Access to Asylum

International Refugee Law and the Offshoring and Outsourcing of Migration Control

Thomas Gammeltoft-Hansen

PhD Thesis, Aarhus University

Access to Asylum

International Refugee Law and the Offshoring and Outsourcing of Migration Control

Thomas Gammeltoft-Hansen

Dissertation submitted for the degree of PhD in law
at the Institute of Law, Aarhus University

May 2009

Supervised by Professor Jens Vedsted-Hansen, LLD
Aarhus University

Co-supervisor: Senior Researcher Simon Turner, PhD
Danish Institute for International Studies

Industrial supervisor: Senior Policy Advisor Thomas Thomsen
Danish Refugee Council

Front cover and layout: Alejandro Savio

Pictures: Cotton Tiberus map, British Library and photographs by Christian Vium from the beach of St. Louis, Senegal, from where many 'piroques' carrying migrants and asylum-seekers set off towards the Canary Islands.

Table of Contents

Acknowledgements

No academic insight is ever achieved in isolation. Beyond the scholars cited in the following, a host of people have more directly contributed to the process through which this volume has materialised. In the following I hope to recall and acknowledge some of those to whom I am particularly grateful.

The single greatest debt of gratitude is owed to my supervisor, Jens Vedsted-Hansen from Aarhus University. Without his encouragement and support I would never have dared to undertake, much less hoped to complete, a PhD study in an academic discipline in which I have no formal training. Your guidance has been of the best kind and it has been a privilege to work with someone so knowledgable and so devoted to his field. In addition, I would like to thank all my colleagues and staff at the department of jurisprudence at Aarhus University. Although I did not get to spend much time there, I have always been met with open arms.

I am secondly grateful to my co-supervisor Simon Turner, who from the outset made sure that my project got anchored with the Danish Institute for International Studies. I am grateful to Simon, Katrine Albertsen, Peter Hansen, Kasper Hoffmann, Nauja Kleist, Jairo Munive, Finn Stepputat and other colleagues in the migration unit for making up the best possible research environment, professionally and personally. I am further indebted to a number of people at DIIS outside the migration unit. In particular, Stefano Guzzini has been a major source of inspiration and crucially helped to frame the present work. His generosity in sharing his time and thoughts and helping to facilitate the ideas of young academics is truly unique. In addition, Louise Andersen, Morten Broberg, Lars Buur, Ulla Holm, Helene Kyed, Stefano Ponte, Catharina Sørensen, and many others have all provided support and encouragement of the kind that not only makes for great colleagues but also good friends. I am lastly very grateful to director Nanna Hvidt for extraordinarily providing me with an office space for the duration of my PhD and fully accepting me as part of the DIIS flock.

For the duration of the present project I have simultaneously been employed by the Danish Refugee Council under the Industrial PhD scheme. I am very grateful to General Secretary Andreas Kamm for providing me with the opportunity to undertake a PhD with this unique setup. As Head of the Asylum Department Anne la Cour has given me the best possible conditions for simultaneously engaging in exciting advocacy tasks and international

projects and, at the same time, extending me the time and space to focus on the academic tasks. My industrial supervisor, Thomas Thomsen, has further been highly instrumental in guiding my work and constantly linking my academic thinking to the practical and policy work of the organisation. Lastly, I would like to thank all my colleagues in both the Asylum Department and the International Department for providing a particularly warm working environment and always reminding me of the reasons why working in this field matters.

It is also through the Danish Refugee Council that I have been given the opportunity to work together with a number of European refugee assisting organisations making up the European Council for Refugees and Exiles. As part of the ECRE advocacy network I have had the privilege of meeting some of the most competent and devoted people working with refugees. The exchange of ideas with them and other practitioners has provided both relief from and stimulus to the time otherwise spent in the ivory tower. I feel particularly honoured to count myself among you.

A particularly warm thank you is owed to each of those who have read through and commented on various draft chapters. Tanja Aalberts, Rosemary Byrne, Peter Vedel Kessing, Anja Klug, Sarah de Lange, Jesper Lindholm and Jorrit Rijpma; your help and suggestions have been invaluable. Great support and many ideas have further been provided by Jens Bartelson, Virginie Guiraudon, Anna Leander, Gregor Noll and Wouter Werner.

One person has followed the becoming of this dissertation closer than anyone. Rebecca Adler-Nissen has been a constant partner in crime for all my academic undertakings and in the process she has become one of my closest and dearest friends. Rebecca, I credit you with the most important thing of all: you have made the last three years inspiring and fun. It is also largely through Rebecca that I have maintained close contacts to my old academic kinsmen at the Department of Political Science at the University of Copenhagen. I am grateful to both the staff and the PhD crowd there for unhesitantly adopting me for academic and social activities, despite my sinful stray of academic path.

Ane Toubro has provided much appreciated support and practical assistance throughout my stay at DIIS. Many thanks are also owed to Alejandro Savio who is responsible for the cover design. Last, but not least, I am very grateful to Ida Marie Vammen for her impressive effort in vigilantly ensuring consistency and correctness in the references and citations. It goes without saying that any errors, faults or omissions remaining are mine alone.

Finally, a number of people outside of academia and refugee work have kept me sane through the long periods of research and writing. I am blessed with

the very best of friends who have provided both relief and advice during the last years of writing. I am particularly grateful to Troels, Sofie, Stephan, Ulrik and Christian for always showing up for a coffee, post-work drink or improvised dinner at and around the office. Likewise, I am grateful to my wonderful family, my parents, brothers, sisters and in-laws, who have always been there. Last, but not least, I would like to thank my wife, Nanna Overgaard. You have been, and remain, as loving and understanding as any man can hope for.

This dissertation is dedicated to Susanne Graae and Hans Gammeltoft-Hansen.

Copenhagen. May 2009

'Human laws cannot have the unerring quality of scientifically demonstrated conclusions. Not every rule need possess final infallibility and certainty; as much as is possible in its class is enough.'

St. Thomas Aquinas (*Summa Theologica*, Ia-2ae, xci 3, ad 3)

1. Introduction

1.1 The questions of extraterritoriality

1.1.1 Encountering the State

When does a refugee encounter the state? The straightforward answer to this question would be when arriving at the border and surrendering herself to the authorities uttering the magical word: 'asylum'. Reality, however, only seldom conforms to this picture. First of all, a substantial number of asylum seekers only make their claim some time after actually entering the country of prospective asylum. Secondly, and more importantly, the last decades have seen a number of policy developments to extend migration control well beyond the borders of the state.

A person seeking asylum in, for example, Europe or the United States may thus encounter the authorities of these countries before even departing. It could be at the consulate when attempting to obtain a visa, at the airport of key departure or transit countries where immigration officers are deployed to advise airlines and foreign authorities on who to allow onwards passage. It could be during an attempt to cross the Mediterranean or the Caribbean or any one of the many other places where ships, aeroplanes and radar systems operate to intercept even the smallest vessel before it can reach the territorial waters of the prospective destination state.

Alternatively, the refugee may not encounter the state *in persona*, but rather through delegation. Under bilateral and EU agreements, Libya and Morocco for example are expected to carry out exit border control in cooperation with EU member states.[1] Or the controlling authority may take the form of a private company. Most industrialised countries today impose heavy fines on airline carriers for boarding passengers without proper documentation and visas, effectively making these companies responsible for carrying out rigorous migration control functions.

---

[1] European Commission. 2003. COM(2003) 104. Wider Europe - Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours. 11 March 2003.

The above initiatives are the concrete expressions of the general trend in many states to extend the reach of migration control to destinations outside their territory and to employ agents other than the states' own authorities. Since the first comprehensive framework for a common European asylum and immigration policy was laid down at the EU summit in Tampere in 1999, cooperation with third countries in this area has been given top priority and in 2005 a full strategy for the 'external dimension' of EU asylum and migration policy was presented.[2] Several scholars have observed how this 'external dimension' is increasingly 'colonising' the EU foreign policy agenda (Rodier 2006; Lavenex 2006; Gammeltoft-Hansen 2006; Boswell 2003; Guiraudon 2002). Similarly, the taking on of tasks in relation to asylum and immigration by private companies is becoming a fast growing industry. Immigration detention centres are increasingly run by private companies, contracts have been awarded to, for example, Boeing to install surveillance systems along the United States–Mexican border, and private security companies are today manning several border checkpoints between Israel and the West Bank.

These two trends are what the present work has termed the offshoring and outsourcing of migration control, and they constitute some of the most striking features in the development of migration policies across both developed and less developed countries. Migration control has traditionally focused strictly on the border as the natural sovereign delineation and the border guard as a natural expression of state authority. While private border guards and overseas migration officers have far from replaced traditional border control, one thing seems safe to conclude: today, the classical dictum that a state's executive power is to be exercised by its own officials and confined within the scope of its territorial borders can no longer be asserted with the same rigour.[3]

---

[2] European Council. 1999. Presidency Conclusions of the Tampere European Council. SI (1999) 800. 16 October 1999; Council of the European Union. 2005. A Strategy for the External Dimension of JHA: Global Freedom, Security and Justice. 14366/1/05 JAI 417 RELEX 628. 24 November 2005.

[3] *Case of the S.S. Lotus*. 7 September 1927. Permanent Court of International Justice. PCIJ Series A - No. 10, p 18. See also Morgenthau 1948: 344.

1.1.2 The research questions

The most pertinent question raised by the developments sketched above is this:

To what extent does international refugee and human rights law gives rise to state responsibility when migration control is carried out extraterritorially and/or by private actors?

The question is important for several reasons. Both scholars and refugee advocates have repeatedly argued that, for example, the interception of boat refugees or the rejection of asylum-seekers by airlines is fundamentally in violation of both the 1951 Convention Relating to the Status of Refugees and general human rights law instruments. The concern is that privatisation and extraterritorialisation is used as a pretext for effectively circumventing basic human rights obligations; either because these are not applicable extra-territorially or when private actors carry out controls, or because they are simply not realised. Secondly, it has been argued that the 1951 Refugee Convention is inadequate in guaranteeing the rights of refugees beyond the territorial boundaries of states. The majority of rights are based on the premise that the refugee is present within the territory or at least at the border of the obliged state. The move towards privatisation and extraterritorial migration control may thus make redundant a number of treaty provisions thereby undermining the ability of the present framework to effectively guarantee refugee protection.

From these considerations alone it becomes clear that a comprehensive answer to the question above is premised on at least three different sub-questions:

- *To what extent does international refugee and human rights law apply to situations where states exercise migration control outside their territory?*

- *Under what circumstances does migration control carried out by private actors give rise to state responsibility under international refugee and human rights law?*

- *How is the realisation of rights under international refugee and human rights law affected by the offshoring and outsourcing of migration control?*

The first of these questions relates to the applicability *ratione loci* of international refugee law. Several commentators have expressed concern that extraterritorial migration control appears to take place 'beyond the rule of law', in a 'rights vacuum' or 'legal black hole' (Vandvik 2008: 28; Wilde 2005). A number of states seem to suggest that somehow international human rights and refugee law do not apply, or apply differently, when states act outside as opposed to within their territory. This is not particular to refugee law but finds parallels in a number of issues ranging from offshore detention of prisoners to international tax havens (Steyn 2004; Palan 2003). As such, it begs both a general analysis of the exact limits for state jurisdiction and a specific examination of the geographical reach of core refugee obligations. In other words, is there such a thing as extraterritorial legal responsibility in the offshoring of migration control and if so, where does it end?

The second question concerns the vertical application of refugee law when states delegate authority to private actors. The outsourcing of control functions to airlines or other private actors has raised concerns from the UNHCR and others that protection obligations are being undermined.[4] Carrier sanctions are generally operated indiscriminately of protection concerns and asylum-seekers are particularly likely to be rejected as they often lack proper documentation (Nicholson 1997: 598; Feller 1989). Voices have further been raised that the use of private contractors to carry out border control or operate immigration detention centres creates an accountability gap where the 'corporate veil' blurs public oversight and states all too easily rid themselves of legal obligations otherwise owed (Verkuil 2007; Vedsted-Hansen 1995). Where privatised migration controls simultaneously operate extraterritorially these issues are only likely to be exacerbated. As is known from the parallel debate on the use of private military companies, impunity of both private contractors and the outsourcing states is a recurrent problem (Singer 2004). The privatisation of migration control thus equally raises more general questions of international law: when and under what circumstances does private conduct give rise to state responsibility under refugee and human

[4] Amnesty International. 1997. No Flights to Safety: Airline Employees and the Rights of Refugees. ACT 34/21/97. London. November 1997; UNHCR. 1991. Position on Conventions Recently Concluded in Europe (Dublin and Schengen Conventions). Geneva. 16 August 1991; Council of Europe Parliamentary Assembly. 1991. Recommendation 1163 (1991) on the Arrival of Asylum-Seekers at European Airports. 23 September 1991.

rights law, and to what extent are these obligations affected by the *locus* of migration control and concomitant extraterritorialisation?

The last sub-question deals with the actual realisation of these rights. Access to legal aid, counselling and national complaint mechanisms may be severely impaired for a refugee that never sets foot on European soil. Several commentators have argued that moving migration control away from the territory or delegating it to private actors may entail an 'out of sight, out of mind' effect vis-à-vis constituencies and national monitoring mechanisms (Gammeltoft-Hansen 2008b; Legomsky 2006: 679; Guiraudon 2003b). Many of the institutional mechanisms that normally ensure the realisation of human rights and the rule of law are essentially territorially limited. Similarly, the distinction between public and private means that many of the ordinary accountability mechanisms do not operate effectively when otherwise governmental functions are delegated to private actors. Beyond questions of the extraterritorial applicability of refugee law and attribution of private conduct there is, thus, also a concern that protection entitlements are simply not realised as the activities take place further away from the state and its territory, where little oversight is provided and access to the ordinary institutions guiding an asylum claim or human rights procedure is lacking.

1.1.3 Understanding the offshoring and outsourcing of migration control

Beyond the more legal questions set out above, the present dissertation also hopes to indirectly contribute to the more general understanding of the offshoring and the outsourcing of migration control as political phenomena.

A growing number of scholars from a variety of disciplines are starting to engage with this question and, as one might expect, rather different frameworks have been presented to answer it. From an economic perspective policies to offshore migration control and refugee protection have been argued to provide more cost-effective solutions. A number of scholars emphasise that the 'externalisation' (e.g. Rodier 2006; Betts 2005; Sterkx 2004; Kruse 2003) or 'externalities' (e.g. Lavenex and Ucarer 2002) of asylum and immigration policy represent a natural response to more complex and diverse migration flows, a complexity which has made it important to extend control to the entire length of the journey (Lavenex and Ucarer 2004; Boswell 2003; Bigo 2000) and to develop more preventive strategies focusing on the 'root causes' of migration (Turner et al. 2006). Others argue that the 'colonisation' of the foreign policy agenda by hitherto domestic issues is a reflection of the

growing politicisation of asylum and immigration issues. As domestic solutions are wrought by policy dilemmas and difficult to realise, the venue for political action shifts outwards to avoid the constraints of domestic policy-making (Lavenex and Ucarer 2004; Guiraudon 2003; Klaauw 2002; Pastore 2002). In particular, immigration is increasingly viewed as an 'internal security threat', albeit one that necessitates an international response in order to be effective (Furuseth 2003; Rudolph 2003; Guiraudon 2002; Bigo 2002; 2000; Huysmans 2000).

Equally, the involvement of private actors in migration control may be seen as part of a much larger trend to privatise tasks hitherto exclusively carried out by the state. Thus private migration control has been argued to be cost-saving through shifting costs of control to, for example, carriers and creating competition among several bidding contractors (Scholten and Minderhoud 2008; Verkuil 2007). Also, privately operated migration controls have been seen as a response to the inability of national authorities to achieve effective control. By requiring airlines to carry out document checks an additional layer of control is installed at the crucial point of departure where airlines have unique access to inbound passengers and their data (Noll 2000: 108; Vedsted-Hansen 1995: 160). Lastly, the privatisation of migration control has even been claimed to result in increased accountability as a competition parameter, and the use of privately contracted border guards to achieve a 'civilising' effect by presenting a more friendly face than that presented at borders manned by national border authorities or military personnel (Dickinson 2007: 230; Logan 1990).

The present dissertation, however, starts from the hypothesis that at least part of the explanation for the current drive towards offshoring and outsourcing of migration control should be found in the answer to the questions regarding the relationship between these policies and international legal structures. This dissertation suggests that extraterritorial controls and the involvement of private actors are becoming increasingly fashionable because states believe that by delegating authority and moving beyond their territory they are able to release themselves – *de facto* or *de jure* – from some of the constraints otherwise imposed by international law.

In that context, the three research questions above become an inroad for asking more critically to what extent offshoring and outsourcing enable states to realise migration control unconstrained by refugee and human rights law. As will be seen, this is not a question that may simply be answered by 'either-or', but rather one that requires nuanced answers and one in relation to which a certain amount of interpretative disagreement persists in some areas. Yet it is

only through a more thorough understanding of the limits of legal responsibility and the areas where such responsibility may at least be contested that it is possible to understand how states enact and position offshore and outsourced migration control. Why is it that European states have been so keen to negotiate access to move migration control from the high seas and into the territorial waters of African states? And why is it that several states emphasise that immigration officers posted to foreign airports only maintain an advisory role in regard to the controls carried out by airline staff?

Lastly, it is hoped that the present analysis might contribute to a better understanding of how offshoring and outsourcing practices fundamentally operate at the intersection between law and politics in today's world. The apparent difficulties in bringing refugee and human rights law fully to bear in all situations of extraterritorial and/or privatised migration control points to a deeper conflict between the universal purpose and idea behind human rights law on the one hand, and the codification of human rights law as part of general international law building on principles of national sovereignty on the other. It is in this tension that offshoring and outsourcing become alluring strategies, as they create a disjuncture between the increasingly global and market-oriented modes of governance pursued by the states and an international legal framework still largely vested in a conceptualisation of the state building on territorial delineations and the distinction between public and private. The result is what may be termed the increasing commercialisation of sovereignty, in which sovereign prerogatives, territory and functions are strategically traded and commodified among states and between governments and private actors: a development that ultimately threatens either to severely undermine the effectiveness of human rights law or demands that some of the most fundamental principles of international law and our politico-legal conception of the state be readjusted.

1.2 Between international legal and political theory

A fundamental premise of the present work is that human rights do not exist in a vacuum (Steiner and Alston 2000: v). The legal regulation of asylum seekers and refugees is also an essentially political undertaking. This is not just evident from the increasing politicisation of these issues in most industrialised states, but also from the very nature of the issues at stake. First of all, the admission of refugees challenges a core feature of state sovereignty. As noted by Emmerich de Vattel, control of the entry of foreigners into the realm is a

sine qua non of sovereignty, since in its absence hostile armies could just walk in (de Vattel 1883: book 1, ch. XIX, par. 231). Secondly, the granting of asylum has always been tied to political interests and diplomatic relations (Noll 2005; Helton 2002; Chimni 1999; Loescher 1992).

While not diminishing the profound contributions to the field of refugee studies produced by legal analysis, there is perhaps a tendency among some lawyers to seek closure within their own field. As often pointed out, legal analysis easily loses its meaning if it becomes too rigidly isolated from the political, social or economic environment in which the law is enacted (Zahle 2007: 9). Consequently, while this dissertation is first and foremost a legal study examining the international responsibility of states in regard to refugees when enlisting private actors or shifting migration control to locations beyond the territory, it also draws somewhat on political science theory in order to further an understanding of the structure of international law and its role in regard to current practices of offshoring and outsourcing migration control.

As law and political science are often seen and treated as two distinct spheres (Reus-Smit 2004: 1), it may be necessary to clarify a few of the theoretical and methodological underpinnings of the approach as below.

Speaking of the deep-seated difference between students of these two disciplines, Hans Morgenthau notoriously asserted that, 'the political realist thinks in terms of interest defined as power…the lawyer, of conformity of action with legal rules' (Morgenthau 1985: 13). Thus, while international relations scholars have shown a tendency to see international law as a regulatory regime apart from the true determinants of international relations, legal philosophers have, on the other hand, repeatedly sought to separate the distinctive character of law outside politics (Reus-Smit 2004: 1).

This is of course a somewhat crude picture and in recent years there has been a surge in attempts to bridge the gap between international law and international relations.[5] The way in which this is done, however, depends very much on the theoretical starting point taken in each discipline.

---

[5] Though, for some reason, one discipline tends to be made instrumental for the development of the other. See, for example, the contributions in the two aptly named volumes by Michael Byers, ed. 2000. *The Role of Law in International Politics* (in which 15 out of 17 contributors are lawyers by profession) and Christian Reus-Smit, ed.. 2004. *The Politics of International Law* (in which 7 out of 10 contributors are engaged in social science disciplines other than law).

1.2.1 Conceptions of international law within international relations

Within International Relations one can identify three overall approaches. Following the *realist* tradition, international politics is viewed as a power struggle between sovereign states, and international relations as an arena in which each state constantly strives to maximise its own relative capabilities (Waltz 1979). Consequently international law is reduced to a simple reflection of this struggle or considered irrelevant altogether (Bolton 2000). The primary purpose of international law is thus to ensure the normative framework for state sovereignty. According, to realist scholars the notion of human rights law is an inherently weak concept as such norms will never be able to penetrate the internal domain of sovereign states, save in circumstances where states believe it to be in their own and present interest (Krasner 2004; Morgenthau 1985). The more recent neo-realist tradition does recognise an independent role for international law in shaping state behaviour, yet emphasises that international law is merely 'a Kantian island in a Hobbesian world' (Kagan 2002).

Contrary to this rather limited view of the role of international law, the *liberalist* or *institutionalist* schools emphasise that states may be more concerned with absolute rather than relative gains as such increased cooperation becomes possible and, simultaneously, increased codification of cooperation. As states develop more 'complex interdependencies' international law serves as fundamental institutionalisation of ever more cooperative regimes (Keohane and Nye 1977). A number of neoliberal institutionalists have pointed to the increased 'legalisation' of both inter- and intra-state relations and consequently called for greater attention to international law as a way to engage with both the processes and content of international regimes (Reus-Smit 2004: 19). International human rights in particular are seen to be gaining more momentum as globalisation makes territorial boundaries increasingly meaningless (Slaughter 1993: 236).

Lastly, while both of the above traditions are based on the positive premise of the state as an essentially rationalist actor, *constructivist* or *reflectivist* scholars emphasise how international relations is a continuing social construct. State action is not merely premised on material considerations but also on normative and cultural structures that, once established, have a tendency to take on a life on their own (Wendt 1992). In this respect international legal norms may not only be adhered to by states for reasons of mutual co-existence or perceived cooperation benefits, but more fundamentally because they possess a discursive power that inevitably structures state actions. In all

dealings, states look to legitimise their actions both internally and externally; normative structures such as international law are relied upon for exactly this purpose (Reus-Smit 2004: 22f). In this sense, international law is both constitutive *of* and constituted *by* international politics.

1.2.2 Conceptions of international politics within international law

The space carved out for the political and state practice in international law similarly differs according to which legal theoretic starting point is adopted.[6] Most of the 19th and the early 20th centuries were dominated by *positivist approaches* to international law. Building on the philosophical foundations of, in particular, David Bentham and John Austin, the legal positivist movement set out to disassociate law and morality, the 'sein' and the 'sollen' (Evald and Schaumburg-Müller 2004: 17; Kelsen 1934). Law is instead defined by power and its legality reflects only its enforceability (Stuer Lauridsen 1992). In the international context, the state is the ultimate source of law and the practice of states the normative foundation of international obligations (Charlesworth and Chinkin 2000: 27). In the absence of any central law-making authority, international law is to be compared to *contract law* (Ross 1961: 108) as there can be no law beyond that which states readily and explicitly consent to through treaties and customs.[7]

---

[6] Like the above overview of main strands in international relations theory, this section does not purport to bring an exhaustive picture of the different international legal theoretical traditions, but merely to highlight some of the theoretical similarities between the two fields and ground the subsequent discussion in a basic introduction to some of the major theoretical movements. Within international legal theory, however, a number of smaller and larger theoretical schools or traditions exist which have been explicitly omitted in the following as they have less direct theoretical relevance for the present topic. These include e.g. the 'New Haven school on international law' (Lasswell and McDougal 1992; Reisman 1992) and 'pragmatism' (Blandhol 2003; Dahlberg-Larsen 2001), certain sub-schools, e.g. 'feminism' (Charlesworth and Chinkin 2000), as well as more loosely associated theoretical developments, such as for example 'Southern theories of international law' (Shahabuddeen 1994; Elias 1992). In the main, the typology chosen here is drawn from Charlesworth and Chinkin 2000: 25ff.

[7] In this sense customs are understood purely as tacit agreements between states. The concept of *jus cogens* that trump the will of certain individual states has been an issue of some debate. Whereas scholars such as Peter Weil ultimately reject this notion (Weil 1983: 413), others accept the possibility of a 'global will' (see e.g. Falk 1964: 246f).

While the positivist approach to international law remains popular to this day, both with states keen to assert their sovereignty and in scholarly presentations of international law,[8] a growing critique of the 'positive' sources of international law as reductionist has given rise to what some scholars have called the 'renaissance of *natural law*'.[9] Although the idea that law may ultimately derive from unformulated extra-cognitive sources, whether divine or some common human conscience[10], much predates positivist conceptions, it is an idea that has had its largest impact in the field of international law in its more modern version.[11]

A particular expression of the modern natural law tradition is thus *liberal international legal theory*. It was in the aftermath of the Second World War and the Nuremberg trials that the modern human rights project developed. Both the trials and human rights build on the assumption that individuals rather than states make up the 'primary normative units' of international law (Charlesworth and Chinkin 2000: 26; Tesón 1998). Liberal international legal theorists see international law as reflecting a social contract similar to that inside the state, and that international law therefore draws its validity in part from general liberal principles such as 'fundamental rights', 'pacifism' and 'fairness' (*inter alia* Schieder 2000: 669; Franck 1998, 1992; Koskenniemi 1989: 66f). Furthermore, liberal international legal scholars have emphasised the role of international institutions, such as the United Nations and the UN Charter as the political expression of common norms for participation in the international community (Verdross and Simma 1984).[12] Consequently, otherwise positively established principles such as non-intervention may occasionally be eclipsed in cases where participating states do not uphold their responsibilities towards their citizens or other states.[13] Thus, while positively

---

[8] See *inter alia* Spiermann 2004 and Dixon 1990.

[9] See e.g. Muhm 2004 and Ross 1961: 109.

[10] For example, the Australian scholar John Finnis builds his modern natural law philosophy on the idea of seven self-evidently valuable 'basic goods' to which all legal authority must strive to conform (Finnis 1980).

[11] One could contend, however, that it was a classical naturalist conception of 'international order' that gave rise to international law as such. Thus, Henry Maine described the 'grandest function of the Law of Nature' as 'giving birth to modern International Law' (quoted in Charlesworth and Chinkin 2000: 25).

[12] As such, international law is moving away from being a 'law between powers' into a more advanced 'law of international community' (Verdross and Simma 1984: 274f).

[13] As expressed by one of the prosecutors at the Nuremberg trials, at which individuals were tried for the first time for violations of international law, 'international law

affirmed norms established through treaties and customs are devalued as the only, or necessarily 'valid', sources of international law, more emphasis is instead put on the political capacity of states to uphold fundamental, or 'natural', principles of international law by giving primacy to, for example, human rights considerations.

Like liberal legal theory, *international legal realism* also shares its name with the related political theory. From the outset realist scholars agree with the proponents of natural law and liberal legal approaches that there have to be more sources of international law than those positively affirmed through treaties or customs, yet realists reject the notion that this 'third source' should be sought in the metaphysical realm (Ross 1961: 109). Rather, scholars such as Alf Ross and Hans Morgenthau emphasise the 'social psychological' factors that, in addition to more objective sources of law, may exert a normative influence in the mind of the judge or others acting in the international sphere (Ross 1961: 109; Morgenthau 1940: 283). The realist approach demanded that the dogmatic reliance on positivist sources be discarded and a more sociological or political enquiry into the rules that are actually applied in international law be initiated (Ross 1961: 109; Morgenthau 1940: 268). Yet, where the liberalists see these factors as reflecting certain supra-state values expressed through an emphasis on individual rights, realists argue that these societal interests mirror the self-interest of states and economic interests, social tensions and aspirations to power which are the motivating forces in the international field (Morgenthau 1940: 269).[14] In this sense, the validity of international law is first and foremost derived from its instrumental role in facilitating the smooth functioning of international politics (Dixon 1990: 17). Paraphrasing the famous proposition by Carl von Clausewitz, one could argue that the realist views law as the continuation of politics by other means (Clausewitz 1997 (1832): 605).

