Lords concluded that the tasks performed by these officers had a clear basis in domestic immigration rules, which included a description of their competences and the grounds under which the officers were allowed to refuse leave to enter. The relevant legislation moreover allowed for judicial review.[222] But it does not seem, as is further explored in chapters 5-7, that European countries commonly consider their domestic immigration statutes to apply to controls undertaken in third countries, raising the question on what

218 For instance ECtHR 21 June 1988, *Berrehab v the Netherlands*, no. 10730/84, para. 26; ECtHR 31 January 2006, *Rodrigues da Silva and Hoogkamer v the Netherlands*, no. 50435/99, para. 44.

219 The question whether limitations for economic reasons can be brought under the permitted restrictions of Article 2(3) Protocol No. 4 ECHR and Article 12(3) ICCPR has received considerable attention, although mainly in the context of limitations imposed by countries of departure for purposes of preventing 'brain drain'. Van Dijk, van Hoof and van Rijn (2006), at p. 944, conclude, in the context of Article 2(3) Protocol No. 4 ECHR, that the freedom to leave may not be restricted on purely economic grounds. Hannum (1987), at p. 40, in respect of Article 12(3) ICCPR, concludes that 'most limitations imposed on the right to leave on economic grounds must be judged in the context of good faith – or lack thereof – of the government concerned. If the limitation of a particular right is necessary to deal with a demonstrable socio-economic problem that threatens public order in a country – particularly when the limitation is proportional, temporary , and determined with adequate notice to those affected by it – it may well fall within the narrow range of limitations permitted under article 12(3) of the Covenant.'

220 See extensively chapter 6.

221 P. Minderhoud and S. Scholten, 'Regulating Immigration Control: Carrier Sanctions in the Netherlands' 10 *EJML* (2008), p. 131, 137-138; Gammeltoft-Hansen and Gammeltoft-Hansen (2008), p. 450-451.

222 *Roma Rights*, paras. 5, 77-86.

legal basis particular enforcement activity is undertaken and whether that activity takes sufficient account of procedural guarantees which must accompany restrictions to the right to leave.

Thirdly, it follows from the requirements of necessity and proportionality that a fair balance must be struck between the public interest and the individual's rights at issue.[223] The Human Rights Committee indicates that for the necessity-requirement to be satisfied, it is not sufficient that the restrictions serve the permissible purposes, they must also be necessary to protect them.[224] For measures to be in conformity with the principle of proportionality, they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.[225] In the case of *Streletz, Kessler and Krenz v Germany*, the European Court addressed the former East German border-policing regime entailing the pertinent refusal to allow GDR citizens to travel to Western Germany, without giving reasons and enforced by unparalleled technical sophistication and the indiscriminate use of firearms. The Court concluded not only that the shooting of persons attempting to flee the GDR failed to have a basis in domestic GDR law, but also that '[i]t cannot be contended that a general measure preventing almost the entire population of a State from leaving was necessary to protect its security, or for that matter the other interests mentioned.'[226] Although the case of East Germany is extreme, certain practices of external migration control, and this argument applies in particular to general diversions schemes coupled with summarily returns at sea, do by their nature not seem to take account of any individual considerations, making it difficult to evaluate their legitimacy in the light of their proportionality vis-à-vis each individual.[227]

4.4.6 Asylum-seekers and the right to leave

Although the *material* scope of the right to leave is limited on account of its qualified nature, the *personal* scope is wider than that of duties inherent to the prohibition of *refoulement* as discussed in section 4.3. The right to leave not only benefits persons who are seeking – and entitled to – international protection, but can be invoked by anyone who wishes to leave a country, for whatever (or indeed: no) purpose he may have in mind.

---

223 *Földes and Földesné Hajlik v Hungary*, para. 32; *Riener v Bulgaria*, para. 109.
224 HRC, General Comment 27, para. 14.
225 Ibid.
226 *Streletz, Kessler and Krenz v Germany*, para. 100.
227 G. Cornelisse, 'European Vessels, African Territorial Waters and 'Illegal Emigrants': The Right to Leave and the Principle of (Il)legality in a Global Regime of Mobility', available at <www.libertysecurity.org>.

It could be posited that the specific plight of asylum-seekers warrants a more thorough scrutiny of the justifiability of restrictions to the right to leave. The argument would be that the notorious repercussions an impossibility of departure may have for asylum-seekers render restrictions to the right to leave particularly problematic, implying that the interests of persons fleeing from maltreatment should more readily outweigh the interest of authorities to prevent departure. One manner to incorporate this line of thought into an assessment of permitted restrictions to the right to leave would be, as has been suggested, to accord additional weight to the interests of the individual in examining the proportionality of the measure.[228] The difficulty with this argument is however that not to be persecuted or not to be subjected to maltreatment is normally seen as an – absolute – *right* which is difficult to incorporate in a test of proportionality. If it is the territorial state which prevents departure, and if this state is also the actor of persecution, one may well defend the reasoning that a refusal to leave is an act contributing to persecution and on that account attracting the state's human rights obligations. If, on the other hand, the persecution stems from non-state actors and the territorial state prevents persons from escaping that persecution, the state may be held responsible under human rights law for failing to provide protection against maltreatment – in this case by allowing or facilitating a safe conduct out of the country – as is inherent to the rights to life and to be free from torture, both phrased in absolute terms. A similar reasoning applies to a non-territorial state employing measures which prevent asylum-seekers from fleeing another country. If the other requirements for attracting the responsibility of such a extraterritorially operating state are met, a refusal to leave which results in a real risk that the person concerned will be exposed to maltreatment can possibly come within the ambit of Articles 2 and 3 ECRH, 6 and 7 ICCPR and/or Article 33 Refugee Convention, as discussed in section 4.3. It follows that the 'aggregate right to leave to seek asylum'[229] constitutes a *lex specialis* of absolute character to the general and qualified right to leave. In the context of the right to leave, this implies that restrictions to that right which result in a violation of other protected fundamental rights must automatically be construed as disproportionate to the aim pursued.[230]

228 See, in this connection, Moreno Lax (2008), p. 356; who argues that 'the aggregate right to leave to seek asylum imposes a stricter principle of proportionality'.

229 Ibid.

230 This reasoning corresponds to the requirement under Article 12(3) ICCPR that restrictions of the right to leave may not impair other rights of the Covenant.

4.5 A RIGHT TO BE PROTECTED BUT NO RIGHT TO PROTECT?

The previous sections 4.3 and 4.4 concluded that the prohibition of *refoulement* and the right to leave any country, including his own, inform the duties of states who are confronted with asylum-seekers in another state. But it was also concluded in section 4.2 that the conduct of the sending state must as a rule respect the sovereignty of the host state and that the sending state has a right to grant extraterritorial protection only in so far as that right does not intervene in matters which are essentially within the domestic jurisdiction of the host state. Scenarios may arise in which the sending state is approached by a person requesting asylum or another form of protection but where the host state opposes to the grant of protection. These scenarios are not merely hypothetical. Persons subjected to pre-entry clearances at a foreign airport who wish to exit that country without valid identity papers, for example, will normally offend the laws of that country and immigration officers of a sending state conducting pre-clearances must respect the local laws in force. But they may also be confronted with valid individual claims for asylum. This may confront the sending state with a conflict of norms, one stemming from being party to a human rights treaty, the other stemming from the principle of territorial sovereignty and the derivative rule of non-intervention. How should a state reconcile these opposing norms?

This question should be addressed in conjunction with the deliberations on the different meaning of the term jurisdiction in general international law and human rights law as set out in Chapter 2. It would follow from that analysis that essentially two approaches to the question would be conceivable. First, it could be argued, in line with the ordinary meaning of the term 'jurisdiction' in general international law, that the requirement of 'jurisdiction' under a human rights treaty may avoid a situation of norm conflict from arising, by considering the person in question not to fall under the jurisdiction of the sending state. The reasoning would be that even though a person may (initially) be within the 'jurisdiction' or 'effective control' of the sending state, any act with regard to that person which constitutes an affront to the territorial sovereignty of the host state is an act over which the sending state *de jure* lacks 'control' or 'authority', because this control and authority accrues to the host state in its capacity as the sovereign power. It would follow from this reasoning that the sending state is only obliged to secure the human rights of the person concerned in so far as doing so will not encroach upon the host state's sovereignty.[231]

The other conceivable approach would be to argue that the term 'jurisdiction' within human rights law has clearly distanced itself from the original notion under international law and has attained *sui generis* standing. This

231 See chapter 2.4.

approach would not preclude the possibility of a state being obliged to ensure human rights to persons who are within their 'jurisdiction' in the human rights meaning of the term, also if they remain subject to the concurrent jurisdiction of another state and if an act regarding that person would transgress upon the sovereignty of the other state. In this approach, the mere existence of a sufficiently close legal or physical relationship between the extraterritorial state and the individual suffices to enliven the state's human rights obligations vis-à-vis the individual. The question whether this would conflict with obligations stemming from other sources of international law is then not relevant for the jurisdiction issue, but may alternatively be incorporated in defining the scope of a state's substantive human rights obligations.

Outside the asylum context, confirmation of the first proposition can be found in the case of *Gentilhomme*, concerning complaints lodged against the refusal of French state schools situated in Algeria to continue to enrol several children with dual French and Algerian nationality. The refusal was in compliance with an indication of the Algerian government to the French government that French state schools in Algeria should close their doors for children with Algerian nationality. The ECtHR, while expressly noting that 'a State may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence',[232] considered that the French refusal constituted an implementation of a decision imputable to Algeria, taken by the sovereign on its own territory and therefore beyond the control of France.[233] Accordingly, it found that the children could not be said to fall within French jurisdiction.

In the particular context of grants of protection which may run counter to demands of the host state, a similar approach was followed by the England and Wales Court of Appeal in the case of *Al-Saadoon and Mufdhi*, which was later brought before the European Court of Human Rights. The case concerned the lawfulness of the proposed transfer of two Iraqi nationals, who were accused of the murder of two British soldiers, from British military facilities in Iraq to Iraqi custody for trial by the Iraqi High Tribunal. The Iraqi Tribunal had repeatedly requested their transfer and the United Kingdom was, under the various agreements concluded with the interim government of Iraq, obliged to comply with these requests. The Court of Appeal, quoting at length from the ECtHR decision in *Bankovic* and recalling that the ECtHR, in interpreting the term jurisdiction, had underlined that account had to be taken of 'of any relevant rules of international law applicable in the relations between the

232 ECtHR 14 May 2002, *Gentilhomme v France*, nos. 48205/99, 48207/99 and 48209/99, para. 20. The Court referred here to its earlier pronouncements in *Banković*, paras. 59-61.
233 Ibid.

parties' (Article 31(3)(c) VCLT),[234] held that for a person to come within 'Article 1 jurisdiction' a mere exercise of *de facto* power – in the meaning of effective control or authority – is insufficient. Instead, Lord Justice Laws formulated four 'core propositions' from which it would follow, amongst other things, that the question of jurisdiction must be ascertained in harmony with other applicable norms of international law and that it implies the possibility of exercising sovereign legal authority.[235] Observing that the British forces in Basra were not, from at least May 2006 until 31 December 2008, entitled to carry out any activities on Iraq's territory in relation to criminal detainees save as consented by Iraq and that the British forces no longer enjoyed a legal power to detain any Iraqi from 1 January 2009 onwards, Lord Justice Laws concluded that the United Kingdom 'was not exercising any autonomous power of its own as a sovereign state' and that 'the detention of the appellants by the British forces at Basra did not constitute an exercise of Article 1 jurisdiction by the United Kingdom'.[236]

The England and Wales Court of Appeal had approached the matter differently in the earlier case of *B and others*, on the traditional question of diplomatic asylum. The case concerned the legality under the United Kingdom Human Rights Act and the ECRH of the refusal of the British authorities to comply with a request for asylum lodged by two minor Afghan brothers in the British consulate in Melbourne, Australia, who submitted that their return

234 Court of Appeal (England and Wales) 21 January 2009, *R (on the application of (1) Faisal Attiyah Nassar Al-Saadoon (2) Khalaf Hussain Mufdhi) v. Secretary of State for Defence*, [2009] EWCA Civ 7, para. 25.

235 Ibid, para. 37: 'It is not easy to identify precisely the scope of the Article 1 jurisdiction where it is said to be exercised outside the territory of the impugned State Party, because the learning makes it clear that its scope has no sharp edge; it has to be ascertained from a combination of key ideas which are strategic rather than lexical. Drawing on the *Bankovic* judgment and their Lordships' opinions in *Al-Skeini*, I suggest that there are four core propositions, though each needs some explanation. (1) It is an *exceptional* jurisdiction. (2) It is to be ascertained *in harmony* with other applicable norms of international law. (3) It reflects the *regional* nature of the Convention rights. (4) It reflects the *indivisible* nature of the Convention rights. The first and second of these propositions imply (as perhaps does the term *jurisdiction* itself) an exercise of sovereign *legal* authority, not merely *de facto* power, by one State on the territory of another. That is of itself an exceptional state of affairs, though well recognized in some instances such as that of an embassy. The power must be given by law, since if it were given only by chance or strength its exercise would by no means be harmonious with material norms of international law, but offensive to them; and there would be no principled basis on which the power could be said to be limited, and thus exceptional.'

236 Ibid, paras. 32-36, 40. The language used may be taken to suggest that the actions of the British forces should not be attributed to the United Kingdom but to Iraq. The Court of Appeal only dealt with the jurisdiction issue however; the High Court had already concluded that, in view of the autonomous tasks performed by the Multi-National Forces, the detention and possible transfer of the appellants were properly attributable to the United Kingdom: High Court (England and Wales) 19 December 2008, *Al-Saadoon & Anor, R (on the application of) v Secretary of State for Defence*, [2008] EWHC 3098 (Admin), para. 79.

to the Australian authorities would subject them to treatment contrary to Articles 3 and 5 ECRH on account of the circumstances of aliens detention in Australia.[237] While within the consular premises, the Australian authorities informed the British consulate that they sought the earliest possible return of the two brothers. On the jurisdiction issue, the Court of Appeal, after an extensive review of relevant Strasbourg case law on the extraterritorial applicability of the European Convention, proceeded from the assumption that, while in the consulate, the applicants were sufficiently within the authority of the consular staff to be subject to the jurisdiction of the United Kingdom for the purpose of Article 1 ECRH.[238] It chose subsequently to define the scope of the United Kingdom's substantive obligations under the ECRH in accordance with its concomitant obligation vis-à-vis Australia in holding that the '*Soering* principle' (or: the prohibition of *refoulement* as implied under Article 3 ECRH), should not have automatic application in situations where asylum is sought in consular premises. It inferred from relevant passages in *Oppenheim's International Law* and the fate of the Durban Six, both discussed in section 4.2.2. above that the 'basic principle' that the authorities of the territorial state can request surrender of a fugitive allows only for limited exceptions, although the exact scope of the exceptions is ill-defined.[239] One situation identified by the Court of Appeal in which a state is entitled to refuse requests for surrender identified was where the territorial state intends to subject the fugitive to treatment amounting to a crime against humanity.[240] Applying these general principles to the facts of the case, the Court of Appeal found the type and degree of the threat to be insufficiently serious to justify a grant of diplomatic asylum and that, in the absence of an entitlement under international law to grant asylum, neither could the ECRH be construed as imposing an obligation on the United Kingdom to grant asylum.[241]

The European Court of Human Rights, in *Al-Saadoon and Mufdhi*, approached the jurisdiction issue in a similar vein. It observed that the applicants

237 Court of Appeal (England and Wales) 18 October 2004, *R (B and others) v Secretary of State for Foreign and Commonwealth Affairs* [2004] EWCA Civ 1344, [2005] QB 643.

238 Ibid, para. 66. In particular, the Court of Appeal relied on an analogy with the case of *WM v Denmark*, which had also concerned a person seeking refuge at an embassy (the Danish embassy in Eastern Berlin), and where the European Commission of Human Rights had applied the test of whether the acts of the Danish ambassador constituted an 'exercise of authority' over the person in question to an extent sufficient to bring him within the jurisdiction of Denmark: EComHR 14 October 1992, *W.M. v Denmark*, no. 17392/90. Also see chapter 2.5.2.

239 Ibid, paras. 85-89.

240 Ibid, para. 88. The Court of Appeal further did not exclude the possibility that a lesser level of threatened harm could also justify an entitlement to grant diplomatic asylum, but the law to provide insufficient guidance on the issue..

241 Ibid, paras. 93-94. This approach was followed in the first instance decision in *Al-Saadoon and Mufdhi*: High Court 19 December 2008, *Al-Saadoon & Anor, R (on the application of) v Secretary of State for Defence*, [2008] EWHC 3098 (Admin).

were arrested by British armed forces, that they were detained in premises which were inviolable and subject to exclusive control and authority of the Multi-National Forces and that, 'given the total and exclusive *de facto*, and subsequently also *de jure*, control exercised by the United Kingdom authorities', the individuals were within the United Kingdom's jurisdiction.[242] As to the question whether the obligations vis-à-vis Iraq could nonetheless 'modify or displace' the obligations under the ECRH, the Court found that this was a matter to be considered in relation to the merits of the complaints.[243] In its judgment on the merits, the ECtHR refrained from according the principle of territorial sovereignty overriding importance however. Instead of defining the scope of a contracting state's duties under the ECRH in accordance with that principle, the Court referred to the principles set out in its earlier case law – which concerned situations where the guaranteeing of human rights *within* a state's territory potentially conflicted with other international law obligations – in holding that 'a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question is a consequence of domestic law or of the necessity to comply with international legal obligations.'[244] It made a reference to the *Soering* case, in observing that the Court in that case had neither limited the application of Article 3 ECRH on account of a conflicting obligation on the part of the United Kingdom under the Extradition Treaty it had concluded with the United States in 1972. It follows, according to the Court, that in principle all acts and omissions attributable to the state are subject to the Court's scrutiny.[245] Although the Court did not explicitly consider that this can also imply that the European Convention may require a contracting state to act in contravention of another state's sovereignty, it found the United Kingdom to have made insufficient attempts at procuring a guarantee that the detainees would not be subjected to the death penalty and to have entered into an arrangement with another state which conflicted with its obligations under Articles 2 and 3 of the Convention and Article 1 of Protocol No. 13.[246] And, in respect of the complaint under Article 34 ECRH, it considered that the

242 ECtHR 30 June 2009, *Al-Saadoon and Mufdhi v the United Kingdom*, no. 61498/08 (admissibility), paras. 86-88.

243 Ibid, para. 89.

244 ECtHR 2 March 2010, *Al-Saadoon and Mufdhi v the United Kingdom*, no. 61498/08 (merits), para. 128, referring to ECtHR 30 June 2005, *Bosphorus v Ireland*, no. 45036/98, para. 153. Also see ECtHR 18 February 2009, *Andrejeva v Latvia*, no. 55707/00, para. 56: 'the fact that the factual or legal situation complained of is partly attributable to another State is not in itself decisive for the determination of the respondent State's "jurisdiction".'

245 Also see *Bosphorus*, para. 137. Although this may be different in situations where state activity serves the effective fulfillment of the mandate of United Nations Security Council, see ECtHR 2 May 2007, *Behrami v France and Saramati v France and Norway*, nos. 71412/01 and 78166/01, para. 149 and ECtHR 9 June 2009, *Galić v the Netherlands*, no. 22617, paras. 47-48.

246 *Al-Saadoon and Mufdhi* (merits), paras. 141-143.

absence, on 31 December 2008, of any available course of action on the part of the United Kingdom consistent with respect for Iraqi sovereignty other than the transfer of the applicants, was of the respondent state's own making and did not modify its duty to comply with an interim measure indicated by the Court.[247]

The case law above signifies that courts have developed divergent lines of reasoning in reconciling the rule of non-intervention with human rights obligations. The different approach of the ECtHR in *Gentilhomme* and *Al-Saadoon and Mufdhi* on the question whether respect for the territorial sovereignty of another state is relevant for the jurisdiction issue underscores the conclusion in chapter 2 that the European Court's interpretation of that term is not always consistent and that the Court tends to confuse the ordinary meaning of the term jurisdiction under international (i.e. to allocate state competences) with the more specific delimiting function it fulfils in human rights law. The most recent approach of the ECtHR in *Al-Saadoon and Mufdhi* also affirms the conclusion of Chapter 2 however that the ECtHR is distancing itself from the imperative to interpret the term jurisdiction in conformity with its 'ordinary meaning', leaving room for an interpretation that limits set by other norms of international law do not as such prevent the Convention from being applicable. Other and potentially conflicting international obligations remain subject to the scrutiny of the Court, which also implies that the Court leaves open the possibility that extraterritorial human rights obligations may trump the principle of respect for the territorial sovereignty of the host state.

What is notable in this respect is that the ECtHR in *Al-Saadoon and Mufdhi* does not appear to distinguish as a matter of principle between state activity carried out on its own territory and activity carried out within the territorial sovereignty of another state. Its reference to the *Soering* case appears to indicate that in establishing whether other international obligations can modify the scope of a state's obligations under the ECRH, the obstacle of the territorial sovereignty of another state should not be addressed fundamentally different from ordinary extradition obligations. This raises questions in view of the ICJ's emphasis in the *Asylum Case* on the fundamental distinction which exists between situations involving extradition and situations of extraterritorial asylum, with the latter constituting a potential intervention in the sovereign matters of the other state. It should also be observed however that the Court underlined the lack of genuine efforts on the part of the United Kingdom's authorities to ensure that a potential future transfer would not expose the applicants to treatment contrary to the Convention. The Court hence avoids an explicit pronouncement that human rights must prevail over territorial sovereignty, and instead appears to argue that because the United Kingdom

247 Ibid, para. 162.

had knowingly allowed a situation of irresolvable norm conflict from coming into being, that norm conflict cannot serve to justify non-applicability of the ECRH. On this point, the case of *Al-Saadoon and Mufdhi* differs from the situation present in *B and others*: while in the former case the British forces had decided of their own accord to arrest and detain the applicants and to enter into bilateral arrangements setting the conditions for the exercise of prosecution activities and cooperation with the local Iraqi criminal procedures, the United Kingdom authorities in *B and others* were more or less accidentally confronted with a fugitive asylum-seeker and had no means at their disposal to avoid a situation of norm conflict from coming into being. It can therefore not be excluded that the ECtHR would accord greater value to the principle of territorial sovereignty in situations of diplomatic asylum proper.[248]

4.6 FINAL REMARKS

This chapter has conceptualized the international legal framework which regulates the relationship between the individual, the territorial state and the non-territorial state in situations of extraterritorial asylum. Because this relationship is triangular and takes place within the territory and sovereignty of a foreign state, the international law notion of 'extraterritorial asylum' differs from 'territorial asylum' in three respects.

First, it is not self-evident that human rights regulate the conduct of sending states in a similar vein as that of host states which receive asylum-seekers. Although it was concluded that the prohibitions of *refoulement* established under the Refugee Convention, CAT, ECRH and ICCPR do not as such oppose extraterritorial application, a first complication is that the wording of Article 33 Refugee Convention and Article 3 CAT renders it problematic to construe these prohibitions as applicable also to activity undertaken in respect of persons who are in the territory from which the threat with persecution or torture stems. This limitation is not present under the prohibitions of *refoulement* established under the ICCPR and ECRH, which entail a protective duty of more general nature. Secondly, because the presumption that an individual is subject to the jurisdiction of the state in which he is does not apply to activity which may affect a person in a foreign territory, the actual applicability of human rights to the relationship between an individual and a sending state requires prior examination of the nature of this relationship, as discussed in chapter 2.

Second, when states act in a foreign territory, their actions must as a rule respect the territorial sovereignty of the foreign state. When the host state requests a person to remain within its own authority, the sending state may be confronted with a conflict between, on the one hand, humanitarian concerns

248 The ECtHR appears to hint in this direction in para. 140 of the judgment.

and/or human rights obligations in respect of the individual and the rule of non-intervention on the other hand. As was shown in the last section of this chapter, attempts undertaken in recent case law to reconcile the norms in question have not been consistent, which is due not only to divergent interpretation of the notion of 'jurisdiction' in human rights law, but also to the fundamental status of both human rights and the notion of territorial sovereignty in international law.

Third, the right to seek asylum – understood as the right to leave a country in order to escape persecution – remains crucial for asylum-seekers who are subjected to measures of border enforcement in countries of origin or countries of transit. Policies aimed at preventing persons from leaving another country may well interfere with the right to leave. Although there can be legitimate reasons for placing restrictions on that right, those restrictions must have a basis in law, may not be applied arbitrarily and must be subject to meaningful and independent review. These conditions constrain the liberty of states to deter or prevent migrants from leaving another country and ordain that such activity is grounded in norms of procedure and good administration. Although persons fearing ill-treatment or persecution who are restricted in their right to leave may also base a claim directly on one of the prohibitions of *refoulement* (or the underlying prohibition of exposure to ill-treatment), the fact that the right to leave may be invoked by anyone, regardless of protection entitlements, implies that it engenders a general procedural framework for employing measures of external migration control which have the potential to deprive persons of the factual possibility to leave the country in question.

5 Extraterritorial asylum under European Union law

5.1 Outline of the chapter

The European Union's *internal* admission policies can roughly be framed according to the threefold distinction between legal immigration, illegal immigration and asylum. Border controls and other measures of migration enforcement must necessarily reflect this distinction: they are not purely restrictive or aimed at putting migration to an end, but translate the needs and interests of Member States, international obligations and general humanitarian traditions into a system of selection and control. Essential guarantees for persons requesting asylum arriving at the EU external border are laid down in the Schengen Borders Code and the Common European Asylum System. Under these regimes of law, a highly rationalised model of entry conditions, admissibility criteria and enforcement measures has developed, which incorporates fundamental rights and subjects refusals of entry or residence to the rule of law.

In parallel to this internal dimension, under the paramount consideration that any effective migration policy must be embedded in the broader framework of external action and cooperation with third countries, the EU is shaping a distinct 'external dimension' to its asylum and migration policy. Under this external dimension, Member States are urged to proactively respond to the migration challenge, rather than to sit back and await the spontaneous arrival of migrants and asylum-seekers.

The key question addressed in the current chapter is how refugee concerns are incorporated into this external dimension: in what manner does EU law constrain the activity of individual Member States when they embark upon external policies of migration control? Is this external dimension also premised on a fundamental distinction between asylum-seekers and other migrants? Does it, in essence, merely export the existing 'internal' model of migration control, together with its essential safeguards, or is it premised on altogether different selection and admissibility criteria, potentially displacing the standards of the EU's internal admission policy?

Answering these questions requires an analysis on two levels. The first part of the chapter discusses in detail how refugee concerns are reflected in the strategic aims of the EU external migration and asylum policy and the concrete measures adopted under that policy. These measures include, apart from specific action programmes on the protection of refugees in countries of transit and regions of origin, a variety of instruments implementing the

idea of remote migration management, including rules on visa, carrier sanctions, immigration liaison officers and joint operations of border control. This part of the chapter focuses in particular on the tension which exists between the goals of preventing irregular migration and of guaranteeing asylum-seekers access to protection. This tension arises especially in the context of various pre-border control arrangements which are targeted at mixed flows of migrants and asylum-seekers and are criticized for not effectively distinguishing between the two.

The second part of the chapter addresses the legal relationship between the EU's internal rules on asylum and border control and the evolving external dimension. It makes some general observations on the territorial locus of European Union law and specifically explores the manner in which the Schengen border crossings regime and the Union's asylum *acquis* may govern extraterritorial activity of Member States.

The chapter argues that, despite a firm rhetoric on the part of EU institutions that external action on migration matters should not jeopardize access to protection by those entitled to it, the concrete measures implementing the policy of external migration management generally fail to regulate the legal status of persons requesting international protection. Because most EU instruments on external migration control leave considerable implementing discretion to Member States and often only in general terms refer to the duty to respect international standards, they do not give meaningful guidance on the crucial question of how refugee concerns should be confronted in practice. The conclusion is then that, in contrast with the EU's internal migration and asylum policy, the external dimension fails not only to formulate a system of selection and admission which pays account to the needs of refugees, but that it also tends to neglect the essential requirements of the rule of law: it does not specify the material and procedural conditions for the undertaking of external migration enforcement, it leaves the taking of coercive action to the virtual complete discretion of Member States, and it does not secure a system of judicial review for those migrants who are directly affected by external measures of migration control.

Although since the entry into force of the Lisbon Treaty the European Community has ceased to exist as a legal entity, the present and following chapters employ the term '(European) Community' when referring directly to judicial or other legal sources mentioning the term. Otherwise, the term EU or Union is used.

5.2 THE EU'S EXTERNAL DIMENSION OF ASYLUM AND MIGRATION

5.2.1 The external dimension as a policy strategy of the Union: from Tampere to Stockholm

What is now commonly referred to as the 'external dimension' of the European Union's immigration and asylum policy has from the outset formed an integral part of that policy. Already in 1994, in exploring the new possibilities of the Treaty on European Union, which had designated the subjects of immigration and asylum as matters of common interest of the Member States, the European Commission had proposed that a comprehensive and effective immigration policy should be built upon the three components of action on migration pressure, action on controlling migration, and action to strengthen policies for legal immigrants.[1] This included a strong focus on cooperation with the main countries of 'would-be' emigration to Europe.[2] The Tampere European Council of October 1999 confirmed this comprehensive approach. It outlined not only the future contents of the new first pillar instruments to be adopted on admission and residence of asylum-seekers and legal immigrants, but signaled that these instruments should be embedded in a broader framework of external action and cooperation on migration with third countries. The Tampere milestones contained separate paragraphs on 'Partnership with countries of origin' and 'Management of migration flows', in which the heads of state and government of the EU Member States stressed the importance of a 'comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit' along with the need 'for more efficient management of migration flows at all their stages.'[3] Apart from interlinking the Union's migration policy with more general development issues, the Tampere conclusions called *inter alia* for the establishment of information campaigns on actual possibilities for legal migration in third countries, the further development of a common policy on visas, assistance to third countries in order to promote voluntary returns and to combat trafficking in human beings, and the conclusion by the Council of readmission agreements with third countries.[4]

The Conclusions of the Seville and Thessaloniki European Council meetings of June 2002 and June 2003 set further political guidelines for integrating immigration policy into the Union's relations with third countries.[5] These were followed up in the 2004 Hague programme, which included an extensive

1 COM(1994) 23 final, 23 February 1994, foreword.
2 Ibid, esp. paras. 47-68.
3 Presidency Conclusions 15/16 October 2009, 'Towards a Union of Freedom, Security and justice: The Tampere Milestones' (hereafter 'Tampere programme'), paras. 11-12, 22-27.
4 Ibid.
5 Presidency Conclusions 21/22 June 2002, paras. 30-36; Council of the European Union, Presidency Conclusions 19/20 June 2003, esp. paras. 9, 15, 19.

paragraph on the 'external dimension of asylum and migration'.[6] This dimension should, in general, aim at assisting third countries in managing migration and protecting refugees.[7] More specifically, EU policy should help preventing illegal migration, inform on legal channels for migration, resolve protracted refugee situations, build border-control capacity and tackle the problem of return. In respect of regions of origin, the Hague Programme called for the development of EU Regional Protection Programmes, to be established in conjunction with third countries and UNHCR, which should primarily focus on building capacity for refugee protection and include a joint EU resettlement programme on the basis of voluntary participation of Member States.[8] With regard to regions and countries of transit, the European Council called for capacity-building in national asylum systems, border control and wider migration issues 'to those countries that demonstrate a genuine commitment to fulfil their obligations under the Geneva Convention on Refugees'.[9] Issued one and a half year after the British New Vision for Refugees,[10] the Hague Programme also called for a study, to be conducted in close consultation with UNHCR, into ' the merits, appropriateness and feasibility of joint processing of asylum applications outside EU territory.'[11] Such processing should however, not replace protection and processing within the Union, but rather complement the Common European Asylum System and should comply with international standards.[12] In the sphere of border checks and migration control, the Hague Programme further stressed the need for closer cooperation in external border control, both between Member States and with third countries.[13] It welcomed the establishment of the European Agency for the Management of Operational Cooperation at the External Borders (Frontex) and initiatives taken in the context of controls and rescue operations at sea. It further called for the ' firm' establishment of immigration liaison networks in relevant third countries.[14]

One year later, at the Brussels summit of December 2005, the European Council adopted the EU Global Approach to Migration.[15] This Approach

6 Presidency Conclusions 4/5 November 2004, Annex I, 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union' (hereafter 'The Hague programme'), para. 1.6.
7 Ibid, para. 1.6.1.
8 Ibid, para. 1.6.2.
9 Ibid, para. 1.6.3.
10 United Kingdom Home Office, 'New International Approaches to Asylum Processing and Protection', reproduced in: House of Lords European Union Committee – Eleventh Report, 'Handling EU asylum claims: new approaches examined', 30 April 2004, Appendix 5.
11 The Hague programme, para. 1.3.
12 Ibid.
13 Ibid, paras. 1.6.3, 1.7.1.
14 Ibid, para. 1.7.1.
15 Presidency Conclusions 15/16 December 2005, Annex I, 'Global Approach to Migration: Priority Actions Focusing on Africa and the Mediterranean' (hereafter 'Global Approach to Migration').

responded specifically to the events in the Mediterranean region, including the incident in September 2005 when hundreds of migrants had tried to climb over the fences erected around the Spanish enclaves of Ceuta and Melilla in Morocco.[16] It called for action to reduce illegal migration flows and the loss of lives, to ensure safe returns, strengthen durable solutions for refugees and build capacity to better manage migration. It explicitly affirmed the 'individual's right to seek asylum', called on Frontex to organize joint operations in the Mediterranean region, for the establishment of regional networks of immigration Liaison Officers (ILOs), to establish a pilot Regional Protection Programme (RPP) and to carry out a study to 'improve understanding of the root causes of migration'.[17] It mentioned Morocco, Algeria and Libya as countries with which dialogue and cooperation in migration management should be sought, but did not reiterate the condition formulated in the Hague Programme to do so only if these countries had showed a commitment to fulfil their obligations under the Refugee Convention.

The European Pact on Immigration and Asylum, formally adopted by the 27 Heads of State and Government on 16 october 2008, reaffirmed the goals outlined in the Global Approach to Migration and the need to engage in close partnership with countries of origin and countries of transit.[18] It called, amongst others, for a greater allocation of resources to the Frontex agency to allow it to cope with crisis situations such as occurring in the Mediterranean and to increase EU aid for the training and equipping of border guards of third countries. It also called for closer operation with UNHCR to ensure better protection for refugees in third countries, possibly including schemes for resettlement in the European Union.

The most recently adopted long-term EU strategy in the field of Justice and Home Affairs, the Stockholm Programme, consolidates and further elaborates the wide variety of measures making up the external dimension of the EU's asylum and immigration policy. It takes stock of problems encountered in the past implementation of various policies and, as such, is much more outspoken in acknowledging that refugee interests and dangers of migrant smuggling require attention in shaping policies aimed at preventing irregular migration. It stipulates that the strengthening of border controls should not prevent access

16 This particular incident later gave rise to allegations that some of the arrested migrants – those with a nationality other than countries with which Morocco had a readmission agreement – were subsequently abandoned in the desert by the Moroccan authorities. For further details see: Human Rights Watch news release 12 October 2005, 'Spain: Deportations to Morocco Put Migrants at Risk – Violence against Migrants in Ceuta and Melilla Requires Independent Investigation'; European Commission, 'Visit to Ceuta and Melilla – Mission Report Technical mission to Morocco on illegal immigration, 7th October – 11th October 2005', 19 October 2006.

17 Global Approach to Migration, p. 5.

18 Council of the European Union, 'European Pact on Immigration and Asylum', 23 September 2008, doc. 13440/08.

to protection to those entitled to benefit from it and formulates 'the twin objective of facilitating access and improving security'.[19] It specifically calls for proposals to clarify the mandate of Frontex and clear rules of engagement for joint operations at sea, 'with due regard to ensuring protection for those in need who travel in mixed flows' and to 'better record and identify migrants trying to reach the EU'.[20] The Stockholm programme remains firmly supportive nonetheless of furthering efforts to combat illegal migration. The notions of integrated border management and cooperation with countries of origin and transit are accorded key priority and more effective action is called for in respect of *inter alia* cooperation in conducting border controls, the conclusion of readmission agreements, capacity building in third countries and the posting of immigration liaison officers in both countries of origin and transit.[21] In respect of 'the external dimension of asylum', the heads of State and government note that 'any development in this area needs to be pursued in close cooperation with UNHCR', that the newly founded European Asylum Support Office should be fully involved in this external dimension and that '[i]n its dealings with third countries, the EU has the responsibility to actively convey the importance of acceding to, and implementing of, the 1951 Geneva Convention on Refugees and its Protocol'.[22] Concrete measures to be implemented should aim at capacity building for the protection of refugees, should expand the idea of Regional Protection Programmes and increase, on a voluntary basis, the number of refugees resettled in the European Union. The Stockholm Programme no longer explicitly requested a study into the feasibility of external processing of asylum-seekers, but in somewhat more ambiguous terms invited the Commission to explore 'new approaches' concerning access to protection in main transit countries, such as 'certain procedures for examination of applications for asylum, in which Member States could participate on a voluntarily basis'.[23]

It transpires from the various policy conclusions and programmes for action that the European Union is unmistakably shaping a distinct external strategy to its immigration and asylum policy. It is not as such remarkable that the external dimension features so prominently in the Union's immigration and asylum agenda. Policies of return and readmission, which by their nature

19 The Stockholm Programme – An open and secure Europe serving and protecting citizens (hereafter 'Stockholm programme'), OJ 2010 C115/01, para. 5.1.

20 Ibid, paras. 5.1, 6.

21 Ibid, para. 6.1.6.

22 Ibid, para. 6.2.3.

23 Ibid. See also, para. 6.2.1, where the Commission is invited to 'finalise its study on the feasibility and legal and practical implications to establish joint processing of asylum applications'. This probably refers to joint processing within the European Union. A Communication of the European Commission setting out the priorities for the future Stockholm Programme had referred to a continuation of the analysis of the legal and practical feasibility of joint processing of asylum applications outside the Union: COM (2009) 262 final, 10 June 2009, para. 5.2.2.

depend on cooperation with countries of origin and transit, are central to any effective immigration policy. The competence of the Union to adopt measures in the sphere of repatriation was explicitly conferred by Article 63(3)(b) of the EC Treaty. This has now been supplemented with a specific competence of the EU to conclude readmission agreements with third countries in Article 79(3) TFEU. The external dimension of the Union's immigration and asylum policy is however much wider in scope than issues of return and readmission. In neutral and widest terms, it propagates cooperation with third countries in the service of the two overarching aims of organising legal migration and controlling illegal immigration.[24] Apart from the facilitation of returns, this includes the goals of preventing illegal immigration, of facilitating legal migration and of contributing to refugee solutions in third countries. This rather inclusive scope of the external dimension has also found reflection in the TFEU, which provides a more express legal basis for future external action in the fields of migration and asylum than the former EC Treaty. Articles 77(1)(c), 77(2)(d), 78(2)(g) and 79(1) TFEU call respectively for the adoption of measures in the sphere of integrated border management; the creation of partnerships with third countries for managing inflows of asylum-seekers; and measures for the prevention of illegal immigration and trafficking in human beings.

The external dimension of the EU's immigration and asylum policy is multifaceted and not all the instruments adopted under it require this study's scrutiny. The two aspects of the external dimension which fall within the heart of this study's scope are the measures implementing what one may call the externalisation of external border management; and, secondly, the external dimension of the EU's asylum policy.

5.2.2 Integrated Border Management and pre-border controls

One of the most prominent and probably best developed facets of the EU's external dimension on migration and asylum is the creation of a multi-layered system of pre-entry control measures forming part of the strategy for the management of the Schengen external borders. This sytem gives voice to the concept of integrated border management, defined as involving measures taken at the consulates of Member States in third countries, measures in countries of transit, measures at the border itself and measures taken within the Schengen area.[25] The concept of integrated border management is premised on

24 European Pact on Immigration and Asylum, p. 2.

25 COM(2008) 69 final, para. 1.2. Building upon the Conclusions of the Laeken European Council and a Commission Communication on the management of the external borders, the concept of integrated management of the external borders was first adopted by the JHA Council in 2002 in its action plan for the management of external borders. Although focusing on the coordination of Member States activities, this action plan already envisaged border management cooperation with third countries, including the pooling of immigration

the idea that border controls are most effective when deployed in parallel with the various stages of the immigrants' travel towards (and inside) the Union. Partly adopted in the course of the intergovernmental Schengen *acquis*, and partly under Article 62 of the former EC Treaty, it is possible to categorize the relevant EU policy instruments implementing the idea of remote control under four headers: the EU visa requirement; carrier sanctions; the posting of immigration liaison officers in third countries; and the creation and operational activity of the Frontex external borders agency. Further, the EU has increasingly provided financial and technical assistance to third countries in order to strengthen border control capacity in third countries.[26]

The key question arising with regard of these policies is to what extent they may impede asylum-seekers from gaining access to protection. As a matter of policy principle, the European Council, the European Commission and the European Parliament have all affirmed that the strengthening of border controls and other measures to combat illegal migration should not prevent persons entitled to protection access to protection and that therefore protection-sensitive border controls should be developed.[27] The question to be answered then, is to what extent this policy principle has effectively been implemented under EU law.

5.2.2.1 The EU visa regime

The EU visa policy does not accord special consideration to refugees. The Visa Requirement Regulation, listing the countries whose nationals are subject to a visa requirement, does not include refugee concerns in the consideration of whether a particular country should be included in the common list, nor does it list refugees as one of the categories of persons exempted from the visa requirement.[28] The Visa Requirement Regulation does make specific reference to stateless persons and *recognised* refugees, but only in stipulating that for purposes of the Regulation, they must be treated similarly as nationals of the third country where they reside and which issued their travel documents, implying that they are in principle to be subjected to the visa requirement on

liaison officers to be posted in third countries and the dispatching of EU special border advisors to third countries.

26 These measures are discussed hereunder in conjunction with the EU's thematic programme on asylum support in third countries, see *infra* section 5.2.3.

27 Eg European Pact on Immigration and Asylum, p. 11; Stockholm Programme, para. 5.1.; Green Paper on the future Common European Asylum System, 6 June 2007, COM(2007) 301 final, para. 5.3.; European Parliament resolution of 18 December 2008 on the evaluation and future development of the FRONTEX Agency and of the European Border Surveillance System (EUROSUR) (2008/2157(INI)), recital (p) and pts. 13, 18, 28.

28 Council Regulation (EC) No. 539/2001, Article 4.

the same footing as the nationals of the country in which they reside.[29] The Visa Code, communautarising and streamlining the regime on the issuing of short stay visas as formerly set forth in the Schengen Implementation Agreement (SIA),[30] applies to all third-country nationals, including refugees, who must possess a visa pursuant to the Visa Requirement Regulation.[31] The conditions for obtaining a visa include *inter alia* the entry conditions of the Schengen Borders Code,[32] but without reiterating the specific derogations and safeguards the Borders Code provides in respect of persons requesting asylum.[33]

It must, on the other hand, also be concluded that the EU visa policy does not prevent Member States from making favourable provisions to persons requesting asylum. Firstly, the Visa Code allows for the issue of visa with limited territorial validity (i.e. valid only in respect of the territory of the issuing Member State and possibly other Member States should they consent to it) on humanitarian grounds or because of international obligations.[34] Secondly, the issuing of long stay visa remains at the discretion of Member States,[35] implying that Member States may issue humanitarian- or other protection visa to persons in need of international protection, including for example special visa for refugees who are to be resettled, in accordance with their national laws. Lastly and most pertinently, it must be underlined that although the EU visa policy does not grant favourable treatment to refugees or other persons seeking protection, persons requesting asylum at the EU external border are exempted from the visa requirement pursuant to Articles 5(4)(c) and 13(1) of the Schengen Borders Code. This brings about the paradox that refugees are not generally exempted from the visa requirement, except at the very moment when that requirement is enforced, namely when it is verified whether the person complies with the entry conditions set forth in the Schengen Borders Code. This means, for practical purposes, that an EU visa requirement bestowed on a refugee wishing to enter the EU is problematic

29 See Article 3 and recital 7. This is however without prejudice to more favourable provisions of the European Agreement on the Abolition of Visas for Refugees (...). Further, Member States may decide that recognised refugees residing in a third country which is exempted from the visa reuirement must nonetheless be in the possession of a visa.

30 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ 2000 L 239, p. 19–62.

31 See the express confirmation in the Explanatory Memorandum to the Visa Code, COM(2006) 403 final, p. 15: ' The concept of "third-country national" is defined by default, by excluding citizens of the European Union within the meaning of Article 17(1) of the EC Treaty. It therefore also includes refugees and stateless persons.'

32 Article 21(1) Regulation (EC) No 562/2006.

33 See extensively section 5.3.2 *infra*.

34 Regulation (EC) No 810/2009, Art. 25(1).

35 Article 18 SIA.

only in those instances where the requirement is enforced by other means of border control than verification of compliance with the entry conditions in the meaning of the Schengen Borders Code. As is explained below other EU instruments do not expressly oblige Member States to verify compliance with the visa requirement in the various pre-border situations. But this may well be different in respect of Member State practices. Most notably, in making use of carrier sanctions and immigration officers entasked to check documents at foreign airports, verification of the visa requirement may be standard procedure.[36] This is especially problematic if these checks are not accompanied with alternative guarantees for refugees.

5.2.2.2 Carrier sanctions

Carrier sanctions have been incorporated in the Schengen *acquis* under Article 26 SIA, which was supplemented by the 2001 Carrier's Liability Directive.[37] Article 26 SIA requires Schengen countries to impose the threefold obligation on carriers to (i.) return aliens who are refused entry into the territory of a Contracting State to the appropriate third State, (ii.) ensure that aliens transported by the carrier are in possession of the travel documents required for entry, and (iii.) pay penalties for transporting aliens not having the requisite travel documents.[38] As a matter of law, the Schengen carriers regime does not jeopardize the position of refugees. Firstly, paragraphs 1 and 2 of Article 26 SIA make implementing measures subject to obligations resulting from the Refugee Convention, confirming that carriers sanctions must respect international refugee law obligations. Secondly, the obligation of return only applies to aliens who have been refused entry into the territory of a Contracting State, and refusals of entry may under the Schengen borders Code not be effectuated in disregard of both international and EU provisions on the right of asylum.[39] For a similar reason, the obligations of carriers to ensure that aliens have the required documents and to incur penalties otherwise, which refer respectively to 'travel documents *required for entry*' and '*necessary* travel documents',[40] could well be interpreted as not being applicable to persons entitled to international protection, because the Schengen Borders Code exempts these persons from the condition to possess valid travel documents. It would follow, hence, that the Schengen carriers regime does not oblige Member States to impose obligations on carriers in respect of persons who are entitled to protection or

36 See notes 44, 45 and 53 *infra* and accompanying text.
37 Directive 2001/51/EC.
38 Article 26 (1)(a)(b) and (2) SIA. The obligation of returning the alien does not apply to land border crossings, see Article 26 (3) SIA.
39 Current Article 13(1) Schengen Borders Code; former Article 5(2) SIA.
40 Article 26 (1)(b) and (2) SIA.

who otherwise fall within the 'special provisions concerning the right of asylum' as specified under Article 13 (1) Schengen Borders Code.

However, with carrier sanctions, the proof of the pudding is in the eating. Exonerations of asylum-seekers under carrier sanction schemes are commonly seen as problematic in practice because they would depend on private carriers making their own assessment of whether a person is indeed exempted from the requirement of possessing valid travel documents – obliging them to entertain asylum applications themselves.[41] Apart from the lack of expertise and training on the side of carriers, the limited processing time and expedient nature of boarding procedures at foreign ports or airports are manifestly ill-suited for conducting such assessments. By consequence, in order to rule out the imposition of fines and return obligations, carriers are prone to rely exclusively on establishing the validity of travel documents, also in respect of persons claiming to be a refugee.[42]

Still, it is arguable that under the current system of EU law, by reading the carriers regime in conjunction with both the Schengen Borders Code and provisions of the Common European Asylum System, carriers need not necessarily be burdened with the hazardous task of verifying themselves whether passengers requesting asylum do indeed have a valid claim. Instead, the argument can be made that all persons requesting asylum, regardless of whether their claim is valid, fall outside the scope of the EU carrier sanctions regime. Because Article 7 of the Asylum Procedures Directive confers a 'right to remain' in the Member State upon any third country national applying for asylum at the border or in the territory of a Member State pending the examination of the application, it would seem that no third country national who lodges an asylum request may be refused entry in the meaning of the Schengen Borders Code, necessarily implying that they are also exempted from the requirement of possessing a valid travel document for being allowed entry. It would follow that the EU carrier sanctions regime does not oppose a system under which airlines and other carriers could simply accept all persons being improperly documented provided they present themselves as asylum-seekers when arriving at the EU external border.[43] Obviously, such a system could

41 S. Taylor, 'Offshore Barriers to Asylum-seeker Movement: The Exercise of Power without Responsibility?', in: J. McAdam (ed), *Forced Migration, Human Rights and Security*, Oxford: Hart Publishing (2008), p. 100-101; E. Feller, 'Carrier Sanctions and International Law', 1 *IJRL* (1989), p. 57; F. Nicholson, 'Implementation of the Immigration (Carriers' Liability) Act 1987: Privatising Immigration Functions at the Expense of International Obligations?', 46 *ICLQ* (1997), p. 599-601.

42 Ibid.

43 It appears that this was also the manner in which the original French initiative for the Carrier's Liability Directive was drafted: 'It is essential that the existence of such provisions should not prejudice the exercise of the right to asylum. With this in mind, it is important that Member States should not apply the penalties which they are required to introduce under this Directive if the third-country national is admitted to the territory for asylum purposes', recital 2 of Initiative of the French Republic with a view to the adoption of a

easily undermine the very purpose of carrier sanctions – by prompting every undocumented migrant to claim asylum – which is probably why States rarely apply such a general waiver for asylum-seekers in their domestic regimes. It transpires from several studies that EU and other Western States incorporate refugee concerns in their carrier sanctions' arrangements in a widely divergent manner, with some countries fining carriers regardless of whether it concerns refugees, some countries waiving fines in case of persons admitted to the asylum procedure and other countries waiving sanctions only in case of improperly documented migrants who are granted refugee status.[44] Further, there are Members States operating arrangements in which carriers, when confronted with persons claiming asylum, are first required to contact the immigration authorities of the Member States.[45]

A further issue left unaddressed by the EU carrier sanctions regime is whether sanctions should also be imposed for carrying persons without the required visa. Article 26 SIA only refers to 'travel documents', which is listed under the Schengen Borders Code as an entry condition separate from possess-

---

Council Directive concerning the harmonisation of financial penalties imposed on carriers transporting into the territory of the Member States third-country nationals lacking the documents necessary for admission, OJ 2000C 269/06. But note that this formula does not distinguish all too clearly between persons admitted entry into the asylum procedure and persons admitted residence on asylum grounds. The adopted Directive 2001/51/EC merely restates that carrier sanctions should not prejudice obligations under the Refuge Convention, leaving the manner of implementation to the Member States, see recital 3.

44 According to a 2007 study of the European Council on Refugees and Exiles, France, Italy and the Netherlands waived the fines if a person was admitted to their asylum procedure (but see note below in respect of the Netherlands), while Denmark, Germany and the United Kingdom fined carriers regardless of protection concerns; European Council on Refugees and Exiles, *Defending Refugees' Access to Protection in Europe*, December 2007, p. 28. Another study indicates that the United Kingdom does waive fines in respect of recognised refugees: United Kingdom Refugee Council, 'Remote Controls: how UK border controls are endangering the lives of refugees' (Report), December 2008, p. 45. A study on Australia reaveals that Australian law and policy makes no provision for non-imposition or refund of penalties in case of refugees: Taylor (2008), p. 100.

