University of Helsinki
Faculty of Law

# CHALLENGING THE MISCONCEPTION OF STATES:

## States can avoid human rights responsibilities through externalized migration control practices

---

Mikaela Graae

November 2020
Master's Thesis

HELSINGIN YLIOPISTO
HELSINGFORS UNIVERSITET
UNIVERSITY OF HELSINKI

| Tiedekunta – Fakultet – Faculty | Koulutusohjelma – Utbildingsprogram – Degree Programme | |
|---|---|---|
| Faculty of Law | Master's Degree Programme in Public International Law | |
| Tekijä – Författare – Author | | |
| Mikaela Graae | | |
| Työn nimi – Arbetets titel – Title | | |
| Challenging the misconception of states: States can avoid human rights responsibilities through externalized migration control practices | | |
| Oppiaine/Opintosuunta – Läroämne/Studieinriktning – Subject/Study track | | |
| Public International Law | | |
| Työn laji – Arbetets art – Level | Aika – Datum – Month and year | Sivumäärä – Sidoantal – Number of pages |
| Master's thesis | November 2020 | x + 77 |


Tiivistelmä – Referat – Abstract

International refugee law is forced to adapt to the increase of externalized migration control. States no longer stick to migration control only at their national borders. Especially developed states have introduced various externalized migration control mechanisms – seeking to control the movement of migrants at every step of their journey. By such externalization, states aim to deter unwanted migrants. The presumption behind these practices is that through them, states can avoid the legal responsibilities that flow from international refugee law and especially the principle of *non-refoulement*. The enforcement of such practices often results in weakened protection for refugees. The control mechanisms are designed so that migrants are effectively denied access to areas where their rights would otherwise be substantially better than in those where they are forced to stay. The thesis deals with these mechanisms as conscious and strategic decisions made by developed states to keep unwanted migrants outside their legal responsibility.

The overall objective of the thesis is to challenges the presumption of states, that they can evade responsibilities by outsourcing migration control to other states. It does so by analyzing the current legal regime on the extraterritorial application of *non-refoulement* and state jurisdiction. The question it answers is thus, when, if ever, does extraterritorial jurisdiction and state responsibility apply if externalized migration control mechanisms have been enforced?

The thesis concludes that, although externalized migration control has become the rule rather than the exception, the current legal regime does not provide comprehensive protection for refugees. Extraterritorial jurisdiction under human rights law relies on effective control over territories or individuals; because externalized migration control mechanisms often outsource the control to third states, the jurisdictional link cannot necessarily be established between the individual and the state that enforces such mechanisms. Therefore, to protect refugees effectively the thesis argues that a contemporary understanding of the rules on extraterritorial jurisdiction should be adopted. It argues that states' reliance on externalized migration control mechanisms can be challenged by adopting an additional basis for jurisdiction – jurisdiction based on the exercise of public powers abroad. It would decrease the attractiveness of externalized practices and increase the likelihood that states commit to fulfill them in a way that respects and guarantees protection for refugees.



Avainsanat – Nyckelord – Keywords

Externalized migration control; non-entrée practices; non-refoulement; extraterritorial jurisdiction; international refugee law

Ohjaaja tai ohjaajat – Handledare – Supervisor or supervisors

Jan Klabbers

Säilytyspaikka – Förvaringställe – Where deposited

Helsingin yliopiston kirjasto, Helsingfors universitets bibliotek, Helsinki University Library

Muita tietoja – Övriga uppgifter – Additional information

# TABLE OF CONTENTS

# TABLE OF CASES

## International decisions

### *International Court of Justice*



### *United Nations Committee Against Torture*



### *United Nations Human Rights Committee*

## Regional decisions

### *European Court of Human Rights*

Al-Saadoon and Mufdhi v the United Kingdom, no. 61498/08, ECHR 2010

Al-Skeini and Others v the United Kingdom [GC], no. 55721/07, ECHR 2011

Amuur v France, 25 June 1996, Reports of Judgments and Decisions 1996-III

Assanidze v Georgia [GC], no. 71503/01, ECHR 2004-II

Banković and Others v Belgium and Others (dec.) [GC], no. 52207/99, ECHR 2001-XII

Behrami and Saramati v France, Germany and Norway [2007] ECtHR (GC) 71412/01 and 78166/01

Cyprus v Turkey [GC], no. 25781/94, ECHR 2001-IV

Drozd and Janousek v France and Spain, 26 June 1992, Series A no. 240

Gentilhomme, Schaff-Benhadji and Zerouki v France, nos. 48205/99 and 2 others, 14 May 2002

Hirsi Jamaa and Others v Italy [GC], no. 27765/09, ECHR 2012

Ilaşcu and Others v Moldova and Russia [GC], no. 48787/99, ECHR 2004-VII

Issa and Others v Turkey, no. 31821/96, 16 November 2004

Loizidou v Turkey (merits), 18 December 1996, Reports of Judgments and Decisions 1996-VI

Loizidou v Turkey (preliminary objections), 23 March 1995, Series A no. 310

M.S.S. v Belgium and Greece [GC], no. 30696/09, ECHR 2011

Medvedyev and Others v France [GC], no. 3394/03, ECHR 2010

### *Inter-American Commission on Human Rights*



## National decisions

### *Australia*

## *Canada*



## *United Kingdom*



## *United States*

# TABLE OF LEGISLATION

## Treaties and legislation

### *International*

United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3

Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 331

## *Regional*

### European

Charter of Fundamental Rights of the European Union [2012] OJ C326/291

Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration [2016] COM/2016/0385

Consolidated Version of the Treaty on European Union [2012] OJ C326/13

Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221

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 [2000] OJ L239/19

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L337/9

Directive 2013/32/EU of the European Parliament and the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60

Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] [2020] 2020/0279(COD)

Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC [2016] OJ L251/1

Regulation (EU) 2019/1240 of the European Parliament and of the Council of 20 June 2019 on the creation of a European network of immigration liaison officers [2019] OJ L198/88

Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31

**American**

American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123

American Declaration of the Rights and Duties of Man (adopted 2 May 1948) OAS Res XXX (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992)

**African**

African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217

Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45

### *Bilateral and national*

Agreement between the Government of Canada and the Government of the United States of America: For cooperation in the examination of refugee status claims from nationals of third countries (signed 5 December 2002)

Australia, Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (No 128, 2001)

Australia, Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013 (No 35, 2013)

The Friendship Pact between Libya and Italy (2008). English translation available at <https://securitylegislation.ly/sites/default/files/lois/7-Law%20No.%20%282%29%20of%202009_EN.pdf> (last accessed 1.10.2020)

## Other official documents

Executive Committee of the High Commissioner's Programme, 'Conclusion on Protection Safeguards in Interception Measures' (10 October 2003) No 97 (LIV) UN Doc A/AC.96/987

Executive Committee of the High Commissioner's Programme, 'General Conclusion on International Protection' (7 October 1994) No 74 (XLV) UN Doc A/49/12/Add.1

Executive Committee of the High Commissioner's Programme, 'Interception of Asylum-Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach' (9 June 2000) UN Doc EC/60/SC/CRP.17

Executive Committee of the High Commissioner's Programme, 'The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum' (20 October 1983) No 30 (XXXIV) UN doc 12A (A/38/12/Add.1)

Executive Committee of the High Commissioner's Programme, 'Note on International Protection' (31 August 1993) UN Doc A/AC.96/815

International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, Yearbook of the International Law Commission, 2011, vol II, Part Two

United Nations General Assembly, Draft International Declaration of Human Rights (30 October 1948) UN doc A/C.3/285/Rev.1

United Nations General Assembly, Res 51/75 (12 February 1997) UN Doc A/RES/51/75

United Nations General Assembly, Res 52/132 (12 December 1997) UN Doc A/RES/52/132

United Nations High Commissioner for Refugees, 'A guide to international refugee protection and building state asylum systems' (2017) Handbook for Parliamentarians No 27

United Nations High Commissioner for Refugees, 'Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' (February 2019) HCR/1P/4/ENG/REV. 4 available at <https://www.unhcr.org/4d93528a9.pdf> (last accessed 1.10.2020)

United Nations Human Rights Committee, 'Concluding observations of the Human Rights Committee Israel' (21 August 2003) CCPR/CO/78/ISR

United Nations Human Rights Committee, 'General Comment No 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) UN Doc CCPR/C/21/Rev.1/Add.13

United Nations, Treaty Series, vol 1465, p 85

United Nations, Treaty Series, vol. 999, p 171 and vol 1057, p 40

United Nations, Treaty Series, vol 189, p 137

United Nations, Treaty Series, vol 606, p 267

# ABBREVIATIONS

| | |
|---|---|
| ARSIWA | Draft Articles on Responsibility of States for Internationally Wrongful Acts |
| CAT | Convention Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment |
| ECHR | European Convention on Human Rights |
| ECtHR | the European Court of Human Rights |
| HRC | Human Rights Committee |
| IACHR | Inter-American Commission on Human Rights |
| ICCPR | International Covenant on Civil and Political Rights |
| ICJ | International Court of Justice |
| ILC | International Law Commission |
| IOM | International Organization for Migration |
| NATO | North Atlantic Treaty Organization |
| UNCLOS | United Nations Convention on the Law of the Sea |
| UNHCR | United Nations High Commissioner for Refugees |
| UNODC | United Nations Office on Drugs and Crime |

# 1 Introduction

> *Developed states have what might charitably be called a schizophrenic attitude towards international refugee law. Determined to remain formally engaged with refugee law and yet unwavering in their commitment to avoid assuming their fair share of practical responsibilities under that regime, wealthier countries have embraced the politics of non-entrée, comprising efforts to keep refugees away from their territories but without formally resiling from treaty obligations.*[1]

The 1951 Refugee Convention[2] guarantees to refugees the right not to be returned 'in any manner whatsoever to the frontiers of territories where [their] life or freedom would be threatened on account of […] race, religion, nationality, membership of a particular social group or political opinion'.[3] Although this has long been recognized as the foundational principle of international refugee law, sadly, externalized migration control practices have effectively influenced its effectiveness. Immigration control is no longer exercised exclusively at the physical borders of states. Control is rather carried out at every step of the journey.[4] The issues with practices of externalized migration control have grown to become important because regardless of time and place, focusing only on the situation where a foreigner is seeking to enter a state's territory, it seems like states around the world aim to achieve the same purpose: to deter migrants from entering their territory unless they are a valuable asset for the state. States are using externalized migration control mechanisms in order to avoid having to deal with a specific kind of migrant: the less valuable one, i.e. the non-educated and vulnerable people who are most

---

[1] Thomas Gammeltoft-Hansen and James C Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law 235, 235.
[2] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (hereinafter 'the Refugee Convention').
[3] ibid art 33(1).
[4] Thomas Gammeltoft-Hansen, 'The Externalisation of European Migration Control and the Reach of International Refugee Law' in *The First Decade of EU Migration and Asylum Law*, 273 (Paul Minderhoud & Elspeth Guild eds, Martinus Nijhoff, 2011).

likely to end up as a burden for the societies rather than a benefit.[5] For instance, if the person is well-educated and thus able to participate usefully in the labor market, he would be an asset for the receiving state rather than a burden. Also, tourists who contribute by economic wealth are seen as valuable from the states' points of view.[6] States' unwillingness to accept immigrants, unless they benefit from them, has been a widespread phenomenon across the world for a long time.[7] The choice of language also speaks to the view that states have in this regard. Speaking of refugees – people in need of protection – as burdens, says a lot about how the developed world perceives their presence.

There are various reasons for why these practices are enforced, some with great benefits that can even be argued as necessary. On the flipside, the mechanisms are enforced by states in order to outsource migration control to other states' territories or to territories of *terra nullius* and thus strategically manipulate the possibility for migrants to access international protection regimes.[8] By geographically shifting the point of migration control, states seem to believe they can avoid legal responsibilities to protect refugees and especially escape the responsibilities they would face in a regular border control situation.[9] Certainly, we would not accept it as lawful if a state denied access to refugees at the borders or made it impossible for them to claim asylum on questionable grounds. But doing so in ambiguous legally constructed manners, seems to be acceptable as far as state practice shows. The practices may lead to states indirectly denying access to otherwise *bona fide* asylum seekers, while shifting the legal responsibility to other

---

[5] See *inter alia* Andreas Fischer-Lescano, Tillmann Löhr and Timo Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21(2) International Journal of Refugee Law 256, 276; Lori A Nessel, 'Externalized Borders and the Invisible Refugee' (2009) 40 Columbia Human Rights Law Review 625, 631; Gammeltoft-Hansen and Hathaway (n 1) 236–240 and 244; Bill Frelick, Ian M Kysel and Jennifer Podkul, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) 4 Journal on Migration and Human Security 190, 191–193; Aylet Schachar, 'The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes' (2006) 81(1) New York University Law Review 148; Stephen Castles, Hein Haas and Mark Miller, *The Age of Migration: International Population Movements in the Modern World* (5th edn, Basingstoke: Palgrave Macmillan 2013); Zygmunt Bauman, *Globalization: The human Consequences* (Cambridge: Polity Press 1998).
[6] Gammeltoft-Hansen and Hathaway (n 1) 237.
[7] ibid 244–256.
[8] See *inter alia* Fischer-Lescano, Löhr and Tohidipur (n 5); Frelick, Kysel and Podkul (n 5); Gammeltoft-Hansen and Hathaway (n 1); Nessel (n 5); Kees Wouters and Maarten den Heijer, 'The Marine I Case: A Comment' (2010) 22 International Journal of Refugee Law 1, 19.
[9] Gammeltoft-Hansen and Hathaway (n 1) 235.

states. Fundamentally, states outsource their migration control to other states, in order to transition the responsibility to protect human rights from themselves to others. This thesis deals with these practices as conscious and strategic decisions made by states in order to avoid legal responsibility.

Most striking in the context of externalized migration control mechanisms is that the so-called 'powerful states'[10], those that have enforced and promote the prominent human rights treaties, are often the loudest ones in seeking to ensure rights to international migrants. However, at the same time they seem to be doing everything they can to develop new mechanisms through which they can refuse entry for unwanted asylum seekers and other migrants to their territories.[11]

Even though these practices may be completely legal, and even necessary, this thesis will show that they often unfortunately mean weakened protection for some groups of migrants, especially for refugees. The reason is that externalized migration control mechanisms are designed so that migrants are pushed-back or else denied access to areas where their rights would otherwise be substantially better than in those where they are forced to stay. The problem with externalized migrations control mechanisms from a legal perspective is, that the prominent view in international law currently does not necessarily recognize state responsibility for the state that enforces those mechanisms. Therefore, this thesis will show that the current international rules on jurisdiction and state responsibility simply do not suffice in the protection of all migrants. Thus, it seeks to discuss and evolve the current way of dealing with state responsibility in the context of externalized migration control mechanisms and practices.

Whether states succeed with their alleged aim of escaping responsibility with externalized migration control practices, will be legally questioned through the current rules on extraterritorial application of human rights treaties and rules on state responsibility through jurisdiction and the provision of aid and assistance. The thesis will especially argue that a

[10] The term 'powerful states' is used by Thomas Gammeltoft-Hansen and James Hathaway, but they do not define it *per se*. Nevertheless, the context of the article reveals that the authors are pointing their fingers at especially the European states, the United States and at Australia – though not excluding the possibility that also other states could be guilty of the same practices. See Gammeltoft-Hansen and Hathaway (n 1) 237.
[11] Frelick, Kysel and Podkul (n 5) 191; Gammeltoft-Hansen and Hathaway (n 1) 237.

contemporary understanding of the rules on jurisdiction must be adopted to provide efficient protection to asylum seekers and refugees also in the extraterritorial sphere. In this respect the jurisprudence of the European Court of Human Rights (hereinafter 'the ECtHR') is especially important.

The purpose is not to challenge the mechanisms themselves, but rather the current state of international law in a context where lawful acts result in harmful situations for individuals. This is an important distinction, because the mechanisms themselves are often carefully designed to be lawful. They are also increasingly based on mutual agreements between states. Thus, the legality of the practices *per se* is not of interest in this thesis. The thesis will rather question the current way of understanding international responsibility where the behavior of international actors is affecting individual right holders protected by the international community, but whose rights are not realized due to the strategic behavior of states.

The issue is also topical because although the practices have a long tradition, it seems like the international community is only moving towards even deeper ways of obstructing the possibilities for migrants to reach their territories. Most recently the European Commission has suggested that the Dublin Regulation will be replaced by a new policy on migration and asylum in the European Union.[12] However, this new migration policy unfortunately does not focus on guaranteeing that the human rights of migrants is upheld, but it is rather a political outcome that is focused on returns and deeper cooperation with third states.[13]

Although this thesis takes a critical view of the circumstances in which these practices are enforced, it should not be understood as not recognizing the benefits of cooperating with migrant producing or transit countries. This thesis does not try to argue that all such practices should be disregarded. There are various reasons for why externalized migration control mechanisms and practices are helpful or even necessary. To some extent states are even encouraged to consider

[12] Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] [2020] 2020/0279(COD).
[13] Amnesty International, 'EU: Migration Pact is not a fresh start but a false start' (23 September 2020) available at <https://www.amnesty.org/en/latest/news/2020/09/eu/> (last accessed 25.9.2020).

creative alternatives for protection. By creating such solutions states may create safe routs for protection seekers to arrive or otherwise provide lasting solutions for refugees who may be unable to seek protection otherwise.[14] The awareness of this shall not be forgotten although the focus of this thesis is limited to discussing the harmfulness of enforcing such migration control mechanisms. The critique pointed towards extraterritorial migration control mechanisms is rather generated by the overall principle that all such mechanisms must be enforced in good faith and in the right context.[15]

## 1.1 Research question, approach and delimitation

The growing trend of outsourcing migration control from destination states to home or transit states is creating a situation where the legal protection regime becomes fragmented. States are seeking to create conditions where the refugee protection is not applicable – or at least not attributable to the state that is enforcing the extraterritorial action. Thus, there is a need to review the current protection provided by international law in these circumstances.