Common to the above positions is that the place and role of international law is not questioned as such. The development of international law is seen as a constructive process designed to further international relations, be this as an international community or through the transactions of self-interested states. The last set of scholars can perhaps best be seen as a counter-reaction to these

---

has…sought to claim that there is a limit to the omnipotence of the State and that the individual human being, the ultimate unit of law, is not disentitled to the protection of mankind, when the State tramples upon his rights in a manner which outrages the conscience of mankind' (quoted in Evald and Schaumburg-Müller 2004: 29).

[14] See further Ross 1961: 95 and Escorihuela 2003.

essentially modernist conceptions of law (Evald and Schaumburg-Müller 2004: 101). What could be loosely termed *critical international legal theory* turns, rather, towards the implicit premise of law as a means towards a better international community, to further equality or generate justice.[15] In essence, critical scholars question whether there is even such a thing as a positive system of international law, as it seems impossible to identify a universally accepted legal discourse to support it (Carty 1991: 66).[16] The Finnish scholar Martti Koskenniemi has argued that international law achieves its authority by enforcing a particular discourse of its own universality that is ultimately unsustainable (Koskenniemi 1989: 485). Not only are legal actors such as judges influenced by the political context in which they work, but international law as such is also invariably the expression of political and value-laden arguments. The task of the legal scholar is thus not only to undertake legal-technical analysis, but also to critically engage in extra-legal reflections such as the 'political enquiry into acceptable forms of containing power' (Toope 2000: 101; Koskenniemi 1989: 485).

1.2.3 Law and politics as mutually constitutive

What is striking from the brief sketch above of the major theoretical positions within each field is not only the close correspondence between the philosophical foundations but also the obvious dependence on elements from different research disciplines in many of the respective theoretical foundations developed.

The more recent surge in calls to integrate the two disciplines within the human rights sphere has primarily built on liberal approaches to international law and similarly liberal and constructivist international relations theory. As a scholar with a background both in law and political science, Anne-Marie Slaughter has suggested that in view of globalisation and declining state sovereignty, the state as we know it is eroding and the premise of the state as unitary actor in international law thus increasingly unworkable (Slaughter

---

[15] Following Evald and Schaumburg-Müller, the term critical international legal theory is used as a collective shorthand to encompass rather diverse theoretical movements, such as marxist theory to abolish law (Pashukanis 2001), feminist theory (Charlesworth and Chinkin 2000), and those who have translated the critical legal studies movement into international law (Purvis 1991).

[16] In this sense, philosophical parallels may be drawn between critical international legal theory and constructivist theory in international relations as discussed above.

2000: 178). Accordingly, she proposes that political and sociological theory be used by international lawyers to examine how the component institutions of the 'disaggregated state', such as 'government networks' and 'transgovernmental regulatory organisations', establish new forms of global governance that become important venues for the development of international law (Slaughter 2000: 204). Similarly, Christine Chinkin has suggested that in an international community dominated by liberal democracies the role of NGOs in developing international law is progressing, necessitating more research into the lobbying processes of NGOs targeting states within the global human rights arena (Chinkin 2000).[17]

From a systemic perspective, scholars such as Vaughan Lowe have argued that international law has now reached a state of maturity in which it is institutionally and normatively adequate to accommodate most international transactions that take place at present (Lowe 2000: 209).[18] Accordingly, he prophesises that the majority of development within international law will take the form of 'interstitial' or 'secondary' norms that work to modify, or fill the gaps between, the primary norms of international law (Lowe 2000: 212f). This brings new challenges to judges faced with a larger nexus of norms derived through national bureaucracies acting on the international level. Since this form of rule-making resembles bureaucratic implementation of policy more than formal law-making, it similarly begs more research into the norm-formulating processes of sub-state institutions acting in more loosely organised international fora (Lowe 2000: 212).

While breaking new and valuable ground for international legal research, both of the above approaches are borne by an underlying political agenda to move beyond formal law towards expansionist legal programmes based on liberal values. In this sense, undue emphasis is similarly put on the way in which international law as the expression of these values inevitably comes to structure state behaviour more and more (Koskenniemi 2000: 31). This, in my opinion, easily skews the research agenda and overlooks the importance of the other side of this relationship; namely how states and state interests operate within these normative structures, influence interpretation or seek to avoid

---

[17] As an example of successful NGO influence in constituting international law she cites the example of the role of Amnesty International and other NGOs in articulating the international ban on torture (Chinkin 2000: 140).

[18] Readers of the international relations scholar Francis Fukuyama will note how this proposition resembles the famous 1989 'end of history' prophecy of Fukuyama, in which he argues that the grand ideological clashes are largely at an end and that the world is converging towards liberal democracy (Fukuyama 1989).

being constrained by them altogether. Secondly, the approaches above tend to take their methodological starting point in the analysis of the law and developments within legal structures. In doing so there is a risk that state practice is overlooked or diminished. Merely looking at the developments within law itself is likely to produce an overly rosy picture which disregards the effectiveness, or otherwise, of human rights law's ability to constrain state behaviour, especially within an area where policies may be designed specifically to avoid legal constraints, *de jure* or *de facto*.

As pointed out by Koskenniemi, the potential for furthering a political realist research agenda in the call for inter-disciplinarity has been somewhat curbed by the relative dominance of liberal theory in both law and politics in recent years (Koskenniemi 2000: 30). Yet, building on many of the same premises regarding the developments of international law as proposed by liberal approaches, it seems easy to reach different conclusions if other political developments than those mentioned above are stressed.

While acknowledging the importance of government networks it may be worth emphasising the strictly governmental and secretive nature of, for example, early European cooperation on asylum and immigration issues (Guiraudon 2003). Even the current institutionalisation of these issues in the EU clearly emphasises the states' prerogative in decision-making and shows a persistent reluctance to invite other institutional actors such as the European Parliament and the European Court of Justice. To the extent that government networks such as the EU and its 'cooperation with third states' in the area of asylum and immigration regulation are becoming important venues for the development of international legal norms, these seem more likely to reflect state interests than some indefinable liberal values derived from its constituent societies. Similarly, Chinkin points out that while NGOs have made new inroads into international norm formulation, states maintain a tight grip on the formal law-making process in which NGOs are largely peripheral (Chinkin 2000: 140). To the extent that NGOs are able to pressure states to sign declarations to further particular normative principles, they are as a rule left with only soft measures of enforcement (Chinkin 2000: 142).

Furthermore, even if one accepts that today the major source of development in international law is in the area of interstitial or secondary norms, there may be little reason to believe that these norms are necessarily developed progressively or towards particular liberal values. As will be developed more thoroughly below, this dissertation starts from the apparent realisation that a number of liberal states, both in rhetoric and in practice, seem to be backtracking on many of the complementary protection standards and

expansionist interpretations of state obligations under international refugee law developed over the course of the last half century. Thus, rather than filling the gaps in an incomplete nexus of human rights obligations, the development of interstitial norms and precedents set by national and international courts may equally be serving state interests by re-conquering discretionary power and sovereignty in this area of regulation at a time when asylum and refugee issues are becoming increasingly politicised.

In sum, the approach championed in the following concurs with the overall assessment of recent constructivist attempts to bridge the gap between international law and international relations by arguing that the relationship between the two must necessarily be seen as mutually constitutive (Armstrong et al. 2007: 69; Reus-Smit 2004: 5). Yet, while liberal (and related constructivist) approaches tend to put emphasis on the way that international legal institutions condition actors' actions and self-understanding, a more realist starting point conversely stresses the potential of states to further particular interpretations and strategically instrumentalise legal structures to their own advantage. The strength of each relation may vary according to the nature and institutionalisation of each subject matter. Where international law is 'determinate' and generally accepted, it may act to condition or constrain state action. Conversely, where legal norms are 'indeterminate' or when unanticipated situations arise, international law acts more as a discursive venue, in which states are able to address their respective claims from different perspectives.

Between these two dynamics, however, existing legal research has primarily focused on the first. The present work proposes to equally stress the latter, i.e. to investigate how state practice may strategically instrumentalise different norms of international law and seek to influence interpretation to avoid or shift legal responsibilities. This approach on the one hand emphasises the continued importance of international norms in affecting and constraining state behaviour. As will be seen, practices to offshore or outsource migration control seldom amount to an outright refusal of international law and related obligations. Rather, it is precisely the acceptance that international refugee law poses certain constraints that appears to motivate the current and often costly surge in attempts to offshore and outsource migration control.

On the other hand, this result hardly conforms to the ordinary liberalist picture of norm conformity in human rights law as inspired by a sense of international community, common values or a higher purpose. Instead, this norm acceptance is often narrowly circumscribed by self-interest and a desire to reduce the content and applicability of international refugee and human

rights law as much as possible. In this context, offshoring and outsourcing become strategies to position practices of migration control to exploit perceived legal loopholes or interpretative unclarity. International refugee law to this end no longer simply constitutes a set of fixed constraints. To resourceful governments human rights and refugee law may equally be treated as a complex legal playing field where protection responsibilities are seen as reducible, shiftable and circumventible.

1.3 Refugee law, human rights and general international law

This dissertation is primarily concerned with international refugee and human rights law. Yet, the analysis of extraterritorial applicability and state responsibility almost inevitably touches upon wider questions of general international law both in identifying the reach and in asserting the limits of international refugee law in these respects. While it seems increasingly popular to anchor refugee law to the broader framework of general human rights law (Gil-Bazo 2006; Hathaway 2005; Clark 2004; Plender 1999), many scholars nonetheless still see human rights law as somewhat distinct from and with a rather step-motherly relation to general international law (Alston 1996: xii). Whether human rights law is seen as part of general international law, or whether human rights are considered a distinctive legal regime will have key methodological and analytical implications for the present analysis. The debate has attracted increasing attention in recent years, and staunch positions have been carved out between those in favour of a 'fragmentation' or 'secessionist' position and those pursuing a 'reconciliation' or 'integrationist' approach.[19]

A number of scholars have argued that human rights law has developed a relative autonomy from general international law and that as such it should be considered a legal system *sui generis* (Scheinin 2004: 78-9; Simma 1995).[20] First

[19] International Law Association. Committee on International Human Rights Law and Practice. 2008. Final Report on the Relationship Between General International Law and International Human Rights Law. 72nd Conference of the International Law Association. Rio de Janeiro. 2008. See also the contributions in Kamminga and Scheinin 2009.

[20] It should be noted that Martin Scheinin as chair of the International Law Association Committee on International Human Rights Law and Practice has since lent support to an integrationist approach.

of all human rights and general international law are inherently different in their focus: where the latter concerns itself with inter-sovereign relations and mechanisms of reciprocity in the outside encounters between state jurisdictions, human rights is almost exclusively concerned with domestic jurisdiction and opening up the black box of the state (Simma 1995: 168-71). Secondly, having to submit human rights interpretation to the general principles of international law easily becomes a straightjacket, highly limited in its results and losing sight of its original ideas and purpose (Scheinin 2004: 78; Simma 1995: 72).

As Allott points out, the risk of such an approach is that human rights are turned into a 'plaything of governments', where: 'if they are not proven actually to be violating the substance of particularized human rights, if they can bring their willing and acting within the wording of this or that formula with its lawyerly qualifications and exceptions, then they are doing well enough.' (Allott 1990: 288). This warning may be particularly well heeded in the legal analysis of new or complicated areas of human rights law, or its application to areas or situations not originally foreseen by the drafters of the relevant instruments. This is certainly the case as far as the present topic goes. As will be seen, the interpretation of concepts like 'jurisdiction' as employed in human rights treaties is bound to meet certain limitations when confronted with its usage in general international law and related principles of territorial sovereignty.

Nonetheless, the present work advances an integrationist or unitary approach. First of all, one should be careful to separate human rights law from general international law, especially at a time when the human rights project as such could be said to be under duress (Bullard 2008). Removing human rights from the embrace of general international law may strip it of its most important quality: that of being law and thereby recognised as binding by the states signatory to refugee and human rights treaties. Anything short of that all too easily risks reducing human rights law to what critics dismiss as ' wishful legal thinking' (Pellet 2000: 4).

Furthermore, the view that interpretation of human rights and refugee law consistent with general international law principles leads to unduly limited results must be challenged. While concepts and principles of general international law may constrain the applicability of human rights and refugee law, it may certainly also expand and bolster it. This is particularly true where little case law is available or human rights instruments are vague in their provisions. As will be seen, the concept of extraterritorial jurisdiction may thus be more dynamically informed by reference to the Law of Sea. Similarly,

clarifying states' human rights obligations in regard to the conduct of private actors may benefit substantially from reference to the work of the International Law Commission on State Responsibility (McCorquodale and Simons 2007). Secondly, one should not underestimate the extent to which human rights law may impact general international law.

It follows from this that legal analysis should be based upon the sources and interpretative methodology normally applicable within general international law. This is not to say that consideration cannot and should not be given to the special purpose and object of human rights treaties. Refugee and human rights emphasise the protection of the individual as a subject of international law as opposed to the more contractual character of traditional inter-state treaties, but this can easily be contained within the ordinary approach to the interpretation of treaties as set out below. At the same time, however, the interpretation of human rights law cannot just do away with uncomfortable principles of general international law and state sovereignty just because they frustrate legal interpretation (Pellet 2000: 15). On the contrary, it is exactly in this clash between human rights and national sovereignty that the true significance, potential and boundaries of refugee and human rights law are to be found.

1.4 Sources and interpretation of international law

From where and how can international law be derived? The discussion on the sources of international law is marred by clashes similar to, yet not always explicitly informed by, the theoretical divides above. The following will attempt to provide a brief overview of the main debates before setting out the specific methodological propositions in the subsequent section.[21]

1.4.1 New and old sources of international law

Most discussions on the sources of international law normally start from Art. 38.1 of the Statute of the International Court of Justice. This stipulates that:

---

[21] In the following sources of international law and rules and means of interpretation of treaties are treated under the same heading. While the two should, of course, not be confused, it is conversely clear that custom and general principles of international law may equally influence treaty interpretation under Art. 31.3(c) of the Vienna Convention.

1. 'The Court, whose function is to decide in accordance with international law such disputes as a submitted to it, shall apply,
    (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
    (b) international custom, as evidence of a general practice accepted as law;
    (c) the general principles of law recognised by civilised nations;
    (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law.'

This article instituted the idea of the 'sources triad' in international law understood as the non-hierarchical relation between treaties, customs and general principles from which international law can be derived that clearly emphasises the consensual nature of international law championed by positivist lawyers (Spiermann 2006: 84).

For international conventions and treaties, interpretation is specifically structured by Art. 31 of the 1969 Vienna Convention on the Law of Treaties:

1. 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms or the treaty in their context and in light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
    (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
    (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty;
3. There shall be taken into account, together with the context:
    (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
    (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.'

While at its inception, the sources triad was probably felt to actually embrace the totality of accepted norms (Fastenrath 1993), this has been somewhat challenged by developments over the last fifty years. First, the non-hierarchical structure was seemingly challenged by the Vienna Treaty Convention, in which the International Law Commission introduced the notion of *jus cogens* as defined in Art. 53:

> 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm having the same character'

Though the International Court of Justice only recognised *jus cogens* as a category of positive international law in 2006,[22] the Vienna Treaty Convention sparked an ongoing debate on the existence of 'super norms', such as *jus cogens*, obligations *erga omnes*, and crimes of states (Weiler and Paulus 1997).

Secondly, and of more direct concern to the present enquiry, a growing number of lawyers have been arguing that while the above list is instructive, it can hardly be said to produce an exhaustive list of materials that the International Court may consider (Weiler and Paulus 1997; Fastenrath 1993; Riedel 1991). In his famous 1964 opus, Wolfgang Friedmann argued that international law was entering a profoundly different era in which the law of co-existence was increasingly replaced by an international law of co-operation (Friedmann 1964).[23] The proliferation of treaty law following 1945 saw the

---

[22] *Case concerning Armed activities on the Territory of the Congo (DR Congo v. Rwanda).* International Court of Justice. 3 February 2006, par 64. See also Spiermann 2006: 116.

[23] The extent to which Friedmann in pointing to the novelty of 'international law of co-operation' somewhat understated the still thriving and necessary 'international law of co-existence' has however been questioned. Thus, more balanced presentations have been put forward by some scholars which emphasise instead the delicate interplay and

codification of new issue areas, such as human rights and international refugee law, in binding instruments and new institutions such as the human rights supervisory bodies and UNHCR emerged, which took an increasingly active role in interpreting international law.

In addition to this deepening of international law, Friedmann pointed to the horizontal extension as more than a 100 new states had emerged in the international arena since 1945. In the current day and age it seems increasingly difficult to identify 'general principles of law recognised by civilised nations' and many new states have shown reluctance in accepting the authority of what they claimed to be a Western dominated International Court of Justice (Riedel 1991: 61). Instead, attempts have been made to infuse other sources with legal validity. In particular, resolutions by the UN General Assembly and its subordinate bodies such as the UNHCR Executive Committee have been argued by many to constitute additional sources of international law and thus binding for all UN member states (Riedel 1991: 62; Sztucki 1989; Malekian 1987: 43ff; Glahn 1981: 19ff).[24] Such attempts have been somewhat supported by practice, as the International Court of Justice has relied substantially on UN General Assembly resolutions for example, as well as inter-state correspondence for the interpretation of the substance in some cases (Dixon 1990: 21).

Some lawyers have greeted these developments and corresponding 'new sources of international law' with optimism, others fear that the fragmentation of international law is a 'legal jungle' and advocate legal non-proliferation (Weil 1983).[25] Although the concept of *jus cogens* may be formally

---

modus operandi in this double structure (Spiermann 2006; Leben 1997: 401). See further the argument set out in chapter 2 that the international law of cooperation may in fact work to reinforce the international law of coexistence and related principles of territorial divisions.

[24] It should be noted that different approaches have been taken as to the inclusion of e.g. UN General Assembly resolutions as a source of international law. Some scholars have attempted to distinguish between resolutions and declarations directed at the internal functioning of the organisation, which would be binding upon the membership that in the case of the UN is nearly universal, and those externally directed, intended merely as aspirations or recommendations without the intention of binding effect. Similarly, it has been argued that resolutions, e.g. made by the UN General Assembly, can be taken as direct evidence of state practice or *opinio juris sive necessitates*, a notion rejected by others as 'pressure-cooked instant customary law' (Riedel 1991: 62).

[25] A number of scholars have written on and enumerated different viewpoints in this ongoing debate. See in particular Nicolaidis and Tong 2004: 1361ff; Spiermann 2006 84f; Weiler and Paulus 1997; Leben 1997 & Salcedo 1997.

acknowledged, uncertainty over its content continues to occupy scholars (Watson 1999: 32; Spiermann 2006: 116f). Similarly, some fear that the multiplication of international bodies dealing with international law may lead to inter-institutional competition and incoherent interpretation.

The debate seems to reflect a fundamental rift between those keen to uphold international law as a system that produces foreseeable and determinable outcomes based on a limited yet objectively identifiable and binding set of international obligations and those who accept that the expansion of international norms with varying normative density necessarily implies a more subjective and dynamic interpretation. While the first clearly builds on the positivist tradition, including those from the realist and liberal traditions who emphasise a more doctrinal approach to international law, the latter has its obvious stepping point in sociological and reflectivist traditions, though these may also be expressed from radically different viewpoints. This is no less the case in approaches to refugee law, and the following sections are thus dedicated to navigating between some of the main approaches to refugee law whilst setting out the core tenets of legal methodology employed in the following analysis.

1.4.2 Carving out a dynamic positivist approach to international refugee law

In the following the advancement of an essentially positivist approach shall be championed, yet with some key modifications inspired by constructivist language theory that concedes points to both legal realist and policy-oriented approaches. It is positivist in the sense that the normative core of international refugee law may be derived from a set of objectively identifiable sources of law, and that refugee law presents a set of binding commitments for those states that through their written signatory, domestic laws or on-going practice have acceded to these norms. One of the scholars who has most clearly sought to set out what he calls 'a modern positivist understanding' of international refugee law, James Hathaway, summarises his approach as follows:

> 'One should begin with the text of the Refugee Convention, and seek to understand it not in the basis of literal constructions but rather in a way that takes real account of its context, and which advances its object and purpose. In addition to the formal components of context, such as the

> Preambles to the Convention and its Protocol, the context includes subsequent interpretation agreement among the parties, in particular the relevant Conclusions issued by the state members of the UNCHR's Executive Committee.' (Hathaway 2005: 74)[26]

The above quote would, in its brevity, probably find support from most refugee lawyers. While not all may agree with the following, it is however an apt starting point for trying to complement traditional positivist doctrine with the insights of other schools of international law. What Hathaway points to is the importance that a black-letter reading of objective sources of law is not employed in isolation but that legal interpretation also takes account of informal sources in deciphering normative content. In other words, meaning is not locked within the text of the Refugee Convention itself but must be sought by looking to a wider context to identify the object and purpose of a binding norm.[27] This may necessitate looking at both historical sources, such as the drafting history, and subsequent interpretations of those implementing it.

Legal scholars drawing on hermeneutic and language theory have built on this basic acknowledgement to argue that informal sources are always necessary to assign meaning to formal sources of law such as the Refugee Convention (Zahle 2001; Fastenrath 1993; Riedel 1991). Binding international obligations, particularly within the human rights sphere, are generally 'open-textured' in the sense that obligations are sometimes presented in vague language, open to interpretation or a 'margin of appreciation'. In order to work effectively, the human rights body is thus dependent on the ongoing development of

---

[26] A similar and more general position has been taken by the Judge Torres Bernardez regarding treaty interpretation, arguing that:

'[f]or treaty interpretation rules there is no 'ordinary meaning' in the absolute and abstract. That is why Art. 31 of the Vienna Convention refers to 'good faith' and to the ordinary meaning 'to be given' to the terms of the treaty 'in their context and in light of its object and purpose…The elucidation of the 'ordinary meaning' of terms used in the treaty to be interpreted requires…that due account be taken of those various interpretative principles and elements, and not only of the words or expressions used in the interpreted provisions in isolation.'

Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras). International Court of Justice. 11 September 1992. Opinion of Judge Torres Bernardez, p. 719.

[27] Cf. with Kelsen's 'pure legal theory', in which a definite set of meaning can be directly deduced from legal texts (Kelsen 1934). See also Fastenrath 1993: 309.

'secondary' or, to use Lowe's terminology, 'interstitial' norms to aid the interpretation and specification of explicitly affirmed international law. While such norms cannot in themselves muster a normative force in the positive sense, they work to modify or specify the effects of positive law, and may as such be considered sources of international law in the broader sense sketched out above.

What emerges is thus an idea of 'relative normativity' in international law, in which secondary norms or standards become a necessary element even within a positivist framework (Fastenrath 1993: 340).[28] This is a particularly important point to stress in an analysis dealing with a topic that, as noted in the introduction, is marked by many policy innovations, substantial political controversy and some lack of clarity as to which binding norms are applicable in the extraterritorial context. In such a scenario, the consensus on what exactly is entailed by written human rights obligations is invariably impacted by both non-binding sources, what is often referred to as 'soft law', and subsequent state practice and interpretation. A qualification of the role of these within a positivist framework is therefore in order.

1.4.3 Soft law

Within international human rights law, it has become customary to distinguish between *hard* and *soft* law, the latter referring to those normative provisions that are not explicitly binding for states yet may still exert a substantial normative influence, not just on the courts but also on the actual behaviour of states. This division is a somewhat crude picture. Although the distinction between formally binding and non-binding norms is often fleeting and changes over time, it is nonetheless a useful concept in distinguishing between two extremes in a system of sources of varying normative density (Riedel 1991).

The notion of soft law has drawn some scepticism from refugee scholars arguing that either law is binding or it is not law (Malunczuk 1997: 54f). Elevating non-binding norms or soft law to the status of legal norms, it is argued, risks conflating law and politics in a way that fundamentally undermines the privileged position of law itself (Noll 2000: 19f). Reflecting the debate on the relationship between human rights and general international law, the critique of so-called policy-oriented approaches to refugee law that

[28] Cf. Weil 1983.

seek to expand or overstate international obligations vis-à-vis refugees has similarly been that they produce little more than 'wishful legal thinking' (Hathaway 2005: 31). This is more likely to deflate the power of truly binding international law than succeed in the intended purpose to harden soft law and moralise on state behaviour (Hathaway 2005: 32).

This warning may be well put. There has been a tendency within some branches of human rights law to simply equate soft and hard law or tendentiously rely on soft law instruments to support a more expansive reading of human rights that flies in the face of similar instruments supporting the opposite conclusion (Watson 1999: 135).[29] Yet completely disregarding soft law by maintaining a binary distinction between binding and non-binding sources of law is likely to yield an overly static picture of the interpretation of refugee law and hardly in line with the argumentation produced by these scholars themselves.

Taking into account the linguistic tradition mentioned above one needs to appreciate how non-obligatory norms in the form of, for example, Conclusions by the UNHCR Executive Committee or resolutions of the Council of Europe, or interpretative recommendations, such as those issued in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status or by refugee scholars, condition both state behaviour and legal analysis by limiting the scope of subjective interpretation and thus bringing about agreement on the content of hard law (Fastenrath 1993: 340). In other words, soft law is often the premise for creating consensus on the understanding of hard law.

In this sense, soft law may be thought of as fulfilling three functions. First, it works as *interpretive principles*, seeking to clarify the exact scope of obligations, meanings of wording and conflicting norms within objective sources of law. Secondly, it serves to provide *accessory standards*, providing guidelines or yardsticks where existing hard law is particularly open or vague. Lastly, soft law can represent *emerging norms*, verbalising legal norms that have not yet constituted themselves within the ambit of the formal sources of international law (Riedel 1991: 74).

---

[29] Similarly, Ole Spiermann notes that the concept of *jus cogens* has sometimes been misused by human rights institutions to assign hierarchical dominance to human rights norms (Spiermann 2006: 117). In 2005 the European Court of Human Rights thus argued that 'the guarantees of the Convention…have a peremptory character'. *Bosphorus Airways v. Ireland*. European Court of Human Rights. Appl. No. 45036/98. 30 June 2005, par. 57.

In none of these cases is soft law a substitute for hard law, yet it plays a crucial role in creating convention and common understandings of the existence of rules, their interpretation and meaning (Fastenrath 1993: 324). Within the present analytical framework, such an approach is unlikely to lead to an expansionist approach. The aim here is not the reification or hardening of soft law but rather its presentation in order to show how differing interpretations of states and human rights institutions may clash and change over time.

1.4.4 Subsequent state practice

The second point concerns the role of state practice, which is here understood as the actual policies and administrative regulation rather than the discursive expression of intentions found in international resolutions and recommendations. While Art. 31.3(b) of the Vienna Treaty Convention explicitly mentions 'subsequent practice in the application of the treaty, which establishes the agreement of the parties regarding its interpretation' as a tool for interpreting the exact meaning of treaty obligations, scholars such as Hathaway suggest caution in assigning too much importance to subsequent state practice when dealing with human rights or refugee treaties that are specifically designed to restrain state behaviour and sovereignty (Hathaway 2005: 71f).

Against this, some international legal realists have argued that reference to general purposes can never replace or defer to subsequent state practice as an expression of treaty obligations (Hailbronner 2006). In a system without coercive judiciary powers, realist human rights scholars have cited Alf Ross arguing that:

> 'The basis of doctrine of legal sources is in all cases actual practice and that alone. The attempt to set up authoritative precepts for the sources of law must be regarded as later doctrinal reflections of the facts, which often are incomplete or misleading in the face of reality.' (Ross 1961: 97)[30]

[30] Cited by James Shand Watson 1998: 34, from whom the translation is preserved.

As such, state practice is reflected in *opinio juris* and in this sense diverging state practice may be evidence of a certain 'permissible scope of action' (Hailbronner 2006).

While such an account may provide a very dynamic interpretation, the disregard for formal sources and context is also highly reductionist and may easily equate law with simple power as stronger states read the law in their own fashion (Fastenrath 1993: 327). This, to the mind of the present author, would be inconsistent with the very existence of international human rights and refugee law and the basic observation that state behaviour to a great extent does seem to refer to and reflect the idea of binding norms within this field.