45 According to Dutch policy, carriers who 'consider' (*'overwegen'*) to bring to the Netherlands improperly documented persons who have claimed asylum are required to first obtain permission of the Dutch immigration authority. When this permission is granted, no fines are subsequently imposed. Vreemdelingencirculaire 2000 [Aliens Circular 2000], para. A2/7.1.5. Air carriers are under this procedure required to call the general phone number of the Dutch Ministry of Justice, which forwards the call to the Border Guard Unit at airport Schiphol. No information is available on what grounds this Unit would grant permission, nor does it appear that this procedure is effectively in use. In the reporting period 2007, the immigration authority had received no requests of carriers to transport undocumented asylum-seekers; Immigratie- en Naturalisatiedienst [Immigration- and Naturalisation Department], Letter of 4 October 2007, no. INDUIT07-4752 [on file with the author]. On the Dutch carrier sanctions regime extensively: S. Scholten and P. Minderhoud, 'Regulating Immigration Control: Carrier Sanctions in the Netherlands', 10 *EJML* (2008), p. 123-147. The United Kingdom also recommends carriers to contact either representatives of UNHCR or the UK on how to proceed in case of persons claiming asylum, United Kingdom Refugee Council Report (2008), p. 45.

ing valid visa.[46] The original proposal for the Carriers Liability Directive had expressly included the lack of required visa as a ground for penalties, but this reference was not included in the adopted directive.[47] It transpires that Member States also impose sanctions for bringing into their territory persons without the required visa.[48]

It must be said that it is notoriously difficult to envisage a carrier sanctions regime which can meaningfully reconcile control concerns with refugee concerns. From a refugee perspective, it would not seem that a system waiving penalties only for recognised refugees (or other protection beneficiaries) is sufficient in preventing refugees from not being allowed to board, because this would allocate the risk of 'getting it wrong' to the carrier. From a control perspective, a system exempting all persons requesting asylum from sanctions may be prone to abuse and therefore neither feasible. UNHCR has alternatively suggested that sanctions should be waived in respect of persons who have a 'plausible claim' for refugee or subsidiary protection status, to the effect that no sanctions are imposed when claims are not found to be manifestly unfounded.[49] This would however still require carriers to make their own assessment of asylum claims and encourage them to not take financial risks. A further solution would be for carriers to refer asylum-seekers to a third party which is able to provide effective protection or conduct a preliminary status determination, such as diplomatic missions which are competent to issue protection visa or the UNHCR. But such arrangements may be resource-intensive, would require the consent of the third country concerned and may be burdened with all kinds of procedural issues.

5.2.2.3 Immigration Liaison Officers

As a corollary to carrier sanctions regimes, and to assist carriers in complying with their obligations, Western States have increasingly deployed immigration control officers in foreign countries, most commonly at airports. These officers are termed differently under national law,[50] but referred to under EU law

46 Article 5 (1)(a) and (b) SBC.

47 Article 4 of the French Initiative, n. 43 *supra*.

48 This is the case for example in the Netherlands, see Vreemdelingencirculaire 2000 [Aliens Circular 2000], para. A2/7.1.2; and in the United Kingdom: United Kingdom Refugee Council Report (2008), p. 44.

49 UNHCR, 'UNHCR Position: Visa Requirements and Carrier Sanctions', September 1995.

50 It appears that the term 'Airline Liaison Officer' is most commonly used to depict officers supporting carriers in discharging their duties under carrier sanctions regimes, while 'Immigration Liaison Officers' are endowed with the broader tasks of collecting information and advising host state authorities. On the functioning of these officers in respectively the United Kingdom, Canada and Australia, see more extensively: United Kingdom Refugee Council Report (2008), p. 35-21; A. Brouwer and J. Kumin, 'Interception and Asylum: When Migration Control and Human Rights Collide', 21 *Refuge: Canada's periodical on refugees* (2003); Taylor (2008).

as Immigration Liaison Officers (ILOs). Under the intergovernmental Prüm Treaty, binding seven of the 27 Member States, they are alternatively called 'document advisors'.[51] The role of immigration officers in impeding asylum-seekers from boarding aircrafts bound to places of safety has been lamented by commentators and has also prompted questions asked by Members of European Parliament.[52] The critique pertains in particular practices whereby immigration officers either directly prohibit persons from entering a plane or where they indirectly 'recommend' a carrier or a foreign border authority to not allow boarding or exiting the country. These practices are alleged not to distinguish between persons claiming to be refugees and other improperly documented travelers, or to provide asylum guarantees which are inherently ineffective.[53]

EU law has done little to harmonise the tasks of immigration officers posted in third countries. Regulation EC 377/2004 created a network of immigration liaison officers, who are posted to the consular authorities of either another Member State or a non-Member State with a view to contributing to the prevention of illegal immigration, facilitating returns and the management of legal migration.[54] The Regulation foresees in the formation of local networks of ILOs from different Member States who are posted to the same country, in order to exchange information and adopt common approaches.[55] The Regulation does not oblige Member States to employ ILOs and does not

51 Article 20 Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration (Hereafter 'Prüm Treaty'), 27 May 2005.

52 S. Taylor (2008); Brouwer and Kumin (2003); European Parliament, Written Question by Jeanine Hennis-Plasschaert (ALDE), Emine Bozkurt (PSE) and Thijs Berman (PSE) to the Commission, 'Immigration liaison officers (ILOs)', no. E-3228/08; European Parliament, Written Question by Jeanine Hennis-Plasschaert (ALDE) to the Commission, 'Immigration liaison officers (ILOs)', no. E-2276/09.

53 Several countries, including Australia, Canada, the Netherlands and the United Kingdom, deploy immigration liaison officers who do not issue refusals of entry but instead provide pre-boarding recommendations to air carriers. The United Kingdom has in the past also employed immigration officers conducting pre-clearance controls, extensively addressed in the *Roma Rights* case, discussed in chapter 4.3.1.1. It is reported that in Canada, Australia and the United Kingdom, instructions are in place for immigration officers to refer intercepted asylum-seekers to either the local UNHCR office, a diplomatic mission or the local authorities. It is also reported however, that such referrals scarcely occur, because intercepted persons seldom articulate a wish for asylum and because immigration officers are reluctant to put the relationship with the host country in jeopardy. In the Netherlands, ILOs confronted with asylum-seekers are instructed to contact the Dutch immigration authority on a similar footing as carriers, but there is no data supporting this practice. See the references in n. 44 and 45 *supra*.

54 Regulation (EC) No. 377/2004, Article 1.

55 Article 4.

exhaustively define the tasks and powers of the ILOs.[56] They must however, be competent to collect and exchange information on a variety of issues and must further be entitled to render assistance in establishing the identity of third country nationals and in facilitating returns.[57] The Prüm Treaty is somewhat more specific in referring to document advisers as having the competence to advice and train both private carriers and the host country border control authorities – although it does not specify whether this 'advise' is of general nature or should also pertain to checks conducted on individuals.[58]

The ILO Regulation leaves the status and operational activity of immigration liaison officers rather obscure. The Regulation is adopted on the basis of Article 63(3)(b) of the EC Treaty, referring to measures on 'illegal immigration and illegal residence, including repatriation of illegal residents', which may explain why the regulation does not contain any reference to rights of refugees or other protection beneficiaries, and neither refers to the proper observation of other substantive EU instruments on border control, visa or legal migration.[59] Further, no public information is disseminated on the functioning of the EU ILO networks ,[60] although a proposal is pending to forward the currently classified biannual reports on their functioning to the European Parliament.[61] In view of its legal basis however, the Commission has considered it impossible to include in these biannual reports specific information on how asylum-seekers are affected by the network.[62]

One question of particular relevance under EU law is whether immigration officers, should they carry out tasks which can be properly defined as amounting to 'border control' or 'border checks' in the meaning of the Schengen Borders Code,[63] should not also be regarded as 'border guards' under the Borders Code and/or be required to comply with all procedural and other standards laid down in the Code. This question touches not only upon the definitional terms of the Borders Code, but also upon its territorial scope, and is further addressed in section 5.3.2. of this chapter below.

---

56 Article 1(4)

57 Articles 2 and 4.

58 Prüm Treaty, Article 21 (2) and (3).

59 It must also be noted that the regulation was adopted before *inter alia* the Schengen Borders Code and the Visa Code.

60 According to Article 6 paragraph 1 of Council Regulation (EC) No 377/2004 a biannual report on the activities of immigration liaison officers networks should be forwarded to the Council and Commission, but this report is classified.

61 COM(2009) 322 final, Article 1 (3).

62 Commission Decision 2005/687/EC of 29 September 2005 sets forth that this report must *inter alia* include information on refusals of entry at the frontiers of the host country. Where relevant, information on asylum-seekers must also be included, but only in so far as asylum-seekers present a 'risk and threat at the host country's borders', see Annex, paras. 6.2. and 6.4.

63 See Article 2 (9) and (10) Schengen Borders Code.

5.2.2.4 Frontex

Frontex, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, has acquired remarkable notoriety in its relatively short life span. Founded in 2004, the agency was presented as a decisive step forward in ensuring effective Member State cooperation in external border controls, border surveillance and the removal of third country nationals.[64] Especially Member States faced with considerable migration pressure at the EU external borders have welcomed Frontex as a vehicle for the pooling of expertise, intelligence and material and personal assets. Others however, have denounced the agency as primarily functioning as a European security instrument, as an agency 'militarising' the EU external border, or even as the 'migrant hunting agency of the European Union'.[65] The agency itself, acutely aware of the contested environment in which it operates, has stressed its subsidiary role and underlined that it 'is not and never will be a panacea to problems of illegal migration'.[66]

Frontex' executive powers are rather limited. After the idea of setting up a supranational European Corps of Border Guards was abandoned in June 2002, it was agreed that an agency should instead be created which would facilitate cooperation, coordination and consistency between the national border guards of the EU Member States – without replacing them.[67] The Frontex regulation lays down that 'responsibility for the control and surveillance of external border lies with the Member States', while the Agency shall 'facilitate and render more effective the application of existing and future Community measures relating to the management of external borders'.[68] Frontex is both a regulatory and coordinating agency, which assists national border guard services by providing technical assistance and training and facilitating the cooperation between national border guards.[69] It is also competent to co-

64 COM(2003) 687 final.

65 *Noborder network* 30 September 2009, 'Act against the migrant hunting agency of the European Union!'

66 The Executive Director of Frontex mr. I. Laitinen, 'Frontex – facts and myths ', Frontex Press Release, 11 June 2007.

67 European Council 14 June 2002, 'Plan for the management of the external borders of the Member States of the European Union', doc. 9834/1/02 FRONT 55 COMIX 392 REV, para. IV. For a summary of discussions on the possible creation of a European Corps of Border Guards, see: House of Lords Select Committee on European Union – Twenty-Ninth Report ('Proposals for a European Border Guard'), 1 July 2003. Also see A.W. Neal, 'Securitization and Risk at the EU Border: The Origins of Frontex', 47 *Journal of Common Market Studies* (2009), p. 340-341.

68 Article 1(2) Regulation (EC) No. 2007/2004

69 Article 2. Extensively, J.J. Rijpma, *Building Borders: The Regulatory Framework for the Management of the External Borders of the European Union*, dissertation Florence (2009), p. 258-260.

operate with third countries in matters covered by the Regulation, by concluding working arrangements.[70]

A prominent feature of Frontex' mandate concerns its power to initiate and approve proposals for joint operations of border control.[71] Responding to the sense of urgency concerning irregular sea arrivals, Frontex has been particularly active in launching joint operations of maritime border control and it is precisely in the context of these operations that refugee concerns have been raised.[72] As is extensively explored in the next chapter, some of these operations have allegedly been accompanied with immediate diversions of migrants to the third country of embarkation, without screening for refugees and without allowing persons access to a status determination procedure.[73]

Although Frontex plays a leading role in the preliminary phase of deciding upon and outlining the modus operandi of joint operations, it is not directly involved in the actual operations themselves. The decision to implement a joint operation and the contents of the operational plan require the consent of both Frontex and the Member State hosting the operation.[74] The RABIT regulation has introduced a specific procedure for deciding upon the deployment of Rapid Border Intervention Teams in the case of emergency situations.[75] This procedure similarly foresees in the close collaboration and mutual consent of Frontex and the host Member State in deciding upon the launch of the operation and the drawing up of the operational plan.[76] Once a decision upon the undertaking of a joint operation has been taken however, the Member States remain in command and control over the activity undertaken by the border guards. Although the original Frontex Regulation left the competences and legal status of officers of Member States participating in a joint operation undefined, the RABIT Regulation, by amending the Frontex Regulation, has now exhaustively regulated the tasks, powers and liability of border guards of one Member State who are posted in another Member State (guest officers).[77] In essence, the adopted legal framework equates guest officers with the border guards of the Member State hosting the operation:

---

70 Article 14.

71 Article 3.

72 For an overview of Frontex activities, see Report on the evaluation and future development of the Frontex Agency, COM(2008) 67 final; also see SEC(2008) 150/2.

73 Chapter 6.2.

74 Article 3 and 20 (3) Regultion (EC) No. 2007/2004. The current Frontex Regulation does not lay down a procedure for decisions to launch joint operations nor does it explicitly refer to the drawing up of an operational plan. These matters are currently regulated in Frontex' Internal Rules of Procedure, see extensively: Rijpma (2009), p. 270-273. The proposal for amending the Frontex Regulation contains a new provision on the drawing up of operational plans, which must be agreed upon by Frontex and the host state, COM(2010) 61 final, Article 3a. See also chapter 6.5.

75 See the new Article 8d Regulation 2007/2004 as amended by Regulation (EC) No. 863/2007.

76 Articles 8d (3)(5)(6) and 8(e).

77 Article 10.

they are incorporated into the command structure of the host Member State, they must comply with the laws of the host Member State and they must be treated as officials of the host Member State for purposes of civil and criminal liability.[78] This rather far-reaching model of putting Member State officials at the disposal of another Member State means that the host Member State has decisive influence over the manner of operation of guest officers. The Frontex Regulation endows the host Member State with the power of instruction over guest officers and stipulates that decisions to refuse entry shall be taken only by the host Member State.[79] What this means in terms of attributing conduct to one or the other Member State is addressed in the next chapter.[80]

The core of the Frontex mandate is rather broadly described as rendering 'more effective the application of existing and future Community measures relating to the management of external borders'.[81] The original Regulation did not refer to specific EU instruments on migration and border control and only in general terms affirmed that the Regulation respects fundamental rights.[82] The lack of a specific reference to international refugee obligations in the mandate of Frontex contributed to a perception that Frontex is preoccupied with security concerns and the prevention of illegal migration, without meaningfully addressing the needs and rights of persons seeking international protection.[83] A variety of stakeholders, including the EU institutions themselves, have called for a clarification of the Frontex mandate in this respect, with a view to ensuring that joint border operations are 'protection-sensitive'.[84] In the Stockholm Programme, the European Council specifically requested the Commission to make further amendments to the Frontex legis-

78 Articles 10(2)(3), 10b and 10c. Also see Rijpma (2009), p. 283.
79 Article 10(3)(10).
80 See chapter 6.5.
81 Article 1(2).
82 Recital 22. The RABIT Regulation, adopted after the entry into force of the Schengen Borders Code, incorporated a reference to the Schengen Borders Code in Article 10 of the Frontex regulation. Article 2 of the RABIT Regulation also refers to rights of refugees, in particular the prohibition of refoulement. Also see recital 17 Regulation 863/2007.
83 S. Carrera, 'The EU Border Management Strategy FRONTEX and the Challenges of Irregular Immigration in the Canary Islands', CEPS Working Document No. 261, March 2007; Rijpma (2009), p. 348.
84 Green Paper on the future Common European Asylum System, COM(2007) 301 final, para. 5.3; UNHCR, Response to the European Commission's Green Paper on the Future Common European Asylum System, September 2007, p. 48; European Parliament resolution of 18 December 2008 on the evaluation and future development of the FRONTEX Agency and of the European Border Surveillance System (EUROSUR), P6_TA(2008)0633, para. 18; COM(2008) 67 final, para, 15; Also see COWI, 'Frontex, External evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union' (Final Report), January 2009, p. 19; House of Lords European Union Select Committee, Ninth Report, 'FRONTEX: the EU external borders agency', 5 March 2008, paras. 140-145.

lative framework, including 'common operational procedures containing clear rules of engagement for joint operations at sea with due regard to ensuring protection for those in need who travel in mixed flows, in accordance with international law' and a mechanism for reporting and following up on incidents occurring in these operations.[85]

Early 2010, the European Commission tabled a general recast for the Frontex Regulation which establishes a permanent pool of available border guards for joint operations ('Frontex Joint Support Teams') and includes several provisions specifically addressing joint operations at sea and the plight of persons seeking asylum.[86] The proposal includes an explicit reference to obligations related to access to international protection, an express legal basis for initiating joint operations outside the territory of the Member States, a requirement that all border guards participating in operational activities coordinated by the Agency have received training in refugee law and an obligation of reporting incidents of alleged breaches of relevant EU law and fundamental rights.[87] Further, the proposal foresees in non-binding supervision of Frontex on the manner in which host Member States are carrying out operations, by obliging the host Member State to take the views of the Frontex coordinating officer 'into consideration'.[88]

Specifically responding to the call in the Stockholm programme to establish common procedures for joint operations at sea, the Council further adopted a Council Decision (2010/252/EU) in April 2010 which embeds sea border operations coordinated by Frontex in the framework of the Schengen Borders Code.[89] A remarkable novelty of the Decision, which establishes binding rules for interception at sea and non-binding rules for rescue operations in the course of Frontex missions, is that it introduces, as a general principle, that '[n]o person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of *non-refoulement*, or from which there is a risk of expulsion or return to another country in contravention of that principle'.[90] Arguably, this can be taken as a codification, for the first

85 Stockholm programme, para 5.1.
86 COM(2010) 61 final.
87 Articles 1(2), 1a(2), 2(1a), 3a(h)(i), 3b(4), 8e(h)(i) and recitals 10, 17 and 23.
88 Article 3c(2).
89 Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. The decision was based on a Commission proposal issued on 27 November 2009, COM(2009)658 final.
90 Council Decision 2010/252/EU, Annex, Part I, para. 1.2.

time in EU law, that the prohibition of *refoulement* also applies to extraterritorial conduct of Member States.[91]

Although firmly embedding international refugee obligations within the Frontex mandate, the proposal for recasting the Frontex Regulation and Council Decision 2010/252/EU do not as such resolve the fundamental issue of how, precisely, the material and procedural requirements stemming from the prohibition of *refoulement* should be made operational in conducting maritime interdictions. The instruments do not set forth in what manner screening for refugees should occur, whether intercepted persons have the right to lodge an asylum application when intercepted, whether third country compliance with refugee and human rights should be a precondition for engaging in cooparation with these countries, and where, ultimately, persons claiming international protection should be disembarked.[92] These are all modalities which must presumably be spelled out in the individual operational plan of each joint operation.[93] Given the importance accorded to refugee concerns in the proposed amendments to the Frontex mandate however, it would seem that Frontex would at the least become bound to take such issues into meaningful account when drafting and deciding upon the operational plan.

The European Parliament has decided to bring an action for annulment of Council Decision 2010/252/EU to the ECJ on account of the Council having exceeded its implementing powers as prescribed under the Schengen Borders Code.[94] The relation of Council Decision 2010/252/EU with the Schengen Borders Code is more extensively discussed in section 5.3.2.1 below. In chapter 6, the relationship between Council Decision 2010/252/EU and obligations deriving from international maritime law and the pertinent rights of persons seeking asylum is more extensively addressed.

91 The original Commission proposal had expressly considered that the prohibition on refoulement 'would apply regardless of the status of the waters the people were in', COM(2009)658 final, para. 2. Also see Annex, para. 4.2. of the original proposal, referring to the material obligation not to expose persons to a risk of harm, rather than adherence to the 'principle of *non-refoulement*'.

92 The only elaboration of the prohibition of *refoulement* is rather ambiguously formulated obligation to inform intercepted or rescued persons 'in an appropriate way so that they can express any reasons for believing that disembarkation in the proposed place would be in breach of the principle of non-refoulement', Annex, Part I, para. 1.2.

93 Also see Annex, Part II, para. 1.2.

94 Case C-355/10, *European Parliament v Council of the European Union*, action brought on 14 July 2010.

5.2.3 The EU's external asylum policy

The evolving EU's external asylum policy[95] is of an altogether different legal nature than the instruments making up the EU system of integrated border management. The policies which have in recent years been developed, primarily in the context of the Hague Programme, and which specifically address the plight of refugees in third countries, have almost exclusively taken the form of programmes of financial and technical aid and do not directly touch upon the legal status of individuals. Despite intense discussions both in- and outside EU institutions on the merits and feasibility of establishing a EU programme for the processing of asylum claims in third countries,[96] the most recent EU policy documents refrain from proposing such a far-reaching scheme and focus instead on the implementation of a strategy – much in line with UNHCR's Convention Plus initiative[97] – which should build capacity in third countries to provide effective protection and contribute to solving protracted refugee situations.[98]

Formally, the external asylum dimension is built on two pillars: the managed entry of refugees into the Europen Union and protection of refugees in the regions of origin.[99] These two pillars support the general strategy of 'consolidating protection capacities in the region of origin and the treatment of protection requests as close as possible to needs and the regulation of safe

95 The Stockholm Programme refers to this policy as 'The external dimension of asylum', para. 6.2.3.

96 See, extensively eg M. Garlick, 'The EU Discussions on Extraterritorial processing: Solution or Conundrum?', 18 *IJRL* (2006), p. 601-629. G. Noll 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones', 5 *EJML* (2003), p. 303–341.

97 The Convention Plus initiative, officially launched by UNHCR in June 2003, sought to develop a normative framework supplementing the Refugee Convention for global burden-sharing that would increase the involvement of Western states in guaranteeing adequate protection for refugees in their regions of origin. The Convention Plus intitiative was incorporated in UNHCR's Agenda for Protection, first endorsed in 2002. Statement by Ruud Lubbers, United Nations High Commissioner for Refugees, First Meeting of the High Commissioner's Forum, 27 June 2003; UN High Commissioner for Refugees, *Agenda for Protection*, October 2003, Third edition, available at: http://www.unhcr.org/refworld/docid/4714a1bf2.html [accessed 19 March 2010]. For a comprehensive appraisal of the Convention Plus Initiative see: M. Zieck, 'Doomed to Fail from the Outset? UNHCR's Convention Plus Initiative Revisited', 21 *IJRL* (2009), p. 387-420.

98 The Stockholm Programme still foresees in the conducting of a 'study on the feasibility and legal and practical implications to establish joint processing of asylum applications', but without referring to processing outside the territory of the Member States; Stockholm Programme, para. 6.2.1. Also see COM (2009) 262 final, para. 5.2.2.

99 The European Commission mentions Regional Protection Programmes as a distinct third part of the external asylum dimension, but these programmes may well be perceived as a more targeted manner of enhancing protection and managing entry: COM(2004)410 final, paras. 4-5; 36-54. Also see Presidency Conclusions 19/20 June 2003 (Thessaloniki), para. 26.

access to the European Union for some of those in need of international protection'.[100]

Financing is the principal means through which the EU implements the notion of enhanced protection in regions of origin. Under the AENEAS budget line and the successor 'Thematic programme for the cooperation with third countries in the areas of migration and asylum', funds are allocated to projects in third countries contributing to *inter alia* the strengthening of institutional capacities to provide protection, the promotion of norm-setting on asylum, the support of registration of asylum applicants and refugees and the support for improving reception conditions and prospects for local integration.[101] These funds form part of the broader financing scheme embracing all 'essential facets of the migratory phenomenon', which also covers projects aimed at discouraging illegal immigration and improving border management capacities in third countries.[102] Given the wide material and geographical scope of the financial programme on asylum and migration, the resources available may be perceived as rather modest: the EU budget for actions in third countries in these fields has risen from an annual amount of € 10 million in 2001 to just over € 50 million in 2010.[103]

The funding made available under this thematic budget line must also provide the means for developing EU Regional Protection Programmes. These programmes are presented as a vehicle for intensified commitment of the EU to specific regions hosting many refugees, in order to contribute to the three 'Durable Solutions' of repatriation, local integration or resettlement and are to be developed in close cooperation with UNHCR.[104] A first pilot project, funded by the EU and implemented by UNHCR, for the three countries of Belarus, Moldova and Ukraine, was officially launched in April 2009.[105]

The second limb of the EU's external asylum policy, that of facilitating organized arrivals of refugees in the EU, is considerably less developed, or, indeed, not developed at all. The main instrument having a reasonable chance of adoption in this area is a Joint EU Resettlement Programme, proposed by

100 COM(2004)410 final, para. 2.

101 European Commission, 'AENEAS Programme. Financial and technical assistance to third countries in the field of migration and asylum, 19 February 2003'; COM(2006) 26 final, para.3.2; Article 16(2)(e) Regulation (EC) No. 1905/2006; European Commission, 'Strategy Paper for the Thematic Programme of Cooperation with Third Countries in the Areas of Migration and Asylum 2007-2010' (undated).

102 Article 16(2)(c) Regulation (EC) No. 1905/2006.

103 Strategy Paper, note above, p. 5, 12. Note that other EU budget lines may also cover financial aid in migration matters, notably in the context of pre-accession countries and the European Neighbourhood Policy.

104 Ibid, p. 29; and in general see European Commission Communication, 'On Regional Protection Programmes', COM(2005) 388 final.

105 Press Release UNHCR 23 April 2009, 'Regional project to support integration of refugees in Belarus, Moldova and Ukraine launched in Kyiv'; Press release Söderköping Process Secretariat, 14 April 2009, 'UNHCR Regional Protection Support Project launched in Kiev'.

the Commission in September 2009.[106] The proposal foresees in the setting by the Commission of common annual priorities on resettlement, in which Member States would participate on a voluntary basis. To this end, it is proposed to include in the Decision establishing the European Refugee Fund a provision stipulating that Member States will receive a fixed amount of 4.000 Euros for each resettled refugee.[107] The decision was not adopted as of August 2010.[108]

Despite the modesty of the proposals, the establishment of an EU resettlement scheme would in itself signify an important departure from the traditional reluctance of European countries to contribute to worldwide resettlement efforts.[109] Nonetheless, it is difficult to see how a EU resettlement scheme, even if it receives widespread Member State participation, could meaningfully address the ambition formulated by both the European Council and European Commission to create effective mechanisms of orderly entry into the EU for refugees, mitigating the need to resort to illegal migration channels and the services of migrant smugglers.[110] By their nature, resettlement policies are subject to numeral ceilings, regional allocations and the selection of specific categories of refugees – and do not grant individual entitlements of entry.[111] Hence, they cannot reasonably be expected to alleviate the phenomenon of refugees arriving spontaneously and by disorderly means. Although the European Union has discussed the establishment of alternative pre-entry procedures allowing refugees to lodge formal applications in third countries for entry into EU territory as employed in various forms by individual Member

106 European Commission Communication, 'On the Establishment of a Joint EU Resettlement Programme', COM(2009) 447 final. Also see Stockholm Programme, para. 6.2.3.

107 Proposal for a Decision amending Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme "Solidarity and Management of Migration Flows" and repealing Council Decision 2004/904/EC, COM(2009) 447 final. The decision was not adopted as of August 2010.

108 In a resolution on the joint EU resettlement programme, the European Parliament considered that a budget line and financial support are not sufficient to establish a real EU-wide resettlement programme and recommended the setting up of a permanent Resettlement Unit as part of the European Asylum Support Office: European Parliament Resolution T7-0163/2010 of 18 May 2010. The EP also proposed to amend the Refugee Fund so as to increase the funding received per resettled person for Member States participating for the first and second years to 6.000 and 5.000 Euros respectively. European Parliament Resolution P7_TA(2010)0160 of 18 May 2010.

109 Currently, nine states host the bulk of the refugees who are annually resettled, of which four are EU Member States: United States, Canada, Australia, Sweden, Norway, Finland, New Zealand, Denmark, The Netherlands. For figures, see UNHCR, Resettlement Handbook (country chapters updated September 2009), 1 November 2004. Also see S. Kneebone, 'The Legal and Ethical Implications of Extraterritorial Processing of Asylum-seekers: The 'Safe Third Country' Concept', in: J. McAdam (ed), *Forced Migration, Human RIghts and Security*, Oxford: Hart Publishing (2008), p. 136.

110 COM(2004) 410 final, paras. 12-21.

111 These selection criteria are also foreseen in the Commission's proposal, COM(2009) 447 final, para. 3.2.1.

States (Protected Entry Procedures or PEPs) – under which refugees can apply, for example, for special protection visa at diplomatic missions – the European Commission ultimately decided to refrain from pursuing further the setting up a EU Protected Entry Procedure mechanism, because of a lack of Member State commitment.[112]

In summary, the EU's external asylum policy is as of yet scarcely developed and of ambivalent character. On the one hand, it is beyond question that the aid and assistance provided by the EU to building capacity for receiving and protecting refugees in third countries may come to the benefit of many persons who are genuinely in need of protection.[113] On the other hand, the evolving EU's external asylum policy embodies more than a mere gesture of international solidarity, but is also premised on a theory of 'containment', i.e. the idea that enhanced protection in regions of transit and origin reduces incentives for people to try to receive protection elsewhere.[114] This containment idea is in fact accorded key priority in the financial programme on asylum and migration support in third countries. Out of a total of € 205 million made available for the years 2007-2010, € 120 million is apportioned to projects along the 'Southern' and 'Eastern Migratory Routes', while only € 4 million is earmarked for asylum and refugee protection globally.[115] It is also noteworthy that the first pilot Regional Protection Programme – originally presented as aimed at providing durable solutions for refugees close to regions of origin – is implemented in the EU's Eastern neighboring (transit) region, and that this programme, apart from contributing to the protection of refugees, includes a strong focus on border management.[116]

5.3 The territorial scope of EU law on border control and asylum

In the previous section I have noted that the specific instruments on external migration management do not succeed in satisfactorily regulating the legal status of refugees subjected to coercive action of Member States, and that they neither make, in the alternative, any meaningful linkage with the pertinent

112 COM(2004) 410 final, paras. 20, 35. An extensive study on Member State practices and the feasibility of establishing EU protected entry procedures was conducted on behalf of the European Commission in 2002: G. Noll, J. Fagerlund and F. Liebaut, Study on the Feasibility Of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum System and the Coal of a Common Asylum Procedure (final report), European Commission/The Danish Centre for Human RIghts, 2002.

113 Garlick (2006), p. 629.

114 Ibid, p. 612. Also see K. de Vries, 'An Assessment of 'Protection in Regions of Origin' in relation to European Asylum Law', 9 *EJML* (2007), p. 84.

115 Strategy Paper, n. 101 *supra*, p. 33.

116 *Supra* n. 105.

internal rules of the European Union on border control and asylum. The present section explores the latter relationship from the perspective of the internal rules. Is it possible that when, for example, a Member State makes use of immigration officers in controlling the borders of a foreign country or when it patrols the territorial sea of a third country, the migrants subjected to such activities can invoke the Union's ordinary regime on border controls and asylum?

It has been suggested that the internal rules on border control and asylum are not designed to address extraterritorial activity of Member States and that therefore, EU law does not comprehensively regulate the manner in which Member States may subject asylum-seekers to coercive measures outside their territories.[117] The current section challenges this assumption – in part. It first shows that EU law may, in general, well regulate relationships or activities which can be situated outside the territory of the European Union. The section then specifically explores the territorial scope of the Schengen border crossings regime and the Common European Asylum System. Although the instruments making up the Common European Asylum System are equipped with specific terminology limiting their territorial scope, the Schengen Borders Code is remarkably responsive to different types of pre-border control measures and may as such constrain the freedom of European Member States in subjecting migrants to controls away from their borders. However, in attempts to embed Frontex sea operations within the Schengen border crossings regime, the Council and the European Commission have tried to do so in questionable disregard of the specific procedural guarantees ordained under that regime.

5.3.1 Some observations on the territorial scope of European Union law

The European Union's legal relationship with the wider world can be approached from a multitude of angles. Most typically legal discourse focuses on defining the EU's external competences with reference to the Union's treaty making powers and its competence to participate in international organisations, touching upon the dual questions of the sources of these competences and the division of power between the Union and the Member States. Although

117 See, with respect to the Schengen Border Crossings regime House of Lords Report (2008), para. 143; and Rijpma (2009), p. 337. With respect to the Common European Asylum System, H. Battjes, *European Asylum Law and International Law*, Leiden/Boston: Martinus Nijhoff (2006), p. 209-211. Also see R. Weinzierl, 'Human Rights at the EU's common external maritime border, Recommendations to the EU legislature', German Institute for Human Rights: Policy Paper No. 11, September 2008, p. 4.

indirectly of relevance to this study, this topic has received ample attention in literature and case law of the ECJ and is not further dealt with here.[118]

A question of a different nature concerns the EU's external prescriptive, or legislative, competence. This issue is also commonly commented upon, but mainly in the context of prescriptive jurisdiction in the field of EU competition law. Here, the most paramount question has been to what extent the EU's competition rules apply to undertakings which have no physical presence in the Union but whose conduct negatively affects the functioning of the internal market. In *Wood Pulp*, the ECJ took position in a theoretical debate which had been ongoing for some years on the question whether the European Community is entitled, along the model previously endorsed by the United States Supreme Court, to assert jurisdiction over companies established outside the Community on the basis that those companies, by engaging in conduct producing substantial effects within the internal market, act contrary to EU antitrust law.[119] The ECJ, avoiding the effects doctrine as an explicit basis for the establishment of jurisdiction, concentrated instead on the factor that it suffices that an agreement is 'implemented' within the Community's internal market and found this basis for asserting jurisdiction over third country companies to accord with 'the territoriality principle as universally recognized in public international law'.[120] The judgment was received by some authors as a clear rejection of the effects doctrine as adhered to by the United States,[121] while others observed that the ECJ had upheld an effects doctrine in disguise.[122] What is, in the context of the present study, most noteworthy about the *Wood Pulp* case, is that in defining the territorial scope of Community law, an assessment was made, firstly, of the wording of a particular Treaty provision and whether particular conduct can be brought within the ambit of that provision. And secondly, if such assessment may have extraterritorial

118 See the contributions in two fairly recently published textbooks, A. Dashwood and M. Maresceau (eds), *Law And Practice Of EU External Relations; Salient Features Of A Changing Landscape*, Cambridge: Cambridge University Press (2008); M. Cremona (ed), *Developments in EU External Relations Law,* Oxford: Oxford University Press (2008). And specifically in the context of competences for the management of the EU's external borders: Rijpma (2009), p. 313-318.

119 For an overview of the US 'effects doctrine', eg A. Robertson and M. Demetriou, '"But that was in Another Country …": The Extraterritorial Application of US Antitrust Laws in the US Supreme Court', 43 *ICLQ* (1994), p. 417-425.

120 ECJ 27 September 1988, *A. Ahlström Osakeyhtiö a.o. v Commission (Wood Pulp I)*, Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, paras. 16-18.

121 V. Lowe, 'International Law and the Effects Doctrine in the European Court of Justice', 48 *The Cambridge Law Journal* (1989), p. 9-11.

122 J.J. Friedberg, 'Convergence of Law in an Era of Political Integration: The Wood Pulp Case and the Alcoa Effects Doctrine', 52 *University of Pittsburgh law review* (1990), p. 291. See also the discussions following the more recent judgment in *Gencor* rendered by the Court of First Instance: Court of First Instance 25 March 1999, *Gencor v Commission*, Case T-102/96;, M.P. Broberg, 'The European Commission's Extraterritorial Powers in Merger Control, The Court of First Instance's Judgment in *Gencor* v. *Commission*', 49 *ICLQ* (2000), p. 172-182.

implications, decisive weight in defining the territorial scope of the Treaty is accorded to the limits set by public international law and in particular the principle of non-intervention.[123]

Wood Pulp evolved around the question to what extent international law permits the European Community to establish jurisdiction over foreign undertakings. The issue of accommodating the Union's competences with the sovereign interests of third countries is not normally apparent in situations where it are the Member States themselves who engage in extraterritorial activities. It is precisely this relationship – to what extent does EU Law regulate the extraterritorial conduct of Member States – in which this study is particularly interested. Unfortunately, this question has received surprisingly little scholarly attention and it is perhaps for this reason that in recent discussions on the extraterritorial applicability of EU legislation on border control and immigration, the knee-jerk proposition has been advanced that EU law cannot govern the extraterritorial activity of the Member States. But this proposition is, as may also be implicitly inferred from *Wood Pulp* and as is more explicitly explained below, misfounded, at least in so far as it intends to suggest that EU rules can only have effect within the common territories of the Member States. Hereunder, a review is made of several cases dealing with the specific issue of the application of EU law to Member State activity outside the common territories of the EU.

In the *Sea fisheries*-case, the question was to what maritime zones the Regulation laying down a common structural policy for the fishing industry applied.[124] The ECJ held that secondary legislation adopted on the basis of the Treaty in principle applies to the same geographical area as the treaty itself and that the delimitation of this geographical area depends on the legal context, the subject matter and the purpose for which the regulation was adopted.[125] Because the Regulation specified that its scope was confined to the 'maritime waters coming under [the Member State's] sovereignty or within its jurisdiction' as 'described by the laws in force in each Member State',[126] the ECJ found the geographical scope of the Regulation to necessarily correspond with the extent to which a Member State exercised its sovereignty in maritime waters and that any extension of national competences in this respect automatically means 'precisely the same extension of the area to which the Regulation applies.' It observed that this interpretation was the only one which accorded with the subject matter and the purpose of the Regulation, which

123 This dual assessment implicitly follows from the Court's judgment in paras. 11-13 and 15-18 and was explicitly followed in the Conclusion of the Advocate-General: Opinion of AG Darmon 25 May 1988, *A. Ahlström Osakeyhtiö a.o. v Commission (Wood Pulp I)*, Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, paras. 8-10; 19 et seq.

124 ECJ 16 February 1978, *Commission v Ireland (Sea fisheries)*, Case 71/77.

125 Ibid, paras. 45-46.

126 Council Regulation (EEC) No. 101/76, Article 2 (1)(3).

was to establish a 'common system for fishing' throughout the whole of the maritime waters belonging to the Member States.[127] This meant that the Regulation and the prohibition of discrimination on grounds of nationality laid down in the EEC Treaty applied to the newly adopted Irish fishery policies within the Irish Exclusive Economic Zone (EEZ).

A similar approach had been followed in *Case 167/73*, on the question of applicability of the EEC Treaty to sea and air transport, including transport outside the territories of the Member States.[128] The case concerned the conformity of restrictions set by French legislation on the number of foreign workers on French commercial and fishing vessels with the primordial treaty provisions on the free movement of workers. Even though the Community had not (yet) made use of its explicit power conferred by former Article 84 (2) EEC Treaty to regulate the air and sea transport, the Court found the ordinary treaty regime on free movement to apply to the French *Code du Travail Maritime*, precluding the French legislator to give preferential treatment to French nationals vis-à-vis nationals of other Member States in respect of work on French vessels.

The Court has not departed from this line of reasoning in various later cases concerning employment relations carried out outside the territory of the EU between a national of one Member State and an undertaking of another Member State. In respect of such employment, the ECJ has consistently held that EU law on free movement of workers applies to 'all legal relationships in so far as those relationships, by reason of either the place where they were entered into or the place where they took effect, could be located within the territory of the Community.'[129] This implies, according to the ECJ, that 'activities temporarily carried on outside the territory of the Community are not sufficient to exclude the application of [Community law], as long as the employment relationship retains a sufficiently close link with that territory'.[130] In the case of *SARL Prodest*, the Court considered that a link of that kind can be found in the fact that the Community worker was engaged by an undertaking established in another Member State and, for that reason, was insured under the social security scheme of that State and in the fact that he continued to work on behalf of the Community undertaking even during his posting to a non-Member Country.[131] In *Mário Lopes da Veiga*, concerning the question

127 *Sea fisheries*, paras. 48-50.

128 ECJ 4 April 1974, *Commission v French Republic*, Case 167-73.

129 ECJ 12 July 1987, *SARL Prodest v Caisse Primaire d'Assurance Maladie de Paris*, Case 237/83, para. 6 ; ECJ 27 September 1989, *Mário Lopes da Veiga v Staatssecretaris van Justitie*, Case 9/88, paras. 15-16; ECJ 29 June 1994, *R.L. Aldewereld v Staatssecretaris van Financiën*, Case C-60/93, para. 14.

130 *SARL Prodest v Caisse Primaire d'Assurance Maladie de Paris*, para. 6 ; *Mário Lopes da Veiga v Staatssecretaris van Justitie*, paras. 15-16; *R.L. Aldewereld v Staatssecretaris van Financiën*, para. 14.

131 *SARL Prodest v Caisse Primaire d'Assurance Maladie de Paris*, para. 7.

of applicability of free movement law to a Portuguese national working as a seaman for a Dutch shipping company, the Court found the relevant criteria for the establishment of a 'sufficiently close connection' to be that the person in question worked on board a vessel registered in the Netherlands, that he was employed by a Dutch undertaking, that the employment relationship was subject to Dutch law and that he paid his taxes in the Netherlands.[132] This case is particularly noteworthy in the context of the present study, because it signified that whereas the Dutch Aliens Act did not impose requirements in respect of the holding of a residence permit on board a Dutch vessel sailing on the high seas, this did not preclude Community law from governing the matter of the person's residence rights in the Netherlands.

In *Boukhalfa*,[133] the ECJ confirmed the case law above and explicitly considered that the general rule that the EC Treaty applies to the territories of the Member States as currently laid down in Article 52 TEU[134] 'does not preclude Community rules from having effects outside the territory of the Community'.[135] It reiterated the 'sufficiently close link'-criterion in establishing whether employment relations are covered by Community law and specified that this link sees primarily to the connection between the employment relationship, on the one hand, and the law of a Member State *and thus the relevant rules of Community law*, on the other.[136] Decisive in the specific case was that the employment contract of a Belgian national who worked for the German embassy in Algiers was entered into in accordance with German law – even though this law stipulated that conditions of employment were to be determined in accordance with Algerian law – that employment disputes had to be brought to courts in Bonn and that the employee was at least partially covered by the German State social security system.[137]

It is difficult to infer from this rather small collection of cases, mostly dealing with free movement of EU citizens, a general set of legal criteria for deciding upon the extraterritorial applicability of European Union law. But it is possible to conclude, firstly, that EU law may well have implications for activities engaged in outside the common territories of the Member States. Secondly, it seems that the question of extraterritorial scope of EU law is inspired by two issues in particular. The first is the object and purpose of EU law, which ordains that the goal of establishing a harmonized system of EU rules may be jeopardized if extraterritorial Member State activity is automatically excluded from the ambit of EU law. Secondly, it transpires that the territorial scope of EU law derives primarily from the territorial scope of the

132 *Mário Lopes da Veiga v Staatssecretaris van Justitie*, para. 17.
133 ECJ 30 April 1996, *Ingrid Boukhalfa v Bundesrepublik Deutschland*, Case C-214/94.
134 Former Article 299 TEC.
135 *Ingrid Boukhalfa v Bundesrepublik Deutschland*, para. 14.
136 Ibid, para. 15.
137 Ibid, para. 16.

domestic laws of the Member States. If persons or activities outside the territory of the Union are nonetheless covered by the domestic laws of a Member State (and can hence 'be located within the territory of the Community (or the EU)'), *and* if the domestic law with regard to that person or activity normally falls within the ambit of EU law, the ECJ has been willing to accept that EU law also extends to that person or activity.

5.3.2 The territorial scope of the Schengen border control regime[138]

If one looks at the EU's border control regime through a territorial lens, problems of legal conceptualisation become readily apparent. On the one hand, EU law on the crossing of external borders signifies the geographical threshold where persons become obliged to comply with the Union's rules on entry conditions and, in general, rights of residence and free movement. On the other hand, it is precisely with a view to maximizing the effective implementation of those rules that the EU has shaped its external migration and asylum policy, which is premised on the very idea that one should control the border well before persons have arrived at it. This conceptual tension may lead to all sorts of legal problems, relating both to the definition of the powers of the European Union and the Member States to subject persons not yet having arrived at the border to coercive measures and, on the other hand, to the identification of rights of persons under EU law who are subjected to such measures. It has been questioned for example, whether EU law provides a basis for engaging in pre-border controls at all.[139] It has also been suggested that persons who are subjected to such measures cannot rely on safeguards deriving from EU law, because those safeguards are triggered only upon the moment one makes contact with Europe's external borders as understood in its geographical meaning.[140]

The Schengen Borders Code is highly relevant for asylum-seekers seeking entry into the European Union for two reasons. Firstly, it lays down generally applicable norms on procedures and good administration to be respected in conducting border controls. These include the procedure to be followed in conducting entry checks, the material entry conditions, the obligation that entry may only be refused by means of a substantiated decision and the right of

138 In addressing the EU legal regime regulating external border controls, a distinction must be made between the Schengen external borders, where border procedures are governed by the Schengen Borders Code, and the external borders of non-Schengen Member States, where national laws determine the procedures to be followed, although within the limits set by EU rules on free movement of persons. On this difference and legal implications extensively, Rijpma (2009), chapters IV, V and VI. The present section exclusively focuses on the Community border regime applicable to the external Schengen border.

139 House of Lords (2008), para. 142-145.

140 Ibid. Also see Rijpma (2009), p. 337.

persons to appeal against refusals of entry.[141] Secondly, the Code accounts for the special position of asylum-seekers who are subjected to border controls. Article 3(b) affirms that the Code does not prejudice the rights of refugees and persons requesting international protection, in particular as regards *refoulement*. This general norm also finds expression in Article 5 (4)(c), allowing Member States to derogate from the entry conditions on humanitarian grounds or because of international obligations. And in Article 13(1), it is provided that entry may not be refused if this comes in conflict with special provisions concerning the right of asylum and to international protection. The practical implication of these provisions must be that in case of asylum-seekers who do not meet the cumulative list of conditions for entry as provided by the Borders Code, border guards may nevertheless not refuse entry and that, at least if an asylum application can be considered to have been made 'at the border or in the transit zones of the Member States', the special procedural safeguards laid down in the Asylum procedures Directive become applicable.[142]

The definition of the external border is set forth in Article 2(2) Schengen Borders Code: "the Member States' land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders". This definition does not precisely map where the external borders lie, but implicates that the EU external border is congruent with that of the Member States. Amongst other things, this implies that EU law does not interfere with various territorial disputes, such as over Gibraltar or the boundary disputes which have arisen as a consequence of the dissolution of Yugoslavia and the Soviet Union.[143]

Even though EU law does not precisely map the location of the external borders, it transpires from the various definitions laid down in the Borders Code that the border control regime is closely intertwined with the physical location of the external border. Border checks are defined as "checks carried out at border crossing points" and border guards are defined as public officials who are assigned "to a border crossing point or along the border, or in the immediate vicinity of that border".[144] Article 3 of the Code, further, limits its scope to persons 'crossing the internal or external borders of Member States'. Even though these provisions are equipped with some geographical flexibility ('along', 'at', 'immediate vicinity') the most immediate impression of these provisions surely is that the Schengen Borders Code focuses on the physical external border as the very object of its scope.

---

141 Articles 6-13 Schengen Borders Code.

142 Asylum Procedures Directive, Art. 3 (1). But see S. Peers, 'Revising EU Border Control Rules: A Missed Opportunity?', Statewatch analysis, 6 June 2005, who expresses reservations as to whether the Borders Code must be interpreted as meaning that asylum-seekers may not be refused entry and considers it preferable to set out this obligation more clearly.

143 See, extensively, Rijpma (2009), p. 76-84.

144 Articles 2 (10) and 2 (13) Schengen Borders Code.

The precise geographical delimitation of the external borders (e.g. does it also include the contiguous maritime zone or the disputed maritime border between Slovakia and Croatia?) may be considered as not terribly important, as the control regime in respect of the external border is operationalised through the obligation incumbent on any person crossing the external borders to do so only at notified border crossing points and during the fixed opening hours.[145] These border crossing points are designated by the Member States, notified to the European Commission and generally labelled merely by the name of the town located at an external land border, the name of the international airport or the name of the port-city. These border crossing points, as is also apparent from the compiled list of border crossing points published by the European Commission, need not necessarily be located 'at' the physical border but may, on the one hand, be located well within the territory of the Schengen area – as is the case with international airports – or on the other hand, well outside the territory of the Schengen area, as is the case with Ashford International railway station in Kent, England and the London Waterloo station, both listed as authorised French border crossing points in the meaning of Article 2(8) of the Schengen Borders Code.[146] Hence, persons may for legal purposes be considered to have crossed the external Schengen border even though they remain physically outside the Schengen area and vice versa. This fiction of law is often used in national immigration legislation.[147]

For enforcement purposes, the Schengen Borders Code foresees in two sorts of policing instruments, both designated as 'border controls'. Border controls, in the meaning of the Code, can consist either of border checks or border surveillance.[148] 'Border checks' are the checks carried out at border crossing points, which, with respect to third-country nationals, comprise verification of whether the person complies with the entry conditions as laid down in the Code.[149] Persons who do not fulfill the entry conditions and do not belong to one of the exempted categories (including persons applying for asylum), must then be refused entry.[150] 'Border surveillance' means the surveillance of borders between border crossing points of which the main purpose is to prevent unauthorized border crossings, to counter criminal activity and to

145 Article 4(1). Exceptions are provided in Article 4(2).

146 Update of the list of border crossing points referred to in Article 2(8) of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ 2007 C 316/01, 28 December 2007.

147 P. Boeles et. al., *European Migration Law*, Antwerp/Oxford/Portland: Intersentia (2009), p. 16-17. That this legal fiction does not preclude persons from being within the jurisdiction of a state for human rights purposes was confirmed in ECtHR 25 June 1996, *Amuur v France*, no. 19776/92, para. 52.

148 Article 2(9) Schengen Borders Code.

149 Articles 2(10), 5, 7(3).

150 Article 13 (1).

take measures against those who have gained illegal entry.[151] Although the Borders Code does not define precisely what measures border guards surveilling the external border may take in respect of persons who have crossed or try to cross the border at a place other than the border crossing point, the non-binding Schengen Handbook mentions the checking of documents of such persons and to stop and to bring them to the nearest border guard's station.[152] This procedure would then allow for refusing such persons entry in accordance with the provisions of the Code and the possible imposition of auxiliary penalties for having gained illegal entry in accordance with the domestic laws of the Member States.[153]

The model described so far is fairly simple: the Schengen rules on the entry of persons wishing to cross the border are effectuated by means of border checks at one of the authorized border crossing points; and to prevent persons from crossing the border elsewhere, the areas in between those crossing points should be held under surveillance.[154] It is probably with a view to this simplified model that it has been questioned whether Frontex has a mandate to operate beyond the external borders of the EU, i.e. to coordinate operations where surveillance and checks are carried out far away from any designated border crossing point and which are accompanied with measures which in the terms of the Schengen Borders Code would amount to a 'refusal of entry'.[155] But if this mandate is indeed not provided by the Code, it must also be questioned – in view of the legal character of the Borders Code *and* because the Code expressly aims at the establishment of a 'common corpus' of legislation as regards border controls – on what basis the Member States themselves may take measures which would normally fall within the ambit of the Code but have the effect of modifying its scope.[156]

---

151 Articles 2(11), 12.

152 Commission Recommendation establishing a common "Practical Handbook for Border Guards (Schengen Handbook)" to be used by Member States' competent authorities when carrying out the border control of persons, C(2006) 5186 final, 9 November 2006, Part 3, para. 2.3 (e).

153 In this vein also COM(2002) 233 final, para. 8: 'Surveillance is exercised in the spaces located between the permitted passage points in order to dissuade persons from crossing the external border illegally.'

154 One explicit exception to this model is that authorities may also conduct a 'second line check', which means a further check carried out in a special location away from the border crossing point, in case there is a need for making additional verifications, see Articles 2(12) and 7(5) SBC.

155 *Supra* n. 139-140.

156 According to recital 4, the Schengen Borders Code aims at 'the establishment of a 'common corpus' of legislation (…) on the management of the external borders'. As a general rule, the legal character of a Community regulation opposes its transformation into domestic law provisions and Member States may not adopt measures which have the effect of altering its scope or adding provisions to it, unless provided for in the regulation itself. See, in general, P.J.G. Kapteyn, A.M. McDonnell, K.J.M. Mortelmans, C.W.A. Timmermans and

The proposition that the Schengen Borders Code only regulates the regime on border crossings in the immediate vicinity of the external border (or only 'at' authorized border crossing points) is difficult to sustain however. It would not only create an anomaly as regards practices of border control carried out at other places, but, more pertinently, is difficult to reconcile with the terms of the Borders Code itself. Crucially, Article 18 of the Code allows for the adoption of specific rules on different types of border controls, in order to tailor checking procedures to the various types of traffic and modes of transport. These specific regimes are set forth in Annex VI of the Code and may derogate from the provisions on entry conditions, border checks and refusal of entry laid down in Articles 5 and 7 to 13.[157] What is most noteworthy about the specific regimes as currently laid down in this Annex is that some of them expressly allow for border checks in third countries, thus incorporating the Union's strategy of integrated border management.

With regard to train traffic this Annex spells out that, pursuant to agreements with third countries, border checks on persons may be carried out in the stations in a third country where persons board the train, during transit or in the station where the persons disembark.[158] And in respect of maritime traffic, the Annex expressly refers to checks carried out in a third country or during sea crossings:

> 'Checks on ships shall be carried out at the port of arrival or departure, on board ship or in an area set aside for the purpose, located in the immediate vicinity of the vessel. However, in accordance with the agreements reached on the matter, checks may also be carried out during crossings or, upon the ship's arrival or departure, in the territory of a third country.'[159]

This paragraph constituted an overhaul of the existing provisions of maritime checking of the Schengen Common Manual on checks at the external borders,[160] and was drafted in the light of the previous recommendations of the Civipol Conseil study and the Programme of measures to combat illegal immigration across the maritime borders of the European Union,[161] which

---

L.A. Geelhoed, *The Law of the European Union and the European Communities*, Alphen aan den Rijn: Kluwer Law International (2008), p. 280-282.