Externalized migration control mechanisms have been researched relatively extensively. However, many have focused more on 'traditional'[16] forms of deterrence like carrier sanctions, visa restrictions, the establishment of international zones, and high seas interception. The research in this thesis will show that these traditional forms of deterrence measures have been proven to be vulnerable both in practice and as a matter of international law.[17] Thus, discussing the newer forms of deterrence, which are cooperation-based and founded on mutual agreements between states, raises a much more interesting discussion for this thesis. The agreements are typically concluded between developed and less-developed states so that deterrence is carried

[14] James C Hathaway, 'The False Panacea of Offshore Deterrence' (2006) 26 Forced migration review 56. See also Maarten den Heijer, *Europe and Extraterritorial Asylum* (Oxford: Hart Publishing 2012) 261.
[15] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 331, arts 26 and 31.
[16] The categorization between traditional and new generation mechanisms is drawn from the classification made by Gammeltoft-Hansen and Hathaway. Gammeltoft-Hansen and Hathaway (n 1).
[17] See below chapter 2.1.

out by authorities of home or transit states, in their territories or in international zones – all while the promoter behind the deterrence practices is the destination state.[18]

The purpose of this thesis is to research whether international law ensures protection to refugees who find themselves in an extraterritorial migration control situation. It seeks to answer whether states can be held responsible for possible violations in such situations and whether the protection provided by international law is adequate. The imminent question to ask is whether the practices of states have created legal black holes where refugees cannot be effectively protected by international law? Moreover, has international law developed rules that can close such black holes? Can extraterritorial migration control overcome the threshold of effective control required by extraterritorial jurisdiction, or are there any other ways to find those states that enforce them responsible under international law? These considerations deal with two clashing interests: state sovereignty and the aim of universal human rights.

The method used for this research is a legal dogmatic method aimed at establishing the applicable law through examining legal sources. This thesis has a human rights law perspective and when it discusses state responsibility or obligations, it refers to both primary and secondary rules of international treaties relating to state responsibility, jurisdiction and extraterritorial application of the relevant norms. Moreover, the research considers international case law as well as customary international law. The overall objective of this thesis is to examine the current legal protection regime where externalized migration control mechanisms are enforced.

The thesis is focused on studying the legal rules that govern state responsibility for externalized migration control mechanisms enforced by the global North. However, it is not strictly geographically limited, although it does in some parts focus more on the European practices by drawing on the case law of the ECtHR. Also, American and Australian practices are discussed where those are significant for the development of externalized migration control mechanisms. The delimitation to the global North is justified on the basis that externalized migration control

[18] Gammeltoft-Hansen and Hathaway (n 1) 240–242.

mechanisms are generally enforce by those states that attract the most migrants.[19] Because the research in this thesis is focused on discussing the legal ways to challenge the effectiveness of the practices, the global North – being the most attractive for asylum seekers – is an obvious delimitation. Moreover, the geographical delimitation does not disrupt the core issue in the thesis, as the underlying norm that governs the protection of refugees is the principle of *non-refoulement*, which is considered to be customary international law.[20] Accordingly, the geographical delimitation is merely a way to delimit the research and focus on the most prominent actors that enforce externalized migration control mechanisms. Although, the practices of the global North are not coherent their distinction is of little relevance for the purpose of providing an overview of the current legal regime that govern state responsibility flowing from the enforcement of externalized migration control mechanisms.

State responsibility for the conduct of international agencies and private actors is excluded from the research because the rules that govern these situations differ from those that apply to direct actions of state officials and agents. The purpose of this thesis is to focus on the legal regime at large, which is why these specific situations cannot be considered. Moreover, this thesis does not include a discussion on shared state jurisdiction.

As explained, the externalized migration control mechanisms pose a challenge to international refugee law. The conclusion of this thesis is that international refugee law and the actions of the international community have not been adequate in their response to the emerging practices of externalized migration control. It argues that a contemporary understanding of the rules on jurisdiction and state responsibility needs to be adopted in order to create a coherent protection regime.

---

[19] Witold Klaus and Marta Pachocka, 'Examining the Global North Migration Policies: A "Push Out – Push Back" Approach to Forced Migration' (2019) 57(5) International Migration 280, 281–283.
[20] UNHCR, 'Note on the Principle of Non-Refoulement' (Prepared for the EU Seminar on the Implementation of the 1995 EU Resolution on Minimum Guarantees for Asylum Procedures, Luxemburg, November 1997) B; 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 15.

## 1.2 Concepts

In this thesis the concept of externalized migration control mechanisms is used to describe all forms of action that consciously outsource the migration control from one state's territory to another's or to territories of *terra nullius* with the purpose to control migration flows into the first state. The included actions are anything that at first sight results in a shift in responsibility from one state to another. In that context the concept of *interception* often appears. There is no internationally accepted definition of what is considered as interception. However, interception should be understood to encompass 'all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons [who are] crossing international borders by land, air or sea, and making their way to the country of prospective destination'.[21] The mechanisms range from traditional forms of interception at high seas to cooperation-based forms like deployment of officials or financial aid and assistance. Some scholars have also described externalized migration control mechanisms with the use of terms like *non-entrée* politics or practices.[22] These terms appear also in this thesis.

'Migrants' in the meaning of this thesis are asylum seekers and refugees. The reason for this delimitation is that these migrants are the most vulnerable where externalized migration control mechanisms have been enforced. As stated above, enforcing such mechanisms often mean that the responsibility to protect the migrants is shifted to another state. The state to which the responsibility is shifted has often not ratified the prominent human rights treaties that protect migrants or does not have the necessary procedures or even the will to protect and ensure respect for asylum seekers' and refugees' rights.[23]

---

[21] Executive Committee of the High Commissioner's Programme, 'Interception of Asylum-Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach' (9 June 2000) UN Doc EC/60/SC/CRP.17, para 10.
[22] Gammeltoft-Hansen and Hathaway (n 1).
[23] ibid. Libya for example is not a party to the 1951 Refugee Convention, which is why the 'Friendship Pact' caused issues for refugees. See 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' (September 2009) available at <https://www.hrw.org/report/2009/09/21/pushed-back-pushed-around/italys-forced-return-boat-migrants-and-asylum-seekers> (last accessed 2.11.2020).

## 1.3 Disposition

In addition to this introductory chapter the thesis is divided into three substantial chapters. Chapter 2 introduces the various externalized migration control mechanisms from a practical point of view. It provides examples of state practices and attempts to determine which practices to consider before going on to analyze how international law responds to the legal problems that they carry with them. The chapter differentiates between traditional and cooperation-based deterrence measures and explains the developments in practice. It concludes that the traditional practices as a deterrence measure have become less attractive for developed states. Therefore, the cooperation-based methods are of greater interest when examining the legal means available in international law to challenge the presumption of states.

Chapter 3 examines the extraterritorial application of the principle of *non-refoulement*, the definition and status determination of a refugee as well as what the right to asylum entails together with the principle of *non-refoulement*. As extraterritorial migration control effectively shifts the geographical point of application, the legal norms governing these notions needs to be assessed in the extraterritorial sphere. The chapter concludes that the principle of *non-refoulement* is applicable beyond state borders, but the refugee determination and right to asylum in connection with the principle of *non-refoulement* do not provide enough protection for refugees where externalized migration control mechanisms have been enforced.

Chapter 4 sets out the legal means available in international law to challenge the assumption of states that the enforcement of externalized migration control mechanisms can evade liability. The legal question it deals with is when, if ever, do extraterritorial jurisdiction and state responsibility apply if externalized migration control mechanisms have been enforced. It questions the presumption of states through a careful assessment of the rules on extraterritorial state jurisdiction. The chapter concludes that the reliance of states on externalized migration control mechanisms can be challenged where they exercise effective control over territories or individuals. In addition, the chapter provides a contemporary interpretation of extraterritorial jurisdiction, according to which a State may be held responsible when it exercises public powers

abroad. As not all actions of states amount to jurisdiction, the principles on responsibilities for aid and assistance is also discussed shortly.

# 2 An evolution of externalized migration control mechanisms

This chapter will discuss the development of various externalized migration control mechanisms. It distinguishes between traditional and new forms of deterrence practices, because the traditional practices as a deterrence measure have to some extent become less attractive for developed states. The chapter gives examples of state practices and seeks to establish a common ground to examine how international law responds to the legal issues that these practices bring with them.

Various externalized migration control mechanisms have been introduced during the last three decades. Although the aim has not exclusively been to deter migrants from reaching the territories of desired destination states, it is one of the main objectives.[24] These practices that aim to outsource migration control beyond state jurisdiction have evolved through time. Gammeltoft-Hansen and Hathaway have classified the distinction in practices according to so called 'traditional *non-entrée* practices' and 'cooperation-based *non-entrée* practices'.[25] Similar categorizations have been recognized by others.[26] The distinction is significant especially when evaluating how the practices succeed to achieve the aim of states and thereof shift state responsibility. The development in law and practice shows that states no longer benefit as much from the traditional forms as they do from the cooperation-based ones. The traditional practices are simply not as effective in deterring migrants as they used to be.

Before explaining the distinction between the traditional and cooperation-based practices, the naming of these practices deserves a quick notice. It is apparent that Gammeltoft-Hansen and Hathaway chose to categorize the practices by drawing on the French term *non-refoulment.* The

[24] James C Hathaway, 'The emerging politics of non-entrée' (1992) 91 Refugees 40; Satvinder Singh Juss (ed), *Research Handbook on International Refugee Law* (Cheltenham: Edward Elgar Publishing Limited 2019).
[25] Thomas Gammeltoft-Hansen and James C Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law 235, 244–256.
[26] Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007) 369–380.

characterization is heavily influenced by the assumption that the practices are designed to counterwork states' obligations not to deter someone from their territory when certain refugee law requirements are fulfilled. The terminology itself is heavily loaded and shows that these scholars argue for a protection regime that does not exclude responsibility where externalized migration control practices are enforced.

The distinction between traditional and cooperation-based *non-entrée* practices as described by Gammeltoft-Hansen and Hathaway is, that the traditional forms have at large been successfully challenged both in practice and in law.[27] The following will take a closer look at the categories in order to establish which practices to study for the purpose of examining legal responsibility for states that enforce them.

## 2.1 Traditional *non-entrée* practices

The traditional forms of *non-entrée* practices, as described by Gammeltoft-Hansen and Hathaway, include visa controls and carrier sanction, announcing international zones within states' territories as well as intercepting migrants on the high seas.[28] These practices are not new. The United States had laws in place already in the nineteenth century that required transportation companies to restrain ill or immoral passengers and non-compliance resulted in sanctions.[29] In other words, the responsibility to control the arrival of persons was shifted in part to private actors. The visa control system has since been developed in the world at large and is utilized as a *non-entrée* mechanism. The visa restrictions are stringent on airlines and other means of transportation and because negligence in checking passengers' visas can result in substantial sanctions, these (often private) companies are given remarkable discretion in

[27] Gammeltoft-Hansen and Hathaway (n 25) 246.
[28] ibid.
[29] Violeta 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' (2008) 10 European Journal of Migration and Law 315, 323.

deciding who to bring with them.[30] Basically the responsibility to evaluate legitimate refugee claims has been shifted from states to private actors because they must decide whether the person who wishes to board fulfills the requirements for international protection in the destination state.[31]

However, although visa controls and carrier sanctions are common, they have become less effective in deterring unwanted migrants. Accurate data about how migrants travel to destination states is difficult to collect because migrants today commonly rely on organized crime to make the journey to the destination state. The circumstances of such journeys are carried out outside the systems that collect data, but a 2018 report of the United Nations Office on Drugs and Crime (hereinafter 'UNODC') disclosed that at least 2,5 million migrants relied on human traffickers and smugglers in 2016 to travel to the desired destination states.[32] The business of smuggling is also very profitable, as the same UNODC report shows that smugglers made up to 7 billion US dollars in 2016.[33] Thus, smugglers are extremely motivated to find ways for transporting migrants successfully to the desired destination states. Smugglers often provide migrants with fake travel, marriage or employment documents that are difficult to detect and thus make it hard for visa controls and carrier sanctions to be enforced as intended. Smugglers also bribe border officials and find new routs of entry to secure access for the migrants. Because of this, states must continuously adapt their migration control to the new ways and routs that smugglers provide for migrants.[34] Consequently, visa controls and carrier sanctions have in practice

---

[30] For the EU see 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 [2000] OJ L239/19, art 26. See further Gammeltoft-Hansen and Hathaway (n 25) 245; Frances Nicholson, 'Implementation of the Immigration (Carriers' Liability) Act of 1987: Privatising Immigration Functions at the Expense of International Obligations' (1997) 46 International and Comparative Law Quarterly 586; Kees Groenendijk, Elspeth Guil and Paul Minderhoud, *In Search of Europe's Borders* (The Hague: Kluwer Law International 2003); António Cruz, *Shifting Responsibility: Carriers' Liability in the member states of the European union and north America* (Trentham Books and School of Oriental & African Studies 1995).

[31] For a detailed discussion about private actors' involvement in migration control see Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge: Cambridge University Press 2011) 158–208.

[32] UNODC, 'Global Study on Smuggling of Migrants' (New York, 2018) 5, available at <https://www.unodc.org/documents/data-and-analysis/glosom/GLOSOM_2018_web_small.pdf> (last accessed 9.10.2020).

[33] ibid.

[34] ibid 23.

become less effective for the purpose of deterring migrants. Migrants' reliance on smugglers effectively capsize part of the purpose of visa controls and carrier sanctions, which makes them less effective in deterring migrants. Thus, their relevance for this thesis is also diminished.

Through history states have also declared so-called international zones within their territories. Especially airports, harbors and islands have been treated as non-territories of the state. The assumption behind such practices have been that international obligations do not apply extraterritorially and thus isolates actions taken there from the obligation to protect refugees. This way of declaring non-protection zones has been rejected through regional case law. In Europe the ECtHR declared already in 1996 in *Amuur v France*[35] that although airports have what are commonly called international zones '[d]espite [the] name, […] international [zones do] not have extraterritorial status'.[36] In the case the ECtHR declared that the asylum seekers were wrongfully detained and thus France violated their right to liberty under Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms[37] (hereinafter 'ECHR').[38] Thus, the Court effectively declared that international zones within state territory cannot be exempted from the responsibility to comply with the Convention. The same reasoning was struck down by the High Court of Australia when a domestic law provided restricted access to Australian courts and refugee procedures when persons arrived at specific islands.[39]

Not only has case law affirmed that the initial interpretation is wrong, but also international maritime law makes it clear that state territory extends to territorial waters and islands.[40] Thus, claiming international zones within state territories is not effective as a deterrence measure. The

---

[35] *Amuur v France*, 25 June 1996, Reports of Judgments and Decisions 1996-III.
[36] ibid para 52.
[37] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.
[38] *Amuur v France* (n35) paras 53–54.
[39] *Plaintiff M61 & Plaintiff M69 v Commonwealth of Australia* (11 November 2010) HCA 41. In 2001 Australia removed over 3500 islands from its migration zone and thus declared that it did not have an obligation to protect refugees there. Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (No 128, 2001). In 2013 the excise was extended to apply also to the mainland of Australia. Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013 (No 35, 2013).
[40] Geneva Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964) 516 UNTS 215, arts 1 and 10; United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (hereinafter 'UNCLOS'), arts 2 and 121.

externalization of national territories has been overcome by jurisprudence and law, which makes the *non-entrée* practice less relevant for the purpose of this thesis.

The third traditional form of *non-entrée* practices is based on the same assumption as the previous one – international obligations do not apply extraterritorially. In addition to establishing non-protection zones within actual state territory, states have occasionally argued that they do not have international obligations in international zones. Therefore, high seas deterrence of refugees has been practiced on the assumption that it does not violate the international duty to protect refugees. In fact, in 1993, the Supreme Court of the United States (hereinafter 'US Supreme Court') decided in the notorious case of *Sale v Haitian Centers Council*[41] (*Sale*) that Article 33(1) of the 1951 Refugee Convention was not applicable on the high seas. In other words the US Supreme Court leaned on the interpretation that the prohibition of *refoulement* did not apply extraterritorially, and allowed for forcible repatriation of refugees in the high seas.[42] The judgement of *Sale* allowed for systematical interdiction of refugees in the high seas and the return of passengers to Haiti, among other states, without first determining whether they would qualify as refugees.

Fortunately the case received little acceptance elsewhere and has been criticized and rejected by many scholars, courts and international agencies.[43] Most importantly, in its brief *amicus curiae* to the *Sale* case, the United Nations High Commissioner for Refugees (hereinafter 'the UNHCR') emphasized the applicability of *non-refoulement* outside state territory because neither the preparatory works nor a textual reading of the Refugee Convention allowed for an opposite interpretation. The UNHCR especially pointed at the structure of the treaty. Territorial limitations are recognized in various articles, but Article 33(1) does not include such limitations.

---

[41] *Sale v Haitian Center Council*, 509 US 155, USSC 1993.
[42] ibid 179–183.
[43] See *inter alia* dissenting opinion of Mr. Justice Blackmun in *Sale* (n 41) 188–208; *Haitian Centre for Human Rights v United States*, Case 10.675, Report No 51/96, Inter-Am. CHR OEA/Ser.L/V/II.95 Doc 7 rev 1997 (hereinafter '*Haitian Centre for Human Rights*') para 157; UNHCR, 'The Haitian Interdiction Case 1993 Brief Amicus Curiae' (1994) 6 International Journal of Refugee Law 85; Harry A Blackmun, 'The Supreme Court and the Law of Nations' (1994) 104 Yale Law Journal 39; Harold Hongju Koh, 'Reflections on Refoulement and Haitian Centers Council' (1994) 35 Harvard International Law Journal 1.

Hence, it is applicable wherever states act.[44] Therefore, expulsion of refugees from any area, whether it is a state's territory or not, is a violation of Article 33 if the territory a refugee is returned to fulfill the criteria laid out by the principle of *non-refoulement*.

One of the most recent and notable rejections made to the interpretation that *non-refoulement* does not apply extraterritorially, is the ruling of the ECtHR in the Grand Chamber case of *Hirsi Jamaa and Others v Italy*[45] (*Hirsi Jamaa*). The Court concluded in *Hirsi Jamaa* that high seas pushbacks breach the obligation of *non-refoulement*.[46] The facts preceding the case concerned a treaty that was concluded between Italy and Libya in 2008. Italy aimed to intercept migrants trying to enter its territory by promising around 5 billion US dollars to Libya in return for *inter alia* repatriating the migrants there. In return Libya was also asked to strengthen its border control mechanisms and diminish migration flows from Libya to Italy.[47] In May 2009, a group of migrants who had left Libya on board vessels were intercepted by the Italian authorities at sea. They were returned to Libya without individual assessment and against their will. In 2012 the ECtHR decided in *Hirsi Jamaa* that Italy had violated its human rights obligations by intercepting migrants based on the bilateral agreement between Italy and Libya.[48] The fact that the treaty included a specific reference for Libya to comply with international human right law and other international conventions to which Libya was a party, did not convince the Court.[49] The Court reiterated what is had concluded in previous cases:

> [T]he existence of domestic laws and the ratification of international treaties guaranteeing

---

[44] UNHCR, Brief Amicus Curiae (n 43) 86.
[45] *Hirsi Jamaa and Others v Italy* [GC], no. 27765/09, ECHR 2012.
[46] The concurring opinion of Judge Pinto de Albuquerque: 'With all due respect, the United States Supreme Court's interpretation contradicts the literal and ordinary meaning of the language of Article 33 of the United Nations Convention relating to the Status of Refugees and departs from the common rules of treaty interpretation.' Ibid 67.
[47] See *inter alia* 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' (September 2009) available at <https://www.hrw.org/report/2009/09/21/pushed-back-pushed-around/italys-forced-return-boat-migrants-and-asylum-seekers> (last accessed 2.11.2020).
[48] *Hirsi Jamaa* (n 45) paras 136–138. The Friendship Pact of 2008 was suspended in 2011. However, in 2017, a new memorandum of understanding (MoU) with similar effects was concluded between Italy and Libya. The first and the latter agreement differ in Italy's level of involvement in the pushbacks. According to the latter agreement, Italy provides support to the Libyan coast guard, which takes care of the physical interception and return of passengers to Libya.
[49] ibid paras 127–128.