Any approach to international law building on linguistic theory would, however, concede that subsequent state practice cannot be completely disregarded. State practice may first of all be seen as evidence of the understanding of the parties to a treaty, in the form of 'continuous extensional definitions of the terms embodied in text of the treaty' (Fastenrath 1993: 313). In a more dynamic interpretation this may not only be an important source for understanding how formal obligations are translated into practice, but also act as the origin for accessory standards and norms that, if successfully tested against more formal sources, may substantially alter existing interpretations of international obligations.[31]

What the present approach suggests is that state practices may assert a particular influence in moulding and developing the interpretation of binding norms, often in a different direction than soft law. The developments of the last three decades have seen a general backtracking on the liberal standards and practices developed under the first decades of the post-WWII refugee regime of many industrialised states. Policy developments increasing the possibility for migration control and the deflection of asylum-seekers may challenge established norms and generally accepted refugee protection principles. Yet most states have consistently presented these policies as being within the scope of the legal framework understood as the obligations set out in relevant treaties. As these practices are becoming more established and firmly entrenched within both new and old asylum countries, it may indeed be relevant to examine the extent to which state practice and policy developments are effectively transforming our understanding of the nature of

[31] As an example, several scholars believe that state practice following the terrorist attacks in 2001 has changed the prohibition against inter-state aggression normally designated a *jus cogens* norm (Spiermann 2006: 118).

the obligations owed to refugees and the effectiveness with which the international refugee protection regime continues to operate.

1.4.5 Sources of international law applied in the analysis

Drawing together the above, a complete picture of what constitutes international law at a given point in time would thus necessarily have to take account of not just formally recognised sources but also the prevailing soft law instruments and state practices that are likely to assert a normative influence. The latter two do not work in isolation, but only as complementary to formal sources, such as the Refugee Convention. Yet it is often exactly in the interaction between soft law and state practice that the dynamic aspects of international refugee law stand out. Soft law obligations are per definition more bendable and mutable than hard law ones, and state practice often explicitly reaffirms formal instruments, while quite clearly challenging soft law or judicial interpretations of the obligations enshrined in these instruments.

With this in mind, the analysis will be based on the following sources:

Formal sources

Of these, treaties, such as the Refugee Convention, general human rights treaties and regional treaties such as the European Convention on Human Rights are the most important. In the interpretation of these treaties objective context documents, including the *travaux preparatoires* are included as subsidiary sources of interpretation.[32]

Secondly, the analysis draws on general principles of international law where applicable. This is particularly relevant in regard to secondary norms of international law. The analysis of refugee law obligations in respect of migration control performed by private actors in particular thus draws extensively on the principles of State Responsibility as agreed upon by the International Law Commission.

[32] For the role of drafting documents in treaty interpretation see discussion in chapter 3.1

Judicial decisions

The lack of an international judiciary for the Refugee Convention leaves primacy to international and regional human rights institutions, notably the European Court of Human Rights and the Inter-American Commission and Court of Human Rights. Further, in the interpretation of general principles of international law the analysis naturally draws on judgements from the International Court of Justice.

Lastly, national reference is to some extent made to national court decisions and decisions of the European Court of Justice, especially where these explicitly discuss the application of international refugee and human rights law instruments or domestic/regional reflections and incorporations thereof.

Evidence of collective state interpretation

As discussed above this includes first and foremost UNHCR Executive Committee resolutions as a non-binding yet important source from which to derive collective, though not universal, interpretations of obligations under the Refugee Convention. Similarly, the comments of the various UN human rights bodies may serve to clarify interpretations, as may positions of and declarations from regional bodies such as the Council of Europe.

Individual state practice

A broad view of state practice is taken including both material exercises of power, as well as more structural and discursive elements as expressed in formal policies, communications and other sources that may be interpreted as expressions of *opinio juris*. The focus is on the practice of states which previously have or are currently engaged in offshoring or outsourcing of migration control. As such, examples are mainly drawn from Australia, Europe and the United States.

Non-state interpretations

These include UNHCR recommendations and advisory opinions as well as position papers and legal analysis produced by national and international NGOs. Similarly, writings of scholars may be a supplementary source of interpretation, as explicitly acknowledged in Art. 38.1(d) of the Statute of the International Court of Justice.

1.5 A note on the policy of law

As discussed above, the present dissertation does not subscribe to the attempts of some scholars to deliberately impose specific extra-contextual agendas or policy-driven interpretations of legal texts in the attempt to determine international legal obligations. While expansionist attempts to maximise refugee rights may be admirable, they give an overly rosy picture of the state of international refugee law that is unlikely to be reflected in judicial outcomes and receive wider acceptance by government and international lawyers. Further, as noted above, such attempts only aggravate the gap between state practices and the obligations claimed by some authors. Taken to this extent states may be tempted to disregard legal scholarship and the commitment to refugee rights altogether.

The ambition of the present dissertation is primarily explanatory rather than prescriptive. The following analysis does not set out to prescribe particular policy recommendations but attempts to carefully describe the relation between state practice and international norms of various standing. In this sense the dissertation seeks to maintain a sharp distinction between *de lege lata* and *de lege ferenda*. Such an approach is not only more clarifying when it comes to discerning the exact scope of international legal obligations but also necessary if one wants to understand why certain state practices develop and the significance of these practices in regard to the ongoing interpretation of legal norms.

What is sought is an understanding of the legal structures, the permissible scope of legal argument and how these govern state actions. There is of course a risk that such an analysis – which is more descriptive than normative in its foundation – may be taken by some as an implicit endorsement of certain state practices to the extent that they are presented as not being inconsistent with a strict reading of international legal obligations. While such a concern cannot be completely disregarded, it should be emphasised that this is not the intention. Echoing Ross it must be possible to acknowledge a certain state of law, while at the same time at a personal level seeing it as a chief concern to change it (Ross 1953: 44). Considerations of legal policy or alternative interpretations, *de sententia ferenda*, in the following are thus sought clearly distinguished and primarily set out towards the end of each chapter and in the conclusion.

1.6 Delimitations and analytical choices

This dissertation does not purport to be exhaustive in the answers it gives to the questions above nor in its description of the political realities or legal issues introduced above. The following chapters bracket certain issues and leave others behind. In that sense, this volume should not be read as a legal handbook and does not provide anything near an exhaustive description of the political practices that take place in this field. Instead, the ambition has been to focus in on some of the issues and major legal debates through which the offshoring and outsourcing of migration control may perhaps be understood and placed in a larger context relating to both law and political science. The present section is thus dedicated to a few reflections on some of the more analytical choices and delimitations made throughout the research process.

1.6.1 International refugee and human rights law

The present dissertation deals solely with the international legal obligations owed by states vis-à-vis asylum-seekers and refugees. By this is meant first and foremost the rights of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. Also included are universal and binding human rights instruments of relevance to refugees such as the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the 1989 Convention Relating to the Rights of the Child (CRC) as well as regional human rights instruments, among which the 1950 European Convention on Human Rights (ECHR) and the 1969 Inter-American Convention on Human Rights are the most important. When speaking of 'international protection' and 'asylum', this is thus taken to refer broadly to protection against expulsion, return or rejection under any of these instruments of aliens seeking refuge.

The inclusion of general human rights instruments as a source of refugee rights should, however, not detract from the fact that this dissertation deals exclusively with rights of refugees. Several scholars and refugee advocates have rightfully pushed for the inclusion of general and regional human rights instruments as useful and necessary instruments in establishing an effective refugee rights regime, yet a number of these seem to be committing the fallacy of simply conflating refugee and human rights. The conceptual risk of such an

approach is that the distinct inter-state dimension and the focus on the protection of non-citizens of the refugee regime are thereby lost (Peral 2006: 476).[33] While refugee and human rights law share a number of characteristics also in regard to the present analysis, it is nonetheless important to appreciate the specific structure of international refugee law and how it relates to core principles of national sovereignty.[34]

Finally, the focus of the present analysis is on access to asylum, or more correctly protection against rejection or involuntary return. The puzzle set out at the introduction is that of the individual refugee encountering migration control enacted extraterritorially and/or carried out by non-state agents. It is the protection, or the lack thereof, available at this idealised moment around which the following chapters are structured. The analysis is thus particularly concerned with the principle of *non-refoulement* as enshrined in Art. 33 of the Refugee Convention and in similar instruments of general human rights and customary law. The relevance of subsequent or more material protection benefits is thus only dealt with in more general terms as part of chapter 2, and the wider set of rights claimable by refugees subjected to extraterritorial migration control is introduced in chapter 4.

1.6.2 International and national law

The following analysis is limited to the relationship between offshoring and outsourcing practices and *international* law. This is an important delimitation and may impact the explanatory reach of the present work. To the extent that policies to offshore or outsource migration control are motivated by the desire to avoid legal constraints, national law may have an important and often more direct impact than international law. National law and institutional mechanisms ensuring monitoring and access to asylum are often explicitly framed to reflect the territorial boundaries of the state in question. Further, structures and constraints imposed by national law are likely to more immediately influence policymakers than are international refugee and human rights instruments which are often only partially incorporated or reflected in domestic legislation.

---

[33] Gregor Noll similarly notes the 'exceptional character of [refugee] protection in that it takes place outside the country of origin' (Noll 2000: 18).

[34] See further chapter 2.3.

The choice is partly practical. A comparison of domestic legislation in key countries carrying out offshore or outsourced migration control would make the present study grow exponentially. At the same time, focusing on the domestic legislation of a select number of countries is unlikely to show the full scope of issues at stake and such an analysis may easily skew the present work, making it too specific for wider usage. At the same time, the international obligations pertaining to refugees set out in the instruments mentioned above could be argued to constitute a critical test case in the assessment of legal constraints when offshoring and outsourcing migration control. First, while territorial limitations are to some extent to be expected in national legislation, the extraterritorial applicability of international refugee and human rights law has been the subject of extensive debate (Gibney 2008; Skogly 2006; Coomans and Kamminga 2004; Gibney et al. 1999). Secondly, international refugee and human rights law may be considered an entry point for drawing out commonalities between different domestic legislations. Lastly, focusing on international law may serve to draw parallels to other subject matters. As noted above, the drive towards offshoring and outsourcing is hardly limited to the refugee context, but finds parallels in a number of other fields with associated human rights concerns.

That said it should be borne in mind that additional considerations regarding the applicability of national law to situations of offshoring and outsourcing may impact analysis in several directions. In some court cases national law has thus been argued to be strictly territorially limited while a proper analysis would clearly indicate that core obligations under international refugee and human rights do apply.[35] In other cases, however, the application of instruments such as the Refugee Convention is questionable, yet domestic law may instead offer certain extraterritorial protections.[36]

1.6.3 Country focus

Offshore and outsourced migration control has so far mainly been a policy response of more traditional asylum countries. As such the focus of the present analysis centres on Australia, Europe and the United States which

---

[35] *Sale, Acting Cmmr, Immigration and Naturalization Service v. Haitian Center Council.* United States Supreme Court. 113 S.Ct. 2549, 509 US 155. 21 June 1993. See further chapter 3.

[36] *European Roma Rights Centre and others v. Immigration Officer at Prague Airport and another.* United Kingdom House of Lords. 9 December 2004.

have so far been the main exponents of these trends. These countries have all been major arrival destinations for both refugees and irregular migrants and may also in other respects be considered forerunners in the development of national policies to restrict access to asylum procedures and refugee protection which have since been adopted by other countries around the globe. As such, the analysis builds on the premise that offshoring and outsourcing practices in these countries are likely to create a similar mimicry effect in developed and developing states alike. To some extent this can already be traced. Carrier sanctions have thus been widely implemented, and examples of extraterritorial migration control and use of private contractors can equally be found in countries like Israel and Thailand.[37]

1.6.4 Accessing data and information

Obtaining knowledge of what actually happens in the encounter between the refugee and state authority or a private substitute on the high seas or in the territory of transit or origin countries has constituted a major methodological challenge. Offshore and outsourced migration control is often carried out covertly with limited access for any independent monitors, much less academic researchers. The effects of this invisibility of the control itself are the subject of chapter 6, yet a few remarks are in order with the aim of clarifying the approach by which information has been gathered on actual practices.

To some extent information may be obtained through official government sources. New operational initiatives of migration control are normally publicised in general terms. Similarly, agreements with third countries or contracts with private companies are often publicly announced, yet the actual text and specific terms of such agreements are far from always disclosed. Secondly, knowledge of actual practices may be derived from national and international case law as well as reports by, for example, parliamentary bodies such as the European Parliament and the House of Lords. Lastly, a crucial inroad to knowledge in this area has been derived from written and visual press accounts of control incidents as well as the testimonies of asylum-seekers and migrants gathered and published by UNHCR, NGOs and grassroots organisations.

Supplementing these sources, the analysis however also draws on my personal experience in this field. Between 2005 and 2008 I was employed as a policy

[37] See chapters 2, 4 and 5.

analyst with the Danish Refugee Council. Through this position I have had the chance to meet and discuss with a number of policymakers and civil servants in the EU and neighbouring countries. Secondly, as a member of the European Council on Refugees and Exiles advocacy network I have been able to draw on the experience and knowledge of a range of European NGOs working on refugee and asylum issues. Part of this work has also involved visits to a number of key locations for the present project. As part of an ECRE study on Refugees' Access to Protection in Europe,[38] a mission to the Canary Islands was thus conducted including visits to detention centres and interviews with Spanish authorities and arriving migrants. As part of a Danish Refugee Council programme to improve refugee protection and asylum procedures in Ukraine, a fact-finding mission was undertaken which included interviews with representatives of state authorities, regional asylum officers, NGOs and UNHCR. Lastly, as part of the UNHCR 10 Point Plan of Action,[39] an Expert Roundtable was organised in Geneva on refugee protection issues with regard to extraterritorial and private involvement in migration control, which gave me the chance to talk to a number of UNHCR field officers and government representatives.

It should be emphasised that none of this has taken the form of academic interviews. Nonetheless, in different ways and to differing degrees, all of the above has contributed to the framing of the present research project and concrete knowledge on state practices with regard to extraterritorial and privatised migration control.

1.7 Structure of the volume

The nexus between offshore and outsourced migration control and international refugee law raises three interrelated legal issues around which the following chapters are structured. The first concerns the geographical applicability of core norms under the Refugee Convention. Chapter 3 examines the extraterritorial application of the *non-refoulement* principle as set out in Art. 33 of the Refugee Convention, which has been a vividly debated issue ever since its inception. The chapter summarises and seeks to structure

---

[38] European Council for Refugees and Exiles. 2007. Defending Refugees' Access to Protection in Europe. Brussels. December 2007.

[39] UNHCR. 2007. Refugee Protection and Mixed Migration: A 10-Point Plan of Action, Revision 1. January 2007

the different arguments to be made from the language of the text, the object and purpose of the article and the drafting documents. It then goes on to examine subsequent interpretation as set out in soft law, state practice and other formulations of *non-refoulement* principles in general human rights and customary law.

The second issue concerns the wider applicability of human rights law to situations of extraterritorial migration control. Chapter 4 analyses the basis for establishing extraterritorial jurisdiction, which is a threshold criterion for both Art. 33 of the Refugee Convention and the majority of general human rights instruments. The chapter looks first at the meaning of jurisdiction within general international law and human rights law respectively. It then goes on to examine whether and under what circumstances jurisdiction may be brought about by migration control exercised in three different geographic spheres: areas where authority is withdrawn or territory excised, migration control carried out in international waters, and migration control carried out within the territorial jurisdiction of another state.

The third part of the legal analysis concerns the attribution of private conduct and thus state responsibility in cases of privatisation. Chapter 5 sets out by recollecting different practices as regards private involvement for the purpose of migration control and the protection concerns voiced by the use of, for example, carrier sanctions and private contracts. It then goes on to examine when and under what circumstances migration control carried out by private actors may be directly attributed under the International Law Commission's Articles on State Responsibility and the concomitant requirement of jurisdiction where privatised migration control is simultaneously carried out extraterritorially. Lastly, privately operated migration control may give rise to due diligence obligations under refugee and human rights law.

Ensuring access to asylum, however, does not stop here. While the legal analysis is a necessary and crucial first step, the refugee subjected to offshore and outsourced migration control often find him- or herself unable to *de facto* realise rights *de jure* owed. Chapter 6 thus sketches some of the more practical protection issues raised by extraterritorial and privatised migration control. As will be shown, offshoring and outsourcing tends to render the control practices themselves invisible and eclipse the ordinary human rights institutions and mechanisms aiding persons to launch an asylum claim and monitoring state behaviour.

Before all this however, the following chapter will attempt to establish a more general framework for understanding the relationship between international refugee law and state policies to control migration flows in a globalised world.

Chapter 2 first locates the refugee as a traditional marker of state sovereignty and traces the current drive towards extraterritorial and privatised migration control. It is then argued that the current developments reflect a deeper tension between the universal claim of human rights and core norms pertaining to national sovereignty, linking human rights to the principle of territoriality and the public/private distinction. The result is the current bifurcation between the reach of refugee law and state practices to offshore and outsource migration control.

Chapter 7 seeks to draw together the conclusions of the preceding analysis as well as set out a few perspectives as regards the wider significance of these issues.

2. The refugee in the late-sovereign order

This chapter posits that the nexus between the refugee and migration control has always been a point of confrontation between national sovereign prerogatives and international law as exemplified by the 1951 Refugee Convention.

Offshoring and outsourcing migration control may be seen as a strategy by the state to bypass this confrontation and reclaim discretionary power. Yet in the process a new field of contestation opens up between universal and particularist claims to the applicability of international refugee and human rights law. It is argued that the difficulties in bringing international law to bear on practices of offshoring and outsourcing reflect an underlying conflict between the universal purpose of human rights law on the one hand, and its formalisation as a matter of treaty law on the other. This is particularly evident in the international refugee protection regime, which remains firmly vested in territorial principles for dividing and tailoring protection obligations. As a result, a growing market for migration control is emerging where sovereign territory and functions are commercialised both between states and in the relation between governments and private actors.

The chapter ends with a few reflections on the wider significance of these developments. The commercialisation of sovereignty reflects and reinforces a disjuncture between the increasingly global and market-oriented forms of state governance and a legal framework still largely built on territorial and statist principles. It is in this tension that the legal debate surrounding extraterritorial human rights application and state responsibility for acts of private actors is waged, and the outcome of this debate may have crucial implications not only for the continued effectiveness of the international human rights regime but also for the very conception of the state as we know it.

2.1 The refugee as a marker of sovereignty

> 'The refugee in international law occupies a legal space characterized, on the one hand, by the principle of State sovereignty and the related principles of territorial supremacy and self-preservation; and, on the

> other hand, by competing humanitarian principles deriving from general international law…and from treaty.' (Goodwin-Gill 1996: v).

The refugee is an anomaly in a world where it is assumed that all individuals remain subjects of a territorial sovereign. Yet, the refugee is also an integral part of the international system of states, a seemingly unavoidable side-effect of state sovereignty as we know it (Haddad 2003: 297).

In the first place, the refugee is a product of national sovereignty, the state's absolute and perpetual power within its commonwealth. The refugee emerges as a result of the state's unwillingness or failure to secure the ordinary protection offered to its citizens. From the expulsion of the French Huguenots as the first 'modern' refugees, the history of refugee flows reads not just as a history of political oppression, revolutions and violent conflict, but also as a history of state-building and the Westphalian state system itself, where the exclusion of some has often been a deliberate strategy to reinforce the inclusion of others (Weiner 1996: 188; Zolberg 1983: 36).

As a legal figure, however, the refugee in the modern context is constructed in contrast to national sovereignty and as a marker of its limits. From the perspective of a potential asylum state, refugee law places a constraint upon the otherwise well-established right of any state to decide who may enter and remain on its territory.[40] As an expression of international sovereignty and international law of co-operation, the refugee protection regime is an attempt, albeit imperfect, to resolve the problem of those occupying the undesirable and in systemic terms impossible position in between mutually exclusive sovereign states.

It is this tension between human rights law and the exercise of sovereign powers that Goodwin-Gill points to in the quote above. Both aspects refer back to the concept of sovereignty. The latter emanates from principles of *national sovereignty* that endow states with the freedom to act unconstrained and the right to exclude foreigners from their territory. The former is an expression of *international sovereignty* through which states have submitted themselves to binding treaties of international law; in this case human rights treaties that explicitly constrain this freedom to act and impose a corollary

---

[40] As Emmerich de Vattel notes in the *Law of Nations*, every sovereign nation retains the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions or to admit them only in such cases or upon such conditions as it may see fit to prescribe (de Vattel 1883: bk. 2, par. 94, 100).

responsibility to respect the rights of individuals within their jurisdiction. The refugee is poised squarely between these two conceptions of sovereignty: sovereignty as freedom and sovereignty as responsibility.[41]

It is also this tension that comes to the fore in the initial encounter between the asylum-seeker and the border authorities of a potential asylum state. As is well known, international law stops short of granting an individual right of asylum.[42] Nonetheless, the key norm of refugee law, the principle of *non-refoulement*, bids states not to return any refugee to a country where they risk persecution. At the drafting committee of the 1951 Refugee Convention, the *non-refoulement* clause was thus described as 'an exceptional limitation of the sovereign right of states to turn back aliens to the frontiers of their country of origin'.[43] It is this 'trump card' that is available to the asylum-seeker and which in the ordinary situation will require a state to suspend its rules of immigration control and undertake a refugee status determination procedure for all asylum-

---

[41] The dictum that sovereignty entails responsibility, even outside the realm of treaty law, was famously expressed by Judge Huber in the *Las Palmas* case:

'Territorial sovereignty … involves the exclusive right to display the activities of the State. This right has as a corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and the inviolability in peace and war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to the circumstances, the State cannot fulfil this duty.'

Case of the Island of Palmas. Permanent Court of International Justice. R.I.I.A. Vol II. 4 April 1928. On the conception of sovereignty as 'freedom' and sovereignty as 'responsibility' see further Aalbert and Werner 2008; Werner 2004.

[42] The right 'to seek and enjoy in other countries asylum from persecution' enshrined in Art. 14 of the Universal Declaration of Human Rights has so far not been codified as a matter of universal treaty law. Further, the somewhat cryptic formulation has traditionally been interpreted as an extension of the much older humanitarian state prerogative to grant asylum and resist extradition; a right of the asylum state vis-à-vis the state of origin against the nationality jurisdiction of the latter (Grahl-Madsen 1966: 195-6). Whether this interpretation is entirely correct may however be disputed. Asylum as a right between states arguably has little to do with the notion of human rights. A closer reading of the drafting history further suggests that while the declaration falls short of an individual right to be *granted* asylum, a procedural right to *seek*, or in other words a right to an asylum process, was intended to remain (Gammeltoft-Hansen and Gammeltoft-Hansen 2008).

[43] Remark made by the Israeli delegate, Nehemiah Robinson. Ad Hoc Committee on Statelessness and Related Problems. First Session, 20th meeting. E/AC.32/SR.20, par. 49.

seekers arriving at its territory to determine if such a risk is present (Hathaway 1997: xix).

The last twenty-five years, however, have seen an increased politicisation of asylum across both traditional and new asylum countries. Following the end of the Cold War receiving refugees no longer entailed ideological points. From the 1970s, the welcoming labour immigration schemes of several European countries were abandoned. At the same time, globalisation has allowed new patterns of migration and refugee flight. For the 'jet-age asylum-seeker' both knowledge of destinations far away and transcontinental transportation are more readily available. And rather than conforming to the traditional image of the singular *bona fide* asylum-seeker, refugees are increasingly caught up in mixed flows of irregular migrants, often facilitated by human smugglers specialised in avoiding traditional forms of border control (Gibney and Hansen 2003; Castles and Miller 2003; Barnett 2002; Zolberg 2001).

The response has been a general tightening of national asylum systems and border control. Recognition rates have gone down in a number of industrialised countries and measures have been introduced to reduce the time of asylum processing and restrict rights and benefits enjoyed during the stay. Secondly, legal mechanisms have been implemented to restrict arriving asylum-seekers' access to asylum procedures, introducing particularly expeditious examinations or *prima facie* rejecting asylum-seekers arriving from so-called 'safe countries of origin' or 'safe third countries' (Guild 2006; Vedsted-Hansen 1999: 17; Goodwin-Gill 1996: 333).

Lastly, states have been keen to prevent asylum-seekers and irregular migrants from reaching their territories in the first place. The *non-refoulement* principle has been seen by some states as an open door or 'blank cheque' for any migrant claiming to be an asylum-seeker, leaving little control to states in determining how many must be admitted to its asylum procedures (Bem 2004; Hathaway 1997: xviii). In practice, many states have further found it difficult to return failed asylum-seekers because of lack of nationality identification or a country willing to accept them. Intercepting asylum-seekers and irregular migrants before they reach their destination has thus become a particularly important strategy for states looking both to reduce the numbers of asylum-seekers and to avoid the trouble and costs associated with returning those rejected (Guild 2006; Lavenex 2006; Guiraudon 2002; Vedsted-Hansen 1999; Hathaway 1992).

As a result, forms of extraterritorial or externalised migration control have been rapidly expanding across traditional asylum countries, in particular Australia, Europe and the United States. This involves first the *offshoring* of the

state's own migration authorities. From the enforcement of visa regulations at consulates to the sending of immigration liaison officers to key transit countries and the deployment of warships to intercept migrant boats on the high sea, migration control is no longer something that is being performed only at the perimeter of a state's sovereign territory, but rather a set of progressive mechanisms to check travellers at every step of their prospective journey (Kneebone 2006; Legomsky 2006; Gammeltoft-Hansen 2005).

Secondly, the externalisation of migration control has been carried out through delegation, as an *outsourcing* of control responsibilities and duties to third states and private parties. The international cooperation regarding migration management is illustrative of the fact that migration, and migration control in particular, has become a foreign policy issue in its own right and transit and origin countries of migration are both directly and indirectly being wooed to carry out exit border control of national and transiting emigrants (Geddes 2009; Gil-Bazo 2006; Gammeltoft-Hansen 2006; Lavenex 2006, Guild 2005; Guiraudon and Lahav 2000). But authority and obligations are also shifted vertically, to private companies and corporations. Under threat of economic penalties, airlines and other carriers have long carried out elaborate document and visa checks at the point of departure (Guild 2004c; Nicholson 1997; Feller 1989). In recent years, private security companies and other contractors have been increasingly employed by states to carry out migration control both at the borders and overseas (Verkuil 2007; Gatev 2006).

Neither of these developments sits easily with the traditional picture of refugee law as a constraint upon states' prerogative to control entry into their territory. As part of extraterritorial controls, states have claimed that neither the *non-refoulement* principle nor other norms under international refugee law apply when refugees are intercepted outside the state's territory. Similarly, the argument that states incur any obligations under refugee law as a result of carrier controls has been rejected on the premise that these controls are a private matter, distinct from the state's own authorities and thus responsibility. As a consequence, few if any protection mechanisms are currently available to the refugee that encounters the immigration authorities or privately operated migration control extraterritorially. In practice at least, the balance between national and international sovereignty, freedom and responsibility, established by modern refugee law thus seems to tip and the refugee, now encountered extraterritorially, is once again submitted fully to the sovereign power and benevolence of the potential asylum state.

2.2 Between universal human rights and principles of national sovereignty

How may we conceptualise the developments sketched above? The case of refugees and migration control could be seen as significant of a more fundamental shift in the way states organise themselves and respond to global challenges. Just as migration control is being offshored, so are functions ranging from commercial business to the detention of terrorist suspects. Similarly, private involvement for the purpose of migration control is part of a much broader trend to privatise inherently sovereign functions; from the running of prisons to the use of private security companies for military operations at home and abroad. In each case the traditional assumption that states remain free to exercise sovereign powers within, and only within, their own territory is challenged, which in turn prompts questions on how to organise sovereign responsibilities relating to national and international human rights obligations.

These questions have occupied numerous political scientists and lawyers for well over the last decade. From very different viewpoints, scholars of both disciplines have heralded the developments above as evidence of the decline or even 'end of sovereignty' (Camilleri and Falk 1992). First, those emphasising sovereignty as a *de facto* property of the state have argued that immigration is just one example that sovereignty, in the sense of the state's ability to control transborder flows and exercise power within its territory, is waning as a result of globalisation. Like migration, the global flow of capital and goods, the rise of transnational corporations, climate change and international crimes like drug trafficking all seem to undermine the state's ability to assert effective jurisdiction at its borders and within its territory (Falk 2005; Krasner 1999; Held et al. 1999; Sassen 1995).

In this context, the extraterritorialisation and privatisation of migration control may be taken as evidence of the 'retreat of the state' and ultimately takes on a more symbolic function (Strange 1996). While control initiatives viewed in isolation can be said to be effective, the idea of perfectly controlling immigration – an actual 'Fortress Europe' – ultimately remains illusory (Gammeltoft-Hansen 2006c; Skogly and Gibney 2002: 783, 787; Weiner 1996: 179-81). Firstly, aspiring to achieve complete control carries an inherent risk of establishing obstacles for the 'wanted' migrants. In the global economy, liberal states are intimately dependent on easy travel across borders, both for their own citizens and for business visitors, tourists and labour migrants. Secondly, when they nonetheless implement migration control, states are

further caught in an impossible endeavour where each expansion of control is likely to spawn an answering loss of control as more migrants and asylum-seekers are driven to seek entry clandestinely, the profitability of human smuggling is driven up and new migratory routes open. (Gammeltoft-Hansen 2006b).