157 Article 18.

158 Schengen Borders Code, Annex VI, paras. 1.2.1.-1.2.2.

159 Ibid, para. 3.1.1.

160 Decision of the Executive Committee of 28 April 1999 on the definitive versions of the Common Manual and the Common Consular Instructions (SCH/Com-ex (99) 13), OJ L 239, p. 317.

161 Civipol Conseil, 'Feasibility study on the control of the European Union's maritime borders' (final report), 4 July 2003, reproduced in Council doc. 11490/1/03 REV 1 LIMITE FRONT 102 COMIX 458; 'Programme of measures to combat illegal immigration across the maritime borders of the Member States of the European Union', Council Doc. 15445/03.

called for the stepping up of border cooperation with third countries and the conducting of port-to-port checking of persons.[162]

The paragraph on maritime checking adds that '[t]he purpose of [these] checks is to ensure that both crew and passengers fulfil the conditions laid down in Article 5'. This explicit reference to the entry conditions enumerated in Article 5 of the SBC would seem to imply that in respect of such checks, the ordinary entry conditions and therewith the substantive requirements concerning *inter alia* travel documents, visa, purposes of stay, means of subsistence and public order concerns apply. This may certainly be described as a prominent example of where EU law establishes prescriptive extraterritorial jurisdiction as regards substantive EU requirements on immigration and border control, but it does so only in so far as 'agreements reached on the matter' allow for this type of border checks.

Contrary to various other specific border procedures mentioned in Annex VI of the Code, the paragraph on checking procedures on maritime traffic does not mention any derogation to Articles 5 and 7 to 13 as allowed for under Article 18 of the Code being applicable. It logically follows that the procedural rules on the conducting of border checks, including safeguards on refusal of entry and the right of appeal, apply equally to the maritime border checks provided for by Annex VI of the Code, including those carried out during sea crossings or in the territory of a third country. Because the specific checking procedure on maritime traffic may not derogate from Article 4 which provides that external borders may only be crossed at border crossing points, this special regime thus allows for the physical relocation of border checks, but does not relieve persons subjected to such checks from the obligation to cross the external border at one of the authorized border crossing points. It is not specified whether this means that the person must again be checked upon arrival at the border crossing point.

Since one of the primary aims of the Borders Code is to provide a 'common corpus' of legislation applicable to external border controls and to ensure 'uniform application by border guards of the provisions of Community law on the crossing of external borders', it makes sense that the Code recognises and arranges for the undertaking of extraterritorial controls by virtue of the specific rules set out in Annex VI.[163] The extension of the Borders Code to areas away from the Union neither appears to be particularly problematic from the perspective of the sovereign rights of third countries. In those instances where instruments of the Union refer to border activity affecting the rights

162 COM(2004) 391 final, p. 25-26.

163 See in particular recital 4 Schengen Borders Code. Also see Article 3(1)(c) Council Decision No. 574/2007/EC.

of third countries, this activity is made conditional upon the prior approval of the third country concerned.[164]

The logic which thus emerges is that, even though some definitional provisions of the Borders Code appear to locate the legal regime on Schengen border crossings 'at' the external border, the Code and related EU instruments are also equipped with flexibility in terms of the geographical areas where border controls may be conducted and that the Code does provide a legal basis for border checks away from the physical external border. As regards train and sea traffic, the Code already allows for subjecting persons to border checks at foreign ports or stations or during transit – but without derogating from the ordinary procedures under the Borders Code. Although Annex VI of the Code also contains an extensive paragraph on air traffic checking procedures, this paragraph does not refer to the checking of persons at airports in a third country.[165]

This logic would also ordain that, if Member States would deem it necessary to establish further extraordinary procedures on the checking of persons in foreign territories which would derogate from the standards contained in Articles 5 and 7 to 13 Schengen Borders Code, appropriate rules must be incorporated in Annex VI Borders Code, requiring amendments in accordance with the co-decision procedure.[166] This would not only imply that border controls at sea involving the checking of identities and travel documents and possibly the issuing of refusals of entry, but also checking procedures at foreign airports, such as pre-clearances, require – in so far as they do not confirm with the ordinary procedures – prior incorporation in the Borders Code.

This is a conclusion with rather far-reaching implications, as it may render current practices of sea and air border control in foreign territories, which involve the taking of measures which can properly be defined as 'border checks' or 'refusals of entry' in the meaning of the Code but which derogate from the Code's procedural standards, void of legal basis – and therefore illegal.

5.3.2.1 Council Decision 2010/252/EU

But an altogether different outlook on the undertaking of extraterritorial controls under the Schengen Borders Code is followed in the Council Decision for maritime Frontex operations, referred to in section 5.2.2.4 above. The Decision constitutes an attempt not only at harmonizing interception practices

164 See the references in Schengen Borders Code, Annex VI, para. 3.1.1.. Also see Article 14 Regulation (EC) No. 2007/2004

165 Annex VI, para. 2.1.2.

166 This also appears to be the view of European Parliament, see n. 176-177 *infra* and accompanying text.

in operations initiated by Frontex, but also at legally embedding those operations in the Schengen Borders Code. The Decision creates a legally binding set of norms for conducting border controls at sea and non-binding guidelines for search and rescue situations.[167]

The (binding) 'Rules for sea border operations coordinated by the Agency' set out in Part I of the Annex introduce a truly extraordinary range of migration enforcement measures to be employed at sea. Rather than setting the modalities for carrying out border checks or issuing refusals of entry in maritime areas, the rules allow for no less than seven types of interception measures taken in respect of migrant vessels, including the requesting of information and documentation on the identity, nationality and other relevant data on persons on board; the stopping, boarding and searching of the ship and persons on board; the seizure of the ship and apprehension of persons on board; ordering the ship to modify its course or escorting the vessel until it is heading on such course; and the conducting and handing over of the ship and persons on board to a third country or another Member State.[168] Although the rules do set out that such measures may only be taken in accordance with the prohibition of *refoulement* and with the competences of states under the law of the sea, extensively discussed in chapter 6 below, the rules do not refer to any of the individual safeguards mentioned under the relevant provisions on border checks and refusals of entry in the Schengen Borders Code.[169]

That the rules do not require compliance with the Schengen Borders Code's procedural standards on border checks and refusals of entry is the consequence of the choice of the Council – seconding that of the Commission's earlier proposal[170] – to hook up the draft on Article 12 (5) of the Borders Code, which allows for the adoption of implementing measures governing 'surveillance' in accordance with the comitology procedure. In legal terms, this choice can only be understood as following a presumption that the Schengen Borders Code would allow for two kinds of procedures for undertaking coercive measures in respect of persons wishing to enter the European Union. One is the procedure on border checks and refusals of entry, which may only be conducted in accordance with the strict procedural guarantees laid down in Borders Code, unless specific derogations are provided under Annex VI. And the second one is border surveillance, which is less precisely defined in the Code but apparently perceived by the Commission and the Council – as long as it is conducted in compliance with international law – as covering the complete spectrum of migration enforcement measures, encompassing not only the checking of identities and documents, but also the issuing of refusals of

167 These are set out in Parts I and II of the Annex, respectively.
168 Annex Part I, para. 2.4.
169 Annex Part I, para. 1.2.
170 COM(2009)658 final.

entry, the apprehension of persons and the return of persons to a third country – and where none of these measures need to be accompanied with individual safeguards or norms of good administration. As the proposal currently stands, one may even wonder how it would be possible for a EU citizen who is intercepted and refused further passage somewhere at sea in accordance with these draft rules, to vindicate his right to enter the European Union.

A further peculiarity of questionable legal nature concerns the legal basis for undertaking these coercive measures. The Decision lays down that the various 'surveillance' measures may be taken against ships 'with regard to which *there are reasonable grounds for suspecting* that they carry persons *intending to circumvent* the checks at border crossing points'.[171] Thus, rather than creating a legal basis for taking coercive measures in respect of migrants at sea by means of relocating the material entry conditions, the Decision foresees in the taking of sanctions on account of a *prospect* of *gaining illegal entry*. This is problematic for two reasons. Firstly, the rules are silent on the kind of activity which gives rise to such suspicion. This may give rise to evidentiary problems as it may be difficult to determine whether persons do indeed have the intention to queue up at an authorized border crossing point or not. In particular, persons seeking asylum may simply wish to step on shore and immediately report to the appropriate authorities in order to request asylum. But secondly and more fundamentally, the sanction of interception and return is imposed not on the basis of a failure to comply with entry conditions, but on an attempt to gain illegal entry. In ordinary migration law discourse, gaining illegal entry is certainly regarded as an offence, but not one which without more constitutes a ground for refusing entry or denying a right to stay. The proposal thus represents a fundamental shift away from the substantive norms on entry and residence under EU law, creating an almost unfettered basis for not allowing persons entry into the European Union.

Possibly, the absence of references to procedural guarantees in the Decision could be remedied by including such guarantees in the operational plans drawn up for each operation coordinated by Frontex.[172] In respect of questions of disembarkation of rescued or intercepted persons, the Decision already stipulates that the operational plan should spell out the 'modalities' of such disembarkation.[173] As is more extensively discussed in the following chapter, procedural norms protecting against possible human rights violations must however find a basis in a law which is accessible and foreseeable and which must afford sufficient protection against arbitrary interferences.[174] In view of their confidential character, Frontex operational plans cannot be deemed as complying with these requirements. It can also be noted that,

171 Annex Part I, para. 2.4.
172 Article 1 Council Decision 2010/252/EU.
173 Annex Part II, para. 2.1.
174 Chapters 6.4.2-6.4.3.

because the Decision has brought Frontex maritime operations within the framework of the Schengen Borders Code and therewith the ambit of EU law, the Member States participating in the operations, in giving effect to the rules on interdiction as laid down in the Decision, are bound by the EU fundamental rights regime, as embodied in general principles of EU law and the EU Charter on Fundamental Rights.[175] The substance of the relevant human rights in the context of maritime controls is discussed in the next chapter.

The European Parliament has opposed the adoption of the Decision, on account of the decision exceeding the implementing powers of the Schengen Borders Code and has brought an action for annulment of the Decision before the ECJ under Article 263 TFEU.[176] The key objection formulated by the Parliament is that the proposed measures exceed the scope of Article 12(5) SBC since they do not constitute additional measures governing 'surveillance', but modify the essential elements of the Borders Code which are reserved to the legislator.[177] One may take this argument further by noting that the proposed measures not only exceed a reasonable interpretation of the term 'surveillance', but that they also exceed the scope of the Borders Code as a whole. In particular, rules on the apprehension of migrants and their return to a third country are not laid down in the Borders Code but in the Returns Directive.[178] The Parliament nonetheless requests the Court to exercise its discretion to maintain the effects of the contested Decision until such time as it is replaced (Article 264(2) TFEU). But because the rules not merely supplement the rules on border checks and border surveillance, but appear to *derogate* from several provisions of the Borders Code it is questionable whether the Court would comply with that request.

The most pertinent conclusion which can be drawn from the above is that the Council Decision for maritime Frontex operations is premised on an inherently contradictory view on the possible extraterritorial application of the Schengen border crossings regime. On the one hand, it is accepted that the common rules on external border control do provide a legal basis for Member States to engage in all sorts of coercive conduct in respect of migrants outside the common EU territories. But they ignore the very same extraterritorial application of the individual safeguards laid down in the Code. This is an illustration of the essential tension between the EU's internal and external

175 Also see section 5.3.3 below.

176 Case C-355/10, *European Parliament v Council of the European Union*, action brought on 14 July 2010.

177 Also see European Parliament, Motion for a Resolution, 11 March 2010, B7-0227/2010, which refers to an opinion of the EP's Legal Service, in which it was considered that the proposed measures 'did not constitute 'additional measures governing surveillance' in general, but specific rules on reinforcing border checks and/or on refusal of entry at the external sea borders, the adoption of which was restricted to the legislature under Article 18 of the Schengen Borders Code'.

178 Directive 2008/115/EC.

migration agenda. It shows how the instrument of border control functions internally as a neutral policy enforcing the Union's rules on admission and residence, while it is employed externally as a tool allowing for the exertion of virtual complete and unchecked state power, which has the potential to displace the Union's substantive rules on legal migration and asylum.

5.3.3 The territorial scope of the asylum *acquis*

The Common European Asylum System was expressly conceived as a body of law applying only to asylum applications made within the territory of the EU Member States or at their border and not to claims lodged outside a Member State's territory. The former EC Treaty contained specific territorial restrictions to this effect.[179] These restrictions have been reiterated and further specified in the various EU asylum instruments adopted under the EC Treaty. The Dublin mechanism for establishing the Member State responsible for examining the application applies only to applications which have been lodged *in* one of the Member States, which includes claims lodged at the border.[180] The Reception Conditions Directive only applies to reception standards provided *within* a Member State and only to asylum-seekers who have lodged their request *at the border* or *in* the territory of a Member State.[181] The Asylum Procedures Directive has a similar restriction: it applies only to standards on procedures *in* Member States and only to those applications "made in the territory, including at the border or in the transit zones of the Member States".[182] The Asylum Procedures Directive further expressly excludes asylum applications from its scope which are submitted in diplomatic or consular representations of Member States.[183]

The one existing (first phase) asylum instrument not containing an explicit territorial restriction is the Qualification Directive, laying down the eligibility criteria and standard of protection to be granted to holders of a protection status. Neither do the corresponding provisions on qualification for international protection of the former EC Treaty embody a restriction of territorial character.[184] It is not entirely clear what should be inferred from this absence.

---

179 Article 63 (1)(a)(b) and (d) TEC.
180 Articles 1 and 3(1) Regulation EC 343/2003.
181 Articles 1 and 3 Directive 2003/9/EC.
182 Articles 1 and 3(1) Directive 2005/85/EC. The addition of 'transit zones' is in conformity with *Amuur* judgment, where the ECtHR stated that the European Convention on Human Rights and Fundamental Freedoms (ECHR) fully applies in transit zones and that the latter should be considered as an integral part of a state's territory: ECtHR 10 June 1996, *Amuur* v. *France*, Application No. 19776/92.
183 Ibid, Article 3(2).
184 Article 63(1)(b) and (2)(a) EC Treaty and Article 1 (on 'subject matter and scope') of Directive 2004/83/EC.

The original Commission proposal for the Qualification Directive did contain a provision on territorial scope similar to the one inserted in the Dublin regulation and the Reception Conditions directive, but this provision was deleted because a number of Member States wanted the scope of the directive to be consistent with that of the Procedures directive and considered the issue of territorial scope a matter to be decided by the latter directive.[185] This would imply that we should not assume that the Qualification Directive has a territorial scope different from the other directives. It has further been argued that it is (i) hardly likely that the EU legislator intended to oblige Member States to grant refugee status to persons who apply for asylum outside their territorial boundaries and that (ii) the absence of a territorial restriction on the scope of the Qualification Directive would be at odds with the consistency advanced by the Common European Asylum System.[186] A further contextual argument against extraterritorial application of the Qualification Directive is that several provisions of the Directive describing the content of international protection presume that protection is enjoyed inside the territories of the Member States.[187]

And even though these arguments not necessarily oppose a strict literal reading – in line with the observation that EU law in general may well govern extraterritorial member State activity[188] – under which the Qualification Directive would oblige EU Member States deciding to examine a claim for protection in an extraterritorial setting to respect the eligibility standards laid down in the Qualification Directive, the Directive does not on its own solve the question of how to proceed with asylum claims made in foreign territories. It contains no free-standing right to make an asylum application, does not generate an obligation to examine a claim, nor does it lay down the procedural safeguards to be respected in the examination. Thus, even a broad interpretation as to its territorial scope would leave the Directive of only modest practical value for the various ways in which European States attempt to regulate the movement of asylum-seekers outside their borders.[189]

In the absence of specific EU asylum instruments regulating the legal status of refugees in the broader phenomenon of external migration control, the question of rights to be accorded to refugees who come within the ambit of the EU's external dimension will primarily depend on the scope and meaning of the primordial right to asylum as a principle of EU law and as enshrined

185 COM(2001) 510 final, Article 3; for the Council discussions, see Council doc. 7882/02, 24 April 2002, p. 5. Also see Battjes (2006), p. 217 at n. 71.

186 H. Battjes, *European Asylum Law and International Law*, Leiden/Boston: Martinus Nijhoff (2006), p. 209-210.

187 See Articles 28 (social welfare),31 (accommodation) and 32 (freedom of movement).

188 See section 5.3.1.

189 Also see K. Wouters and M. den Heijer, 'The Marine I Case: a Comment', 22 *IJRL* (2010), p. 17-18.

in Articles 18 and 19 of the EU Charter on Fundamental Rights.[190] Because the content and scope of this right to asylum must correspond to the Refugee Convention and the rights guaranteed by amongst others the European Convention on Human Rights,[191] this right may well have a territorial scope broader than that contained in the secondary instruments EU instruments.[192] Further, the explicit reference in Article 18 of the EU Charter to the 'right to asylum' allows for an interpretation focusing not only on the prohibition of *refoulement* (which is separately codified in Article 19 of the Charter), but also on the rights associated with gaining access to protection mechanisms and the content of protection.

It follows from the right to asylum as a principle of EU law that both in the interpretation and the implementation of EU law this must be respected, also in situations where EU law expressly permits or obliges States to take action in respect of migrants and asylum-seekers away from the Schengen external border.[193] As indicated above, general references to fundamental rights, the Refugee Convention or the prohibition of *refoulement* have also been incorporated in the EU's carrier sanctions regime, the Frontex' mandate and the Schengen Borders Code. These references, together with the general doctrine of implementing EU law in accordance with fundamental rights,[194] may thus set potent limits to Member State activity falling within the scope of the relevant EU instruments. But the key challenge which EU law has yet to take up, is to translate these general principles into a useful framework of rights, procedures and practical guidelines.

In the proposals for the second phase asylum instruments, no change of the territorial scope of the various instruments is foreseen, although the proposal for recasting the procedures directive does specify that the directive must also apply to asylum applications made in the territorial waters of the Member States.[195] A complication for urging the European Union to specify in more detail the procedural standards and rights of asylum-seekers to be respected when Member States engage in forms of pre-border control is that the pertinent provisions on asylum in Article 63 EC Treaty contained a strict territorial outlook as noted above. In the new Article 78 of the Treaty on the Functioning of the European Union, laying down the Union's competence to develop a common policy on asylum, the previous references in Article 63 EC Treaty to asylum applications, procedures and reception conditions 'in Member States' have been omitted. It has also added a new paragraph which calls for engaging in 'partnership and cooperation with third countries for the purpose of

190 OJ 2007 C303/01..
191 Articles 52 (3) and 53 Charter.
192 As discussed in chapters 2 and 4.
193 Article 51(1) Charter.
194 ECJ 27 June 2006, *Parliament v Council*, C-540/03, paras. 104-105; ECJ 13 July 1989, *Wachauf*, 5/88, para. 19.
195 COM(2009) 554 final, Article 3(1).

managing inflows of people applying for asylum or subsidiary or temporary protection'.[196] Read together, these provisions do not oppose the adoption of a more comprehensive Union framework where instruments on border control and other facets of the external migration and asylum agenda are supplemented with safeguards on the protection of refugees and persons seeking asylum. Article 78 TFEU would thus provide a suitable legal basis for the conclusion of future legislative instruments or agreements with third countries on *inter alia* safeguards of asylum-seekers subjected to pre-border controls, the installment of alternative protection mechanisms for refugees in third countries or the development of mechanisms for the managed entry of persons in need of international protection. The European Asylum Support Office, created on the basis of Articles 74 and 78 TFEU, has expressly been endowed the competence to be involved in the external dimension of the EU asylum policy, amongst others by coordinating issues arising from the implementation of relevant instruments and facilitating operational cooperation between Member States and third countries.[197]

5.4 Final remarks

As they stand, the EU instruments adopted under the external migration and asylum policy do not directly require Member States to interfere with refugee rights. But neither do they take the special position of refugees and other protection seekers meaningfully into account. Pre-border migration enforcement measures in the form of carrier sanctions and a variety of pre-clearances have become an object of EU law, but their reconciliation with refugee concerns is primarily a matter of Member State implementation. It is no surprise therefore, that in making use of carrier sanctions schemes, immigration officers or controls at the high seas, Member States employ highly divergent mechanisms for dealing with persons claiming asylum.

A key challenge for the future external migration policy of the Union, and in particular its strategy of 'integrated border management', is how it will seek to distinguish refugees from other irregular travelers. At the extreme ends, the Union faces the choice of either simply equating the two categories of migrants, in line with the approaches of several Member States, or to export the 'internal' safeguards in respect of asylum claimants also to those who are intercepted far away from Union territory.

It is suggested however that the policy freedom of the European Union in devising external forms of border control is limited. Firstly, several issues will presumably be a matter of the crystallization of law rather than of unrestrained policy-making. The proposition cannot ultimately be maintained

196 Article 78(2)(g) TFEU.
197 Articles 2(1), 7 and 49(2) Regulation (EU) No. 439/2010.

that EU law would allow for the creation of two altogether different regimes on border controls, where one would have the potential of defeating the core guarantees, and therewith the object and purpose, of the other. This means that, in the context of extraterritorial control measures which in fact amount to border checks or refusals of entry as defined in the Schengen Borders Code, including interceptions at sea but possibly also activity undertaken by ILOs in third countries, such measures will, sooner rather than later, have to appropriately correspond with or embedded in the prevailing framework of EU law and in particular the Borders Code. In view of the special protection accorded to persons requesting asylum under the Borders Code, this would also present a possible solution to the problem that refugees without a valid visa may currently be refused further passage in the context of controls other than those carried out at the external Schengen Border. Because i) the Schengen Borders Code aims to set forth a common corpus for the controls of persons who wish to enter the Schengen states, because ii) there is no rule of general character stipulating that EU law cannot govern extraterritorial activity of Member States, and because iii) the Code already recognises the possibility of conducting controls at sea and in third states, there is a strong argument for employing the Code as a standard for all controls on persons wishing to cross the external border, also if conducted away from that border. It follows that, should Member States wish to maintain or establish special procedures for conducting border checks or refusals of entry which derogate from the ordinary procedures, specific rules must be incorporated into the Borders Code in accordance with Article 18 of the Code, instead of through adopting additional rules with regard to 'surveillance' as has been done with Council Decision 2010/252/EU.

Secondly, implementing measures taken under EU law must comply with fundamental rights. This not only follows from the Member States' international obligations, but also from the duty incumbent under EU law to implement EU rules in a manner consistent with requirements flowing from fundamental rights.[198] The obligations set by international law on the protection of refugees in extraterritorial settings as explored in the first part of this book thus set limits to the discretion of states in their dealings with refugees. Hence, the key question is not whether refugee interests are of concern, but rather *how* they must be responded to. The discussions on the drafting of Council Decision 2010/252/EU evidence the difficulties Member States encounter in agreeing upon common standards and practical arrangements for guaranteeing human rights in the course of pre-border controls. This is due not only to the reluctance to accept that human rights law does set limits to the state's discretion to conduct controls, but also due to the absence in international law of a clear duty to allow persons claiming international protection access to

198 C-540/03, para. 105.

the territory and/or asylum procedure of the state. Because neither international law nor European Union law oblige Member States to allow persons requesting asylum with their agents in foreign territories entry into their territory, there is, at least in theory, room for devising alternative arrangements. The challenge for EU law, should it wish to bring more coherence in the Member States' approaches, is not only to identify and reiterate the relevant human rights which set limits to external border controls, but also to translate these norms into practical guidelines and rules addressing the questions how refugee screening should occur, whether asylum claimants should be allowed access to an asylum procedure and which authority should be responsible for the reception and the processing of claims. The search for solutions in this respect will touch upon the fundamental dilemma of how to reconcile refugee concerns with control concerns. In the following two chapters, the merits and feasibility of several 'protection-sensitive' arrangements for conducting external border controls are further explored.

6 Interdiction at sea

6.1 INTRODUCTION

The phenomenon of refugees and undocumented migrants travelling by sea gives rise to a number of distinct issues under international law. It raises the question of the allocation of responsibilities for the protection of refugees; it questions the duties of states to preserve life at sea; and it questions the international competence of states to control the sea as an instrument of immigration policy. These are topics which challenge the interpretation and application of the right of asylum and other human rights, but also the rights and freedoms under the Law of the Sea.

Not all these issues are new. Some of them came to the fore in the context of the Vietnamese exodus of 'boat people' in the 1970s, when thousands of refugees fled the coasts of Vietnam in small fishing boats, hoping to be rescued by freighters on busy shipping lanes on the high seas.[1] They came to the fore also in the context of the United States' Caribbean Interdiction Programme, which was initiated as early as 1981, when President Reagan concluded an agreement with the Haitian government allowing the US Coast Guard to board Haitian vessels on the high seas and redirect them to Haiti.[2] In more recent years, the obligations of states towards refugees found at sea attracted renewed interest in the aftermath of the international incident around the *MV Tampa*, which concerned the taking of control by Australian security forces of a container vessel which had rescued 438 asylum-seekers and which was subsequently prevented from entering Australian ports and eventually diverted to Port Moresby, the capital of Papua New Guinea.[3] The Tampa incident and

---

1 The questions of rescue and admission of refugees found at sea have been addressed by UNHCR's Executive Committee on several occasions: EXCOM Conclusion No. 2 (XXVII), 1976, paras. (f)-(h), EXCOM Conclusion No. 14 (XXX), 1979, paras. (c)-(d), EXCOM Conclusion No. 15 (XXX), 1979, para. (c), EXCOM Conclusion No. 20 (XXXI), 1980, paras. (a)-(g), EXCOM Conclusion No. 23 (XXXII), 1981, paras. (1)-(5). For an account of the Vietnamese boat people and international law see J.Z. Pugush, 'The Dilemma of the Sea Refugee: Rescue Without Refuge', 18 *Harvard International Law Journal* (1977), p. 577-604.

2 For a historical and legal analysis: S. Legomsky, 'The USA and the Caribbean Interdiction Program', 18 *IJRL* (2006), p. 679-683.

3 For a historical and legal analysis: P. Mathew, 'Australian Refugee Protection in the Wake of the Tampa', 96 *AJIL* (2002), p. 661-676; E. Willheim, 'MV Tampa: The Australian Response', 15 *IJRL* (2003), p. 159-190; C.M.J. Bostock, 'The International Legal Obligations owed to the Asylum-seekers on the MV Tampa', 14 *IJRL* (2002), p. 279-301.

the subsequent installment of Australia's Pacific Solution served as a catalyst for debate and action of both UNHCR and the International Maritime Organization (IMO), in particular on the issues of treatment and disembarkation of asylum-seekers rescued at sea.[4]

This chapter discusses migrant interdiction practices at sea employed by EU Member States. It focuses not on the general question how EU Member States, the European Union, or the international community at large should cope with refugees at sea, but deals specifically with those instances where EU Member States on their own motion or in accordance with international arrangements engage in interdiction strategies at sea. The chapter seeks to delineate firstly, the international competences of states to interdict boat migrants and, secondly, the circumstances under which EU Member States can be held responsible under international law for the manner in which these interdictions affect the rights of persons seeking asylum.

Various terms are used in describing enforcement actions relating to migrants at sea. In policy documents, Frontex and the European Commission employ the terms 'interception' and 'diversion', without specifying the nature of the distinction.[5] International maritime law usually distinguishes between on the one hand, measures amounting to the boarding and searching of a ship (or visit) and, on the other hand, the taking of coercive measures which may include the arrest of the persons on board and the seizure of the ship (including the placing of the vessel under (forcible) escort).[6] This chapter will use the more general term 'interdiction' to describe all forms through which states make contact with migrant vessels in the course of sea border controls and will specifically refer to appropriate maritime law terminology where relevant.[7]

---

4 See extensively section 6.3.2.2. below. Australia's Pacific Solution, entailing the transfer of all unauthorised boat arrivals to processing centers in the Pacific region, is extensively discussed in chapter 7.

5 European Commission, Commission Staff Working Paper, Report from the Commission on the Evaluation and Future Development of the Frontex Agency, Statistical Data, 13 February 2008, SEC(2008) 150/2; Frontex News Release 17 February 2009, 'HERA 2008 and NAUTILUS 2008 Statistics'. In the latter document, it is mentioned that 'migrants diverted back' are '[p]ersons […] who have either been convinced to turn back to safety or have been escorted back to the closest shore.'

6 According to Guilfoyle, international maritime law generally distinguishes between 'boarding' or 'search' on the one hand, and 'seizure' on the other hand. D. Guilfoyle, *Shipping Interdiction and the Law of the Sea*, Cambridge University Press (2009), p. 4, 9. See in particular Articles 105, 109(4) and 110(2) United Nations Convention on the Law of the Sea (UNCLOS), 10 December 1982, 1833 *UNTS* 396.

7 UNHCR commonly employs the term 'interception', which it has defined as measures employed by States to: '(i.) prevent embarkation of persons on an international journey; (ii.) prevent further onward international travel by persons who have commenced their journey; or (iii.) assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law', EXCOM Conclusion No. 97 (LIV), 2003.

Section 2 of this chapter provides the necessary background by describing the European interdiction programme, which is comprised primarily of Member States' driven efforts to assert control over undocumented migrants traveling towards Europe by sea. Section 3 discusses relevant provisions of the Law of the Sea. These relate, firstly, to entitlements of migrants under the principle of free navigation and, secondly, to specific duties incurred by states in respect of migrants who are in distress at sea. Section 4 appreciates migrant interdictions at sea in terms of human rights. It discusses specific duties towards refugees (non-*refoulement*, disembarkation, status determination), but also duties with a wider personal scope, in particular the right to leave and the right to liberty. The chapter will argue that although the Law of the Sea leaves ample room for states to cooperate for purposes of migrant interdiction, requirements of human rights law, in particular those of a procedural nature, substantially restrict the discretion of EU Member States to subject undocumented migrants to various types of coercive measures at sea. It will conclude that the key challenge facing EU Member States employing interdictions at sea is to develop a meaningful human rights strategy which supplements and restrains the policy of sea interdiction. The development of such a framework is however controversial, as it may well imply that particular interdiction practices need to be fundamentally reconsidered.

6.2 THE EUROPEAN INTERDICTION PROGRAMME

The phenomenon of boat migration to Europe and the policy responses of Southern European governments have been extensively covered in other studies and need not be recounted in full here.[8] The picture which emerges from those studies is that the daily images of overcrowded boats with migrants from Morocco and other African countries arriving at European shores brought about a notable change in the perception of irregular migrants arriving at Europe's southern border. While governmental policies as well as local communities in the beginning of the 1990s were still focused on providing humane responses based on notions of solidarity and compassion, the increase of the

8 J. Simon, 'Irregular Transit Migration in the Mediterranean – some facts, figures and insights', in: N. Nyberg Sorensen (ed), 'Mediterranean Transit Migration' (Report), Danish Institute for International Studies (2004); S. Alscher, 'Knocking at the Doors of "Fortress Europe": Migration and Border Control in Southern Spain and Eastern Poland', The Center for Comparative Immigration Studies Working Paper No. 126, San Diego (November 2005); M. Albahari, 'Death and the Moral State: Making Borders and Sovereignty at the Southern Edges of Europe', The Center for Comparative Immigration Studies Working Paper No. 136, San Diego (June 2006); P. Cuttitta, 'The changes in the fight against illegal immigration in the Euro-Mediterranean area and in Euro-Mediterranean relations', CHALLENGE working paper (22 January 2007); H. de Haas, 'Irregular Migration from West Africa to the Maghreb and the European Union: An Overview of Recent Trends', IOM Migration Research Series, IOM Geneva (2008).

number of illegal entries and often negative media coverage lead to a corresponding decrease in the willingness of states and communities to provide shelter to large amounts of them. Several authors have described the change in attitude of Southern European societies towards boat migrants as a process in which 'a spirit of humanitarian reception and solidarity' gradually gave way to a fear of an 'invasion of the poor'.[9] This process was accompanied by acute governmental efforts to seal off the maritime border.

It is difficult to draw an exhaustive picture of what this sealing off exactly amounts to. There is not one model employed by EU Member States for the surveillance and control of the sea border. The deployed strategies have varied in time, from one Member State to the other and they may further differ according to the third country from where the migrants have embarked on their journey (and with which agreements may or may not have been concluded). For the purposes of this study it suffices to focus on those interdiction measures which may preclude asylum-seekers from gaining access to a EU Member State. In this connection, it is possible to identify three general models of migrant interdiction which are of particular interest.

The first are joint operations in territorial waters of a third country. Especially Spain and Italy have been active in concluding agreements with several North-African countries which allow them to participate in border patrols in the territorial seas of those third countries. Since 2003, Morocco and Spain have collaborated in joint naval patrols and Spain later concluded similar agreements with Mauritania (2006), Senegal (2006), Cape Verde (2007) and with Gambia, Guinea and Guinea Bissau (2008).[10] In 1997, Italy signed an exchange of letters with the Albanian government, followed up by a Protocol, allowing the Italian navy to enter the territorial waters of Albania and to interdict vessels carrying undocumented migrants.[11] In the years 2000-2007, Italy entered into several agreements with Libya for cooperation on irregular migration, including a protocol of 29 December 2007, which foresees in joint Italian and Libyan patrols in the territorial waters of Libya, together with the transfer of Italian coast guard gutters to Libya to be manned by mixed Italian and Libyan crews.[12] What makes it difficult to comprehensively describe the modus operandi of these joint controls with third country authorities is that

9 Alscher (2005), p. 14; Albahari (2006), p. 3-5, 8-12.

10 P. García Andrade, 'Extraterritorial Strategies to Tackle Irregular Immigration by Sea: A Spanish Perspective', in: B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control. Legal Challenges*, Leiden/Boston: Martinus Nijhoff (2010), p. 319.

11 ECtHR 11 January 2001, *Xhavara a.o. v Italy and Albania*, no. 39473/98 (under 'B. Relevant domestic law'); A. di Pascale, 'Migration Control at Sea: The Italian Case', in: Ryan and Mitsilegas (2010), p. 293-296.

12 Di Pascale (2010), p. 297-300; J.J. Rijpma, *Building Borders: The Regulatory Framework for the Management of the External Borders of the European Union*, dissertation Florence (2009), p. 342. The contents of the protocol have not been published. A formal launch ceremony for the joint Italian-Libyan patrols was held in the southern Italian harbour of Gaeta at May 14, 2009.

virtually all the agreements on the joint conducting of border patrols are outside the public domain.[13] One of the few disclosed agreements providing specific details of how the operations are carried out is the 2008 Agreement between Spain and Cape Verde on joint monitoring of maritime areas under the sovereignty and jurisdiction of Cape Verde.[14] This treaty foresees in the conducting of joint patrols along the 'shiprider model', where Cape Verdean personnel is placed on board Spanish vessels, with the former being exclusively competent in deciding upon the visit and arrest of vessels and those on board.[15] It does appear that this shiprider model is commonly followed in joint operations of border control in the territorial sea of third countries. As noted above, the Italian-Libyan Protocol foresaw in the delivery of Italian coast guard gutters to be manned by mixed Italian and Libyan crews. The Frontex operational plan for the Hera III operation, which implements bilateral agreements between Spain and Mauritania and Senegal, also mentions the compulsory placement of Senegalese and Mauritanian agents on board vessels of EU Member States, who are exclusively competent in sanctioning visits and arrests.[16]

The second group of interdiction practices can be classified as the interdiction and summarily return of migrants to a third country, which have also been called 'push-backs'. These interdictions are normally undertaken at the high seas and also presuppose that a third state is willing to accept the return of the migrants. The most prominent example of these push-backs are the interdictions accompanied with immediate forcible return carried out by Italian vessels in respect of migrants having embarked in Libya or Algeria, in accord-

13 See, for an overview of the agreements concluded between Spain and African countries allowing for joint border controls, Rijpma (2009), p. 341. Also see Guilfoyle (2009), p. 216-220.

14 Agreement between the Kingdom of Spain and the Republic of Cape Verde on Monitoring Joint Maritime Areas Under the Sovereignty and Jurisdiction of Cape Verde (Acuerdo entre el Reino de España y la República de Cabo Verde sobre vigilancia conjunta de los espacios marítimos bajo soberanía y jurisdicción de Cabo Verde, done at Praia, 21 February 2008.

15 Ibid, Articles 3 (1)(b) and 6. On shiprider agreements, see eg Guilfoyle (2009), p. 72-73.

16 According to the operational plan for the Hera III mission, the task of Member States would consist *inter alia* of carrying out 'an optimal maritime and aerial surveillance of the waters close to Mauritania and Senegal, with the authorization of the Mauritanian and Senegalese authorities, carrying onboard the E.U. vessels personnel from these countries that are the responsible of the operations and are the people that must send back the immigrants to the national authorities in the coast', Frontex, Operational plan Hera III, (partly public accessible, on file with the author), para. 19.1. Also see Frontex press release 9 September 2008, 'HERA 2008 and NAUTILUS 2008 Statistics', in which it is explained that 'Spain concluded agreements with Mauritania and Senegal which allow diverting of would-be immigrants' boats back to their points of departure from a certain distance of the African coast line described in the agreements that Spain has between Mauritania and Senegal. A Mauritanian or Senegalese law enforcement officer is always present on board of deployed Member States' assets and is always responsible for the diversion.'

ance with agreements concluded with these two countries.[17] According to the Italian authorities, from 6 May 2009, when the operations were first implemented, to 31 July 2009, it had returned 602 migrants to Libya and 23 to Algeria.[18] Since that period, the push-back operations have continued.[19] This has resulted in a substantial fall of the number of migrants embarking by boat from Libya.[20] Despite submissions of UNHCR that it had found that many of the interdicted persons were seeking international protection, the Italian authorities officially acknowledged that they did not proceed with a formal identification of the pushed back migrants and that there is no procedure in place for entertaining asylum applications.[21] Apart from such formalized return policies, EU Member States have been reported to engage in diversions of informal nature, with the goal of either preventing migrants entry into their territorial waters or to drive them back to the high seas.[22] In the absence of return agreements with a third country, these diversions are primarily aimed at preventing irregular entries.

17 For an extensive appraisal of these push backs and their legal basis see: CPT, Report to the Italian Government on the visit to Italy from 27 to 31 July 2009, 28 April 2010, CPT/Inf (2010) 14. Also see UNHCR Press Release 7 May 2009, 'UNHCR deeply concerned over returns from Italy to Libya'; UNHCR Press Release 14 July 2009, 'UNHCR interviews migrants pushed back to Libya'; Human Rights Watch Press Release 7 May 2009, 'Italy/ Libya: Forced Return of Migrants Violates Rights'; Human Rights Watch, 'Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum-seekers, Libya's Mistreatment of Migrants and Asylum-seekers' (report), September 2009.

18 CPT Report on Italy (2010), para. 13. The figure reported by UNHCR to the CPT was over 900.

19 Ibid.

20 Ibid. According to media reports, in Malta, while during 2008 a total of 84 boats with 2,775 illegal immigrants arrived from Libya, this number dropped to 17 boats with a total of 1,475 illegal immigrants in 2009. The majority of the arrivals in 2009 moreover reached Malta in the months before the push-backs were started; *Times of Malta*, 'Frontex patrols stopped as Malta quits. Italy, Libya patrols proving to be very effective', 28 April 2010.

21 CPT report on Italy (2010), paras. 13-14. The Italian government submitted that no migrant encountered in the operations expressed an intention to apply for asylum and that there was accordingly no need for their identification.

22 These informal diversions may take a variety of forms. It was reported for example that in August 2009 a patrol boat, allegedly belonging to Malta, had provided the passengers of a ship which had been adrift for twenty days with fuel and directions for the Italian island of Lampedusa; Migration Policy Group, *Migration News Sheet*, Brussels, Sept. 2009, p. 12. Diversions have also been reported to include lamentable practices such as the puncture of rubber dinghies of migrants or the dissuasion of migrants from further passage by intimidating encircling maneuvers or the deliberate creation of waves. See eg Foundation Pro Asyl and Group of Lawyers for the Rights of Refugees and Migrants, 'The truth may be bitter but it must be told. The Situation of Refugees in the Aegean and the Practices of the Greek Coast Guard' (Report) (October 2007); mentioning practices such as encircling manoeuvres, the puncture of dinghies, and the robbing and beating of migrants. Spanish border guards were also allegedly involved in cutting holes in inflatable dinghies; Migration Policy Group Brussels, *Migration News Sheet*, Brussels, April 2008, p. 8.

A third model of migrant interdictions relevant for this study are rescue operations followed by disembarkations in a third country. Rescue operations of migrants who are in distress at sea are by their nature conducted on an ad hoc basis. This has on multiple occasions resulted in rather protracted situations whereby EU Member States and/or third countries entered into toilsome negotiations as to the appropriate place of disembarkation of the rescuees. Although it is possible to infer from past experiences that irregular migrants rescued by Member State coast guards are usually allowed to disembark in one or another Member State,[23] it has also occurred that third countries were persuaded in taking in the migrants. One prominent example is the *Marine I* case, concerning the 369 passengers of African and Asian origin of a boat which had gone adrift in international waters and which was towed by a Spanish rescue tug to the territorial waters of Mauritania. After a standoff which lasted a week, the Mauritanian government eventually allowed the Spanish Guardia Civil to offload the passengers in one of its ports, after Spain had guaranteed that it would arrange for their repatriation.[24] The Council Decision for maritime Frontex operations stipulates, as a general rule of thumb, that in respect of rescue operations taking place in the context of border controls coordinated by Frontex, priority should be given to disembarkation in the third country from where the ship carrying the persons departed or through which territorial waters or search and rescue region the ship transited.[25]

A final distinction of legal relevance in discussing European practices of sea interdiction is between interdictions with and without involvement of the EU external borders agency Frontex. This distinction is primarily relevant for issues of attributing conduct. Here, the question may rise to whom a migrant should direct a claim if he feels his human rights are unjustifiably interfered with on account of the conduct of an officer who receives his salary from and wears the uniform of one Members State, but who also wears a blue armband with the insignia of the European Union and who receives his instructions from yet another Member State.[26]

6.3 Migrant interdiction and the Law of the Sea

In chapter 4 of this book, it was addressed at length how international law puts limits to the freedom of states to engage in extraterritorial conduct. As a general rule, and failing the existence of a permissive rule to the contrary, a state may not enforce its authority outside its own territories. This means

23 See also the examples mentioned in section 6.3.2. of this chapter.
24 M. den Heijer and K. Wouters, 'The Marine I Case: a Comment', 22 *IJRL* (2010), p. 1-19.
25 Council Decision 2010/252/EU, Annex, Part II, para. 2.1. See further section 6.3.2.2.
26 Article 10 (3)(4) Regulation 2007/2004.

that the freedom of states to enforce their migration policies, but also to secure human rights, within another country may face the obstacle of the other state asserting its territorial sovereignty. Interdictions at sea do not take place within the exclusive territorial sovereignty of one state or another but are governed, instead, by the specific regime of the Law of the Sea, which distributes international legal titles and obligations within the different maritime zones. Most relevant for the topic of this chapter are those norms of the Law of the Sea pertaining to the Member States' control powers in the different sea areas and duties of search and rescue of migrants who are in distress.

The EU Justice and Home Affairs Council also identified these two topics as warranting special scrutiny in the course of border controls at sea.[27] Addressing these issues, the European Commission presented a Study on the international law instruments in relation to illegal immigration by sea in May 2007, in which it sought to identify possible obstacles sprouting from the Law of the Sea for the effective exercise of maritime controls and surveillance.[28] This study prompted the further installment of an informal working group consisting of representatives of Member States, Frontex, IMO and UNHCR to draft specific guidelines for Frontex operations at sea which should *inter alia* set out the competences of states in taking measures in the course of sea border control operations by paying due respect to norms of international maritime law and human rights law. After it transpired that the working group could not agree on issues such as human rights implications and the identification of the places of disembarkation, the European Commission proposed a draft implementing decision under Article 12 (5) Schengen Borders Code based on the provisional outcomes of the working group.[29] Due to several Member States opposing a binding regime for rescue operations and the disembarkation of migrants, the Council subsequently divided the proposal in a set of binding rules for the conducting of interceptions in the course of sea border controls coordinated by Frontex and non-binding guidelines for search and rescue situations and disembarkation.[30] The relationship of this Decision with the Schengen Borders Code was discussed in chapter 5.

Section 6.3.1 examines the interdiction powers of states in the different maritime areas and questions the extent to which migrants and refugees may

27 JHA Council Conclusions 2 December 2004, 'Conclusions evaluating the progress made with regard to the implementation of the Programme of measures to combat illegal immigration across the maritime borders of the Member States of the European Union', 15087/04 FRONT 201 COMIX 709, p. 7. Also see Presidency Conclusions 15/16 December 2005, Annex I, 'Global Approach to Migration: Priority Actions Focusing on Africa and the Mediterranean', 15744/05 ASIM 66 RELEX 761, p. 4.

28 European Commission, Study on the international law instruments in relation to illegal immigration by sea, Brussels, 15 May 2007, SEC(2007) 691.

29 COM(2009) 658 final.

30 Council Decision 2010/252/EU

rely on the principle of free navigation. Section 6.3.2 discusses the contents of international maritime obligations of search and rescue. Where relevant, references are made to the Commission study on the international law instruments in relation to illegal immigration by sea and Council Decision 2010/252/EU.

6.3.1 The right to interdict

6.3.1.1 The territorial sea

In respect of the powers of the state to regulate conduct within the territorial sea, the doctrine has come to prevail that 'the rights of the coastal state over the territorial sea do not differ in nature from the rights of sovereignty which the state exercises over other parts of its territory.'[31] This is now confirmed in Article 2 UNCLOS and Article 2 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.

That the state's sovereignty extends to its territorial sea does not mean that its municipal laws automatically apply to the territorial sea.[32] The question whether, for example, an immigration statute applies to persons having crossed the borders of the territorial sea but who have not yet set foot on land, must be answered on the basis of relevant domestic law provisions.[33] The United States, in this connection, has installed a 'wet-foot/dry-foot policy', under which those Cuban migrants 'touching' the US soil, bridges, piers or rocks become subject to US immigration processes. If their feet are 'wet', on the other hand, they are generally returned to Cuba, unless they establish a credible fear of prosecution, in which case they are taken to the naval base at Guantanamo Bay for further status determination and possible removal to third country.[34] Australia entertains a distinction between 'offshore entry persons' and 'onshore' arrivals, to the effect that all aliens who have first entered Australia at an 'excised offshore place' without lawful authority – which includes all persons arriving by boat without the valid visa – are detained and transferred to Australia's Christmas Island, where their reasons for being

31 Report of the International Law Commission covering the work of its eighth session, *YBILC* 1956, II, p. 265.

32 R.R. Churchill and A.V. Lowe, *The Law of the Sea*, Juris Publishing, Manchester University Press (1999), p. 75.

33 Goodwin-Gill and McAdam observe that States generally apply their immigration laws not within territorial waters, but within internal waters, G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, Oxford University Press (2007), p. 273-274. But see notes 37-40 *infra* and accompanying text.

34 See, extensively and for further references, Legomsky (2006), p. 684.

in Australia are identified.[35] The offshore entrants remain subject to Australian jurisdiction and the provisions of Australia's Migration Act, except for the purposes of applying for a visa, including protection visa for refugees. This means that persons claiming asylum are subject to a non-statutory refugee status assessment, where claims are assessed directly against the criteria set out in the Refugee Convention, but without a legal entitlement of entry into Australia if a person is found to be a refugee.[36]

Contrary to these two countries, European states have not 'excised' their territorial sea (or their overseas territories) from their domestic migration statutes.[37] Current European practices indicate that, even though diversions from the territorial sea reportedly occur, ships found in the territorial waters of a Member State are generally considered to be subject to the relevant asylum and immigration safeguards under either domestic, European or international law and that, rather than being pushed back to the open sea or transferred to some other place, these ships are escorted to a port and the passengers processed according to the ordinary procedures.[38] In order to accommodate the situation of asylum-seekers arriving at sea borders, the proposal for recasting the Asylum Procedures Directive foresees in a clarification of the territorial scope by specifying that the notion of 'territory' includes the territorial waters of the Member States.[39] This amendment would ensure that in the treatment of persons applying for asylum in their territorial sea, Member States must uphold the standards of the Asylum Procedures Directive.[40]

The main impediment for states to enforce their laws within the territorial sea is the right of innocent passage guaranteed under Articles 17-26 UNCLOS and Articles 14-20 of the Convention on the Territorial Sea and the Contiguous Zone. The right of innocent passage embodies both the right of freely traversing through the coastal state's territorial seas and the right to proceed to and

35 Australian Government, Department of Immigration and Citizenship (DIAC), Fact sheets 60, 61, 75, 81; Australian Migration Act 1958, Sections 5, 6, 46A. The Australian programme for the offshore processing of asylum-seekers is extensively discussed in chapter 7.

36 According to the Australian government however, 'It will generally be the case that where such unauthorised arrivals are assessed as engaging Australia's protection obligations under the non-statutory refugee status assessment process, the Minister will lift the bar on making a valid visa application and they will be allowed to validly apply for a visa under the Act.', DIAC Fact sheet 81.

37 See, in respect of Italy, CPT Report on Italy (2010), para. 11.

38 In the context of the Italian push-backs, Italian media quoted Berlusconi as saying: 'Our idea is to take in only those citizens who are in a position to request political asylum and who we have to take in as stipulated by international agreements and treaties,' while referring to 'those who put their feet down on our soil, in the sense also of entering into our territorial waters'; Human Rights Watch News Release 12 May 2009, 'Italy: Berlusconi Misstates Refugee Obligations'.

39 COM(2009) 554/4, Article 3 (1). This is in line with the Commission study on illegal migration and the law of the sea, which stipulated that the Community asylum instruments also extend to the territorial sea of the Member States, SEC(2007) 691, Annex, para. 4.2.2.10.

40 See, on the territorial scope of EU asylum law, chapter 5.3.3.

from a coastal state's internal waters or ports.[41] Passage is only innocent if it is not prejudicial to the 'peace, good order or security' of the coastal state.[42] Under UNCLOS, it is specified that the unloading of persons contrary to immigration regulations renders passage non-innocent.[43] Ships that have forfeited the right of innocent passage remain subject to the full jurisdiction of the coastal state and may be arrested for violation of local laws or in some other manner prevented from passage through the territorial sea.[44] States may, moreover, adopt laws in respect of innocent passage aimed at preventing infringements of its immigration laws, for example the setting of conditions of access to its ports.[45] Because UNCLOS excludes ships violating immigration laws from the rights of innocent passage, it is commonly considered that the law of the sea permits states to prevent irregular immigrants traveling on a ship from setting foot on land and to require the ship to leave the territorial waters.[46] This may, as noted above, however come in conflict with immigration guarantees under domestic or international law.

According to UNCLOS, the unloading of passengers only renders passage non-innocent if this unloading is contrary to the immigration laws of the 'coastal State'.[47] This begs the question whether migrant vessels which are merely traversing through the territorial waters of a state in order to enter the territorial waters (and the territory) of that of another, may also be subjected to interdiction. In its study on the international law instruments in relation to illegal immigration by sea, the European Commission considers the passage of undocumented migrants wishing to land in another Member State than the Member State through which waters they are traversing to be non-innocent, under the reasoning that, in view of the common rules on the crossing of external borders, illegal entries in another Member State must also be considered as prejudicial to the good order and security of the coastal Member State.[48] This interpretation would appear to textually depart from the language of UNCLOS, but an argument can also be made that, because the European Union is itself a party to UNCLOS, Member States patrolling and

41 Art 18 (1) UNCLOS; Article 14 (2) Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958, 516 *UNTS* 205.

42 Article 19 (1) UNCLOS; Article 14 (4) Convention on the Territorial Sea and the Contiguous Zone.

43 Article 19(2)(g) UNCLOS.

44 In respect of the right to deny and suspend non-innocent passage in the territorial sea, see more extensively Churchill and Lowe (1999), p. 87-88.

45 Articles 21(1)(h) and 25(2) UNCLOS.

46 SEC(2007) 691, para. 2.1.2. For a discussion: M. Pallis, 'Obligations of States towards Asylum-seekers at Sea: Interactions and Conflicts Between Legal Regimes', 14 *IJRL* (2002), p. 355-359.