> respect for fundamental rights are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where […] reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention. Furthermore, […] Italy cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya. Even if it were to be assumed that those agreements made express provision for the return to Libya of migrants intercepted on the high seas, the Contracting States' responsibility continues even after their having entered into treaty commitments.[50]

Thus, the Court emphasized that the responsibility to respect the principle of *non-refoulement* does not end by concluding bilateral agreements that include references to guarantee human rights. In order to avoid responsibility for indirect *non-refoulement* the state that enforces such agreements must make sure that the other party provides the same protection as guaranteed by the ECHR.

These cases show that high seas interception is highly likely to result in responsibilities for the state that is enforcing them – at least where the state itself is taking actions. Thus, their appeal as a deterrence measure is diminished and states seek other ways to fulfill their aim.

Traditional forms of *non-entrée* practices have become less effective in practice and even proven as contrary to international law. Refugees rely increasingly on other means to reach developed states and it makes it difficult for visa controls and carrier sanctions to detect them before they arrive. Also, international zones within state territories are not areas where states' obligations to protect refugees would be exempted. Likewise, high seas deterrence by the states' own authorities results in responsibilities for the state to protect human rights. These conclusions make the practices much less attractive for developed states in their aim to deter migrants. Thus, the relevance to discuss state responsibility for enforcing traditional forms of *non-entrée* practices is also reduced. However, the following will show that state responsibility for enforcing the new – cooperation-based – generation of externalized migration control practices remains relevant.

---

[50] *Hirsi Jamaa* (n 45) paras 128–129; *M.S.S. v Belgium and Greece* [GC], no. 30696/09, ECHR 2011, para 353; *Saadi v Italy* [GC], no. 37201/06, ECHR 2008, para 147.

## 2.2 Cooperation-based *non-entrée* practices

The cooperation-based *non-entrée* practices are more complex than the traditional ones. This follows the logic that they have in part been designed because the traditional ones are not as effective anymore, or at least have a higher likelihood of resulting in responsibility for the states enforcing them. The cooperation-based practices range from the reliance on diplomatic agreements to complete jointly operated migration control operations. The practices can be categorized according to the degree of involvement of the state that is enforcing them. However, the practices are not necessarily implemented separately, but often include elements of two or more of the recognized categories.[51] This subchapter of the thesis will present these cooperation-based mechanisms and give examples of practices of the prominently acting states.

The first level of involvement is invoked when states rely on diplomatic relations in combating unwanted migration. The destination states have used persuasive measures for states of origin or transit to assist in the deterrence of migrants. Methods to motivate the involvement of those states include for instance withholding development assistance or the promise of trade agreements in return for their involvement in migration deterrence.[52] This kind of bartering has been for example promoted by the EU. The EU has called upon Member States to negotiate agreements with migrant-sending countries like Africa, Asia and Latin America[53] and the 2016 Partnership Framework on Migration[54] draws largely on diplomatic relations to combat unwanted migration. Moreover, the EU also requires that acceding states meet detailed migration control standards as a condition for membership in the EU.[55] Thus, the EU is able to pressure states that are seeking to accede to the EU by first requiring that they comply with EU's

[51] Gammeltoft-Hansen and Hathaway (n 25) 250–257.
[52] ibid 251.
[53] Aderanti Adepoju, Femke Van Noorloos, and Annelies Zoomers, 'Europe's Migration Agreements with Migrant-Sending Countries in the Global South: A Critical Review' (2009) 48(3) International migration, 42, 43 <https://doi-org.libproxy.helsinki.fi/10.1111/j.1468-2435.2009.00529.x> last accessed 20.10.2020.
[54] Communication from the Commission COM/2016/0385 to the European Parliament, the European Council, the Council and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration [2016].
[55] Consolidated Version of the Treaty on European Union [2012] OJ C326/13, arts 49 and 2. More specific criteria were established at the European Council meeting in Copenhagen in 1993.

aim of deterring unwanted migrants. On a general level it is possible to find state responsibility for diplomatic agreements, but this will be discussed further in chapter 4.

Financial funding of migration control operations in states of origin or transit is another mechanism of cooperation-based *non-entrée*.[56] The United States has for instance paid billions of dollars to Mexico for improving the migration control between Mexico and Central America, resulting in less migrants reaching the US.[57] The funding has been used by Mexico to improve equipment related to migration control, such as surveillance aircrafts and technology to advance data collection. The US has also contributed to immigration monitoring sites along the Mexico-Guatemala border.[58] This form of cooperation is often not purely financial, or it can at least be difficult to distinguish whether the state providing the financial aid is involved in directing the aid to specific purposes, and thus more involved in the migration control carried out in another state. For the purpose of this thesis it is important to point out here that state responsibility based on pure financial aid is more difficult to establish. However, the International Law Commission's (hereinafter 'the ILC') Articles on Responsibility of States for Internationally Wrongful Acts[59] (hereinafter 'the ARSIWA') recognize that aiding and assisting in the conduct of internationally wrongful acts can result in responsibility for the sponsoring state.[60] The relevance of these articles will be discussed further under subchapter 4.2.

Additionally, states may be involved in extraterritorial migration control through the direct provision of equipment to a third state or by training authorities of that state. Member States of

[56] Gammeltoft-Hansen and Hathaway (n 25) 251–255.
[57] The Merida Initiative in the US is a multi-year agreement between the United States and Mexico under which the US has provided Mexico with *inter alia* financial aid to combat drug smuggling, transnational crime, and illegal immigration. U.S. Department of State, 'U.S. Relations With Mexico' available at <https://www.state.gov/u-s-relations-with-mexico/> (last accessed 1.10.2020). See generally Isabella A Vaughne (ed), *The Merida Initiative: U.S. Counterdrug and Anticrime Assistance for Mexico* (New York: Nova Science Publishers 2010).
[58] Clare Ribando Seelke, 'Mérida Initiative for Mexico and Central America: Funding and Policy Issues' (CRS Report for Congress, R40135, 21 August 2009) available at <https://fas.org/sgp/crs/row/R40135.pdf> (last accessed 19.9.2020).
[59] Draft Articles on Responsibility of States for Internationally Wrongful Acts (adopted by the International Law Commission in 2001) Supplement No 10 (A/56/10).
[60] ibid art 16.

the EU have for instance provided Libya with border control equipment.[61] In particular, Italy has provided fast patrol boats and other technical equipment to the Libyan Coast Guard.[62] To fund the migration control of those states that are of key interest for the developed state, has become increasingly attractive. The Mérida initiative in the United States, the Pacific Solution in Australia and the EU's migration policy all include elements that refer to the provision of equipment or training to the migrant producing or transit countries as a means to cooperate with those countries.[63] However, state responsibility for human rights violations conducted by a third state, only on the basis that a state provides equipment for the purpose of conducting migration control, rarely amounts to jurisdiction for the aiding state. Nevertheless, the state may still be held responsible if certain conditions are met.[64]

Destination states have also deployed immigration officials to work together with the authorities of countries of origin or transit. For instance, the US has immigration officers in more than 52 countries around the world[65] and Australia has deployed Airline Liaison Officers to airports that are considered as major gateways to Australia.[66] The EU has also sent immigration officers from Member States to key border crossing points where migrants attempt to reach the EU.[67] The EU has since 2004 sent immigration liaison officer to third states in order to uphold contacts with the authorities of third states and thus coordinate effectively with them on how to prevent and

---

[61] Gammeltoft-Hansen and Hathaway (n 25) 252; Derek Lutterbeck, 'Migrants, weapons and oil: Europe and Libya after the sanctions' (2009) 14(2) The Journal of North African Studies, 169 <https://doi.org/10.1080/13629380802343558> last accessed 20.10.2020.

[62] The 2008 agreement ('The Friendship Pact') between Libya and Italy included a promise that Italy would provide Libya with both financial and technical aid. An unofficial English translation of the Treaty is available at <https://security-legislation.ly/sites/default/files/lois/7-Law%20No.%20%282%29%20of%202009_EN.pdf> (last accessed 1.10.2020).Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control — On Public Powers, S.S. and Others V. Italy, and the "Operational Model"' (2020) 21(3) German Law Journal 385, 391–393.

[63] Bill Frelick, Ian M Kysel and Jennifer Podkul, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) 4 Journal on Migration and Human Security 190, 201; Josh Watkins, 'Australia's irregular migration information campaigns: border externalization, spatial imaginaries, and extraterritorial subjugation' (2017) 5(3) Territory, Politics, Governance 282.

[64] See discussion on state responsibility for aiding and assisting under chapter 4.2.

[65] U.S. Immigration and Customs Enforcement, 'Homeland Security Investigations' available at <https://www.ice.gov/about> (last accessed 12.10.2020).

[66] Taylor Savitri, 'Offshore Barriers to Asylum Seeker Movement: The Exercise of Power Without Responsibility?' in *Forced Migration, Human Rights and Security* (Jane McAdam ed, Oxford, Hart Publishing, 2008) 95.

[67] Regulation (EU) 2019/1240 of the European Parliament and of the Council of 20 June 2019 on the creation of a European network of immigration liaison officers [2019] OJ L198/88.

combat illegal migration, facilitate returns and manage legal migration.[68] Although these officers are often emphasized as not carrying out the actual tasks of sovereign states, their presence, support and advice are often decisive for the determination of a continued journey.[69] Especially considering that carrier sanctions apply to those companies that transport unlawful immigrants, it is unlikely that those officers would not obey the advice given by an officer of the destination state. The discussion in chapter 4 shows that this cooperation-based *non-entrée* is likely to result in state responsibility at least where it can be established that the role of the deployed officers is more significant than just advisory and supportive.

Another form of cooperation-based migration control includes situations where destination and transit or home countries work together through joint or shared enforcement programs.[70] For example, Australia and Sri Lanka have enforced a 'Joint Working Group on People Smuggling and Transnational Crime' under which officials of Australia work together with officers of Sri Lanka to combat human smuggling.[71] In these situations the link to find state responsibility will be overcome with less difficulties, although the operations may be constructed in manners where the enforcing state with key interests to deter migrants, is less involved in the physical control of the individuals. Chapter 4 will show that a contemporary understanding of state jurisdiction is likely to challenge states' reliance on joint operations to escape responsibilities to protect migrants.

Furthermore, states may also participate directly in the migration control of another state within the territories of that state.[72] For instance, the UK established at the airport of Prague a pre-clearance procedure where British officers decided who could enter the UK prior to boarding.

---

[68] ibid.
[69] Savitri (n 66) 103.
[70] Gammeltoft-Hansen and Hathaway (n 25) 253–254.
[71] Australian Government, Department of Foreign Affairs and Trade, 'Sri Lanka country brief' available at <https://www.dfat.gov.au/geo/sri-lanka/Pages/sri-lanka-country-brief> (last accessed 1.10.2020). See also Melissa Curley and Kahlia Vandyk, 'The Securitisation of Migrant Smuggling in Australia and Its Consequences for the Bali Process' (2017) 71(1) Australian journal of international affairs 42; Emma Larking, 'Controlling Irregular Migration in the Asia-Pacific: Is Australia Acting against its Own Interests?' (2017) 4(1) Asia & the Pacific policy studies 85; Susan Kneebone, 'The Bali Process and Global Refugee Policy in the Asia–Pacific Region' (2014) 27(4) Journal of Refugee Studies 596.
[72] Gammeltoft-Hansen and Hathaway (n 25) 255.

The procedure resulted in deterring mostly Roma and the House of Lords recognized that it was discriminatory.[73] Thus, although the practice was carried out within the territory of another state, the UK was responsible for violating the rights of individuals. Understandably as the level of attachment to the deterrence measure increases also the probability to find state responsibility does.

Lastly migration control can also be entrusted directly to international agencies. To shift responsibilities to international agencies is not exactly unproblematic. General human rights law and international refugee law is primarily applicable in a way that they bind states.[74] While there are rules in place to attribute responsibility to international organizations[75] it is doubtful that the agencies themselves can be seen as bound by international human rights instruments.[76] Here for example the European Border and Coast Guard Agency (hereinafter 'FRONTEX') has developed to become an entity which carries out its own immigration tasks.[77] Although, the mandate of FRONTEX requires it to respect international refugee law and especially the principle of *non-refoulement*,[78] scholars find it difficult to challenge possible violations of human rights due to the lack of adjudicatory jurisdiction.[79] Moreover, Australia relies heavily on the International Organization for Migration (hereinafter 'the IOM') to deter unwanted migrants in the Asia-Pacific region. The IOM in turn relies on the funding it receives from Australia, which is why Australia's interests in migration management influences the work of the IOM. Basically the IOM is enforcing Australia's migration deterrence strategies, while

[73] *Regina v Immigration Officer at Prague Airport and another*, [2004] UKHL 55, 9 December 2004; Andrew Brouwer and Judith Kumin, 'Interception and Asylum: When Migration Control and Human Rights Collide' (2003) 21(4) Refuge: Canada's Journal on Refugees, 6 <https://doi.org/10.25071/1920-7336.21305> last accessed 20.10.2020.
[74] *Behrami and Saramati v France, Germany and Norway* [2007] ECtHR (GC) 71412/01 and 78166/01.
[75] Draft Articles on the Responsibility of International Organizations (adopted by the International Law Commission in 2011) UN Doc A/CN.4/L.778.
[76] Gammeltoft-Hansen and Hathaway (n 25) 256.
[77] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC [2016] OJ L251/1, arts 3 and 8.
[78] ibid preamble (47).
[79] Gammeltoft-Hansen and Hathaway (n 25) 256.

Australia denies responsibility for human rights violations that occur as a consequence.[80] Although, state responsibility for the conduct of international agencies is an interesting topic that has become increasingly relevant in the field of extraterritorial migration control, a further discussion on the topic is excluded from this thesis.

As the discussion shows, the traditional forms of *non-entrée* practices have been proven vulnerable in practice and law. States no longer achieve their aim to deter migrants by relying on them. Meanwhile states have increasingly enforced cooperation-based practices which have resulted in what can only be described as creating more grey areas for the protection regime of refugees. The practices are often disguised as operations that are conducted in the name of rescue-operations and humanitarian aid, while the true incentive behind them is not purely that, but also to keep out unwanted migrants.[81] What is eminent is that the cooperation-based mechanisms are utilized to outsource migration control. These practices may have created legal black-holes that impose a challenge to international refugee law, endanger the existence of it and frankly the rule of law.

The implied presumption behind these practices lead to question whether the principle of *non-refoulement* is applicable extraterritorially also where cooperation-based *non-entrée* practices have been enforced – that is to say, when the state enforcing such practices is less involved in the operations. Moreover, these practices cannot achieve the aim of states if the right to asylum implies a right to enter state territory or to claim protection extraterritorially. Therefore, the following chapter will address the extraterritorial application of the principle of *non-refoulement* and the right to asylum.

---

[80] For a detailed discussion on IOM's involvement in Australia's migration management strategies in Indonesia see Asher Lazarus Hirsch & Cameron Doig 'Outsourcing control: the International Organization for Migration in Indonesia' (2018) 22(5) The International Journal of Human Rights 681.

[81] Martin Geiger and Antoine Pécoud (eds), *The Politics of International Migration Management* (London: Palgrave Macmillan 2010) 12–14; Julia van Dessel, 'International Delegation and Agency in the Externalization Process of EU Migration and Asylum Policy: the Role of the IOM and the UNHCR in Niger' (2019) 4 European journal of migration and law 435, 440.

# 3 Extraterritorial application of *non-refoulement* and the right to asylum

The previous chapters have introduced the state practices of externalizing migration control and raised the concerns that these practices have from a human rights perspective. Because states allegedly use externalized migration control mechanisms in part to avoid legal responsibility, it is of essence to examine the legal framework where refugee rights are realized and especially whether such rights exist without attachment to national territory.

This chapter examines the extraterritorial application of the principle of *non-refoulement*, the definition and status determination of a refugee as well as what the right to asylum entails together with the principle of *non-refoulement*. These are important for the discussion of enforcing externalized migration control mechanisms since there is a close relationship between the three elements.[82] The right to asylum can simply not be realized if there is no access to it. Questions that are answered under this chapter include: Is the presumption of states right – the applicability of the principle of *non-refoulement* and the right to asylum is diminished where externalized migration control mechanisms are enforced? Does the right to asylum entail a right to access state territory?

## 3.1 *Non-refoulement*

Part of states' sovereign rights is to have the right to decide who they will allow to enter and remain in their territory.[83] To exercise this right, states have enforced various interception measures to be able to control the arrival of individuals. These measures were traditionally enforced within a state's territory but, as stated previously, have increasingly grown to be used also outside their own territories, especially for those countries that attract the most migratory

[82] Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007) 357.
[83] Emmerich de Vattel, *The Law of Nations* (Book 2, Philadelphia: T & J W Johnson & Co's Law 1883) paras 94 and 100.

movements.[84] Contrary to what states seem to believe, these extraterritorial interception measures do not isolate states from their international obligations, but the ambiguous involvement of states highlight the importance of the principle of *non-refoulement*.