A different set of arguments has also emerged: that territorial and state-centric sovereignty principles as a normative framework for the organisation of state competences and rights in the international system are at best superfluous and at worst directly misleading in today's world (Nicolaidis and Tong 2004: 1354; Henkin 1999; Clapham 1999: 522; Malanczuk 1997: 17-8; Koskenniemi 1989: 198). Globalisation not only provides challenges to traditional modes of governance, but also new possibilities. As a result, states themselves are becoming global actors, and the offshoring and outsourcing of governmental functions is a natural consequence in a world increasingly dominated by the international law of cooperation as opposed to coexistence (Sakellaropoulos 2007; Skogly and Gibney 2002: 784; Salcedo 1997; Friedmann 1964).

From a human rights perspective, these developments have been taken by some as support for a similar revision or more dynamic interpretation of human rights and other areas of international law and of their ability to regulate the activities of states and non-state actors. If human rights are supposed to be universally applicable and remain effective, the emergence of offshoring and outsourcing practices in themselves provides the strongest argument for similarly expanding the reach of these instruments and having international judiciaries respond more readily to human rights violations of signatory states wherever on the globe they may be occurring (Gibney 2008; Vandvik 2008; Scheinin 2004; Meron 1995). Similarly, the growing role of non-state actors on the international scene has been argued to entail new responsibilities of, for example, transnational corporations under international law (Clapham 2006). Thus, while the offshoring and outsourcing of migration control may be accepted as a natural strategy to recoup efficiency in response to global challenges, such activities cannot remain outside the scope of international refugee and human rights obligations.

In contrast to the different positions above, the present work does not identify a waning of state sovereignty, regardless of whether this elusive concept is defined as a set of material powers or as a normative framework. The idea of perfect border control may be illusory. Yet, like any other display of sovereign autonomy, full control over a state's external borders has probably always remained a somewhat unfulfilled ideal (Krasner 1999). While states may be confronting new challenges in this regard, outsourcing and

offshoring represent practices whereby the exact same mechanisms of globalisation, or perhaps more correctly globality, are employed to reassert regulatory capacity and control in areas where such capacity is otherwise restrained, either by the factual circumstances such as increased migratory pressures or by legal constraints such as national and international refugee and human rights obligations. Thus, paradoxically, shifting regulatory functions away from the territory and away from the state's own authorities seems to reinforce rather than diminish state power in this material sense (Palan 2003: 153; Guild 2002: 103; Guiraudon 2002).

Furthermore, despite evocative references to a growing 'legal black hole', there is little to suggest that offshoring and outsourcing practices take place outside international and national law as such. Firstly, arrangements to shift migration control to foreign territory or to delegate control functions to private entities tend to be facilitated precisely through international legal arrangements and national law. Second, as will be evidenced throughout the following chapters, both general principles of international law and a growing body of human rights case law affirm that human rights and refugee law obligations remain applicable even when states act extraterritorially or delegate authority to non-state actors.

Yet, contrary to the claims for a universal extension of state obligations, it is equally clear that the application of refugee and human rights instruments to situations of offshore or outsourced governmental activities is a far from straightforward matter. As will be seen, states are not bound in all situations and the content and extent of obligations may change when migration control is shifted to foreign territories or private entities. In each case state responsibility is dependent on the establishment of extraterritorial jurisdiction over the human rights victim in question and in cases of outsourcing, control over the agent or actors perpetrating the human rights in question.[44] Consequently, while case law establishing state responsibility in these situations is growing, there has been some reluctance among both national and international judiciaries to unconditionally extend human rights obligations in cases of offshoring and outsourcing.

This reluctance reflects a potential clash with core norms of international law anchored in national sovereignty. The first of these is the *principle of territoriality*. Probably the most fundamental principle of international law is that each

[44] Where migration control is both privatised and carried out extraterritorially, such as in the case of carrier sanctions, these requirements become cumulative, see further chapter 5.7.

state's right to exercise power is limited to its sovereign territory. The territory is the state's primary physical manifestation vis-à-vis other states (Brownlie 1998: 105). In a world composed of equal and mutual sovereign states, the claim to legitimately exercise power, or jurisdiction, is vested within the 'sovereign nation cage', horizontally encompassing the state's land territory and territorial sea, and vertically extending from the 'von Kármán line' 50,550 miles above sea level and down to the sub-soil of the of national territory ending at the centre of the Earth (Spiermann 2005: 83; Palan 2003: 97; Ford 1999; Ruggie 1993: 151).[45]

In international law territory thus serves as the expression of national sovereignty and has become instrumental in solving legal disputes. As was held by the Permanent Court of International Justice in the *Las Palmas* case:

> 'Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.'[46]

In the human rights context, the territoriality principle has played an equally important role in setting boundaries for state responsibility. Some instruments explicitly limit rights to beneficiaries present within the territory of the state in question. More generally, many human rights instruments are limited in their geographical application to the state's 'jurisdiction'. While the meaning of this term has been fiercely debated, it has been difficult to disassociate it from territory as the primary realm of state power. Thus, in the *Bankovic* case the European Court of Human Rights held that 'jurisdiction' in the meaning of the Convention:

---

[45] See further chapter 4.2.1.

[46] *Case of the Island of Palmas*. Permanent Court of International Justice. R.I.I.A. Vol II. 4 April 1928, p. 838.

> 'must be considered to reflect the ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case.'[47]

As will be discussed in chapter 4 jurisdiction and concomitant human rights responsibility may, in a range of situations, equally be established extraterritorially. Yet, in the vast majority of cases jurisdiction is naturally understood in territorial terms and any extension beyond this requires the additional step of establishing the state's authority or control over the human rights victim or geographic area in question.

The second foundational norm is the *distinction between public and private*. The separation between public and private has been a constitutive element of both national and international law (Alston 2005; Chinkin 1999; Higgins 1994: 153). The state's monopoly on the legitimate exercise of power within its commonwealth necessitates that the state, and those acting as agents of the state, can be clearly defined in relation to those over whom power is to be exercised. Just as territoriality serves to delineate and define the state horizontally vis-à-vis other states, the public/private distinction thus serves to define the state vertically, in relation to its subjects.[48]

A basic principle of international law has thus been that states cannot be held responsible for the conduct of private actors (Barnidge 2008: 4; Crawford 2002: 91; Higgins 1994: 153). As noted by the International Court of Justice in the *Genocide* case:

> 'the fundamental principle governing the law of international responsibility [is that] a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf.'[49]

---

[47] *Bankovic and Others v. Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxemburg, Netherlands, Norway, Poland, Portugal, Spain, Turkey and the UK.* European Court of Human Rights. Appl. No. 5207/99. 12 December 2001, par. 61.

[48] The public/private distinction as a foundational norm of international law and the critique thereof is dealt with in chapter 5.4.

[49] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro).* International Court of Justice. 26 February 2007, par. 406.

Of course, real life seldom conforms to the neat separation between public authorities and private persons. Private involvement in the execution of otherwise governmental policies is no new phenomenon and a growing one, and a sharp distinction between public and private is consequently hard to uphold both *de facto* and *de jure*. Chapter 5 deals with situations where conduct of otherwise private actors may thus nonetheless be attributed to the state and thereby gives rise to human rights responsibility. But even so, the public/private distinction remains the point of departure. An initial presumption against state responsibility for human rights violations persists in cases where governmental functions such as migration control are privatised, and this presumption must be rebutted in each specific case.

The result is a situation where the application of international refugee and human rights law to situations of offshore or outsourced migration control is increasingly contested. Interpretation of both specific refugee law provisions and general principles such as 'jurisdiction' and 'attribution' seems to oscillate between two opposing poles – on the one hand the universal claim underpinning both refugee and human rights law and on the other, principles of national sovereignty anchoring responsibility to the state and its territory. In other words, each time human rights responsibility has to be established in situations of offshoring and outsourcing the 'sovereignty threshold' has to be overcome (Skogly and Gibney 2002: 796).

The difficulties in establishing human rights responsibility in cases of extraterritorial or privatised migration control thus inevitably point back to a deeper conflict within international refugee and human rights law itself. On the one hand human rights are declared to be universal, on the other hand human rights are part and parcel of the larger framework of international law and as such must pay homage to its underlying principles in order to remain law.[50] Borrowing a distinction from Kant, a difference thereby remains between the *sein* and the *sollen* of refugee and human rights law, between human rights codified as positive international law and human rights as a universal normative ideal (Dupuy 1998: 285).[51] While the latter proceeds from

---

[50] Neil MacCormick speaks of the 'positivisation' of human rights law that serves to institutionalise and make authoritative otherwise controversial and often inexact notions of rights (MacCormick 2007: 273-4).

[51] Though partly related, the argument made above should not be confused with the dichotomy sometimes proponed by critical legal scholars between human rights as expressing human values and human rights as expressing State values: the utopia and the

the creed that wherever there is power there must be constraint of that power, the former fixes responsibility to a legal construction of the state built on the principles of territoriality and the public/private distinction.

2.3 The territoriality of the international refugee regime

The above is no less true of international refugee law. Despite its appearance and language of universality and the starting premise of escaping national sovereignty by ensuring refuge for subjects of other states, the international refugee protection regime is in the true sense of the word *inter-national*. Refugee protection is not guaranteed in a global homogenous juridical space but materialises as a patchwork of commitments undertaken by individual states tied together by multilateral treaty agreements (Palan 2003: 87). This becomes clear not only from looking at the global provision of protection but also when examining the fundamental principles upon which human rights and in particular refugee law are premised.

As noted above, to some extent territorial principles permeate human rights law in general. The subjects of human rights protection are normally conceived to be either a state's own nationals or aliens within its territory. The major achievement of the human rights movement was exactly to introduce to international law a set of norms that did not simply concern the *horizontal* relationship between states, but a *vertical* obligation between each state and its subjects and others within its territory (Steiner 2006: 769; Skogly and Gibney 2002: 782). In codifying this vertical relationship as a matter of treaty law, the principle of territoriality is essentially reaffirmed once more. As Matthew Craven points out:

> 'The general problem…is that the international human rights project, far from being one that is essentially antithetical to the inter-state order, is one that relies upon a relatively sharp demarcation between respective realms of power and responsibility. Human rights obligations typically require not merely that states abstain from certain courses of action, but

---

apology (See e.g. Burchill 2008 and Koskenniemi 1989). Whereas the view presented in this thesis poses the conflict in terms of contrasting and competing interests in the service of human rights law, the tension identified above is structural and relates to a conflict between purpose and form.

> also act with 'due diligence' to protect individuals from others, and to progressively fulfil rights in certain circumstances. In order for these obligations to be in any way meaningful, some distinction has to be maintained between those contexts in which a state may reasonably be said to assume those responsibilities and those in which it does not.' (Craven 2004: 255)

This is not to say that human rights obligations are under all circumstances limited to this sphere. As will be evidenced throughout the following chapters and as is shown in a growing body of literature, human rights responsibility may involve an additional *diagonal* relationship between a state and individuals outside its territory (Gibney and Skogly 2009; Coomans and Kamminga 2004), but intra-state protection remains the starting point.

The international legal refugee protection regime is part and parcel of this development. Refugee law may be considered a branch of human rights law, and refugee protection has benefited substantially from the bolstering and patching of claims under specific refugee instruments with obligations derived from general human rights law.[52]

That said, refugee law is distinctive in at least one respect. Whereas the thrust of the human rights movement is geared towards opening up the black box of the state hitherto so viciously guarded by principles of national sovereignty, refugee law is specific in dealing solely with the relationship between the state and the subjects of another state. This relation may still be played out vertically within the host state, yet the fact that it is concerned solely with foreigners and not a state's own subjects means that the refugee regime, in certain ways, differs from the ordinary *modus operandi* of the broader human rights regime.

Much of the human rights movement has been geared towards pushing for increased state responsibility in ensuring rights owed to its citizens. The refugee regime, in contrast, takes the starting point that for some individuals the realisation of fundamental rights within their country of origin will never be possible. While both the human rights and the refugee regime share the same concern to avoid rights violations, the solution offered under the refugee regime is not state reform, but protection in another state (Hathaway 2007). No onus is put on the obligations of countries of origin under international refugee law; rather instruments have been explicit in stating that the granting

[52] See chapter 1.3.

of asylum is not to be considered as an 'unfriendly act' towards countries of origin.[53] Thus where the human rights regime in general is *preventive* and aimed at protection in the country of nationality, the refugee regime is by and large *palliative* and *exilic* (Goodwin-Gill and McAdam 2007: 2-5; Chimni 1999; Okoth-Obbo 1996; Hathaway 1995).

There have been several attempts to overcome this exilic bias. The movement by some scholars to 'reconceive refugee law as human rights' naturally involves an extension of protection obligations to states without a direct territorial affiliation to the refugee; to countries of origin for ending persecution and to more developed states for providing financial support to the countries of first asylum that continue to receive the majority of the world's refugees (Hathaway 1997). Similarly, current policy developments in a number of countries seem to emphasise 'protection in the region' or even 'in-country protection' as alternatives to asylum in, for example, Europe or the United States (Taylor 2006).

To some extent these developments might be readily welcomed. For decades, UNHCR has been trying to get the message across that 'refugees are human rights violations made visible.' A more equitable distribution of the global burden of refugee protection is no doubt needed if greater compliance with refugee protection standards is to be ensured. The increasing popularity of offshoring and outsourcing migration control may, however, also be seen as an attempt to overcome this exilic bias. Yet, in this case, the result is not increased burden sharing but rather burden shifting.

The basic structure of international refugee law could be argued to provide a certain incentive for doing exactly that. This concerns first the core principle that states may not send back, or *refouler*, a refugee to a place in which he or she risks persecution.[54] Normally, this prohibition is engaged as soon as a refugee or asylum-seeker arrives at the frontiers of given state, and in principle requires authorities to undertake a status determination procedure (Fitzpatrick

---

[53] See e.g. the preamble of the UN Declaration on Territorial Asylum. UNGA resolution 2312 (XXII). 14 December 1967.

[54] In effect this also applies to asylum-seekers. Refugee status is declaratory not constitutive, meaning that it is not dependent on formal recognition by a state e.g. through a refugee status determination procedure. As a result, states are bound to respect the principle of *non-refoulement* presumptively until it has been proven that an asylum-seeker is not a refugee and therefore can be rejected or returned without a risk of harm.

1996: 229).[55] In this way, the division of refugee protection responsibilities generally follows territorial borders – whatever country refugees find themself in, that state is responsible for not sending them back to persecution. The *non-refoulement* principle is reactive in the sense that it presupposes some kind of contact between the state and the asylum-seeker. As states engage in offshoring and outsourcing practices however, it may be seen as an attempt to *de facto* or *de jure* prevent this initial encounter that triggers responsibility.

The importance of proximity and territorial delineations becomes even more evident when moving past this fundamental obligation and looking at the wider set of protections guaranteed by the international refugee protection regime. The rights stemming from the 1951 Refugee Convention are not granted *en bloc*, but rather progressively according to the 'level of attachment' a refugee obtains to a given country. Thus, the most sophisticated rights, such as access to welfare, employment and legal aid, are only granted when the refugee is 'lawfully staying' or 'durably resident' in the territory of the host state. Conversely, refugees or asylum-seekers who are not present in a state's territory but *de facto* under its jurisdiction, such as on the high seas or in the territory of a third state, are only entitled to a very basic set of rights centred around the *non-refoulement* obligation.[56]

This incremental approach reflects a seemingly sensible concern of the drafters not to immediately extend the full scope of rights in situations where refugees may arrive spontaneously in large numbers (Hathaway 2005: 157). Yet, at a time when states are moving both migration control and the management of asylum outside their own territorial confines, this notion of progressiveness risks being cut short, as refugees and asylum-seekers may never reach the territory of the acting state.

Lastly, protection is not just protection. Despite the near global applicability of instruments such as the 1951 Refugee Convention, the protection of refugees remains dependent on the individual sovereign states obliged to

---

[55] UNHCR. 2007. Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. 26 January 2007.

[56] The most pertinent rights under the Refugee Convention that are specifically granted without reference to being present or staying at the territory include Art. 33 (*non-refoulement*), Art. 16 (access to courts) and Art. 3 (non-discrimination). Somewhat more specific and limited in their extraterritorial remit Arts. 13 (property), 22 (education) and 20 (rationing) also apply extraterritorially (Hathaway 2005: 160ff).

guarantee it. As such, the actual protection afforded to refugees has been seen to vary considerably depending on the country bestowing it.

This variation can be seen to have at least three dimensions. First, one could ask whether it can be assumed that the rights owed to refugees under the Refugee Convention are actually afforded. This is most evident in the case of states that are not party to the Refugee Convention or other relevant human rights instruments, and therefore under no obligation to guarantee the rights embedded in them.[57] Furthermore, as repeatedly pointed out by the agency responsible for supervising the application of the Refugee Convention, the degree of certainty with which it can be assumed that rights are effected and the obligations owed are adhered to should not be taken for granted, even for states that are a party to the Convention (UNHCR 2006). As the surge in restrictive asylum and immigration policies has taken hold among countries in the Global North, it becomes increasingly difficult to find 'model states'.

Secondly, even though adherence to the formal protection requirements is taken for granted, specific rights may not be implemented or implemented rather differently in different countries. Thus, the scope of rights afforded can be said to vary. Only four (Arts. 3, 4, 16.1 and 33) of the 33 articles specifying the rights of refugees (Arts. 2-34) are exempt from the possibility of reservations. In some cases, reservations have been employed to derogate from the way in which a specific right is granted. Denmark entered a reservation towards Art. 17.1 (the right to labour), as it has been reluctant to extend to refugees similar access to the labour market as enjoyed by 'most favoured nationals of a foreign country', which are those of the Nordic countries, with whom Denmark has entered into special agreements.[58]

This leads to the third and perhaps most important aspect. A great number of rights pertaining to refugees are specifically granted at a level *relative* to how each country treats different categories of people. The freedom of religion guaranteed under Art. 4 of the Refugee Convention is thus not absolute, but only enjoyed in relation to the freedom of religion afforded to nationals of the country in question. This is particularly pertinent to the social rights and services that can be claimed by refugees. The great differences between human rights and living standards in more and less developed countries are likely to

---

[57] Except for obligations that may take the form of *jus cogens*, as some scholars argue is the case for the *non-refoulement* principle. See e.g. Allains 2001. See further chapter 3.6.9.

[58] The wording of the reservation was changed into its current formulation on 25 March 1968. Denmark's reservation is still upheld, yet its practical significance is reduced if not entirely redudated by subsequent EU law granting similar rights to all EU nationals.

make the refugee experience dramatic differences between, for example, Uganda and the United Kingdom.

Together these three dimensions can be termed the 'quality of protection', understood as the *certainty*, *scope* and *level* of rights afforded to refugees. They paint a rather chequered picture of the entitlements actually provided to refugees under the international refugee protection regime. Thus, when states attempt to prevent the triggering of the territorial mechanism that makes them responsible for granting certain rights to asylum-seekers (as in the case of interdiction schemes or carrier sanctions) or subsequently to shift the burden for bestowing these rights onto third countries (as in the case of 'safe third country' rules or plans for 'protection in the region of origin'), it may be relevant to consider not only whether protection will be afforded elsewhere, but also the quality of this protection.

There has been a tendency to overlook or even deny this point when considering the transfer of responsibility for protection as, for example, under the 'safe third country' rule. As the House of Lords of the United Kingdom declared:

> 'the Convention is directed to a very important but very simple and very practical end, preventing the return of applicants to places where they will or may suffer persecution. Legal niceties and refinements should not be allowed to obstruct that purpose. It can never, save in extreme circumstances, be appropriate to compare an applicant's living conditions in different countries if, in each of them, he will be safe from persecution or the risk of it.'[59]

Arguably, however, such an interpretation of the Refugee Convention fails to acknowledge the array of rights normally bestowed upon any refugee having arrived in the territory, even if refugee status is not yet recognised (Hathaway 2005: 332). But where the refugee is encountered extraterritorially only a very limited set of rights under the 1951 Refugee Convention may potentially be claimed. In the process of offshoring and outsourcing the formal responsibility for *non-refoulement* may not only shift but the quality of protection owed is also likely to be substantially altered depending on the territorial state in which migration control is carried out. To the extent that protection

---

[59] *R. v. Secretary of State for the Home Department, ex parte Yogathas*. United Kingdom House of Lords. 29 October 2002, par. 9.

responsibility is deflected or transferred to less developed states, or to states with poor human rights records or undeveloped asylum systems – as has indeed been the case – this may effectively erode the quality of protection afforded under the present refugee regime.

The result is what could be termed 'protection lite', understood as the presence of formal protection, but with a lower degree of certainty about the scope and/or level of rights afforded. Like 'Coke lite' it retains its brand name, but the content has substantially fewer calories. It is important to note that, within a strict or restrictive reading, this may well fall within the operational flexibility made possible by the international legal framework. Indeed, the territorial principle of dividing responsibility and bestowing rights relative to the practices and situation of each particular country enshrined in the 1951 Refugee Convention is the very premise for this development. Whether it is within the spirit of the present regime, however, is another question.

2.4 The commercialisation of sovereignty and the market for migration control

The difficulty in having international refugee law overcome the sovereignty threshold could be argued to stem from the fundamental change in the political logic around which migration control is organised. The territorial structures underpinning the international refugee protection regime not only provide an incentive to extraterritorialise migration control to reduce protection obligations owed. They also make it attractive to engage in cooperation with third states and private actors to shift migration control to the territory of states with perceived lower costs in regard to the quality of refugee protection. Designating migration control as 'extraterritorial' or 'private' in itself becomes an asset. Hence, from the perspective of the corporate actors taking on control responsibilities or the territorial state within whose jurisdiction migration control is enacted, these very traits become marketable.

As political practices, the offshoring and outsourcing of migration control could be seen as the expression of a growing 'commercialisation of sovereignty'. This term was originally coined by international political economists to explain the significance of tax havens and offshore economies. It describes how certain states have strategically deregulated areas of national legislation, often only for particular groups such as foreigners, for example for taxation or even for certain areas of their territory such as airport tax-free

zones, tourist areas or the use of flags of convenience. It involves a bifurcation of the sovereign space into heavily and lightly regulated realms – all in order to attract international business and capital (Palan 2002; 2003). As a result Liberia is, at least on paper, the largest shipping nation in the world, and the Cayman Islands formally the world's fifth-largest economy (Palan 2003: 3).

More generally, and in the wider sense in which this term is used in the present context, the commercialisation of sovereignty may be defined as the strategic disposition or commodification of state territory, rights, prerogatives and functions in the relation between states and between states and private actors. In the context of migration control, commercialisation of sovereignty is possible exactly because of the territorial principles underpinning refugee law in terms of the distribution of responsibility and the extent and quality of protection owed. In the patchwork of national refugee and human rights regimes, shifting the legal geography for migration control may simultaneously reduce the acting state's protection responsibilities and shift legal obligations to third states or private actors whose 'human rights obligations are either lower, less extensive or less precise than those of the destination State' (Noll 2006b: 1).

The result is a growing international and corporate market for migration control. This market may be seen to have two dimensions. The first is the horizontal and primarily related to offshoring. By moving control activities out of their national territory states are engaging in 'jurisdiction shopping' (Palan 2002). Jurisdiction shopping may involve a unilateral decision to move control activities to the high seas, or *res communis*, and thereby a reduction of rights owed under international refugee law compared to the territorial setting. Equally, some states have sought to excise parts of their territory such as airports or exposed shorelines, to create consciously deregulated areas where ordinary procedures and law in regard to asylum-seekers and migrants does not apply. Most clearly, however, jurisdiction shopping may be observed when states shift migration control into the territory or territorial waters of another state willing to make available its sovereign jurisdiction for the specific purpose. In these instances, the responsibility of the acting state is not only reduced, a competing duty bearer is introduced into the equation that may be argued to have the primary responsibility for assessing the protection needs of any asylum claim made within its territory.

Examples where states have engaged in such bartering of sovereign authority for the purpose of migration management are several and growing. As part of the EU coordinated HERA operations preventing irregular migration to the Canary Islands, Spain has thus signed agreements with Senegal and Mauritania,

for example, to intercept and directly return irregular migrants within their territorial waters. After long negotiations, Italy has signed a similar treaty with Libya that allows for joint patrolling in Libyan waters. Outside Europe, the United States has used the Guantanamo base leased from Cuba as a diversion point for asylum-seekers intercepted on the high seas and, in 2001, Australia negotiated an agreement with the island states of Nauru and Papua New Guinea to establish offshore processing centres for intercepted asylum-seekers.

The economic or other costs involved in these arrangements are often hard to gauge as agreements may not be publicly available and arrangements for the purpose of migration control tied to other foreign policy areas such as trade or development aid (Geddes 2009: 33; Gammeltoft-Hansen 2006; Lavenex 2006; Guild 2005; Niessen 2004). In addition to costs associated with setting up a radar station in Tripoli and delivering six naval ships, the joint patrol treaty between Italy and Libya was accompanied by an agreement that Italy would pay 5 billion USD to Libya.[60] Whether such solutions are cost-effective in the strictly economic sense is, furthermore, uncertain. NGOs estimate that over a six-year period the costs of ensuring third state cooperation; of relocating, housing and processing asylum-seekers at offshore locations has cost Australia close to 1 billion AUD, an amount much greater than that of processing the approximately 1,700 asylum-seekers concerned through ordinary territorial procedures.[61] Such calculations are however notoriously speculative and the calculations for other cases, especially where only access for control is negotiated, may of course look different. In any case, offshore schemes are generally driven by political motivations and the estimated deterrent effect than for economic reasons alone (Noll 2003).

Closely related to the market for migration control, but somewhat beyond the scope of this volume, one may equally identify a growing 'market for refugee protection' (Gammeltoft-Hansen 2007). The Australian case thus involves more than merely jurisdiction shopping for the purpose of migration control, but concerns an offshoring of the asylum procedure as a whole. Offshore asylum procedures, or at least screening, have equally been conducted by the United States in Cuba and was put forward, though never realised, as an EU-

---

[60] The funds were framed as a compensation and apology for the damages and misdeeds done during Italy's colonial rule of Libya. John Philips. 'Pact with Libya aims at curbing illegals'. Washington Times. 31 August 2008.

[61] Bem, et al. 2007. A price too high: the cost of Australia's approach to asylum seekers. Carlton: A Just Australia and Oxfam Australia. August 2007.

wide proposal by the United Kingdom in 2003.[62] Lastly, a number of states currently operate so-called 'protected entry procedures', which involve the possibility of submitting asylum applications at the embassies of third countries (Noll et al. 2003).

While offshore asylum procedures have been shown to entail a number of problems both relating to costs and to the legal questions around the closed camp type setting of most proposals (Noll 2006b, 2003), policies that attempt to shift material protection obligations have generally fared better. In recent years policies to realise 'protection in the region' have thus been pursued by both the EU and a number of individual states (Gammeltoft-Hansen 2007; Betts 2006; Peral 2005). The overall aim here is to improve the protection capacity of key transit or neighbouring countries and thus prevent secondary movements and/or designate them as 'safe third countries'. The jurisdiction shopping and market-based logic of these schemes are equally clear: by shifting responsibility for refugees to less developed countries the territorial structure of the refugee regime is utilised to reduce the quality of protection owed and thereby get 'more protection for the Euro' (Noll et al. 2003: 5).[63]

Interestingly, jurisdiction shopping for the purpose of migration control may be indirectly linked to commercialisation of sovereignty for other purposes. Many of the boats carrying irregular migrants setting off from Libya and the West African coast in the attempt to reach Europe are operated by former Ghanaian and Senegalese fishermen, prized by human smugglers for their navigational and seafaring skills (Lucht 2007: 74). Declining fish stocks have made it increasingly difficult for these people to maintain their traditional livelihood. According to critics, this depletion is in itself caused by EU agreements with countries like Senegal and Mauritania to buy access for European trawlers which increasingly operate within the territorial waters and exclusive economic zone of West African States (Lucht 2007: 74). Thus, the EU and its member states first pay to ensure access for their trawlers and then again negotiate access to the same waters for the purpose of curbing irregular migration.

---

[62] See further chapter 3.5.2.

[63] The practice of designating 'safe third countries' may also in itself be conceptualised as part of an international market for refugee protection. While safe third country policies are unilateral instruments, the readmission agreements that permit actual return have been a key topic of foreign policy negotiations between traditional asylum countries and transit states and have involved substantial financial compensation or other trade-offs (Coleman 2009; Cassarino 2007; Gammeltoft-Hansen 2006; Byrne et al. 2002: 19; Lavenex 1999; Landgren 1999).