47 Articles 19(2)(g), 21(1)(h) UNCLOS.

48 SEC (2007) 691, para. 4.2.2.6.

controlling one another's coastal waters are doing so in the exercise and for the benefit of the European Union's rights under UNCLOS.[49]

In the framework of interstate cooperation in the suppression of undocumented migration, states increasingly conduct border patrols and subsequent interdictions within one another's territorial sea. Because these operations take place within the territorial sovereignty of another state they will require the consent of and must be conducted in accordance with the conditions set by the coastal state. Special arrangements facilitating the interdiction by one Member State in the coastal sea of another Member State are provided by the Frontex Regulation, as amended by the RABIT Regulation.[50] The Council Decision for maritime Frontex operations stipulates that any interdiction carried out by one Member State in the territorial sea of another requires prior authorization of the coastal Member State.[51] In the proposal for recasting the Asylum procedures Directive, it is further set out that asylum applications made to the authorities of one Member State carrying out immigration controls in the territory of another must be dealt with by the Member State in whose territory the application is made.[52] Although this provision clarifies responsibilities, it may also raise issues of indirect *refoulement*.[53]

Joint operations of border control in the territorial sea of a third country must necessarily be carried out in accordance with agreements between the coastal state and an EU Member State or possibly the EU itself. An anomaly in the Frontex framework defining the task and powers of guest officers is the absence of references to the law and sovereignty of the third country. The relevant provisions presume compliance with the laws of the host Member State and ordain that guest officers take instructions from the host Member State, whereas the 'shiprider agreements' concluded with several North African

49 The European Community acceded to UNCLOS on 1 April 1998. According to Article 4(3) of Annex IX, UNCLOS, international organizations may 'exercise the rights and perform the obligations which its member States which are Parties would otherwise have under this Convention, on matters relating to which competence has been transferred to it by those member States'. In depositing the instrument of ratification, the European Community formally declared its 'acceptance, in respect of matters for which competence has been transferred to it by those of its Member States which are parties to the Convention, of the rights and obligations laid down for States in the Convention and the Agreement'; Declaration concerning the competence of the European Community with regard to matters governed by the United Nations Convention on the Law of the Sea of 10 December 1982 and the Agreement of 28 July 1994 relating to the implementation of Part XI of the Convention, 1 April 1998. The argument would accordingly be that in applying, for example, the Schengen Borders Code, the Member States are enforcing not merely their municipal immigration laws, but also the common Union corpus on external border controls, thus giving effect to the right of the European Union established under UNCLOS to protect the common external borders from irregular infringements.

50 See chapter 5.2.2.4.

51 Council Decision 2010/252/EU, Annex, Part I, para. 2.5.1.2.

52 COM(2009) 554/4, Article 4(5).

53 See extensively, section 6.4.1. below.

countries stipulate that not the host Member State, but the third country is ultimately competent in deciding upon visits and arrests.

6.3.1.2 The contiguous zone

States may assert, in respect of particular subject matters, jurisdiction over the contiguous zone adjacent to the territorial sea. This zone does not form part of the territorial sovereignty of the coastal state and hence, its laws and regulations cannot apply in this zone. Article 33 (1) UNCLOS does permit states, however, to exercise the control necessary to: '(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.'[54] Accordingly, UNCLOS does allow for the taking of specific measures in the contiguous zone on immigration matters.

The key question here concerns the scope of these powers. Some authors consider that Article 33 (1) UNCLOS enlivens a general competence to intercept and redirect irregular migrants found in the contiguous zone.[55] In this vein also, Council Decision 2010/252/EU does not distinguish between enforcement activity undertaken in the territorial sea and contiguous zone. it set forth that, in respect of decisions concerning *inter alia* the seizure of the ship and persons on board or the escorting of the vessel towards the high seas, ultimate competence lies with the coastal Member State.[56]

But other authors have stressed the distinction in Article 33 UNCLOS between measures of prevention and measures of punishment.[57] Under this reasoning, the power to 'punish' refers to measures taken in response to infringements of the coastal state's law which have been committed *within* its territory or territorial sea, by analogy to the doctrine of hot pursuit. The power to prevent would, on the other hand, merely entail a right to approach, inspect and warn a vessel, rather than to take enforcement measures such as arrest, diversion or the forcible escort to a port.[58] This would correspond with the notion that because undocumented migrants not yet having entered the territory or territorial waters of the coastal state have not (yet) acted in contravention of a coastal state's immigration laws, there is no explicit jurisdictional basis for subjecting these persons to coercive measures. Contrary to Council Decision 2010/252/EU, the earlier Commission study on the law of the sea

54 Also see Article 24 Convention on the Territorial Sea and the Contiguous Zone.

55 S. Trevisanut, 'The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection', 12 *Max Planck Yearbook of United Nations Law* (2008), p. 233.

56 Annex, Part I, paras. 2.5.1.1.-2.5.1.2.

57 Guilfoyle (2009), p. 12-13. Also see D. P. O'Connell, *The International Law of the Sea*, vol. I, Oxford: Clarendon Press (1982), p. 1058; A. Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels', 35 *ICLQ* (1986), p. 330.

58 Ibid.

aligned with this interpretation, in noting that it seemed impossible that a state is allowed in the contiguous zone, in addition to the right to approach the vessel and to prevent its entry into territorial waters, to arrest it or bring it to a port.[59] It would follow from this reasoning, firstly, that if found that there is a prospect of a vessel infringing the immigration regulations of the coastal state, the general rule of flag-state jurisdiction implicates that any further enforcement action is possible only with the consent of the flag state.[60] And, secondly, if the flag-state has not waived its jurisdiction, the coastal state must refrain from enforcement action until the vessel does indeed enter territorial waters – and therewith bring itself within the ordinary legal order and possible concomitant safeguards on border control and asylum of the coastal state.

6.3.1.3 The high seas

International waters, or the high seas, constitute that part of the seas which does not belong to the territorial seas, the contiguous zone, or the exclusive economic zone (EEZ).[61] The legal order on the high seas is based on the two foundational ideas of freedom of navigation and flag state jurisdiction.[62] Under the former, it is prohibited for any state to subject the high seas to its sovereignty and guaranteed that every state may sail its ships on the high seas.[63] The notion of flag state jurisdiction embodies the basic rule that a ship is subject to the exclusive jurisdiction of the state whose flag it flies.[64]

The rule of flag state jurisdiction implicates that states may not, without prior agreement or consent, interdict vessels flying a foreign flag. By analogy to bilateral treaties concluded for the suppression of drug trafficking, European states have concluded treaties amongst themselves and with third countries, in which permission is granted for the interdiction of vessels on the high seas which are suspected of carrying undocumented migrants.[65] Through such

59 SEC(2007) 691, Annex, para. 4.2.4.

60 See section 6.3.1.3 below.

61 Article 86 UNCLOS. Within the EEZ or exclusive economic zone, coastal States enjoy specific rights and competences in respect of economic exploration and exploitation. For immigration related matters, the legal regime applicable to the EEZ does not differ from that applicable to the high seas; see Articles 56 and 58 UNCLOS.

62 Codified in Articles 87 and 92 (1) UNCLOS; Articles 2 and 6 (1) Convention on the High Seas, 29 April 1958, 450 *UNTS* 82.

63 Articles 89 and 90 UNCLOS; Article 4 Convention on the High Seas.

64 Article 92 (1) UNCLUS; Article 6 (1) Convention on the High Seas.

65 See above, section 6.2. Also see the Exchange of notes between the United States and Haiti constituting an agreement concerning the interdiction of and return of Haitian migrants, Port-au-Prince, 23 September 1981, providing for *inter alia*: 'Upon boarding a Haitian flag vessel, in accordance with this agreement, the authorities of the United States Government may address inquiries, examine documents and take such measures as are necessary to establish the registry, condition and destination of the vessel and the status of those on board the vessel. When these measures suggest that an offense against United States immigration laws or appropriate Haitian laws has been or is being committed, the Govern-

treaties, consent to the visit, search and seizure of the vessel may be given in advance and no further authorization is needed at the moment that a vessel wishes to conduct a boarding. Article 110 UNCLOS explicitly allows for the conclusion of such agreements.[66] Without advance or ad hoc permission from the flag state, a state may not subject a foreign vessel to coercive measures and it has been suggested that at best, a state may approach and warn a foreign vessel carrying undocumented migrants that it will be seized or forced back as soon as it enters the territorial sea – provided this is done, of course, in accordance with other norms of international or domestic law.[67] It has been observed that European states have on occasion circumvented the rule of flag state consent by interdicting migrant vessels under the pretext of search and rescue operations, also in opposition to demands of those on board the vessel.[68] Council Decision 2010/252/EU holds that in the absence of authorization of the flag state, a Member State may not take enforcement action, but should survey the ship at a prudent distance, unless the ship is in an emergency situation.[69]

One particular question which may come to the fore if a state interdicts a foreign vessel is what law applies to the vessel, its crew, its passengers and the boarding officers. This will generally depend on the contents of the agreement between the flag- and the boarding state. The rule of flag-state jurisdiction signifies that the flag state stipulates the conditions under which another state may exercise its jurisdiction over the vessel and that the flag state reserves the right to withdraw its consent and resume exclusive control over, for example, detention and subsequent prosecution.[70] This also means that, unless agreed otherwise, the vessel and all what happens on board remains subject to the applicable laws of the flag state. In cases where a boarding party violates the laws of the flag state, questions of immunity from foreign law enforcement may arise, which will not be further discussed here.[71]

6.3.1.4 The problem of stateless vessels

More controversial is the question of the assertion of jurisdiction in the high seas over ships without a nationality. Many migrants crossing the seas between Africa and Europe, it has probably been correctly submitted, do so on board

---

ment of the Republic of Haiti consents to the detention on the high seas by the United States Coast Guard of the vessels and persons found on board.'

66 According to Article 110 (1) UNCLOS: '[e]xcept where acts of interference derive from powers conferred by treaty (…)'.

67 Guilfoyle (2009), p. 212.

68 Rijpma (2009), p. 343 (speaking of the 'forcible rescue' of persons aboad unseaworthy ships); Legomsky (2006), p. 685.

69 Annex, Part I, para. 2.5.2.6.

70 Guilfoyle (2009), p. 10.

71 See, extensively, Guilfoyle (2009), p. 299-323.

stateless vessels.[72] A ship may be considered stateless if, upon request, it fails to successfully claim a nationality.[73] In its study on international law instruments, the European Commission posits that in respect of a vessel without a nationality, a state may prevent its further passage, arrest and seize it, or escort it to a port, provided this is done with due respect for fundamental rights and other applicable norms of international law.[74] This interpretation corresponds with the school of thought that ships without a nationality do not enjoy the protection of any state and that, in the absence of competing claims of state sovereignty, any state can apply its domestic laws to a stateless vessel and to that purpose proceed with the boarding, searching and seizure of that vessel.[75] That stateless vessels are subject to such deprivational measures is further explained by the fact that the registration of ships and the need to fly the flag of the country where the ship is registered are considered essential for the maintenance of order on the open sea and to prevent the open sea from becoming a region of lawlessness and anarchy.[76] The paramount principle that each vessel sailing the high seas must fly a flag is recognised under Article 92 (1) UNCLOS, stipulating that any vessel must have a nationality – and one only.

But this view is not uncontested. Churchill and Lowe maintain that there must be some further jurisdictional nexus for a state to extend its laws to those on board a stateless ship and enforce the laws against them.[77] Article 110 (1)(d) UNCLOS clearly allows states to assert jurisdiction over ships without nationality, but it speaks only of a 'right of visit'. This is defined as the right 'to proceed to verify the ship's right to fly its flag', which includes the boarding of the vessel, the checking of documents, and, if suspicion remains, a further examination on board the ship 'which must be carried out with all possible

72 SEC(2007) 691, Annex, para. 4.3.1.3.

73 This can either mean that the shipmaster of the vessel does not claim the vessel to have a nationality or that the claim is denied by the State whose registry is claimed. See, on issues of nationality, flags and registry: H.E. Anderson, 'The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives', 21 *Tulane Maritime Law Journal* (1996), p. 140-170.

74 SEC(2007) 691, Annex, Para. 4.3.1.3. This approach is followed in Council Decision 2010/252/EU, Annex, para. 2.5.2.5. Note however that the Council Decision further requires reasonable grounds to suspect that the ship is engaged in the smuggling of migrants.

75 According to *Oppenheim's International Law*: 'In the interest of order on the open sea, a vessel not sailing under the maritime flag of a State enjoys no protection whatsoever, for the freedom of navigation on the open sea is freedom for such vessels only as sail under the flag of a State', R. Jennings and A. Watts (eds), *Oppenheim's International Law*, vol. I, London: Longman, 9th edition, (1996), p. 546. Also see P. Malanczuk (ed.), *Akehurst's modern introduction to international law*, London: Routledge, 7th rev. ed (1997), p. 186; R.G. Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries*, Leiden/Boston: Martinus Nijhoff (2004), p. 57.

76 *Oppenheim's International Law* (1996), p. 727; and, extensively, M.S. McDougal, W.T. Burke and I.A. Vlasic, 'The Maintanance of Public Order at Sea and the Nationality of Ships', 54 *AJIL* (1960).

77 Churchill and Lowe (1999), p. 214. Also see Anderson (1996), p. 141; Pallis (2002), p. 351.

consideration'.[78] Surely, if such verification leads to suspicions as regards criminal activity over which the inspecting state may assert jurisdiction (such as piracy, the slave trade, unauthorized broadcasting, human smuggling or human trafficking[79]), the state can enforce its criminal jurisdiction over the ship and its crew in accordance with the relevant provisions of international law. But, in contrast with the other instances under which Article 110 UNCLOS allows for a right to visit, neither UNCLOS nor other parts of the Law of the Sea confer an explicit right upon states to subject an interdicted stateless vessel, its crew or its passengers to such far-reaching measures as seizure or arrest.[80] Guilfoyle submits therefore, that 'treaty practice' is consonant with the requirement of a further jurisdictional nexus permitting coercive action, but he also admits that state practice would appear to favor the absence of a general prohibitive rule on further coercive action taken in respect of stateless vessels.[81]

The main problem with the requirement of a specific or further jurisdictional link allowing a state to enforce its laws upon stateless vessels is that it is premised on the idea that the system of the Law of the Sea would indicate that interdiction of stateless vessels is only allowed if it provides for a clear permissive statement to that effect. But it is questionable whether such explicit entitlement needs to exist in respect of stateless vessels. Under UNCLOS and the Law of the Sea in general, the freedom of navigating the high seas, and all related freedoms (including the right of innocent passage through the territorial sea discussed above), are exclusively endowed upon states.[82] The implication of this state-centered view of the Law of the Sea is that it removes stateless vessels from the general safeguards on the freedom of navigation and that, therefore, a state subjecting a stateless vessel to its jurisdiction does not act contrary to any of the rights recognized under the Law of the Sea. It is precisely on the basis that the law of the sea accords protection only to ships flying the flag of a state and not to stateless ships, that national courts, including in the United Kingdom and the United States, have considered international maritime law to permit any nation to subject stateless vessels to its

78 Article 110 (2) UNCLOS.

79 In respect of migrant smuggling, see section 6.3.1.5. below.

80 See, with regard to piracy and unauthorized broadcasting, Articles 105 and 109 UNCLOS, which explicitly provide for arrest and seizure.

81 P. 17, 296.

82 See eg Article 87 (1) UNCLOS ('The high seas are open to *all States*, (…)'); Article 90 UNCLOS ('*Every State* (…) has the right to sail ships flying its flag'); emphasis added. According to Article 92 (1) UNCLOS, the principle of exclusive jurisdiction only accrues to ships flying under the flag of a State. Accordingly, it is perhaps better to speak not of the open sea as being common to all mankind but rather as common to all nations.

jurisdiction.[83] In literature, this view is also endorsed, and explained by the fact that, were it otherwise, stateless vessels would become 'floating sanctuaries of freedom from authority', which is an unacceptable situation for a universally applicable system of international law.[84] Accordingly, the reasoning would be that, in the absence of any specific rights or freedoms endowed by the Law of the Sea on stateless vessels *and* in the absence of any competing claims of states in respect of such vessels, international law sets no barriers for states to subject stateless vessels to their domestic laws, implying that the state is empowered to assert its full jurisdiction, both of legislative and enforcing nature, over those ships.

This does, on the other hand, not mean that interventions against stateless vessels take place outside the realm of international law. It has rightly been observed that the interdiction of vessels without a nationality may lead, firstly, to assertions of diplomatic protection by the state whose nationals are on board the intercepted stateless vessel.[85] Secondly, and for our purposes of the utmost relevance, the taking of coercive measures in respect of any vessel and those on board is likely to come within the ambit of human rights law. As is extensively addressed in section 6.4.3 below, deprivations of liberty or other interferences with human rights are as a rule only permitted if they have a basis in law and if this legal basis is of sufficient quality. This will ordinarily

83 United States Court of Appeals, Eleventh Circuit 9 July 1982, *United States v. Marino-Garcia*, 679 F.2d 1373, paras. 12, 17: ' Vessels without nationality are international pariahs. They have no internationally recognized right to navigate freely on the high seas. (…) Moreover, flagless vessels are frequently not subject to the laws of a flag-state. As such, they represent "floating sanctuaries from authority" and constitute a potential threat to the order and stability of navigation on the high seas. (…) [I]nternational law permits any nation to subject stateless vessels on the high seas to its jurisdiction. Such jurisdiction neither violates the law of nations nor results in impermissible interference with another sovereign nation's affairs. We further conclude that there need not be proof of a nexus between the stateless vessel and the country seeking to effectuate jurisdiction. Jurisdiction exists solely as a consequence of the vessel's status as stateless.' In the *Asya* case (1948), the United Kingdom Privy Council held it to be lawful for a State to seize a stateless ship on the high seas. The case concerned a ship with illegal immigrants on its way to Palestine but seized in the high seas by a British naval vessel and escorted to a Palestinian port, where the passengers were sent to a clearance camp. In respect of the argument that the illegal immigrants could rely on the freedom of navigation, the Privy Council held: 'the freedom of the open sea, whatever those words may connote, is a freedom of ships which fly and are entitled to fly the flag of a State which is within the comity of nations. The Asya did not satisfy these elementary conditions. No question of comity nor of any breach of international law can arise if there is no State under whose flag the vessel sails.' The Council further confirmed that, having been brought involuntarily in Palestinian territorial waters, the passengers had become subject to the Ordinances dealing with immigration into Palestine and on that basis liable to deprivational measures. Judicial Committee of the Privy Council 20 April 1948, *Naim Molvan v. Attorney General for Palestine (The "Asya")*, [1948] AC 351.

84 H. Meijers, *The Nationality of Ships*, Den Haag: Martinus Nijhoff (1967), p. 319.

85 Churchill and Lowe (1999), p. 214; D. Guilfoyle, Maritime Interdiction of Weapons of Mass Destruction, 12 *Journal of Conflict & Security Law* (2007), p. 10; Guilfoyle (2009), p. 18.

imply that coercive measures taken in respect of persons on board stateless vessels may only be taken pursuant to domestic (or, if existent, international) law provisions setting the conditions and limits for engaging in coercive activity.

6.3.1.5 The UN Protocol on Migrant Smuggling and extraterritorial criminal jurisdiction

From the challenges posed by the phenomenon of undocumented sea migration consensus has emerged that, similar to activities as piracy, unauthorized broadcasting, the slave trade and drug trafficking, international law should broaden the basis for states to assert criminal jurisdiction over the offence of migrant smuggling, also when committed at sea. Studies suggest that, not least due to the sharpening of maritime controls and surveillance, migrants increasingly make use of the services of smugglers in their efforts to cross the seas to Europe.[86] The Protocol against the Smuggling of Migrants by Land, Sea and Air, adopted in Palermo in 2000, obliges states to criminalize migrant smuggling, defines the term 'migrant smuggling' and provides specific rules on the interdiction of migrant smugglers at sea.[87] The Protocol is annexed to the UN Convention against Transnational Organize Crime (UNTOC),[88] which expressly permits state Parties to establish (prescriptive) jurisdiction over offences listed in the Convention which are *inter alia* committed outside their territory, if they are committed 'with a view to the commission of a serious crime within its territory'.[89]

Because serious crimes are defined as those offences 'punishable by a maximum deprivation of liberty of at least four years',[90] it will depend on the national laws criminalizing the facilitation of illegal entry whether the Migrant Smuggling Protocol, read together with UNTOC,[91] allows for the vesting of criminal jurisdiction over smuggling which takes place outside the state's territory. That there must be a link between the smuggling and a punishable offence within the state's territory further implicates that UNTOC only provides for the establishment of jurisdiction on the basis of the principle of protection and not on the principle of universality, from which it follows

86 *Supra* n. 8.

87 UN doc. A/RES/55/25 (2001), Annex III (hereafter Migrant Smuggling Protocol), Articles 3, 6 and 7-9. The Migrant Smuggling Protocol was adopted together with the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children. Unlike the Migrant Smuggling Protocol, the Human Trafficking Protocol contains no specific provisions on the maritime interdiction of persons suspected of engagement in human trafficking. Not all EU Member States have as of yet ratified the protocol.

88 15 November 2000, 2237 *UNTS* 39574.

89 Article 15 (2)(c).

90 Article 2(b).

91 According to Article 1 (2) of the Migrant Smuggling Protocol, the provisions of UNTOC apply unless the Protocol provides for a *lex specialis*.

that states may only undertake coercive activity in accordance with the Protocol in respect of smugglers who wish to enter their territory. But because the establishment of prescriptive criminal jurisdiction over offences committed abroad is not commonly considered as being subject to general permissive statements under international law, the Protocol does not in itself prevent states from proscribing the extraterritorial offence of migrant smuggling in a wider manner.[92]

One of the specific aims of the Migrant Smuggling Protocol is to expedite the cooperation of states in the interdiction of vessels which are suspected of being engaged in migrant smuggling. The Protocol's provisions in this respect follow the general maritime rule of flag-state jurisdiction, implying that a state wishing to interdict a vessel flying another state's flag may only do so upon prior authorization of the flag state.[93] The flag state is not obliged to comply with such a request, but it is under a duty to respond to requests expeditiously.[94] The flag state may, further, set the conditions for waiving its jurisdiction to the other state.[95] In its study on the international law instruments in relation to illegal immigration by sea, the European Commission suggests to consider a broadening of the criminal (enforcement) jurisdiction of States, so as to allow states to interdict any vessel engaged in migrant smuggling or human trafficking, either along the model of universal jurisdiction as applicable to the crime of piracy, or along the model of unauthorized broadcasting, where, apart from the flag state, the state of nationality of the suspect or the state receiving the transmission may proceed with the arrest, seizure and prosecution of the vessel and suspects on board.[96]

The Migrant Smuggling Protocol also specifically provides for states to interdict stateless vessels suspected of engagement in migrant smuggling.[97] In case of stateless vessels or when flag state consent is obtained, states may proceed with the boarding and search of suspected vessels.[98]

If evidence confirming the suspicion is found, the state may take further 'appropriate measures with respect to the vessel and persons and cargo on board'.[99] Presumably, to 'take appropriate measures' must be taken to correspond not only with what is necessary to suppress the vessel from being used for migrant smuggling, but also with the conditions set by the flag state

92 Permanent Court of International Justice 7 September 1927, *S.S. 'Lotus' (France v. Turkey)*, 1927 PCIJ Series A. No. 10, p. 13. Also see European Committee on Crime Problems, 'Extraterritorial criminal jurisdiction' (Report), Strasbourg: Council of Europe (1990), p. 20-30.
93 Article 8(2).
94 Article 8(2)(4).
95 Article 8(5).
96 SEC(2007) 691, Annex, para. 4.3.2.4. The specific regimes on piracy and unauthorised broadcasting are laid down in Articles 105-109 UNCLOS.
97 Article 8(7).
98 Article 8(2)(7).
99 Ibid.

and/or the form and degree in which states have established prescriptive criminal jurisdiction over the offence of migrant smuggling by sea. Because states are expressly allowed under the Migrant Smuggling Protocol and UNTOC to establish extraterritorial criminal jurisdiction over the offence of migrant smuggling, the taking of appropriate measures would, subject to the rule flag state consent, necessarily seem to imply a right to seize the ship and to place the crew under arrest and to instigate prosecution.[100]

A crucial question left unaddressed by the Protocol is what this power to 'take appropriate measures' implies for the migrants who are the objects of the smuggling. Article 5 of the UN Migrant Smuggling Protocol prohibits the criminalization of migrants who have been the object of migrant smuggling, raising the question on what legal basis a state could subject the migrants – instead of the smugglers – to coercive measures such as arrest, detention or forcible escort into its territory. Even though it may well be that to bring migrants who have been the object of migrant smuggling forcibly to a port will be the only practicable option a state may have which wishes to enforce its criminal jurisdiction over the offences committed on board the vessel, the express prohibition to subject migrants to criminal jurisdiction renders the Protocol an insufficient legal basis to subject the smuggled migrants to arrest or other coercive measures amounting to a deprivation of liberty.[101]

The logical implication of the prohibition to assert criminal jurisdiction over migrants solely on the basis that they have been the object of smuggling must be that the issue of a state wishing to subject smuggled migrants to penal or administrative sanctions must be answered on the basis of the general regime on interdictions on the high seas discussed above. This means that, on the one hand, the power to take coercive action will depend on the contents of the agreements in place between the interdicting state and the flag state. And in the case of stateless vessels and vessels flying the state's own flag, the power to subject the migrants to coercive measures must necessarily follow

100 It may be useful here to draw an analogy with the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988, U.N. Doc. E/CONF.82/15) which similarly, and also subject to the rule of flag State consent, allows States to, '[i]f evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board' (Article 17(4)). Various national courts have interpreted this formula as necessarily implying a right to seize the ship and to place the crew under arrest and to instigate prosecution. This interpretation also finds confirmation in the Council of Europe Agreement on Illicit Traffic by Sea, implementing article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (31 January 1995, *CETS* 156), which is expressly meant to carry out and enhance the effectiveness of the said provision of the UN Narcotics Convention, and which authorizes States to require the vessel and persons on board to be taken into the territory of the intervening or another State and, upon the finding of evidence that a relevant offence has been committed, to proceed with the arrest of the persons or detention of the vessel. See, extensively and with further references, Guilfoyle (2009), p. 84-85.

101 In Article 16(5) of the Protocol, the possibility of detention of smuggled migrants is mentioned, but without indication as to the basis of this detention.

from applicable domestic law.[102] In both situations however, a key problem which may come to the fore is that to be without proper identity- or travel documents at the high seas will not normally constitute an offence under the laws of a coastal State. Hence, in the absence of specific international agreements or domestic laws setting the conditions for asserting coercive action over smuggled migrants, a state may lack the competence to subject smuggled migrants to coercive measures, which may consequently constitute a practical obstacle for taking 'appropriate measures' in respect of the smugglers. As is further explained below,[103] the ultimate consequence of a lack of a proper legal basis for undertaking coercive measure against migrants at the high seas could be that human rights law prohibits the taking of such measures, which may greatly constrain the possibility of states to seize vessels engaged in migrant smuggling and bring them to a port.

6.3.2 Obligations of search and rescue

The issues of which EU Member State should be responsible for saving migrants at sea and where the rescued persons should be disembarked have been subject to intense debate in the context of operations concerning the EU's sea borders coordinated by Frontex. The debate essentially evolves around the reconciliation of humanitarian aspirations with fears of having to carry the migrant burden.

In terms of international law, the two key principles to be reconciled are, on the one hand, the duty of both private shipmasters and coastal states to provide assistance to those who are in peril at sea and, on the other hand, the equally well established sovereign right of states to control the entry of non-nationals into its territory. In the context of the Vietnamese exodus, Pugash described the plight of the boat people as the 'Catch 22 of the Law of the Sea': 'The shipmaster of a freighter in international waters off Indochina is obligated to rescue Vietnamese sea refugees, but no nation is bound to take the refugees once they have been rescued.'[104]

Despite attempts of UNHCR, the International Maritime Organization (IMO) and, on a regional level, the EU, this anomaly remains prevalent today.[105] In the European context, migrants having embarked on the often perilous sea journey to the European continent have often found themselves in distress and, after being rescued, wound up as subjects in international negotiations

102 This is also the manner in which the USA had organised the competences of the US Coast Guard to interdict any vessel carrying undocumented aliens. See Executive Order 12324 – Interdiction of Illegal Aliens, September 29, 1981; and Executive Order 12807 – Interdiction of Illegal Aliens, May 24, 1992.

103 See section 6.4.3.

104 Pugash (1977), p. 578.

105 See n. 143-148 *infra* and accompanying text.

on their disembarkation, sometimes resulting in rather protracted situations. In one incident in May 2007, the shipmaster of a tuna pen flying the Maltese flag had rendered assistance to a group of 28 irregular migrants whose ship had sunk in the rough seas of the Mediterranean but had, for both financial and security reasons refused to allow the migrants on board. And because Malta, Italy nor Libya were under a clear obligation to allow the migrants to disembark in one of its ports, the migrants were compelled to desperately clung to the buoys of a tuna fishing net for three days before finally being brought to the shore of the Italian island of Lampedusa.[106] In another incident in July 2006, the Maltese government had refused to allow the disembarkation of fifty-one migrants rescued by the Spanish fishing trawler *Francisco y Catalina* by affirming that it had been Libya's responsibility to rescue them and, given that a Spanish vessel ended up doing so, the migrants had become Spain's responsibility. After a standoff lasting eight days, it was agreed that Malta, Libya, Italy, Spain and Andorra would all take in a share of the migrants.[107] A similar exchange of arguments took place in April 2009, when Italy refused a Turkish-owned vessel which had rescued 140 migrants entry into its territorial waters, positing that, because they were found in the search and rescue area of Malta, they had to be disembarked in Malta. Malta disagreed, arguing that the migrants needed to be landed in Lampedusa, since that was the nearest safe port. The row ended with the Italian government authorizing the migrants to disembark at Lampedusa .[108] A final peculiar example of how EU Member States grapple with burdens posed by rescued migrants is the fate of the 27 mostly African passengers of a small boat which had ran into trouble in late May 2005 and drifted off the coast of Sicily for eight days while other vessels passed it by but refused to help. The Danish-registered container ship *MV Clementine Maersk* eventually picked up the migrants and continued its scheduled voyage to Felixtowe, Britain, prompting the British *Daily Express* to bring the rescue operation on its front page with the headline: 'MAD: Illegal immigrants rescued in the Mediterranean and the ship's captain brings them 2,000 miles... to Britain.'[109] Guidelines for search and rescue situations and for disembarkation in the context of sea border operations coordinated by the Frontex Agency have now been laid down in the non-binding Part II of the Annex of Council Decision 2010/252/EU.

In addressing the plight of migrants in distress at sea, legal studies often focus on issues of effectiveness, compliance and enforceability of relevant obligations under the Law of the Sea.[110] Another and more general legal angle

106 The incident has been widely reported. For a summary: Migration Policy Group, *Migration News Sheet*, Brussels, July 2007, p. 11.

107 Migration Policy Group, *Migration News Sheet*, Brussels, August 2006, p. 16-18.

108 Migration Policy Group, *Migration News Sheet*, Brussels, May 2009, p. 8

109 *Daily Express* 8 June 2005.

110 Pugash (1977); M. Davies, 'Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea', 12 *Pacific Rim Law & Policy Journal* (2003), p. 109-141.

is the extent to which migrant interdictions and sea border controls may increase risks involved for migrants, attracting obligations not only under the Law of the Sea but possibly also under human rights law.[111] Although highly important, the current study is not as such interested in the causes and remedies for the migrant death toll at sea. It is concerned, rather, with the smaller question of delineating the obligations of states for undertaking rescue operations at sea and to subsequently identify the obligations relevant for disembarkation. It is in this connection that international maritime obligations on search and rescue are particularly relevant because they, firstly, lay down a general duty to render assistance to persons in distress at sea which distorts the ordinary maritime regime defining the interdiction powers of states in the various maritime zones. Secondly, the duty of search and rescue encompasses the duty to bring rescued persons to a place of safety, touching upon the crucial question of the appropriate place of disembarkation.

6.3.2.1 The duty of search and rescue

The duty to assist persons in distress at sea is an essential constitutional element of the law of the sea and codified in a variety of treaties, most notably in Article 98 UNCLOS, the International Convention for the Safety of Life at Sea (SOLAS), and the International Convention on Maritime Search and Rescue (SAR).[112] It is a duty incumbent on all shipmasters: both private and governmental.[113]

The duty to render assistance applies anywhere at sea and to anybody in distress.[114] What exactly amounts to distress and how far a shipmaster's duties to provide assistance stretch is not always specified. The SAR Convention defines a distress phase as 'a situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance'.[115] A ship need not be dashed against the rocks before it can successfully invoke a claim of distress, nor is the fact that the vessel may be able to come into port under its own power

111 T. Spijkerboer, 'The Human Costs of Border Control', 9 *EJML* (2007), p. 127-139.

112 International Convention for the Safety of Life At Sea, 1 November 1974, 1184 *UNTS* 3; International Convention on Maritime Search and Rescue, 27 April 1979, 1405 *UNTS* 23489. The SOLAS and SAR Conventions provide for an expedient amendment procedure, see Article VIII SOLAS and Article III SAR Convention. The SAR Convention was amended by IMO Resolution MSC. 70(69), adopted May 1998 and IMO Resolution MSC.155(78), adopted May 2004. The 1998 amendments put greater emphasis on regional cooperation and co-ordination between maritime and aeronautical SAR operations. The 2004 amendments aim to facilitate the disembarkation of rescued persons. References to the SAR and SOLAS Conventions hereunder are made to the consolidated versions.

113 Art 98 (1) UNCLOS.

114 Art 98(1) UNCLOS; SAR, Annex, para. 2.1.10; SOLAS, Annex, Chapter V, Regulation 33 (1).

115 SAR, Annex, para. 1.3.13.

conclusive evidence that a plea of distress is unjustifiable.[116] Arguably, passengers threatening to kill themselves or throw children overboard bring themselves in distress, thereby triggering a legal duty of rescue and/or assistance.[117] It has been suggested that 'preservation of life' is the appropriate criterion in determining whether a distress situation exists.[118] EU Member States do not interpret the term distress uniformly. Malta, for example, considers a ship to be in distress only if a distress call has been issued and if there is an immediate danger to the life and safety of those on board. Italy, on the other hand, considers all unseaworthy ships to be in distress and is reported to have commenced rescue operations also against the will of migrants on board the concerned vessels.[119] Council Decision 2010/252/EU stipulates that the assessment of whether a distress situation exists should take account of a range of factors, including the existence of a request for assistance, the seaworthiness of the ship, the presence of qualified crew and safety equipment and the weather and sea conditions.[120]

Apart from the duty to provide assistance to persons in distress, international maritime obligations imposed on states in connection to search and rescue at sea comprise the duty to establish and maintain adequate and effective search and rescue services; and the duty to cooperate with neighbouring states to ensure that assistance is rendered.[121] The SOLAS and SAR Conventions oblige states to ensure that necessary arrangements are made for coast watching.[122] Detailed provisions on the establishment of rescue co-ordination centres, the designation of rescue units and the equipment of rescue units are laid down in Chapter 2 of the SAR Annex.[123] The term 'necessary' indicates that the establishment of rescue services must be commensurate with past experiences relating to accidents at sea and the knowledge of navigational risks, which is also apparent from the SOLAS Convention, which refers to 'the density of the seagoing traffic and the navigational dangers'.[124] Given the rampant incidents of migrants perishing in the seas between Africa and Europe, it may

116 General Claims Commission United States and Mexico, Opinion rendered 2 April 1929, *Kate A. Hoff v The United Mexican States*, 4 UNRIAA 444, reprinted in 23 *AJIL* (1929), p. 860-865.

117 On situations of self-inflicted distress, see D.J. Devine, 'Ships in distress – a judicial contribution from the South Atlantic', 20 *Marine Policy* (1996), p. 231-232, who emphasises that self-inflicted distress must still be seen as distress.

118 Churchill and Lowe (1999), p. 63; Barnes advances a wider definition of distress, which does not necessarily require that the very existence of the person concerned is in jeopardy. R. Barnes, 'Refugee Law at Sea', 53 *ICLQ* (2004), p. 59-60.

119 Rijpma (2009), p. 343.

120 Annex, Part II, para. 1.3.

121 The general duties of coastal States are summarized in Art 98 (2) UNCLOS.

122 SOLAS, Annex, Chapter V, Regulation 7(1). Also see SAR, Annex, para. 2.1.1.

123 See esp. SAR, Annex, paras. 2.2.-2.6.

124 SOLAS, Annex, Chapter V, Regulation 7(1).

be questioned whether all involved states in the region take this duty sufficiently serious.[125]

A key obstacle for identifying clear obligations on the side of coastal states to respond to distress calls or to provide a place of safety for rescued persons is a lack of clarity concerning the allocation of responsibility between states. Addressing this issue, the SAR calls upon states to jointly agree upon the establishment of national search and rescue regions (SRRs or SAR regions), which are expressly *not* related to the delimitation of national boundaries between states, within which each state has primary responsibility for overall co-ordination of search and rescue operations.[126] The division of the world's oceans in SAR regions was undertaken within the framework of the International Maritime Organization and general agreement was reached on the establishment of a SAR plan for the Mediterranean Sea in 1997.[127] Apart from having responsibility for overall co-ordination, the responsibility of states within their SAR regions embodies the duty to use search and rescue units for providing assistance to persons in distress within the specified area – an obligation phrased in imperative and unconditional terms.[128]

Although the establishment of search and rescue regions has helped clarify the state having primary responsibility for providing assistance, it does not always appear to function effectively in the Mediteranean. Libya, although a party to the SAR Convention, has repeatedly refused to answer distress calls from within its SAR region.[129] Malta, on the other hand, has on occasion referred to the delimitation of the sea into SAR regions as a pretext to eschew responsibility for undertaking rescue operations, by pointing out that the troubled vessels were within another state's search and rescue area.[130] It must be emphasised however, that the SAR regions do not establish mutually exclusive areas of responsibility. A preponderant feature of the legal regime pertaining to coastal state search and rescue obligations is the duty for coastal states to cooperate in ensuring that assistance is provided to persons who are in distress at sea. Article 98 (2) UNCLOS urges State Parties to conclude mutual

125 Note that the SOLAS and SAR Conventions also acknowledge that not all States may be equally capable to arrange for search and rescue services, SOLAS, Annex, Chapter V, Regulation 7(1) and SAR, annex, para. 2.1.1.

126 SAR, Annex, paras. 2.1.3-2.1.12.

127 Agreement adopted at IMO Mediterranean and Black Seas Conference on Maritime Search and Rescue (SAR) and the Global Maritime Distress and Safety System (GMDSS), Valencia (Spain), 8 to 12 September 1997.

128 SAR, Annex, para. 2.1.9.

129 Rijpma (2009), p. 344.

130 Late May 2007, the Maltese government refused to provide assistance and to take in the 26 migrants rescued by the Spanish tug *Monfalco*, by arguing that 'the incident took place 27 miles inside Libya's search and rescue area and 17 miles outside Malta's SAR zone, and that Libya was therefore responsible for the peoples' safety about 60 nautical miles from the Libyan coast'; Migration Policy Group, *Migration News Sheet* , Brussels, July 2007, p. 11 and 15. Also see the incident concerning the *Francisco y Catalina*, n. 107 *supra*.

regional arrangements to this effect and a range of provisions in the SAR Convention call for the establishment of close cooperation between the rescue services of states.[131] Paragraph 3.1.7 of the SAR Convention explicitly stipulates that each State Party must ensure that 'its rescue coordination centres provide, when requested, assistance to other rescue coordination centres, including assistance in the form of vessels, aircraft, personnel or equipment'. Further, any search and rescue unit being alerted of a distress incident must take immediate action if in the position to assist.[132] These provisions make clear that states do not have mutually exclusive zones of responsibility for undertaking rescue operations but rather the obligation to cooperate in ensuring that assistance is provided.

6.3.2.2 Disembarkation and a 'place of safety'

The definition of 'rescue' in the SAR Convention includes the duty to deliver persons in distress to a place of safety.[133] What is meant by a 'place of safety' is not explained in the SAR Convention. The safety of the people rescued, and the safety of the rescuing vessel and crew, will primarily determine the most appropriate course of action, including finding a 'safe' port for disembarkation.[134] One author notes that it is common maritime practice to disembark rescued persons at the next port of call, but merely as a matter of commercial expedience rather than as definite rule.[135] On the basis of this practice, UNHCR's Executive Committee has in the past suggested that 'persons rescued at sea should normally be disembarked at the next port of call'.[136] UNHCR has later explained that the next port of call can either mean the nearest port of call, the next scheduled port of call, the port of embarkation, or even the best equipped port of call.[137] IMO has further observed that a place of safety may also be an assisting vessel capable of safely accommodating the survivors.[138] Yet, given the paramount consideration of preserving life at sea, detrimental circumstances on board a ship may well place limits on the shipmaster's freedom to choose an appropriate port of call. In this regard, it

131 See especially SAR, Annex, paras. 3.1.1-3.1.8.
132 SAR, Annex, para. 4.3.
133 SAR, Annex, para. 1.3.2.
134 According to the Guidelines on the Treatment of Persons Rescued at Sea, adopted under IMO Resolution MSC. 167(78), 20 May 2004, paras. 6.12-6.14, 'a place of safety [in the meaning of the SAR Convention] is a . . . place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Further, it is a place from which transportation arrangements can be made for the survivors' next or final destination'.
135 Barnes (2004), p. 51-52.
136 UNHCR EXCOM Conclusion No.23 (XXXII), 1981, para. 3.
137 UNHCR, 'Background note on the protection of asylum-seekers and refugees rescued at sea', Geneva, 18 March 2002, paras. 30-31.
138 IMO Resolution MSC. 167(78), 20 May 2004, para. 6.13.

is not uncommon that a vessel coming to the rescue will find itself in distress after a rescue operation.[139] A lack of food and water or medical supplies, or a lack of sufficient safety equipment for the amount of persons a vessel is licensed to carry may severely limit the options a shipmaster has in choosing a place of safety. Depending on the circumstances, a shipmaster may have no other option than to deliver the rescued persons to the nearest port without any delay.

UNHCR has underlined that legal obligations of states under international refugee law must also inform the choice as to the port for disembarkation.[140] Although disembarkation in a potentially unsafe country may certainly raise issues under the prohibition of *refoulement* (see section 6.4.1 below), it can be questioned whether one should incorporate the notion of safety under refugee law (understood as being safe from proscribed ill-treatment or persecution) into the concept of safety under the Law of the Sea. Within the latter body of law, 'safety' refers to the preservation of life at sea and does not as such deal with refugee considerations. Further, while the obligation to bring rescued persons to a safe place is addressed to both governments and shipmasters under the Law of the Sea, the prohibition of *refoulement* applies to governments of Contracting States only.[141] Rather than reading one obligation into another one, the duties to bring rescued persons to a place where there basic and medical needs are met and to respect the prohibition of *refoulement* are best conceived as two distinct but complementary obligations. It is not unimaginable that situations may arise in which states can find it difficult to reconcile the different safety concepts.[142]

In more recent years, the question of disembarking rescued migrants attracted renewed interest on both the international level and the level of the European Union. Partly in response to Australia's *Tampa* affair, the International Maritime Organization proposed to identify existing inconsistencies and ambiguities in internal maritime law instruments with a view to ensuring

139 A strong case has been made that the asylum-seekers taken on board the *MV Tampa* were in distress. See Bostock (2002), p. 296. For a discussion, Barnes (2004), p. 59-61. For European examples, one may refer to the adventures of the private rescue vessel *Cap Anamur* which had picked up 37 migrants, of whom some suffered nervous breakdowns and wanted to throw themselves overboard when the ship was refused entry in the port of Empodocle, Sicily. Only when the ship issued an emergency call was permission given to enter port. Migration Policy Group, *Migration News Sheet*, Brussels, August 2007, p. 12-13.

140 UNHCR, 'Background note on the protection of asylum-seekers and refugees rescued at sea', Geneva, 18 March 2002, para. 31

141 See also, ibid, para. 22, where UNHCR explains that the private shipmaster of a rescuing vessel 'will not be aware of the nationality or status of the persons in distress and cannot reasonably be expected to assume any responsibilities beyond rescue' and that, therefore, '[t]he identification of asylum-seekers and the determination of their status is the responsibility of State officials adequately trained for that task'.

142 One can think, for example, of situations where the state of health of the passengers requires their immediate disembarkation but where refugee concerns oppose such disembarkation.

that survivors of distress incidents are provided assistance, are delivered to a place of safety and are treated in accordance with humanitarian maritime traditions, while minimizing the inconvenience to assisting ships.[143] As a result, the IMO's Maritime Safety Committee adopted several amendments to the SOLAS and SAR Conventions in May 2004, together with the Guidelines on the Treatment of Persons Rescued at Sea.[144] Included in the amendments is a prohibition imposed on the owner, the charterer or the company operating a ship to prevent or restrict a shipmaster from engaging in a rescue undertaking and the obligation of shipmasters to treat embarked persons in distress at sea with humanity.[145] Most pertinent is the amendment setting forth some sort of procedural mechanism for ensuring that shipmasters who have provided assistance are released from their obligations and that disembarkation is effectuated.[146] This provision endows 'primary responsibility' for ensuring cooperation between the parties involved in finding a place of disembarkation upon the state in whose SAR region the persons have been rescued. In this cooperation, the involved Parties are under a joint duty to arrange disembarkation to be effected as soon as reasonably practicable. Even though they do not designate by default the state where disembarkation should take place, the 2004 SOLAS and SAR amendments were not accepted by Malta, because it considered that persons rescued at sea should always be disembarked at the nearest safe port – and because it would be 'manifestly unfair to expect a country of the size and population density of Malta to bear any greater share of the burden of illegal immigration than it already does'.[147] In the non-binding Principles Relating to Administrative Procedures for Dis-

143 IMO Resolution A.920(22), November 2001. Also see: 'F.J. Kenney, Jr. and V. Tasikas, 'The *Tampa* Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea', 12 *Pacific Rim Law & Policy Journal* (2003), p. 143-177.

144 IMO Resolutions MSC.153(78) , MSC. 155(78) and MSC.167(78), adopted 20 May 2004. The amendments entered into force on 1 July 2006. Under the SAR and SOLAS Conventions, an expedient 'tacit acceptance' amendment procedure applies, whereby amendments are deemed accepted by a specified date unless a required number of Parties object.

145 SOLAS, Annex, Chapter V, Regulations 33(6) and 34-1.

146 SAR, Annex, para. 3.1.9.; and (under identical terms) SOLAS, Annex, Chapter V, Regulation 33 (1.1): 'Parties shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships´ intended voyage, provided that releasing the master of the ship from these obligations does not further endanger the safety of life at sea. The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable'

147 Letter of the Permanent Representative of Malta to the Permanent Representative of Germany and COREPER Chair, 8 June 2007; *Times of Malta* 23 April 2009, 'Editorial: An unnecessary diplomatic stand-off'.

embarking Persons Rescued at Sea issued by IMO's Facilitation Committee in January 2009, the responsibility of the government in whose SAR region the persons have been rescued is taken further. These guidelines stipulate that, if disembarkation cannot be arranged swiftly elsewhere, the government responsible for the SAR area should accept the disembarkation of the rescued persons.[148]

On the level of the European Union, Council Decision 2010/252/EU proposes to address the question where the migrants should be disembarked somewhat differently. The guidelines posit that 'priority should be given to disembarkation in the third country from where the ship carrying the persons departed or through the territorial waters or search and rescue region of which that ship transited and if this is not possible, priority should be given to disembarkation in the host Member State unless it is necessary to act otherwise to ensure the safety of these persons.'[149] The term host state refers to the Member State whose borders are the object of control of the Frontex operation.[150] The guidelines do note that this is 'without prejudice to the responsibility of the Rescue Coordination Centre', probably referring to the responsible SAR state.[151] Because the guidelines are addressed at the Member States participating in Frontex operations and not at third countries, the priority of disembarking persons in a third country will necessarily depend on further agreement with the third state concerned. The alternative allocation to the host Member States may well be instrumental in averting ad hoc disagreements between Member States on the issue of disembarkation, but it is also the most controversial element of the Decision. Malta, likely to be a host of Frontex operations, opposed the adoption of the Council Decision on the basis of precisely this element. In the words of a spokesperson of the Maltese government: "if we decide to host the Frontex mission, we will get funding to operate, but that would mean that we would have to take in people rescued off the sea from as far away as Crete."[152] Instead, Malta continues to favor a system where rescued migrants are as a rule taken to the nearest port of call and has threatened to refrain from future participation in Frontex operations.

On the one hand, rules or guidelines setting by default the state responsible for allowing disembarkation appear imperative for the effective implementation of duties of search and rescue. Clear guidelines may resolve the problem of private shipmasters being reluctant to render assistance for a fear of not being allowed entry into a port and may ensure that the needs of rescued migrants

148 IMO Facilitation Committee, 22 January 2009, FAL.3/Circ. 194, para. 2.3.
149 Annex, Part II, para. 2.1.
150 See recital 5.
151 Annex, Part II, para. 2.1
152 The Malta Independent Online 4 February 2010, 'Malta and Frontex missions: 'No chance if the rules are changed''; *Times of Malta* 1 February 2010, 'Angry Malta protests over new Frontex rules'.

are attended to as soon as practicable. On the other hand, any default rule, regardless of which state is appointed, is problematic in view of the fact that each distress situation is different. IMO has underlined that, given the variety of factors to be taken into account, selection of a place of safety must always depend on the unique circumstances of each case – by referring to such matters as medical needs and the situation on board the ship.[153] Although one may therefore criticize the Law of the Sea for not providing a crystal clear rule as to the appropriate place of disembarkation, the nature of the duty to bring persons to a safe place would seem to inherently require a certain level of flexibility.

It can further be observed that past disputes between EU Member States on the issue of disembarkation were not, in essence, grounded in a lack of clarity of the scope of maritime obligations or the relevant interests to be taken into account. References by governments to a perceived imprecision of the Law of the Sea or even outright differences of interpretation have been used, rather, as a pretext obscuring the much more fundamental discord on the question of taking in the migrant burden. In other words, it is not the imprecision – or flexibility – of the Law of the Sea which undermines compliance with obligations of rescue and of bringing persons to a safe place, but the fact that the person in distress is also a migrant which is the cardinal factor explaining why states find it difficult to comply with relevant maritime obligations. One may question, in this connection, whether the Law of the Sea constitutes the appropriate framework to address this issue. The Law of the Sea has not been designed to regulate questions of migrant burden sharing and these issues are likely to be much more effectively resolved by regional arrangements, such as in the context of the European Union. From this perspective, Council Decision 2010/252/EU, despite its shortcomings and controversial contents, may be regarded as an example of how a regional instrument can contribute to the proper implementation of obligations of search and rescue. Other examples of burden-sharing arrangements which are perceived as having successfully contributed to ensuring and speeding up the disembarkation of rescued people are the Disembarkation Resettlement Offers (DISERO) and Rescue at Sea Resettlement Offers (RASRO) schemes established by UNHCR in the 1980s in response to the Indochinese refugees.[154] These schemes created a special reserve of

153 IMO Resolution MSC.167(78), para. 6.15. This need for flexibility is well illustrated by the choice of a Spanish patrol boat, taking part in Frontex operation Nautilus in the seas between Italy and Libya, which had rescued 26 migrants among whom a woman and her baby born only three days earlier, not to sail to the nearby island Lampedusa but to Malta since both child and mother required urgent medical assistance which was not available on Lampedusa. Migration Policy Group, *Migration News Sheet*, Brussels, August 2007, p. 13.

154 UNHCR, Problems Related to the Rescue of Asylum-Seekers in Distress at Sea, EC/SCP/18, 26 August 1981; UNHCR, Problems Related to the Rescue of Asylum-Seekers in Distress at Sea, EC/SCP/30, 1 September 1983. Because the resettlement offers where perceived as creating a 'pull-factor', the schemes were replaced by the Comprehensive Plan of Action

resettlement guarantees to which – mainly developed – countries contributed according to fixed criteria.

6.4 Human rights at sea

The analysis above has explored the rights of states to interdict migrant vessels under the Law of the Sea. The framework and conditions for asserting rights of interdiction are properly exercisable vis-à-vis other states. In connecting this regime of law to issues of migration enforcement at sea, one must be aware that, in essence, the Law of the Sea protects the freedom of navigation of states, and that this protection is made operational through a system under which specific rights and freedoms are accorded to vessels flying under the flag of one or the other state. Crucially, this system of protection and the waiving of protection does not *in itself* regulate the powers a state may exercise vis-à-vis the *passengers* of such vessels in the course of migration control. In other terms, although the Law of the Sea sets the circumstances under which states may take particular action over migrant vessels, it does not answer the question of what action may subsequently be taken against the migrants themselves. From positing that the Law of the Sea allows for the interdiction of migrant vessels, it does not automatically follow that a state becomes competent to arrest, detain or return the migrants found on board.

These are questions which instead depend on two complementary but interlinked bodies of law. One is the general framework of the international law on aliens, and in particular human rights law on the treatment of aliens. The other is the domestic regime on immigration and border control (or, where relevant, bilateral or regional arrangements), prescribing the extent to which states consider it opportune to engage in migration enforcement at sea. One prime reason why these two regimes cannot be assessed in isolation, is that human rights law requires states not merely from refraining from activity which is in violation of human rights, but also obliges states to put in place a system of law which secures against human rights violations, which entails safeguards against arbitrariness and which ensures the availability of remedies. In the context of migrant interdiction at sea, the scope and contents of domestic laws regulating interdictions are a particularly salient issue, precisely because interdictions are often conducted outside the ordinary framework of the state's immigration policies.