The principle of *non-refoulement* is the prominent principle of international refugee law. It is often referred to as the cornerstone of international refugee protection.[85] It can be found in *inter alia* Article 33 of the Refugee Convention which reads:

> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.[86]

Most of the rights established in the Refugee Convention are progressively granted based on the degree of attachment that the refugee has acquired to the state. More specifically, most rights are reserved for refugees who have entered the territory of the state or otherwise meet the criteria of some degree of attachment to the state. However, some core rights apply without attachment to territory.[87] Core rights in the Refugee Convention are those rights that are considered as fundamental for the object and purpose of the treaty. Without question, the right not to be returned to territories where the life or freedom of an individual is at risk, is a core right acknowledged by the Convention.[88] The object and purpose of refugee law is to provide substituted protection of human rights to people who no longer benefit from the protection of

---

[84] Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Leiden: Martinus Nijhoff Publishers 2010) 69–70.
[85] Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge: Cambridge University Press 2011) 44.
[86] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.
[87] James C Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press 2005) 160–163; *R v Secretary of State for the Home Department*, [2012] UKSC 12, 21 March 2012, paras 21–26.
[88] Hathaway (n 87) 160–161.

their country of origin. It follows from the Preamble of the Refugee Convention which notes the particular importance of assuring 'refugees the widest possible exercise of […] fundamental rights and freedoms'.[89] This object and purpose of the Refugee Convention has been analyzed and accepted by many.[90]

The principle of *non-refoulement* also has the status of a non-derogable norm of customary international law.[91] While first developed in the framework of international refugee law, it has since been adopted and further developed under international and regional human rights law.[92] Although the principle is found in international human rights law as well as in refugee law, it is not the identical in both. The principle is a component in for instance Article 3 of the United National Convention Against Torture[93] (hereinafter 'the CAT'), Article 3 of the ECHR[94], Article 18 of the Charter of Fundamental Rights of the European Union[95] (hereinafter 'the EU Charter') as well as Article 7 of the International Covenant on Civil and Political Rights[96] (hereinafter 'the ICCPR').

Through the principle of *non-refoulement* states have a negative obligation to refrain from returning persons to territories where they may be persecuted with reference to the grounds stated in Article 33(1) of the Refugee Convention. The principle is of particular importance in

---

[89] The Refugee Convention (n 86) Preamble. For a more detailed discussion on the object and purpose of the Refugee Convention see James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, Cambridge: Cambridge University Press 2014) 183–186.
[90] See *inter alia Canada v Ward* [1993] 2 SCR 689; *Horvath v Secretary of State for the Home Department*, [2000] UKHL 37, 6 July 2000; *Minister for Immigration and Multicultural Affairs v Khawar* (11 April 2002) HCA 14. See also Hathaway (n 87) 4–5.
[91] UNHCR, 'Note on the Principle of Non-Refoulement' (Prepared for the EU Seminar on the Implementation of the 1995 EU Resolution on Minimum Guarantees for Asylum Procedures, Luxemburg, November 1997) B; 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) paras 12 and 15; UNGA Res 51/75 (12 February 1997) UN Doc A/RES/51/75 para 3; UNGA Res 52/132 (12 December 1997) UN Doc A/RES/52/132 preamble para 12.
[92] Ryan and Mitsilegas (n 84) 70.
[93] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.
[94] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.
[95] Charter of Fundamental Rights of the European Union [2012] OJ C326/291.
[96] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

the context of interception measures that are carried out outside state territories, because, while many states have mechanisms in place to ensure that the principle is upheld when enforcing such measures within their territory, the existence of comparable mechanisms are rarely found or *de facto* followed in connection with measures that concern extraterritorial interception methods.[97] The mechanisms vary in each country and their sufficiency would need to be evaluated separately. Overall, the mechanisms can range from including specific references to the principle of *non-refoulement* or just refugee law in general. Some countries have dealt with the obligation by referring all asylum requests to a specific authority, while some use surveys to identify the persons at risk.[98] However, contrary to what some argue, the applicability of the principle does not dissolve just because states act beyond their borders. The principle of *non-refoulement* is applicable also extraterritorially.[99]

The principle of *non-refoulement* is the foundation for refugee protection but through interception measures abroad the protection it guarantees is diminished. The extraterritorial applicability of it is not unclear, but in practice its realization is endangered by the enforcement of extraterritorial interception measures. Thus, it seems that in practice states do – to some extent – achieve their aim to evade responsibility by the enforcement of externalized migration control mechanisms. Because of this, the following will assess the legal rules that govern the recognition of a refugee and the right to asylum extraterritorially. It shows that because of externalized migration control mechanisms refugee rights are not realized as intended, especially because either refugees status is not recognized or the possibility to claim asylum is reduced.

## 3.2 Extraterritorial refugee status and the right to asylum

Is the possibility to claim asylum affected by the enforcement of extraterritorial migration control mechanisms? Answering the question negatively undermines the idea of why

[97] Ryan and Mitsilegas (n 84) 71; Andrew Brouwer and Judith Kumin, 'Interception and Asylum: When Migration Control and Human Rights Collide' (2003) 21(4) Refuge: Canada's Journal on Refugees, 6 <https://doi.org/10.25071/1920-7336.21305> last accessed 20.10.2020.
[98] See further Anja Klug and Tim Howe in Ryan and Mitsilegas (n 84) 71.
[99] UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement' (n 91) para 26.

externalized migration control mechanisms are problematic. The effects of externalized migration control mechanisms would not correlate the aim that states seek by enforcing them, if refugee status and the right to asylum are not attached to territory or state jurisdiction.

### 3.2.1 Refugee status

The primary international instruments that govern the definition of a refugee are the already mentioned 1951 Refugee Convention[100] as well as the 1967 United Nations Protocol relating to the Status of Refugees.[101] Many regional agreements have expressly adopted the definition laid down it the Refugee Convention. Also, domestic law in many countries apply the Convention definition with direct effect thorough ratification.[102] Article 1(A)2 of the Refugee Convention defines a refugee as any person who:

> [O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The Refugee Convention thus defines refugees in three stages; they are outside their country of origin or former habitual residence; they are unable or unwilling to enjoy the protection of that country owing to a well-founded fear of being persecuted; and the persecution feared is based on one or more of the grounds stated in Article 1(A)2, i.e. race, religion, nationality, membership of a particular social group or political opinion.[103]

At first glance, the definition of a refugee appears to be limited to time and geography. This used to be the reality because differences emerged between states during the drafting of the

---

[100] (n 86).
[101] Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.
[102] For a discussion on the definition of a refugee in international, regional and municipal law see Goodwin-Gill and McAdam (n 82) 15–46.
[103] For a detailed discussion about Article 1 see Hathaway and Foster (n 89); Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (Cambridge: Cambridge University Press 2020).

Refugee Convention over how to define the scope of the Convention.[104] The restrictive view won, and the Convention was limited to apply only for refugees who acquired their status from events that had occurred in Europe before 1 January 1951. The limitation to geography and time was later amended by the 1967 Protocol. Article 1(2) of the Protocol states:

> For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words "As a result of events occurring before 1 January 1951 and ..." "and the words"... "a result of such events", in article 1 A (2) were omitted.

Thus, through the 1967 Protocol the Refugee Convention acquired a broader scope of application for refugees seeking protection in States parties to the Protocol. Most states are parties to both the Refugee Convention and its 1967 Protocol, but some have only acceded to one of them.[105] Nevertheless, the refugee definition has received critique because of its narrow application. Even when interpreted broadly the definition excludes persons who are displaced because of armed conflicts or environmental disasters.[106] Where externalized migration control mechanisms have been enforced the definition of a refugee is not the issue that poses problems, but rather how and when refugees are recognized i.e. how their status is determined.

Although explicit in the Refugee Convention, it is important to point out that refugee status is acquired by fulfilling the criteria contained in Article 1(A)2 of the Refugee Convention rather than through a recognition process.[107] Therefore, the process to determine whether a person fulfills those criteria is not decisive for whether someone is a refugee – it is only a declaration of the already acquired status. The UNHCR has stated that the '[r]ecognition of his refugee

---

[104] Goodwin-Gill and McAdam (n 82) 35–37.
[105] At the time of writing there are 146 parties to the Refugee Convention and 147 parties to the 1967 Protocol. Madagascar, Saint Kitts and Nevis are parties only to the Convention, while Cape Verde, the United States of America and Venezuela are parties only to the Protocol. See United Nations, Treaty Series, vol 189, p 137; United Nations, Treaty Series, vol 606, p 267.
[106] Eeva Nykänen, *Fragmented State Power and Forced Migration: A Study on Non-State Actors in Refugee Law* (Leiden: Martinus Nijhoff Publishers 2012) 19.
[107] See also Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L337/9, preamble para 21.

status does not […] make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee'.[108] However, in practice a person is often not officially recognized as a refugee before the recognition process has declared the refugee claim valid.[109] In other words, persons who fulfill the criteria laid down in the Refugee Convention have rights under international law, but those rights may in practice be withheld from them until the domestic recognition procedure has affirmed their refugee status.[110]

This raises issues especially where externalized migration control mechanisms have been enforced. Actual refugees in the meaning of the Refugee Convention, may not have access to the recognition processes and, albeit contrary to international law, their rights as refugees are never realized because their status as refugees is not recognized. Although refugee status is strictly based on circumstances and facts, rather than a lengthy recognition process, externalized migration control mechanisms can restrict the access to such recognition processes and thus ultimately distort the international obligations that states have in protecting refugees. Especially, where externalized migration control mechanisms are enforced between non-contracting states and states parties to the Refugee Convention and/or the Protocol, the refugee status of a person may not be recognized before a refugee is already pushed back or refused entry in other ways, and therefore left with increasingly diminished or no protection at all.

Nevertheless, as established before, the principle of *non-refoulement* is customary international law, and thus states who are not parties to the Refugee Convention or the 1967 Protocol are not exempted from its application. The application of the principle itself implies that a refugee must

---

[108] UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' (February 2019) HCR/1P/4/ENG/REV. 4 available at <https://www.unhcr.org/4d93528a9.pdf> (last accessed 1.10.2020) para. 28. See also Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press 2003) 116 para 90.

[109] Hathaway (n 87) 158; *Krishnapillai v Minister of Citizenship and Immigration* [2002] 3(1) FC 74 (Can. FCA), paras 25 and 27.

[110] Hathaway (n 87) 158–159.

be recognized. The UNCHR has declared that:

> Every refugee is, initially, also an asylum-seeker; therefore, to protect refugees, asylum-seekers must be treated on the assumption that they may be refugees until their status has been determined. Otherwise, the principle of non-refoulement would not provide effective protection for refugees, because applicants might be rejected at borders or otherwise returned to persecution on the grounds that their claim had not been established.[111]

Thus, international law does require that when a person is claiming asylum, he or she should be assumed to be a refugee until proven otherwise. However, as externalized migration control mechanisms usually shift the responsibility to states that are not parties to the Refugee Convention or its Protocol, or states that do not have the formal procedures in place for determining refugee status, the legal effect of the provision is diminished. Despite the principle's status, some states simply do not have the means or will to carry out formal status determination processes or to respect the principle of *non-refoulement*.[112] For example, even though Libya is formally bound to respect the principle of *non-refoulement* and other refugee rights by its commitment to the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa[113], the ICCPR and the CAT, it has no functioning asylum system in place and has repeatedly been pointed at for abuse of refugee rights.[114] While the states that enforce externalized migration control mechanisms may not intend to allow for human rights violations, the enforcement of such measures in these circumstances unfortunately increase the likelihood for that to occur.

Furthermore, since in practice refugee status is often determined by a recognition process, states have introduced means to expedite the formal procedures where the asylum applications are

---

[111] Executive Committee of the High Commissioner's Programme, 'Note on International Protection' (31 August 1993) UN Doc A/AC.96/815, para 11.
[112] Thomas Gammeltoft-Hansen and James C Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law 235, 256.
[113] Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45.
[114] Amnesty International, 'Libya: "Between Life and Death" Refugees and Migrants Trapped in Libya's Cycle of Abuse' (24 September 2020) MDE 19/3084/2020, available at <https://www.amnesty.org/download/Documents/MDE1930842020ENGLISH.pdf> (last accessed 18.10.2020).

considered as abusive or manifestly unfounded. Rules have been developed to determine the state of origin, transit or first arrival as safe third countries or simply to decide that the first country of arrival is responsible for handling an asylum claim.[115] The idea behind such expedited procedures is to reduce the burden of the state where asylum is sought and thus, increase the assets available to those applicants who have good grounds to be recognized as refugees.[116] In the EU for example there is evidence that the safe third country doctrine allows states to interpret country situations differently. For example, there was a disagreement between France and Finland on whether Iraq was a safe country. France did not return Iraqis to Finland because it considered it to be a violation of the principle of *non-refoulement* since Finland relied on looser grounds for returning migrants to Iraq, as it considered parts of Iraq as safe. The ECtHR concluded in *NA v Finland*[117] that Finland had violated Articles 2 and 3 of the ECHR by relying on those looser grounds.[118] The doctrine entails uncertainty for asylum seekers and refugees, and the success of getting asylum differ depending on where asylum is sought.

Through the development of expedited procedures, states have diminished the workload of migration control officials and thus inevitably reduced asylum claims from certain countries and areas.[119] Although the aim here is to expedite status determination, scholars have actually

---

[115] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31; Directive 2013/32/EU of the European Parliament and the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60, art. 38; Agreement between the Government of Canada and the Government of the United States of America: For cooperation in the examination of refugee status claims from nationals of third countries (signed 5 December 2002). Due to detention practice in the United States the Agreement between Canada and the United States was recently declared invalid by the Federal Court of Canada in *The Canadian Council for Refugees et al v Minister for Immigration and Minister for Public Safety* [2020] FC 770.

[116] Executive Committee of the High Commissioner's Programme, 'The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum' (20 October 1983) No 30 (XXXIV) UN doc 12A (A/38/12/Add.1). See also UNHCR, 'A guide to international refugee protection and building state asylum systems' (2017) Handbook for Parliamentarians No 27, 175–177.

[117] *N.A. v Finland*, no. 25244/18, 14 November 2019.

[118] ibid paras 79–86.

[119] See *inter alia* Bill Frelick, Ian M Kysel and Jennifer Podkul, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) 4 Journal on Migration and Human Security 190, 195–196; Isabel Mota Borges, 'The EU-Turkey Agreement: Refugees, Rights and Public Policy' (2017) 18 Rutgers Race & the Law Review 121, 139–140.

recognized that these are mechanisms for deterring migrants from the destination states.[120] In situations where asylum claims from persons arriving from such countries are evaluated, the assessment for determining whether those claims are valid is often done with minimal adherence to the factual situation of the person.[121] The problem as such is not the enforcement of these rules but rather the circumstances in which they are realized.

As the determination of refugee status is decisive for a further set of rights, the extraterritorially acting states must consider protection claims also beyond their borders. The recognition procedures can be carried out extraterritorially as well. There is no requirement that such procedures must be formal – 'pre-screening' and 'profiling' for the purpose of status determination is sufficient, as long as the status is recognized in so far that the refugee is not returned unless the claim is determined as invalid.[122] Moreover, it can be drawn from the ECtHR's reasoning in *Amuur v France*[123] that states cannot claim that they do not have jurisdiction over asylum claims in a specific territory while still continuing to assume sovereign powers for other purposes in the same territory.[124] Thus, status determination must be carried out also extraterritorially when such claims are directed to state authorities who exercise effective control.[125]

To conclude, status determination procedures affect the possibility for refugees to be recognized. Although international law requires that asylum seekers are assumed to be refugees, in practice, the status is affirmed through determination procedures. Access to those procedures is diminished by enforcing migration control mechanisms extraterritorially. Although states can enforce status determination procedures also extraterritorially, the externalized migration control mechanisms may lead to situations where refugees cannot access such procedures and thus their rights are not realized. Therefore, the obstacles to status determination threaten the

[120] ibid. See also Gammeltoft-Hansen (n 85) 119–120.
[121] Frelick, Kysel and Podkul (n 119) 196.
[122] UNHCR, 'Protection Policy Paper Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing' (November 2010) paras 13–14.
[123] *Amuur v France*, 25 June 1996, Reports of Judgments and Decisions 1996-III
[124] ibid para 43.
[125] See chapter 4.1 for a further discussion on effective control.

object and purpose of refugee protection. So far, states still seem to achieve their aim by enforcing these externalized control mechanisms.

Because of these findings it is necessary to address whether there is an international right to asylum, which can protect refugees in these extraterritorial settings. The following will address that and question whether such a right implies a right to enter state territories.

### 3.2.2 The right to asylum – right to enter state territory?

There is no internationally binding treaty that recognizes a substantial right to asylum.[126] Thus, the right to asylum is left within the discretion of states. This is the outcome of a restrictive approach that states took in implementing the notion of asylum. It is also one that relates to the core issue in this thesis – states have strategically decided not to recognize a universal right to asylum as a substantial right to enter a state's territory. The outcome of this is restricted access for refugees to destination states. International law does, however, recognize a procedural right to *seek and enjoy* asylum.[127] The meaning of the right must be explored in order to examine the effects that externalized migration control mechanisms have on the legal possibilities to enjoy it.

Within international law the right to seek and enjoy asylum is found in Article 14(1) of the Universal Declaration of Human Rights[128] (hereinafter 'the UDHR'), which states that 'everyone has the *right to seek and to enjoy* in other countries *asylum from persecution*'.[129] The UDHR is considered as particularly influential in the development of international law. It is not a treaty with legally binding force, although it reflects general principles of international law and has acquired the status of reflecting customary international law.[130] The drafting process of

---

[126] Nykänen (n 106) 23.
[127] Goodwin-Gill and McAdam (n 82) 357–358.
[128] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III).
[129] Emphasis added.
[130] It has for instance been relied upon by the ECtHR for the purpose of interpreting the European Convention on Human Rights (ECHR). Some US writers have also leaned on the UDHR as evidence of customary international law. See *inter alia* James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford: Oxford University Press 2012) 636–637 and fn14; Nykänen (n 106) 23.

Article 14(1) of the UDHR clearly displays the tension that exists between state sovereignty and the right to asylum as an international obligation of sovereign states. The Commission on Human Rights originally proposed that the text would be phrased as 'everyone has the right to seek and *be granted*, in other countries, asylum from persecution'.[131] However, the right was not accepted as such into the UDHR. Evidently, states supported the restrictive text, because it did not impose a legal obligation for states to grant asylum, which they argued was within the sovereign right of each state to decide by themselves.[132] The UK delegation even argued that if the UDHR was to include a substantial right to asylum it could have negative effects for individuals, because it would encourage states to persecute undesirable persons. Essentially, it would result in a situation where states would persecute unwanted individuals to encourage them to pursue the right to asylum in other countries.[133] Thus, they argued that by including a substantial right to asylum, it would mean an increase in the amount of persecuted people. Ultimately the tension between state interests and human rights resulted in the outcome of the vague right provided in Article 14(1) of the UDHR.