The second dynamic in the commercialisation of sovereignty relates to the increased commercialisation of otherwise sovereign functions towards non-state entities. In the same way that jurisdiction shopping creates a market for migration control between states, privatisation establishes a vertical market between a state and private contractors, companies and individuals. The trend towards privatisation of otherwise governmental functions is closely linked to neo-liberalism and, more recently, the dominance of new public management theory (Leander 2006: 43; Andrisani et al. 2002). It builds on the idea that 'the job of government is to steer, not row the boat'.[64] Steering is done through 'market-based governance', by designing and awarding contracts, and introducing economic incentives and sanctions (Verkuil 2007: 168-71). As a result government control or influence is often less directly felt and observable.

In the privatisation of migration control one may observe several different modes of governance.[65] These includes first the use of formal contractors supplementing national immigration authorities in carrying out a variety of tasks, from the designing and setting up of border control technology to acting as auxiliaries to or completely replacing national border guards. In the United States Boeing was thus awarded a 2.5 billion USD contract to set up a high-tech surveillance system along the United States-Mexico border, and in Israel private security companies run several of the major checkpoints between Israel and the West Bank. In comparison, the co-optation of airlines and other carriers to perform document checks of their passengers is much less formalised. Instead, carrier sanctions and liability legislation relies on the negative economic logic that airlines will find it more cost-efficient to introduce the required control measures than incur the financial penalties and obligation to return any unauthorised passengers. Lastly, private actors may on their own initiative take on migration control related functions for ideological or economic purposes. This may be seen, for example, in the growing market for commercial visa processing companies or the rise of vigilante 'border guards' such the self-proclaimed Minute Men patrolling the United States-Mexico border.

Beyond reasons of efficiency, the appeal of privatising migration control may equally lie in the distancing of the control functions from the state to avoid accountability. It creates the appearance that migration control is exactly private and thus external to the state itself. If the label 'private' is accepted this

---

[64] E.S. Savas, quoted in Osbourne and Gaebler 1992: 25.

[65] All the following examples are dealt with more extensively in chapter 5.1.

may serve to remove certain legal obligations; as a matter of positive law only states are accountable under international refugee law. The privatisation of migration control may further work to circumvent national or regional legislative constraints. In the European Union, concerns that the abolition of internal border checks would entail a loss of control were mitigated by legislation having carriers check passports or identity cards on all intra-EU routes (Lahav 2003: 93). Today, any passenger travelling through an EU member state is thus likely to have his or her documents checked at least twice, once at check-in and once at the gate – in both instances by private airline officials.[66]

For both offshoring and outsourcing then, the market for migration becomes a question of the choice of forum – between different national jurisdictions and between the public and private. Commercialisation of sovereignty is in this sense facilitated by the international law of cooperation, contract law and market-driven governance techniques (Palan 2003: 86; Lahav 2003: 92). It is, for example, through bilateral agreements between Spain and Senegal that Spanish ships are allowed to carry out migration control inside Senegalese waters.[67] And it is within and through the framework laid down in the 1944 Chicago Convention and associated ICAO standards that governments impose migration control obligations upon airline companies.[68]

At the same time, however, these arrangements are premised on the existence of regulatory differences, either between states or in the distinction between public and private. Only if there is a differential in terms of obligations and constraints incurred does it make sense to shift activities elsewhere. In this sense the commercialisation of sovereignty is equally a governmental technique of spatial and statist constraints that serves to reaffirm the importance of territorial boundaries and the public/private distinction (Palan 2003: 3)

In this sense both jurisdiction shopping and the marketisation of sovereignty involve a disjuncture between actual practices of offshoring and outsourcing on the one hand, and international and national legal frameworks on the other. The commercialisation of sovereignty is made possible exactly because of the difficulty of capturing current political practices related to increased international cooperation and market-based governance within the legal norms

---

[66] See further chapter 5.3.

[67] See chapter 4.3.3.

[68] See chapter 5.3.

of responsibility (Schwarz and Jütersonke 2005: 651; Palan 2002: 153). Paradoxically, it is the traditional norms of national sovereignty and the territorial structure of international refugee law that provide the precondition for the proliferation of international cooperation and private contracts in the area of migration control.

The commercialisation of sovereignty is intimately dependent on this structural difference between law and politics. Thus, the growth in offshoring and outsourcing practices has not been accompanied by a similar extension of legal frameworks to cover and regulate new forms of governance as one might have expected. Instead, outsourcing and offshoring practices rely on and reconstruct old norms of territoriality and the public/private distinction. As a result, the commercialisation of sovereignty, quite unlike Friedmann's original vision, describes a world in which the ever-growing international law of cooperation does not challenge but rather reaffirms principles of national sovereignty and the international law of coexistence (Friedmann 1964).

2.5 Conclusion and wider implications: offshoring and outsourcing as late-modern sovereignty games

This chapter has attempted to probe the deeper legal and political issues at stake in the offshoring and outsourcing of migration control. Why is it so difficult to hold states accountable under international refugee and human rights law when migration control moves outside the territory or is delegated to private actors?

Arguably the encounter between the refugee and the border authorities of a possible asylum state has always been a marker of sovereignty and as such a battleground between core sovereign prerogatives and international treaty obligations. Whilst offshoring and outsourcing may be perceived as strategies to circumvent the latter, they also open up a new field of contestation between universal and more particularist interpretations of international refugee and human rights law itself.

The difficulties in establishing state responsibility in cases of extraterritorial or privatised migration control inevitably point back to core norms pertaining to national sovereignty, more specifically the principle of territoriality and the public/private distinction. A potential is hereby created for the commercialisation of sovereignty and a growing 'market for migration control' where states may trade access to sovereign territory or outsource sovereign functions in order to shift or deconstruct refugee and human rights

obligations. As is particularly evident when examining the territorial structure of the Refugee Convention, international law itself plays a constitutive role in fostering these new practices by continuously emphasising territorial and public/private divisions.

From the core of the commercialisation of sovereignty emerges a problem of matching political realities with legal norms. This is not a particularly new thing. Writing more than six decades ago, Hans Morgenthau noted with regret a similar disjuncture:

> 'At the root of the perplexities which attend the problem of the loss of sovereignty there is the divorce, in contemporary legal and political theory, of the concept of sovereignty from the political reality to which the concept of sovereignty is supposed to give legal expression.' (Morgenthau 1948: 348)

More recently, scholars have pointed out that at the heart of this seeming paradox there is a 'descriptive fallacy' (Walker 2003: 7; Werner and de Wilde 2001: 285). Those who argue that state sovereignty is being eroded as a consequence of immigration flows and difficulties in maintaining border control or other features of globalisation seem to assume that state sovereignty needs to correspond to something 'out there', a real state of world affairs. As Krasner points out, history is full of aberrations and few states have ever fully and simultaneously been able to claim the key features normally associated with sovereignty – internal authority, recognition by other states, autonomy in decision-making and control over transborder flows; indeed striving for one of these may often fundamentally impair another (Krasner 1999: 3, 220). Certain elements of state sovereignty seemingly go untouched despite fundamental changes at the level of political organisation. So far, no international institutions have managed to escape the statist framework and legal base conferred upon them by independent states (Sur 1997: 421; Keohane 1995: 172). Similarly, despite the fashionable references to 'failed states', it is surprising how resilient these entities remain in their ability to claim international legal sovereignty (Sørensen 1999).

Sovereignty needs, rather, to be understood as a *claim* to power circumscribed by law setting out the idea of the legitimate supreme power within a polity (Walker 2003: 6). In this sense, sovereignty works as an 'institutional fact' – an organisational set of principles, the authenticity of which depends on the internalisation of the relevant norms by key actors (MacCormick 2007; Werner

and De Wilde 2001). Such a claim may become more complex to perform in an era of globalisation, yet it continues to be the only claim to exercise legitimate power and remains thereby the essential and existential reference point.

It would be wrong to assume, however, that no link exists between law and politics and that legal frameworks may thus remain completely unaffected by changing political practices. Rather, when political practices related to sovereignty such as offshoring and outsourcing are dislocated from the traditional Bodinian and Vattelian picture of the state, a field of contestation opens where opposing claims to authority and responsibility may be made based on either *de facto* or *de jure* conceptualisations of sovereignty.

The current debate over state responsibility in cases of privatisation and the extraterritorial application of human rights is the strongest testimony to this fact. The majority of human rights lawyers start from practice when arguing, for example, that the exercise of power by the United States at Guantanamo must be accompanied by a similar extension of national and international law to the individuals detained in order to remain legitimate. Similarly, claims that states' own human rights obligations are strictly state-centric and territorially limited may appear somewhat fictitious if those same states are simultaneously engaged in widespread offshoring and outsourcing practices thereby leaving an obvious human rights vacuum. Such a move may end up as 'sovereignty overstretching' where the gap between the normative construction of the state and concomitant boundaries for sovereign responsibility and political realities in the exercise of sovereign powers becomes too wide (Aalberts and Werner 2008).

This has not prevented states from doing exactly that however. In particular, the long-standing debate as to the geographical application of the *non-refoulement* principle as enshrined in the 1951 Refugee Convention is illustrative of the fact that states continue to fall back on territorial principles in delimiting their own human rights obligations.[69] Beyond the blunt refusal of any and all extraterritorial obligations, however, the way in which claims for limited human rights responsibility are made is interestingly not simply by self-reference to the limited sphere of a state's own authority but rather, and more often, by reference to the responsibility of someone else.

This is a key feature of the commercialisation of sovereignty and what has elsewhere been described as 'late-modern sovereignty games' (Gammeltoft-

[69] See chapter 3.

Hansen and Adler-Nissen 2008). In the 'classical' sovereignty game aspiring and established states are concerned with claims to their *own* legitimate authority as sovereigns, be this through territorial control, popular support or international recognition. The commercialisation of sovereignty, by contrast, essentially involves instrumentalising the authority of another entity in order to limit the sovereignty, or at least sovereign responsibility, of the acting state. Put simply, as offshoring and outsourcing practices have moved to the fore, sovereignty games in this regard become a matter of *dis*claiming authority and sovereign responsibility over the polity or acts concerned (cf. Walker 2003: 5).

This is most evident in the case of jurisdiction shopping where the sovereign territory of another state is instrumentalised in order to shift human rights obligations, exploitation rights or fiscal authority to another sovereign and thus duty bearer in the international system. It is only by subsuming offshore fishing to the sovereign exploitation rights and fishing quotas of Ghana that Spain and other European countries can maintain that their national fishing does not exceed internationally set quotas. Similarly, it is by reference to the territorial state as the guarantor of human rights obligations within its national borders that a presumption is created against similar obligations of states carrying out interception schemes in foreign territorial waters.[70]

A disclaiming of authority is equally at work in the context of privatisation. This is seen clearly where delegated tasks are simultaneously carried out extraterritorially, such as in the case of imposing control responsibilities on private airline carriers. Here, privatisation not only works to distance the outsourcing state from the performance of control but also the use of a private interlocutor in the exercise of authority avoids a possible sovereignty conflict with the territorial state and may thereby create an even stronger presumption for any refugee protection obligations to fall back on the territorial state. Disclaiming authority may however also work by reference to entities other than the state. While the public/private distinction has traditionally been used to limit the role of private actors as subjects of international law, more recent claims for direct responsibility of private actors under international law could be seen as an attempt to institutionalise alternative duty bearers that may indirectly distance states from similar responsibility (Clapham 2006; Alston 2005).[71] In situations of both offshoring and outsourcing it thus becomes alluring for states to play the 'sovereignty card'; to emphasise national sovereignty norms and boundaries for

[70] See chapter 4.3.3.

[71] See further chapter 5.4.

responsibility not just on behalf of themselves but perhaps more so on behalf of others.

Consequently the confrontation pertaining to this area is not merely one relating to differing interpretations of refugee and human rights law instruments, but equally a struggle over competing sovereignty claims of authority and responsibility. On the one side stand those stressing the actions of the offshoring and outsourcing states; on the other those pointing to the continued importance of national sovereignty in the determination of legal obligations. The first set of arguments moves from actual assertions of sovereign power to emphasising the correlated sovereign responsibility and the universal application of human rights. The second set of arguments starts from the legal construction of sovereign authority as circumscribed by territorial and statist norms and moves from there to simultaneously limiting sovereign responsibility for extraterritorial acts and non-state entities as well as emphasising the responsibility of the territorial states where control is performed.

In what follows a more traditional legal analysis is offered that attempts to trace the reach of international refugee law, human rights law and general international law in holding states accountable when offshoring and privatising migration control. Yet to understand the difficulties in extending refugee and human rights obligations to all situations involving extraterritorial acts and situations of privatisation, it may be useful to keep in mind not just the inherent interpretative issues and complications brought about by the legal analysis, but also the deeper politico-legal framework in which legal interpretation is rooted.

3. Refugee protection and the reach of the *non-refoulement* principle

The *non-refoulement* principle is often referred to as the 'cornerstone' or 'centrepiece' of the international refugee protection regime. Short of a right to be granted asylum, the guarantee that no refugee will be sent back to a place where he or she will be persecuted constitutes the strongest commitment that the international community of states has been been willing to make to those who are no longer able to avail themselves of the protection of their own governments. At the same time the *non-refoulement* obligation serves as the entry point for all subsequent rights that may be claimed under the 1951 Refugee Convention. Without this, little else matters.

In the initial encounter between the refugee and the authorities of a potential asylum state, the protection against refoulement naturally becomes the first and most important consideration. This chapter examines the geographical reach of the *non-refoulement* principle as a first and crucial step in determining states' international obligations in cases of offshore migration control.

The *non-refoulement* principle as enshrined in Art. 33 of the Refugee Convention reads as follows:

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.'

Various interpreters have argued that the wording and meaning of this article are unambiguous.[72] Nonetheless, intense debate continues to rage over its exact application and scope. This is particularly true with regard to its geographic reach and the extent to which states are bound by this fundamental obligation with regard to refugees encountered extraterritorially. Most restrictively, the *non-refoulement* principle has been interpreted as applying solely within the territory of an acting state. While admitting that this is not a very satisfactory solution to the problem of asylum, Nehemiah Robinson concludes in his commentary that:

> 'Art. 33 concerns refugees who have gained entry into the territory of a Contracting State, legally or illegally, but not to refugees who ask entrance into this territory…In other words, if a refugee has succeeded in eluding the frontier guards, he is safe; if he has not, it is his hard luck.' (Robinson 1953: 163)

This interpretation has drawn support from other scholars, arguing that '[e]ven though '*refoulement*' may mean 'non-admittance at the frontier', it is quite clear that the prohibition against '*refoulement*' in Art. 33 of the 1951 Convention does not cover this aspect of the term '*refoulement*'' (Grahl-Madsen 1963). Several states have taken the same view when deciding to close their borders[73] and the United States Supreme Court took a similar position in a case involving United States interdiction of Haitian boat refugees (Goodwin-Gill and McAdam 2007: 218ff).[74]

A slightly more embracing view would hold that the geographical scope must at least be extended to situations arising at the borders. The use of the phrase 'in any manner whatsoever' lends strong support to the interpretation that Art. 33.1 also applies to situations involving non-admittance of refugees presenting themselves at the frontier of an asylum state (Weis 1995: 341). Furthermore,

---

[72] See e.g. UNHCR. 2007. 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, par 24, and the dissenting opinion by Justice Blackmun in *Sale, Acting Cmmr, Immigration and Naturalization Service v. Haitian Center Council.* United States Supreme Court. 113 S.Ct. 2549, 509 US 155. 21 June 1993. See further *inter alia* Noll 2005: 553f.

[73] See further section 3.2.5.

[74] *Sale, Acting Cmmr, Immigration and Naturalization Service v. Haitian Center Council.* United States Supreme Court. 113 S.Ct. 2549, 509 US 155. 21 June 1993.

both scholars and international bodies have argued that it would seem illogical that the refugee who succeeds in crossing the border illegally would enjoy greater protection than the refugee who lawfully presents herself to the authorities at the border (Sinha 1971: 111).[75]

Others again have argued that in respect to the *refoulement* prohibition, states are responsible for conduct in relation to any refugee subject to or within their jurisdiction. While the notion of jurisdiction primarily refers to a state's territory, it does also cover situations in which states exercise effective control beyond their borders, such as on the high seas or within foreign territory. This position is supported by reference to the broader incorporation of the *non-refoulement* principle in universal and regional human rights law;[76] instruments that clearly oblige states even where jurisdiction is established extraterritorially (Hathaway 2005: 160ff; Plender and Mole 1999: 86).

Lastly, is has been argued that the question of *from* where *refoulement* occurs is wholly immaterial. Art. 33.1 is only concerned with *to* where a refugee might be returned. The principle of *non-refoulement* as enshrined in the Refugee Convention thus in principle enjoys *universal* application wherever a state may act.[77] Art. 33.1 contains no explicit restrictions as to the lawful presence or residence of the refugee within the territory of the state in question but

---

[75] See in particular: Council of Europe Parliamentary Assembly. 1965. Report on the Granting of the Right of Asylum to European Refugees. Doc. 1986. 29 September 1965, p.7.

[76] See section 3.6 below.

[77] An obvious exception to this notion of universality, however, would seem to be the country of origin, as a persecuted person who has not yet left his or her country is not a refugee in the meaning of Art. 1 of the Refugee Convention (Goodwin-Gill and McAdam 2007: 244). This point has also been expressed in UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status:

'It is a general requirement for refugee status that an applicant who has a nationality be outside the country of his nationality. There are no exceptions to this rule. International protection cannot come into play as long as a person is within the territorial jurisdiction of his home country.'

UNHCR. 1992. Handbook on Procedures and Criteria for Determining Refugee Status. HCR/IP/4/Eng/Rev.1 ed. Geneva. Original edition, 1979, par 88.

Nonetheless, some scholars have suggested that as a general principle of international law, Art. 33 may also apply in circumstances in which the refugee or asylum seeker is within their country of origin yet under the protection of a third state (Lauterpacht and Bethlehem 2003: 122). For a contrary view see Noll 2005: 550ff. See further section 3.6.8 below.

explicitly prohibits *refoulement* in 'any manner whatsoever' (Goodwin-Gill and McAdam 2007: 246). A similar argument has been made in an Opinion prepared for UNHCR arguing that, as a wider principle of customary international law, the prohibition against *refoulement* binds all states and will engage their responsibility wherever conduct takes place (Lauterpacht and Bethlehem 2003: 149).

Just from this brief sketch it should be clear that there is far from a consensus on the applicability *ratione loci* of Art. 33 of the Refugee Convention. Through a more systematic interpretative approach this chapter seeks to dispel the present ambiguity. Yet, in reviewing the arguments made in favour of the different interpretative stances, the inherent potential of contesting the application of core norms when carrying out offshore migration control also comes to the fore.

3.1 The historical context of Article 33

Noting that the geographical scope of application attached to Art. 33 of the Refugee Convention does at least appear ambiguous,[78] the following section will be dedicated to a brief analysis of its drafting history. This is not to give this source pre-eminence; as is quite evident from the Vienna Convention the *travaux préparatoires* are to be considered only a supplementary means of interpretation.[79] In this particular case, however, the discussions that took place during the drafting of the Refugee Convention serve as a particularly apt starting point for understanding the continued disagreement as to the exact applicability *ratione loci* of the *non-refoulement* principle and may thus provide a frame for the subsequent analysis.

---

[78] Beyond the scholarly disagreements staked out above, this assessment also finds support in *European Roma Rights Centre and others v. Immigration Officer at Prague Airport and another*. House of Lords. UKHL 55. 9 December 2004, par. 17.

[79] Recollecting the rules of interpretation as set out in Art. 32 of the Vienna Convention on the Law of Treaties:

'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

a. leaves the meaning ambiguous or obscure, or

b. leads to a result which is manifestly absurd or unreasonable.'

3.1.1 The Ad Hoc Committee

The Refugee Convention was first discussed by an Ad Hoc Committee[80] consisting of thirteen government representatives, which convened in two sessions in January and August 1950 to produce a draft text. The UN General Assembly decided not to deal with the substance of the draft but rather to convene a Conference of Plenipotentiaries in Geneva to ensure the widest possible debate, also by non-members of the UN (Robinson 1953: 5). The conference took place in July 1951 with 26 states represented and two observing. On the 25th of July the final text was adopted by 24 votes to none.

From the outset there was a realisation that the *non-refoulement* principle was of key importance to ensure a functional instrument and that it might place considerable restrictions on state sovereignty. In both fora the provisions leading to Art. 33 of the final text were thus discussed at length. In the first draft prepared by the Secretariat for the Ad Hoc Committee, *non-refoulement* appeared in Art. 24.3:

> 'Each of the Contracting Parties undertakes in any case not to turn back refugees to the frontiers of their country or origin, or to territories where their life or freedom would be threatened on account of their race, religion, nationality or political opinions.'

In addition, the draft Art. 24.1 clearly referred to both 'expulsions' and 'non-admittance at the frontier (*refoulement*)' as inspired by Art. 3 of the 1933 Convention Relating to the International Status of Refugees.[81] The inclusion of non-admittance at the border was supported by the representative of the United States, Louis Henkin, who argued that even though an actual right to asylum had been deleted from the draft, it:

> 'did not, however, follow that the convention would not apply to persons fleeing from persecution who asked to enter the territory of the

[80] United Nations General Assembly (1949). Resolution 248 (IX)(B).
[81] Doc. E/AC.32/2. All references to drafting documents can be found in Takkenberg Christopher Tahbaz. 1990. *The Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees*. Amsterdam: Dutch Refugee Council.

> contracting parties. Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even of expelling him after he has been admitted to residence in the territory, the problem was more or less the same. Whatever the case might be, whether the refugee was in a regular position, he must not be turned back to a country where his life and freedom could be threatened.'[82]

This interpretation received support from both the French and Israeli representatives.[83] The French representative emphasised the absolute nature of the *refoulement* prohibition and argued that 'any possibility, even in exceptional circumstances, of a genuine refugee being returned to his country of origin would not only be inhuman, but was contrary to the very purpose of the Convention.'[84] While the direct reference to non-admittance at the border was taken out in subsequent drafts,[85] it was emphasised that the French term '*refoulement*' was thought to cover both situations of expulsions or return from the territory and non-admittance at the frontier.[86]

Support for a wider geographic scope can also be found indirectly in the more general discussions of Art. 33. A matter of considerable debate concerned whether to include exceptions in cases of national security or where refugees invited public disorder, and it was argued that an unrestrained *non-refoulement* obligation might require states to admit refugees whom they considered a threat (Robinson 1953: 164-5). Both the Belgian and United States representatives argued against such provisions, noting that even when a country was unwilling to admit a refugee on national security grounds, 'it would always be possible to direct him to territories where his life or his freedom would not be threatened.'[87]

This reasoning was further advanced in the comments submitted in the report of the Ad Hoc Committee after the first session, noting that '[t]his article does

---

[82] Doc. E/AC.32/SR.20, par. 54.

[83] Doc. E/AC.32/SR.20, par. 60, 63-64.

[84] Doc. E/AC.32/SR.40, par. 33.

[85] Doc. E/1850.

[86] Doc. E/AC.32/SR.21, par 13-26. Similarly, 'turn back' was replaced by 'return', yet this was seemingly only intended as a matter of style. Doc. E/AC.32/SR.22, par. 110.

[87] Doc. E/AC.32/SR.20, par. 14.

not imply that a refugee must in all cases be admitted to the country where he seeks entry.'[88] While not explicitly mentioned in the discussions, it is worth pointing out that if 'admitted' is to be understood as physically allowed access to the territory, such a situation could only occur *at* or *outside* the territorial borders of the state in question. Logically Art. 33.1 could thus not have been assumed only to apply for those who have already entered the territory.

Instrumental in the discussions of the Ad Hoc Committee was to establish a broad principle prohibiting *refoulement* or return 'in any manner whatsoever' and to 'any territory where his life or freedom would thereby be endangered' (Weis 1995: 328). To the extent that restrictions to the *ratione loci* of this prohibition were proposed these were answered in the negative, supporting an interpretation that would at least embrace non-admission at the frontier and, most likely, an even wider application.

3.1.2 The Conference of Plenipotentiaries

At the Conference of Plenipotentiaries in July the following year developments, however, took a different turn. The Conference were concerned that the Ad Hoc Committee had set too absolute a standard in regard to the *non-refoulement* clause and argued that the international situation had substantially changed since the initial work of the committee (Hathaway 2005: 356; Robinson 1953: 160).[89]

During the first meeting at which the then Art. 28 was discussed, Mr. Zutter, the Swiss representative, questioned the exact meaning assigned to the operational words used in the draft text. In his opinion the word '*refoulement*' in particular seemed to leave room for various interpretations:

> 'In the Swiss Government's view, the term 'expulsion' applied to a refugee who had already been admitted to the territory of a country. The term '*refoulement*', on the other hand, had a vaguer meaning; it could not,

[88] E/1618. Comments to Art. 28 [previously Art. 24] in the Report of the First Ad Hoc Committee on Statelessness and Related Problems (Takkenberg and Tahbaz 1990: 421).

[89] Notably, the Article proposed by the Ad Hoc Committee only contained the first paragraph cited above. It was the Conference which, with reference to national security, inserted paragraph 33.2 limiting the *ratione personae* of the *non-refoulement* obligation for refugees considered a 'danger to the security of the country' and those having been convicted of a 'particularly serious crime'.

> however, be applied to a refugee who had not yet entered the territory of a country. The word 'return' used in the English text, gave that idea exactly."[90]

As reason for this interpretation, the Swiss representative noted that states could not be compelled to allow large groups of persons claiming refugee status to cross its frontiers.[91] He further asked the conference that this point be made entirely clear and that Switzerland could only support the adoption of the text on the above interpretation.

The Swiss concern was recognised by a number of countries that all supported the Swiss interpretation.[92] At the last meeting, the Dutch representative, Baron van Boetzelaer, recalled the Swiss remarks from the first reading according to which 'Article 28 would not have involved any obligations in the possible case of mass migration across frontiers or of attempted mass migration' and that such an interpretation of the scope of the now Art. 33 was of 'very great importance' to the Dutch government. In order to dispel of any ambiguity he thus wished to have it officially noted that the conference was in agreement with such an interpretation. Since there were no objections, the President, Knud Larsen, ruled that this reading could be placed on the record.[93]

While this understanding was argued entirely on concerns regarding large scale migration, the possibility of extraterritorial applicability was seemingly sacrificed entirely for state fears of mass influx. At least this is the interpretation of some of the early commentators. It is on the basis of the discussions at the conference that Robinson concludes that only the refugee who has succeeded in eluding the border guard is safe (Robinson 1953: 163). According to Grahl-Madsen this means that a contracting state that manages to fence off its entire territory 'may refuse admission to any corner of its territory without breaking its obligations under Article 33' (Grahl-Madsen 1963).

---

[90] Doc. A/CONF.2/SR.16, p. 6.

[91] Doc. A/CONF.2/SR.16, p. 6.

[92] Notably France, Italy, Sweden, Netherlands and the Federal Republic of Germany. See Doc. A/CONF.2/SR.16, p. 6ff.

[93] Doc. A/CONF.2/SR.35, p. 21.

3.1.3 Between two readings

Two conflicting bases for establishing the applicability *ratione loci* of Art. 33 of the Refugee Convention clearly emerge when going through the drafting history. The Ad Hoc Committee, placing its emphasis on *to* where, rather than *from* where return is conducted, clearly support a more universalist interpretation. Affirming the centrality of the *non-refoulement* provision, this argument could easily be extended to make Art. 33 cover situations taking place beyond the borders of an acting state as well. On the other hand, the conference appears to have unequivocally rejected any extra- and ad-territorial application and instead assumed a strictly territorial reading of obligations under this provision.

How this conflict should be resolved depends on the methodological approach pursued. Within the limited remit of the *travaux préparatoires*, solving this conflict largely comes down to methodological preference. Proponents of a consensual approach are likely to lend authority to the territorialist interpretation. The question of geographic scope was raised repeatedly at the conference and the rejection of extraterritorial and border applicability fully argued and affirmed. The fact that the draft from the Ad Hoc Committee was reverted to a Conference of Plenipotentiaries, rather than dealt with during a UN General Assembly could be taken to further support the argument that more substantial revisions were envisioned to supersede the initial draft and thereby the argumentation provided by the Ad Hoc Committee. On the other hand, the argumentation provided by the Ad Hoc Committee clearly speaks to the purpose and object of Art. 33, pointing out that its importance demands a broad scope. Further, while the restrictive interpretation proposed by the Swiss delegate was placed on the record with no objections, the actual existence of a consensus could be questioned, and no textual amendments were made to the draft text to cement this interpretation.[94] Lastly, the restrictive interpretation put forward by the Swiss and Dutch delegates concerned only a very specific set of circumstances, namely situations of mass

---

[94] While the remarks were placed 'on the record', they were not 'agreed to' or 'adopted' as one could have expected of something which, given the broader interpretation suggested by the committee, would effectively constitute an amendment to the scope of the Article Dissenting opinion by Justice Blackmun in *Sale, Acting Cmmr, Immigration and Naturalization Service v. Haitian Center Council*. United States Supreme Court. 113 S.Ct. 2549, 509 US 155. 21 June 1993.