It is not necessary to repeat what has been said about the extraterritorial application of human rights and in particular the 'right to asylum' in chapters 2

---

for Indochinese Refugees, under which only those determined as refugees were eligible for resettlement. For an appraisal, see W. Courtland Robinson, 'The Comprehensive Plan of Action for Indochinese Refugees, 1989–1997: Sharing the Burden and Passing the Buck', 17 *Journal of Refugee Studies* (2004), p. 319-333.

and 4 of this book. But it is helpful to start this section by noting that the European Court of Human Rights has on various occasions considered the European Convention on Human Rights to apply to interdictions at sea. In the case of *Medvedyev*, concerning the visit and subsequent seizure and arrest of a vessel and its crew at the high seas in the course of an anti-drug trafficking operation, the Court considered the arrest and detention to come within the ambit of Article 5 ECRH, protecting the right to liberty.[155] On a general note, the ECtHR pronounced that:

> '[T]he special nature of the maritime environment (…) cannot justify an area outside the law where ships' crews are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction, any more than it can provide offenders with a "safe haven".'[156]

In the specific context of the interdiction of migrants and asylum-seekers, the ECtHR has considered the guarantees of Article 2 ECRH, the right to life, to apply to an incident where a boat carrying more than 50 migrants from Albania who wished to enter Italy collided with an Italian warship and sunk in international waters.[157] The Committee against Torture, in the *Marine I* case, considered that a rescue operation of the Spanish Civil Guard of 369 migrants whose boat had gone adrift in international waters had brought the passengers within the jurisdiction of Spain for the purposes of the complaints at issue, which included alleged violations of Articles 1 and 3 CAT, on account of the treatment of the passengers and their forcible repatriation to India after they had been disembarked in Mauritania.[158]

It could nonetheless be questioned whether, in analogy with the *Banković* requirement that a person must find himself within the effective control of the state, all forms of sea interdictions must necessarily entertain the human rights obligations of the interdicting state.[159] It has been reported that not all interdiction activities are accompanied with the boarding of migrant vessels, but that states may also employ diversion tactics without making physical contact with a migrant vessel.[160] Examples which can be given are the escort-

155 ECtHR 10 July 2008, *Medvedyev v France*, no. 3394/03 (Chamber); ECtHR 29 March, *Medvedyev v France*, no. 3394/03 (2010 (Grand Chamber). Also see ECtHR 12 January 1999, *Rigopoulos v Spain*, no. 37388/97 (adm. dec.).

156 *Medvedyev v France* (Grand Chamber), para. 81

157 ECtHR 11 January 2001, *Xhavara a.o. v Italy and Albania*, no. 39473/98 (adm. dec.).

158 UN Committee Against Torture 21 November 2008, *J.H.A. v Spain (Marine I)*, no. 323/2007, para. 8.2.

159 See extensively chapter 2.5.2.

160 See the accounts of various diversion tactics employed by States in the Mediterrrean in Foundation Pro Asyl (2007); Human Rights Watch, 'Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum-seekers, Libya's Mistreatment of Migrants and Asylum-seekers' (report), September 2009.

ing of a migrant vessel; the addressing of the captain or passengers by megaphone; the dissuasion of a vessel from further passage by making intimidating maneuvers; or even the shooting of the engine of a vessel.[161] But it is difficult to see why such measures should preclude persons from being brought under the personal scope of the acting state's human rights obligations. As concluded in chapter 2 of this book, it transpires from the evolving case law on the extraterritorial application of human rights that the form or manner of state activity is generally not considered decisive for enlivening the state's extraterritorial obligations but rather the question whether there is a factual assertion of state sovereignty which affects a person in such a way that he can be considered a victim of an alleged infringement of a human rights obligation.[162] This reasoning finds further support in the ECtHR judgment in *Women on Waves v Portugal*, in which a prohibition to enter Portuguese territorial waters imposed on a Dutch vessel and enforced by a warship of the Portuguese Navy which took position near the Dutch vessel, was considered to contravene the right of the Dutch crew to promote to the debate on reproductive rights in Portugal.[163]

Migrant interdictions at sea not only attract obligations specific for asylum-seekers, but may extend to the full panoply of rights laid down in the different human rights conventions. The current section explores three human rights which appear particular at issue when states subject migrants at sea to coercive measures: the prohibition of *refoulement*, the right to leave and the right to liberty. It will conclude that the manner in which several EU Member States currently control their maritime sea borders raises serious issues under all these rights.

6.4.1 *Non-refoulement* obligations arising out of interdiction at sea

In situations of land arrivals of refugees at a state's border where the state wishes to exclude the refugee, the state will have the alternatives of either to send the refugee to his country of origin, possibly violating the prohibition of refoulement, or to send him to a third country, which may also involve either direct or indirect refoulement and further depends on the willingness of the other country to admit the person. In respect of sea arrivals, there is the alternative possibility of sending the refugee back to open sea.[164] Although sea diversions not accompanied with forced returns to another country are not necessarily at variance with the prohibition of refoulement, they are problematic nonetheless. Ultimately, it may result in 'refugees in orbit',

161 Ibid.
162 See in particular the analysis in chapter 2.5.2.
163 ECtHR 3 February 2009, *Women on Waves v Portugal*, no. 31276/05.
164 Pugash (1977), p. 594.

where no country is willing to allow entry into its ports.[165] Because migrants at sea often travel on unseaworthy or unsafe ships and will often have limited food-, water- or fuel supplies, they cannot be expected to stay at sea indefinitely. In practical terms, this means that diversions to the open sea may result, firstly, in refugees seeing no other option than to return to the state where their life or freedom is in danger or where there is a risk of chain refoulement. This may well amount to either exposure to ill-treatment under Article 3 ECRH or 'return' (or '*refouler*') in the ordinary meaning of the term under Article 33(1) Refugee Convention and must therefore be classified as prohibited.[166] Secondly, also in situations short of distress, to knowingly accept the risk that a migrant vessel is forced to remain at sea for a prolonged period may endanger the life and well-being of the passengers, thus attracting the state's human rights obligations under the right to life and/or the prohibition of inhuman treatment.[167]

Increasingly, EU Member States seek not to merely divert vessels carrying irregular migrants, but to conclude agreements with third countries allowing for their immediate return. This practice has attracted considerable attention of legal scholars and UNHCR and touches upon the two crucial issues of where asylum-seekers should be disembarked and where and how their status should be determined.

The most immediate question in connection to summary returns of refugees who are interdicted at sea is how states should deal with asylum requests lodged by intercepted migrants. At the land border, specific mechanisms will normally regulate the lodging and processing of asylum requests. But domestic laws often remain silent on asylum requests lodged at sea, rendering the mechanism of processing asylum applications, and how to guarantee access to fair and efficient asylum procedures, manifestly unclear.[168] Because inter-

165 Mathew (2002), p. 666.

166 See chapter 4.3.

167 It is reported that, on occasion, EU Member States have attempted to divert migrant vessels, also if in distress, rather than to bring them to a port. In August 2009, the five survivors of a ship carrying over seventy migrants, who had embarked in Libya, told to the Italian press that their ship had ran out of fuel and had remained adrift for twenty days, during which time only one out of several vessels passing by had stopped to provide assistance. Two days before being rescued, a patrol boat, allegedly belonging to Malta, had provided them with fuel and directed them to the Italian island of Lampedusa, *Migration News Sheet*, Migration Policy Group, Brussels, Sept. 2009, 12. On preventive duties under the right to life and border controls, see Spijkerboer (2007), p. 137-139. Council Decision 2010/252/EU expressly allows Member States participating in border operations coordinated by Frontex to order a ship to modify its course towards a destination other than the territorial waters or contiguous zone, but also obliges Member States to always respect fundamental rights and to not put at risk the safety of the intercepted passengers, Annex, Part I, paras. 1.1, 2.4(e).

168 UNHCR, 'Background note on the protection of asylum-seekers and refugees rescued at sea', Geneva, 18 March 2002, para. 21.

dictions will normally bring asylum-seekers within the jurisdiction of the state in human rights terms, a lack of guarantees of law safeguarding asylum-seekers from being returned without their claim being assessed in itself raises serious issues under the prohibition of *refoulement*. Under Article 3 ECRH, 'a rigorous scrutiny must necessarily be conducted of an individual's claim that his or her deportation to a third country will expose that individual to treatment prohibited by Article 3'.[169] This ordains the installment of certain procedural safeguards, an obligation which likewise applies to the prohibition of *refoulement* under other treaties.[170] Therefore, although the question of whether a particular return measure does indeed expose a person to ill-treatment or persecution can ultimately only be answered on the basis of an assessment of the circumstances of the individual and those prevailing in the receiving country (including the possibility of onward removal), return practices not allowing for some sort of screening procedure in effect amount to a blanket determination that none of the returnees may have a valid asylum claim, without the possibility of assailing that determination.[171]

Crucially therefore, any interdiction practice not providing for some form of refugee screening runs counter to procedural duties which follow from the prohibition of *refoulement*, regardless of whether it concerns countries which are generally considered as unsafe, such as Libya,[172] or whether it concerns a safe country, as it is generally accepted that asylum-seekers must always be allowed the possibility to rebut the supposed safety of the country concerned.[173] Hence, interdictions of EU Member States where no specific regard is paid to refugee concerns, including the recent returns by Italy of migrants intercepted at sea to Libya, but also the interdictions and summarily returns carried out in the context of the Hera operations in the territorial waters of Senegal, Mauritania and the Cape Verde – which have not been confirmed to provide for access to an asylum procedure[174] – are problematic.[175] Out-

169 ECtHR 11 July 2000, *Jabari v Turkey*, no. 40035/98, para. 39. On the obligation to install procedural safeguards under Articles 3 ECHR, 7 ICCPR and 3 CAT extensively K. Wouters, *International Legal Standards for the Protection from Refoulement*, Antwerp: Intersentia (2009), p. 330-331, 411-412, 513-515.

170 Ibid.

171 Cf. H.H. Koh, 'The Human Face of the Haitian Interdiction Program', 33 *Virginia Journal of International Law* (1993), p. 486.

172 Human Rights Watch News Release 17 January 2008, 'Libya: Summary deportations would endanger migrants and asylum-seekers'; Human Rights Watch, 'Libya: Stemming the F low, Abuses Against Migrants, Asylum-seekers and Refugees' (Report), Volume 18, No. 5(E), September 2006; S. Hamood, 'EU–Libya Cooperation on Migration: A Raw Deal for Refugees and Migrants?' 21 *Journal of Refugee Studies* (2008) p. 19-42. Also see the country information reproduced in ECtHR 20 July 2010, *A. v the Netherlands*, no. 4900/06.

173 J.C. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press (2005), p. 326-333; K. Hailbronner, 'The Concept of 'Safe Country' and Expeditious Asylum Procedures: A Western European Perspective', 5 *IJRL* (1993), pp.51, 53.

174 García Andrade (2010), p. 321-322.

side the European context, interdiction practices which have been reported not to entertain meaningful screening for refugees include the returns of Haitians intercepted by the US Coast Guard to Haiti after President G.H.W. Bush had issued the Kennebunkport Order in 1992[176] and the return of asylum-seekers interdicted by Australia to Indonesia in the most recent decade.[177]

UNHCR has repeatedly underlined the necessity of identifying and subsequent processing of asylum-seekers who are intercepted at sea. In view of all sorts of practical constraints, UNHCR advises that status determination is most appropriately carried out on dry land – where access to *inter alia* translators, appropriate counsel and appeal mechanisms can be ensured.[178] Although not always unambiguous, UNHCR generally appears to refrain from recommending that the processing must always be conducted within the territory of the interdicting state.[179]

---

175 The CPT has explicitly submitted that Italy's policy of pushing back migrants to Libya violates the prohibition of *non-refoulement*, CPT Report on Italy (2010), para. 48.

176 Legomsky (2006), B. Frelick, '"Abundantly Clear": *Refoulement*', 19 *Georgetown Immigration Law Journal* (2005), p. 245-275. The Kennebunkport Order (Executive Order 12807), named after the vacation home of the President from where the order was issued, declared that Article 33 Refugee Convention did not extend to persons located outside the territory of the United States and that vessels found to be engaged in the irregular transportation of persons could be returned to the country from which it came, provided that the Attorney General, 'in his unreviewable discretion', decided that a person who is a refugee shall not be returned. See, further chapter 7.2.1.

177 S. Kneebone, 'The Pacific Plan: The Provision of 'Effective Protection', 18 *IJRL* (2006), p. 714; Mathew (2002), p. 671.

178 UNHCR, 'Background note on the protection of asylum-seekers and refugees rescued at sea', Geneva, 18 March 2002, para. 23-24. UNHCR does not exclude the possibility of onboard processing in limited circumstances. In a similar vein: IMO, 'Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea', FAL.3/Circ.194, 22 January 2009, para. 2.2. Frelick has aptly described the inadequacies of on board identification and screening of Haitian refugees in the context of the Haitian interdiction policy: Frelick (2005), p. 245-247.

179 UNHCR Background note (2002), paras. 25-29. EXCOM had earlier recommended, in the context of rescue operations, that asylum-seekers should normally be disembarked and further processed in the country of the next port of call; EXCOM Conclusion No. 23 (XXXII), 1981, para. 3. In EXCOM Conclusion No. 15 (XXX), 1979 para. h iii, it was stated that 'intentions of asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account'. More recently, and specifically responding to rescue operations carried out by EU Member States, UNHCR recommended that '… disembarkation of people rescued in the Search and Rescue (SAR) area of an EU Member State should take place either on the territory of the intercepting/rescuing State or on the territory of the State responsible for the SAR. This will ensure that any asylum-seekers among those intercepted or rescued are able to have access to fair and effective asylum procedures. The disembarkation of such persons in Libya does not provide such an assurance'; UNHCR, Letter to His Excellency Mr. Martin Pecina, Minister of the Interior of the Czech Republic, 28 May 2009, in: UNHCR, Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Hirsi and Others v. Italy (Application no. 27765/09), March 2010, para. 4.3.6.

As noted above, the non-binding Part II of Council Decision 2010/252/EU sets as a default rule that, by way of priority, intercepted or rescued persons in Frontex operations should be disembarked in a third country.[180] The Decision does not provide specific guidelines or rules on how participating Member States should deal with asylum claims lodged at sea, but it does stipulate firstly, that no person shall be disembarked in or handed over to a country in contravention of the prohibition of direct or indirect *refoulement*; and secondly, that rescued or intercepted persons must be allowed the possibility to 'express any reasons for believing that disembarkation in the proposed place would be in breach of the principle of *non-refoulement*'.[181] Further, Member States must ensure that their participating border guards are trained with regard to relevant provisions of human rights and refugee law.[182] Although this is the first legal instrument of the European Union codifying the extraterritorial applicability of the prohibition of *refoulement*, it does little to resolve the fundamental question of how to make operational procedural duties for deciding upon asylum claims lodged at sea. Theoretically, it leaves the Member States confronted with asylum claims the three options of either to process the asylum-seeker on the territory of one of the Member States (normally the host Member State[183]), to process the claim in a third country, or to process the claim at sea.

Because all three options may be problematic from either a legal, practical or policy perspective, states have on occasion sought recourse to the further possibility of entering into arrangements with a third country allowing for the identification, status determination and subsequent repatriation or resettlement in that country. In chapter 7 of this study, the merits of such external processing schemes are more extensively reviewed. It transpires from that review that although the processing of asylum claims of interdicted asylum-seekers in a third country not necessarily raises issues under the prohibition of *refoulement*, these schemes may raise a variety of other human rights issues, especially in the sphere of procedural guarantees and the availability of safeguards against arbitrary detention.

6.4.2 The right to leave at sea

The right to leave can be invoked by any person, regardless of entitlements to international protection. It was concluded in chapter 4 of this book that the right to leave, laid down in Articles 2(2) Protocol No. 4 ECRH and 12(2) ICCPR may constrain the freedom of states to employ extraterritorial measures of

180 Section 6.3.2.2.; Council Decision 2010/252/EU, Annex, Part II, para. 2.1.
181 Annex, Part I, para. 1.2.
182 Annex, Part I, para. 1.4.
183 Annex, Part II, para. 2.1.

border control. It was derived from relevant case law of the ECtHR and HRC that measures of immigration control enforced in the territorial waters of a third country can constitute an interference with the right of a person to leave that country, and that it is neither excluded that interdictions at the high seas accompanied with summarily returns to the third country may also deprive the right to leave of meaningful effect.[184]

Concluding that measures of border control effectuated in a foreign country attract protection under the right to leave has substantial ramifications for the manner in which those controls must be executed. Surely, states may have very good reason to require persons to only cross international borders with valid travel and identity documents. When states, to that purpose, conclude international arrangements allowing them to deny persons from exiting another country, such activity may well be brought within one of the justifiable aims for restricting a person's right to leave. The key point, however, is that *any interference* with the right to leave requires compliance with *all* the elements of the limitation clauses of Articles 2(3) Protocol No. 4 ECRH and 12(3) ICCPR. Most pertinent, in view of current practices, is the requirement of *in accordance with law*, ordaining that interferences may only take place under a procedure prescribed by law, that this procedure must be accessible and foreseeable and sufficiently precise to avoid all risk of arbitrary application.[185]

It is in this sphere that issues arise. This is so firstly, because interdiction practices of European states at sea which involve the summarily return of migrants to a third country are often conducted outside a clear procedural framework. And, secondly, the same conclusion applies to joint operations of border control within the territorial seas of third countries: these operations often take place under obscure arrangements, which do not set the precise conditions for refusing persons to exit a country, nor embody guarantees against arbitrary application.

It is useful here to make an analogy with the case of *Medvedyev v France*.[186] Although concerning the right to liberty instead of the right to leave, the judgments of both of the Chamber and the Grand Chamber of the ECtHR in that case shed light on how the requirement of 'lawfulness' should be interpreted in a situation concerning the interdiction of a vessel and the taking of coercive measures against those on board in the context of a bilateral arrangement with another country. The Court had regard to the applicable French legislation, the international law instruments on the suppression of drug trafficking and the ad hoc arrangements between France and Cambodia. It concluded that universal treaty law on the suppression of drug trafficking did provide for international cooperation in taking action against illicit drug trafficking by sea but merely referred to the taking of 'appropriate measures'

184 See, extensively, chapter 4.4.4.
185 Ibid.
186 *Supra* n. 155.

with respect to persons on board, not specifically to depriving the crew of the intercepted ship of their liberty.[187] It considered French law on the carrying out of checks at sea not to apply, because the law referred to international treaties to which Cambodia was not a party.[188] Moreover, the Chamber had found the French law to neither make specific provision for deprivation of liberty of the type and duration of that to which the applicants were subjected.[189] And in respect of the diplomatic note concluded between France and Cambodia, by which Cambodia had agreed to the interception of the vessel, the Court found the agreement to solely refer to action taken against the ship itself, not covering the fate of the crew.[190] The Court concluded that none of the relevant provisions referred specifically to depriving the crew of the intercepted ship of their liberty, that they did not regulate the conditions of deprivation of liberty on board the ship, that they did not provide for the possibility for the persons concerned to contact a lawyer or a family member and did not place the detention under the supervision of a judicial authority. As *obiter dictum*, the Court considered that although international treaties do afford the possibility of concluding regional or bilateral initiatives setting forth a more clearly defined legal framework for undertaking coercive action, international efforts to that effect had been lacking in substance.[191]

The right to liberty is accorded special protection under the European Convention and not all its substantive and procedural guarantees necessarily apply to the right to leave. Nonetheless, the 'lawfulness' requirement under the right to leave does require the law to set the grounds and conditions under which it is permitted to set restrictions on persons crossing borders. The general issue which rises here is that even though several southern EU Member States have made provision in their domestic laws for suppressing irregular migration by sea, also on the high seas or in the territorial waters of third countries if this is pursuant to agreement with the flag state or coastal state, they do not appear to set forth on what specific grounds and under what conditions action may be undertaken against migrants trying to leave another country.[192] Neither do the applicable bilateral arrangements between EU Member States and third countries put in place a legal framework which sets forth the specific procedures to be followed in preventing persons from exiting

187 *Medvedyev v France* (Chamber), paras. 60-61; *Medvedyev v France* (Grand Chamber), para. 95.
188 *Medvedyev v France* (Grand Chamber), paras. 90-92.
189 *Medvedyev v France* (Chamber), para 60.
190 *Medvedyev v France* (Grand Chamber), paras. 98-100.
191 *Medvedyev v France* (Grand Chamber), para. 101.
192 For an extensive appraisal of applicable Italian and Spanish legislation to interdiction at sea, see Di Pascale (2010), p. 283-289 (Italy) and García Andrade (2010), p. 313-316 (Spain). Also see Rijpma (2009), pp 339-340.

a country.[193] Especially problematic, in this respect, is that most of the bilateral arrangements currently in force and which allow for joint operations in the territorial waters of third countries are outside the public domain, raising issues of accessibility and foreseeability. In sum, the legal frameworks currently applicable to interceptions involving refusing individuals to leave another country, seem of insufficient quality to meet the requirement that, when human rights are at issue, the law must set limits to the discretionary power of states.[194]

Problems also arise under the requirement of *effective remedies*. Articles 13 ECRH and 2 (3) ICCPR require amongst other things that when there is an arguable claim that a human right is violated, administrative mechanisms must be in place ensuring that individuals have accessible and effective remedies to vindicate their rights; that allegations of violations are investigated promptly, thoroughly and effectively through independent and impartial bodies; and that states Parties make reparation to individuals whose rights have been violated.[195] The 'quality of law' doctrine under the limitation clause of the right to leave further requires the law to provide for an independent review to allow alleged victims of human rights violations to vindicate their rights.[196] It transpires from the few European cases involving sea interdiction of migrants which have been brought before a court that domestic laws on effective remedies do not always allow migrants to challenge their interception and/or return before an independent authority or court. In the *Marine I* case, the Spanish High Court had rejected claims under the Spanish human rights act lodged by the migrants rescued at the high seas because the incidents complained of were regarded as political acts which were exempted from judicial prosecution.[197] In the case of *Hirsi v Italy*, concerning the Italian push-back policy, the migrants, after having been intercepted in international waters, had been delivered to the Libyan authorities allegedly without having been granted the opportunity to challenge their return.[198] These examples indicate that EU Member States do not always accept that procedural guarantees implied in human rights govern their various interdiction policies. Given that certain

193 See, for example, the 2008 Spain-Cape Verde Treaty, n. 14 *supra*, which speaks only in general terms of interceptions and visits and does not endow Spain with the explicit competence to prohibit intercepted migrants from leaving the third country, see Articles 3 and 6.

194 ECtHR 24 April 2008, *C.G. a.o. v Bulgaria*, no. 1365/07, para. 39.

195 See, extensively, with references to case law, P. Boeles et al, *European Migration Law*, Antwerp: Intersentia (2009), p. 380-384.

196 See, extensively, chapter 4.4.5; and Boeles et al (2009), p. 382 (with references to case law).

197 *J.H.A. v Spain (Marine I)*, para. 6.2. Note that this case concerned a rescue operation.

198 ECtHR 18 November 2009, Exposé des faits et Questions aux Parties, in the case of Hirsi a.o. v Italy, no. 27765/09 (Communication).

interdiction measures may very well deny migrants the possibility of leaving a country, this deficiency is difficult to sustain.

Apart from the requirements of in accordance with law and effective remedies, further issues under the right to leave may arise under the requirements of *legitimate aim* and *necessity and proportionality*. These are not further discussed here.[199]

6.4.3 The right to liberty at sea

It is not unimaginable that coercive measures taken in respect of migrants at sea may interfere with their liberty. Similar to the right to leave discussed above, establishing that interdictions at sea may attract protection under the right to liberty is particularly relevant in the light of guarantees of procedure and good administration which must be respected when a state deprives a person of his liberty. Under Articles 5 ECRH and 9 ICCPR, deprivations of liberty must be in accordance with a procedure prescribed by law, which must be accessible and foreseeable and must afford legal protection to prevent arbitrary interferences of the right to liberty. Safeguards relating to the right to liberty include the informing of the persons who have been detained of their rights, allowing them to contact a lawyer and to bring them before an appropriate judicial authority within a reasonable time.[200]

Although restrictions on liberty may also fall within the ambit of Article 12 (1) ICCPR and Article 2 (1) Protocol No. 4 ECRH securing the right to freely move within a country and to choose a residence, the references in these provisions to 'lawful' presence within the territory of a state and movement within 'the State's territory' render it problematic to consider this more general right to freedom of movement applicable to irregular migrants at sea who are prevented from crossing borders.[201] This section is concerned only with restrictions on liberty which amount to a deprivation of liberty in the meaning of Articles 5 ECRH and 9 ICCPR. It first addresses the circumstances under which sea interdictions can be considered to come within the ambit of the right to liberty. It next addresses several issues raised by current interdictions practices under obligations of good administration and procedural guarantees.

With respect to assertions of criminal jurisdiction at sea, such as in the course of anti-drug trafficking operations, it will normally be beyond dispute that coercive activity amounting to arrest and detention of suspects on board a vessel constitutes a deprivation of their liberty in the meaning of Articles 5

199 For some general remarks, see chapter 4.4.5.

200 Eg *Medvedyev and Others v France* (Grand Chamber), paras. 76-80.

201 On the distinction between restrictions on liberty of movement and deprivations of liberty see eg ECtHR 6 November 1980, *Guzzardi v Italy*, no. 7367/76, paras. 92-93; and HRC 18 July 1994, *Celepli v Sweden*, no. 465/91, para. 6.1.

ECRH and 9 ICCPR. This is less straightforward in sea interdictions which have the purpose of preventing irregular migration. Normally, intercepted migrants are not formally put under arrest, although they may be taken to a detention facility after arrival in a port. What renders it particularly difficult to draw a general picture on the relation between the right to liberty and the interdiction of migrants at sea is that interdictions take a variety of forms: some interdictions amount to the mere diversion of migrant vessels without the boarding of the vessel; some interdictions amount to the taking on board of the migrants; and others amount to the towing of a vessel still having the migrants on board. Further, while some interdictions result in the return of the migrants to a third country against their desire, others may be expressly welcomed by interdicted migrants, especially those involving an escort to a EU Member State. Another relevant distinction may be between rescue operations and operations expressly aimed at undertaking coercive activity in respect of the vessel and the migrants on board.

The problem of classifying coercive action taken in respect of irregular migrants at sea as deprivations of liberty is well illustrated by the Australian *MV Tampa* case, involving the refusal of the Australian authorities to allow a group of rescued asylum-seekers to disembark in its territory. After the Australian trial judge had granted *habeas corpus* relief to the persons on board the vessel on account of them having been held in custody on the vessel contrary to the powers conferred by the Australian Migration Act,[202] Australia's Federal Court upheld the challenge of the Australian government that the control asserted over the persons on board was incidental to the executive power to prevent the entry of non-citizens and that there was no restraint susceptible to *habeas corpus*: 'the actions of the Commonwealth were properly incidental to preventing the rescuees from landing in Australian territory where they had no right to go. Their inability to go elsewhere derived from circumstances which did not come from any action on the part of the Commonwealth. The presence of SAS troops on board the MV Tampa did not itself or in combination with other factors constitute a detention. It was incidental to the objective of preventing a landing and maintaining as well the security of the ship. It also served the humanitarian purpose of providing medicine and food to the rescuees.'[203] The dissent maintained, on the other hand, that as a practical matter 'the movements of those rescued on the ship were controlled by officers of the Special Armed Services of the Australian Defence Force and the rescued people were not allowed to leave the ship except to leave Australian territorial waters.'[204] Accordingly, the dissent considered the asylum-

202 Federal Court of Australia 11 September 2001, *Victorian Council for Civil Liberties Incorporated v Minister for Immigration & Multicultural Affairs*, [2001] FCA 1297.

203 Federal Court of Australia 18 September 2001, *Ruddock v Vadarlis*, [2001] FCA 1329, para. 213.

204 Ibid, para. 80.

seekers to have been held in custody unauthorised by law, and that they therefore should be released on mainland Australia so that they could enjoy their right to a remedy in an effective way.

It is rather unlikely that the European Court of Human Rights would concur with the reasoning of Australia's Federal Court. The gist of the Federal Court's argument – that the inability of the migrants to go elsewhere and that hence the restraint on their liberty could not be attributed to the Commonwealth – was repudiated by the ECtHR in the case of *Amuur v France*, on the question whether the holding of asylum-seekers in the transit zone of an international airport amounted to a deprivation of liberty.[205] After having posited that the right of Contracting States to control the entry of aliens must be exercised in accordance with the provisions of the Convention, including Article 5 ECRH, the Court dismissed the French government's argument that the transit zone was closed on the French side but not on the outside, so that the applicants could have returned of their own accord to Syria. Instead, the Court noted that there was only a theoretical possibility for the asylum-seekers to leave the transit area and that the circumstances in which they were held were equivalent in practice to a deprivation of liberty.[206] The Court took account of the considerable duration of their stay (twenty days) and the fact that they were placed under strict and constant police supervision.[207] In so doing the Court affirmed that the right to control migration does not entail an unfettered prerogative to subject migrants to coercive measures and that Article 5 ECRH protects against factual deprivations of liberty irrespective of whether persons have voluntarily brought themselves within the scope of a state's executive power in migration matters.

There is a wealth of case law, especially under Article 5 ECRH, on the material scope of the deprivation of liberty. It transpires, as a general formula, that in pronouncing upon a deprivation of liberty, account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.[208] In cases not concerning placement in prisons or other specialized detention facilities, such as house arrest or compulsory hospitalization, particular relevant factors are the degree of supervision, the actual freedom of movement and the possibility to maintain contact

205 ECtHR 25 June 1996, *Amuur v France*, no. 19776/92.

206 Ibid, paras. 48-49.

207 This may be different however, in a situation where there is a genuine possibility of traveling elsewhere, see: EComHR 5 April 1993, *S.S., A.M. and Y.S.M. v Austria*, no. 19066/91; ECtHR 8 December 2005, *Mahdid and Haddar v Austria*, no. 74762/01 (both cases concerning asylum-seekers in a transit area at an airport).

208 Eg *Guzzardi v Italy*, para. 92; *Amuur v France*, para 42.

with the outside world.[209] A further relevant factor is whether the constraining measure was taken with a view to protect the person concerned.[210] This latter factor may, in the context of the present chapter, also be of relevance for rescue operations at sea. As regard the specific situation of placing restrictions on liberty of persons on board a ship – where the freedom to move is necessarily confined to the physical boundaries of the ship and where they may accordingly not be a particular need for additional constraining measures – the ECtHR in *Medvedyev v France* further considered the factor relevant whether the ship's course was imposed by the state's authorities.[211]
These factors lend themselves for meaningful application in the context of interdictions of migrants at sea. Especially interdictions which involve the taking of control of the vessel and which are accompanied with strict police supervision over the persons on board may well come within the ambit of the right to liberty.

By way of further illustration of how these criteria are to be applied to interdiction activity, it is useful to refer to the *Marine I* case.[212] Although the right to liberty was not expressly at issue in this case, the facts do shed light on how, deliberately or not, rescue or interception activities may factually result in migrants being severely restrained in their liberty. The case had initiated as a rescue operation where a Spanish maritime rescue tug responded to a distress call of a vessel carrying 369 migrants which had gone adrift in international waters and which was subsequently towed into the territorial waters of Mauritania. Instead of being allowed to disembark however, Spanish Civil Guard personnel took control of the vessel, which remained anchored off the Mauritanian coast for eight days. The complainant had submitted, amongst other things, that during that period 'the migrants were crammed together below deck, receiving food by means of ropes, and that no medical personnel was able to provide assistance or board the vessel to ascertain their state of health.'[213] Although the facts of the case do not precisely indicate the degree of supervision over the migrants and the scope of their freedom of movement while on board the vessel, the vessel had clearly ceased to be a mere object of a rescue operation but instead became the object of an operation of migration control. The presence of security forces on board the vessel, the prolonged stay of the migrants, the restrictions on contacts with

209 ECtHR 28 November 2002, *Lavents v Latvia*, no. 58442/00, paras. 63; ECtHR 26 February 2002, *H.M. v Switzerland*, no. 39187/98, paras. 44-48; ECtHR 28 May 1985, *Ashingdane v United Kingdom*, no. 8225/78, para. 42. See, in the context of the Article 9 ICCPR, and with references to views of the HRC, S. Joseph et al, *The International Covenant on Civil and Political Rights: Cases, Commentary and Materials*, Oxford University Press, 2nd Edition (2004) p. 307-308.

210 *H.M. v Switzerland*, para. 44.

211 *Medvedyev v France* (Grand Chamber), para. 74.

212 *J.H.A. v Spain (Marine I)*. Also see den Heijer and Wouters (2010).

213 Ibid, para. 5.2.

NGO personnel and the taking of control over the vessel including the setting of its course, support a conclusion that the situation on board did amount to a deprivation of liberty; and that, as such, the confinement of the migrants on board the vessel constituted a mere prelude to their placement in a reception facility on the mainland of Mauritania, of which it was not disputed that it amounted to a deprivation of liberty.[214] In these circumstances, the Spanish government's argument that the operation had only amounted to a humanitarian operation which did not attract human rights obligations is difficult to maintain.[215]

The significance of concluding that migrant interdictions can amount to a deprivation of liberty primarily lies with the concomitant rule that deprivations of liberty must be accompanied with norms of good administration and procedural guarantees. It is not necessary to repeat here the issues which were noted in respect of the requirements of 'in accordance with law' and 'effective remedies' under the right to leave in the section above. In the specific context of the requirement of lawfulness under Article 5(1) ECRH, the ECtHR requires the law to not only set forth the precise circumstances under which deprivations of liberty are permitted, but also to set limits as regards the duration of detention, to provide for legal and humanitarian assistance, and to allow for judicial review.[216] The general problem identified in respect of the requirement of 'lawfulness' under the right to leave which also raises under the right to liberty is that the domestic laws of EU Member States and bilateral agreements with third countries are often lacking in circumscribing the state's power to deprive migrants who are outside its territory of their liberty.[217] Neither do international conventions of a general nature expressly regulate the subject of detention of migrants on the high seas. Although international maritime law does allow for the boarding and search of vessels that are without nationality and/or engaged in the smuggling of migrants by sea,[218] it does not make specific provisions for deprivation of liberty of improperly documented migrants found on board such vessels.[219] As noted in chapter 5, Council Decision 2010/252/EU has neither succeeded in supplementing powers of interception, seizure of the ship, apprehension of persons on board and the conducting of the ship or persons on board to another country with procedural guarantees, a right to judicial review or other norms of good administration.

214 Ibid, para. 4.3.
215 Ibid, paras. 4.3, 6.2.
216 *Amuur v France*, paras. 50, 53.
217 *Supra* n. 192 and accompanying text.
218 Article 110 UNCLOS; Article 8 Migrants Smuggling Protocol. Also see chapter 6.3.1.3-6.3.1.4.
219 Cf. *Medvedyev v France* (Grand Chamber), paras. 87-89, 101.

6.5 ISSUES OF ATTRIBUTION AND ALLOCATION OF RESPONSIBILITY

The previous sections examined in what manner sea interdictions may conflict with obligations of states under human rights law. A preliminary condition for establishing the international responsibility of states for wrongful conduct is that the interdiction activity must be attributable to the state or on some other account attract the state's international responsibility.[220] This requirement warrants special scrutiny in the context of joint operations of sea border control, where multiple actors are involved in the interdiction of migrants, in particular joint operations of EU Member States under the coordination of Frontex and joint operations of EU Member States and third countries along the shiprider model.

The Frontex / RABIT model

The Frontex Regulation, as amended by the RABIT Regulation, lays down specific rules on civil and criminal liability for acts committed by guest officers.[221] These rules are only binding as between the Member States and do not prejudice claims brought by a national of a third state.[222] Moreover, they only relate to claims for damages or criminal offences and do not touch specifically upon human rights claims.

It follows that, outside the context of inter-Member State claims, attribution of particular activity of a guest officer to either the host or the home Member State depends on the general rules of attribution discussed in chapter 3 of this book and in particular the rule on attributing conduct of a state organ to the state at whose disposal it is placed.[223] For such attribution it is necessary not only that an organ or officer of a state acts on behalf of another state, but it must also be placed within the command structure of the other state and be subject to that state's instructions. Especially Article 10 of the amended Frontex Regulation, laying down the tasks and powers of guest officers is instructive in this regard. Article 10 (3) specifies that 'guest officers may only perform tasks and exercise powers under instructions from and, as a general rule, in the presence of border guards of the host Member State'. Article 10(10)

220 See, extensively, chapter 3.

221 Articles 10b and 10c Regulation 2007/2004. Article 10b appoints civil liability for damages incurred by acts of guest officers to the host Member State; Article 10c lays down that guest officers are treated the same way as officials of the host Member State with regard to criminal offences committed by or against them. Guest officers are border guards of other Member States than the Member States hosting the operation, Article 1a (6) Regulation 2007/2004. The rules on civil and criminal liability, together with the further specification of tasks and powers of guest officers and division of competences between Member States and Frontex, discussed hereunder, were introduced in the Frontex Regulation pursuant to Article 12 of the RABIT Regulation (863/2007).

222 This follows from the *pacta tertiis* rule codified in Article 34 VCLT and is implicitly recognized under Article 10b (3) and (5) Regulation 2007/2004.

223 See chapter 3.2.3.

specifies further that refusals of entry in the meaning of the Schengen Borders Code shall be taken only by border guards of the host Member State.[224] Article 10(2) lays down that guest officers shall comply with Community law and the national law of the host Member State. The only activities requiring specific authorization of the home Member State are the carrying of weapons and the use of force in the exercise of their powers.[225] Although the Frontex Agency is involved in the practical organization of joint operations and the drawing up of operational plans,[226] it has no specific power of instruction as regards the manner in which interdictions are conducted.[227]

Presuming that Frontex operations comply with this model, i.e. that interdictions are only carried out on instructions of the host Member State and in compliance with the laws of the host Member State, it would seem in accordance with the Law on State Responsibility to attribute possible wrongdoings ensuing from activities of guest officers to the host Member State. This does, however, not always mean that the home Member State is discharged of its own obligations under human rights law. Home Member States have the discretion to decide upon participation in Frontex operations and thus wield ultimate influence over the deployment of their officers.[228] They may be presumed, further, to be well aware of activity undertaken by their officers. On that account, and depending on the circumstances, home Member States may be under a positive duty to make use of material opportunities to prevent their officers from being engaged in possible wrongdoings, for example by refusing or terminating their participation.[229]

The shiprider model

A notorious problem with pronouncing on the international responsibility for possible international wrongs committed by EU Member States in the course

224 This raises the further question of whether this also applies to decisions as to the stopping, boarding and searching of a vessel, the seizure of the vessel and apprehension of those on board, and the return of the ship and persons on board to a third country as now laid down in Council Decision 2010/252/EU, Annex, Part I, para. 2.4.; see the discussion in chapter 5.3.2.1.

225 Articles 10(5)(6) Regulation 2007/2004.

226 See *inter alia* Articles 3, 8e Regulation 2007/2004.

227 With regard to Rapid Border Intervention Teams, the RABIT Regulation does foresee in a closer involvement of the Frontex Agency, but it merely specifies that the host Member State shall take the 'views' of the Frontex coordinating officers 'into consideration'; Article 5(2) Regulation 863/2007. The proposal for recasting the Frontex Regulation foresees in a similar provision for other Frontex operations, COM(2010) 61 final, Article 3(c)(2).

228 But see article 8d (8) 'shall make border guards available'. Also see COM(2010) 61 final, Article 3(b)(3).

229 For a general discussion on the circumstances giving rise to such duties, see chapters 3.2.2.4 (positive obligations). Note that the 'jurisdiction' requirement may render it problematic to construe potential victims of human rights violations as being within the personal scope of the home Member State's (postive) human rights obligations, see chapter 2.5.3.

of joint patrols with and pursuant to agreements with third countries is the lack of accurate information on the relevant legal arrangements and their manner of implementation. This section will, for reasons of expedience, primarily refer to the terms of the Spain-Cape Verdean Treaty.[230]

That treaty foresees in joint maritime patrols, with Spain deploying air and naval assets in Cape Verdean maritime areas. These assets remain under Spanish command and Spain is competent to decide upon matters of flight and navigation.[231] At least one coast guard officer of the Cape Verde must be present on board Spanish ships and aircraft.[232] Interceptions, visits and arrests can only be made by the Cape Verdean authorities or under their direction.[233] It appears that this model is also followed in the context of the joint patrols Spain conducts with other third countries, notably Mauritania and Senegal.[234]

One difference of potential crucial nature between this shiprider model and the Frontex operations discussed above is that Spanish officers are not placed within the command structure of the host state (Cape Verde), rendering it difficult to consider them as having been put at the disposal of another state.[235] Rather, as long as host and guest officers function within their own state machinery, acts committed by them are properly attributable to their own state, or may in particular situations be labeled as 'joint acts', engaging the responsibility of both states involved.[236]

The agreement between Spain and Cape Verde speaks of coercive measures which are either carried out by Cape Verde or carried out by Spain but under the direction of Cape Verde. As regards the situation of direction, both Spain and Cape Verde will normally incur responsibility for ensuing conduct which is unlawful. This situation is specifically governed by Article 17 of the ILC Articles on State Responsibility, according to which the directing state incurs responsibility on account of it having directed or controlled the wrongful act in question. But this does not diminish the responsibility of the directed state for having itself committed a wrongful act.[237] The directed state would then be under the obligation to decline to comply with the instruction.[238]

Alternatively, where officers of the host state are engaged in wrongful activity, it will depend on the involvement of guest officers with the wrongful conduct whether the guest state can incur either derived responsibility for having facilitated the act in question or for having failed in discharging a

230 *Supra* n. 14.
231 Article 6 (4).
232 Articles 3(1)(b), 6(4).
233 Article 6(5).
234 *Supra* n. 16.
235 See chapter 3.2.3.
236 See chapter 3.2.4.1.
237 *ILC Yearbook* 2001-II, A/CN.4/SER.A/2001/Add.1 (Part 2), p. 69 (at 9).
238 Ibid.

positive duty to take measures within its power to prevent wrongdoings from occurring.[239] In general, for such responsibility to arise, it is required that the facilitating state has knowledge of the circumstances of the wrongful act.[240] This may be a potent threshold in the context of sea interdictions, as it will often be uncertain to what exact treatment interdicted migrants will be subjected. On the other hand, it is not impossible to imagine situations where a EU Member State would facilitate the interdiction of migrants by the authorities of a third country in the knowledge that those authorities commonly place irregular migrants in detention facilities where maltreatment systematically occurs, where detention can be prolonged indefinitely and where refugee claims are not examined. The problem with such a reasoning remains nonetheless, that it may be hard to identify a connection of sufficiently close nature between the interdicted migrant and the facilitating state, raising issues under both the victim-requirement and that of 'jurisdiction' under human rights treaties.[241]

6.6 FINAL REMARKS

Few areas in migration law are so contested and legally complex as the interdiction of migrants at sea. From an international law perspective, the legality of migrant interdiction at sea depends on an assessment of i) the competences of states under the Law of the Sea to interdict migrant *vessels* and ii) the limits set by human rights law to the treatment of the *migrants* found on the vessel. The chapter has observed that in several respects, EU Member States have tended to interpret competences under the Law of the Sea extensively, while they have interpreted requirements of human rights law restrictively.

For sea interdictions to be carried out in conformity with human rights standards, Member States will, either unilaterally, in the context of arrangements with third countries or on the level of the European Union, have to develop a meaningful human rights strategy which supplements and restrains the policy of sea interdiction. The chapter has argued that this not only implies the formulation of procedures to be followed in respect of asylum-seekers at sea. Current European interdiction practices attract a wider range of human rights concerns, and may also interfere with the right to liberty and the right of persons to leave any country, including their own.

The development of such a human rights framework is controversial, as it transgresses the very idea that pre-border controls and other extraterritorial coercive measures take place outside the realm of refugee and other human rights concerns. A key rationale underlying many of the current interdiction

239 Chapters 2.5.3, 3.2.2.4, 3.3.2.
240 Ibid.
241 Chapters 2.5.2-2.5.3.

strategies is that they would prevent the migrants from making 'contact' with the domestic jurisdictions of Member States and therewith the concomitant domestic procedures and legal safeguards.

But this rationale constitutes an affront to the law on human rights. Interdictions carried out at sea, and especially those involving the taking of coercive activity, must in one way or the other be incorporated into the state's domestic immigration policy, by setting forth the grounds, conditions and safeguards for undertaking interdiction measures. This may ultimately imply that particular interdiction strategies need to be fundamentally reconsidered. The key argument of this chapter has however not been to posit that pre-border interdictions are necessarily at variance with human rights or that they should be abandoned altogether. The salient point, rather, is that European states cannot simply pretend that their policies do not entertain human rights concerns; and that, therefore, their policies must be embedded in a legal framework affording migrants *inter alia* access to a proper and fair status determination procedure, access to effective judicial oversight and adequate safeguards in relation to detention. The alternative would be the coming into being of an area outside the realm of the law, where migrants would enjoy no protection whatsoever, and where states could go forth and seize persons to their utter discretion.

Although it is increasingly acknowledged on the level of the European Union that procedural standards for maritime migrant interdictions need to be agreed upon, attempts to incorporate Member State practices into the Schengen regime on border crossings have as of yet not resulted in the laying down of a framework of procedural guarantees safeguarding against human rights violations and the provision of appropriate remedies. The recently adopted Council Decision for maritime Frontex operations sets forth a large variety of interception measures to be taken against vessels suspected of intending to circumvent border checks, but, apart from a general reference to fundamental rights and the prohibition of *refoulement*, does not lay down the precise procedures to be followed or safeguards to be respected when apprehending migrants, refusing them further passage or returning them to a third country. Hence, the Decision not only departs from the ordinary standards on border checks and refusals of entry laid down in the Schengen Borders Code as concluded in chapter 5, it neither provides detailed guidance on the appropriate respect for human rights. Further, the Decision arguably overstretches the competences of states to undertake coercive action in respect of foreign vessels in the contiguous zone.

7 External Processing

7.1 INTRODUCTION

The relocation of asylum-seekers to an external processing facility for the determination of their status can be regarded as the culminating idea of external migration control. By locating protection and asylum processing outside the state of refuge, policies of external reception represent a fundamental shift from the traditional paradigm that asylum is granted inside the state's territory. Instead, asylum-seekers are granted a temporary safe haven in a foreign location, allowing for the determination of their status and the arrangement of more durable solutions. Those found eligible for protection may either be resettled into the state of refuge or are removed to a safe third country. Others, it is assumed, ought to be repatriated to their country of origin. The rationales for external processing may consist of discouraging abuse of territorial protection regimes, of avoiding legal obligations pertaining to those who present themselves at the state's border, of the provision of a temporary safe haven until the circumstances in the country of origin have changed, or to reduce costs in the reception of asylum-seekers.[1] External processing is further perceived as the ultimate means of preserving the state's sovereign prerogative to control the entrance of aliens. Or, as Australian Prime Minister Howard stated in support of Australia's Pacific Strategy: 'We will decide who comes to this country and the circumstances in which they come.'[2]

Within the refugee advocacy, the external processing and protection of refugees has raised a multitude of concerns, especially as regards the use of detention as a necessary auxiliary instrument and the lack of safeguards against the onward removal to potentially unsafe countries.[3] On a more fundamental

---

1 United Kingdom Home Office, 'New International Approaches to Asylum Processing and Protection', reproduced in: House of Lords European Union Committee – Eleventh Report, 'Handling EU asylum claims: new approaches examined', 30 April 2004, Appendix 5 (hereafter 'A New Vision for Refugees'); K.F. Afeef, 'The Politics of Extraterritorial Processing: Offshore Asylum Policies in Europe and the Pacific', Oxford: Refugees Studies Centre Working Paper No. 36, October 2006.

2 *ABC Lateline* 21 November 2001, 'Liberals accused of trying to rewrite history'.

3 Amnesty International, 'Australia/Pacific: The 'Pacific Solution' – Offending Human Dignity', 26 August 2002, AI Index: ASA 12/009/2002; Amnesty International, 'Unlawful and Unworkable: Extraterritorial Processing of Asylum Claims', 17 June 2003, AI Index: IOR 61/004/2003; Human Rights Watch, 'An Unjust 'Vision' for Europe's Refugees' (Briefing

note, it is feared that schemes of external protection may render refugees 'beyond the domain of justice' and create 'rights-free zones' where neither domestic or international legal obligations apply.[4] The danger of the coming into being of a lawless area is seen to be augmented by the remote location of external facilities, making the processing less visible, transparent and accessible to public scrutiny.[5]

But, scholars have also submitted that states are not as such barred under international law from conceiving creative protection alternatives.[6] And in line with UNHCR's strategy of enhancing protection capacities in regions of origin, some academics have welcomed regional protection options as providing safe alternatives to unsafe routes of escape and as contributing to lasting solutions for the overwhelming majority of refugees who are not able to flee beyond their own region.[7] A variation to this argument is that the establishment of processing or reception centres in transit countries could provide a viable alternative for the protection of refugees who are refused further travel in the course of pre-border enforcement measures, including for those who are subjected to checking procedures at foreign airports or those who are interdicted at sea, as discussed in chapters 5 and 6.

External processing can take a variety of forms. In general, a distinction can be made between protection in regions of origin (or regional protection programmes[8]) and the external processing of asylum-seekers in transit countries. The former sees primarily to the enhancement of protection capacities in regions of origin, by increasing the capacities of state actors, non-state actors and international organiSations as the UNHCR; by contributing to resettlement;

Paper), 17 June 2003; Human Rights Watch, 'Not For Export': Why the International Community should Reject Australia's Refugee Policies' (Briefing Paper), September 2002.

4 G. Noll, 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones', 5 *EJML* (2003), p. 338; H.H. Koh, 'America's Offshore Refugee Camps', 29 *University of Richmond Law Review* (1994), p. 141.

5 Australian Human Rights Commission, '2009 Immigration detention and offshore processing on Christmas Island' (Report), 2009, part C. introduction.

6 J.C. Hathaway, 'The False Panacea of Offshore Deterrence', 26 *Forced Migration Review* (2006), p. 56-57; G.S. Goodwin-Gill, 'The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations', in: S. Blay, J. Burn and P. Keyzer (eds), *Offshore Processing of Asylum-seekers: The Search for Legitimate Parameters*, Broadway: Halstead Press (2008), p. 40. Also see UNHCR, 'Migration Amendment (Designated Unauthorised Arrivals) Bill. Submission of the Office of the United Nations High Commissioner for Refugees to the Senate Legal and Constitutional Legislation Committee', 22 May 2006, para. 16.

7 Ibid; Also see N. El-Enany, 'Who is the New European Refugee?', LSE Legal Studies Working Paper No. 19/2007, December 2007, p. 1-2.

8 See extensively chapter 5.2.3.

and by contributing to prospects of local integration.[9] It has also been suggested that regional protection areas could be used for the return of failed asylum-seekers.[10] The external processing in transit countries is generally proposed as an alternative to reception within the state of refuge; as a location where temporary protection can be provided; where claims are processed; and from where resettlement or repatriation can be arranged.

In view of the fact that protection programmes in regions of origin remain scarcely developed and are often not proposed as entailing the direct involvement of EU Member States nor the explicit restriction of rights of migrants in the sphere of entry and residence,[11] the current chapter deals only with programmes of external processing involving the interception and transfer of asylum-seekers and their subsequent status determination and resettlement or repatriation. In the absence of presently functioning European policies of external processing, the chapter will take as its background the two most pertinent non-European experiences of external processing: the programmes developed by the governments of Australia and the United States. These non-European precedents are then transposed into the European legal framework, by assessing to what extent those programmes correspond with the human rights norms binding the EU Member States. From this assessment, conclusions are drawn as to the legal feasibility of the possible future creation of programmes of external processing in the European context.

Although the idea of external processing has especially attracted attention in refugee law discourse, the material focus of the chapter extends beyond the typical rights associated with refugees. Indeed, programmes for the external processing of asylum-seekers may or may not increase a risk of *refoulement*. In itself, the very decision to institute a policy of external processing constitutes a recognition, in law or as a matter of policy, that rights of refugees should be respected and that, to that end, an assessment of the protection status of claimants should be made before a decision on resettlement or repatriation is taken. It would follow that external processing not necessarily constitutes an affront to international refugee law. This conclusion is subscribed by several authors who, commenting upon specific aspects of the past US and Australian offshore policies, have observed that the operations paid due respect for the prohibition of *refoulement*.[12]

---

9 A New Vision for Refugees, para. 1; European Commission Communication, 'On the Managed Entry in the EU of Persons in Need of International Protection and the Enhancement of the Protection Capacity of the Regions of Origin: "Improving Access to Durable Solutions"', 4 June 2004, COM(2004)410 final.