However, Article 14(1) has been criticized because it only reiterates the existing obligations and rights that states and individuals have under international law, namely the right for individuals vis-à-vis their home state or state of habitual residence to seek and enjoy asylum in other countries, while the host state has to respect the principle of *non-refoulement*. However, the provision knowingly lacks a duty for states to provide effective protection, because it does not include an obligation for states to grant asylum, it only binds other states to respect the right to seek asylum and enjoy it when it has been granted.[134] The right contained in Article 14(1) basically seems to be just a positive formulation of the principle of *non-refoulement* and neither

[131] UNGA, Draft International Declaration of Human Rights (30 October 1948) UN doc A/C.3/285/Rev.1 (emphasis added).
[132] Goodwin-Gill and McAdam (n 82) 359 and fn20.
[133] ibid 359.
[134] Hersch Lauterpacht, *International Law and Human Rights* (London: Stevens 1950) 422; Gregor Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law' (2005) 17 International Journal of Refugee Law 542, 546–547.

the principle nor the right contained in Article 14(1) provide an explicit right to enter a state's territory.[135]

Because there is no binding treaty to lean on, customary international law must be examined in this context. Some might argue that the absence of a binding norm to grant asylum seems to have been overcome by state practice. Although not required by the Refugee Convention or any other international treaty, several countries in fact grant asylum to persons whom they consider as refugees within the meaning of international refugee law. However, customary international law confirms that there is no international right to asylum as a right to enter state territory, because there is no consistent state practice or *opinio juris* on such a right.[136] Actually, the *opinion juris* is quite the contrary, as has already been revealed in the previous chapters of this thesis.

Article 14 of the UDHR does apply where externalized migration control mechanisms have been enforced however, the outcome of enforcing these mechanisms cannot be legally challenged with reference to Article 14 or international customary law. Since Article 14 can only be relied upon when asylum has already been granted and vis-à-vis the state having jurisdiction, it is implied that it cannot be invoked where access to asylum has been restricted through externalized migration control mechanisms. Also keeping in mind its unbinding nature, the refugee aspiring to seek and enjoy asylum is left largely to rely on the Refugee Convention instead. So, although the right to seek and enjoy asylum reflects customary international law, the right itself does not expand the possibility for individuals to claim asylum.

Furthermore, the Refugee Convention is silent on the requirements for admitting refugees to the territories of potential asylum states. Simply put the Convention leaves admission procedures within the discretion of each state.[137] Article 33 of the Refugee Convention only states that '[n]o Contracting State shall expel or return […] a refugee', but it does not require states to allow for refugees to enter the state. The Refugee Convention also does not provide an explicit right to

[135] Noll (n 134) 547.
[136] ibid.
[137] Goodwin-Gill and McAdam (n 82) 370.

asylum. However, it does commit states to act in ways that do not infringe on the right not to be returned to areas where an individual's life or freedom is at risk.[138] Although the Refugee Convention does impose obligations on state parties to protect refugees, even when their status has yet to be recognized through national procedures, the explicit means do not require permitting entry into state territory.[139] In order to fully comply with the principle of *non-refoulment* states are often forced to take actions that initiate jurisdiction when the person claiming international protection is encountered at the border. The same pressure does not apply where externalized migration control mechanisms have been enforced, because the state which has enforced them may not itself be legally responsible to provide protection – especially not when a jurisdictional link cannot be established.

Because the Refugee Convention does not regulate entry procedures the applicability of it is dependent on the state either allowing for the refugee to enter its territory, the state taking actions that awaken jurisdiction for it or for the refugee to enter the territory unlawfully and thus gain access to better protection. Important to point out in this context, is that refugees who enter states unlawfully are protected from criminal procedures based on illegal entry. The Refugee Convention includes an explicit obligation which provides that once the refugee has entered a state's territory unlawfully, he or she is protected by Article 31(1) of the Refugee Convention and cannot be penalized for entering unlawfully.[140]

Only unsuccessful attempts towards a universal right to asylum have been made since the UDHR. The development of a right to asylum has continued through regional initiatives, even though it is questionable if these have in fact extended the protection regime.[141] At first glance,

[138] UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement' (n 91) para 8.
[139] UNHCR, 'Commentary on the Refugee Convention 1951: Articles 2–11, 13–37' (Geneva, October 1997), art 33 para 3.
[140] Article 31 (1) of the Refugee Convention reads: 'The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence'.
[141] Goodwin-Gill and McAdam (n 82) 358–365.

the EU Charter seems to provide a right to asylum in its Article 18, which states:

> The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union […].[142]

However, by reference to the Preamble of the EU Charter, the purpose of it is not to create new rights or obligations, but rather to reaffirm existing ones.[143] The intention of Article 18 of the EU Charter is therefore comparable to all the above examined legal norms. It reiterates the existing rights and obligations and only guarantees a procedural right to seek and enjoy asylum rather than a substantial right to asylum.[144] Thus, the EU Charter does not provide a more extensive right to asylum within the EU than what is recognized by international law. Likewise, the African and the American regional settings only recognize the rights and obligations as already established by international law.[145]

As the discussion shows neither the Refugee Convention nor any other international or regional[146] obligation provide a right to asylum as a right to enter a state's territory. Thus, the mechanisms achieve the aim of states as far as access to territory is concerned.

Although it seems that no international instruments impose a duty for states to grant asylum or allow for refugees to enter, one interpretation could rebut this assumption. The right to seek asylum in conjunction with the right to freedom of movement found, *inter alia*, in Articles 13 of the UDHR and 12 of the ICCPR, suggests an obligation for states to respect the right to leave one's country for the purpose of seeking protection.[147] Through this interpretation, it can be argued that states are acting contrary to the requirement provided by the 1969 Vienna

---

[142] Charter of Fundamental Rights of the European Union [2012] OJ C326/291.
[143] ibid Preamble para 5. See also Gregor Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law' (2005) 17 International Journal of Refugee Law 542, 547.
[144] Goodwin-Gill and McAdam (n 82) 368.
[145] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, art 22(7); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, art 12(3); See also ibid 368–369; Nykänen (n 106) 23.
[146] Regional in this context refers to the Global North.
[147] Goodwin-Gill and McAdam (n 82) 370.

Convention on the Law of Treaties[148] of implementing treaty obligations in good faith.[149] Therefore, although this has not been affirmed by international jurisprudence, the construction of strategies that prevent the enjoyment of these rights could possibly be considered as a breach of state obligations.

To conclude, although there is extensive state practice to grant asylum states are at the same time unambiguously showing that no obligation to grant asylum exists. Because 'the humanitarian practice exists, but the sense of obligation is missing' the right to asylum as a right to enter has not acquired the status of customary international law.[150] Because the right to seek and enjoy asylum is a procedural right, which can only be invoked after asylum has been granted, it cannot be effectively relied upon for protection in extraterritorial settings of migration control. The connection between the international obligation for states to refrain from *refoulement* and the right for persons to seek and enjoy asylum is arguably inadequate. Simply put, a person cannot be returned if they never gain access.

However, refugee status must be assumed where a person claims it. It can be looked over only after the claim has been determined as invalid. But what if the claim can never be addressed to an official with capacities to provide protection? Something that is likely to occur as a consequence of the enforcement of externalized migration control mechanisms. International law fails to protect refugees in those circumstances because the practices cannot be challenged with reference to a right to asylum and states cannot be accused of breaching the principle of *non-refoulement* unless some level of attachment is met. Rights of refugees are thus, at large left in the hands of states that are not as invested in enforcing refugee protection as the developed or powerful states seemingly are.

The rules that govern the right to asylum and status determination of refugees correlate with the aim that states seek by the enforcement of externalized migration control mechanism. By

[148] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 331.
[149] ibid arts 26, 31 and Preamble. See also Goodwin-Gill and McAdam (n 82) 370.
[150] Goodwin-Gill and McAdam (n 82) 369.

externalizing the migration control to other states' territories or territories of *terra nullius* states may with reference to the rules discussed above, avoid the responsibilities that follow from refugee claims. But can the understanding that states do not incur responsibilities be challenged when some level of attachment between the state and the individual is established? The following chapter questions whether the presumption of states is accurate – states are less likely to be responsible for human rights obligations outside state territories. To assess this, it is necessary to link state responsibility with the principle of *non-refoulement* in situations where states act extraterritorially. The link has been made through seeking guidance in the approach of international human rights law and by applying the public international law principles of jurisdiction.[151] The following chapter will therefore discuss the possibility to challenge states' presumption of non-responsibility in extraterritorial situations especially through the rules on extraterritorial state jurisdiction.

[151] Gammeltoft-Hansen and Hathaway (n 112) 257–272.

# 4 Challenging the presumption of states through the rules on extraterritorial jurisdiction

The previous chapter established that although the principle of *non-refoulement* applies extraterritorially international law lacks guarantees to determine refugee status and the right to asylum extraterritorially as these do not assure a right to enter a state's territory and they are largely left within the discretion of states. Since, the externalized practices are more likely to cause situations where it is difficult to establish state responsibility for violations of individuals' human rights, the question remains whether states succeed in their aim by enforcing the cooperation-based practices. Especially where the involvement of the developed state is more indirect, it might be difficult to exceed the threshold required by international law for responsibility to apply. This chapter will deal with the legal framework to establish state responsibility where externalized migration control mechanisms have been enforced. The legal question to deal with is when, if ever, do extraterritorial jurisdiction and state responsibility apply if externalized migration control mechanisms have been enforced.

This part will conclude that although externalized migration control mechanisms are problematic from an international refugee law point of view, they cannot currently be effectively challenged by international law – unless a broader interpretation of the notion of state jurisdiction is adopted.

## 4.1 Extraterritorial jurisdiction

According to international human rights law rights are owed to anyone 'within' or 'subject to' the jurisdiction of a state.[152] Different treaties obviously provide different scopes of application, but generally human rights treaties tend to apply where states exercise jurisdiction. For example,

[152] Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge: Cambridge University Press 2011) 81–93; James C Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press 2005) 64–66.

the CAT must be respected when persons are 'in *any* territory under [a state's] jurisdiction'[153], the ICCPR applies to persons 'within its territory and subject to its jurisdiction'[154], the American Convention on Human Right ensures 'to […] all persons subject to [state parties'] jurisdiction the free and full exercise of […] rights and freedoms'[155] and the ECHR similarly secures rights to 'everyone within [a state party's] jurisdiction'.[156] The same view of applicability based on jurisdiction is also supported by soft law[157] and prominent state practice[158] although some states have presented distinguished views.[159] Nevertheless, some treaties – including the Refugee Convention – are silent on the general scope of their application.[160] The apparent dilemma occurring in the context of externalized migration control mechanisms is that refugees in need of protection are strategically placed outside the jurisdiction of the state that they are trying to seek protection from. Simply put, because state jurisdiction traditionally is a prerequisite for the responsibility to protect human rights, states are seeking to transfer jurisdiction to other states or to territories of *terra nullius*.[161]

The threshold for acquiring jurisdiction must be evaluated because it is generally accepted that

---

[153] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 2(1) (emphasis added).
[154] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 2(1).
[155] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, art 1(1).
[156] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, art 1.
[157] Executive Committee of the High Commissioner's Programme, 'Conclusion on Protection Safeguards in Interception Measures' (10 October 2003) No 97 (LIV) UN Doc A/AC.96/987, para (a); Executive Committee of the High Commissioner's Programme, 'General Conclusion on International Protection' (7 October 1994) No 74 (XLV) UN Doc A/49/12/Add.1, para (g).
[158] Gammeltoft-Hansen (n 152) 72–81.
[159] Beth Van Schaack, 'The United States' position on the extraterritorial application of human rights obligations: now is the time for change' (2014) 90 International Law Studies, US Naval War College, 20.
[160] Hathaway (n 152) 163–167. See for example International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195; Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; American Declaration of the Rights and Duties of Man (adopted 2 May 1948) OAS Res XXX (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).
[161] Satvinder Singh Juss (ed), *Research Handbook on International Refugee Law* (Cheltenham: Edward Elgar Publishing Limited 2019) 170; Gammeltoft-Hansen (n 152) 46.

states have obligations vis-à-vis right holders when they exercise jurisdiction over them. In fact, the fundamental function of establishing jurisdiction under general human rights law is to establish whether a state is bound to respect human rights obligations in a specific case.[162] Moreover, establishing extraterritorial jurisdiction in situations where human rights are concerned is motivated by the desire to avoid creating double standards: something that a state is not allowed to do in its own territory, it should also not be allowed to do in another state's territory.[163]

The International Court of Justice (hereinafter 'the ICJ') held already in *Namibia*[164] that: 'Physical control of a territory, and not sovereignty or legitimacy of title, is the basis for state liability for acts affecting other states'.[165] The UN Human Rights Committee (hereinafter 'HRC') and the ICJ have both later concluded that according to general human rights law extraterritorial jurisdiction can be established through effective control over territories or individuals regardless of whether that control is lawful or not.[166] The HRC clarifies the scope of application of the ICCPR as follows:

> [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. […] This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained […].[167]

---

[162] Gammeltoft-Hansen (n 152) 107. For an analysis of the difference between the notion of state jurisdiction under general international law and general human rights law see Erik Roxstrom, Mark Gibney and Terje Einarsen, 'The NATO Bombing Case (Bankovic et al. v. Belgium et al.) and the Limits of Western Human Rights Protection' (2005) 23 Boston University International Law Journal 55, 66–68.
[163] *Cyprus v Turkey* [GC], no. 25781/94, ECHR 2001-IV, para 78; Sergio Euben Lopez Burgos v Uruguay, (6 June 1979) UN Doc Supp No 40 (A/36/40), para 12(3); *Celiberti de Casariego v Uruguay*, (29 July 1981) UN Doc A/36/40, 185; *Issa and Others v Turkey*, no. 31821/96, 16 November 2004, para 71; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (9 July 2004) Advisory Opinion ICJ Reports 2004, 136 , para 109; Gammeltoft-Hansen (n 152) 111–112.
[164] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* notwithstanding Security Council Resolution 276 (1970), (21 June 1971) Advisory Opinion ICJ Reports 1971, 16.
[165] ibid para 118.
[166] UN Human Rights Committee, 'General Comment No 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 10; *Namibia* (n 164) para 118; *Legal Consequences of the Construction of a Wall* (n 163) para 112.
[167] General Comment No 31 (n 166) para 10.

Keeping these considerations in mind, the same logic should be extended to the Refugee Convention, since refugee law is a subset of public international law.[168] The drafters to the Refugee Convention did not intend to create obligations for states outside their territories unless they chose to act extraterritorially. But, the language of the Refugee Convention shows that it is not only applicable in situations where refugees are physically present in states, although most of the rights are prompted only after access to territory.[169]As stated previously, some core rights apply without a higher level of attachment. The UNHCR has also been clear on expressing that the principle of *non-refoulement* applies wherever states act:

> Since the purpose of the principle of non-refoulement is to ensure that refugees are protected against forcible return to situations of danger it applies both within a State's territory and to rejection at its borders. It also applies outside the territory of States. In essence, it is applicable wherever States act.[170]

The view of the UNHCR does not necessarily mean that the responsibility to protect refugees is linked exclusively to jurisdiction, although actions taken by states may very well mean that they have acquired jurisdiction – at least on some level. But is it possible that actions of states do not amount to such that they result in jurisdiction for the state? This is especially likely where cooperation-based externalized migration control mechanisms have been enforced through proxy or by the provision of aid and assistance. Thus, it is necessary to assess what the required link for protection and responsibility is in the context of externalized migration control.

International law has developed and established rules that govern extraterritorial state jurisdiction in situations where states are exercising control over territories or individuals.[171] The development in law indicates that jurisdiction based on the exercise of public powers is

---

[168] Hathaway (n 152) 169.
[169] See *inter alia* Thomas Gammeltoft-Hansen and James C Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law 235, 257–258; Hathaway (n 152) 160–164.
[170] UNHCR, 'Note on the Principle of Non-Refoulement' (Prepared for the EU Seminar on the Implementation of the 1995 EU Resolution on Minimum Guarantees for Asylum Procedures, Luxemburg, November 1997) E.
[171] Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Leiden: Martinus Nijhoff Publishers 2010) 76–85.

emerging as a third way to acquire state jurisdiction.[172] The rules on jurisdiction are still under evolution and for the sake of extraterritorial application, this thesis argues that a contemporary understanding of jurisdiction needs to be adopted to provide a comprehensive protection regime for refugees.

The following will discuss jurisdictional issues related to externalized migration control mechanisms. The discussion is divided into four categories. The first concerns situations where states exercise effective control over foreign territories, the second examines state jurisdiction in situations where states act in territories of *terra nullius* and the third deals with state jurisdiction when states exercise control over individuals within the territories of foreign states. The last category is focused on discussing state jurisdiction when the state is exercising public powers in another state. Jurisdiction based on exercising public powers abroad is most likely to challenge effectively the presumption of states that they can escape responsibilities by the enforcement of cooperation-based externalized migration control mechanisms. This is especially true when the actions of states do not amount to effective control over territory or individuals. These categories are discussed because although the legal principles relevant to them are intertwined, each category has different potential to challenge the presumption of states that responsibility can be avoided by the enforcement of externalized migration control mechanisms.

### 4.1.1 Effective control over foreign territory

States primarily have *de jure* and *de facto* jurisdictional competence within their territory.[173] Although states have claimed international zones within their territories, and thus claimed that they have no jurisdiction in specific areas, international case law confirms that jurisdiction is primarily territorial and absconding territorial jurisdiction is exceptional.[174] But, in situations

[172] Gammeltoft-Hansen and Hathaway (n 169) 267.
[173] *Banković and Others v Belgium and Others* (dec.) [GC], no. 52207/99, ECHR 2001-XII, para 59; Gammeltoft-Hansen (n 152) 100.
[174] *Legal Consequences of the Construction of a Wall* (n 163) paras 109–110; *Banković* (n 173) paras 59–61; *Assanidze v Georgia* [GC], no. 71503/01, ECHR 2004-II, para 137.

where an individual is under the control of a state while present in another state's territory, the state which is exercising control may not have a valid claim to *de jure* jurisdiction, although it might be exercising *de facto* jurisdiction.[175] This follows from the same principle that jurisdiction is primarily territorial i.e. the state in which the person is present is presumed to exercise jurisdiction. However, states may in fact exercise effective jurisdiction over foreign territories through *de facto* control but without *de jure* authorization. Such circumstances have to date mostly been recognized only in situations of military occupation.[176] In its *Wall*[177] Advisory Opinion the ICJ affirms that human rights obligations apply to:

> [A]ll conduct by the State party's authorities or agents in [the occupied] territories that affect the enjoyment of rights […] and fall within the ambit of State responsibility of [the state party] under the principles of public international law.[178]

The ECtHR also concludes in *Cyprus v Turkey*[179] that the exercise of 'effective overall control' over a foreign territory extends the obligation of that state to secure all substantive rights of the ECHR there, and violations of such rights are imputable to the state that has 'effective overall control'.[180] Thus, the actions taken in such areas are not themselves decisive for finding jurisdiction, but jurisdiction follows rather from the effective control of the territory itself.