Whether the particular interpretation tabled at the conference did constitute an actual amendment is of course equally debatable.

influx. This need not, and may never have intended to, entail a general restriction of the applicability *ratione loci* of Art. 33.[95]

There has been a tendency among both scholars and practitioners to cite *either* the Ad Hoc Committee *or* the Conference of Plenipotentiaries.[96] While this may serve to solidify particular positions, needless to say it is not furthering genuine legal scholarship. In the above, it has been attempted to provide a balanced account, which is crucial if we want to understand how this duality between the universal and the territorial, between international and national conceptualisations of sovereign human rights responsibilities continues to have a bearing on the interpretation of the geographical scope of the *non-refoulement* principle.

One should be careful of assigning too much importance to the drafting history in the interpretation of human rights treaties.[97] When the historical remarks and interpretations nonetheless serve as an introduction to the present interpretative quest it is because the drafting history clearly illustrates the competing understandings and interpretations of core refugee law principles. On the one hand, a universal interpretation was proposed that clearly builds on general human rights principles and the ideological promise

---

[95] Indeed the possibility of a more conditional or limited responsibility in cases of mass influx has been partly recognised in subsequent interpretation. See e.g. UNHCR Executive Committee Conclusion No. 100. 2004; and Conclusion No. 22 (XXXII) 1981; and UNHCR. 2001. Protection of Refugees in Mass Influx Situations: Overall Protection Framework. UN Doc. EC/GC/01/4. 19 February 2001. For an overview of the debate for and against a derogation or limits to the *non-refoulement* principle and other rights under the Refugee Convention in cases of mass influx see Goodwin-Gill and McAdam 2007: 335-45; Hathaway 2005: 355-63; Durieux and McAdam 2004; Barutciski and Suhrke 2001.

[96] See e.g. UNHCR. 2007. 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; and *Sale, Acting Cmmr, Immigration and Naturalization Service v. Haitian Center Council*. United States Supreme Court. 113 S.Ct. 2549, 509 US 155. 21 June 1993.

[97] The use and place of the preparatory works in the interpretation of international refugee law has been the subject of some debate. In his dissenting opinion to the *Sale* case, Justice Blackmun argued that '[r]eliance on a treaty's negotiating history (travaux préparatoires) is a disfavoured alternative of last resort'. *Sale, Acting Cmmr, Immigration and Naturalization Service v. Haitian Center Council*. United States Supreme Court. 113 S.Ct. 2549, 509 US 155. 21 June 1993. See also UNHCR. 1994. Brief Amicus Curiae: The Haitian Interdiction Case 1993. *International Journal of Refugee Law* 6 (1):85-102, p. 99. On the other hand, James Hathaway had argued that the preparatory work is essential in determining the object and purpose of treaty text (Hathaway 2005: 56ff).

that human rights may serve to constrain state power wherever it is exercised. On the other hand, at least a number of states seemed adamant about applying a territorial reading, referring back to principles of national sovereignty and strict Westphalian boundaries for state responsibility. It is in these discussions that the seeds were planted of the legal disputes that continue to occupy refugee lawyers more than half a century later.

Moving beyond the drafting history, we shall see how the above arguments feed into a more doctrinal legal inquiry into the scope *ratione loci* of the *non-refoulement* obligation. Notably, the discussions on application during the conference did not question the deliberations as to the object and purpose of the *non-refoulement* clause made by the Ad Hoc Committee. Rather, the argument made by the Swiss delegate concerned the linguistic interpretation of the article, thus at the very outset sowing doubt as to what exactly is the ordinary meaning of the words 'return' and '*refoulement*'. Following the traditional order of treaty interpretation the following section sets out by considering the language and meaning of the text. Secondly, arguments as to the object and purpose will be presented. Thirdly, subsequent developments in both state practice and soft law will be considered, and lastly the wider normative context of the *non-refoulement* principle in international law is discussed.

3.2 Language

3.2.1 'in any manner whatsoever'

What does the language of Art. 33 tell us about the territorial scope of the *non-refoulement* principle? As noted above, on the more general level some scholars have argued that the particular embracing language of this article, prohibiting *non-refoulement* 'in any manner whatsoever' would suggest that it applies, regardless of whether actions occur inside the territory of an acting state, at the border or even beyond the national territory (Goodwin-Gill and McAdam 2007: 246; Legomsky 2006: 687; Hathaway 2005: 338; Weis 1989: 341).

This argument has a strong appeal on an immediate reading. Yet a closer analysis indicates that this is at the least unlikely to have been the intended meaning. Going through the various drafts of the convention and surrounding discussion it becomes clear that the expression 'in any manner whatsoever' was not included out of any consideration as to geographical application. Rather, it was inserted to ensure that Art. 33 covered any thinkable instance of *refoulement,* even when not submitted to a formal procedure. The use of 'in any

manner whatsoever' thus prohibits all different acts and forms of return, expulsion or extradition, whether by judicial or administrative authorities (Lauterpacht and Bethlehem 2003: 122; Robinson 1953: 162).[98]

3.2.2 Level of attachment

Secondly, an argument has been made based upon the negative inference that since nothing in the wording explicitly restricts the obligation to actions occurring within the territory or at the border, a broader scope *ratione loci* is called for. This reflects the overall structure of the treaty. The wording of the majority of provisions in the Refugee Convention specifically makes rights conditional ocondition rights on some kind of territorial affinity (e.g. being physically present, lawfully present, or lawfully staying). Art. 33 is, however, one among a small number of rights to which no such conditions adhere and is thus applicable wherever a state exercises jurisdiction (Hathaway 2005: 160ff; Goodwin-Gill and McAdam 2007: 246).[99]

This argument provides an important premise for claiming a wider scope for Art. 33. Yet, it remains questionable whether a wider application can be inferred from this alone. In other words, the fact that no territorial conditions are mentioned in Art. 33(1) does not in itself call for a wider geographical scope of application but only defers argumentation to subsequent stages of interpretation.

3.2.3 Article 33.2

Conversely, the United States Supreme Court in the *Sale* case made an argument that the language of Art. 33.2 does in fact imply that a physical presence in the territory is necessary to engage the *non-refoulement* provision.[100]

---

[98] Draft E/AC.32/L.25 introduced 'in any way' to refer to the 'various methods by which refugees could be expelled, refused admittance or removed.' While 'refused admittance' is mentioned, there is no reference to whether this includes border situations. See further Report of the First Ad Hoc Committee on Statelessness and Related Problems, Comments to Art. 28 (Takkenberg and Tahbaz 1990).

[99] UNHCR. 1994. Brief Amicus Curiae: The Haitian Interdiction Case 1993. *International Journal of Refugee Law* 6 (1):85-102, p. 86. See further chapter 2.3.

[100] While the Court held that the Refugee Convention and the 1967 Protocol was non-self-executing, thereby moving the main issue to the interpretation of the United States'

Noting that this article exempts states from the *non-refoulement* obligation for refugees who constitute a 'danger to the security of a *country in which he is*' (emphasis added), the court goes on to argue that since a refugee on the High Seas is in no country at all, if the *non-refoulement* obligation was to apply there, it would create an anomaly where 'dangerous aliens on the high seas would be entitled to the benefits of 33.1 while those residing in the country that sought to expel them would not.'[101] Based on this reasoning the court finds it 'more reasonable to assume that the coverage of 33.2 was limited to those already in the country because it was understood that 33.1 obligated the signatory state only with respect to aliens within its own territory.'[102]

While Art. 33.2 clearly represents a concession to national sovereignty by maintaining the right of states to expel refugees already on their territory causing security concerns (Legomsky 2006: 689), the argument that this exception entails a territorial limitation of the *non-refoulement* obligation as such seems flawed in its underlying logic. Whereas Art. 33.2 is clearly an exception to Art. 33.1, referring to its scope *ratione loci, materiae* and *personae* and in itself setting out a subgroup of refugees for whom the protection against *refoulement* is waived, it does not follow that Art. 33.1 is conversely limited by the scope of Art. 33.2. Justice Blackmun succinctly pointed this out in his dissenting opinion:

> 'One wonders what the majority would make of an exception that removed from the Article's protection all refugees who 'constitute a danger to their families'. By the majority's logic, the inclusion of such an exception presumably would render Art. 33.1 applicable only to refugees with families.'[103]

---

implementing legislation, it did recognise that this statute was passed specifically to conform United States domestic legislation with the obligations spelled out in the Convention and thus reserved some effort for deliberations over the interpretation of the scope *ratione loci* of Art. 33. See further Legomsky 2006: 687ff.

[101] *Sale, Acting Cmmr, Immigration and Naturalization Service v. Haitian Center Council.* United States Supreme Court. 113 S.Ct. 2549, 509 US 155. 21 June 1993, p. 7.

[102] *Sale, Acting Cmmr, Immigration and Naturalization Service v. Haitian Center Council.* United States Supreme Court. 113 S.Ct. 2549, 509 US 155. 21 June 1993, p. 7.

[103] Dissenting opinion by Justice Blackmun in *Sale*, p. 3.

Rather, one could argue that Art. 33.2 may have been restricted to those present at the territory either because situations involving extraterritorial interception were not foreseen (Legomsky 2006: 689) and/or because it would be natural to assume that a refugee would only pose a real danger to the security of a country once he or she had entered its territory (Hathaway 2005: 336).[104]

3.2.4 '*refouler*'

Next, it has been pointed out that the word '*refouler*', as known only in French and Belgian law, clearly also covers non-admission to the territory (Hathaway 2005: 336f).[105] As both the French and the English texts are authoritative, the Council of Europe Parliamentary Assembly has thus noted that '*ne pas refouler*' without further ado can be interpreted as covering non-admission to the territory.[106]. Further, it also appears from the drafting history that the Style Committee replaced the word 'turn back' with 'return' as the latter was considered the nearest equivalent to the French '*refouler*' around which the early discussions evolved (Robinson 1953: 162). To clear any doubts as to whether 'return' had a more restrictive meaning, the French term was even parenthetically included in the english text (Robinson 1953: 162).

Nonetheless, it has been argued that even though '*refouler*' may apply to non-admittance and the border in ordinary usage, '*refouler*' was given a special meaning by the parties to the Refugee Convention regardless of its ordinary usage consistent with Art. 31.4 of the Vienna Convention.[107] As support for this argument, reference is made to the drafting history. If a genuine

---

[104] As also noted by Justice Blackmun, 'the tautological observation that only a refugee already in a country can pose a danger to the security of the country 'in which he is' proves nothing.' (p.3). Further, even in the conceived instance where a refugee not in the country could pose a security threat, presumably the benefit of the exception, allowing *refoulement*, would make little difference.

[105] UNHCR. 1994. Brief Amicus Curiae: The Haitian Interdiction Case 1993. *International Journal of Refugee Law* 6 (1):85-102, p. 90; As noted above this was also recognised during the drafting discussions. See Doc. E/AC.32/SR.21, par 13-26.

[106]Council of Europe Parliamentary Assembly. 1965. Report on the Granting of the Right of Asylum to European Refugees. Doc. 1986. 29 September 1965, p 6.

[107] For the view that a special meaning was attached to the terms 'return' and '*refouler*' see *R. (ex parte European Roma Rights Centre and others) v. Immigration Officer at Prague Airport and another*. United Kingdom House of Lords. UKHL 55. 9 December 2004, par. 68.

consensus was established based on the remarks of the Swiss and Dutch delegates regarding a special meaning of the term 'return' as suggested by commentators such as Robinson and Grahl-Madsen, no enquiry needs to be made into its usage elsewhere.

In her treatment of this question, however, Davy refuses this on three grounds. First, deducing a 'special meaning' exclusively from the *travaux préparatoires* would effectively make these a primary source of interpretation, which would be inconsistent with the hierarchical structure of interpretation set out in the Vienna Convention where the preparatory work is only relied upon as a secondary, and clarifying, source. Secondly, it is not clear from the record and minutes that a decision was taken on a 'special meaning' during the conference. As discussed above, the remarks by the Swiss and Dutch delegates may have sowed doubt as to the meaning of these terms, yet there is a stretch from that to arguing that they constitute a new consensus on a special meaning. Lastly, in light of the high number of states who have signed the convention, also post 1951, establishing a 'special meaning' would require more than remarks from a few states discussing the issue at the Conference of Plenipotentiaries (Davy 1996: 106-7).

3.2.5 'to the frontiers of territories'

Lastly, there is the argument mentioned at the outset of this chapter that the question of *from* where a refugee is returned is irrelevant on a closer reading of the terms employed. Art. 33 sets out two proscriptions, one regarding *expulsion* and one regarding *return*. As indicated by the use of 'or' between 'expel' and 'return' in the article, these two prohibitions should be read disjunctively. The first, *expulsion*, clearly refers solely to actions removing a refugee *from* a contracting state.[108] The second prohibition, however, bans actions returning refugees *to* the frontiers of any territories where their life or freedom would be threatened.[109] As noted by Justice Blackmun, a dictionary reading of 'return' would have it mean 'to bring, send or put (a person or thing) back to or in a former position'.[110] One could reasonably argue that any action undertaken by

---

[108] The prohibition against expulsion of refugees lawfully present is further set out in Art. 32 of the Convention.

[109] UNHCR. 1994. Brief Amicus Curiae: The Haitian Interdiction Case 1993. *International Journal of Refugee Law* 6 (1):85-102, p. 87.

[110] Drawn from Webster's Third New International Dictionary 1941 (1986). Cited in Justice Blackmun in *Sale, Acting Cmmr, Immigration and Naturalization Service v. Haitian*

a state to intercept a refugee after commencing flight would be included in this reading if it would result in a redirection of the refugee to a risk of persecution.[111]

3.2.6 Summary: arguments from the language of Article 33

These last two points are probably the strongest arguments drawn from the text itself for a wider scope of Art. 33. To the extent that these readings can be established as the ordinary meaning, one needs not proceed further in the inquiry. Yet, on both accounts this interpretation has been contested. Although scholars like Nehemiah Robinson and Atle Grahl-Madsen have acknowledged the reading of '*refouler*' as including actions at the frontiers, both still defer to the territorial interpretation based on the drafting history. From a methodological perspective the validity of relying so heavily on the subjective element of drafting intent is questionable. Under a strict application of the 1969 Vienna Convention, an objective interpretation of the wording will always take precedence (Linderfalk 2001: 261-64; Noll 2000: 430; Davy 1996: 105).[112]

Center Council. United States Supreme Court. 113 S.Ct. 2549, 509 US 155. 21 June 1993, p. 2.

[111] A variation of this argument was presented in the analysis of Art. 33 submitted to UNHCR's Global Consultations by Lauterpacht and Bethlehem:

'[I]t must be noted that the word used is 'territories' as opposed to 'countries' or 'States'. The implication of this is that the legal status of the place *to* which the individual may be sent is not material. The relevant issue will be whether it is a place where the person concerned will be at risk. This also has wider significance as it suggests that the principle of *non-refoulement* will apply also in circumstances in which the refugee or asylum seeker is within their country of origin but is nevertheless under the protection of another Contracting State.' (Lauterpacht and Bethlehem 2003: 122)

This argument faces at least one major difficulty however, as it is hard to see how the conclusion can be reconciled with the requirement of Art. 1A(2) limiting the *ratione personae* of the Convention to persons having fled their country of origin (Goodwin-Gill and McAdam 2007: 250f). Beyond this, the argument would appear to fall back on the same intermediate premise as set out above, namely that it is not a question of *from* where, but *to* where a person is returned.

[112] Of course neither Robinson nor Grahl-Madsen would have known of this instrument at the time of their writing, which may account for their stronger reliance on the preparatory works. On the other hand, the Vienna Convention is usually regarded as a codification of pre-existing customary international law.

It may thus be concluded that 'the plain and ordinary meaning' of *refouler* supports an interpretation extending application of the *non-refoulement* requirement to situations occurring *at* the border. This, however, does not in itself aid in extending the scope *ratione loci* to include situations where migration control is exercised extraterritorially. The majority ruling in the *Sale* case thus acknowledged the point that the inclusion of '*refouler*' in the english text would indicate that 'return' should be understood as a 'defensive act of resistance or exclusion at a border', yet proceeds from there to deny that the Convention applies to actions on the high seas.[113] While an examination of the language thus extends the scope *ratione loci* of Art. 33 of the Refugee Convention to situations at the border, it does not bring clarity regarding any application beyond the physical frontiers.

3.3 Purpose and object

Beyond the strict interpretation of treaty language, any legal provision would have to be interpreted in the light of the purpose to which it is directed and the concerns it seeks to address. Looking for the *telos* of Art. 33 of the Refugee Convention, several substantial arguments have emerged in favour of a wider geographical application of the article. Nonetheless, the rift between territorialist and universalist interpretations continues to be evident in the debate over the purpose and object of Art. 33; not just in the relative importance assigned to this source of interpretation, but also in the orientation chosen. The contours emerge of a conflict partly reflecting the disagreement evident during the drafting history, but also pointing to a broader confrontation between those emphasising general principles of human rights and universality and those who see human rights law as expressing a

---

[113] *Sale, Acting Cmmr, Immigration and Naturalization Service v. Haitian Center Council*. United States Supreme Court. 113 S.Ct. 2549, 509 US 155. 21 June 1993, p. 7f.

To the present author, however, the reasoning between these two statements does not appear entirely clear. The argument, best summarised, starts from the assertion that if '*refouler*' is limited to instances occurring behind or at the frontiers, its parenthetical insertion following 'return' would indicate a narrower meaning of this term as well. Secondly, based on previous litigation, border situations are interpreted as 'on the threshold of initial entry', which again is taken to refer to a refugee physically present, yet not resident. For a critique of this reasoning see UNHCR. 1994. Brief Amicus Curiae: The Haitian Interdiction Case 1993. *International Journal of Refugee Law* 6 (1):85-102, 89f.

compromise between such aspirations and the *Realpolitik* of what states eventually are willing to sign up for.

3.3.1 Towards a wider interpretation

For several scholars the natural starting point to search for evidence of the essential object of Art. 33 is again the drafting history of the treaty (Hathaway 2005: 56; Lauterpacht 1949: 83). In particular, the initial and substantial discussions of the Ad Hoc Committee are often drawn upon in favour of a wider interpretation. Recalling the remark by the American representative, Louis Henkin:

> 'Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even of expelling him after he has been admitted to residence in the territory, the problem was more or less the same. Whatever the case might be, whether the refugee was in a regular position, he must not be turned back to a country where his life and freedom could be threatened.' [114]

This point essentially confirms the textual reading above arguing that the purpose of Art. 33 is to prevent a certain consequence, namely return *to* rather than *from* a specific territory. Consequently, limiting the geographical application to the territory would be 'inconsistent with the purpose, and is contrary to the spirit, of the UN Refugee Convention' (UNHCR 1995: 204; see further Gornig 1987: 21).

While Henkin's reasoning was addressed to border situations, it seems clear that a purposive interpretation could extend this reasoning to cover extraterritorial application as well. Henkin himself affirmed this in connection with the *Sale* case:

> 'It is incredible that states that had agreed not to force any human being back into the hands of his/her oppressors intended to leave themselves – and each other – free to reach out beyond the territory to seize a refugee

[114] Doc. E/AC.32/SR.20, par. 54, also cited above.

> and to return him/her to the country from which he sought to escape'. (Henkin 1993: 1)

Similarly, the purpose and object of Art. 33 have been sought to be extracted from the text itself. Replicating language arguments espoused above, it has thus been claimed that the 'essential purpose' of the *non-refoulement* principle is to prohibit 'return in *any manner whatsoever* of refugees to countries where they may face persecution' (Goodwin-Gill and McAdam 2007: 248).

Secondly, reference has been made to the context of the treaty. The preamble thus explicitly recognises 'the social and humanitarian character of the problems of refugees' (Lauterpacht and Bethlehem 2003: 106f; Willheim 2003: 175). Further, noting the endeavour to 'assure refugees the widest possible exercise of these fundamental rights and freedoms' may be taken as support of a wide interpretation of both the material and geographic scope of the Convention.

The historical context may further be invoked in support of a wider geographical application. As noted by Justice Blackmun in his dissent to the *Sale* verdict:

> '[T]he Convention…was enacted largely in response to the experience of Jewish refugees in Europe during the period of World War II. The tragic consequences of the world's indifference at that time are well known. The resulting ban on *refoulement*, as broad as the humanitarian purpose that inspired it, is easily applicable here…'[115]

In this sense, the lack of any direct historical precedent for extraterritorial interception mechanisms may excuse Art. 33 for not explicitly emphasising an extraterritorial scope (Hathaway 2005: 337).

Following on from this it has been contended that a strictly territorial interpretation leads to a self-evidently arbitrary and unreasonable result. If a strictly territorial interpretation is applied, the most fundamental protection afforded by the Convention turns not on protection needs but on the ability

---

[115] Justice Blackmun in *Sale, Acting Cmmr, Immigration and Naturalization Service v. Haitian Center Council*. United States Supreme Court. 113 S.Ct. 2549, 509 US 155. 21 June 1993, p. 7.

of refugees to clandestinely access the country of asylum.[116] Recalling the regret of early commentators, it seems intuitively wrong to uphold an interpretation whereby the refugee that manages to elude the border guard and enter illegally will receive more protection than the refugee who honestly presents his or her asylum claim to the authorities at or before the border (Gornig 1987: 20; Grahl-Madsen 1980: 85; Robinson 1953: 163).[117]

3.3.2 Against a wider interpretation

In contrast to the above stand those who claim that the purpose of the Refugee Convention is essentially territorial in the commitments it asks states to undertake. The United Kingdom House of Lords has argued that the focus of the Convention is on the treatment of refugees within the receiving state. The Refugee Convention is explicitly an instrument relating to the *status* of refugees. Emphasis is thus on the rights owed to refugees that are assumed to be *within* the country of asylum.[118] In more swaying terms, Grahl-Madsen, while regretting the lack of applicability of Art. 33 at the border, has argued that territorial affinity may always be at the heart of states' willingness to take on human rights responsibilities:

> 'However strange these results may seem from a logical point of view, they are nevertheless not devoid of merit. It must be remembered that the Refugee Convention to a certain extent is a result of the pressure by humanitarian interested persons on Governments, and that public opinion is apt to concern itself much more with the individual who has set foot on the nation's territory and thus is within the power of the national authorities, than with the people only seen as shadows or

---

[116] UNHCR. 1994. Brief Amicus Curiae: The Haitian Interdiction Case 1993. *International Journal of Refugee Law* 6 (1):85-102, p. 92.

[117] A similar point building on the wider norm context has been made with reference to Art. 31 of the Refugee Convention, exempting refugees from penalties related to illegal entry or presence. Noll asserts that if the Convention prohibits states from penalising refugees from breaking national entry regulations, 'it must be concluded *a fortiori* that the Convention does not allow that the observance of the same regulations is enforced *ex ante* by the means of *refoulement*.' (2000: 430). See further Davy 1996: 120.

[118] Lord Bingham of Cornhill in *R. (ex parte European Roma Rights Centre and others) v. Immigration Officer at Prague Airport and another*. 9 December 2004. United Kingdom House of Lords. UKHL 55, par. 16.

> moving figures 'at the other side of the fence.' The latter have not materialized as human beings, and it is much easier to shed responsibility for a mass of unknown people than for the individual whose fate one has to decide.' (Grahl-Madsen 1963)

While Grahl-Madsen moves somewhat beyond the realm of strictly legal reasoning, he nonetheless points to the same underlying argument that the Convention is essentially territorial in its inception and that states cannot reasonably be expected to oblige themselves on matters concerning refugees beyond this.

Yet, the argumentation in both instances appears flawed. As discussed at the outset of this chapter, it is correct that the Refugee Convention operates on a principle of territorial approximation in which different rights are accrued according to the level of attachment established between the refugee and the host state. Yet, exactly because of this complex structure *ratione loci*, it cannot simply be inferred that because most rights enshrined are triggered only after presence within the territory that this is the geographical ambit of Art. 33 as well. Indeed, it is clear from the drafting history that several rights under the Convention were intended to have an extraterritorial application. This is so for the right to property (Art. 13) where the drafters were keen to ensure refugees the ability to claim property in states where they are not physically present (Hathaway 2005: 162). Similar arguments were made for the right to tax equity (Art. 29) and, importantly, access to courts (Art. 16(1)). Common to these rights, like Art. 33, is that no explicit reference is made to a certain level of attachment.

In respect of Grahl-Madsen's more general argument, one equally wonders if his premises apply in the globalised world of today. As argued above, the drafters of the Convention are unlikely to have foreseen that states would move their migration control to the high seas or foreign jurisdictions in order to prevent asylum-seekers from arriving at their borders. Although these practices may take place 'out of sight' of the controlling state's public oversight mechanisms[119] there nevertheless is little doubt that offshore and outsourced migration control increasingly mean authorities decide the fate of refugees far before they arrive at their territory.

The second argument in favour of a more territorial interpretation builds on the consequentialist position that extraterritorial application of Art. 33 would

[119] See chapter 6.

entail a *de facto* right of admission, which was explicitly excluded from the remit of the Convention. The underlying premise of this reasoning is that in practice adherence to the *non-refoulement* principle generally requires states to undertake a status determination procedure in order to ensure that a refugee is not returned to persecution. As such procedures cannot meaningfully be conducted on, for example, the high seas, states would be required to admit any asylum-seeker for whom the *non-refoulement* principle is applicable to its territory for at least the duration of the asylum procedure (Weinzierl 2007: 19). Not only would this have immense implications for the legality of all types of offshore migration control mechanisms (Noll 2005: 549), it would also seem to go against the intention of the drafters, who explicitly precluded a right of admission for those not already present (Goodwin-Gill and McAdam 2007: 206).[120]

This view, however, may be refuted on several levels. First, it should be recognised that neither in theory nor in practice does the *non-refoulement* obligation amount to a right of admission in situations involving asylum-seekers at the border of a state or beyond. While, as Noll describes it, Art. 33 may be said to entail a right for refugees to 'transgress an administrative border' triggering the legal responsibility of a state, it does not entail a similar right to physically access the territory of the said state (Noll 2000: 387). The fact that in practice states subsequently allow admission for asylum-seekers encountered at their frontiers or in international waters in order to instigate an asylum procedure does not amount to a *right* to admission.

Further, as discussed above, even the Ad Hoc Committee made it quite clear that the *refoulement* prohibition does not entail that refugees must in all cases be admitted to the territory.[121] Rather, it was envisioned that a state who refused admission to its own territory might divert a refugee to a third country as long as no risk of persecution existed there.[122] Safe third country policies and plans for extraterritorial processing of asylum-seekers are both examples of strategies that seek to carve out a space located exactly between the negative responsibility not to return a refugee to persecution and the positive obligation of allowing entry. Lastly, a reading of the drafting history suggests that while issues regarding admission and a right of asylum were omitted from the scope of the Convention, this reflected *Realpolitik* and lack of consensus

---

[120] Doc. E/AC.32/SR.20, par. 54.

[121] E/1618, Report of the First Ad Hoc Committee on Statelessness and Related Problems, Comments to Art. 28. Cited above.

[122] Doc. E/AC.32/SR.20, par. 14. Cited above.

rather than an express intention or *telos* to deny admission in frontier situations.[123]

The last but most consistent set of arguments for a restrictive interpretation conceptualises the purpose of the Refugee Convention as being a compromise between competing interests; on the one hand the need to ensure protection for victims of persecution, on the other respect for the national sovereignty of both asylum and origin states.[124] From a pure protection perspective this has entailed a number of shortcomings. As dealt with above, no right to be granted asylum is guaranteed under the Refugee Convention and states still maintain sovereign control over who gains access to their territory. Likewise, both the present refugee regime and that preceding it are fundamentally *exilic* or *palliative* in nature and no emphasis or obligations are placed on the countries of origin (Okoth-Obbo 1996; Tomuschat 1996; Hathaway 1995).