10 A New Vision for Refugees, para. 1 (iv).

11 See, in the EU context, chapter 5.2.3.

12 C.M.J. Bostock, 'The International Legal Obligations owed to the Asylum-seekers on the MV Tampa', 14 *IJRL* (2002), p. 288; E. Willheim, '*MV* Tampa: The Australian Response', 15 *IJRL* (2003), p. 172-176.

This does however not diminish the validity of concerns raised by others on alleged non-conformity of the US and Australian offshore programmes with the prohibition of *refoulement*.[13] These concerns however, do not appear to touch upon the concept of external processing as such, but rather originate from a lack of guarantees accompanying the external process, rendering it impossible, for example, to challenge decisions on the transfer to an offshore facility, status determination, or eventual removal from the facility.

In taking the US and American policies as background, the present chapter takes a more holistic perspective on the phenomenon of external processing. It focuses not on the detailed execution of the policies and their conformity with the wide variety of human rights which may indeed be at stake. Rather, it examines the legal validity of the two arguably most intrinsic components of external processing: that of both *procedurally* and *physically* containing a specific group of migrants. Within this analysis, the question of possible *refoulement* is taken as part of the broader issue of granting unauthorized arrivals access to a system of substantive and procedural safeguards capable of ensuring human rights and guaranteeing against the arbitrary exercise of state power. Under the question of *physical containment*, the general issue arises whether it is permissible to mandatorily and systematically detain a specific category of migrants. This question not only involves the legality of external detention as an instrument of migration policy, but also the cognate issues of terminating detention and the provision of prospects for detained persons in the sphere of entry, resettlement or repatriation.

The chapter submits that the physical and procedural 'containment' of asylum-seekers raises a number of key human rights issues which have not been satisfactorily addressed in the Australian and United States' offshore processing programmes. Apart from a system which does not secure essential requirements of the rule of law (especially obstacles in the sphere of judicial review and an insufficient level of guarantees against arbitrary human rights interferences), the Achilles' heel of previously employed external processing lies in the absence of meaningful and lasting solutions for persons being processed in an extraterritorial facility. The chapter will conclude that, in order to be legally viable, *and* to provide meaningful prospects for refugees and failed claimants alike, programmes of external processing should be embedded in a broader framework addressing the crucial questions of entry, resettlement or repatriation.

13 Eg A. Francis, 'Bringing Protection Home: Healing the Schism Between International Obligations and National Safeguards Created by Extraterritorial Processing', 20 *IJRL* (2008), p. 283-292; S. Legomsky, 'The USA and the Caribbean Interdiction Program', 18 *IJRL* (2006), p. 680 et seq; Australian Human Rights Commission (2009), para. 8.2.

7.2 THE LOGIC OF EXTERNAL CONTAINMENT UNDER US AND AUSTRALIAN PRACTICES

7.2.1 The US offshore programme

The United States Naval Station at Guantánamo Bay, situated on a strip of land leased from Cuba on a permanent basis, has been used at various points to house migrants and refugees, predominantly Cubans and Haitians in the 1990s. The Naval Station remains in use today to accommodate small numbers of migrants who have a possibly valid refugee claim and it is retained as a contingency facility for future large scale migration crises.

The base was first opened for migrants in November 1991, when United States Coast Guard cutters were becoming severely overcrowded by intercepted Haitians who had fled their country after the ousting of President Aristide in September that year.[14] Reluctant to proceed with the standing policy of forcibly returning Haitians boat migrants to their home country and failing to secure options for their reception in third countries in the region, the US administration opened a camp at the Naval Station, where the migrants were pre-screened for possible asylum in the United States. Over the following eighteen months, more than 36.000 Haitian refugees were processed in Guantánamo Bay, with 10.000 screened in and allowed entry into the United States, while the remainder were repatriated to Haiti. A smaller number of refugees who were infected with the HIV virus were initially barred from entering the United States, and only brought to US territory under the Clinton administration in June 1993, after a federal judge had ordered the closure of the facility.[15] The policy of temporarily harboring Haitians in Guantánamo Bay had at that time already been reversed as a consequence of the Kennebunktport Order of May 1992, issued after a renewed surge of Haitian boat migrants threatened to overburden the Guantanámo Bay facility, and according to which the US Coast Guard was to immediately return all intercepted migrants to Haiti without the conducting of refugee interviews.[16]

The migrant facility in Guantánamo Bay was reopened in July 1994, when violence had broken out again in Haiti and when President Clinton bowed to the pressure to abandon the no-screening return policy. The new offshore programme entailed the bringing of all Haitians expressing a fear of persecution to a location in the region where they would be processed as potential

14 For an extensive historical account, eg R.E. Wasem, Congressional Research Service, 'U.S. Immigration Policy on Haitian Migrants', CRS Report for Congress, 31 March 2010; S. Ignatius, 'Haitian Asylum-Seekers: Their Treatment as a Measure of the INS Asylum Officer Corps', 7 *Georgetown Immigration Law Journal* (1993), p. 119-125; H.H. Koh, 'America's Offshore Refugee Camps', 29 *University of Richmond Law Review* (1994), p. 139-173.

15 H.H. Koh (1994), p. 143-151; N. White, 'The Tragic Plight of HIV-Infected Haitian Refugees at Guantánamo Bay', 28 *Liverpool Law Review* (2007), p. 249-269.

16 See also chapter 6.4.1.

refugees. Those found to be a refugee were not granted the opportunity of obtaining asylum in the United States, but should instead be resettled in a third country. To this end, the US entered into agreements allowing for the opening of other reception centers across the Caribbean, including in Jamaica and the Turks and Caicos Islands.[17] The large majority of the Haitian migrants held in Guantánamo could however, after the return of President Aristide in October 1994, be gradually repatriated to Haiti under the consideration that the country had become safe.

In August 1994, the US government had decided to use the Guantánamo Bay facility also for a sudden surge of Cubans trying to migrate to the US by boat, thereby reversing the three-decade long US policy of welcoming Cubans fleeing from Fidel Castro's regime. The decision constituted a response to the announcement of Fidel Castro that he would no longer prevent Cubans from leaving Cuba, prompting over 30.000 Cubans to exit their country in small and often unseaworthy boats. As with the Haitians, those Cubans found to be refugees were not allowed to apply for asylum in the United States but ought to be resettled in third countries in the region.[18] In total, 28.000 Cubans were granted temporary refuge in Guantánamo Bay. A further 9.000 migrants were brought to a US military facility in Panama.[19]

After signing an agreement with Cuba, on 2 May 1995, the Clinton administration reversed its previous position of not allowing the detained migrants entry into US territory by announcing that most of the Cubans at Guantánamo Bay would be transferred to the United States and that in the future, those Cubans intercepted at sea would immediately be repatriated to Cuba. This policy shift was partly instigated by the high costs incurred for operating the migrant facility at Guantánamo Bay and by concerns voiced by government officials over the unfavorable conditions within the facility.[20] Further, the promise of the Cuban government to not only take effective measures to prevent future unsafe departures but also to allow the repatriation of Cubans intercepted at sea removed the necessity of retaining the Guantánamo Bay facility as a deterrent for future Cuban migrants. The new policy on Cuban migrants, which remains in force until today, did provide Cubans the possibility of applying for asylum when intercepted at sea. After a preliminary refugee screening at sea, possible Cuban refugees are subsequently transferred to Guantánamo Bay, until a third country can be found for their resettlement.[21] According to a congressional report, from May 1995 through July 2003, about

17 Koh (1994), p. 154; Wasem (2010), p. 5; Legomsky (2003), p. 681.
18 Koh (1994), p. 154-155; M.E. Sartori, 'The Cuban Migration Dilemma: an Examination of the United States' Policy of Temporary Protection in Offshore Safe Havens', 15 *Georgetown Immigration Law Journal* (2001), p. 328-329.
19 Sartori (2001), p. 331.
20 Ibid, p. 349-350.
21 Ibid, p. 352.

170 Cuban refugees were resettled in 11 different countries, including Spain, Venezuela, Australia and Nicaragua.[22]

Since the large scale exoduses of Haitians and Cubans in the mid-1990s, Guantánamo Bay has been in permanent use for the accommodation of smaller groups of migrants interdicted in the Caribbean. In 2002, President G.W. Bush issued a decree granting the Attorney General the power to maintain custody over and to screen undocumented aliens interdicted in the Caribbean region in the Guantánamo Naval Base or another appropriate facility.[23] The decree specified that aliens determined not to be persons in need of protection should be held in custody until such a time as they are returned to a country of origin or transit and that the US government shall execute a process for resettlement in third countries of persons identified as in need of protection. Since 2003, migrants are being held in the Migrants Operations Centre, operated by the private company GEO Group, which has a capacity of 130 migrants but typically keeps fewer than 30 people.[24] It was used again for the temporary protection of Haitian refugees from 2004 onwards, when violence had resurfaced in Haiti and when President G.W. Bush decided to re-install the policy of summary returns to Haiti, except for those migrants who had indicated a need for protection and who passed a subsequent on board pre-screening refugee interview.[25] In 2005, only nine of 1.850 interdicted Haitians were transferred to Guantánamo Bay and only one of those was found to be a refugee.[26] The center is further retained as a contingency facility for a future large scale migration crisis. In 1999, the US government had considered the naval base at Guantánamo Bay as a temporary safe haven for approximately 20.000 refugees from Kosovo, but eventually abandoned the idea.[27] In the beginning of 2010, the US government also initiated plans to use the Guantánamo Naval Base in the event of a sudden outflow of Haitians in the aftermath of the Haiti earthquake.[28]

---

22 R.E. Wasem, Congressional research Service, 'Cuban Migration to the United States: Policy and Trends', CRS Report for Congress, 2 June 2009.

23 Executive Order 13276 of 15 November 2002, 'Delegation of Responsibilities Concerning Undocumented Aliens Interdicted or Intercepted in the Caribbean Region'.

24 GEO group, http://www.thegeogroupinc.com.

25 Legomsky (2006), p. 682, Wasem (2010), p. 5. Frelick has described the on-board refugee screening process as involving a 'shout test' under which 'only those who wave their hands, jump up and down and shout the loudest are afforded a shipboard refugee pre-screening interview': B. Frelick, '"Abundantly Clear: *Refoulement*"', 19 *Georgetown Immigration Law Journal* (2004), p. 246.

26 Wasem (2010), p. 5.

27 *The New York Times* 6 April 1999, 'Crisis in the Balkans: The Haven; U.S. Chooses Guantánamo Bay Base in Cuba for Refugee Site'.

28 Fox News 15 January 2010, 'U.S. Suspends Haitian Deportations as Florida Prepares for Migration From Quake Zone'.

7.2.2 Australia's excised territories and offshore processing

Australia's offshore programme for intercepted asylum-seekers, officially known as the Pacific Strategy but colloquially known as the Pacific Solution, was installed in the aftermath of the 2001 Tampa-incident, discussed in chapter 6, and constituted a validation and consolidation of the actions taken by the Australian government in respect of the boat people found on the *MV Tampa*. Although the offshore processing centre on the Pacific island state of Nauru was closed in the beginning of 2008, the Australian government has continued a policy of excluding boat arrivals from the ordinary terms of the Australian Migration Act and to process them instead in a facility on Christmas Island, one of Australia's overseas territories.

Under the Pacific Solution, a legislative scheme was put in place allowing for the transfer of unauthorized boat arrivals from September 2001 onwards to Nauru and Manus Island, Papua New Guinea. In accordance with memoranda of understanding signed with Nauru and Papua New Guinea, offshore processing facilities were established on the two islands on 19 September 2001 and 21 October 2001, providing for the accommodation of up to 1.200 persons in Nauru and 1.000 in Papua New Guinea.[29] In return, the governments of Nauru and Papua New Guinea were offered financial arrangements.[30] The processing centre in Manus Island was in use for a relatively short period and closed in July 2003, although it was retained as a contingency facility.[31] The facility in Nauru remained in use until 8 February 2008, when a final group of 21 Sri Lankans, found to be refugees, were resettled in Australia as part of the humanitarian resettlement program. In total, 1.637 persons were processed in the Nauru and Manus facilities, of which the majority had the nationality of Iraq or Afghanistan.[32]

Persons found to be a refugee in the offshore processing centers were not legally entitled to enter Australia, but places in third countries were sought for their resettlement. These efforts were only partly successful, with New Zealand being the only country which was prepared to accept a substantial number of refugees. Out of the 1.637 persons brought to Nauru and Manus, 1.153 were found to be refugees.[33] New Zealand allowed for the resettlement of 360 persons and smaller numbers were accepted by Canada, Sweden,

29 Parliament of Australia, Report of the Senate Select Committee on a Certain Maritime Incident, 23 October 2002, paras. 10.33-10.38, 10.51-10.61.

30 Ibid.

31 S. Taylor, 'Australia's Pacific Solution Mark II: The Lessons to be Learned', in: S. Blay, Burn and Keyzer (2008), p. 107

32 Senator Chris Evans, Minister for Immigration and Citizenship, 'Last refugees leave Nauru', press release 8 February 2008; Parliament of Australia Background Note, 'Boat arrivals in Australia since 1976', 25 June 2009, p. 13-16.

33 Ibid.

Denmark and Norway.[34] The remainder were eventually taken to Australia on temporary visas.[35]

In December 2007, the new Rudd government made the decision to close the detention facility on Nauru and to resettle the remaining detainees on mainland Australia. The new government did not however fundamentally depart from the system of excluding unauthorized boat arrivals from the ordinary migration regime. The legislative arrangements pertaining to Australia's excised territories and the special status of offshore entry persons remained in place, but instead of bringing these persons to centers in 'declared countries', the new arrangement provided for the bringing of all unauthorized boat arrivals to a newly built facility on Australia's Christmas Island, opened in December 2008, where they are held in immigration detention until they have been granted a visa or are removed from Australia.[36] Originally, the new centre had a capacity to house 800, but this was rapidly increased to 2040 in early 2010.[37] The official capacity was nonetheless exceeded for the first time in April 2010.[38]

Refugee claims on Christmas Island are not tested within the framework of Australia's Migration Act, but directly against the Refugee Convention. Those determined to be a refugee are not legally entitled to enter Australia, although in practice, the Minister for Immigration and Citizenship will 'lift the bar' on making a valid visa application for all persons found to be a refugee, enabling them to enter into mainland Australia.[39] Those not found to entertain Australia's international protection obligations are subject to removal from Australia in accordance with the ordinary provisions of the Migration Act and removed as soon as practicable.

In July 2010, the new Australian Prime Minister Gillard announced plans to create a regional processing centre in East Timor for the status determination of persons intercepted en route by boat to Australia.[40] These plans are not further discussed here.

---

34 The Senate, Legal and Constitutional Legislation Committee, Commonwealth of Australia, 'Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006' (Report), June 2006, para. 3.90.

35 Ibid.

36 M. Grewcock, 'Systems of Exclusion: The Rudd Government and the 'End' of the Pacific Solution', 19 *Current Issues in Criminal Justice* 2007-2008, p. 364. Australian Human Rights Commission (2009), part C. introduction.

37 *ABC News* 7 March 2010, 'Rudd shoots down detention centre report'.

38 *The Australian* 2 April 2010, 'Capacity exceeded on Christmas Island with 138 new arrivals'.

39 Australian Human Rights Commission (2009), para. 7.

40 *BBC News* 6 July 2010, 'Australian PM Gillard plans E Timor asylum centre'; *The Age* 6 July 2010, 'Gillard Timor policy 'responds to xenophobia''.

7.3 THE FEASIBILITY OF PROCEDURAL CONTAINMENT

The US and Australian policies of offshore processing are both premised on a system whereby detained persons are barred from invoking domestic migration legislation and from accessing courts. This logic of procedurally containing a specific group of migrants coincides with a substantial degree of executive discretion over the status and detention of migrants held in an offshore facility.

In the context of the US offshore programme, the excluding of migrants held at Guantánamo Bay from statutory protection was made possible by a series of executive decisions and the confirmation of their legality by domestic US courts. The Presidential Kennebunkport Order 0f 1992 held Article 33 Refugee Convention not to be applicable outside the territory of the United States and authorized the Attorney General to exercise 'unreviewable discretion' in deciding upon the return of refugees.[41] This unassailable executive discretion was confirmed by the Executive Order of 2002, which explicitly stated that the powers accorded to the Attorney General were not reviewable, that the processing of interdicted migrants did not create rights or benefits that are enforceable at law, and that the establishment of offshore arrangements cannot be construed as to require any procedure to determine whether a person is a refugee or otherwise in need of protection.[42] A variety of policy guidelines were adopted regulating the procedures for screening and pre-screening for refugee status outside US territory, which provided for examinations undertaken by US immigration officers outside the terms of the Immigration and Naturalization Act, without the possibility of review or appeal and without a right to legal representation.[43]

Although lower US Courts had been divided on the question of applicability of immigration statutes and constitutional rights to the persons held in Guantánamo Bay,[44] the Supreme Court, in *Sale*, ultimately found the US Immigration and Nationality Act not to apply beyond the geographic borders of the United States and held the programme of summarily returning interdicting migrants at sea to be subjected to neither domestic nor international obligations.[45] This ruling was followed up in two later cases concerning a series of claims brought by Haitians and Cubans detained at Guantánamo Bay, relating not only to their entitlements under the Refugee Convention and domestic asylum legislation, but also to several rights guaranteed under the US Constitution. The claims were rejected by the US Court of Appeals for the Eleventh Circuit, holding that domestic legislation could not be presumed to

41 Executive Order 12807 of 24 May 1992, 'Interdiction of Illegal Aliens'.
42 *Supra* n. 23.
43 Ignatius (1993), p. 121-129; also see Canadian Council for Refugees, 'Interdiction and Refugee Protection: Bridging the Gap', International Workshop, Proceedings, Ottowa, 29 May 2003, p. 4.
44 See, extensively, Koh (1994) p. 143-148.
45 On the *Sale* decision extensively, chapter 4.3.1.1.

apply beyond the borders of the US without express congressional authorization and that the Haitians and Cubans held in Guantánamo Bay were 'without legal rights that are cognizable in the courts of the United States'.[46] Instead, the court found the US policy of providing these migrants a safe haven a 'gratuitous humanitarian act which does not in any way create even the putative liberty interest in securing asylum processing (…)'. Although recognizing the difficulties of their prolonged stay at the naval base, the court considered this a problem 'to be addressed by the legislative and executive branches of our government'.[47] As noted below however, more recent US litigation on the detention of terrorist suspects in Guantánamo Bay signifies a shift towards the acceptance that US courts do enjoy jurisdiction in reviewing the conformity of detention on Guantánomo Bay with the US Constitution.[48]

Under the Pacific Strategy, Australia's government similarly opted for the establishment of an offshore programme following a system of unreviewable executive control. This system was grounded in a substantial revision of Australia's Migration Act, issued shortly after the Tampa-incident.[49] The revision pertained mainly to the legal status and procedural guarantees accorded to irregular migrants arriving by boat. It removed particular overseas Australian territories from the Australian migration zone (these were called 'offshore excised places'), to the effect that persons arriving at such places ('offshore entry persons') were barred from applying for a visa under Australia's Migration Act.[50] This included applications for a protection visa, the ordinary document granted to persons who are recognized as refugees. Further, the amendments allowed for the taking of offshore entry persons to a 'declared country', which is a country declared by the minister as *inter alia* providing access to effective status determination procedures; protection pending the status determination; and protection for refugees pending their voluntary repatriation or resettlement in another country.[51] Apart from being prevented from applying for a visa, the amended Migration Act also barred offshore entry persons from instituting legal proceedings in Australian courts, including proceedings relating to their entry, their status, the lawfulness of detention and their transfer to a 'declared country'.[52] The system put in place ensured that offshore entry persons fell outside the refugee status determination procedure regulated by the Migration Act, preventing them, perhaps most crucial-

46 *Cuban American Bar Association (CABA) v Cristopher*, 43 F.3d 1412 (11th Cir. 1995). *Haitian Refugee Center, Inc. v Christopher*, 43 F.3d 1431 (11th Cir. 1995).
47 Ibid.
48 *Infra* n. 64 and accompanying text.
49 For a detailed description of the legislative scheme putting in place the Pacific Solution, see eg P. Mathew, 96 *AJIL* (2002), p. 663-5; Taylor (2008); Kerr, (2008).
50 Section 46A Migration Act invalidates visa applications of offshore entry persons.
51 Section 198A(3) Migration Act.
52 Section 494AA Migration Act.

ly, from invoking a right of entry once they were found to be a refugee. Instead, offshore refugee claims were considered by Australian immigration officers under a non-statutory procedure, without granting claimants a right to legal representation, without access to independent merits review, and with no, or very limited, access to judicial review.[53]

The special legislative arrangements pertaining to excised territories and offshore entry persons remained in force after the closure of the Nauru facility and the formal dismantling of the Pacific Solution. The main difference with the past policy is that, instead of being brought to a processing center in a third, 'declared' country, offshore entry persons are since 2008 brought to Christmas Island, which is properly situated within the territorial sovereignty of Australia. Similar to the previously applicable scheme, refugee claims lodged at Christmas Island are tested directly against the definitional terms of the Refugee Convention, without a system of legally enforceable guarantees and without an entitlement for persons determined to be a refugee to enter Australia.[54] The new arrangement did provide for two procedural changes: the introduction of access for offshore entry persons to Australia's legal aid programme and the installment of an Independent Reviewer competent to review negative decisions on refugee claims and to issue a non-binding recommendation to the minister to reconsider lifting the bar to allow a person to apply for a protection visa.[55] A further difference of considerable practical importance is that the Australian government no longer maintains a policy of granting visas to refugees only as a last resort, i.e. if no other countries can be found for their resettlement.[56]

Within the European context, both the inapplicability of the law and the barriers to judicial review are inherently problematic from a human rights perspective. Although it is, as such, possible for states to differentiate in their domestic laws between various forms of entry or to consider particular laws to only apply within certain parts of its territory[57] (or, conversely, also to

53 Taylor (2008), p. 108; S. Kneebone, 'The Pacific Plan: The Provision of 'Effective Protection?'', 18 *IJRL* (2006), p. 715. Although the non-statutory determination procedure does not make provision for judicial review, failed claimants may possibly invoke a constitutional right to seek a remedy in court; see, extensively: Kerr, (2008), p. 57-68.

54 For a summary of the procedure for determining refugee status on Christmas Island, see Australian Human Rights Commission (2009), p. 14-17.

55 Ibid.

56 *Supra* n. 39.

57 Various authors have nonetheless submitted that the putting into place of a distinct processing regime for unauthorized boat arrivals amounts to discriminatory treatment: Francis (2008), p. 284; Legomsky (2006), p. 693; S. Kneebone, 'Controlling Migration by Sea: The Australian Case', in: B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control. Legal Challenges*, Leiden/Boston: Martinus Nijhoff (2010), p. 362. Although the singling out of one specific category of migrants for the purpose of offshore processing, for example on account of nationality, may amount to discrimination, these authors do not substantiate

foreign territories), these arrangements must conform with international law. Crucially, as extensively discussed in chapter 2 of this book, states cannot simply excise particular territories from their human rights obligations, nor are they absolved from respecting those obligations when undertaking activity in a foreign territory.[58] In so far as governmental activity interferes with human rights, the law must set limits to the scope of executive power and must provide guarantees against arbitrary interferences. This implies not only that persons held in an offshore facility may invoke human rights, but also that the state holding them in such a facility must ensure that legal regulations are in place which guarantee against the abuse of discretionary state power.[59]

From the same rationale, migrants held in an offshore facility may invoke the right of having access to a court or an effective remedy. In general terms, Article 13 ECRH and Article 2 (3)(a) ICCPR oblige states to ensure the availability of an effective remedy to vindicate the substantive rights and freedoms guaranteed under both Conventions. Specific provisions on judicial review apply to situations of detention (Articles 5 (4) ECRH and 9 (4) ICCPR).[60] Further, Article 16 Refugee Convention provides that '[a] refugee shall have free access to the courts of law on the territory of all Contracting States.' This latter provision, which, similar to Article 33 of the Refugee Convention, does not require any specific attachment of the refugee with the state, has been interpreted as necessarily applying also to those refugees who have not yet been formally declared to be a refugee.[61]

The programmes of offshore processing in Guantánamo Bay, Nauru and Christmas Island reveal a paradoxical attitude towards the protection of human rights. Notably, as a matter of policy, and with the exception of the United States 'no-screening policy' in respect of Haitians in the period 1992-1994, the Australian and US offshore programmes upheld a pledge to guarantee refugee rights: the very purpose of offshore processing was to ensure that pre-border migration controls paid respect to the special position of refugees, by granting them a safe haven and by not returning those found to be a refugee to their country of origin. The Australian government, in this connection, has explicitly considered itself bound, at least so under the Christmas Island arrangement,

---

whether discrimination based on mode of arrival can be brought under one of the prohibited discrimination grounds. A further question to be determined before one can speak of prohibited discriminatory treatment is whether there is an objective and reasonable justification for the difference in treatment.

58 See chapters 2 and, by analogy, 6.4.

59 Ibid, and especially the discussions in chapter 6.4.2.

60 The Human Rights Committee has considered the Australian restrictions on judicial review of administrative detention to be in violation of Article 9 (4) ICCPR: HRC 30 April 1997, *A. v Australia*, no. 560/1993, para. 9.5.; HRC 6 November 2003, *Bakhtiyari v Australia*, no. 1069/2002, para. 9.4; HRC 18 September 2003, *Baban v Australia*, no. 1014/2001, para. 7.2.

61 Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press (2005), p. 645; Willheim (2003), p. 172.

to the terms of the Refugee Convention.[62] But this pledge to safeguard rights of refugees was implemented within a system designed to prevent migrants from invoking any right which may effectuate their entry into the state. This system necessitated the abandonment of procedural rights and norms of good administration as equally protected under human rights law, including the right to a fair and effective determination of asylum claims, the right to an independent review of the transfer to a processing centre located in a third country, and the right to an independent review of decisions of repatriation or resettlement from the processing center. Ultimately, this strategy of procedural containment leaves the upholding of refugee and other fundamental rights to the exclusive discretion of the state, which is an unacceptable proposition under human rights law. As an American federal judge put it in a judgment on the legal position of the HIV infected refugees whose stay at Guantánamo Bay was prolonged: "[i]f the Due Process Clause does not apply to the detainees at Guantánamo, [the US Government] would have discretion deliberately to starve or beat them, to deprive them of medical attention, to return them without process to their persecutors, or to discriminate among them based on the color of their skin."[63] The implication of the recognition that human rights do apply to programmes of offshore processing is not only that they should pay special consideration to refugees. It also implies that offshore processing is embedded in a framework of procedural guarantees capable of ensuring the respect for those rights.

The more recent developments in US litigation on the detention of terrorist suspects in Guantánamo Bay also tend towards the acceptance of this maxim. The US Supreme Court considered that US courts are empowered to hear *habeas corpus* challenges filed by detainees at Guantánamo Bay, and that the scope of judicial review extends to provisions of the US Constitution.[64] The Supreme Court found reason to depart from its earlier case law that non-citizens detained in foreign territories were never deemed to have rights under the Constitution, in view of the exceptional duration of the detention and because the detainees were held in a territory that, while technically not part of the United States, is under the complete and total control of our Government'.[65]

---

62 According to the Australian government: 'The retention of the excision zone does not prevent Australia fulfilling its international obligations under the Refugees Convention and under other relevant international instruments. Regardless of where, and how, unlawful non-citizens arrive in Australia, those who claim asylum have their protection claims assessed and are provided with protection in Australia if found to be owed protection.' Australian Government Department of Immigration and Citizenship, 'Fact Sheet 75 – Processing Unlawful Boat Arrivals', available at http://www.immi.gov.au/media/fact-sheets/75processing-unlawful-boat-arrivals.htm (accessed 18 May 2010).

63 U.S. District Court for the Eastern District of New York 7 april 1992, *Haitian Centers Council, Inc v. Sale*, 823 F.Sup. 1028 (E.D.N.Y. 1993). See extensively White (2007), p. 249-269.

64 U.S. Supreme Court 28 June 2004, *Rasul v Bush* [2004] 542 U.S. 466; U.S. Supreme Court 12 June 2008, *Boumediene v Bush* [2008] 553 U.S. 723.

65 *Boumediene v Bush*, note above.

Although the reasoning of the Supreme Court may be relied upon also by migrants in the context of legal challenges against detention, the terrorist cases do not necessarily have ramifications in the context of challenges against removal to a third country. Notably, a US Court of Appeals, in relying on the 2008 Supreme Court's decision in *Munaf v Geren* on the transfer of detainees in Iraq,[66] concluded that detainees in Guantánamo, in obstructing their removal to a third country, cannot invoke the Convention Against Torture, because US law only allows judicial review under the CAT in respect of removal proceedings taking place within US territory.[67]

7.4 THE FEASIBILITY OF PHYSICAL CONTAINMENT

A prominent feature of the processing schemes established in Nauru, Christmas Island and Guantánamo Bay is the mandatory detention of migrants. The physical containment of irregular boat arrivals ensures not only that they are prevented from effectuating unauthorized entry and residence, but also serves as a deterrent for future arrivals.[68] The systematic detention of irregular migrants in an offshore facility has attracted considerable criticism.[69] Most importantly, the setting up of a detention regime which is not subject to judicial review, without maximum time limits and no guarantees as to resettlement or repatriation, would potentially allow for migrants to be detained for an indeterminate and excessive period of time. Further, contrary to the detention of asylum-seekers inside the territory of the state of refuge, offshore detention in a remote island facility by its nature restricts possibilities to engage in meaningful activities such as work or education or to maintain contacts with the outside world. In case of refugees, mandatory detention is generally seen to contrast with the notion that, in view of the character and causes of their flight, detention should only be used as a last resort and only upon an individual assessment of the necessity of detention.

---

66 U.S. Supreme Court 12 June 2008, *Munaf v Geren* [2008] 553 U. S. ___

67 U.S. Court of Appeals for the District of Columbia Circuit 7 April 2009, *Kiyemba v Obama*, 561 F.3d 509. The case was subsequently brought to the Supreme Court. Also see N. Frenzen, 'US Migrant Interdiction Practices in International and Territorial Waters', in: Ryan and Mitsilegas (2010), p. 393-395.

68 Francis (2008), p. 274; Parliament of Australia Background Note, 'Boat arrivals in Australia since 1976', 25 June 2009, p. 13. In the UK's New Vision for Refugees, it was considered that '[t]his approach could act as a deterrent to abuse of the asylum system', 'New international approaches to asylum protection and processing', para. 2.

69 Eg Australian Human Rights Commission (2009); Australian Human Rights and Equal Opportunity Commission, 'Submission to the Senate Legal and Constitutional Legislation Committee on the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006', 22 May 2006; HRC, Concluding observations on Australia, 7 May 2009, CCPR/C/AUS/CO/5, para. 23.

The detention of asylum-seekers solely on account of unauthorized entry is controversial but not necessarily prohibited.[70] Under the right to liberty protected by Articles 5 ECRH and 9 ICCPR, detention which forms part of a process to determine whether persons should be granted entry clearance or asylum is not in itself prohibited, provided it cannot be branded as arbitrary. The ECtHR, in *Saadi v United Kingdom*, concluded that states are permitted under Article 5 (1)(f) to detain would-be immigrants who have applied for permission to enter, whether by way of asylum or not, but that, to avoid being branded as arbitrary, detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued.[71] The Court explicitly considered that immigration detention does not require a more stringent proportionality test, i.e. applying detention only as a measure of last resort or striking a balance between the interests involved.[72] Albeit less unambiguous, the Human Rights Committee has also recognized that circumstances particular to the arrival of asylum-seekers and other unauthorized migrants, such as the need for identification and the proper assessment of claims of entry, may warrant their detention.[73] The Human Rights Committee has, in its various pronouncements on the detention of asylum-seekers in Australia, never concluded that Australia's policy of mandatorily detaining all asylum-seekers, on the sole ground of them having arrived in Australia without prior authorization, contravenes Article 9 ICCPR – although it has repeatedly denounced the restrictions to judicial review and

70 See extensively Hathaway (2005), p. 413-439. UNHCR submits that there should be a presumption against the detention of asylum-seekers and that detention should only take place after a full consideration of all possible alternatives: UNHCR, 'Revised Guidelines On Applicable Criteria And Standards Relating To The Detention Of Asylum-seekers', February 1999, Guideline 3; Also see the dissenting opinion of judges Rozakis, Tulkens, Kovler Hajiyev, Spielmann and Hirvelä in ECtHR 29 January 2008, *Saadi v the United Kingdom* (Grand Chamber), no. 13229/03.

71 *Saadi v United Kingdom* (Grand Chamber), paras. 70-74.

72 Ibid, paras. 70-73.

73 In *A. v Australia*, the Human Rights Committee considered that 'the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period.' HRC 30 April 1997, *A. v Australia*, no. 560/1993, para. 9.4. Also see HRC 26 August 2004, *Francesco Madafferi and Anna Maria Immacolata Madafferi v. Australia*, no. 1011/2001, para. 9.2; HRC 6 November 2003, *Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari v. Australia*, no. 1069/2002, para. 9.2. *Contra*, Cornelisse, who concludes that the HRC would not accept general justifications for the detention of asylum-seekers. However, the cases cited in support of that proposition concern violations of Article 9(1) ICCPR on account of prolonged detention instead of the initial decision of detention, G. Cornelisse, *Immigration Detention and Human Rights. Rethinking Territorial Sovereignty*, Leiden/Boston: Martinus Nijhoff (2010), p. 254.

the prolonged duration of detention.[74] In *Bakhtiyari v. Australia,* the Committee found the detention of an asylum-seeker having arrived by boat, in light of the facts that his identity was in doubt and that he had lodged a claim for protection, not to be arbitrary and in breach of Article 9(1) ICCPR.[75] The ECtHR and HRC have however underlined that the notion of arbitrariness may require more vigilance in cases of persons with special needs, including unaccompanied minors, families with minor children or persons with a serious illness.[76]

This rather broad discretion accorded to the state in deciding upon the detention of potential immigrants is however circumscribed by the conditions stemming from the prohibition of arbitrariness in respect of *continued* detention. The detention of unauthorized arrivals, while initially warranted, may become arbitrary if it is *inter alia* no longer connected to its purpose or if the duration of detention exceeds that reasonably required for the purpose pursued.[77] These considerations also apply to the detention of persons whose claims have been refused and who are detained with a view to deportation. According to the ECtHR 'any deprivation of liberty under Article 5 (1)(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 para. 1 (f)'.[78] The HRC has applied a more fully fledged proportionality assessment in respect of continued detention, which includes consideration of whether less invasive means can achieve the same ends, for example the imposition of reporting obligations.[79] The conducting of a proportionality test is also warranted under Article 31 (2) Refugee Convention, which prohibits the imposition of restrictions on the free movement of refugees on account of illegal entry 'other than those are necessary'.[80]

---

74 Ibid.

75 *Bakhtiyari v. Australia*, para. 9.2. The Committee further considered relevant that the person in question was granted a protection visa and released seven months after his arrival.

76 Ibid, para. 9.3; ECtHR 12 October 2006, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03; ECtHR 19 January 2010, *Muskhadzhiyeva a.o. v Belgium*, no. 41442/07; *Madafferi v. Australia*, para. 9.3. See, in general, P. Boeles et al, *European Migration Law*, Antwerp: Intersentia (2009), p. 386-387.

77 *Saadi v United Kingdom*, paras. 74, 77. Also see *A. v Australia*, para 9.4; HRC 18 September 2003, *Omar Sharif Baban v Australia*, no. 1014/2001, para. 7.2.

78 *Chahal*, paras. 112-113: ECtHR 8 October 2009, *Mikolenko v Estonia*, no. 10664/05, paras. 59, 63.

79 HRC 28 October 2002, *C. v Australia*, no. 900/1999, para 8.2.; *Bakhtiyari v Australia*, para 9.3.; *Baban v Australia*, para. 7.2.

80 Goodwin-Gill, referring to the drafting history, has interpreted Article 31(2) Refugee Convention as allowing for the initial detention of asylum-seekers for identification and investigation purposes but as prohibiting prolonged detention unless other justifications arise. G.S. Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection', in: E. Feller, V. Türk and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press (2003), p. 195-196. Note that Article 31 Refugee

Because we may assume that offshore detention also serves the goal of preventing irregular migrants and asylum-seekers from effecting an unauthorized entry, it would not seem that systems of offshore detention run in themselves counter to the right to liberty. However, unlike, for example, the fast-track procedures for asylum-seekers coupled with mandatory detention for specific categories of asylum-seekers as employed by several EU Member States, the Australian and US offshore programmes not merely pertain to the swift and efficient determination of identities and claims of entry. They serve the further purpose of physically excluding migrants until resettlement or repatriation can be arranged, or when, as a last resort, authorization to enter is granted. In general, to maintain detention until a solution as to removal to a particular country can be arranged sits uncomfortably with safeguards against unreasonable duration of detention. These safeguards imply, amongst others, that the identification and verification of claims of entry must be prosecuted without undue delay and that, as regards failed claimants, prolonged detention can only be maintained as long as there is a 'reasonable prospect of removal' or as long as 'action is being taken with a view to deportation'.[81] As regards refugees, it has further been submitted that when detention can no longer be connected to the administrative purposes of identification, status determination or repatriation, it amounts to the imposition of a penalty on account of illegal entry in contravention of Article 31 (1) Refugee Convention.[82]

Especially problematic, in this respect, is that the past US and Australian offshore programmes were established without an adjoining strategy as to the eventual release – in the form of authorization of entry, resettlement or repatriation – of the migrants after their claim had been determined. The ultimate consequence of the decision of the Australian government to embark upon a strategy of detaining and processing boat arrivals in the Nauru facility without authorising their entry, and with neither having procured in advance resettlement and repatriation guarantees from third countries, was that successful and failed claimants alike were compelled to remain within the Nauru facility for considerable periods of time. It has been reported that asylum-seekers recognized as refugees remained on Nauru for four years before being brought to Australia.[83] Another example concerns the HIV-infected Haitian

Convention contains an explicit territorial restriction in that it only applies to refugees who have 'entered or are present' in the Contracting State's territory.

81 *Supra* n. 77. Also see HRC 26 March 2002, *Jalloh v the Netherlands*, no. 794/1998, para. 8.2.

82 Hathaway (2005), p. 422. Francis (2008), p. 284; J. von Doussa, 'Human Rights and Offshore Processing', in: Blay, Burn and Keyzer (2008), p. 48-49; Australian Human Rights Commission (2009), para. 8.1. Note however the territorial restriction to the applicability of Article 31 Refugee Convention, see n. 80 *supra*.

83 Human Rights and Equal Opportunity Commission, 'Submission to the Senate Legal and Constitutional Affairs Legislation Committee on the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006', para. 4.14; S. Taylor, 'Australia's Pacific Solution Mark II:

refugees who were confined to a separate facility in Guantánamo Bay for eighteen months before being allowed entry into the US for further medical treatment and processing.[84] In respect of the current detention of asylum-seekers at Christmas Island, the Australian Human Rights Commission has noted that the arrangements in place have not dispelled the risk that people may be held for prolonged or indefinite periods.[85]

Accordingly, operations of external processing which follow a policy presumption of prolonging detention until a definite solution on their removal can be arranged is prone to conflict, in individual cases, with safeguards against arbitrary detention. In view of the often unsuccessful efforts to secure resettlement or repatriation, it would seem imperative – in order to comply with requirements of periodic review of the justifications for detention and the possibility of release – that offshore detention is complemented with a meaningful 'exit strategy' in case a prospect of removal or resettlement to a third country ceases to exist. Although the US and Australian governments did allow, for humanitarian or practical reasons, the sporadic entry of certain categories of migrants into their territory (or, in the case of Christmas Island: 'community detention'[86]), these decisions were of ad hoc and discretionary character and not based upon existing guarantees established in law.[87]

The Lessons to be Learned', in: Blay, Burn and Keyzer (2008), p. 108; S. Kneebone, 'Controlling Migration by Sea: The Australian Case', in: Ryan and Mitsilegas (2010), p. 362.

84 White (2007), p. 263

85 Australian Human Rights Commission (2009), para. 9.2.

86 Under the presently functioning Christmas Island scheme, the Australian government has pledged to detain unauthorized arrivals only for the purpose of health, identity and security checks and that, once checks have been successfully completed, continued detention is unwarranted: C. Evans (Minister for Immigration and Citizenship), 'New directions in detention: restoring integrity to Australia's immigration system', Speech delivered 29 July 2008. Immigration detainees whose claim has not yet been resolved, are then eligible for 'community detention' on Christmas Island, allowing them to reside at a specified place where they are generally free to come and go and are not subject to constant supervision. The Australian Human Rights Commission has observed however that, due to the small size of the community on Christmas Island and the significant number of detainees, the option of community detention is only sporadically used; see Australian Human Rights Commission (2009), para. 13.

87 In respect of the fist large influx of Cuban migrants in 1994 of which the majority were brought to Guantánamo Bay, the U.S. government made frequent humanitarian exceptions to its initial position that the Cubans would not gain entry into the U.S., and granted parole to unaccompanied minors, families and persons suffering from medical emergencies; see M.E. Sartori, 'The Cuban Migration Dilemma: An Examination of the United States' Policy of Temporary Protection in Offshore Safe Havens', 15 *Georgetown Immigration Law Journal* (2001), p. 348-349. Under the presently functioning Christmas Island scheme, the Australian government has commenced with the transfer of persons who have been denied refugee status from Christmas Island to detention facilities on mainland Australia, although this does not change their entitlements under Australia's Migration Act; *ABC News* 29 March 2010, 'Asylum-seeker transfer could spark test case'.

The conclusion that programmes of offshore processing should be complemented with meaningful exit guarantees in the sphere of entry, resettlement or repatriation acquires specific gravity in respect of refugees, because the Refugee Convention presupposes that refugees should not be isolated from their host communities and that they should, congruent to their level of attachment with the state, eventually be granted a variety of social, economic and social rights.[88] Even though the freedom of movement guaranteed under Articles 31 (2) and 26 Refugee Convention accrues to refugees who are either unlawfully or lawfully *present* in the state's territory and can therefore not literally be construed as applicable to refugees not yet having entered the state, the case law of the European Court of Human Rights and Human Rights Committee indicates that the detention of asylum-seekers must take proper account of their possible entitlements under international law.[89] A system designed to prolong detention in a remote facility beyond what is necessary for status determination or for effectuating resettlement to a third country runs counter to that notion. It fails to recognize the Refugee Convention's underlying premise of creating genuine prospects and possibilities of self-fulfillment for refugees. True, the enjoyment of most of the substantive rights of the Refugee Convention depends upon the prior acquisition of lawful presence or residence. But a system which neither guarantees a right of lawful entry for refugees nor ensures that lawful entry can be obtained into another state, leaves refugees in a legal vacuum, in which the enjoyment of the substantive rights laid down in the Refugee Convention (and in other human rights treaties) is potentially subject to indefinite postponement.

7.5 Issues of attribution and the allocation of responsibility

The aforegoing analysis presupposed that external processing engages the international responsibility of the state, on account of the state having brought the migrants under its jurisdiction (thereby enlivening its human rights obligations vis-à-vis the migrants) and on account of potentially wrongful conduct being attributable to that state. A notable feature of external processing is however that it can take place outside the territorial sovereignty of the state and may involve multiple actors, giving rise to questions of jurisdiction, attribution and the allocation of international responsibility.

As regards the offshore programmes initiated at Christmas Island and Guantánamo, these questions are not particularly apparent. Both programmes are of unilateral character, with an easily identifiable state actor, and take place

88 See extensively Hathaway (2005), p. 978-979.

89 See, in particular, ECtHR 25 June 1996, *Amuur v France*, no. 19776/92 para. 43 ('States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions'). Also see *Saadi v United Kingdom*, para. 74; *A. v Australia*, para. 9.4.

within the state's territory (Christmas Island) or otherwise within a setting where the state retains exclusive and ultimate control over the migrants, including over detention matters, refugee status determination, resettlement and repatriation (Guantánamo Bay). In the light of the framework on the extraterritorial application of human rights and the allocation of responsibility for wrongful conduct as established in chapters 2 and 3, it can be readily assumed that decisions or activity in the course of external processing which interfere with human rights would come within the scope of the acting state's human rights obligations.[90]

As to the Nauru scheme, a more complex division of labour between different actors was agreed upon. Under the Memorandum of Understanding concluded with the government of Nauru, Nauru agreed to accept 'certain persons' on behalf of Australia, in return for Australia's commitment that it would ensure the departure of the individuals within a reasonable time and that it would fully finance all activities in Nauru.[91] Under a service agreement with Australia, the International Organisation for Migration (IOM) provided reception and processing services, including management of accommodation and the provision of staff.[92] Security tasks were shared between Nauru and Australian officers, with Australian security personnel providing 'the more active security within the centres'.[93] The government of Nauru government had issued special purpose visa to the asylum-seekers which formed the basis for their temporary residence and confinement to the detention facility on its territory.[94] Although UNHCR had initially been involved in the status determination of the asylum-seekers, it later withdrew from that agreement, leaving Australian immigration officers exclusively responsible for the determination of claims.[95]

---

90 Cf. ECtHR 30 June 2009, *Al-Saadoon and Mufdhi v United Kingdom*, no. 61498/08 (adm. dec.), paras. 87-89; CAT 21 November 2008, *J.H.A. v. Spain (Marine I)*, no. 323/2007, para. 8.2. See further chapters 2.5 and 3.

91 Parliament of Australia, Senate Select Committee Report (2002), paras. 10.33-10.36. For the operational arrangements, see also High Court of Australia 31 August 2005, *Ruhani v Director of Police [No 2]*, [2005] HCA 43, para. 49-51; S. Taylor, 'The Pacific Solution or a Pacific Nightmare?: The Difference Between Burden Shifting and Responsibility Sharing', 6 *Asia Pacific Law and Policy Journal* (2005), p. 13-14.

92 Parliament of Australia, Senate Select Committee Report (2002), paras. 10.81-10.82.

93 Ibid, para. 10.83.

94 *Ruhani v Director of Police [No 2]*, para. 8.

95 According to UNHCR, 'While UNHCR does undertake refugee status determination under its mandate, this is normally undertaken in situations where signatory States have no resources or capacity to conduct the exercise, or where a State is not signatory to the 1951 Convention, thus requiring that UNHCR undertakes refugee status determination in order to ensure the protection of refugees. In the context of extraterritorial processing by Australia, given that Australia is a long-time signatory to the 1951 Convention and has in place its own procedures, these procedures should be applied'; UNHCR, Migration Amendment (Designated Unauthorised Arrivals) Bill. Submission of the Office of the United Nations High Commissioner for Refugees to the Senate Legal and Constitutional Legislation Commit-

This division of responsibilities may certainly give rise to difficulties in the allocation of responsibilities; or be used as a pretext to eschew responsibility. It indeed appears that both the Nauru and Australian governments denied responsibility for the situation in which the asylum-seekers were held.[96] Given the plurality of actors involved and the complexity of the legal arrangements, it will depend on the precise complaint at issue and the involvement of the respective parties to which actor particular conduct should be attributed and on what account individuals should be considered to fall within the jurisdiction of Nauru or Australia for the purposes of human rights protection.[97] In general, it can however be observed that Australia exercised exclusive authority over the procedure leading to a decision on resettlement or repatriation, that it financed the operation, and that its officials were present and closely involved in the management of the facility. Further, Australia was the party initiating, organizing and eventually terminating the operation. This direct and decisive involvement of Australia not only opens various avenues for attributing conduct or for establishing derived forms of responsibility as discussed in chapter 3, but is also instructive in the establishment of a sufficiently close 'jurisdictional link' between the migrants and Australia as discussed in chapter 2, either under a reasoning that Australia maintained 'effective control' over the migrants, because the migrants were directly affected by acts of Australian officials, or on account of Australia's involvement in and influence over activities undertaken by other actors, potentially enlivening positive obligations.[98] This does, on the other hand, not preclude the existence of possible concurrent responsibility for wrongful conduct on the side of Nauru.[99]

7.6 Final remarks

This chapter has identified some of the key human rights issues raised by the United States and Australian policies of external processing. By focusing on the two aspects of the procedural and physical exclusion of migrants, the analysis is relevant also for possible future policies embracing the idea of external processing launched by the European Union and/or its Member States.

---

tee, 22 May 2006, para. 24.

96 Taylor (2005), p. 14-15. Referring to the management of the centre by IOM, Australia's Immigration Minister Amanda Vanstone reportedly stated: 'They are in charge. It's not in Australian territory, it's on Nauru, and being run by other people. If someone doesn't want to be there, they can go home.' *Tahiti Presse* 17 December 2003, 'Australia: hunger-striking asylum-seekers not our problem, says government'.

97 See, in general, chapter 3.2.3-3.3.

98 Cf. ECtHR 8 July 2004, *Ilascu a.o. v Moldova and Russia*, no. 48787/99, paras. 392-394. See extensively, chapters 2.5.2, 2.5.3, 3.2.2.4.

99 See chapter 3.2.4.1.

It follows from this chapter that, although not necessarily contravening the international refugee law regime, the procedural and physical containment of a specific group of migrants raises issues under more general doctrines of human rights law. The summary conclusion is that the programmes of offshore processing carried out in Nauru, Guantánamo Bay and Christmas Island failed to deliver sufficient guarantees in the sphere of *procedures* and *prospects*: the absence of a legal and procedural framework allowing for the vindication of human rights and the absence of guarantees in the sphere of repatriation or resettlement ultimately allowed for a system where refugees and other migrants were left in a legal vacuum for potentially indefinite duration. Although the US and Australian governments did provide for status determination and eventual removal from the offshore facility, these procedures were not grounded in the law nor subject to independent (or, in the case of Christmas Island: legally enforceable) review.

The conclusion that external processing must more firmly be embedded in a framework of guarantees safeguarding against the arbitrary exercise of state power is much in line with the previous chapter's conclusions on interdictions at sea. Similar to what was said in the context of sea border controls, the key challenge for states wishing to employ policies of offshore processing is to devise such policies in harmony with a meaningful human rights strategy. It follows from this chapter that such a human rights strategy embodies more than a policy of screening for refugees and a search for ad hoc solutions in the event a person is found to be a refugee. Perhaps most crucially, all actions taken in the course of external processing potentially interfering with human rights must be based in the law and must allow for review; and detention may not be maintained beyond what is necessary for status determination or for effectuating a removal.

These requirements may have notable repercussions for the arrangement of programmes of external processing. Especially guarantees of securing release from detention in the absence of prospects of removal compel governments engaged in offshore processing to ensure that alternative solutions for the reception of migrants are put in place. Under the Christmas Island arrangement and the UK New Vision proposal, it is foreseen that those found to be a refugee should be resettled in Australia and the EU Member States respectively.[100] But it may be much more difficult to devise similar guarantees of removal in respect of failed claimants. In view of the often protracted nature of readmission procedures, states may well be confronted with persons whose repatriation to the country of origin cannot be arranged and for whom alternatives must be found. This challenge of putting into place an 'exit strategy' also questions the effectiveness of offshore processing as a temporary solution for the reception of migrants. As the past US and Australian experiences of

100 A New Vision for Refugees, para. 2.

external processing of asylum-seekers show, the securing of resettlement or readmission into third countries was only partly successful, and a majority of the migrants held in Nauru and all the Cuban migrants held in Guantánamo Bay in the 1990s, were eventually brought to the mainland.

The conclusions of this chapter are premised on the finding that the Australian and US governments exercised *de facto* and *de jure* control over the processing, detention and eventual removal from the facility and that the persons held in the facilities could thus be brought within the personal scope of the respective states' human rights obligations. One may however also imagine situations where external processing merely involves the transfer of persons to such a facility and/or the financing of the facility, but without a further or 'decisive' involvement of the state in the treatment and the determination of protection claims.[101] Examples of such arrangements are the border cooperation agreements between Australia and Indonesia and Papua New Guinea, where the authorities of Indonesia and Papua New Guinea have agreed to intercept irregular migrants thought to be intent on traveling toward Australia and under which the Australian government funds the reception and status determination carried out in those countries.[102] Under these arrangements, it is problematic to identify a clear 'jurisdictional link' between the financing state and the migrants. As submitted in chapter 2, the existence of this link will then depend on the relationship of the state with a particular set of circumstances involving the individual being of such a special nature that the state can be considered to be under a duty to use its influence, knowledge, or other resources at its disposal to prevent the manifestation of human rights violations, provided that the state is indeed legally and factually capable to do so.[103] It is highly unlikely however, that the mere financing of reception and status determination, in the course of which human rights violation incidentally occur, would give rise to the international responsibility of the financing state.

101 The UK New Vision remained silent on the question whether EU Member State should be directly involved in the operation of Transit Processing Centres. It merely proposed that such centers should be managed by IOM and that screening should occur under the 'approval' of UNHCR; ibid, para. 2.