However, situations where states exercise effective control over foreign territory, is less relevant for the purpose of extraterritorial migration control. Bearing in mind that externalized migration control mechanisms are supposedly being placed in motion by states to circumvent human rights obligations, this method of taking effective control of foreign territories is certainly not supportive of this goal, as it entails the responsibility of the state effectively in control of foreign

---

[175] Hathaway (n 152) 160.
[176] *Legal Consequences of the Construction of a Wall* (n 163) paras 102–114; *Cyprus v Turkey* (n 163) para 77; *Loizidou v Turkey* (merits), 18 December 1996, Reports of Judgments and Decisions 1996-VI; *Coard et al v United States*, Case 10.951, Report No 109/99, Inter-Am. CHR OEA/Ser.L/V/II.106; *Salas v United States*, Case No. 10.573, Report No 31/93, Inter-Am. CHR OEA/Ser.L/V.85. See also Gammeltoft-Hansen and Hathaway (n 169) 261–262.
[177] *Legal Consequences of the Construction of a Wall* (n 163).
[178] Ibid para 110 (the ICJ quotes the HRC); United Nations Human Rights Committee, 'Concluding observations of the Human Rights Committee Israel' (21 August 2003) CCPR/CO/78/ISR, para 11.
[179] *Cyprus v Turkey* (n 163).
[180] ibid para 77.

territory. The migration control practices discussed in chapter 2 also show that states do not typically take over the control of foreign territories, but rather cooperate with third states through less means of control. Enforcing externalized migration control mechanisms in a way where the controlling state would effectively take over control of a foreign territory is therefore doubtful, because it would undermine one of the main purposes to why states are enforcing externalized migration control.

The following subchapters are therefore of greater relevance for the purpose of this thesis, where the focus is on situations where states do not exercise effective control over territory but rather over individuals. The potential for challenging externalized migration control mechanisms through establishing control over individuals is likely to be much more effective than that of territorial control.

### 4.1.2 Jurisdiction over individuals in territories of *terra nullius*

Since the core rights of the Refugee Convention apply without attachment to territory or a higher level of attachment to the state, situations where states are exercising *de facto* jurisdiction over individuals – in this case refugees – beyond their territories, need special attention. In situations where such control is exercised in territories of *terra nullius* it has been established that for the purpose of protecting human rights, states cannot escape responsibility just because they do not have a lawful right to claim control over a specific territory.[181] It would simply be inconsistent with the purpose of human rights law if states could inflict harm in situations where they exercise control over individuals, but that control is not legally justified because the presumption of jurisdiction is primarily territorial.[182] The UNHCR confirms that the applicability of the *non-refoulement* principle is not limited to individuals present in the territory of a State Party or under *de jure* control of that State, but extends to circumstances where by 'effective authority and control', states exercise 'effective jurisdiction'.[183] This view is also confirmed through case

[181] Hathaway (n 152) 160–161.
[182] ibid.
[183] 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 35.

law of the prominent Courts, although on a regional level the United States Supreme Court has generated some confusion in this regard.[184]

In *Medvedyev and Others v France*[185] the ECtHR had to decide whether French authorities exercised jurisdiction over a merchant ship intercepted in the high seas. French authorities had stopped a Cambodian vessel in the high seas because they suspected it was involved in drug smuggling. The persons suspected of smuggling were retained on board the vessel while it was escorted to France. The applicants alleged that they were arbitrarily deprived of their liberty after the French authorities boarded the ship.[186] In its decision, the ECtHR sitting as a Grand Chamber reiterated the view which it had already taken in the previous case of *Banković and Others v Belgium and Others*[187] i.e. that extraterritorial jurisdiction is exceptional.[188] However, the ECtHR concluded in *Medvedyev* that operating in the high seas does not create a lawless situation, and it may invite the jurisdiction of the state that operates there.[189] The Court concluded that 'the applicants were effectively within France's jurisdiction' because France 'exercised full and exclusive control over the [merchant ship] and its crew, at least de facto, from the time of its interception, in a continuous and uninterrupted manner […], until they were tried in France'.[190]

The case is remarkable for externalized migration control mechanisms because it established the view of the ECtHR that the conditions to acquire state jurisdiction do not necessarily have to amount to *de jure* control. The applicants were under the control of the French authorities because they were under their exclusive guard while confined in their cabins.[191] The Court recognized that in the instant case there was a gap in the legal bases for the interception, but it

---

[184] In *Sale* the US Supreme Court decided that the obligations imposed by the Refugee Convention did not apply extraterritorially. *Sale v Haitian Center Council*, 509 US 155, USSC 1993. The US Supreme Court has since at least to some degree discarded from its position in *Sale*. See Harold Hongju Koh, 'The "Haiti Paradigm" in United States Human Rights Policy' (1994) 103(8) The Yale Law Journal 2391.
[185] *Medvedyev and Others v France* [GC], no. 3394/03, ECHR 2010.
[186] ibid paras 62 and 104.
[187] *Banković* (n 173) para 61.
[188] *Medvedyev and Others v France* (n 185) para 64.
[189] ibid para 81. The Court found that France had violated Article 5 of the ECHR.
[190] ibid para 67.
[191] ibid para 66.

expanded state jurisdiction to apply through what has been called a 'functional approach'.[192] The functional approach to jurisdiction is focused on whether a state exercises power over the individuals under specific circumstances rather than using a general test of territorial or individual control.[193] According to the ECtHR the relevant factors to consider are whether the state exercises power and control over individuals, and the assumption of such control is especially strong where the use of force is involved.[194]

The ECtHR had the opportunity to address another situation of extraterritorial state actions in the high seas in its landmark ruling in the case of *Hirsi Jamaa*.[195] As a contrast to the facts in *Medvedyev*, the course of events in *Hirsi Jamaa* convinced the Court to find also *de jure* jurisdiction for Italy because the migrants were transferred from their vessels to Italian military ships.[196] The Court established that because of the transfer to Italian ships, the migrants were effectively under the exclusive jurisdiction of Italy according to the flag ship principle.[197] However, the Court again emphasized with reference to previous cases that such conclusion was exceptional since jurisdiction is essentially territorial:

> In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention.[198]

The Court found that Italy had violated its human rights obligations because it exercised *de jure* and *de facto* control over individuals although it operated in the high seas.[199] Italy returned the migrants to Libya without assessing their need for international protection because it claimed

---

[192] Valsamis Mitsilegas, *The Criminalisation of Migration in Europe Challenges for Human Rights and the Rule of Law* (1st edn, Cham: Springer International Publishing 2015) 7. For a discussion on the functional approach see Gammeltoft-Hansen (n 152) 124.
[193] Gammeltoft-Hansen (n 152) 124.
[194] *Medvedyev and Others v France* (n 185) para 66.
[195] *Hirsi Jamaa and Others v Italy* [GC], no. 27765/09, ECHR 2012.
[196] ibid paras 79–80.
[197] UNCLOS (n 40) art 92.
[198] *Hirsi Jamaa* (n 195) para 72. See also *Drozd and Janousek v France and Spain*, 26 June 1992, Series A no. 240, para 91; *Banković* (n 173) para 67; *Ilaşcu and Others v Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII, para 314.
[199] *Hirsi Jamaa* (n 195) paras 81–82.

that the 2008 Friendship Pact between Italy and Libya guaranteed that Libya would not treat the applicants contrary to Article 3 of the ECHR.[200] However the Court did not accept this argument as Libya had on several occasion been recognized as failing to protect refugees due to a lack of asylum procedures and the authorities' unwillingness to recognize refugee status.[201] The fact that Italy described the events as rescue-operations did not circumvent the Court's view that Italy was responsible for ensuring that the applicants would not be subjected to indirect *refoulement*.[202] Moreover, the Court expanded the application of Article 4 of Protocol No 4 on the prohibition of collective expulsion of aliens. The ECtHR concluded that:

> [W]hile the notion of "jurisdiction" is principally territorial and is presumed to be exercised on the national territory of States […], the notion of expulsion is also principally territorial in the sense that expulsions are most often conducted from national territory. Where, however, as in the instant case, the Court has found that a Contracting State has, exceptionally, exercised its jurisdiction outside its national territory, it does not see any obstacle to accepting that the exercise of extraterritorial jurisdiction by that State took the form of collective expulsion. To conclude otherwise, and to afford that last notion a strictly territorial scope, would result in a discrepancy between the scope of application of the Convention as such and that of Article 4 of Protocol No. 4, which would go against the principle that the Convention must be interpreted as a whole.[203]

Through this statement the Court extended the geographical application of collective expulsion from state territories to territories *outside national territories* if the state exercises jurisdiction there. A welcome extension in the context of externalized migration control mechanisms, since their effect could also violate the prohibition of collective expulsion. Likewise, through this statement the Court recognized the issues that extraterritorial migration control brings with them, and such practices will subsequently be determined also with extraterritorial collective expulsion in mind.

However, the case of *Hirsi Jamaa* concerns a situation where Italy – a State Party to the ECHR – had effective control over the individuals and took actions that affected those individuals'

[200] ibid para 141.
[201] ibid paras 152–156.
[202] ibid para 79.
[203] ibid para 178 (emphasis added).

possibility to enjoy their rights. As shown previously, externalized migration control mechanisms are increasingly enforced through cooperation with third states and thus the level of attachment to the enforcing state is diminished. Although the ruling of *Hirsi Jamaa* is important and expands the protection for refugees, it leaves room for interpretation. The ECtHR does not make it clear how far the reasoning can be applied. The Court does not stipulate on the different kinds of state actions that can engage jurisdiction as well as the level of intensity required to satisfy the notion of effective control for the ECHR to apply.[204] Nevertheless, the Court's previous case law can provide guidance to evaluate the required intensity for effective control.[205] In this context den Heijer gives an example and questions whether a refusal to rescue a sinking ship is enough to find the victims to be within the jurisdiction of the refusing state in line with the meaning of Article 1 of the ECHR. Such actions are undeniably prohibited by international maritime law, but the case law of the ECtHR gives two possible answers to the question.[206] First in *Hirsi Jamaa* the Court refers to the case of *Banković* where the principle is interpreted narrowly because control is not effective when 'only an instantaneous extra-territorial act is in issue'.[207] Then the Court refers to *Al-Skeini*[208] where a broad approach is endorsed because the Court concludes that a state exercises jurisdiction '*whenever* the State, through its agents, exercises control and authority over an individual'.[209] According to den Heijer the narrow approach would lead to a conclusion where states would not acquire jurisdiction through the refusal to rescue a sinking ship, while the broader approach has the opposite effect.[210] The case law of the ECtHR thus leaves room for interpretation but makes it clear that the ECtHR's approach will depend on the facts of each case. The Court clearly promotes a functional approach to determine whether a state exercises jurisdiction over individuals.

---

[204] Maarten den Heijer, 'Reflections on Refoulement and Collective Expulsion in the Hirsi Case' (2013) 25(2) International Journal of Refugee Law 265, 273.
[205] See *inter alia Loizidou v Turkey* (preliminary objections), 23 March 1995, Series A no. 310; *Öcalan v Turkey* [GC], no. 46221/99, ECHR 2005-IV; *Issa and Others v Turkey* (n 163); *Al-Saadoon and Mufdhi v the United Kingdom*, no. 61498/08, ECHR 2010.
[206] Den Heijer (n 204) 273–274.
[207] *Hirsi Jamaa* (n 195) para 73; *Banković* (n 173) para 75.
[208] *Al-Skeini and Others v the United Kingdom* [GC], no. 55721/07, ECHR 2011.
[209] *Hirsi Jamaa* (n 195) para 74; ibid paras 136–137 (emphasis added).
[210] Den Heijer (n 204) 273–274.

Finally, perhaps Italy's jurisdiction was so obvious, that the ECtHR did not feel the need to take a more reasoned position on the general conditions to exceed the threshold for the application of Article 1 of the ECHR. Also, because the case concerned an operation carried out exclusively by Italy, there was no need to address the possibility of concurring jurisdiction.[211]

The position of the Inter-American Commission on Human Rights (hereinafter the 'IACHR') is in line with that of the ECtHR. Already in 1999, the Court decided similarly in *Brothers to the Rescue*[212] that even though Cuba did not have *de jure* control over the high seas or international airspace, it did exercise jurisdiction when Cuban military aircrafts shot down two civilian airplanes, which resulted in the death of several civilians. The Court referred to decisions of other courts and argued that the reach of state jurisdiction applies to 'all […] persons under [the state's] actual authority and responsibility'.[213] The IACHR concluded that:

> '[T]he victims died as a consequence of direct actions taken by agents of the Cuban State in international airspace. […] W]hen agents of a state, whether military or civilian, exercise power and authority over persons outside national territory, the state's obligation to respect human rights continues […].[214]

However, although the international community largely today agree that *de facto* control in territories of *terra nullius* indicate responsibility, the United States has objected to this view on many occasions.[215] Nevertheless a persistent objector does not make the legal norm any less valid. Although *non-refoulement* is customary international law its applicability follows from binding legal sources as well – sources to which the United States is also a contracting party.[216] A wrongful interpretation of a legal norm does not make the interpretation valid.

---

[211] ibid 274.
[212] *Armando Alejandre Jr and Others v Cuba ('Brothers to the Rescue')*, Case 11.589, Report No 86/99, Inter-Am. CHR OEA/Ser.L/V/II.106 Doc 3 rev 1999.
[213] ibid para 24. See also *Loizidou v Turkey* (n 205) paras 56–64.
[214] *Brothers to the Rescue* (n 212) para 25.
[215] For a discussion on the arguments by the United States see Van Schaack (n 159).
[216] The United States has for example ratified the ICCPR and the CAT. United Nations, Treaty Series, vol. 999, p 171 and vol 1057, p 40; United Nations, Treaty Series, vol 1465, p 85.

The case law shows that establishing extraterritorial jurisdiction over individuals in territories of *terra nullius* is dependent on the specific circumstances of each case. The emphasis is not on the threshold of effective control over persons or territory but is instead on the power and authority that the state is exercising *de facto* while acting extraterritorially. The relationship between the state and the individual is the foundation for jurisdiction and it seems that jurisdiction is more likely to rely on the merits of the case than on the test of acquiring effective control and thus jurisdiction.[217] The presumption that states have jurisdiction when they act extraterritorially in areas of *terra nullius* is therefore strong. Consequently, states seeking to avoid responsibility for protecting refugees through extraterritorial migration control mechanisms, seem unlikely to succeed when the mechanisms shift the geographical point of state control to territories of *terra nullius* and the state itself is involved in the actions taken there. As to the cooperation-based mechanisms presented in chapter 2 it can surely be agreed that joint operations enforced in territories of *terra nullius* are likely to be challenged on this basis if the state actions amount to control over individuals. States cannot assume their responsibilities are nullified when operations are enforced in territories of *terra nullius* if the actions are attributable to the state that is enforcing them.

However, the case law shows that jurisdiction requires a link between the extraterritorially acting state and the individual. Instantaneous acts are left outside the scope of application. Therefore, the real danger is that states will seek to completely outsource the extraterritorial acts to third states' agents and thus avoid activating jurisdiction for themselves. It is unlikely that a jurisdictional link could be established, on the grounds discussed above, for the state that has through a diplomatic agreement with another, outsourced its migration control so that the latter is effectively in control of migrants in territories of *terra nullius*. Therefore, externalized migration control mechanisms that are implemented through delegation are difficult to challenge purely based on effective control over individuals.

The following subchapter will move on to discuss how jurisdiction over individuals in foreign territories can be established. It will show that the assumption of primarily territorial jurisdiction

[217] Gammeltoft-Hansen (n 152) 124–125.

is even stronger when individuals are present within third state territories as opposed to territories of *terra nullius*.

### 4.1.3 Jurisdiction over individuals present in foreign territories

The third situation to consider concerns circumstances where extraterritorial jurisdiction is established over persons who are present in another state's territory. Largely the same rules apply as those presented under jurisdiction over individuals present in territories of *terra nullius*. However, since the presumption is that states primarily have jurisdiction in their own territories, the threshold to establish jurisdiction for a state that acts extraterritorially is likely to be higher. The following case law demonstrates that it is even more difficult to establish a jurisdictional link between the individuals present in foreign territories and the state that is acting extraterritorially, unless that state is exercising complete physical control over the individual.

In the case of *Marine I*[218] the Committee Against Torture had to decide whether Spain exercised jurisdiction over migrants of Asian and African origin during and after a rescue operation at sea. The facts of the case concerned a capsized cargo vessel carrying 369 migrants in the high seas outside West Africa. After negotiating with Mauritania and Senegal, Spanish authorities boarded the vessel to provide health care for those in need and ultimately towed the vessel to Mauritania where the migrants were detained.[219] Spain and Mauritania negotiated a diplomatic agreement under which Spain had the authority to control the migrants. The Committee concluded that:

> [J]urisdiction must also include situations where a State party exercises, directly or indirectly, *de facto* or *de jure* control over persons in detention […]. In the present case, the Committee observes that [Spain] maintained control over all persons on board the *Marine I* from the time the vessel was rescued and throughout the identification and repatriation process that took place at Nouadhibou. In particular, [Spain] exercised, by virtue of a diplomatic agreement concluded with Mauritania, constant *de facto* control

[218] *J.H.A v Spain (Marine I)*, (21 November 2007) No 323/2007, Committee Against Torture, CAT/C/41/D/323/2007.
[219] The complainant also noted in the case of *Marine I* that Spain agreed to pay Mauritania 650 000 euros in return for transferring the migrants to Mauritania. The reasons are not speculated. Ibid para 2.4.

> over the alleged victims during their detention in Nouadhibou. Consequently, the Committee considers that the alleged victims are subject to Spanish jurisdiction […].[220]

The conclusion of the Committee is not surprising as Spain was in fact directly exercising effective control over the migrants both while the vessel was towed and when the persons were detained in Mauritania. The control was based on an agreement between the territorial state and the state that was acting extraterritorially, which made it unnecessary to question whether Mauritania or any other state would have acquired the responsibility to protect the individuals. Fundamentally, for the purpose of externalized migration control mechanisms, it is clear that extraterritorial detention-like conditions will amount to jurisdiction for the state that exercises effective control over the individuals.