In the same way, a lack of extraterritorial scope of the *non-refoulement* prohibition may be viewed as a protection shortcoming that 'offends one's sense of fairness'.[125] Yet, it does not follow that it was necessarily the purpose of the Convention to remedy these shortcomings. This argument was expressed clearly by the majority in the *Sale* case:

> 'The drafters…may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such actions may even violate the spirit of Article 33; but a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent. Because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions towards aliens outside its own territory, it does not prohibit such actions.'[126]

---

[123] Doc. E/AC.32/SR.19, p. 18 and Doc. E/AC.32/SR.20, p. 7.

[124] Lord Bingham of Cornhill in *R. (ex parte European Roma Rights Centre and others) v. Immigration Officer at Prague Airport and another*. 9 December 2004. United Kingdom House of Lords. UKHL 55, par. 16.

[125] Remark in relation to the *Sale* case by Simon Brown J in *R. (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport*. 20 May 2003. United Kingdom Court of Appeal. QB 811 EWCA Civ 666.

[126] *Sale, Acting Cmmr, Immigration and Naturalization Service v. Haitian Center Council. United States Supreme Court*. 113 S.Ct. 2549, 509 US 155. 21 June 1993, p. 8.

3.3.3 General presumptions in the interpretation of *telos*

This brings us to a more fundamental discussion of what general presumptions underlie the arguments on each side and thus what actually counts as object and purpose of a given legal instrument. Here the preliminary choices of interpretative position become decisive (Noll 2000: 450). The argumentation above expresses a strong preference in favour of voluntarist theory and related principles of national sovereignty.[127] Under this view, the scope of international law is determined entirely by the will of states at the moment of conception.[128] Lacking a clear interpretative basis for a wider scope within the text and drafting remarks, a residual principle of freedom or state sovereignty prescribes 'restrictive interpretation', choosing the permissible interpretation that involves the minimum of obligations for the state party; a maxim dubbed *in dubio mitius*.[129]

An interpretative position starting from international sovereignty and the state as an international law subject, however, would reject this view. Elihu Lauterpacht and Daniel Bethlehem have argued that the object and purpose of the Refugee Convention, like other treaties of a 'humanitarian character', does not conform to this mode of reasoning which represents, at best, a maxim relevant in regard to the international law of co-existence (Lauterpacht and Bethlehem 2003: 104).[130] Citing an Advisory Opinion of the International Court of Justice on *Reservations to the Genocide Convention* it is contended that:

---

[127] Indeed, the majority's decision in the *Sale* decision closely mimics that of the *Lotus* case:

'The rules of law binding upon States therefore emanate from their own free will as expressed in conventions…Restrictions upon the independence of States cannot therefore be assumed.'

Case of the S.S. Lotus. Permanent Court of International Justice. PCIJ Series A - No. 10. 7 September 1927, p. 18

[128] *Case of the S.S. Lotus*. Permanent Court of International Justice. PCIJ Series A - No. 10. 7 September 1927, p. 18

[129] See *Case of the S.S. Wimbledon*. Permanent Court of International Justice. PCIJ Series A - No. 1. 28 June 1923, p. 24f.

[130] In line with this view, Noll concludes that the *in dubio mitius* principle has been somewhat eclipsed by the proliferation of human rights:

'Where treaties aim at stipulating benefits for third parties not represented under treaty negotiations, the duty-minimising presumption of bilateral international law is no longer appropriate.' (Noll 2000: 409).

> 'In such a convention, the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those higher purposes which are the *raison d'être* of the convention.'[131]

More generally, we may ask if taking the premise of national sovereignty and the presumptive freedom of action as a starting point for interpreting binding instruments aimed at constraining both is not somewhat self-defeating. In his famous article, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties', Hersch Lauterpacht argued against restrictive interpretation:

> 'The purpose of treaties – and of international law in general – is to limit the sovereignty of states in the particular sphere with which they are concerned. Their purposes are to lay down rules regulating conduct by restricting, in that particular sphere, the freedom of action of states. To a large extent treaties have no meaning except when conceived as fulfilling that function.' (Lauterpacht 1949: 60)

The critique against *in dubio mitius* in treaty interpretation, and especially in regard to human rights instruments, has found support from a number of scholars.[132] What is essentially rejected here is an interpretative outlook in which national sovereignty is the sole starting point. Entering into binding international agreements is a function of states' international sovereignty and so it would be natural to base purposive interpretation on a conception of the state as an international law subject.

Variations on Lauterpacht's argument have been put forward by a broad array of refugee and human rights scholars. While the critique against restrictive interpretation as not taking account of the context of international sovereignty

---

[131] Reservations to the Convention on the Prevention of and Punishment of the Crime of Genocide, Advisory Opinion. International Court of Justice. 28 May 1951, p. 23.

[132] See e.g. Hathaway 2005: 73; Noll 2000: 409; Spiermann 1995: 189. It should be noted that the principle is not mentioned in the Vienna Convention, nor is there evidence that it has ever found extensive application in the judgements of the International Court of Justice or its predecessor.

may be well placed, one should however be careful of not simply replacing one bias for another. This concern is particularly relevant where human rights instruments are subjected to a particular interpretative methodology in which state interests may be disregarded in view of the higher, co-operative, purpose of the legal instrument (Lauterpacht and Bethlehem 2003).[133] The particular value or pitfalls of such a methodological distinction between human rights and general international law notwithstanding,[134] it is quite clear that the interpretative problem between the territorial and the universal positions is not solved as such, but only referred back to the underlying conflict, or preliminary choice, between national and international sovereignty.

3.4 Preliminary conclusions after the first stage of interpretation

The above has sought a solution to the scope *ratione loci* of Art. 33 within the ordinary meaning of the text, the purpose and object of the article and, though formally categorised as 'supplementary', the drafting history. These categories represent the immutable basis of interpretation and thus the essential starting point of any positivist reading.

Yet no clear result as to the geographical scope of application has emerged at this stage. An examination of the language used does support extending the scope to include non-admission at the border but as regards extraterritorial application, an inherent discordance seems to persist between restrictive and universal readings. This interpretative tension has been shown to exist in the very drafting process without explicitly having been resolved. Instead, a number of arguments around the language and the object and purpose of the article inevitably fall back on arguments already proposed during the drafting sessions or different elements of the drafting history itself are enlisted in support of one position or the other.

On balance, the arguments from the wording of the article and an analysis of the object and purpose provide relatively more support to a broader scope that includes at least border situations and possibly an even wider application.

---

[133] A similar view is taken by Hathaway when noting that treaties designed to advance 'general goals for the international community as a whole … their very nature compels a more particularized approach to interpretation.' (Hathaway 2005: 73)

[134] See chapter 1.3

Yet, nowhere does an interpretation present itself that convincingly narrows the field to yield a single authoritative result. Thus, while the analysis set out somewhat unorthodoxically by discussing the drafting history, an interpretative scope is equally found in the analysis of the language, object and purpose of the Convention.

At the present stage one is thus tempted to concur with Gregor Noll's assessment that '[g]iven the richness of accumulated arguments, the battle on the proper interpretation of Article 33 GC can no longer be won on a substantial level. The decisive arguments are those relating to the interpretation of interpretative rules' (Noll 2000: 427). This is clear not only in the debate over what sources to accord primacy, but equally in the underlying principles guiding interpretative choices.

Interpretation, however, does not stop here. Following the methodological approach outlined in the introductory chapter, this is where informal sources and a wider contextual reading may aid legal interpretation. The following sections will seek to relate the primary interpretation arrived at above to sources that may exert an interstitial normative influence on the reading of Art. 33. These fall into three main categories. First, non-binding resolutions, or *soft law*, as expressed by international or regional inter-state bodies. Secondly, state practice as regards actual interpretation of the scope of Art 33 in situations involving migration control beyond the territory. And lastly, expressions of the *non-refoulement* principle in other human rights instruments and general international law with which relevant parallels may be drawn. Again, it is important to underline that these sources do not possess an independent normative force. Yet, in the identification of the interpretative scope remaining after the interpretative application above, this secondary step in the legal analysis aims at narrowing or conflating ambiguities in the interpretation from the sources applied at the first stage.

3.5 Subsequent interpretation and state practice

3.5.1 Soft law

Looking to soft law, a substantial number of resolutions have appeared to deal with the interpretative problem of the geographical application of the *non-refoulement* obligation under Art. 33. The majority of them have been directed to the issue of border applicability and largely replicate the various arguments for inclusive readings presented above. More recently, however, a similar

consensus seems to have emerged in favour of extending the application of the *non-refoulement* principle to the entire jurisdiction of acting states.

3.5.1.1 At the frontiers

The UNHCR Executive Committee has passed numerous conclusions on the issue of *non-refoulement* and its interpretation under the Refugee Convention. An examination of this material makes it quite clear that the scope *ratione loci* of Art. 33 was accepted early on to encompass situations at the border. A number of Conclusions have simply expressed concern over refugees being rejected at the frontier.[135] More directly, Conclusion No. 15 (XXX) 1979, par. j, recommends that 'where an asylum-seeker addresses himself in the first instance to a frontier authority the latter should not reject his application without reference to a central authority'.[136] More strongly, 'the fundamental importance of the observance of the principle of *non-refoulement* – both at the border and within the territory of a State' was reaffirmed in Conclusion No. 6 (XXVIII) 1977, par. c.[137]

Support may also be drawn from the 1967 UN Declaration on Territorial Asylum[138] and the 1977 Draft Convention on Territorial Asylum[139]. Art. 3 of the Declaration as well as of the Convention cover *non-refoulement* and were

---

[135] UNHCR Executive Committee Conclusion No. 14 (XXX) 1979, par b, and Conclusion No. 21 (XXXII) 1981, par. f.

[136] A similar recommendation that immigration officers act in respect of the principle of *non-refoulement* in border instances is expressed in Conclusion No. 8 (XXVIII) 1977, par e(i).

[137] Since then, the view that observance of the *non-refoulement* principle simply entails non-rejection at the frontier has been set out in Conclusion No. 22 (XXXII) 1981, par. II.A.2, No. 81 (XLVIII) 1997, par. h, No. 85 (XLIX) 1998, par. q, and No. 99 (LV) 2004, par. l.

[138] UNGA resolution 2312 (XXII), 14 December 1967. The Declaration found further support from the Committee of Ministers of the Council of Europe. Declaration on Territorial Asylum. 278th Meeting of the Ministers' Deputies. 18 November 1977.

[139] A number of different versions have been prepared for this Convention. For an overview, see Grahl-Madsen 1980: 174-211. All citations in the following relate to the draft presented at the United Nations Conference on Territorial Asylum. UN Doc. A/CONF.78/12. While in the end the conference could not agree to adopt the Convention, the provisions of the draft were discussed at length and 76 States expressed support for the Convention and it may as such be considered a source of soft law. See Grahl-Madsen 1980: 8f and 61-66.

explicitly intended to clarify the scope of Art. 33 of the Refugee Convention. Referring back to the original argument made by the Swiss and Dutch delegates in favour of a strictly territorial application, a clause was inserted in each instrument exempting the state in cases of mass influx. Yet, barring this situation, it is clear that the *non-refoulement* principle is otherwise to cover asylum-seekers 'at the frontier' and prohibit 'non-rejection at the frontier, return or expulsion, which would compel him to remain in or return to a territory with respect to which he has a well-founded fear of persecution…'.[140]

The Council of Europe Parliamentary Assembly has taken a similar view. While acknowledging the strictly territorial interpretation possible on the basis of the *travaux préparatoires*, it is argued that not only can the concept '*ne pas refouler*' be interpreted to cover non-admission to the territory, it further 'seems illogical a priori that a person who has succeeded in crossing the frontier illegally should enjoy greater protection than someone who presents himself legally.'[141] Border applicability is further affirmed by a Council of Europe resolution urging member governments to ensure that 'no one shall be subjected to refusal at the frontier, rejection, expulsion, or any other measure which would have the result of compelling him to return to or remain in a territory where he would be in danger of persecution'.[142]

3.5.1.2 Within the jurisdiction

In more recent resolutions support can equally be found for extending the geographical scope beyond the borders. While UNHCR itself has been quite explicit in expressing the view that the *non-refoulement* principle applies wherever a state acts,[143] evidence for a more expansive interpretation of the

---

[140] United Nations. 1977. Draft Convention on Territorial Asylum. UN Doc. A/CONF.78/12. 4 February 1977, Art. 3.

[141] Council of Europe Parliamentary Assembly. 1965. Report on the Granting of the Right of Asylum to European Refugees. Doc. 1986. 29 September 1965, p 6-7.

[142] Council of Europe. 1967. Resolution 14 (1967) Asylum to Persons in Danger of Persecution. 29 June 1967, par. 2.

[143] As argued:

'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 the borders. It also applies outside the territory of States. In essence, it is applicable wherever a State acts.'

geographical scope is somewhat more subtle and nuanced in the Executive Committee conclusions. Particular attention has been paid to interdiction and refugees rescued at sea. UNHCR's Advisory Opinion on extraterritorial application of the *non-refoulement* principle cites Conclusion No. 15 (XXX) 1979, par. c, asserting that '[i]t is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons onboard wishing to seek asylum.'[144] While this would seem to extend an obligation to vessels on the high seas or adjacent territorial seas, it is less clear that this obligation stems from the legal *non-refoulement* principle as enshrined in the Refugee Convention and not from a more general 'humanitarian obligation' or, more likely, the law of the sea.[145]

The more recent Conclusion on Protection Safeguards in Interception Measures is clearer that the *non-refoulement* principle is intended to apply extraterritorially. Responding to new legal developments to allow migration control on the high sea or in foreign territorial waters, it is recommended that:

> 'Interception measures should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a Convention ground…' (Conclusion No. 97 (LIV) 2003, par. a(iv)).

UNHCR. 1997. UNHCR Note on the Principle of Non-Refoulement (EU Seminar on the Implementation of the 1995 EU Resolution on Minimum Guarantees for Asylum Procedures).

See further UNHCR. 2007. Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. 26 January 2007; and UNHCR. 2005. Brief Amicus Curiae: R (ex parte European Roma Rights Centre et al) v. Immigration Officer at Prague Airport and another (UNHCR intervening). *International Journal of Refugee Law* 17 (2): 426-453.

[144] UNHCR. 2007. Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. 26 January 2007.

[145] See the 1982 United Nations Convention on the Law of the Sea, the 1974 International Convention for the Safety of Life at Sea (SOLAS), the 1979 International Convention on Maritime Search and Rescue (SAR) and the 1989 International Convention on Salvage.

In the same conclusion, however, it is emphasised that: 'The State within whose sovereign territory, or territorial waters, interception takes place has the primary responsibility for addressing any protection needs of intercepted persons' (par a(i)). While it is a bit unclear how exactly 'primary responsibility' is to be understood, this limitation would seem to support an interpretation that states are obliged by the principle of *non-refoulement* wherever they exercise effective control. This is supported by Conclusion No. 74 (XLV) 1994, par. g, calling upon states 'to respect scrupulously the fundamental principle of *non-refoulement*, and to make every effort to ensure the safety and well-being of refugees within their jurisdiction'.

Lastly, an interpretation extending the principle of *non-refoulement* to situations involving interdiction has been put forward by regional bodies. The Inter-American Commission of Human Rights issued a report following the Supreme Court ruling in the *Sale* case. The Commission specifically rejected the view taken by the Supreme Court, and gave support to UNHCR's *Amicus Curiae* that Art. 33 does indeed apply to persons interdicted on the high seas as opposed to United States territory.[146] Consequently, the United States was breaching the *non-refoulement* principle set out in the Refugee Convention. [147] Similarly, the Council of Europe has issued recommendations calling on member states to uphold their responsibilities under both the Refugee Convention and the European Convention on Human Rights when conducting immigration control at sea.[148]

3.5.2 State practice

While in discourse states thus appear to have affirmed a more expansive interpretation, actual practice may, however, tell a different story. It is in

---

[146] UNHCR. 1994. Brief Amicus Curiae: The Haitian Interdiction Case 1993. *International Journal of Refugee Law* 6 (1):85-102.

[147] *Haitian Center for Human Rights v. United States ('US Interdiction of Haitians on the High Seas')*. Inter-American Commission of Human Rights. Case 10.675, Report No. 51/96, Doc. OEA/Ser. L/V/II.95 7 rev. 13 March 1997, par. 156-158.

[148] Council of Europe Parliamentary Assembly. 2004. Recommendation 1645 (2004) Access to assistance and protection for asylum seekers at European seaports and coastal areas. 29 January 2004, par. j. The preceding report further notes that 'these recommendations should apply as long as foreign nationals are under the jurisdiction of a member state'. Doc. 10011, 5 December 2003, par 49.

relation to concrete state actions that one is likely to find the most evident resistance to extraterritorial application of the *non-refoulement* principle.

3.5.2.1 State practice in the interpretation of human rights treaties

Following Art. 31.3(b) of the Vienna Convention, any subsequent practice in the application of the treaty may be taken into account if it establishes an agreement of the parties regarding its interpretation. Yet, the value to accord state practice from an interpretative perspective continues to be a contested issue among refugee and human rights lawyers. On the one hand, legal realists have argued that human rights norms not backed up by consistent state practice are essentially meaningless, and observation of actual practice thus becomes the primary source if one is to deduce valid norms (Watson 1999). Other scholars, conversely, have argued that it is only relevant to consider state practice insofar as it supports the purpose of the instrument in question (Hathaway 2005: 73; Weinzierl 2007: 37). According to this position, '[r]eports of non-compliance with the principle of *non-refoulement* on the high seas and occasionally expressed doubts of single EU states about the applicability of the principle of *non-refoulement* on the high seas are not relevant indications under international law for the interpretation of the Refugee Convention' (Weinzierl 2007: 37).

To the mind of the present author, neither of these positions is correct. While the relative value of state practice as a source of international law may be debated,[149] it is a highly dubious position to accord some practices normative importance while *prima facie* discarding others according to a preliminary determination of the purpose of the instrument.[150] On the other hand, ascribing normative influence to every breach of human rights norms as representative of a more restrictive interpretation amounts to little more than a refusal of international human rights law as such.[151]

Between these two extremes, a more correct starting point is to assess the influence of state practice on the interpretation of treaty law by using the same criteria as when looking for general custom. Thus, state practice must be measured both on its consistency and the extent to which it is borne by a

---

[149] See chapter 1.4.4.

[150] The problems of such an approach are further compounded in those instances where the determination of purpose is equally restricted by some preconceived assumption for or against national sovereignty and State interests. See section 3.3.3 above.

[151] See chapter 1.2.1.

conviction that such practice is permissible under the relevant legal rule (*opinio juris*). Positively identifying a state's conviction about its legal duty is in many cases impossible and this has lead to some methodological resistance to the importance of *opinio juris sive necessitatis* within customary international law (Spiermann 2006: 51ff; Goldsmith and Posner 2005: 24f). Yet, in the present context, where the objective is to assess restrictive state practice and the concomitant absence of such convictions of legal obligations, it is conversely clear that where evidence of *opinio juris* is found to be incongruent with actual practice, such state practice may readily be discarded.[152]

3.5.2.2 General assessment

Looking for state practice in this area, it is nonetheless surprising how few examples one can find of states rejecting asylum-seekers at their borders or in international waters *and* claiming that this is permissible under Art. 33 of the Refugee Convention. Several of the states which opposed application at the frontier during the drafting sessions today apply the *non-refoulement* principle to border situations through their national legislation (Rodger 2001: 15; Taylor 1994: 459; Gornig 1987: 23; Hailbronner 1980: 95). Notably, EU member states have established the *non-refoulement* obligation to apply in border situations.[153] While notorious examples of border closures clearly resulting in *refoulement* have been recorded, the majority of these instances have been followed by claims that those expelled were 'illegal immigrants' and not refugees, that the non-refoulement obligation could be derogated due to a situation of mass influx, or that local authorities were acting independently (Goodwin-Gill and McAdam 2007: 230). While such re-labelling of refugees may pose a serious problem, and arguments that the *non-refoulement* principle does not apply in situations of mass influx are questionable, they do not,

---

[152] This is consistent with the approach of the International Court of Justice in the *Nicaragua* case, pointing out that contrary practice does not undermine the formation of customary international law if the practice is condemned or the state in question does not claim to be acting as a matter of right. *Case concerning military and paramilitary activities in and against Nicaragua.* International Court of Justice. 27 June 1986.

[153] European Council. 2003. Regulation 342/2003. Establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. 25 February 2003, Art. 3(1); and European Council. 2005. Directive 2005/85/EC. Minimum standards on procedures in Member States for granting and withdrawing refugee status. 1 December 2005, Art 3(1) and 35. Under Art. 35 of the directive member states are, however, allowed to apply national border procedures subject to fewer legal safeguards.

however, challenge the interpretation of the geographic scope of application of the *non-refoulement* obligation.

Similarly, up until the *Sale* case, scholars have found it difficult to record a single historical precedent for similar extraterritorial deterrence mechanisms without some assumption of responsibility (Hathaway 2005: 337). UNHCR equally noted that, to its knowledge, no other state has resorted to the implementation of a formal policy of intercepting refugees on the high seas and repatriating them against their will.[154] This has lead Goodwin-Gill to conclude that while Art. 33 may not have applied to situations beyond the border at the time of drafting, subsequent state practice has confirmed a wider scope *ratione loci* (Goodwin-Gill 1996: 121-124).

Since *Sale*, however, one could point to some additional examples; most notably the Australian operation of the so-called 'Pacific Solution' and the British proposal for a 'new vision for refugees'. Before simply concluding that a general consensus of the parties has been established regarding the interpretation of the applicability *ratione loci* of Art. 33, a critical look must therefore be taken at these cases and a few general caveats underlined.

First, it should be noted that only a limited number of states are likely to have ever confronted a situation where they have to take a deliberate stance against extraterritorial applicability of the *non-refoulement* principle. Naturally, this would be limited to coastal states or states applying extraterritorial migration control in the territory of third states, which has so far been primarily a feature of more developed countries.

Secondly, there is a time element to consider. As shown in the later chapters, extraterritorial migration control in its various forms has clearly become more popular recently and the picture may thus be changing. Lastly, and this will be considered in more detail in the next chapter, it is necessary to nuance state interpretation of scope *ratione loci* somewhat more. While some states may accept liability in situations involving interdiction on the high seas, they may refuse that the *non-refoulement* principle applies to actions undertaken on the sovereign territory of another state. That said, a closer look at the Australian, United Kingdom and United States cases suggests that even practices in these countries do not uniformly support a strict territorial interpretation.

---

[154] UNHCR. 1994. Brief Amicus Curiae: The Haitian Interdiction Case 1993. *International Journal of Refugee Law* 6 (1):85-102, p. 92.

3.5.2.3 Australia

The Australian 'Pacific Solution' was developed following a détente concerning the Norwegian ship 'MV Tampa'. In August 2001 it responded to the Australian Search and Rescue authorities' request to investigate a distress call from an Indonesian vessel, which turned out to be carrying 433 mainly Afghan asylum-seekers. Australia refused to let the Tampa enter Australian waters. Health problems onboard made the Tampa ignore this and the ship was subsequently boarded by Australian special forces. Following another week of negotiations, Australia struck a deal with Papua New-Guinea and Nauru, where the asylum-seekers were taken for processing.[155]

The incident led the Australian government to pass three pieces of legislation.[156] First, the 2001 Border Protection Act established interdiction powers in the territorial sea, contiguous zone and in international waters. Secondly, two amendments were passed to the Migration Act; one excising certain northern islands from its 'migration zone' and thus from the part of its territory from where an asylum claim can effectively be launched,[157] and one enabling Australian authorities to send interdicted asylum-seekers or persons having arrived at the excised territories to countries 'declared' to provide effective protection in accordance with relevant human rights standards.[158]

The Australian response attracted substantial criticism from the international community (Magner 2004: 83; Willheim 2003: 191). From a legal perspective, it is clear that Australia was misguided in thinking that it is free to simply define and delimit the territory on which international obligations are owed as it is an established principle of international law that the sovereign territory is not defined by individual announcement, but by effective possession and exercise of power (Hathaway 2005: 321; Magner 2004: 74f; Goodwin-Gill 1996: 123; Ross 1961: 159f).[159] Secondly, the simple declaration of countries as providing effective protection creates a number of difficulties concerning

---

[155] For more detailed analysis of the Tampa incident, see Kneebone 2006; Magner 2004; Pugh 2004; Willheim 2003; Bostock 2002; Mathew 2002.

[156] For a more detailed description, see Mathew 2002: 663f.

[157] Migration Amendment (Excision from Migration Zone) Act of 2001. The migration zone delimits the territory from where application for a 'protection visa' can be launched, which in practice is how Australia accepts an application for asylum (Mathew 2002: 664).

[158] Migration Amendment (Consequential Provisions) Act of 2001, § 198A.

[159] Situations of excised territory and international zones are discussed in more detail in chapter 4.3.1.

transfer of protection responsibility, exacerbated by Australia's decision to sign an agreement with Nauru, which is not a signatory to the 1951 Refugee Convention (Kneebone 2006; Legomsky 2003).[160]

Yet, these issues notwithstanding, it is not clear that the Australian practice amounted to a rejection of the *non-refoulement* principle to situations involving interdiction on the high seas. The asylum-seekers onboard the 'Tampa' and subsequently interdicted vessels were not returned to Afghanistan, Iran or Indonesia or other countries of origin. On the contrary, the Australian government made substantial efforts to negotiate agreements with third countries to ensure asylum-seekers would receive some kind of protection and eventual asylum processing. Such a system may raise other issues under international refugee law yet it is, strictly speaking, not inconsistent with Art. 33 as long as no risk of *refoulement* exists in those third states.[161] Thus, while the Pacific Solution was manifestly intended to avoid asylum procedures in Australia, the fact that another state was envisaged to provide at least temporary protection supports the interpretation that the Australian government did indeed believe the *non-refoulement* principle to apply in cases involving interdiction on the high seas.

3.5.2.4 The United States

In contrast to Australia, the United States government did expressly hold that Art. 33 was not applicable to actions carried out by the United States Coast Guard in international waters when arguing the *Sale* case. In 1989, the United States delegate to the UNHCR Executive Committee had taken a similar position, arguing that there is a difference between binding legal commitment and mere moral and political principles of refugee protection:

> 'As a matter of practice, the United States authorities did not return persons who were likely to be persecuted in their countries of origin…That was the practice, and …the policy of the United States, and not a principle of international law with which it conformed…It did not

---

[160] On the issue of transferring responsibility for status determination and refugee protection more generally, see Lassen et al. 2004.

[161] This has primarily been dealt with in the context of 'safe third country' policies. See e.g. Gil-Bazo 2006; Selm 2001; Lassen and Hughes 1997. See also Doc. E/AC.32/SR.20, par. 14, cited above.

> consider that the *non-refoulement* obligation under article 33 of the Convention included an obligation to admit an asylum-seeker. The obligation…pertained only to persons already in the country and not to those who arrived at the frontier or who were travelling with the intention of entering the country but had not yet arrived at their destination.'[162]

More recently, the Unites States issued a set of observations in response to a 2007 advisory opinion by UNHCR on the extraterritorial application of the *non-refoulement* principle. In these observations, the United States underlines its 'long-standing interpretation' that 'Article 33 of the 1951 Refugee Convention applies only in respect of aliens within the territory of the Contracting State', and emphasises that any practice of the United States to respect the *non-refoulement* principle when carrying out interception on the high seas was a matter of national policy, not international legal obligation.[163]

While these statements are unambiguous, they have not drawn any support from other states. It is further noteworthy that the United States itself has hardly been consistent in applying this interpretation (Goodwin-Gill and McAdam 2007: 224). The Haitian interdiction programme was enacted following a 1981 agreement with the Haitian government authorising the United States officials to board Haitian vessels on the high seas and in United States territorial waters.[164] Under this agreement, however, the United States promised not to return anyone found to be a refugee (Legomsky 2006: 679). In section 3 of the concomitant Executive Order 12324, United States authorities were further required to 'take whatever steps are necessary to ensure…the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland'[165] Thus, under

---

[162] Remarks by Mr. Kelley. UN Doc. A/AC.96/SR.442, paras. 80-82. Cited in Goodwin-Gill 1994: 106.

[163] United States Mission to the United Nations and Other International Organisations in Geneva. 2007. Observations of the United States on the Advisory Opinion of the UN High Commissioner for Refugees on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol. Geneva, 28 December 2007, p. 9.

[164] Exchange of Diplomatic Letters Between E.H. Preeg, United States Ambassador to Haiti, and E. Francisque, Haiti's Secretary of State for Foreign Affairs. TIAS No. 10241. 23 September 1981.

[165] United States. 1981. Executive Order 12324. Interdiction of Illegal Aliens. 29 September 1981.

coastguard guidelines, if interviews conducted onboard suggested that persons had a legitimate claim to refugee status, passage to United States territory for asylum processing would be arranged (Koh 1994: 2393).[166] There is thus a strong argument that, up until the Kennebunkport Order of 1992,[167] not only actual practice but also *opinio juris* existed in favour of an interpretation of the *non-refoulement* principle as applying on the high seas.