102 For an overview: S. Taylor and B.R. Rafferty-Brown, 'Waiting for Life to Begin: the Plight of Asylum Seekers Caught by Australia's Indonesian Solution', 22 *IJRL* (2010), p. 558-592.

103 See especially chapter 2.5.3. Also see chapter 3.2.2.4.

8 Conclusions

The late Professor Atle Grahl-Madsen, pioneer in the development of international refugee law, once explained why it is that states perceive their obligations towards refugees as being essentially territorial in character:

> 'It must be remembered that the Refugee Convention to a certain extent is a result of the pressure by humanitarian interested persons on Governments, and that public opinion is apt to concern itself much more with the individual who has set foot on the nation's territory and thus is within the power of the national authorities, than with people only seen as shadows or moving figures "at the other side of the fence." The latter have not materialized as human beings, and it is much easier to shed responsibility for a mass of unknown people than for the individual whose fate one has to decide.'[1]

This perception remains prevalent today. It underlies the United States' 'wet-foot/dry-foot policy' (under which only those Cuban migrants 'touching' US soil become subject to US immigration legislation), it forms the justification of the Italian push-backs as advanced by Prime Minister Berlusconi ('to take in only those citizens (…) who put their feet down on our soil, in the sense also of entering into our territorial waters') and constitutes the essential rationale behind the Australian offshore programme as voiced by Prime Minister Howard ('we will decide who comes to this country and the circumstances in which they come'). For individuals to successfully claim protection with a state other than their own, they need first to enter that state. And as long as they have not succeeded in doing so, the rationale goes, the approached state is discharged of its protection obligations under international law.

The present study was born out of the conception that the proliferation of practices of external migration control employed by major immigration countries, including the Member States of the European Union, warrant a reconsideration of this rationale. The Refugee Convention (and Grahl-Madsen's commentary) was drafted in a time when states were passive recipients of refugees. Very few would derive from the Refugee Convention an obligation on the part of states to venture out of their territory to actively seek refugees and to offer them asylum – even though states are increasingly urged to do so by contributing to resettlement efforts on a voluntary basis. But the question

---

1 See chapter 4.3.1.1. at n. 108.

of the territorial scope of protection obligations towards persons seeking asylum does become manifest when states actively seek to *prevent* migrants, possibly including refugees, from arriving at their borders. Such activity would potentially allow for the circumvention of protection duties states normally incur in respect of asylum claimants presenting themselves at the state's border. The possible detrimental consequences in terms of obtaining access to protection gave rise to the study's thesis that when European states endeavour to control the movement of asylum-seekers outside their territories, they remain responsible under international law for possible wrongdoings ensuing from their sphere of activity. The general premise underlying this thesis is that the territorial scope of the state's obligations under international law, including human rights law, is congruent with – and must necessarily follow – the locus of state activity. To wit, this premise equals that of Grahl-Madsen noted above, in so far as he indicates that the degree to which a state incurs responsibility for protecting people should be commensurate with the degree to which people are 'within the power of the national authorities'.

This concluding chapter proceeds as follows. First, a number of final observations are made on the key thesis of the study mentioned above: in what manner, through which avenues and under what circumstances does international law, and in particular human rights and refugee law, *govern* the externalized migration practices of EU Member States. This includes an appraisal of the limits inherent in international and human rights law in responding to activity which takes place across legal orders and which may involve a plurality of actors: in particular the duty to respect other state sovereignties, limits inherent in substantive human rights norms, and the general boundaries inherent in the Law on State Responsibility and the extraterritorial application of human rights (section 8.1).

Second, some concluding observations are drawn as to the material and procedural obligations of international human rights and refugee law informing current and possible future practices of European states in the sphere of external migration control. In setting forth the dynamics explaining why states not always succeed in devising effective human rights strategies in their external migration practices, this section makes a number of recommendations for ensuring that fundamental rights are accorded higher priority in the external dimension of asylum and migration (section 8.2).

Finally, some concluding remarks are made on the potential of the European Union, both as a source of law and as a political actor, to contribute to appropriate norm-setting. This involves not only the manner in which EU law may set limits to individual Member State activities, but also the broader question of the capacity of the EU to address root causes for Member States' reluctance to implement respect for fundamental rights in their external activities (section 8.3).

8.1 SOVEREIGNTY, TERRITORY AND HUMAN RIGHTS: TOWARDS A GENERAL PROPOSITION

One of the reasons why only persons outside their country of origin are eligible for refugee status is that the protection of internal refugees, now commonly denoted as internally displaced persons, was seen as constituting an infringement of the territorial sovereignty of the country of origin.[2] Internal refugees were not deemed unworthy of protection, but the physical presence of the refugee within his country of origin was seen as a practical impediment for other states to effectively provide protection. Within human rights treaties of general scope, the possibility of colliding state sovereignties also constituted a decisive consideration for introducing restrictive clauses which made the existence of a state's human rights obligations dependent on a person being within its jurisdiction and/or territory. The division of the world in mutually exclusive state sovereignties was necessarily seen to implicate that the state is legally and practically handicapped in ensuring respect for human rights in another country.

The phenomenon of extraterritorial migration enforcement challenges this paradigm. It shows that exercises of state power may transcend predefined territorial demarcations. Although this re-opens the debate on the relationship between human rights protection and state sovereignty, it also opens up an area of legal indeterminacy. It should not be doubted that the process of relocating migration management and of dispersing control tasks to other actors severely hampers the identification of the applicable law and the actor who can be held internationally responsible for potential wrongful conduct. Typically this process of relocation and outsourcing is accompanied with the establishment of extraordinary procedures which fall outside the ambit of domestic migration statutes. Although this renders the identification of the international legal framework governing these activities all the more important, it presupposes an understanding and examination of doctrines of international law which not only deal with the substance of refugee rights and human rights, but also with some of the founding principles of human rights law and overarching regimes of international law. In essence, the questions raised in this study form part of one of the arguably most topical challenges within contemporary international law: how to formulate responses to shifting and colliding state sovereignties within an international legal order which is still premised on the foundational ideas of sovereign equality and territorial demarcation.

The formulation of answers, in this study confined to issues relevant for human rights and refugee protection, is by no means an easy task. The conclusions drawn in the first chapters of this study are attempts at putting some

2 See, extensively, J.C. Hathaway, *The Law of Refugee Status*, Toronto/Vancouver: Butterworths (1991), p. 29-33; A.E. Shacknove, 'Who Is a Refugee?', 95 *Ethics* (1985), p. 282-283.

of the most topical issues in context and of contributing to ongoing discourse, but they leave ample room for debate and further questions. Undoubtedly, many of the rules and principles discussed in this study will remain contested. Not only because the legal complications are of magnitude, but also because the political stakes are high. In the specific context of migration, perceived gaps in international law are employed by states as a means to discharge themselves of protection obligations. They may allow for shifting the migrant burden and its concomitant administrative, social and financial implications. It is no surprise therefore, that some governments continue to deny the existence of extraterritorial human rights obligations, that they posit that humanitarian activity should not be conflated with human rights obligations, or that they point to other entities as being primary responsible for protection or controlling activities.

As this is a legal study which is not as such hampered by political ramifications, it is nonetheless possible to draw some general conclusions on the manner in which international law in general, and human rights and refugee law in particular, govern the external migration activities of states. One of the foremost conclusions must be that *international public law* contains a potent tool-box for holding states responsible for violations of international obligations occurring in the context of extraterritorial and/or joint activity of states. Under the general regime of international law, it is the *conduct* of the state, constituting a violation of its international obligations, which forms the essential source for arriving at the state's international responsibility.[3] This basic rule is sufficiently wide to respond to the various atypical forms of state activity discussed in this study. Firstly, as a matter of principle, international obligations govern state conduct wherever it takes place, unless a particular territorial restriction flows from the text of a treaty or particular obligation.[4] Secondly, the study has indicated that there are multiple avenues for holding states accountable for conduct which may have been committed by actors which are not normally classified as agents of the state. The study has extensively discussed how the legal constructs of attribution, derived responsibility and positive obligations constitute three separate but conjunctive instruments for identifying which conduct is attributable to the state or which conduct should dependently on conduct of another entity lead to the state's responsibility. It follows that, subject to limitations, international law must be considered as generally well-equipped to respond to the various forms through which European states implement their agendas of external migration control: including interceptions at sea, activities of private airlines which have been delegated powers in relation to immigration control, activities of immigration officers posted in a third country, joint operations of border

3 Chapter 2.1 and 3.1.
4 Chapters 2.6 and 4.3.

control, or schemes of external processing. The doctrine of positive obligations, or due diligence, is an especially potent jurisprudential tool for arriving at the international responsibility of a state in situations where another actor is the source of the violation complained of and where the state, on account of its facilitating activity or because of unduly passive conduct, has abused or failed to make use of material opportunities to ensure the upholding of human rights.

The study has proposed, secondly, that a similar rationale – i.e. the locus of obligations is commensurate with the locus of the exercise (or effects) of power – should serve as guiding principle for deciding upon questions of extraterritorial application of obligations under *human rights treaties*. The issue of whether a particular human rights norm binds a state who takes action in respect of an individual outside its territory involves both the debate on possible restrictions of general nature (and the oft-cited delimiting role of the notion of 'jurisdiction' in this respect) and the possible specific territorial limitations flowing from the text of a particular human right at issue. In respect of the second question, the foremost limits set to obligations of states to protect refugees outside their borders flow from the territorially restricted refugee definition in the Refugee Convention and the manner in which the prohibition of *refoulement*, the key norm to be respected under refugee law, has found expression in Article 33 Refugee Convention and Article 3 CAT. The literal wording of these provisions renders it problematic to construe them as applicable also to activity undertaken in respect of persons who are within their country of origin or within another territory from which the threat with persecution or torture stems. This limitation is not present under the prohibitions of *refoulement* established under the ICCPR and ECRH, which entail a protective duty of more general nature.

As regards the general debate on the extraterritorial application of human rights, the study has observed that the notion of jurisdiction under human rights law has been employed by national and international courts and bodies in divergent manner, making it difficult to make firm pronouncements on the precise circumstances giving rise to extraterritorial human rights obligations. The most contested issue in this respect appears to be whether any exercise of authority of the state, in whatever form it takes place, constitutes an 'exercise of jurisdiction' and can hence bring affected individuals within the personal scope of the state's human rights obligations; or that it is only in exceptional cases that acts of the contracting states performed, or producing effects, outside their territories can bring individuals within the acting states' 'jurisdiction'. This latter approach appears to presume that there must be a pre-existing relationship between the state and the individual, normally conceptualized through the criterion of 'effective control', or, in the words of the European Court of Human Rights, 'other recognised instances of the extra-territorial

exercise of jurisdiction'[5] – a phrase relating to the *competence* of states to assert jurisdiction in respect of matters which may also affect the sovereignties of other states.

In respect of this issue, the study has proposed that both the reference to the competence (or the *right*) of a state to act and the employment of the factual criterion of 'effective control' as a basis for the establishment of a jurisdictional link between the acting state and the affected individual are problematic as delimiting concepts in defining the territorial scope of human rights obligations. Firstly, human rights bodies and the International Court of Justice have accepted as a general rule that *de facto* exercises of *power* (or control), regardless of whether the activity constitutes a legitimate exercise of the state's authority vis-à-vis another state, form the basis for enlivening the state's obligations under human rights treaties.[6] Secondly, the criterion of 'effective control', although of potential use in situations of control over a foreign territory, is rather selectively used by human rights courts and supervisory bodies to determine the extraterritorial application of particular human rights provisions in respect of incidental exercises of power or authority over persons. There are several judgments and decisions in which, for example, the mere exercise of force, the refusal to issue a passport or visa to a person living abroad, or decisions such as the termination of pension rights or the freezing of assets in respect of persons living abroad, did attract the state's human rights obligations – without any particular examination of whether the affected individuals could be said to be within the state's 'effective control'.[7] On a similar token, refusing migrants further passage at sea, refusing persons to board an airplane at a foreign airport or refusing to offer protection to persons who present themselves to a diplomatic mission are all acts which can in themselves – but see below – bring affected individuals within the purview of human rights protection. In sum, *de facto* exercises of authority over persons, in whatever form and wherever it takes place or where its effects are felt, should be considered sufficient for establishing a 'jurisdictional link' between the state and the affected individual. The evolving case-law supports a proposition that power or authority, rather than territory, engages the state's obligations under human rights treaties.

It follows that the thesis introduced in this study, i.e. European states remain responsible under international law for possible wrongdoings ensuing from their sphere of activity in pursuing their external migration policies, finds affirmation in both the general regime of international law and the subset of human rights. This having said, the thesis, which is formulated in rather broad terms, has it limits. Although it may serve as a general rule or axiom for deducing and inferring the scope and contents of a state's obligations in a

5 ECtHR 12 December 2001, *Bankovic v Belgium*, no. 52207/99, para. 72.
6 Chapter 2.4, 2.5.2.
7 Chapter 2.5.2.

particular case at hand, the exertion of power in and impacting upon other states' sovereignties may well give rise to further questions of demarcation. Firstly, there is the potential of *conflicting* state sovereignties: how do the sovereign interests of other states restrict the power of the state to ensure human rights within the other state? A second limitation concerns the potential of *conflating* state sovereignties: in which sovereign order (and concomitant sphere of responsibility) should particular violations of the law be placed which involve a causal chain of actions or multiple actors?

8.1.1 Conflicting sovereignties

To posit that international law recognizes for and follows exertions of state sovereignty outside the state's territory does not in itself resolve the question of a potential conflict between human rights obligations and the duty not to interfere within the sovereign order of another state. Although they may seem hypothetical, there can be all sorts of situations where to guarantee human rights to persons outside the state's territory could come in conflict with the (sovereign) interests of another state. A grant of diplomatic asylum by a sending state in opposition to demands of the host state is a classic example, but similar situations of norm conflict may arise when, for example, a border guard official of a sending state is confronted with an asylum claim of a fugitive national of the host state, or when a state interdicts a migrant vessel flying a foreign flag and where the flag state demands the return of the passengers. The study has identified several cases before British courts and the ECtHR in which such precise issues arose but where the courts followed different approaches in reconciling human rights obligations with the rule of non-intervention.[8] Somewhat simplified, approaches have been adhered to under which human rights can simply not come into play when this would conflict with sovereign decisions of the territorial state (*Gentilhomme*); under which the protection of human rights can only be deemed compatible with public international law if it constitutes a recognised humanitarian exception to the principle of state sovereignty (*B and others*); or that in principle all acts or omissions of the state require compliance with human rights, regardless of whether the act or omission in question is a consequence of the necessity to comply with international legal obligations, leaving room for an argument that extraterritorial human rights obligations may trump the principle of respect for the territorial sovereignty of the host state (*Al-Saadoon and Mufdhi*). Although one may tentatively infer from this case law a development under which the notion of state sovereignty is no longer seen as necessarily discharging the sending state of its own human rights obligations, it neither seems

8 Chapter 4.5.

that international law is as of yet sufficiently developed to provide unequivocal guidance for addressing this type of situations.

The absence of a set of guiding principles in this respect should not come as a surprise. The relationship between human rights and state sovereignty is such a central and contested topic in international law that it is arguably too much to expect courts to develop a normative framework for reconciling these two core notions in the context of rather isolated cases. Failing the existence of this guiding framework, appropriate solutions could however be sought, not (only) on the level of legal doctrine or progressive jurisprudential developments, but also, by analogy to the conventions on diplomatic asylum concluded in Latin-America, in arrangements of practical character between host and sending states which address the human rights concerns of specific extraterritorial practices. Hence, should states for example agree on the placement of border guards of one party in that of the other, on the conducting of joint border controls or on the setting up of centers for the reception of migrants, states could avoid being confronted with situations of norm conflict by agreeing upon conditions with the host state which pay regard to their reciprocal interests. An apt illustration in this respect concerns the case of *Al-Saadoon and Mufdhi*, where the ECtHR had faulted the United Kingdom for having failed to make use of material opportunities to secure arrangements with the Iraqi government which would both respect the proper treatment of prisoners in custody of British forces in Iraq as well as the sovereign interest of the Iraqi authorities to allow its justice system to have its course. The challenge for states concluding arrangements providing for competences to undertake particular enforcement activity in another state is thus to include in those arrangements, where relevant, agreements on respect for human rights as well.

8.1.2 Conflating sovereignties

A second topical problem which rises in the context of activities described in this study concerns the identification of the degree of causality between a state's sphere of activity and the eventual violation of human rights. Not all extraterritorial activity which in some way negatively impacts upon human rights must necessarily attract the acting state's responsibility. Perceiving the term jurisdiction under human rights law in the manner as described above – a term which first and foremost gives expression to merely an exercise of state power – is only one element in establishing whether the state has acted in contravention of its human rights obligations. A further question, which is especially salient in the context of the present study, is whether exercises of authority which only remotely or indirectly affect an individual in enjoying fundamental rights should also attract the state's responsibility. Here, the study has tentatively drawn a distinction between, on the one hand, enforcement

activity in which there is a direct or sufficiently close link between the state and the alleged misconduct, such as joint operations of border control or schemes of external processing involving a decisive amount of involvement and influence of a state; and, on the other hand, programmes of aid or cooperation of more general nature, such as development assistance targeted at root causes of migration, the supply of surveillance equipment, the training of border guards, or capacity building for the reception and treatment of migrants.

In the latter type of situations, assistance is normally rendered without specific knowledge or presumed awareness of the circumstances in which it will be used. This renders it difficult to establish a sufficiently close causal link between the state's sphere of activity and the eventual misconduct complained of. Although this may allow a critical observer to conclude that European states can simply shift all responsibilities for controlling the border to other states – by funding, training and supplying equipment – this essential limit of international law must generally be deemed as beneficial for the promotion of international cooperation. Further, this does not as such deprive states from being receptive to human rights concerns in deciding upon such forms of cooperation, since there may be circumstances, especially in situations of systematic violations, where the link between general programmes of aid and human rights does become legally relevant.

A preliminary issue within human rights law complicating the identification of the required causal link concerns the choice of the appropriate jurisprudential tool. The study has identified several cases (*Tugar*, *Hess, Ben El Mahi*) where the absence of a 'direct' link between the exercise of authority and the alleged violation was addressed in the context of the jurisdiction-requirement under human rights treaties, leading to the conclusion that the relationship between the state and the alleged victim was 'too remote' (*Tugar*), that there was simply no 'jurisdictional link' (*Ben El Mahi*) or that an exercise of 'joint' authority cannot be divided into 'separate jurisdictions' (*Hess*).[9] There have however also been cases (*Ilascu*, *Treska*, *Application of the CERD (Georgia v Russia)*) where, also in the absence of an act 'directly' targeted at an individual, the notion of jurisdiction was not perceived as a *prima facie* barrier for accepting that the relationship of a state with a particular set of circumstances can be of such special nature, that the state's (positive) human rights obligations may become engaged in respect of the individual.[10]

In respect of this issue, the study has questioned whether the requirement of 'jurisdiction' is the appropriate tool for giving expression to the link which must exist between the acting (or omitting) state and the eventual wrongful conduct committed in respect of an individual. In particular, employing the notion of jurisdiction in this vein may compete with, or potentially displace,

9 Chapters 2.5.2, 3.2.4.2, 3.3.2.
10 Chapters 2.5.2, 2.5.3, 3.2.2.4, 3.2.4.2, 3.3.2.

other legal constructions which also bridge acts of the state with eventual wrongful conduct: the concept of positive obligations, the doctrine of derived responsibility (or 'aid and assistance'), but also the 'victim-requirement' as laid down in Article 34 ECRH, which requires the existence of a 'sufficiently direct link between the applicant and the damage allegedly sustained'.[11] This is not the place to repeat the differences in nature between these legal concepts and the respective requirements to be met for holding a state to have violated its human rights obligations. It suffices to emphasize that these other legal concepts have been developed precisely to provide guidance as to the circumstances giving rise to international responsibility for violations of international law in situations where the establishment of the link between the state and the affected individual is not straightforward. The tendency, in particular within the case law of the European Court of Human Rights, to bring together questions of extraterritorial applicability with those of causality under the single denominator of 'jurisdiction' hence appears to conflate issues which are conceptually distinct. Especially a narrow outlook on the 'jurisdiction'-requirement in this respect risks opening up an area within human rights law where the state's activity may be material or decisive in the eventual manifestation of human rights violations, but without a concomitant level of international responsibility.

8.2 THE IMPLEMENTATION OF A HUMAN RIGHTS STRATEGY: TOWARDS RECOMMENDATIONS

The main task undertaken by this study has been to clarify the applicable law and to derive from that law the essential conditions for the extraterritorial treatment of refugees and other persons entitled to international protection. The key conclusion in this respect is not that extraterritorial migration enforcement is *against* the law, but rather that is it is *within* the law: external migration enforcement cannot be implemented in terms of unfettered discretion of states to control migration, but takes place within the ambit of well-established guarantees of international law on the treatment of aliens in general and refugees in particular.

Current and past practices of external migration control employed by EU Member States and other Western countries display notable discrepancies in the level of human rights protection. Some policies have been accompanied by strict procedural safeguards; others aim at respecting human rights but without a system of procedural rights guaranteeing their effectiveness; and some proceed from the assumption that states enjoy an unassailable discretion in deciding upon the treatment of migrants.

11 See chapters 2.5.3, 3.2.2.4, 3.3.

By way of good practice, mention can be made of the United Kingdom's scheme introduced in 1999 of enabling its immigration rules to be operated extraterritorially rather than only at UK points of entry. Although this scheme expressly aimed at stemming the flow of asylum-seekers coming from countries not subject to the UK's visa regime (through the posting of immigration officers in foreign countries to conduct pre-clearances), the tasks and duties of the immigration officers operating that scheme were expressly incorporated in the UK immigration statute.[12] In granting or refusing leave to enter the immigration officers were bound by the ordinary grounds for refusing entry and those refused leave to enter enjoyed the right to lodge an appeal. Although the House of Lord held the relevant obligations not to include respect for the prohibition of *refoulement*,[13] the arrangement evidences that it is well possible to export domestic legislation on entry and border controls to controlling activity of state agents in a foreign country.

The schemes of migrant interdiction at sea and the subsequent processing of asylum claims in an extraterritorial facility employed by the United States and Australia, and arguably also the ad hoc agreement between Spain and Mauritania on the passengers of the *Marine I*, are examples of arrangements which do in themselves aim at respecting human rights, and in particular the plight of refugees, by providing for a form of refugee screening and subsequent status determination. These arrangements accordingly reflect a recognition that human rights do matter and that refugees should not be put at risk of being returned to persecution. However, this pledge to safeguard rights of refugees was implemented within systems designed to prevent migrants from invoking any right which could effectuate their entry into the state. Ultimately, these arrangements made the upholding of refugee and other fundamental rights subject to the exclusive discretion of the state. As observed in chapter 7, this is highly problematic from a human rights perspective, because human rights by their nature require the existence of mechanisms allowing for their enforcement.

There are, finally, arrangements which do not appear to recognize any human rights considerations whatsoever. The most clear examples are diversions or 'push-backs' at sea which take place outside the realm of domestic legislation and neither allow for surrogate forms of protection. These arrangements have been widely criticized by legal commentators and international supervisory bodies, including the European Committee for the Prevention of

12 The relevant UK legal framework is amongst others set out in: Court of Appeal (England and Wales) 20 May 2003, *R (European Roma Rights Center) v Secretary of State for the Home Department* [2003] EWCA Civ 666, paras. 7-15. See, on the right of appeal against entry clearance decisions under UK law extensively: G. Clayton, 'The UK and Extraterritorial Immigration Control: Entry Clearance and Juxtaposed Control', in: B. Ryan and V. Mitsilegas (eds), Extraterritorial Immigration Control, Leiden/Boston: Martinus Nijhoff (2010), p. 407-411.

13 See extensively chapter 4.3.1.1.

Torture and UNHCR. The key issue raised is that this form of interdiction strikes at the heart of interests protected under refugee law, by not allowing for a procedure capable of establishing whether among the migrants there are persons in need of international protection. The governments operating these diversions have nonetheless upheld their legitimacy by relying on assertions derived from the contested extraterritorial application of human rights and refugee law. Typical other forms of migration control where claims are upheld that they do not engage duties under human rights law are those which involve the sharing of shifting of specific tasks to other states or entities. These include the joint maritime patrols of EU Member States and third countries, the activities of immigration officers posted in third countries who are said to only fulfill an advisory role, and schemes of external processing where multiple states and other entities jointly arrange for the reception and treatment of migrants. In these situations, states have employed the fiction of mutually exclusive state sovereignties and concomitant spheres of responsibility to renounce distinct obligations flowing from their own acts or omissions.

To observe that current European practices of externalised migration control do not always pay due respect for human rights is a worrisome conclusion. Although we could leave it at that – and hope for the better in the future – it is appropriate at this concluding moment to move beyond the letter and spirit of the law and to address the broader legal-political context of the phenomenon of external migration controls. It is only within that broader context where the reasons, and hence also suggestions for solutions, for the states' reluctance to devise effective human rights strategies can be found.

8.2.1 Clarifying the law

A first factor explaining why states do not always pay due account to human rights in the course of external migration enforcement is the contested nature of the law. As noted above, some of the most crucial issues discussed in this study are burdened with a lack of consensus within legal doctrine, contrasting opinions of courts and sometimes conflicting regimes of law. The resulting legal ambiguity occasions states to legally justify their activities. The judgments, for example, of the US Supreme Court in *Sale* and the House of Lords in *Roma Rights*, endorse rather than restrict the liberty of states to take enforcement action in respect of persons claiming protection in the course of sea operations or pre-clearances at airports. On a more general note, the externalization of migration enforcement can be depicted as a trend under which states unilaterally and broadly interpret the scope of their competencies and where the law, including its institutionalised supervisory structures, encounters problems in providing acute responses. This calls for the continuation of efforts to clarify the relevant legal framework. The present study has taken up this challenge and constitutes one attempt at contributing to ongoing discourse and at identi-

fying the proper application of the law to a number of past and current practices. Beyond academic legal discourse, which on the subject matter of this study continues to produce a considerable collection of literature, there are a range of other actors, stakeholders and supervisory bodies which play a role in identifying and setting limits to the external migration policies of states.

On the international level, which by its nature offers the best chances of arriving at harmonious interpretations, the topic of this study also enjoys an increasing amount of interest. Especially UNHCR has ever since the exodus of Vietnamese boat people in the 1970s shown an unremitting effort in explaining and emphasizing the rights of refugees who are subjected to extraterritorial enforcement activity. In more recent years, other relevant international organizations have followed suit. Amongst many other efforts, the International Maritime Organization has pressed for and adopted amendments to maritime treaty law and guidelines on the treatment of persons rescued at sea; the European Union, whose role is more extensively discussed in section 8.3, has called for studies and arrangements setting forth the applicable law in respect of interdiction activities; the International Organisation for Migration has regularly organized round tables and expert seminars on diverse issues of external migration management and the European Committee of Torture has published a highly critical report on the Italian push-back strategy. On a more general level, international courts and supervisory bodies have issued a range of pronouncements on the relevant framework governing extraterritorial activity of states.

Although it is difficult to estimate the effect these norm-setting activities have had on the actions of individual states, the continuous attention for the extraterritorial treatment of migrants of international supervisory bodies is a welcome development. Although they may not always offer uniform interpretations nor receive unequivocal support, they allow for progressive standard-setting and provide a forum for discussion and the exchange of good practices. Perhaps more importantly, the sense of involvement displayed by international organizations indicates that there exists a shared international concern for persons who are at risk of not finding protection with any state and that therefore collective responses should be formulated.

From the perspective of resolving legal ambiguities, one problem remains that most of the adopted standards are of soft law character, such as is the case with UNHCR conclusions and recommendations, IMO guidelines and the EU guidelines for Frontex rescue operations at sea. Another factor which explains the limited observance by states is the lack of effective individual complaint mechanisms, as is the case under international maritime law treaties and the Refugee Convention. More may be expected in this regard of obligations of European states under the European Convention of Human Rights and the capacity of the European Court of Human Rights to issue binding judgments in respect of individual claims. The pending case of *Hirsi v Italy*,

on the Italian push back-policy, is the first case in which the European Court is specifically asked to dwell upon the issue of migrant interdiction at sea and could therefore set an important precedent.[14]

It may, in view of the abundant amount of literature and debate on the topic, perhaps come as a surprise that the issue of legality of external migration policies, and in particular enforcement activities such as pre-clearances and interdictions, have not attracted a more robust collection of international jurisprudence. An important explanation may lie in the fact that the outsourcing of control tasks engenders intrinsic obstacles in the sphere of justiciability. On the one hand, we have seen that domestic courts, for example in Spain (*Marine I*) and the United States (*Sale* and others) have considered the activities of states to be exempt from judicial prosecution because they fall under the 'political question'-doctrine or because domestic courts simply lack jurisdiction to apply domestic laws to foreign cases.[15] On the other hand, the physical distance of controls and the resulting difficulty of monitoring and ensuring legal representation constitutes a potent barrier for individual migrants to lodge complaints or appeals and to present themselves before a court. And even in the exceptional situation that a migrant or a group of migrants, often due to the unrelenting efforts of specialized NGOs or UNHCR, succeed in bringing a complaint, the problem of keeping track of migrants and of obtaining authentic authorization of attorney may pose a bar for the complaint's admissibility. Thus, in the case of *Hussun a.o. v Italy*, concerning the expulsion of a group of 84 migrants who had landed in Lampedusa and who had subsequently absconded or were expelled, the European Court of Human Rights declared the complaints inadmissible on account of the representatives having lost all contact with the applicants and because the powers of attorney of 34 of the applicants had in fact been written and signed by one and the same person.[16] The complaint in the *Marine I* case failed on a similar ground, namely because the organization lodging the complaint could not demonstrate that it was duly competent to represent the alleged victims. In order to preclude repetition, and in the light of the high profile it has accorded to the case, UNHCR has made special arrangements for keeping track of the whereabouts of the complainants and for ensuring their proper representation in the pending case of *Hirsi v Italy*. But in the vast majority of cases where persons are subjected to extraordinary controls or diversions, this service will be unavailable, rendering the lodging of (successful) complaints a distant likelihood. There is, in sum, no shortage of factors explaining why it is that so little cases on the topic of this study have resulted in successful litigation: admissibility thresholds of domestic and international courts; a lack of procedural safeguards and information about avenues for obtaining redress; the

14 See chapter 6.4.2.
15 Chapters 4.3.1.1, 6.4.2, 7.3.
16 ECtHR 19 January 2010, *Hussun a.o. v Italy*, nos. 10171/05, 10601/05, 11593/05 et 17165/05.

ignorance and limited resources on the part of migrants to individually vindicate their rights; and a lack of access to legal aid. This creates a troublesome dynamic in which the absence of institutionalized safeguards for protecting human rights is able to sustain itself.

The identification of the legal framework governing external migration practices of states involves not only relevant international norms but also the application of domestic statutes. As indicated, the formulation or extrapolation of domestic guarantees to foreign conduct of states is crucial in ensuring respect for human rights. Procedural duties inherent in human rights protection require domestic law to restrict the scope of discretion offered to competent authorities and to protect against arbitrariness. This is a proposition states find difficult to accept. The widening of the state's competences to undertake enforcement activity outside its ordinary legal order is only seldom accompanied with an extrapolation of individual guarantees. This has resulted in constructions of enigmatic legal character, under which domestic immigration laws are selectively employed as a basis for undertaking enforcement activities. Thus, whereas the US Supreme Court in *Sale* denied the extraterritorial application of US immigration statutes, the Presidential Order allowing for the interdiction of aliens at sea derives a competence to return vessels from a 'reason to believe that *an offense is being committed* against the United States immigration laws'. This begs the question how one can violate a law which in the circumstances of the case does not apply. The alternative solution of prospective nature created by the EU Council Decision on maritime Frontex operations ('reasonable grounds for suspecting that they carry persons *intending* to circumvent the checks at border crossing points'), is semantically more sound, but it neither complies with the essential rule that state competences and individual rights are two sides of the same coin.

8.2.2 Clarifying reality

A second and related factor which helps understanding why the protection of human rights in externalised migration controls often falters is the lack of information and visibility of what goes on in practice. This study itself has encountered the problem that very little is disseminated about the actual manner of, for example, joint controls coordinated by Frontex or between EU Member States and third countries or of the activities of immigration officers posted at foreign airports. This is due not only to governments displaying reluctance in making public the relevant arrangements, but also due to the physical distance of the relevant activities. In the first place, both governmental and non-governmental stakeholders such as human rights institutions, NGOs, the media and legal advisers have no self-evident access to persons who are subjected to external controls. The fact that activities are undertaken within territories of regimes which are not always used to the same standards of

public scrutiny is a further obstacle for these actors to fulfill their traditional role of informing the public and of monitoring human rights compliance. Secondly, the physical distance of the control activities may lead to the sociological effect pointed to by Grahl-Madsen in this conclusion's introduction, namely that public opinion feels less concerned with people who remain outside national borders and who are therefore not deemed to be of society's primary concern. These dynamics, which may be mutually reinforcing, explain the lack of reliable and systematic information on what precise activity states undertake outside their borders, which in turn renders it difficult to make firm statements on whether such activity complies with the law or not. Although this study has not refrained from taking a critical stance towards particular state practices, this criticism was often couched in terms of 'may', 'if' and 'probably'. This also points to the incentive of states to preserve the obscure character of some of their external strategies. It allows not only for a maximization of their discretionary powers, but also for rebutting allegations that human rights are violated. To give an example, it is sheer impossible to verify Italy's claim that none of the persons intercepted in the course of its push-back policy expressed an intention to apply for asylum, in which case they would allegedly have been promptly brought to Italy.

Typically, states and other entities responsible for border controls invoke the ground of public security or the preservation of international relations to refuse the disclosure of specific information on the conducting of controls. In requesting a copy of the Operation Plan of the Hera 2007 operation, the present author was informed by the Frontex agency that disclosure of the documents would undermine the course of external border controls and therefore fell under the public security exception of the EC Regulation on public access to documents. The CPT delegation which visited Italy in July 2009 to verify whether the push-back policy complied with the prohibition of *refoulement*, was denied access to *inter alia* the logbooks of the operations and inventory lists of objects seized from the migrants on grounds of confidentiality, even though Italy could have requested the CPT not to make the information public. Despite repeated requests of European Parliament, the biannual report on the functioning of EU networks of immigration liaison officers remains classified and although a proposal is now pending to better inform the European Parliament on the activities of the network, the European Commission has refused to include in this information specific data on how the functioning of the network affects asylum-seekers.[17] This is not the place to extensively discuss whether all aspects of border controls, and in particular information on procedures to be followed, the grounds for refusing further passage and the numbers of affected persons must necessary fall under the protected interests of public security or international relations. It suffices to

17 Chapter 5.2.2.3.

observe that the veil of security interests obstructs transparency and public understanding of practices which due to their physical distance and isolated location are already highly invisible to the public.

NGOs and UNHCR have recognized the imperative of ensuring that more information is disseminated on what goes at and beyond the EU's external borders. UNHCR is engaged in the screening of (returned) migrants for refugees and on assembling data on the number of migrants who indicate a wish for and who subsequently receive a form of international protection. Organizations such as Amnesty International, Human Rights Watch, the European Council on Refugees and Exiles and Pro-Asyl report on incidents occurring at sea and collect stories and travel accounts of individual migrants in an effort to give some impression of the consequences of externalized controls for individual migrants. Other privately instigated activities concern those of 'United for Intercultural Action' and 'Fortress Europe', internet-based action groups which collect press accounts on migrant deaths and other incidents along the EU's external border and which compile data and publish yearly statistics on the loss of immigrant life at sea or in African transit countries. Governmental information, on the other hand, is normally restricted to persons who have presented themselves at their borders. Although these data present reliable accounts on, for example, the nationalities of the migrants and the ratio between successful and unsuccessful asylum claimants, they do not shed clear light on the plight of those who have not succeeded in arriving at their border.

8.2.3 Clarifying political aims

The essential political challenge underlying the subject of this study is that of reconciling rights of refugees and other migrants with the goal of preventing unsolicited migration. The idea of protection elsewhere and of outsourcing and externalizing control mechanisms was born out of, as Lord Justice Simon Brown of the England and Wales Court of Appeal put it, 'the great public concern' on 'asylum overload' and illegal immigration.[18] The 'problem' caused by this phenomenon was initially sought to be controlled by imposing visa regimes upon states from which most asylum-seekers or irregular migrants come, coupled with a system of carrier's liability to ensure that the requirement for prior entry clearances would be effectively enforced. The very object of these controls is 'of course' – again quoting Lord Justice Brown – to prevent these persons from reaching our shores: 'the very arrival of asylum-seekers at the border entitles them to apply for asylum and thus defeats the visa regime'. The conducting of pre-clearances by immigration officers at foreign airports and the establishment of controls at the high seas or territorial waters of third countries are additional instruments ensuring that only persons with

18 *Supra* n. 12, para. 1.

prior admission arrive at the state's border. The foremost rationale of all these policies is to prevent unauthorized migrants from effectuating an unauthorized entry – as this would automatically set in motion administrative and societal burdens.

Yet, there is notable consensus among the major immigration countries, including the Member States of the European Union, that refugees form a particular vulnerable group and that external migration controls should, if possible and manageable, pay account to their particular entitlements under international law – or at the least their precarious humanitarian position. Thus, even Justice Stevens, delivering the majority opinion in the contested judgment of the US Supreme Court in *Sale*, acknowledged that 'the gathering of fleeing refugees and their return to the one country they had desperately sought to escape' may 'violate the spirit of the Refugee Convention'. In order to take heed of this spirit, governments have chosen to devise schemes of external processing so as to preclude refugees from being sent back to countries of persecution. It is for the same reason that many states, in implementing schemes of carrier's liability or border controls at sea, make reference to the upholding refugee rights. It must therefore also be concluded that, even in the absence of forthright acknowledgments that human rights and refugee law constrain external migration activities, their underlying humanitarian aspirations are generally embraced as a standard for the treatment of migrants.

This study has indicated that although the twin aims of preventing unauthorized migration and respecting refugee rights may find reconciliation in the context of policy documents, round table discussions or press releases issued by responsible agencies, they are much more difficult to reconcile in practice. Border guards may be trained in understanding refugee law, but if the domestic procedures under which they operate do not allow for referring claimants to a protection mechanism, the training remains an academic exercise. The Dutch immigration service may have opened up a special phone number for private carriers in case they are confronted with persons claiming asylum, but in the absence of a duty on the part of carriers to entertain asylum applications, it is no surprise that the phone never rings.[19] Other questionable attempts at reconciling human rights with control concerns are the 'shout-test' of the US Navy, under which persons are only given a credible fear interview if they spontaneously show or state a fear of return[20]; and the more recent Italian practice of only bringing to its shore those persons who, upon being rescued or interdicted, declare immediately a wish to apply for asylum.

The essential challenge therefore, is not only to formulate political aims, but also to make – and to account for – political choices. Despite increasing discourse, especially within the European Union, on establishing 'protection-sensitive' entry management systems, current practices do appear to sub-

19 Chapter 5.2.2.2 at n. 45.
20 Chapter 7.2.1 at n. 25.

ordinate human rights to the goal of preventing illegal entries. States have refrained from establishing (or have abolished) protected entry procedures; from granting a general waiver for private carriers bringing persons claiming asylum to their territories; from exporting asylum guarantees inherent in border controls standards to pre-clearances; or from establishing external processing arrangements capable of granting rights of entry for those who are found to be a refugee. The underlying political choice is clear but rarely ventilated by government officials: the advantage such arrangements may bring in terms of human rights are outweighed by the risk that they may facilitate irregular entries.

Proper understanding of the legal challenges raised by this study would be much enhanced if states would more clearly acknowledge that it is inherently difficult to ensure respect for human rights in the course of external controls. This study has, in fact, not been able to identify a single example of where a system of procedural guarantees for the upholding of refugee and human rights has been successfully implemented within a control mechanism which ensures that persons without legal entitlements of entry are precluded from arriving in the state. This is not due to a lack of creativity on the part of states, but because the contents of procedural and material duties of human rights impose a heavy burden on states, in particular in respect of claims for asylum. It is well-nigh impossible to install status determination procedures of sufficiently quality, coupled with access to legal assistance and effective remedies, in the context of controlling procedures which aim at the swift and efficient checking of persons outside the state's territory and which may further be of only temporary character. This is not necessarily the case in respect of more durable arrangements of external processing of asylum applications, but, as concluded in chapter 7, these schemes are in themselves resource-intensive and can only be deemed a legal success if accompanied with guarantees on timely repatriation and resettlement which may be difficult to procure.

The bleak prospect that emerges is that European and other immigration countries will continue to employ and expand their arsenals of external migration instruments without them finding effective ways of ensuring that these instruments do not jeopardize access to protection for refugees. Although the further crystallisation of the law and efforts of procuring and disseminating information on the human rights effects of certain state practices may contribute to better human rights compliance or even force states to abandon some of the most legally questionable practices, adherence to human rights is ultimately premised on a requisite amount of societal and political support. Because the deterrent effect of external migration controls is widely perceived as crucial for preserving essential societal interests, it is likely that fundamental rights will face continuous contestation and that therefore external migration enforcement remains in a constant state of tension with both the letter and spirit of human rights and refugee law.

8.3 THE EUROPEAN UNION AS A PANACEA FOR UPHOLDING REFUGEE RIGHTS?

The European Union may, both as a source of law and as a collective platform for action, be better placed than individual Member States to address some of the challenges discussed above. The policy strategies of the EU in the sphere of external migration and asylum display a firm commitment to the vulnerable position of refugees. The EU's programme of enhancing refugee protection capacities in regions of origin and transit must be commended from the perspective of ensuring that refugees have access to effective protection and for contributing to global efforts to alleviate the needs of refugees. These activities see in particular to promoting accession and adherence of third countries to refugee instruments, to the creation of national protection systems consistent with international rules on refugees and asylum, and to contributing to the durable solutions of resettlement, local integration and voluntary return.

This commitment to refugees also features in respect of the strategy of integrated border management, which includes the multi-layered system of pre-entry control measures. The goal to make these measures more 'protection-sensitive' has already produced some concrete results, such as in the sphere of border guard training on asylum issues, a more firm embedding of fundamental rights in the recast of the Frontex Regulation and a recognition that the compilation of data and incident reporting contributes to an understanding of the nature and effects of particular forms of border control. The European Asylum Support Office, established in May 2010, has an express mandate to be involved in the external dimension of the Common European Asylum System and to contribute to ensuring that the international protection needs of refugees in the context of the external dimension are met.[21]

Further, in respect of clarifying the law, the study has forecasted a trend under which EU law pertaining to border controls and fundamental rights may compensate for the substantial amount of discretion the current EU policy on external migration is perceived to accord to Member States. This prospect concerns not only instances where Member States implement relevant EU instruments on, for example, carrier's liability, Frontex operations or the deployment of immigration officers, but also involves the broader matter of identifying which activities of Member States should be deemed as falling within the remit of the EU's common border crossings regime. The action brought before the European Court of Justice for annulment of the Council Decision on maritime Frontex operations is a very welcome and timely one, since it deals with the essential issue of whether ordinary EU safeguards on border checks must also apply to extraordinary checking procedures.

Yet, when it comes to those situations where control concerns may warrant diametrically opposed solutions as respect for rights of refugees and other irregular migrants, the EU has shown to be little more than the sum of its parts.

21 Articles 2(1) and 7 Regulation EU No. 439/2010.

Although it is instrumental in exchanging good practices and in providing support and technical assistance to Member States subject to particular migration pressures, the EU has not been able to agree upon more far-reaching arrangements in the sphere of burden sharing of migrant arrivals among Member States or the obligatory allocation of rescued or intercepted migrants. Although these mechanisms may ultimately be much more effective in guaranteeing that Member States respect procedural and other rights of migrants, they face the obstacle of the Member States' sovereign prerogative of deciding upon questions of entry and residence.

Council Decision 2010/252/EU on maritime Frontex operations is symptomatic of the EU's limited capacities in this respect. Despite its aim to ensure uniform application of relevant aspects of international maritime law and international law on refugees and fundamental rights, the Decision has not succeeded in creating a binding arrangement for the disembarkation of migrants, it does not define what procedural duties flow from the prohibition of *refoulement* in the course of interdictions at sea, and it has disconnected external controls from the ordinary regime on border crossings instead of bringing them within that framework. In sum, the decision epitomizes rather than resolves the contested applicability of fundamental rights and EU law to operations undertaken outside EU territory.

Samenvatting

Europa en Extraterritoriaal Asiel

Het voor u liggende boek betreft een juridisch promotieonderzoek naar de hedendaagse trend waaronder Europese staten, in een poging de druk op de binnenlandse beschermingscapaciteit te verlagen, in toenemende mate trachten migratie- en asielstromen buiten het eigen grondgebied te reguleren. Deze trend betreft het uitvoeren van migratiecontroles op personen die het grondgebied van de Europese Unie nog niet hebben bereikt, zoals op zee of luchthavens in niet-EU landen, het stellen en handhaven van toegangsvoorwaarden nog voordat migranten de Europese buitengrenzen hebben bereikt, en het creëren van bescherming- en opvangalternatieven voor vluchtelingen in landen buiten de Europese Unie.

Deze 'externalisering' van het migratiebeleid heeft eerst en vooral tot doel een rem te zetten op de binnenkomst van ongewenste migranten. Door in te grijpen nog voordat een migrant zonder recht op toegang zich meldt aan de grens, worden juridische en logistieke lasten die gepaard gaan met statusdeterminatie en eventuele uitzetting weggenomen. Er is evenwel ook kritiek op de wijze waarop Europese landen uitvoering aan deze externe migratiestrategie geven. Eén van de voornaamste bezwaren is dat ook vluchtelingen, die vaak ongedocumenteerd zijn, beperkt worden in hun mogelijkheden bescherming te vinden op het Europese grondgebied. Externe migratiecontroles zouden, anders dan controles aan de grens zelf, onvoldoende acht slaan op de bijzondere status van vluchtelingen. Ten aanzien van pogingen om alternatieve vormen van opvang voor vluchtelingen in derde landen in te richten wordt verder de kritiek geuit dat deze opvang de rechten van vluchtelingen onvoldoende zeker stelt en niet kan gelden als volwaardig substituut voor asiel binnen Europa.

Het promotieonderzoek bestudeert het spanningsveld tussen externe controlemechanismen en de rechtspositie van vluchtelingen en andere asielzoekers. De centrale stelling die wordt verdedigd is dat indien Europese landen uitvoering aan dergelijk beleid geven, zij onder het internationale recht gehouden blijven de rechten van vluchtelingen en asielzoekers te respecteren.

Het proefschrift bestaat uit drie delen van elk twee hoofdstukken. Het eerste deel (hoofdstukken 2 en 3) verschaft het algemene internationaalrechtelijke en mensenrechtelijke kader dat van toepassing is op atypische situaties van statelijk optreden, in het bijzonder optreden van staten buiten het eigen grondgebied en optreden dat plaatsvindt in gemeenschappelijkheid met andere actoren, zoals andere staten of private partijen als luchtvervoerders. Dit deel van de studie is deels inventariserend van karakter, maar beschouwt ook kritisch de heersende opvattingen in doctrine en jurisprudentie. Hoofdstuk 2 verkent de theorie, internationale jurisprudentie en doctrine omtrent de extraterritoriale werking van mensenrechtenverdragen. Hoofdstuk 3 behandelt de internationaalrechtelijke leerstukken omtrent de toedeling van verantwoordelijkheden voor gedeeld of gedelegeerd optreden van staten. Ten aanzien van beide thema's wordt geconcludeerd dat het internationale recht, inclusief mensenrechtenverdragen, voldoende ontwikkeld en geëquipeerd is om rechtsstatelijke grenzen te stellen, waardoor 'gaten' in de internationale rechtsbescherming kunnen worden voorkomen. De reikwijdte van de internationale aansprakelijkheid van staten in dit verband wordt evenwel begrensd door 1) het beginsel van staatssoevereiniteit, en in het bijzonder de verplichting om de territoriale soevereiniteit van andere staten te respecteren en 2) de overdracht van bevoegdheden aan andere actoren of het delen van bevoegdheden met andere actoren. In algemene zin kan worden gesteld dat een vaststelling van internationale aansprakelijkheid een duidelijk te identificeren band vereist tussen statelijk optreden en een uiteindelijke schending van internationaal recht.

Het tweede deel van het proefschrift (hoofdstukken 4 en 5) betreft een conceptualisering van het begrip 'extraterritoriaal asiel' in het internationale respectievelijk Europese recht. Hoofdstuk 4 bespreekt de relevante juridische verschillen tussen situaties van 'territoriaal asiel' (asiel op het grondgebied van de aangezochte staat) en 'extraterritoriaal asiel' (asiel gevraagd aan een extraterritoriaal optredende staat). Centraal in dit hoofdstuk staat de driehoeksverhouding tussen een extraterritoriaal operende staat, de territoriale staat en het bescherming zoekende individu. Het hoofdstuk geeft een historische beschouwing van diplomatieke asielverlening in het internationale recht, analyseert de extraterritoriale werking van de refoulementverboden en bespreekt de voorwaarden waaronder een individu het recht om asiel te zoeken moet worden toegekend. De slotparagraaf bespreekt aan de hand van relevante jurisprudentie de mogelijke spanning die kan bestaan tussen enerzijds een mensenrechtelijke verplichting om bescherming aan een individu in een andere staat te verlenen en de verplichting anderzijds om niet te treden in de territoriale soevereiniteit van de andere staat.

Hoofdstuk 5 bespreekt de grenzen die het recht van de Europese Unie stelt aan externe vormen van migratiecontrole. Het hoofdstuk geeft een overzicht van de Europese rechtsinstrumenten die de externe dimensie van het Europese

asiel- en migratiebeleid vormgeven. In het bijzonder wordt ingegaan op visumverplichtingen, verplichtingen van luchtvervoerders (*carrier sanctions*), de bevoegdheden van immigratieverbindingsofficieren, het mandaat en optreden van het buitengrensagentschap Frontex en instrumenten die specifiek zien op het verbeteren van de bescherming van asielzoekers in derde landen. Ook wordt de mogelijke toepasselijkheid van regels voortkomend uit het Schengenrecht en gemeenschappelijke asielrecht op situaties van extraterritoriaal asiel besproken. In dat kader komt ook Raadsbesluit 2010/252/EU aan de orde, waarin regels zijn neergelegd voor maritieme grenscontroles die worden gecoördineerd door het EU agentschap Frontex. Het Europees Parlement heeft dit Raadsbesluit ter vernietiging voorgelegd aan het Hof van Justitie van de EU vanwege een onjuist gevolgde besluitvormingsprocedure. De studie betrekt de stelling dat het Raadsbesluit niet slechts vanwege procedurele redenen maar ook op materiële gronden moet worden vernietigd: anders dan de Schengen Grenscode verlangt, ontbreken in het Raadsbesluit essentiële waarborgen omtrent de rechtsbescherming van op zee onderschepte migranten.

Het laatste deel van de studie (hoofdstukken 6 en 7) toetst in hoeverre huidige Europese praktijken van extraterritoriale migratiecontroles plaatsvinden in overeenstemming met het internationale recht, in het bijzonder vluchtelingenrecht en mensenrechten. Hoofdstuk 6 geeft een uitputtende juridische analyse van zeegrenscontroles. Het hoofdstuk bespreekt in hoeverre het internationale maritieme recht een grondslag biedt voor de onderschepping van bootmigranten, welke bescherming volgens het maritieme recht dient te worden geboden aan migranten die in nood zijn op zee, en welke rechten onderschepte migranten kunnen ontlenen aan mensenrechtenverdragen. In hoofdstuk 7 komt de externe opvang van asielzoekers aan bod. Aan de hand van voormalig en huidig beleid gevoerd door de regeringen van Australië en de Verenigde Staten wordt bezien in hoeverre gelijksoortige Europese voorstellen om over te gaan tot de externe opvang van asielzoekers juridisch haalbaar zijn. Ten aanzien van zowel maritieme onderscheppingen als de externe opvang van asielzoekers wordt geconcludeerd dat zij niet altijd in overeenstemming geschieden met geldende internationale normen en dat zij het risico van gebrekkige individuele rechtsbescherming met zich dragen.

In het concluderende hoofdstuk worden drie algemene aanbevelingen gedaan.

Eerstens wordt aangedrongen op een verdere verheldering van het toepasselijke rechtskader indien Europese staten besluiten personencontroles buiten het eigen grondgebied uit te voeren. Dit betreft niet slechts de identificatie van relevante internationale normstellingen, maar ook de vertaling van deze normen in nationale en Europese wetgeving. In die vertaling zou het in het bijzonder moeten gaan om de opstelling van procedurele garanties en het waarborgen van rechterlijk toezicht.