Yet, situations that are as clear as those in *Marine I* are becoming less common in the context of externalized migration control practices. As stated previously, states have for example deployed officers to third state territories to advise and support national authorities that carry out migration control. These officials are formally emphasized as not carrying out migration control tasks and thus they are not likely to fulfill the high threshold of exercising effective control over individuals – although in practice they often have extended capacities.[221]

In the already mentioned case of *Banković*[222] the ECtHR created some confusion to the application of extraterritorial jurisdiction.[223] The case concerned the responsibility of the State Parties to the ECHR for the bombing of a Serbian radio station in Yugoslavia, despite the fact that NATO conducted the bombing. The killed civilians were thus present in another state than those states alleged to be responsible for the deaths. Therefore, the ECtHR had to decide on whether the impact of state actions could result in violations of the ECHR even if the state did not exercise *de jure* or even *de facto* territorial or personal jurisdiction. The ECtHR found the case inadmissible because the NATO states did not have *de facto* jurisdiction over the killed

[220] *Marine I* (n 218) para 8.2.
[221] Gammeltoft-Hansen (n 152) 126.
[222] *Banković* (n 173).
[223] Gammeltoft-Hansen (n 152) 260.

civilians by virtue of authorizing the bombing of Yugoslavia.[224] The Court came to the conclusion through examining the concept of jurisdiction as it is enshrined in general international law rather than human rights law:

> As to the "ordinary meaning" of [jurisdiction], the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction […] are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States […].
>
> […] A State may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence, unless the former is an occupying State in which case it can be found to exercise jurisdiction in that territory, at least in certain respects […].
>
> The Court is of the view […] that Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case.[225]

The ruling has been criticized because it resulted in an interpretation of human rights law that can be considered as inconsistent with the purpose of it. It has been argued that the ECtHR failed to acknowledge that the notion of jurisdiction in human rights law is broader compared to public international law, where the lawfulness of an action is decisive for establishing jurisdiction.[226] Some scholars agree that it is necessary to consider the framework of general international law while some argue that international human rights law has developed an autonomous notion of jurisdiction.[227] The critique pointed towards the *Banković* decision is that because the Court applied the notion of jurisdiction in general international law, which refers to the sovereign powers of states to *legally* legislate, enforce and adjudicate, the Court failed to see the effects it has on human rights. The Court should instead have distinguished the notion of jurisdiction in

---

[224] *Banković* (n 173) para 61.
[225] ibid paras 59–61 (emphasis added).
[226] Alexandra Rüth and Mirja Trilsch, 'Banković v. Belgium' (2003) 97(1) American Journal of International Law 168, 171; Hathaway (n 152) 167–168.
[227] See *inter alia* Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: Oxford University Press 2011) 23–33; Gammeltoft-Hansen (n 152) 112–114.

human rights law, which refers to situations where states have attained lawfully or unlawfully effective control over territories or individuals, and are consequently bound to respect human rights obligations.[228] In other words, the Court's ruling in *Banković* relied on general international law rules on jurisdiction, which were based on the legal enforcement of actions rather than actual control over the situation. The absurd conclusion is that, because there was no legal territorial or personal link between the NATO states and the injured civilians, the Court could not find responsibility under the ECHR.

Because the Court rejected the cause-and-effect jurisdiction in *Banković* it seems unlikely – at least on the personal basis for jurisdiction – that extraterritorial migration control carried out in territories of other states – by the authorities of that state – would lead to a conclusion where the sponsoring state has jurisdiction and could be held responsible.

However, the notion of extraterritorial jurisdiction has been developed through subsequent case law. The Court made it clear in *Al-Skeini* that while states are acting increasingly outside their territories, they are exercising jurisdiction in the meaning of international human rights law.[229] *Al-Skeini* will be discussed further below. The IACHR has also confirmed that placing persons under the control of state authorities, obliges that state to protect their 'fundamental and non-derogable human rights'.[230]

The considerations above lead to a conclusion that territorial jurisdiction is not required to establish jurisdiction over human rights. States may be held accountable for actions taken outside their national territories when they exercise control or authority over individuals whether in territories of *terra nullius* or within a third state's territories. The case law also confirms that control can be indirect and will be assessed through the factual circumstances of each case. These international rules on jurisdiction over individuals can therefore be of great relevance to

[228] For a detailed discussion on the distinction between the concept of jurisdiction in general international law and human rights law see Milanovic (n 227) 23–33. See also Gammeltoft-Hansen (n 152) 107.
[229] *Al-Skeini* (n 208) para 132.
[230] *Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba)* Inter-Am. CHR 41 ILM 532 (12 March 2002).

challenge the view of states' that practices of externalized migration control mechanisms can insulate them from the responsibility to protect migrants.

Although these rules are likely to apply on many occasions, there are situations where the territorial or even the personal control approach will not be enough. This is especially true where externalized migration control mechanisms are enforced through sponsoring a home country or advising the transit country on migration control in a way that effectively stops the journey of migrants from those countries. Thus, especially when migration control is enforced through engaging third state authorities acting as a proxy, the reliance on the rules established above will decrease the likelihood for ensuring protection to refugees. For these situations jurisdiction cannot be based on individual control because such control is not exercised by the enforcing state, but rather by the cooperating party. In such circumstances jurisdiction could perhaps be established through the emerging jurisprudence of jurisdiction based on the exercise of public powers abroad. The following will discuss this additional form of jurisdiction as a powerful tool to combat the evolving practices of cooperation-based externalized migration control.

### 4.1.4 Jurisdiction based on the exercise of public powers abroad

The weaknesses of state jurisdiction on the bases of territorial or personal control have been acknowledged by many scholars.[231] Some have argued that an additional way to establish jurisdiction has emerged. The model in which many see potential is predicated on finding jurisdiction based on the exercise of public powers.[232] Some argue that this is an additional way for finding jurisdiction[233] while others see its potential as partially replacing the traditional ways of control over territory or persons.[234] The model is elaborated from the case law of the ECtHR

[231] Rick Lawson, 'Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights', published in Fons Coomans and Menno Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia 2004); Milanovic (n 227); Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control — On Public Powers, S.S. and Others V. Italy, and the "Operational Model"' (2020) 21(3) German Law Journal 385.
[232] Gammeltoft-Hansen and Hathaway (n 169); Moreno-Lax (n 231).
[233] Gammeltoft-Hansen and Hathaway (n 169) 270.
[234] Moreno-Lax (n 231) 386.

although it has yet to determine a case solely on the basis of state responsibility stemming from the exercise of public powers.

In the case of *Al-Skeini*[235] the ECtHR decided whether the death of six Iraqi civilians occurred under the jurisdiction of the United Kingdom, because it had assumed the responsibility for security operations in Southern Iraq.[236] In the case the Court did not find the United Kingdom responsible only with reference to control over territory or individuals but also because Britain exercised public powers in Iraq that are normally exercised by sovereign states. Mainly the Court found that:

> [T]he United Kingdom assumed authority and responsibility for the maintenance of security in south-east Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basra […], exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.[237]

The understanding that acts considered as public powers invite jurisdiction had already been elaborated in *Banković*, but – perhaps due to the confusion that had been created in the principles of jurisdiction after that decision – the Court carefully addressed all the relevant rules again in *Al-Skeini*.[238] In addition to the traditional territorial or personal jurisdiction the Court confirmed with reference to its earlier case law that:

> [T]he Court has recognised the exercise of extraterritorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the *public powers normally to be exercised by that Government* […]. Thus, where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the

[235] *Al-Skeini* (n 208).
[236] ibid paras 149–150.
[237] ibid para 149.
[238] ibid paras 130–142.

> Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State […].[239]

Consequently, the ECtHR argues that jurisdiction can be established through the exercise of public powers when three elements are met. First, there must be a legal authority established in 'accordance with custom, treaty or other agreement' that entitles the extraterritorially acting state to act within the territory of another state.[240] This means that, contrary to personal or territorial jurisdiction, only lawful presence can entail jurisdiction in this regard. Therefore, the requirement is not met when a state acts extraterritorially through unlawful invasions.

Cooperation-based externalized migration control mechanisms are likely to surpass the first threshold quite easily, because the essence of these mechanisms require that an agreement has been concluded between the state that is acting extraterritorially and the territorial state. As stipulated previously military occupation is rarely the way for states to enforce extraterritorial migration control mechanisms. Moreover, the 'other agreement' gives the impression that the threshold is low, and even informal agreements are sufficient to demonstrate that some form of consent has been given for the extraterritorial act. The facts in the case of *Al-Skeini* support this view, since the United Kingdom was in fact exercising public powers on the basis of letters exchanged between relevant parties, although these letters were later noted in a Security Council Resolution.[241] Thus, also informal agreements between states, such as memorandums of understanding could – and most likely would – exceed the threshold. The low requirement is favorable for establishing a jurisdictional link for extraterritorial migration control mechanisms, since the agreements can be vague and informal, but the intention of cooperation is still eminent.

The second requirement to meet concerns the nature of the powers that are performed. They must be powers that are normally exercised by sovereign states.[242] The definition of what constitutes public powers is not well established in international law, but considering that migration control is conceived by states as a sovereign right to determine who to permit entry,

---

[239] ibid para 135 (emphasis added).
[240] ibid para 135.
[241] ibid paras 143–148.
[242] ibid para 135.

there should be no doubt to regard acts that affect the migration control of other states as acts that constitute public powers.[243] The Court also notes in *Al-Skeini* that not only are tasks related to security or civil administration considered as public powers, but also the exercise of judicial and executive functions.[244] For example in *X and Y v Switzerland*[245] immigrants were refused entry into Liechtenstein, but the European Commission attributed jurisdiction to Switzerland, because it was responsible for the legislation of both territories.[246] The direct exercise of executive or judicial functions abroad thus create a strong assumption for extraterritorial jurisdiction.[247]

Although the Court does not elaborate in detail what is considers to be within the ambit of public powers the state practice clearly demonstrates that states consider migration control as an exclusive sovereign right that signifies public powers.[248] Thus, the second requirement should not to be difficult to overcome where externalized migration control mechanisms affect the migration control of another state. Especially where officials are deployed to work with the immigration officers of other states, albeit only to advice and support, their presence and advice is often considered authoritative. Such control must certainly be considered on a case by case basis, but if substantive assistance can be identified as the exercise of public powers abroad, it is also possible to establish jurisdiction and responsibility.[249]

For an act to meet the requirements of externally exercised public powers, the last prerequisite to meet is that any infringement of human rights must be attributable to the state acting extraterritorially rather than the territorial State.[250] In *Al-Skeini* the ECtHR does not elaborate

---

[243] Gammeltoft-Hansen and Hathaway (n 169) 268; Emmerich de Vattel notes in *The Law of Nations* that every sovereign nation has through its sovereignty the power to forbid entrance of foreigners or to admit them whenever they see fit. It 'is a consequence of the right of domain'. Emmerich de Vattel, *The Law of Nations* (Book 2, Philadelphia: T & J W Johnson & Co's Law 1883) paras 94 and 100.
[244] *Al-Skeini* (n 208) paras 143–148.
[245] *X and Y v Switzerland* (admissibility decision) nos. 7289/75 and 7349/76, ECHR 14 July 1977).
[246] ibid 71–73. See also *Drozd and Janousek v France and Spain* (n 198); *Gentilhomme, Schaff-Benhadji and Zerouki v France*, nos. 48205/99 and 2 others, 14 May 2002.
[247] Gammeltoft-Hansen (n 152) 109.
[248] See for example *Sale* (n 184) 199.
[249] Gammeltoft-Hansen and Hathaway (n 169) 272.
[250] *Al-Skeini* (n 208) para 135.

on the requirements for attribution. However, the rules on state responsibility give guidance on the general principles of international law under which breaches of human rights can be attributable to states. The principles for state responsibility are enshrined in the ARSIWA.[251] The ARSIWA itself is a non-binding instrument, but it has been extensively cited and the rules in it have been argued to express customary international law.[252] Article 2 of the ARSIWA confirms that state responsibility requires that an internationally wrongful act can be attributed to the state. The state itself is an organ without a conscience or a mind, consisting of collective actors and unable to function without its representatives. Thus the actions and omissions of the organs and officials of the state shall be regarded as acts of the state.[253] The ILC also makes it clear in the Commentaries to the ARSIWA that an internationally wrongful act can be attributable to more than one state at the same time, and that an act or omission of one state can be attributed to another.[254] However, the ILC as well as the leading approach of international law in general agree that the basic principle of international law is that states are initially responsible for their own conducts in respect of their own international obligations.[255]

It is not contested that extraterritorial acts can be attributable to the extraterritorially acting state when the state has deployed officers that are directly involved in the enforcement of the relevant public powers. But when states are not directly involved in the enforcement of public powers, but rather advice and instruct others, Article 8 of the ARSIWA gives guidance on whom to hold responsible for such conduct. Article 8 of the ARSIWA states:

> 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.

---

[251] Draft Articles on Responsibility of States for Internationally Wrongful Acts (adopted by the International Law Commission in 2001) Supplement No 10 (A/56/10).
[252] James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford: Oxford University Press 2012) 540 and fn7.
[253] ARSIWA (n 251); Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, Yearbook of the International Law Commission, 2011, vol II, Part Two, 38–39, paras 2–6. See also Jan Klabbers, *International Law* (Cambridge: Cambridge University Press 2013) 126.
[254] ARSIWA with commentaries (n 253), art 1, 33–34, para 6.
[255] ibid. See also Andre Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34(2) Michigan Journal of International Law 359, 381–383.

The ICJ has also confirmed that this as accurate.[256] Therefore, where externalized migration control mechanisms are enforced so that a state is instructing other persons in migration control matters, that direction or control of private actors or authorities of the territorial state fulfill the necessary requirement of attribution in the meaning of general international law.

The pending case of *SS and Others v Italy*[257] has potential to shine more light to the understanding of the ECtHR with regards to state responsibility for the exercise of public powers abroad. On a broader level the facts of the case concern the cooperation between Italy and Libya where Italy enabled, through provision of equipment and assistance, the coast guard of Libya to intercept people at sea and bring them back to Libya. The applicants in the case argue that Italy is responsible for the violations of human rights because it has enforced policy that is a direct link in the chain of actions, which resulted in a fatal incident in 2017. The view of the applicants is that jurisdiction should be found on a functional basis, taking the 'whole operation, its foreseeable impact and the knowledge of likely consequences' into account.[258] The case will test whether the Court finds Italy responsible based on the exercise of public powers because, although Italy was not the state that directly held effective control over the intercepted migrants, Italy has a substantial role in shaping the migration and border control of Libya through its provision of equipment and direction.

In general, the ECtHR seems to attach the notion of public powers to the exercise of normative and legitimate powers attributable to the state. Thus, it can be argued that even when states plan and implement agreements or policy, the link to find jurisdiction exists already by virtue of that. Thus, the jurisdictional link can be established through the exercise of public powers even before possible violations occur. Through jurisdiction based on public powers states may be exercising effective control by simply enforcing agreements that relate to the public powers of another sovereign state.[259]

---

[256] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, (27 June 1986) Merits ICJ Reports 1986, 14.
[257] *S.S. and Others v Italy*, Application No. 21660/18 (pending).
[258] Moreno-Lax (n 231) 414.
[259] ibid 402–403.

Adapting the model to determine jurisdiction based on the exercise of public powers is also in line with what is generally embraced by international human rights law; human rights obligations do not end when states cooperate with each other but rather the obligations continue to bind the states even during such cooperation. Simply put, states are precluded from entering into agreements which conflict with the obligations they have under human rights law.[260]

An example that clarifies the benefits of jurisdiction based on public powers concerns the European Border Intervention Teams established in the EU. According to the legal framework under which these teams are operating, any responsibilities rest solely on the Member State that is hosting the operations[261] and members of the team have the 'capacity to perform all tasks and exercise all powers for border control and return […] under instructions from and, as a general rule, in the presence of border guards or staff involved in return-related tasks of the host Member State'.[262] Such powers may not necessarily engage the responsibility of another Member State under the traditional legal framework on jurisdiction, which is based on territorial or personal control. However, since the officials are in fact exercising public powers, as established above, the additional way for incurring jurisdiction could surely invoke responsibility for those extraterritorially acting states as well.

Some scholars have argued that jurisdiction based on public powers is not an additional way for acquiring jurisdiction. It is rather just an element within the sphere of jurisdiction based on control over individuals, which extends the possibilities to find jurisdiction under different factual circumstances.[263] However, to establish jurisdiction through the notion of exercising public powers separately, without attaching it to physical power and control over individuals, has potential to render many of the harmful extraterritorial state actions as unattractive. States would simply not be as keen to promote extraterritorial migration control mechanism if such

---

[260] *Al-Saadoon* (n 205) para 138; *Hirsi Jamaa* (n 195) para 129.
[261] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC [2016] OJ L251/1, art 42(1).
[262] ibid art 40(1) and (3).
[263] Conall Mallory, 'European Court of Human Rights Al-Skeini and Others v United Kingdom (Application No 55721/07) Judgment of 7 July 2011' (2012) 61(1) International and Comparative Law Quarterly 301, 311.

actions would be more likely to result in responsibility for them. At a minimum this additional way of finding jurisdiction would bring with it states' willingness to make sure that enforcing such extraterritorial actions do not result in human rights violations.

To conclude, extraterritorial jurisdiction may challenge many of the cooperation-based practices that states have enforced. This is especially clear in situations where states are exercising effective control over foreign territory or power and authority over individuals. Moreover, jurisdiction could also be established based on the exercise of public powers abroad. Because many of the cooperation-based practices result in the exercise of public powers, this additional way has potential to render many of the practices unattractive for the states that are enforcing them. To accept a contemporary understanding of extraterritorial jurisdiction has the potential to enhance international refugee protection. Externalized migration control and deterrence policies should surely be carried out in a way that balances state interests, positive outcomes of externalized migrations control mechanisms and most importantly respects international guarantees for refugee protection.

Not all situations will however be covered, even though the rules on extraterritorial jurisdiction, and especially a contemporary understanding of them, may successfully challenge the presumption of states' that state responsibility is somehow diminished when acting extraterritorially. Therefore, the following will discuss shorty the principles of international law on state responsibility for aiding and assisting.

## 4.2 State responsibility for aiding and assisting

The previous subchapters argue that state responsibility can be established when states act extraterritorially and have attained effective control over individuals or territory. Because not all externalized migration control mechanism amount to such control, the thesis argues that an additional way to establish jurisdiction, which relies on the exercise of public powers abroad, has potential to challenge state's reliance on *non-entrée* practices. While these are effective and will probably be enough to challenge states' reliance on most of the *non-entrée* practices to evade responsibility, they cannot challenge those practices that do not amount to jurisdiction.