Ten tweede wordt aanbevolen tot het vergroten van de zichtbaarheid en kennis van de praktische consequenties van externe vormen van migratiecontrole. Het onderzoek concludeert dat gouvernementele toezichthouders, niet-gouvernementele organisaties, rechtshulpverleners, de media en andere relevante actoren nauwelijks zicht hebben op of toegang hebben tot extern optreden van staten, waardoor niet slechts de individuele rechtsbescherming, maar ook de publieke informatieverstrekking en legitimering in gedrang komt.

Ten derde wordt aanbevolen tot een verduidelijking van de politieke doelstellingen die aan externe migratiecontroles ten grondslag liggen. De twee hoofddoelstellingen die op beleidsniveau doorgaans worden geformuleerd zijn het tegengaan van illegale migratie enerzijds en het blijven bieden van bescherming aan vluchtelingen en andere zwakke groepen migranten anderzijds. Het onderzoek signaleert dat in de praktijk het belang van het tegengaan van illegale migratie vaak prevaleert boven de bescherming van vluchtelingen. Het politieke uitgangspunt dat vluchtelingen beschermd dienen te worden behoeft derhalve een betere implementatie in de praktijk. Het onderzoek concludeert onder andere dat huidige pogingen om controlemechanismes in te richten die recht doen aan beide doelstellingen onvoldoende succesvol zijn en doet suggesties voor verbetering.

Bibliography

I MONOGRAPHS AND EDITED VOLUMES

Battjes H, *European Asylum Law and International Law*, Leiden/Boston: Martinus Nijhoff (2006)

Boeles P et al, *European Migration Law*, Antwerp/Oxford/Portland: Intersentia (2009)

Bossuyt MJ, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights*, Dordrecht: Martinus Nijhoff (1987)

Brownlie I, *Systems of the Law of Nations: State Responsibility*, Part I, Oxford: Clarendon Press (1983)

— *Principles of Public International Law*, 6th Ed., Oxford University Press (2003)

Bruin R (ed), *Niemandsland, opvang van vluchtelingen in de regio*, Amsterdam: Amnesty International Nederland (2003)

Bynkershoek, van C, *De Foro Legatorum Liber Sigularis* (1744), translated by G.J. Laing, Oxford: Clarendon Press (1946)

Chesterman S, *Just War or Just Peace? Humanitarian intervention and international law*, Oxford University Press (2001)

Churchill RR and Lowe AV, The Law of the Sea, Juris Publishing, Manchester University Press (1999)

Coomans F and Kamminga MT (eds), *Extraterritorial Application of Human Rights Treaties*, Antwerp: Intersentia (2004)

Cornelisse G, *Immigration Detention and Human Rights. Rethinking Territorial Sovereignty*, Leiden/Boston: Martinus Nijhoff (2010)

Craven M, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, Oxford: Clarendon (1998)

Crawford J, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press (2002)

Cremona M (ed), *Developments in EU External Relations Law*, Oxford University Press (2008)

Dashwood A and Maresceau M (eds), *Law And Practice Of EU External Relations; Salient Features Of A Changing Landscape*, Cambridge University Press (2008)

Denza E, *Diplomatic law: commentary on the Vienna Convention on diplomatic relations*, Oxford University Press (2008)

Detrick S, *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"*, Dordrecht: Martinus Nijhoff (1992)

Eagleton C, *The Responsibility of States in International Law*, New York University Press (1928)

Evans M (ed), *International Law*, Oxford University Press (2003)

Feller E et al (eds), *Refugee Protection in International Law. UNHCR's Global Consultations on International Protection*, Cambridge University Press (2003)

Gardiner RK, *Treaty Interpretation*, Oxford University Press (2008)
Gondek M, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties*, Antwerp: Intersentia (2009)
Goodwin-Gill GS and McAdam J, *The Refugee in International Law*, Oxford University Press (2007)
Gowlland-Debbas V (ed), *Multilateral Treaty-Making: The Current Status of Challenges to and Reforms Needed in the International Legislative Process*, The Hague: Martinus Nijhoff (2000)
Grahl-Madsen A, *The Status of Refugees in International Law*, Vol. II, Leiden: Sijthoff (1972)
— *Territorial Asylum*, Stockholm/London/New York: Almqvist & Wiksell International (1980)
Groenendijk K, Guild E and Minderhoud P (eds), *In Search of Europe's Borders*, The Hague: Kluwer (2002)
Grotius H, *Mare Liberum* (1608), translated by R. Van Deman Magoffin, New York: Oxford University Press (1916)
— *De Jure Belli ac Pacis* (1625), translated by A.C. Campbell, Kitchener: Batoche Books (2001)
Guilfoyle D, *Shipping Interdiction and the Law of the Sea*, Cambridge University Press (2009)

Hannum H, *The Right to Leave and Return in International Law and Practice*, Dordrecht/Boston/Lancaster: Martinus Nijhoff (1987)
Hathaway JC, *The Law of Refugee Status*, Toronto/Vancouver: Butterworths (1991)
— *The Rights of Refugees under International Law*, Cambridge University Press (2005)
Higgins R, *Problems & Process. International Law and How We Use It*, Oxford: Clarendon Press (1994)
Hobbes T, *Leviathan. Or The Matter, Form and Power of a Commonwealth Ecclesiastical and Civil* (1651), translated by A. Martinich, Peterborough: Broadview Press (2002)

Jennings R and Watts A (eds), *Oppenheim's International Law*, Vol. I, 9th Ed., London: Longman (1992)
Jonge, de K, *Dagboek uit Pretoria*, Amsterdam: van Gennep (1987)
Joseph S et al, *The International Covenant on Civil and Political Rights: Cases, Commentary and Materials*, 2nd Ed., Oxford University Press (2004)

Kapteyn PJG, McDonnell AM, Mortelmans KJM, Timmermans CWA and Geelhoed LA, *The Law of the European Union and the European Communities*, Alphen aan den Rijn: Kluwer Law International (2008)

Lauterpacht H, *International Law and Human Rights*, reprint Hamden: Archon Books (1968)
Lawson RA, *Het EVRM en de Europese Gemeenschappen. Bouwstenen voor een aansprakelijkheidsregime voor het optreden van internationale organisaties*, Deventer: Kluwer (1999)

Lee LT, *Consular Law and Practice*, Oxford: Clarendon Press (1991)

Malanczuk P (ed), *Akehurst's modern introduction to international law*, 7th Ed., London: Routledge (1997)
McAdam J (ed), *Forced Migration, Human Rights and Security*, Oxford: Hart Publishing (2008)
Meijers H, *The Nationality of Ships*, Den Haag: Martinus Nijhoff (1967)
Meron T, *The Humanization of International Law*, Leiden/Boston: Martinus Nijhoff (2006)
Mowbray A, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford: Hart Publishing (2004)
Murty BS, *The International Law of Diplomacy, The Diplomatic Instrument and World Public Order*, Dordrecht/Boston/London: Martinus Nijhoff (1989)

Noll G, *Negotiating Asylum. The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, The Hague/Boston/London: Martinus Nijhoff (2000)
Nowak M, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, 2nd Ed., Kehl am Rhein: Engel (2005)
— and McArthur E, *The United Nations Convention Against Torture. A Commentary*, Oxford University Press (2008)

O'Connell DP, *The International Law of the Sea*, Vol. I, Oxford: Clarendon Press (1982)

Przetacznik F, *Protection of officials of foreign states according to International law*, Dordrecht: Martinus Nijhoff (1983)

Rayfuse RG, *Non-Flag State Enforcement in High Seas Fisheries*, Leiden/Boston: Martinus Nijhoff (2004)
Rijpma JJ, *Building Borders: The Regulatory Framework for the Management of the External Borders of the European Union*, dissertation Florence (2009)
Robinson N, *Convention Relating to the Status of Refugees, Its History, Contents and Interpretation*, New York: Institute of Jewish Affairs (1953)
Ryan B and Mitsilegas V (eds), *Extraterritorial Immigration Control*, Leiden/Boston: Martinus Nijhoff (2010)

Shaw M, *International Law*, 5th Ed., Cambridge University Press (2003)
— *International Law*, 6th Ed., Cambridge University Press (2008)
Shue H, *Basic Rights: Subsistence, Affluence, and US Foreign Policy*, Princeton University Press (1980)
Sinha SP, *Asylum and International Law*, The Hague: Martinus Nijhoff (1971)
Skogly SI, *Beyond National Borders: States' Human Rights Obligations in International Cooperation*, Antwerpen/Oxford: Intersentia (2006)

Triepel H, *Völkerrecht und Landesrecht*, Leipzig: Siebeck (1899)

Vattel, de E, *Le Droit des Gens ou Principes de la Loi Naturelle* (1758), translated by C.G. Fenwick, Washington: Carnegie Institution (1916)

Weis P, *The Refugee Convention, 1951. The Travaux Préparatoires Analysed with a Commentary by the Late Dr Paul Weis*, Cambridge University Press (1995)
Wouters K, *International Legal Standards for the Protection from Refoulement*, Antwerp: Intersentia (2009)

II ARTICLES IN JOURNALS, PAPERS AND CONTRIBUTIONS TO EDITED VOLUMES

Akehurst M, 'Jurisdiction in International Law', 46 *British Yearbook of International Law* (1972) p. 145
Albahari M, 'Death and the Moral State: Making Borders and Sovereignty at the Southern Edges of Europe', The Center for Comparative Immigration Studies Working Paper No. 136, San Diego (2006)
Alscher S, 'Knocking at the Doors of "Fortress Europe": Migration and Border Control in Southern Spain and Eastern Poland', The Center for Comparative Immigration Studies Working Paper No. 126, San Diego (2005)
Alston P and Quinn G, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', 9 *Human Rights Quarterly* (1987) p. 156
Anderson HE, 'The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives', 21 *Tulane Maritime Law Journal* (1996) p. 139
Anzilotti D, 'La Responsabilité Internationale des États: A Raison des Dommages Soufferts par des Étrangers', 13 *Revue Générale de Droit Public* (1906) p. 289
Ataner A, 'Refugee Interdiction and the Outer Limits of Sovereignty', 3 *Journal of Law and Equality* (2004), p. 7

Barnes R, 'Refugee Law at Sea', 53 *ICLQ* (2004) p. 47
Battjes H, 'The *Soering* Threshold: Why Only Fundamental Values Prohibit *Refoulement* in the ECRH Case Law', 11 *EJML* (2009) p. 205
Bigo B and Guild E, 'Policing at Distance: Schengen Visa Policies', in: Bigo B and Guild E, *Controlling Frontiers: Free Movement Into and Within Europe*, London: Ashgate (2005) p. 233
Boivin A, 'Complicity and beyond: International law and the transfer of small arms and light weapons', 87 *International Review of the Red Cross* (2005) p. 467
Bostock CMJ, 'The International Legal Obligations owed to the Asylum-seekers on the MV Tampa', 14 *IJRL* (2002) p. 279
Brehm M, 'The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law', 12 *Journal of Conflict & Security Law* (2008) p. 359
Broberg MP, 'The European Commission's Extraterritorial Powers in Merger Control, The Court of First Instance's Judgment in Gencor v. Commission', 49 *ICLQ* (2000) p. 172
Brouwer A and Kumin J, 'Interception and Asylum: When Migration Control and Human Rights Collide', 21 *Refuge: Canada's periodical on refugees* (2003) p. 6

Carrera S, 'The EU Border Management Strategy FRONTEX and the Challenges of Irregular Immigration in the Canary Islands', CEPS Working Document No. 261 (2007)

— and Merlino M, 'Undocumented Immigrants and Rights in the EU Addressing the Gap between Social Science Research and Policy-making in the Stockholm Programme?', Brussels: Centre for European Policy Studies (CEPS) (2009)
Cassese A, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', 18 *EJIL* (2007) p. 649
Clayton G, 'The UK and Extraterritorial Immigration Control: Entry Clearance and Juxtaposed Control', in: Ryan B and Mitsilegas V (eds), *Extraterritorial Immigration Control*, Leiden/Boston: Martinus Nijhoff (2010) p. 397
Coffey K, 'The Due Process Right To Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy', 19 *Yale Law and Policy Review* (2001) p. 303
Cole CV, 'Is There Safe Refuge in Canadian Missions Abroad?', 9 *IJRL* (1997) p. 654
Conforti B, 'Exploring the Strasbourg case-Law: Reflections on State Responsibility for the Breach of Positive Obligations', in: Fitzmaurice M and Sarooshi S (eds), *Issues of State Responsibility before International Judicial Institutions*, Oxford: Hart Publishing (2004) p. 129
Coomans F, 'Some Remarks on the Extraterritorial Application of the International Covenant on Economic Social and Cultural Rights', in: Coomans F and Kamminga MT (eds), *Extraterritorial Application of Human Rights Treaties*, Antwerp: Intersentia (2004) p. 183
Cornelisse G, 'European Vessels, African Territorial Waters and 'Illegal Emigrants': The Right to Leave and the Principle of (Il)legality in a Global Regime of Mobility', Challenge Working Paper, published online <www.libertysecurity.org> (2008)
Courtland Robinson W, 'The Comprehensive Plan of Action for Indochinese Refugees, 1989–1997: Sharing the Burden and Passing the Buck', 17 *Journal of Refugee Studies* (2004) p. 319
Crawford J, 'Revising the Draft Articles on State Responsibility', 10 *EJIL* (1999) p. 435
— and Olleson S, 'The Nature and Forms of International Responsibility', in: Evans M (ed), *International Law*, 5th Ed., Oxford University Press (2003) p. 445
Cuttitta P, 'The changes in the fight against illegal immigration in the Euro-Mediterranean area and in Euro-Mediterranean relations', CHALLENGE working paper (2007)

D'Amato A, 'The Invasion of Panama Was a Lawful Response to Tyranny', 84 *AJIL* (1990) p. 516
Davidson RA, 'Spaces of Immigration "Prevention": Interdiction and the Nonplace', 33 *Diacretics* (2003) p. 3
Davies M, 'Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea', 12 *Pacific Rim Law & Policy Journal* (2003) p. 109
Dennis MJ, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', 99 *AJIL* (2005) p. 119
Devine DJ, 'Ships in distress – a judicial contribution from the South Atlantic', 20 *Marine Policy* (1996) p. 229
Donnelly J, 'Cultural Relativism and Universal Human Rights', 6 *Human Rights Quarterly* (1984) p. 400
Doussa, von J, 'Human Rights and Offshore Processing', in: Blay S, Burn J and Keyzer P (eds), *Offshore Processing of Asylum-seekers: The Search for Legitimate Parameters*, Broadway: Halstead Press (2008)

Dummett A, 'The Transnational Migration of People seen from within a Natural Law Perspective', in: Barry B and Goodin RE (eds), *Free Movement. Ethical Issues in the Transnational Migration of People and of Money*, New York: Harvester Wheatsheaf (1992) p. 169

El-Enany N, 'Who is the New European Refugee?', LSE Legal Studies Working Paper No. 19/2007 (2007)

Evans MD, 'State Responsibility and the European Convention on Human Rights: Role and Realm', in: Fitzmaurice M and Sarooshi D (eds), *Issues of State Responsibility before International Judicial Institutions*, Oxford: Hart Publishing (2004) p. 139

Feller E, 'Carrier Sanctions and International Law', 1 *IJRL* (1989) p. 48

Ferris E, 'Internal Displacement and the Right to Seek Asylum', 27 *Refugee Survey Quarterly* (2008) p. 76

Fischer-Lescano A, Löhr T and Tohidipur T, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law', 21 *IJRL* (2009) p. 256

Francis A, 'Bringing Protection Home: Healing the Schism Between International Obligations and National Safeguards Created by Extraterritorial Processing', 20 *IJRL* (2008) p. 273

Frelick B, ''Preventive Protection' and the Right to Seek Asylum: A Preliminary Look at Bosnia and Croatia', 4 *IJRL* (1992) p. 439

— '"Abundantly Clear: *Refoulement*"', 19 *Georgetown Immigration Law Journal* (2004) p. 245

Friedberg JJ, 'Convergence of Law in an Era of Political Integration: The Wood Pulp Case and the Alcoa Effects Doctrine', 52 *University of Pittsburgh law review* (1990) p. 289

Fry JD, 'Coercion, Causation and the Fictional Elements of Indirect State Responsibility', 40 *Vanderbilt Journal of Transnational Law* (2007) p. 611

Gammeltoft-Hansen T and Gammeltoft-Hansen H, 'The Right to Seek – Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU', 10 *EJML* (2008) p. 439

García Andrade P, 'Extraterritorial Strategies to Tackle Irregular Immigration by Sea: A Spanish Perspective', in: B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control. Legal Challenges*, Leiden/Boston: Martinus Nijhoff (2010) p. 311

Garlick M, 'The EU Discussions on Extraterritorial Processing: Solution or Conundrum?', 18 *IJRL* (2006) p. 601

Gibney MJ and Hansen R, 'Asylum Policy in the West: Past Trends, Future Possibilities', United Nations University Discussion Paper No. 2003/68, World Institute for Development Economics Research (2003)

Gilbert B, 'The Practice of Asylum in Legations and Consulates of the United States', 3 *AJIL* (1909) p. 562

Gondek M, 'Extraterritorial application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?', 52 *Netherlands International Law Review* (2005) p. 349

Goodwin-Gill GS, 'The Haitian Refoulement Case: A Comment', 6 *IJRL* (1994) p. 103

— 'Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection', in: Feller E, Türk V and Nicholson F (eds), *Refugee*

Protection in International Law. UNHCR's Global Consultations on International Protection, Cambridge University Press (2003) p. 185
— 'The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations', in: Blay S, Burn J and Keyzer P (eds), *Offshore Processing of Asylum-seekers: The Search for Legitimate Parameters*, Broadway: Halstead Press (2008)
Graefrath B, 'Complicity in the Law of International State Responsibility', 29 *Revue Belge de Droit International* (1996) p. 370
Grahl-Madsen A, 'Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37)' (1963), re-published by UNHCR Department of International Protection, Geneva (1997)
Grewcock M, 'Systems of Exclusion: The Rudd Government and the 'End' of the Pacific Solution', 19 *Current Issues in Criminal Justice* (2008) p. 363
Griebel J and Plücken M, 'New Developments Regarding the Rules of Attribution? The International Court of Justice's Decision in Bosnia v. Serbia', 21 *Leiden Journal of International Law* (2008) p. 601
Guilfoyle D, 'Maritime Interdiction of Weapons of Mass Destruction', 12 *Journal of Conflict & Security Law* (2007) p. 1
Guiraudon V, 'Before the EU Border: Remote Control of the "Huddled Masses"', in: Groenendijk K, Guild E and Minderhoud P (eds), *In Search of Europe's Borders*, The Hague: Kluwer (2002) p. 191

Haas, de H 'Irregular Migration from West Africa to the Maghreb and the European Union: An Overview of Recent Trends', IOM Migration Research Series, IOM Geneva (2008)
Hailbronner K, 'The Concept of 'Safe Country' and Expeditious Asylum Procedures: A Western European Perspective', 5 *IJRL* (1993) p. 31
Hamood S, 'EU–Libya Cooperation on Migration: A Raw Deal for Refugees and Migrants?' 21 *Journal of Refugee Studies* (2008) p. 19
Happold M, 'Bankovic v Belgium and the Territorial Scope of the European Convention on Human Rights', 3 *Human Rights Law Review* (2003) p. 77
Harvey C and Barnidge RP, 'Human Rights, Free Movement, and the Right to Leave in International Law', 19 *IJRL* (2007) p. 1
Hathaway JC, 'The False Panacea of Offshore Deterrence', 26 *Forced Migration Review* (2006) p. 56
Heijer, den M, 'Whose Rights and Which Rights? The continuing Story of Non-Refoulement under the European Convention on Human Rights', 10 *EJML* (2008), p. 277
— and Wouters K, 'The Marine I Case: a Comment', 22 *IJRL* (2010), p. 1
Henkin L, 'Notes from the President', *ASIL Newsletter* (September-October 1993), p. 1
— 'An Agenda for the Next Century: The Myth and Mantra of State Sovereignty', 35 *Virginia Journal of International Law* (1994) p. 115
Hessbruegge JA, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law', 36 *N.Y.U. Journal of International Law and Politics* (2004) p. 265
Higgins R, 'The Right in International Law of an Individual to Enter, Stay in and Leave a Country', 49 *International Affairs* (1973) p. 341
Hilpold P, 'Humanitarian Intervention: Is There a Need for a Legal Reappraisal?', 12 *EJIL* (2001) p. 437

Hoof, van GJH, 'The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views', in: Alston P and Tomasevski K (eds), *The Right to Food*, Dordrecht: Martinus Nijhoff (1984) p. 97

Ignatius S, 'Haitian Asylum-Seekers: Their Treatment as a Measure of the INS Asylum Officer Corps', 7 *Georgetown Immigration Law Journal* (1993) p. 119

Juss S, 'Free Movement and the World Order', 16 *IJRL* (2004) p. 289

Kavaldjieva S, 'Jurisdiction of the European Court of Human Rights: Exorbitance in Reverse?', 37 *Georgetown Journal of International Law* (2006) p. 507

Kenney, Jr FJ and Tasikas V, 'The *Tampa* Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea', 12 *Pacific Rim Law & Policy Journal* (2003) p. 143

Kerr D, 'The Red Queen's Law : judicial review and offshore processing after 'Plaintiff S157/?2001', in: Blay S, Burn J and Keyzer P (eds), *Offshore Processing of Asylum-seekers: The Search for Legitimate Parameters*, Broadway: Halstead Press (2008)

Kesby A, 'The Shifting and Multiple Border and International Law', 27 *Oxford Journal of Legal Studies* (2007) p. 101

Kjaerum M, 'Article 14', in: Eide A et al (eds), *The Universal Declaration of Human Rights. A Commentary*, Oslo: Scandinavian University Press and Oxford University Press (1992) p. 216

Kneebone S, 'The Pacific Plan: The Provision of 'Effective Protection', 18 *IJRL* (2006), p. 696

— 'The Legal and Ethical Implications of Extraterritorial Processing of Asylum-seekers: The 'Safe Third Country' Concept', in: McAdam J (ed), *Forced Migration, Human Rights and Security*, Oxford: Hart Publishing (2008) p. 129

— 'Controlling Migration by Sea: The Australian Case', in: B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control. Legal Challenges*, Leiden/Boston: Martinus Nijhoff (2010) p. 347

Koh HH, 'The Human Face of the Haitian Interdiction Program', 33 *Virginia Journal of International Law* (1993) p. 483

— 'America's Offshore Refugee Camps', 29 *University of Richmond Law Review* (1994) p. 139

— 'Reflections on Refoulement and Haitian Centers Council', 35 *Harvard International Law Journal* (1994) p. 1

— 'The "Haiti Paradigm" in United States Human Rights Policy', 103 *Yale Law Journal* (1994) p. 2391

Künnemann R, 'Extraterritorial Application of the International Covenant on Economic Social and Cultural Rights', in: Coomans F and Kamminga MT (eds), *Extraterritorial Application of Human Rights Treaties*, Antwerp: Intersentia (2004) p. 201

Lauterpacht E and Betlehem D, 'The scope and content of the principle of non-refoulement: Opinion', in: Feller E et al (eds), *Refugee Protection in International Law. UNHCR's Global Consultations on International Protection*, Cambridge University Press (2003), p. 87

Lavanex S, 'EU external governance in "Wider Europe"', 11 *Journal of European Public Policy* (2004) p. 680

Lawson RA, 'Out of Control – State Responsibility and Human Rights: Will the ILC's Definition of the 'Act of State' meet the Challenges of the 21st Century?', in Castermans M, Van Hoof F & Smith J (eds), *The Role of the Nation State in the 21st Century – Essays in Honour of Peter Baehr* (1998) p. 91

— 'Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights', in: Coomans F and Kamminga MT (eds), *Extraterritorial Application of Human Rights Treaties*, Antwerp: Intersentia (2004) p. 83

Legault LH, 'Canadian Practice in International Law during 1979 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs', 18 *Canadian Yearbook of International Law* (1980) p. 301

Legomsky S, 'The USA and the Caribbean Interdiction Program', 18 *IJRL* (2006) p. 677

Linderfalk U, 'State Responsibility and the Primary-Secondary Rules Terminology – The Role of Language for an Understanding of the International Legal System', 78 *Nordic Journal of International Law* (2009) p. 53

Lowe AV, 'International Law and the Effects Doctrine in the European Court of Justice', 48 *The Cambridge Law Journal* (1989) p. 9

— 'Responsibility for the conduct of other states', 101 *Kokusaiho Gaiko Zassi/Japanese Journal of International Law* (2002) p. 1

— 'Jurisdiction', in: Evans M (ed), *International Law*, Oxford University Press (2003)

Mann FA, 'The Doctrine of Jurisdiction in International Law', 111 *Recueil des Cours de l'Académie de Droit International* (1964) p. 1

— 'The Doctrine of International Jurisdiction Revisited After Twenty Years', 186 *Recueil des Cours de l'Académie de Droit International* (1984) p. 9

Mathew P, 'Australian Refugee Protection in the Wake of the Tampa', 96 *AJIL* (2002) p. 661

McDougal MS, Burke WT and Vlasic IA, 'The Maintenance of Public Order at Sea and the Nationality of Ships', 54 *AJIL* (1960) p. 25

Meron T, 'Applicability of Multilateral Conventions to Occupied Territories', 72 *AJIL* (1978) p. 542

Milanović M, 'State Responsibility for Genocide', 17 *EJIL* (2006) p. 553

— 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties', 8 *Human Rights Law Review* (2008) p. 411

Minderhoud P and Scholten S, 'Regulating Immigration Control: Carrier Sanctions in the Netherlands' 10 *EJML* (2008) p. 123

Moreno Lax V, 'Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees', 10 *EJML* (2008) p. 315

Morgenstern F, ''Extra-Territorial' Asylum', 25 *BYIL* (1948) p. 236

— 'The Right of Asylum', 26 *BYIL* (1949) p. 327

— 'Diplomatic Asylum', 67 *The Law Quarterly Review* (1951) p. 362

Nafziger JAR, 'The General Admission of Aliens Under International Law, 77 *AJIL* (1983) p. 804

Nahapetian K, 'Confronting State Complicity in International Law', 7 *UCLA Journal of International Law & Foreign Affairs* (2002) p. 99

Neal AW, 'Securitization and Risk at the EU Border: The Origins of Frontex', 47 *Journal of Common Market Studies* (2009) p. 353

Nicholson F, 'Implementation of the Immigration (Carriers' Liability) Act 1987: Privatising Immigration Functions at the Expense of International Obligations?', 46 *ICLQ* (1997) p. 586

Noll G, 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones', 5 EJML (2003) p. 303

— 'Seeking Asylum at Embassies: A Right to Entry under International Law?', 17 *IJRL* (2005) p. 542

Nolte G and Aust HP, 'Equivocal Helpers – Complicit States, Mixed Messages and International Law', 58 *ICLQ* (2009) p. 1

Noyes JE and Smith BD, 'State Responsibility and the Principle of Joint and Several Liability', 13 *Yale Journal of International Law* (1988) p. 225

O'Boyle M, 'The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on 'Life After Bankovic', in: Coomans F and Kamminga MT (eds), *Extraterritorial Application of Human Rights Treaties*, Antwerp: Intersentia (2004) p. 125

O'Nions H, 'The Erosion of the Right to Seek Asylum', 2 *Web Journal of Current Legal Issues* (2006)

Orakhelashvili A, 'Restrictive Interpretation of the Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights', 14 *EJIL* (2003) p. 529

Pallis M, 'Obligations of States towards Asylum-seekers at Sea: Interactions and Conflicts Between Legal Regimes', 14 *IJRL* (2002) p. 329

Palombella G, 'The rule of law beyond the state: Failures, promises and theory', 7 *International Journal of Constitutional Law* (2009) p. 442

Pascale, di A, 'Migration Control at Sea: The Italian Case', in: Ryan B and Mitsilegas V (eds), *Extraterritorial Immigration Control*, Leiden/Boston: Martinus Nijhoff (2010), p. 281

Paspalanova P, 'Undocumented vs. Illegal Migrant: Towards Terminological Coherence', 4 *Migraciones Internacionales* (2008) p. 79

Peers S, 'Revising EU Border Control Rules: A Missed Opportunity?', Statewatch, published online <www.statewatch.org> (2005)

Porcino P, 'Toward Codification of Diplomatic Asylum', 8 *New York University Journal of International Law and Politics* (1976) p. 435

Pugash JZ, 'The Dilemma of the Sea Refugee: Rescue Without Refuge', 18 *Harvard International Law Journal* (1977) p. 577

Quigley J, 'Complicity in International Law: A New Direction in the Law of State Responsibility', 57 *BYIL* (1986) p. 77

Reisman WM, Sovereignty and Human Rights in Contemporary International Law, 84 *AJIL* (1990) p. 866

Riveles S, 'Diplomatic Asylum as a Human Right: The Case of the Durban Six', 11 *Human Rights Quarterly* (1989) p. 139

Robertson A and Demetriou M, '"But that was in Another Country …": The Extraterritorial Application of US Antitrust Laws in the US Supreme Court', 43 *ICLQ* (1994) p. 417

Rossitto AM, 'Diplomatic Asylum in the United States and Latin America: A Comparative Analysis', 13 *Brooklyn Journal of International Law* (1987) p. 111

Roxstrom E, Gibney M and Einarsen T, 'The NATO Bombing Case (Bankovic et al. v. Belgium et al.) and the Limits of Western Human Rights Protection', 23 *Boston University International Law Journal* (2005) p. 55

Rozakis C, 'The Territorial Scope of Human Rights Obligations: the Case of the European Convention on Human Rights', Report Venice Commission, Strasbourg (2005), No. CDL-UD(2005)022rep

Ruth A and Trilsch M, 'International Decisions: Bankovic v Belgium (Admissibility)', 97 *AJIL* (2003) p. 168

Ryan B, 'Extraterritorial Immigration Control: What Role for Legal Guarantees?', in: Ryan B and Mitsilegas V (eds), *Extraterritorial Immigration Control*, Leiden/Boston: Martinus Nijhoff (2010), p. 3

Sartori ME, 'The Cuban Migration Dilemma: an Examination of the United States' Policy of Temporary Protection in Offshore Safe Havens', 15 *Georgetown Immigration Law Journal* (2001) p. 319

Scheinin M, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights', in: Coomans F and Kamminga MT (eds), *Extraterritorial Application of Human Rights Treaties*, Antwerp: Intersentia (2004), p. 73

Shacknove AE, 'Who Is a Refugee?', 95 *Ethics* (1985) p. 274

Shearer A, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels', 35 *ICLQ* (1986) p. 320

Shue H, 'The Interdependence of Duties', in: Alston P and Tomasevski K (eds), *The Right to Food*, Dordrecht: Martinus Nijhoff (1984) p. 83

Simma B, 'How Distinctive Are Treaties Representing Collective Interest? The Case of Human Rights Treaties', in: Gowlland-Debbas V (ed), *Multilateral Treaty-Making: The Current Status of Challenges to and Reforms Needed in the International Legislative Process*, The Hague: Martinus Nijhoff (2000) p. 83

Simon J, 'Irregular Transit Migration in the Mediterranean – some facts, figures and insights', in: N. Nyberg Sorensen (ed), 'Mediterranean Transit Migration' (Report), Danish Institute for International Studies (2004)

Spijkerboer T, 'The Human Costs of Border Control', 9 *EJML* (2007) p. 127

Spinedi M, 'On the Non-Attribution of the Bosnian Serbs' conduct to Serbia', 5 *Journal of International Criminal Justice* (2007) p. 829

Stevens D, 'The Asylum and Immigration Act 1996: Erosion of the Right to Seek Asylum', 61 *The Modern Law Review* (1998) p. 207

Talmon S, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq', in: Shiner P and Williams A, *The Iraq War and International Law*, Oxford: Hart Publishing (2008) p. 185

Taylor S, 'The Pacific Solution or a Pacific Nightmare?: The Difference Between Burden Shifting and Responsibility Sharing', 6 *Asia Pacific Law and Policy Journal* (2005) p. 1

— 'Offshore Barriers to Asylum-seeker Movement: The Exercise of Power without Responsibility?', in: McAdam J (ed), *Forced Migration, Human Rights and Security*, Oxford: Hart Publishing (2008) p. 93

— 'Australia's Pacific Solution Mark II: The Lessons to be Learned', in: Blay S, Burn J and Keyzer P (eds), *Offshore Processing of Asylum-seekers: The Search for Legitimate Parameters*, Broadway: Halstead Press (2008)
— and Rafferty-Brown BR, 'Waiting for Life to Begin: the Plight of Asylum Seekers Caught by Australia's Indonesian Solution', 22 *IJRL* (2010) p. 558
Trevisanut S, 'The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection', 12 *Max Planck Yearbook of United Nations Law* (2008) p. 222

Vries, de K, 'An Assessment of 'Protection in Regions of Origin' in relation to European Asylum Law', 9 *EJML* (2007) p. 83

Wasem RE (Congressional research Service), 'Cuban Migration to the United States: Policy and Trends', CRS Report for Congress (2009)
— 'US Immigration Policy on Haitian Migrants', CRS Report for Congress (2010)
Weinzierl R, 'Human Rights at the EU's common external maritime border, Recommendations to the EU legislature', German Institute for Human Rights: Policy Paper No. 11 (2008)
White N, 'The Tragic Plight of HIV-Infected Haitian Refugees at Guantánamo Bay', 28 *Liverpool Law Review* (2007) p. 249
Willheim E, '*MV* Tampa: The Australian Response', 15 *IJRL* (2003) p. 159
Wyman JH, 'Vengeance Is Whose: The Death Penalty and Cultural Relativism in International Law', 6 *Journal of Transnational Law & Policy* (1997) p. 543

Table of cases

I Permanent Court of International Justice

- *Certain questions relating to settlers of German origin in the territory ceded by Germany to Poland*, Advisory opinion, 10 September 1923, PCIJ Series B, No. 6
- *S.S. 'Lotus' (France v Turkey)*, Judgment, 7 September 1927, PCIJ Series A. No. 10

II International Court of Justice

- *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007, General List No. 91
- *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russian Federation) (Provisional Measures)*, Order, 15 October 2008, ICJ Reports 2008, p. 353
- *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, 19 December 2005, ICJ Reports 2005, p. 168
- *Barcelona Traction, Light and Power Company, Limited*, Judgment, 5 February 1970, ICJ Reports 1970, p. 3
- *Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)*, Judgment, 26 June 1992, ICJ Reports 1992, p. 240
- *Colombian-Peruvian asylum case*, Judgment, 20 November 1950, ICJ Reports 1950, p. 266
- *Corfu Channel case*, Judgment, 9 April 1949, ICJ Reports 1949, p. 4
- *Haya de la Torre case*, Judgment, 13 June 1951, ICJ Reports 1951, p. 71
- *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras) (Application to Intervene)*, Judgment, 13 September 1990, ICJ Reports 1990, p. 92
- *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Reports 1971, p. 16
- *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, p. 136
- *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226 (8 July 1996)
- *Military and Paramilitary Activities in und against Nicaragua (Nicaragua v United States of America) (Merits)*, Judgment, 27 June 1986, ICJ Reports 1986, p. 14
- *Monetary gold removed from Rome in 1943 (Preliminary Question)*, Judgment, 25 June 1954, ICJ Reports 1954, p. 19
- *Request for interpretation of the Judgment of November 20th, 1950, in the asylum case*, Judgment, 27 November 1950, ICJ Reports, p. 395

III INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

IV EUROPEAN COMMISSION OF HUMAN RIGHTS

V EUROPEAN COURT OF HUMAN RIGHTS

- *Behrami and Behrami v France and Saramati v France, Germany and Norway*, nos. 71412/01, 78166/01 (2 May 2007)
- *Ben El Mahi a.o. v Denmark*, no. 5853/06 (11 December 2006)
- *Berrehab v the Netherlands*, no. 10730/84 (21 June 1988)
- *Bosphorus v Ireland*, no. 45036/98 (30 June 2005)
- *C.G. a.o. v Bulgaria*, no. 1365/07 (24 April 2008)
- *Carson a.o. v the United Kingdom*, no. 42184/05 (4 November 2008)
- *Chahal v United Kingdom*, no. 22414/93 (15 November 1996)
- *Cyprus v Turkey*, no. 25781/94 (10 May 2001)
- *Djavit An v Turkey*, no. 20652/92 (20 February 2003)
- *Drozd and Janousek v France and Spain*, no. 12747/87 (26 June 1992)
- *Eugenia Michaelidou Developments Ltd. a.o. v Turkey*, no. 16163/90 (31 July 2003)
- *Földes and Földesné Hajlik v Hungary*, no. 41463/02 (31 October 2006)
- *Galić v the Netherlands*, no. 22617/07 (9 June 2009)
- *Gentilhomme a.o. v France*, nos. 48205/99, 48207/99, 48209/99 (14 May 2002)
- *Guzzardi v Italy*, no. 7367/76 (6 November 1980)
- *H.L.R. v France*, no. 24573/94 (29 April 1997)
- *H.M. v Switzerland*, no. 39187/98 (26 February 2002)
- *Haydarie a.o. v the Netherlands*, no. 8876/04 (20 October 2005)
- *Ilascu a.o. v Moldova and Russia*, no. 48787/99 (8 July 2004)
- *Ireland v United Kingdom*, no. 5310/71 (18 January 1978)
- *Isaak v Turkey* (dec.), no. 44587/98 (28 September 2006)
- *Isaak v Turkey*, no. 44587/98 (24 June 2008)
- *Issa a.o. v Turkey*, no. 31821/96 (16 November 2004)
- *Jabari v Turkey*, no. 40035/98 (11 July 2000)
- *Kelly a.o. v the United Kingdom*, no. 30054/96 (4 May 2001)
- *Kovaèiè a.o. v Slovenia*, nos. 44574/98, 45133/98, 48316/99 (9 October 2003)
- *Lavents v Latvia*, no. 58442/00 (28 November 2002)
- *L.C.B. v the United Kingdom*, no. 23413/94 (9 June 1998)
- *Loizidou v Turkey* (Preliminary Objections), no. 15318/89 (23 March 1995)
- *Loizidou v Turkey*, no. 15318/89 (18 December 1996)
- *Luordo v Italy*, no. 32190/96 (17 July 2003)
- *Mahdid and Haddar v Austria*, no. 74762/01 (8 December 2005)
- *Mahmut Kaya v Turkey*, no. 22535/93 (28 March 2000)
- *Malone v the United Kingdom*, no. 8691/79 (2 August 1984)
- *Manoilescu and Dobrescu v Romania and Russia*, no. 60861/00 (3 March 2005)
- *Markovic v Italy*, no. 1398/03 (14 December 2006)
- *Martin v the United Kingdom*, no. 40426/98 (25 October 2006)
- *Mastromatteo v Italy*, no. 37703/97 (24 October 2002)
- *Mayeka and Mitunga v Belgium*, no. 13178/03 (12 October 2006)
- *Medvedyev a.o. v France*, no. 3394/03 (10 July 2008)
- *Medvedyev a.o. v France* [GC], no. 3394/03 (29 March 2010)
- *Mikolenko v Estonia*, no. 10664/05 (8 October 2009)
- *Minasyan and Semerjyan v Armenia*, no. 27651/05 (23 June 2009)
- *Muskhadzhiyeva a.o. v Belgium*, no. 41442/07 (19 January 2010)
- *N. v the United Kingdom*, no. 26565/05 (27 May 2008)
- *Napijalo v Croatia*, no. 66485/01 (13 November 2003)
- *Nolan and K. v Russia*, no. 2512/04 (12 February 2009)
- *Öcalan v Turkey*, no. 46221/99 (12 March 2003)
- *Öcalan v Turkey* [GC], no. 46221/99 (12 May 2005)
- *Olsson v Sweden (No. 1)*, appl. 10465/83 (24 March 1988)

- *Celiberti de Caseriego v Uruguay*, no. 56/1979 (29 July 1981)
- *Francesco Madafferi and Anna Maria Immacolata Madafferi v Australia*, no. 1011/2001 (26 August 2004)
- *Ibrahima Gueye et al. v France*, no. 196/1983 (3 April 1989)
- *Jalloh v the Netherlands*, no. 794/1998 (26 March 2002)
- *Lichtensztejn v Uruguay*, no. 77/1980 (31 March 1983)
- *Lopez Burgos v Uruguay*, no. 52/1979 (29 July 1981)
- *Loubna El Ghar v Libyan Arab Jamahiriya*, no. 1107/2002 (15 November 2004)
- *Mohammed Alzery v Sweden*, no. 1416/2005 (10 November 2006)
- *Montero v Uruguay*, no. 106/1981 (31 March 1983)
- *Munaf v Romania*, no. 1539/2006 (30 July 2009)
- *Nunez v Uruguay*, no. 108/1981 (22 July 1983)
- *Omar Sharif Baban v Australia*, no. 1014/2001 (18 September 2003)
- *Peltonen v Finland*, no. 492/1992 (29 July 1994)
- *Vidal Martins v Uruguay*, no. 57/1979 (23 March 1982)

IX COMMITTEE AGAINST TORTURE

- *J.H.A. v Spain (Marine I)*, no. 323/2007 (21 November 2008)

X INTER-AMERICAN COURT OF HUMAN RIGHTS

- *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75),* Advisory Opinion, OC-2/82, Series A No. 2 (24 September 1982)

XI INTER-AMERICAN COMMISSION OF HUMAN RIGHTS

- *Alejandre et al v Cuba*, Case. 11.589, report no. 86/99 (29 September 1999)
- *Coard et al v the United States*, Case 10.951, report no. 109/99 (29 September 1999)
- *Disabled Peoples' International et al v the United States*, Case 9.213 (22 September 1987)
- *Salas et al v United States*, Case 10.573, report no. 31/93 (14 October 1993)
- *The Haitian Centre for Human Rights et al v United States (Haitian Interdiction)*, Case 10.675, report no. 51/96 (13 March 1997)
- *Victor Saldano v Argentina*, report no. 38/99 (11 March 1999)

XII INTERNATIONAL TRIBUNALS

- General Claims Commission – United States and Mexico 2 April 1929, *Kate A. Hoff, Administratrix of the Estate of Samuel B. Allison, Deceased (USA.) v United Mexican States*, 4 UNRIAA p. 444
- Ad Hoc International Arbitral Tribunal 11 March 1941, *Trail smelter case (United States v Canada)*, 3 UNRIAA p. 1905
- Iran-United States Claims Tribunal 2 November 1987, *Kenneth P. Yeager v The Islamic Republic of Iran*, Partial Award No. 324-10199-1, reprinted in 17 Iran-United States Claims Tribunal Reports p. 92
- Permanent Court of Arbitration 30 January 2007, *The Channel Tunnel Group Ltd and France-Manche S.A. v United Kingdom and France (Eurotunnel)*, Partial Award

XIII NATIONAL COURTS

Australia

United Kingdom

United States

Index

Curriculum vitae

MAARTEN DEN HEIJER
Born in Voorburg, the Netherlands, on the 3rd of August 1979

Education
LL.M., Leiden University, 2005
M.A., Political Science, Leiden University, 2003
VWO, Erasmus College, Zoetermeer, 1997

Professional experience
- PhD candidate, Institute of Immigration Law, Leiden University, 2006-2010
- Lecturer and researcher, Institute of Immigration Law and Europa Instituut, Leiden University, 2005-2006

Memberships & Activities
- Member Appeals Board Dutch Foundation for Refugee Students UAF, 2009-present
- Member of Standing committee of experts on international immigration, refugee and criminal law (Meijers Committee), 2007-present
- Contributor to the *NJCM-Bulletin* (Dutch Journal for Human Rights), 2006-present
- Award for best masters' dissertation in the field of immigration law in the Netherlands in 2006 (*Hanneke Steenbergen thesis award*)

Selected publications
- Heijer, M. den, 'Europe beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control', in: B. Ryan and V. Mitsilegas (eds): Extraterritorial Immigration Control: Legal Challenges (Leiden/Boston: Martinus Nijhoff 2010), 169-198
- Heijer, M. den & K. Wouters, 'The *Marine I* Case: a Comment', 22 *International Journal of Refugee Law* (2010), 1-19
- Boeles, P., M. den Heijer, G.G. Lodder and C.W. Wouters, *European Migration Law* (Antwerpen: Intersentia 2009)
- Heijer, M. den, 'Whose Rights and Which Rights? The Continuing Story of Non-Refoulement under the European Convention on Human Rights', 10 *European Journal of Migration & Law* (2008), 277-314

In de boekenreeks van de Graduate School of Legal Studies van de Faculteit der Rechtsgeleerdheid, Universiteit Leiden, zijn in 2009 en 2010 verschenen:

MI-156 N.M. Dane, *Overheidsaansprakelijkheid voor schade bij legitiem strafvorderlijk handelen*, (diss. Leiden), Tilburg: Celsus juridische uitgeverij 2009, ISBN 978 90 8863 034 7

MI-157 G.J.M. Verburg, *Vaststelling van smartengeld,* (diss. Leiden) Deventer: Kluwer 2009

MI-158 J. Huang, *Aviation Safety and ICAO*, (diss. Leiden) 2009 ISBN-13 978 90 4113 115 7

MI-159 J.L.M. Gribnau, A.O. Lubbers & H. Vording (red.), *Terugkoppeling in het belastingrecht*, Amersfoort: Sdu Uitgevers 2008, ISBN 978 90 6476 326 7

MI-160 J.L.M. Gribnau, *Soevereiniteit en legitimiteit: grenzen aan (fiscale) regelgeving*, (oratie Leiden), Sdu Uitgevers 2009, ISBN 978 90 6476 325 0

MI-161 S.J. Schaafsma, *Intellectuele eigendom in het conflictenrecht. De verborgen conflictregel in het beginsel van nationale behandeling* (diss. Leiden), Deventer: Kluwer 2009, ISBN 978 90 13 06593 0

MI-162 P. van Schijndel, *Identiteitsdiefstal*, Leiden: Jongbloed 2009

MI-163 W.B. van Bockel, *The ne bis in idem principle in EU law*, (diss. Leiden), Amsterdam: Ipskamp 2009, ISBN 978 90 90 24382 5

MI-164 J. Cartwright, *The English Law of Contract: Time for Review?*, (oratie Leiden), Leiden 2009

MI-165 W.I. Koelewijn, *Privacy en politiegegevens. Over geautomatiseerde normatieve informatie-uitwisseling,* (diss. Leiden), Leiden: Leiden University Press 2009, ISBN 9 789087 280703

MI-166 S.R.M.C. Guèvremont, *Vers un traitement équitable des étrangers extracommunautaires en séjour régulier. Examen des directives sur le regroupement familial et sur les résidents de longue durée*, (diss. Leiden), Zutphen: Wöhrmann Printing Service 2009, ISBN 978 90 8570 419 5

MI-167 A.G. Castermans, I.S.J. Houben, K.J.O. Jansen, P. Memelink & J.H. Nieuwenhuis (red.), *Het zwijgen van de Hoge Raad*, Deventer: Kluwer 2009, ISBN 978 90 13 07029 3

MI-168 P.M. Schuyt, *Verantwoorde straftoemeting*, (diss. Leiden), Deventer: Kluwer 2009, ISBN 978 90 1307 156 6

MI-169 P.P.J. van der Meij, *De driehoeksverhouding in het strafrechtelijk vooronderzoek*, (diss. Leiden), Deventer: Kluwer 2010, ISBN 978 90 1407 158 0

MI-170 M.V. Polak (red.), *Inbedding van Europese procesrechtelijke normen in de Nederlandse rechtsorde*, Nijmegen: Ars Aequi Libri 2010, ISBN 978 90 6916 714 5

MI-171 E. Koops, *Vormen van subsidiariteit. Een historisch-comparistische studie naar het subsidiariteitsbeginsel bij pand, hypotheek en borgtocht*, (diss. Leiden), Den Haag: Boom Juridische uitgevers 2010, ISBN 978 90 8728 070 3

MI-172 H.H. Kielman, *Politiële gegevensverwerking. Naar een effectieve waarborging*, (diss. Leiden) Zutphen: Wöhrmann Print Service 2010, ISBN 978 90 8570 503 1

MI-173 K. Siewicz, *Towards an Improved regolatory Framework of Free Software. Protecting user freedoms in a world of software communities and eGovernments*, (diss. Leiden) Warszawa (Polen): Sowa 2010, ISBN 978 83 930580 0 6

MI-174 L. Mommers, H. Franken, J. van den Herik, F. van der Klaauw, G.-J. Zwenne (red.) *Het binnenste buiten,* Liber amicorum A.H.J. Schmidt, Leiden: eLaw@leiden 2010, ISBN 978 90 815196 1 8

MI-175 R. Ong, *Mobile Communication and the Protection of Children*, (diss. Leiden), Leiden: Leiden University Press 2010, ISBN 978 90 8728 080 2

MI-176 M.P. Lycklama à Nijeholt, *Goodwill and value creation of acquisitions*, (diss. Leiden), Zutphen: Ipskamp 2010, ISBN 978 90 9025 290 2

MI-177 M.K.G. Tjepkema, *Nadeelcompensatie op basis van het égalitébeginsel. Een onderzoek naar nationaal, Frans en Europees recht,* (diss. Leiden), Deventer: Kluwer 2010 ISBN, 978 90 8728 098 7

MI-178 J.H. Crijns, *De strafrechtelijke overeenkomst. De rechtsbetrekking met het Openbaar Ministerie op het grensvlak van publiek- en privaatrecht*, (diss. Leiden), Deventer: Kluwer 2010, ISBN 978 90 1307 662 2

MI-179 M.B. Voulon, *Automatisch contracteren*, (diss. Leiden), Leiden: Leiden University Press 2010, ISBN 978 90 8728 098 7

MI-180 B.J. de Vos, *Horizontale werking van grondrechten. Een kritiek*, (diss. Leiden), Apeldoorn: Maklu 2010

MI-181 S. van Wingerden, D. Alberda, M. Moerings, B. Wartna & J. van Wilsem, *Recidive en nazorg. Een onderzoek onder oud-bewoners van Exodus, DOOR, Moria & Ontmoeting*, Den Haag: Boom Juridische uitgevers 2010, ISBN 978 90 8974 316 9

MI-182 J. Vis, *Ondernemend Waarderen : Waarderend Ondernemen. De subjectiviteit van het begrip economische waarde*, (diss. Leiden), Apeldoorn: Maklu 2010, ISBN 987 90 466 0364 2

MI-183 J.M.J. van Rijn van Alkemade & J. Uzman (red.), *Soevereiniteit of pluralisme? Nederland en Europa na het Lissabon-Urteil*, Nijmegen: Wolf Legal Publishers 2011, **ISBN ???????**

MI-184 G.K. Schoep, C.P.M. Cleiren, J.P. van der Leun & P.M. Schuyt (red.), *Vervlechting van domeinen. Opstellen aangeboden aan prof. mr. J.L. de Wijkerslooth*, Deventer: Kluwer 2010, ISBN 978 90 1307 879 4

MI-185 Th. Doreleijers, J. ten Voorde & M. Moerings (red.), *Strafrecht en Forensische Psychiatrie voor 16- tot 23-jarigen,* Den Haag: Boom Juridische uitgevers 2010, ISBN 978 90 8974 356 5

MI-186 C. Jiménez Monroy, *Legal and Institutional Aspects of Latin-American Space Cooperation AQUARELSat: The Water Monitoring Constellation*, (diss. Leiden) Zutphen: Wöhrmann Print Service 2010, ISBN 978 90 8570 595 6

MI-187 M.A.H. van der Woude, *Wetgeving in een Veiligheidscultuur*, *Totstandkoming van antiterrorismewetgeving in Nederland bezien vanuit maatschappelijke en (rechts)politieke context*, (diss. Leiden), Den Haag: Boom Juridische uitgevers 2010, ISBN 978 90 8974 379 4

MI-188 A.G. Castermans, K.J.O. Jansen, M.W. Knigge, P. Memelink & J.H. Nieuwenhuis*, 40 jaar practicum. Rondom onroerend goed*, Deventer: Kluwer 2010, ISBN 978 90 13 08228 9

MI-189 M.R. Bruning, M.P. de Jong, T. Liefaard, P.M. Schuyt, J.E. Doek & T.A.H. Doreleijers, *Wegwijs in het jeugdsanctierecht. Onderzoek naar het juridisch kader voor de zwaarste jeugdsancties in theorie en praktijk,* Nijmegen: Wolf Legal Publishers 2011, ISBN 978-90-5850-621-4

MI-190 J.P. van der Leun, E.R. Muller, N. van der Schee, P.M. Schuyt & M.A.H. van der Woude, *De vogel vrij. Liber amicorum prof.dr.mr. Martin Moerings*, Den Haag: Boom Lemma Uitgevers 2011, ISBN 978 90 5961 657 7

MI-191 M. den Heijer, *Europe and Extraterritorial Asylum* (diss. Leiden) 2011

Zie voor de volledige lijst van publicaties: www.law.leidenuniv.nl/onderzoek