This is especially true when a state's involvement in another state's migration control is minimal, like in the case of training officials or providing equipment for migration control purposes.[264] This subchapter will consider shortly how such minimal involvement can be challenged through international law.

According to established international law states can be held responsible for international wrongful acts carried out by another state if they aid or assist that state to commit such acts.[265] According to Article 16 of the non-binding ARSIWA:

> 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: […] that State does so with knowledge of the circumstances of the internationally wrongful act; and […] the act would be internationally wrongful if committed by that State.

Although its non-binding nature, state practice and *opinio juris* supports that the principles established in Article 16 have gained status as customary international law.[266]

Unfortunately, the ARSIWA does not specify what counts as aid and assistance, but its commentaries provide guidance on the matter. The ILC notes that the provision of material aid that is used by the assisted state to commit human rights violation, can incur responsibility for the assisting state.[267] For instance, in the *Bosnian Genocide*[268] case, the ICJ found that the Federal Republic of Yugoslavia's provision of weapons, military equipment and financial aid to the Republic of Srpska amounted to aid and assistance.[269]

The ILC notes that state responsibility for aid and assistance is limited in three ways. First, the state that provides 'aid or assistance must be aware of the circumstances making the conduct of

---

[264] Gammeltoft-Hansen and Hathaway (n 169) 276.
[265] ibid 277.
[266] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, (26 February 2007) Judgment ICJ Reports 2007, 43, para 420 (hereinafter '*Bosnian Genocide*'); Helmut Aust, *Complicity and the Law of State Responsibility* (Cambridge: Cambridge University Press 2011) 181–191.
[267] ARSIWA with commentaries (n 253) 67 para 9.
[268] *Bosnian Genocide* (n 266).
[269] ibid paras 422 and 239–241.

the assisted State internationally wrongful'.[270] Thus, if the state that provides aid or assistance is unaware that its support is intended to be used by the assisted state for the commission of internationally wrongful acts, it bears no responsibility.[271] Second, 'the aid or assistance must be given with a view to [facilitate] the commission of the wrongful act, and must actually do so'.[272] This requirement implies that the support provided by the assisting state must be connected to a subsequent wrongful act and that a state cannot be held liable if it did not intend to facilitate the act. However, the ILC notes that the assistance does not have to amount to such that it is essential for the commission of an internationally wrongly act as long as it contributes significantly to it.[273] Third, the act must be considered as an internationally wrongful act also 'had it been committed by the [aiding or assisting] state itself'.[274]

As to the enforcement of externalized migration control mechanisms, states that provide equipment or training to states of transit or origin are certainly aware of the fact that those may result in weakened protection for refugees or even to violations of their rights. This is especially true where the cooperation is enforced between states that do not have the means or will to protect refugees.[275] Willful blindness is generally not accepted as a justification for such actions.[276] Pursuant to these considerations it can fairly be stated that where states provide equipment, share intelligence or fund the migration control efforts of another state, and those are significant for the purpose of breaching the principle of *non-refoulement* or other human rights obligations, the assisting state is acting within the ambit of Article 16. However, some actions must be kept separate from the application of Article 16. Actions that do not amount to the requirements include for example diplomatic pressure or the provision of development aid if it is given in good faith.[277]

---

[270] ARSIWA with commentaries (n 253) 66 para 3.
[271] ibid para 4.
[272] ibid para 5.
[273] ibid.
[274] ibid para 3.
[275] Gammeltoft-Hansen and Hathaway (n 169) 256.
[276] ibid 281.
[277] ibid 279–280.

To conclude, state's reliance on externalized migration control to avoid responsibility can also be challenged through the rules on state responsibility for aid and assistance. Thus, states that enforce *non-entrée* practices without the exercise of jurisdiction, are not immune from legal responsibility, but the limits to Article 16 set the threshold for state responsibility quite high. However, as externalized migration control mechanisms are allegedly enforced in order to control the migration flows from countries of origin or transit to the destination states, the states that are enforcing them are likely to continue with measures that give them actual control of those migratory movements. Thus, states are likely to prefer mechanisms that give the developed states more control of the outcomes. Although states may continue enforcing these less intrusive measures of *non-entrée* they might not be as effective in deterring migrants and thus reaching the aim of states.

# 5 Conclusion

The extraterritorial development in migration control has resulted in a situation where migrants find themselves outside of those states' territories that could effectively protect them from human rights violations. The prominent actors in the field are not those countries that generate the most refugees, but rather those that are the loudest promoters of human rights protection – the developed states. Unfortunately, the strategic externalization of migration control through implementation of different mechanisms does not seem to have an end, quite the contrary – states are being resourceful in finding new ways to restrict access for refugees to their territories. The traditional *non-entrée* practices are no longer as attractive for developed states, because their ability to answer to the aim of deterring migrants has diminished. Refugees today rely heavily on smugglers to arrive to destination states, which makes it difficult for those states to detect them. The creation of international zones withing state territories as well as declarations of non-responsibility for high seas deterrence to deny responsibilities, have been declared as wrongful interpretations of international law. States have therefore instead embraced models that utilize cooperation with third states. The cooperation-based *non-entrée* practices are harmful for refugees, as their possibilities to claim international protection is diminished. Because cooperation-based practices seek to outsource the responsibility to protect refugees from developed states to less developed ones, the very existence of refugee protection is endangered. Simply put the legal regime of less developed states lacks the necessary protection guarantees. They often do not provide the same protection as the refugee would get in the desired destination state, because they are not parties to relevant international treaties or do not have the means or will to protect refugees. Indeed, the increase of extraterritorial migration control has posed challenges to the realization of human rights and the rule of law.

States rely on the enforcement of extraterritorial migration control because there is no associated extraterritorial right to asylum or acknowledgement of refugee status unless some level of attachment between the state and the individual can be established. The right to seek and enjoy asylum is a procedural right which does not impose obligations on states to grant asylum – that

is left within the discretion of each sovereign state. Therefore, the rights of refugees are only triggered once they have reached the territories or jurisdictions of states' that respect these rights, effectively making it impossible for refugees to exercise their rights unless they overcome the obstacles set by extraterritorial migration control mechanisms.

International law currently does not provide a comprehensive protection regime for refugees who do not manage to overcome the obstacles set by extraterritorial migration control mechanisms. However, the legal black holes that states have created by enforcing such mechanisms can be overcome at least where the state exercises jurisdiction over territories or individuals. But, in such circumstances the extraterritorially acting state must itself exercise effective control over the territory or the individual. Therefore, where states outsource the extraterritorial migration control completely to third states' agents, they avoid activating jurisdiction and thus responsibility. However, this thesis argues that a contemporary understanding of state responsibility can effectively defeat those legal black holes. It relies on jurisdiction based on the exercise of public powers abroad. Jurisdiction based on public powers has the potential to eliminate the requirement of control between the enforcing state and individuals or territory when a state is in fact exercising public powers abroad. Thus, it protects migrants also in situations where migration control is enforced through proxy. Jurisdiction based on public powers should, however, not be seen to replace the traditional ways for acquiring jurisdiction, but rather as an additional way to do so. By adopting this additional form of acquiring jurisdiction we would not only improve the protection regime available for refugees, but it would effectively affect the current practices of states. States could no longer enforce extraterritorial migration control with impunity, which practically renders the entire Refugee Convention insignificant. It would also render extraterritorial migration control mechanisms as unattractive for deterrence purposes.

Since the purpose of states in enforcing these extraterritorial migration control mechanisms, is to control and deter migrants seeking to enter their territories, it can be assumed that they are likely to prefer more control rather than less. Thus, even where states' involvement in the migration control of other states is currently minimal, it is likely that their involvement will increase especially in those areas mostly producing or used as travel routes by migrants.

The overall conclusion of this thesis is that international law can adopt to the practices that states have introduced. Therefore, states that rely on externalized migration control mechanisms to avoid responsibilities proceed with false confidence.

# BIBLIOGRAPHY

## Books


Aust H, *Complicity and the Law of State Responsibility* (Cambridge: Cambridge University Press 2011)

Bantekas I and Oette L, *International Human Rights Law and Practice* (Cambridge: Cambridge University Press 2020)

Bauman Z, *Globalization: The human Consequences* (Cambridge: Polity Press 1998)

Castles S, Haas H and Miller M, *The Age of Migration: International Population Movements in the Modern World* (5th edn, Basingstoke: Palgrave Macmillan 2013)

Crawford J, *Brownlie's Principles of Public International Law* (8th edn, Oxford: Oxford University Press 2012)

Cruz A, *Shifting Responsibility: Carriers' Liability in the member states of the European union and north America* (Trentham Books and School of Oriental & African Studies 1995)

Feller E, TürkV and Nicholson F (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press 2003)

Gammeltoft-Hansen T, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge: Cambridge University Press 2011)

— — 'The Externalisation of European Migration Control and the Reach of International Refugee Law' in *The First Decade of EU Migration and Asylum Law*, 273 (Paul Minderhoud & Elspeth Guild eds, Martinus Nijhoff, 2011)

Geiger M and Pécoud A (eds), *The Politics of International Migration Management* (London: Palgrave Macmillan 2010)

Goodwin-Gill G and McAdam J, *The Refugee in International Law* (3rd edn, Oxford University Press 2007)

Groenendijk K, Guil E and Minderhoud P, *In Search of Europe's Borders* (The Hague: Kluwer Law International 2003)

Hathaway JC, *The Rights of Refugees Under International Law* (Cambridge University Press 2005)

Hathaway JC and Foster M, *The Law of Refugee Status* (2nd edn, Cambridge: Cambridge University Press 2014)

Heijer den M, *Europe and Extraterritorial Asylum* (Oxford: Hart Publishing 2012)

Juss SS (ed), *Research Handbook on International Refugee Law* (Cheltenham: Edward Elgar Publishing Limited 2019)

Klabbers J, *International Law* (Cambridge: Cambridge University Press 2013)

Lauterpacht H, *International Law and Human Rights* (London: Stevens 1950)

Milanovic M, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: Oxford University Press 2011)

Mitsilegas V, *The Criminalisation of Migration in Europe Challenges for Human Rights and the Rule of Law* (1st edn, Cham: Springer International Publishing 2015)

Nykänen E, *Fragmented State Power and Forced Migration: A Study on Non-State Actors in Refugee Law* (Leiden: Martinus Nijhoff Publishers 2012)

Ryan B and Mitsilegas V (eds), *Extraterritorial Immigration Control: Legal Challenges* (Leiden: Martinus Nijhoff Publishers 2010)

Savitri T, 'Offshore Barriers to Asylum Seeker Movement: The Exercise of Power Without Responsibility?' in *Forced Migration, Human Rights and Security* (Jane McAdam ed, Oxford, Hart Publishing, 2008)

Vattel de E, *The Law of Nations* (Book 2, Philadelphia: T & J W Johnson & Co's Law 1883)

Vaughne IA (ed), *The Merida Initiative: U.S. Counterdrug and Anticrime Assistance for Mexico* (New York: Nova Science Publishers 2010)

## Articles and Journals

Adepoju A, Noorloos Van F, and Zoomers A, 'Europe's Migration Agreements with Migrant-Sending Countries in the Global South: A Critical Review' (2009) 48(3) International migration, 42 <https://doi-org.libproxy.helsinki.fi/10.1111/j.1468-2435.2009.00529.x> last accessed 20.10.2020

Blackmun HA, 'The Supreme Court and the Law of Nations' (1994) 104 Yale Law Journal 39

Borges IM, 'The EU-Turkey Agreement: Refugees, Rights and Public Policy' (2017) 18 Rutgers Race & the Law Review 121

Brouwer A and Kumin J, 'Interception and Asylum: When Migration Control and Human Rights Collide' (2003) 21(4) Refuge: Canada's Journal on Refugees, 6 <https://doi.org/10.25071/1920-7336.21305> last accessed 20.10.2020

Curley M and Vandyk K, 'The Securitisation of Migrant Smuggling in Australia and Its Consequences for the Bali Process' (2017) 71(1) Australian journal of international affairs 42

Dessel van J, ‘International Delegation and Agency in the Externalization Process of EU Migration and Asylum Policy: the Role of the IOM and the UNHCR in Niger’ (2019) 4 European journal of migration and law 435

Fischer-Lescano A, Löhr T and Tohidipur T, ‘Border Controls at Sea: Requirements under International Human Rights and Refugee Law’ (2009) 21(2) International Journal of Refugee Law 256

Frelick B, Kysel IM and Podkul J, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) 4 Journal on Migration and Human Security 190

Gammeltoft-Hansen T and Hathaway JC, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law 235

Hathaway JC, ‘The emerging politics of non-entrée’ (1992) 91 Refugees 40

— — ‘The False Panacea of Offshore Deterrence’ (2006) 26 Forced migration review 56

Heijer den M, ‘Reflections on Refoulement and Collective Expulsion in the Hirsi Case’ (2013) 25(2) International Journal of Refugee Law 265

Hirsch AL & Doig C ‘Outsourcing control: the International Organization for Migration in Indonesia’ (2018) 22(5) The International Journal of Human Rights 681

Klaus W and Pachocka M, ‘Examining the Global North Migration Policies: A “Push Out – Push Back” Approach to Forced Migration’ (2019) 57(5) International Migration 280

Kneebone S, ‘The Bali Process and Global Refugee Policy in the Asia–Pacific Region’ (2014) 27(4) Journal of Refugee Studies 596

Koh HH, ‘Reflections on Refoulement and Haitian Centers Council’ (1994) 35 Harvard International Law Journal 1

— — ‘The “Haiti Paradigm” in United States Human Rights Policy’ (1994) 103(8) The Yale Law Journal 2391

Larking E, ‘Controlling Irregular Migration in the Asia-Pacific: Is Australia Acting against its Own Interests?’ (2017) 4(1) Asia & the Pacific policy studies 85

Lawson R, ‘Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights’, published in Fons Coomans and Menno Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia 2004)

Lutterbeck D, ‘Migrants, weapons and oil: Europe and Libya after the sanctions’ (2009) 14(2) The Journal of North African Studies, 169 <https://doi.org/10.1080/136293808023 43558> last accessed 20.10.2020

Mallory C, ‘European Court of Human Rights Al-Skeini and Others v United Kingdom (Application No 55721/07) Judgment of 7 July 2011’ (2012) 61(1) International and Comparative Law Quarterly 301

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’ (2008) 10 European Journal of Migration and Law 315

—— ‘The Architecture of Functional Jurisdiction: Unpacking Contactless Control — On Public Powers, S.S. and Others V. Italy, and the “Operational Model”’ (2020) 21(3) German Law Journal 385

Nessel LA, ‘Externalized Borders and the Invisible Refugee’ (2009) 40 Columbia Human Rights Law Review 625

Nicholson F, ‘Implementation of the Immigration (Carriers’ Liability) Act of 1987: Privatising Immigration Functions at the Expense of International Obligations’ (1997) 46 International and Comparative Law Quarterly 586

Noll G, ‘Seeking Asylum at Embassies: A Right to Entry under International Law’ (2005) 17 International Journal of Refugee Law 542

Nollkaemper A and Jacobs D, ’Shared Responsibility in International Law: A Conceptual Framework’ (2013) 34(2) Michigan Journal of International Law 359

Roxstrom E, Gibney M and Einarsen T, ‘The NATO Bombing Case (Banković et al. v. Belgium et al.) and the Limits of Western Human Rights Protection’ (2005) 23 Boston University International Law Journal 55

Rüth A and Trilsch M, ‘Banković v. Belgium’ (2003) 97(1) American Journal of International Law 168

Schaack van B, ‘The United States’ position on the extraterritorial application of human rights obligations: now is the time for change’ (2014) 90 International Law Studies, US Naval War College, 20

Schachar A, ‘The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes’ (2006) 81(1) New York University Law Review 148

UNHCR, ‘The Haitian Interdiction Case 1993 Brief Amicus Curiae’ (1994) 6 International Journal of Refugee Law 85

Watkins J, ‘Australia’s irregular migration information campaigns: border externalization, spatial imaginaries, and extraterritorial subjugation’ (2017) 5(3) Territory, Politics, Governance 282

Wouters K and Heijer den M, ‘The Marine I Case: A Comment’ (2010) 22 International Journal of Refugee Law 1

## Reports and policy documents

Amnesty International, ‘Libya: “Between Life and Death” Refugees and Migrants Trapped in Libya's Cycle of Abuse’ (24 September 2020) MDE 19/3084/2020, available at <https://www.amnesty.org/download/Documents/MDE1930842020ENGLISH.pdf> (last accessed 18.10.2020)

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’ (September 2009) available at <https://www.hrw.org/report/2009/09/21/pushed-back-pushed-around/italys-forced-return-boat-migrants-and-asylum-seekers> (last accessed 2.11.2020)

Seelke CR, ‘Mérida Initiative for Mexico and Central America: Funding and Policy Issues’ (CRS Report for Congress, R40135, 21 August 2009) available at <https://fas.org/sgp/crs/row/R40135.pdf> (last accessed 19.9.2020)

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)

— —, ‘Commentary on the Refugee Convention 1951: Articles 2–11, 13–37’ (Geneva, October 1997)

— —, ‘Note on the Principle of Non-Refoulement’ (Prepared for the EU Seminar on the Implementation of the 1995 EU Resolution on Minimum Guarantees for Asylum Procedures, Luxemburg, November 1997)

— —, ‘Protection Policy Paper Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing’ (November 2010)

UNODC, ‘Global Study on Smuggling of Migrants’ (New York, 2018) available at <https://www.unodc.org/documents/data-and-analysis/glosom/GLOSOM_2018_web_small.pdf> (last accessed 9.10.2020)

## Electronic sources

Amnesty International, ‘EU: Migration Pact is not a fresh start but a false start’ (23 September 2020) available at <https://www.amnesty.org/en/latest/news/2020/09/eu/> (last accessed 25.9.2020)

Australian Government, Department of Foreign Affairs and Trade, ‘Sri Lanka country brief’ available at <https://www.dfat.gov.au/geo/sri-lanka/Pages/sri-lanka-country-brief> (last accessed 1.10.2020)

U.S. Department of State, ‘U.S. Relations With Mexico’ available at <https://www.state.gov/u-s-relations-with-mexico/> (last accessed 1.10.2020)

U.S. Immigration and Customs Enforcement, ‘Homeland Security Investigations’ available at <https://www.ice.gov/about> (last accessed 12.10.2020)