3.5.2.5 United Kingdom

In February 2003, a British proposal for a 'new vision' for refugee protection was leaked to the press. The proposal contained two main elements. The first was to improve regional protection and set up 'regional protection areas' as a means to reduce secondary movement and return failed asylum-seekers who for other reasons cannot be returned to their countries of origin.[168] It was the second half of the proposal, however, that sparked the most furious debate.[169] This part envisaged the establishment of 'transit processing centres' in third countries on the major transit routes to the EU. Asylum-seekers arriving spontaneously in the EU would thus as a rule be sent back for status determination to centres managed by IOM and operating a screening procedure approved by UNHCR.[170]

In particular, the latter element of the proposal attracted substantial criticism for being inconsistent with international refugee law and the whole scheme was eventually vetoed by Germany and Sweden. The adjoining analysis of the legal implications itself considered the need for possible revisions to the *non-*

---

[166] As noted by Legomsky, however, the effectiveness of this procedure in avoiding *refoulement* was highly questionable. 364 vessels were inspected from 1981 to 1990 and more than 21,000 Haitians returned, yet in the same period only six claims were found strong enough to warrant transfer to United States territory (Legomsky 2006: 679).

[167] United States. 1992. Executive Order No. 12807. Interdiction of Illegal Aliens. 24 May 1992.

[168] United Kingdom Home Office. 2003. New Vision for Refugees. London: United Kingdom Home Office. 7 March 2003, p. 11f.

[169] The two parts were conflated in a later version presented to the EU Commission in March 2003 under the common heading of 'regional protection areas', although subsequent discussion papers and a Danish Memorandum retained the distinction. For an overview of the different language and content of these documents, see Noll 2003: 10ff.

[170] United Kingdom Home Office. 2003. New Vision for Refugees. London: United Kingdom Home Office. 7 March 2003, p. 13f.

refoulement principle as enshrined in the Refugee Convention and the European Convention of Human Rights to avoid extraterritorial obligations, but ended up recommending a solution that, by establishing regional protection areas, would represent 'a new way of providing protection with continued adherence to the *non-refoulement* principle.'[171] Thus, not only was this plan never implemented in practice, but similar to Australia's 'Pacific Solution' extraterritorial application of the *non-refoulement* principle was not denied, but rather – though with some regret – affirmed.

In other instances, however, the United Kingdom has been more direct in claiming a territorial interpretation. Following the positioning of British immigration officers at Prague Airport carrying out extraterritorial migration control, a case was submitted to the House of Lords by six rejected asylum-seekers of Roma origin.[172] Both the United Kingdom government and the House held that, as the Refugee Convention had been *conceived*, the scope of Art. 33 is limited to those present in the territory (par. 17). The British government has taken similar positions in cases concerning the imposition of carrier sanctions and visa applications at British embassies (Nicholson 1997: 614f).[173]

Nonetheless, on a closer reading of the reasoning in *Immigration Officer at Prague Airport,* the House of Lords nonetheless asserts that in view of the soft law developments cited above:

> 'there appears to be general acceptance of the principle that a person who leaves the state of his nationality and applies to the authorities of another state for asylum, whether at the frontier of the second state or from within it, should not be rejected or returned back to the first state

---

[171] United Kingdom Home Office. 2003. New Vision for Refugees. London: United Kingdom Home Office. 7 March 2003, p. 10.

[172] *European Roma Rights Centre and others v. Immigration Officer at Prague Airport and another*. House of Lords. UKHL 55. 9 December 2004.

[173] In *Sritharan*, the court similarly argued, 'Article 33 does not refer, and has never been understood to refer, to someone who has not yet arrived here…even if the refusal to permit him to come here leads to his physical return by some other country to the country from which he is fleeing.' *Regina v. Secretary of State for the Home Department, ex parte Robert Denzil Sritharan and Benet Marianayagam*. United Kingdom High Court (England and Wales). Immigration Appeal Reports 184 1993. 24 February 1992.

> without appropriate enquiry into the persecution into which he claims to have a well-founded fear.'[174]

What distinguishes the operation of carrier sanctions and immigration officers in the above cases is not the geographical scope of Art. 33 but the fact that the asylum-seekers had not left their country of origin and thus could not be considered refugees in the meaning of Art. 1 of the Refugee Convention.

3.5.3 Summary: soft law and state practice

Examples where states have either sought to circumvent the *non-refoulement* obligation or outright deny its application outside the territory have become more prevalent. This is hardly surprising. At a time where concerns over asylum and immigration have lead to more restrictive policies in the majority of developed countries, it becomes very alluring for states to re-invoke restrictive interpretations and principles of national sovereignty in cases where the exact scope of obligations is seen as unclear or unsettled.

What the above examples make clear, however, is that such restrictive interpretation is not uniform, neither in space nor time. What makes these cases stand out is the backdrop of both practice and discursive commitments confirming a more expansive reading of the *non-refoulement* principle enshrined in Art. 33 of the Refugee Convention. This is richly confirmed in resolutions and recommendations. Early on border application was established, and more recently growing support has gathered in favour of a reading extending applicability *ratione loci* to the jurisdiction of the acting state.

As such, one should be careful in assigning too much importance to examples of restrictive state practice. While one cannot simply disregard these instances, from the standpoint of legal interpretation the prevalence, consistency and degree of legal conviction does not merit normative significance at present. This said; to the extent that these examples signify the start of a more general trend towards restrictive interpretation, this may of course change in the future.

---

[174] *European Roma Rights Centre and others v. Immigration Officer at Prague Airport and another.* House of Lords. UKHL 55. 9 December 2004, par. 26. Elsewhere, however, the verdict specifically rejects extraterritorial application of the Refugee Convention in line with the *Sale* verdict (see par. 68, Lord Hope). See further discussion of this case in chapter 4.3.3.

3.6 The wider normative context of the *non-refoulement* principle

The *non-refoulement* principle finds expression in a number of other international instruments, both by name and by effect. At this stage looking to the wider normative context of Art. 33 may legitimately aid the interpretation. Both national and international jurisprudence have emphasised the importance of interpreting the Refugee Convention as a 'living instrument' affected by subsequent legal developments (Nicholson and Türk 2003: 37-38). As Hathaway further points out, since refugees are normally entitled to benefit from general human rights protection and the content of the Refugee Convention and other human rights instruments overlaps on several issues, an interpretation should be sought that gives some coherence to cognate concepts under different treaties (Hathaway 2005: 64).

3.6.1 Methodological appraisal of comparative interpretation

The question remains as to what weight to accord to coherence with other treaties when interpreting the geographical scope of the *non-refoulement* principle set out in the Refugee Convention. Arguments have been put forward that this may form part of the context by reference to Art. 31(3)c, stipulating that interpretation must take into account 'any relevant rules of international law applicable in the relations between the parties' (Koskenniemi 1997). For the most part, formulation of the *non-refoulement* principle in these instruments has been concluded or judicially developed after the drafting of the 1951 Refugee Convention. Interpreting treaties within their contemporary international legal context is, however, commonly accepted. Originally, the draft Art. 31(3)c VTC included a delimiting 'in force at the time of conclusion'. Yet, this provision was intentionally dropped to allow for a more 'dynamic' or 'evolutionary' interpretation (Spiermann 2006: 130; Oppenheim 1992: 1282).[175]

---

[175] As noted in connection with the *Namibia* case, 'interpretation cannot remain unaffected by subsequent development of law…an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.' *Namibia (South West Africa) Case*. International Court of Justice. 26 January 1971, p. 31.

More problematic, however, is the fact that rules must be 'applicable in the relations between the parties'. 'Parties' in this context is all signatory states (Linderfalk 2001: 203). Even though there is a broad coincidence of norms, the group of states bound by the Refugee Convention is not coextensive with the group of states bound by e.g. the European Convention on Human Rights or the International Covenant on Civil and Political Rights. As such it is doubtful that these instruments can be considered a primary source under Art. 31(3)c of the Vienna Convention (Linderfalk 2001: 292; Noll 2005: 552).

Formulations of the *non-refoulement* principle in other binding international instruments, to the extent that they do concern themselves with norms with partly similar content and form to those of Art. 33 of the Refugee Convention, may however be considered treaties *in pari materia*, and as such subsidiary sources of interpretation (Noll 2005: 552). This approach has been generally confirmed by both the International Court of Justice and the European Court of Human Rights (Linderfalk 2001: 288-300). Comparative analysis may thus be used, albeit restrictively, to ensure a more systematic interpretation.

3.6.2 1933 Refugee Convention

The extended debate regarding the applicability of Art. 33 of the 1951 Refugee Convention to non-admission at the frontiers is somewhat surprising considering that its predecessor, the 1933 Convention Relating to the International Status of Refugees explicitly included this obligation. The original formulation read: '*Elle s'engage, dans tous les cas, à ne pas refouler les réfugiés sur les frontières de leur pays d'origine.*'[176] While some initial confusion during the drafting pertained as to the proper translation of the authoritative french text (Beck 1999: 621), the english text of Art. 3 is unambiguous:

> 'Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*), refugees who have been authorised to reside there regularly, unless the said measures are dictated by reasons of national security or public order. It undertakes in any case not to refuse entry to refugees at the frontier of their countries of origin.'

[176] L.S.C. 14.1933, 3.f

The 1951 Refugee Convention specifically set out to revise the 1933 Convention. While a deliberately more restrictive approach in the successor instrument cannot be ruled out, the 1933 Convention must however be considered an important interpretative source in cases where the latter instrument lacks clarity regarding the same issue (Hathaway 2005: 315; Noll 2000: 424-25; Fourlanos 1986: 153).[177] In terms of scope *ratione personae*, the protection offered by Art. 3 of the 1933 Refugee Convention is however limited to 'refugees who have been authorised to reside there [the asylum country] regularly'. Thus protection against non-admittance would only concern refugees who had already gained admission and residence previously (Robinson 1953: 163).

3.6.3 Covenant on Civil and Political Rights

The 1966 International Covenant on Civil and Political Rights does not contain any explicit references to *non-refoulement* or asylum. Yet in relation to Art. 7 the Human Rights Committee has stressed that 'States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*'.[178] Some disagreement exists as to scope *ratione loci* of the Covenant in general. Art. 2.1 stipulates that states parties are to ensure the rights of the Covenants to all individuals 'within its territory and subject to its jurisdiction'. The wording of this article allows for both a cumulative reading through which the Covenant would apply only within those parts of the territory where the state also has jurisdiction, and a disjunctive reading setting territory as well as jurisdiction as the applicability *ratione loci* of the instrument.

Based on a cumulative reading, some scholars have rejected extraterritorial application of the Covenant on Civil and Political Rights entirely (Noll 2005:

---

[177] Robinson, however, simply accepts that the scope of Art. 33 of the 1951 Refugee Convention is less favourable than that of Art. 3 of the 1933 Refugee Convention (Robinson 1953: 163). At the same time, however, he points out that Art. 3 of the 1933 Refugee Convention only concerns 'refugees who have been authorised to reside there [the asylum country] regularly' and that the frontier application would thus assume that that refugees already have made territorial contact (Robinson 1953: 163).

[178] Human Rights Committee. General Comment to Art. 7 20/44, par. 9.

557-64; Noll 2000: 440; Amerasinghe 1990: 147-149). Similarly, the United States has argued that not only is the disjunctive interpretation unsustainable, the United States also rejects that the Human Rights Committee has competence to issue authoritative interpretations of the text.[179]

Convincing arguments have however been advanced in favour of a disjunctive reading. A strictly territorial reading would lead to a manifestly absurd result such as, for example, the right to enter one's own country would be meaningless if individuals could not claim it from outside the territory of their country of origin (Hathaway 2005: 165; McGoldrick 2004: 48; Meron 1995: 80; Nowak 1993: 41). More importantly, the wider interpretation has been supported by the Human Rights Committee noting that 'a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party'.[180] This reading has further been confirmed by the International Court of Justice.[181] If not the case at its inception, extraterritorial applicability thus appears to have been firmly established since.

3.6.4 Convention on the Rights of the Child

Art. 2.1 of the 1989 Convention on the Rights of the Child obliges signatory states to 'respect and ensure the rights set forth in the present Convention to each child within their jurisdiction…'. At the same time, Art. 37 of the Convention indirectly prohibits *refoulement* of children to places where they would be at risk of being tortured.

---

[179] United States Observation on General Comment 31. Human Rights Committee. Meeting of the 87th Session. United States of America (2nd and 3rd periodic report). Geneva. 10-28 July 2006. See further United States Mission to the United Nations and Other International Organisations in Geneva. 2007. Observations of the United States on the Advisory Opinion of the UN High Commissioner for Refugees on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol. Geneva, 28 December 2007, p. 8.

On the role of General Comments by the Human Rights Committee in setting out interpretation however, see Buergenthal 2001: 386-90.

[180] Human Rights Committee. General Comment No. 31. UN Doc. HRI/GEN/1/Rev.7. 12 May 2004, p 192.

[181] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. International Court of Justice. 9 July 2004 and Democratic Republic of Congo v. Uganda. International Court of Justice. 19 December 2005.

In addition, other articles in the convention may attach and add to obligations owed under other instruments of national and international law. The 'best interest of the child' principle enshrined in Art. 3 has thus been invoked both in cases involving admission and return of children and their families (McAdam 2006). More specifically, Art. 22.1 obliges states to 'take measures to ensure' that refugees or asylum-seekers falling under the personal scope of the convention 'receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.' As Noll shows, the latter may in some cases involve obligations in cases where asylum-seekers encounter authorities extraterritorially (Noll 2005: 570-72).

3.6.5 Convention Against Torture

The 1984 Convention Against Torture resembles the Refugee Convention in the sense that applicability *ratione loci* is not set out in a single article, but differing scopes pertain to each of the obligations placed upon signatory states. A number of articles specify 'any territory under its jurisdiction', which would allow for extraterritorial application in at least the instances where a state exercises effective control over a geographical area beyond its national territory.[182] Other articles, however, contain no explicit geographical limitations. Among these are Art. 3 that prohibits parties from returning, extraditing or refouling any person to a state 'where there are substantial grounds for believing that he would be in danger of being subjected to torture'. The Committee against Torture has reaffirmed a wider protection-based application of this article to asylum-seekers fearing *refoulement* on numerous occasions (Gorlick 1999: 486-488). The lack of a specific geographical limitation has led some commentators to suggest that the *non-refoulement* principle flowing from Art. 3 of the Convention Against Torture regulates state action 'wherever it takes place' (Goodwin-Gill and McAdams 2007: 248). Even under a more restrictive interpretation, the Committee against Torture has affirmed that applicability *ratione loci* of Art. 3 is not limited

[182]Arts. 2, 5, 7, 11, 12, 13, and 16.

to the territory, but must be extended to all situations in which a state exercises effective control, whether over territory or individuals.[183]

3.6.6 OAU Convention on Refugees

At the regional level, the 1969 African Union Convention governing specific Aspects of Refugee Problems in Africa contains a broad *non-refoulement* clause that clearly embraces border applicability. Art. II.3 reads:

> 'No person shall be subjected…to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened.'

3.6.7 American Convention on Human Rights

Art. 22.8 of the 1989 American Convention on Human Rights reads:

> 'In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.'

Art. 1.1 of the convention contains much the same jurisdiction formulation as used in the Convention on the Rights of the Child, ' to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms', with no territorial reference as in Covenant on Civil and Political Rights.

---

[183] UN Committee against Torture. *Conclusions and recommendations of the Committee against Torture*. United States of America. CAT/C/USA/CO/2. 25 July 2006, par. 14. The United States and the United Kingdom have rejected this view on various grounds. For a refutation of their argumentation, see Kessing 2008: 234-237. See also UNHCR. 2007. Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. 26 January 2007, p. 17.

3.6.8 European Convention on Human Rights

Lastly, Art. 1 of the 1950 European Convention on Human Rights states: 'The High Contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. While the convention does not include an explicit *non-refoulement* clause, Art. 3 has been consistently interpreted to include the prohibition of *refoulement* to places where individuals may fear torture, inhuman or degrading treatment or punishment (Weinzierl 2007: 16-18; Noll 2000: 441-446; Nicholson 1997: 627).[184] The jurisprudence of the European Court of Human Rights has repeatedly affirmed that that the term 'jurisdiction' may in some circumstances extend beyond the territory – the decisive criterion being whether or not a state exercises 'effective control'.[185]

3.6.9 *Non-refoulement* as part of customary international law

The widespread adherence to the *non-refoulement* principle as enshrined in different international instruments has lead some to suggest that *non-refoulement* is part of customary international law and as such may have a wider scope of application *ratione loci* (Goodwin-Gill 1986: 103).[186] As part of UNHCR's

---

[184] The application of Art. 3 to instances of non-refoulement was first affirmed by the Court in *Soering v. United Kingdom*. European Court of Human Rights. Appl. No. 14038/88. 7 July 1989. Subsequently, the court has held that it is 'well-established in case law that the fundamentally important prohibition against torture and inhuman and degrading treatment under Article 3, read in conjunction with Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in the Convention', imposes an obligation on Contracting States not to expel a person to a country where substantial grounds have been shown for believing that he would face a real risk of being subjected to treatment contrary to Article 3.' T.*I. v. United Kingdom*. European Court of Human Rights. Appl. No. 43844/98 (Admissibility). 7 March 2000, par. 228.

[185] UNHCR. 2007. Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. 26 January 2007, par. 39-40. The meaning of 'jurisdiction' and 'effective control' is discussed more extensively in chapter 4.

[186] See further UNHCR. 2005. Brief Amicus Curiae: R (ex parte European Roma Rights Centre et al) v. Immigration Officer at Prague Airport and another (UNHCR intervening). *International Journal of Refugee Law* 17 (2):426-453, p. 436-40; and UNHCR.

Agenda for Protection all parties to the Refugee Convention formally acknowledged 'the principle of *non-refoulement*, whose applicability is imbedded in customary international law'.[187] Similarly, in their analysis of the *non-refoulement* principle, Elihu Lauterpacht and Daniel Bethlehem draw support for customary status both from the parallel formulations of the principle in other instruments of international law and the fact that around 90 per cent of all UN states are party to one or more conventions that include a direct or indirect *non-refoulement* obligation (Lauterpacht and Bethlehem 2003: 147). According to Lauterpacht and Bethlehem, establishing *non-refoulement* as part of customary international law dictates 'that the responsibility of a State will be engaged in circumstances in which acts or omissions are attributable to that State wherever these may occur' (Lauterpacht and Bethlehem 2003: 160).

Two issues are at stake here. The first concerns whether or not the *non-refoulement* principle can be considered part of customary international law. While UNHCR and a number of important scholars seem to think so, it should be borne in mind that there is still some disagreement as to this conclusion. Critical scholars have thus argued that while adherence to some principle of *non-refoulement* is widespread, the standard of customary law simply has not been met yet (Hathaway 2005: 363; Hailbronner 1988: 128-136).[188] The second issue concerns the geographic scope of such a custom. Even if customary status is accepted, the argument that this entails universal application *ratione loci* is questionable. The debate surrounding customary status has mainly evolved around whether or not the *non-refoulement* principle can be extended to protect a wider set of beneficiaries than those mentioned in Art. 1 of the Refugee Convention and whether the non-refoulement principle is binding for all states. To wit, the question of whether states not signatory to the Refugee Convention or other instruments are bound by the *non-refoulement* principle remains different from that concerning its scope *ratione loci* in triggering the individual responsibility of each state when encountering the refugee. In other words, it would require further evidence to presume that

---

1994. Brief Amicus Curiae: The Haitian Interdiction Case 1993. *International Journal of Refugee Law* 6 (1):85-102, p. 94.

Some scholars have even argued that *non-refoulement* may be considered *jus cogens* (Allain 2001).

[187] Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees. UN Doc. HCR/MMSP/2001/09. 13 December 2001, par. 4. See also Hathaway 2005: 364.

[188] For an overview of positions taken as regards this issue, see Noll 2000: 363, note 1059.

the geographical scope of a customary principle of international law is broader than the explicit formulations of this principle in treaty law upon which its claim as customary international law is in this case founded. Any claim for a wider scope *ratione loci* for a customary principle of *non-refoulement* will thus have to be independently underpinned by systematic analysis of state practice and soft law.

3.6.10 Jurisdiction as a standard scope of application *ratione loci* in human rights law

Another argument proposed on the basis of a comparative analysis is that, as a general proposition, states are responsible under international human rights law in relation to any person subject to or within their jurisdiction (Goodwin-Gill and McAdam 2007: 244-245; Lauterpacht and Bethlehem 2003: 110-112; Plender and Mole 1999: 86).[189] The argument appears to build on the assumption that in the absence of explicit specification to the contrary, jurisdiction is the 'standard' scope of application *ratione loci* for a state's obligations under public international law (Hathaway 2005: 161). As noted by Theodor Meron: 'Narrow territorial interpretation of human rights treaties are anathema to the basic idea of human rights, which is to ensure that a state should respect human rights of persons over whom it exercises jurisdiction' (Meron 1995: 82).

Unlike the argument for customary status of the *non-refoulement* principle specifically, this line of reasoning does not depend on the existence or inference of *non-refoulement* principles in other human rights treaties. In support of this position, one may thus look to human rights treaties in general, international humanitarian law and general principles of public international law in order to bolster the claim that states are, as a general rule, responsible under international human rights law to anyone within or subject to their jurisdiction.

On closer scrutiny, however, the argument seems to falter. First of all, a significant number of international human rights treaties actually go wider than jurisdiction in their geographical application. Notably, the Genocide

---

[189] UNHCR. 2007. Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. 26 January 2007, p. 16.

Convention contains no geographic restrictions whatsoever,[190] and the 1949 Geneva Convention obliges states parties 'in all circumstances' (Art. 1). The 1965 Convention on the Elimination of all forms of Racial Discrimination does include a jurisdiction clause in Art. 3 in setting the positive obligations of states parties, but is otherwise silent on the matter.[191] Secondly, a number of instruments have a more complex structure, prescribing different scopes *ratione loci* for different articles, which speaks against such a general assumption. This goes for the Refugee Convention and the Convention Against Torture mentioned above. As an additional example, the 1966 International Convention on Economic, Social and Cultural Rights obliges states to 'take steps individually and through international assistance and co-operation' in order to achieve the realisation of the rights enshrined in the covenant. Yet, the possible extraterritorial dimension remains debatable in relation to the precise nature and content of each article (Coomans and Kamminga 2004: 2).

A general principle that states are responsible for anyone within their jurisdiction cannot therefore be deduced from a comparative analysis. The introduction of a 'standard scope *ratione loci*' seems most of all a preliminary choice that defies ordinary interpretative methodology (Noll 2005: 552). To appreciate this, one needs only draw a parallel to the *Sale* case in which a similar standard applicability *ratione loci* amounting to state territory was relied upon as an important premise of the court's verdict.[192] The flaws of this reasoning were pointed out both by the dissenting Justice Blackmun and by subsequent commentators, and the United States Supreme Court soon after overturned it in its litigation involving competition law (Hathaway 2005: 339; Koh 1994: 2428).

3.6.11 Conclusions: the wider normative context of the *non-refoulement* principle

---

[190] *Case concerning Application of the Convention on the Prevention and Punishment of Genocide (Bosnia-Herzegovina v. Yugoslavia) (preliminary objections)*. International Court of Justice. 11 July 1996, par. 31.

[191] See also the 1979 Convention on the Elimination of Discrimination Against Women.

[192] *Sale, Acting Cmmr, Immigration and Naturalization Service v. Haitian Center Council*. United States Supreme Court. 113 S.Ct. 2549, 509 US 155. 21 June 1993.

A comparative analysis of explicit and implicit *non-refoulement* obligations set out in binding human rights instruments other than the Refugee Convention shows that states parties to one or more of these instruments are bound by some variation of the *non-refoulement* principle, even beyond their territory. The 1933 predecessor of the 1951 Refugee Convention explicitly obliged signatories to respect the *refoulement* prohibition in instances occurring at the frontiers. A norm of *non-refoulement* extending to state jurisdiction can further be deduced from both the Covenant on Civil and Political Rights and the European Convention on Human Rights. Both the Human Rights Committee and the European Court of Human Rights have established that such jurisdiction is not limited to state territory but can extend both to actions undertaken on the high seas and to actions undertaken in the territory of a foreign sovereign. A similar *non-refoulement* obligation has further been drawn from Art. 3 of the Convention Against Torture. While this instrument does not explicitly delimit the applicability *ratione loci* of this article, even a more restrictive interpretation would have it apply extraterritorially to the extent that signatory states exercise effective control.

The impact of these observations, however, should not be unduly extrapolated. The view that today *non-refoulement* forms part of customary international law and therefore applies to state action wherever it occurs must be rejected, if not on its premise then on the missing justification as to why the conclusion follows from this premise. Similarly, the argument that, in the absence of explicit specification to the contrary, jurisdiction may be assumed to be the 'standard' scope of application *ratione loci* of all human rights treaties sits uneasy with a critical analysis of human rights treaties which shows a considerable variation in the designation of geographical application between and within instruments.

On the other hand, it is clear that in the interpretation of Art. 33 of the Refugee Convention the instruments examined above may be considered treaties *in pari materia* and that formulations and development of *non-refoulement* obligations in this wider normative context may be considered a subsidiary source of interpretation. From a systematic viewpoint it is thus noteworthy that an interpretation of Art. 33 of the Refugee Convention as applying wherever a state exercises jurisdiction is coherent with the parallel obligations stemming from the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the European Convention on Human Rights. For the Convention Against Torture, a more universalist interpretation may extend the application of Art. 3 even further, but as a minimum the *non-refoulement* obligation established from this provision must be understood as extending to everyone within a state's jurisdiction.

General human rights law has always been relied upon as providing important additional avenues to ensure protection for many refugees (Plender and Mole 1999: 89). From a pragmatic perspective, this creates a basic presumption for any state party to one or more of the above instruments to respect the *non-refoulement* principle in any situation where jurisdiction can be established. The *non-refoulement* principles set out in instruments other than the Refugee Convention further expand both *ratione personae* and *ratione materiae* in comparison to Art. 33. Thus, the *refoulement* prohibitions stemming from, for example, the Convention Against Torture or the European Convention on Human Rights do not allow for derogations for reasons of national security as set out in Art. 33.2, nor are they limited to persons fearing persecution for reasons connected to race, religion, political opinion or affiliation to a certain social group as set out by Art. 1 of the Refugee Convention.[193] In addition, while Art. 1 of the Refugee Convention arguably excludes application in cases where potential asylum-seekers have not yet left their country of origin,[194] neither the OAU Convention nor any of the general human rights instruments carry this limitation.

The latter points should not be taken to imply that Art. 33 of the Refugee Convention may also be interpreted as applying inside the country of origin or encompassing a wider group of beneficiaries. This would fly in the face of the language employed in Art. 1 of the Refugee Convention and no subsidiary source of interpretation can change that. What it does mean, however, is that to the extent that the interpretation of Art. 33 in the Refugee Convention is still contested, the above provisions give additional support to an interpretation extending the applicability *ratione loci* to state jurisdiction for Art. 33 as well.

3.7 A note on delimitations *ratione loci*

The above analysis has been operationalised around four concentric conceptions of applicability *ratione loci* of the *non-refoulement* principle enshrined in Art. 33 of the Refugee Convention – 'within the territory', 'at the frontier',

---

[193] This does not preclude, however, that Art. 33 of the Refugee Convention may in some instances be applicable in cases that do not amount to torture, inhuman or degrading treatment or punishment.

[194] *European Roma Rights Centre and others v. Immigration Officer at Prague Airport and another. House of Lords*. UKHL 55. 9 December 2004, par. 15, 26.

'within a state's jurisdiction' and 'wherever a state acts'. These delimitations were chosen because they reflect the main positions in the existing debate to determine the geographical scope of the *non-refoulement* principle. In order to justifiably portray the existing views in their original context it has thus been necessary to replicate these categorisations even though they are not entirely unproblematic. A number of graduations or further differentiations are possible. One such important case is application inside the country of origin of an asylum-seeker. Whereas most scholarly work, including the present analysis, would insist that this is excluded under an immediate reading of Art. 1 of the Refugee Convention, as seen above some scholars have claimed that this is conceivable in certain situations where a refugee is within their country of origin, but nonetheless subject to the jurisdiction of another state (Lauterpacht and Bethlehem 2003: 122). Moreover, while the notions of 'in the territory' or 'anywhere a state acts' are reasonably self-explanatory, 'at the frontier' and 'within the jurisdiction' are not. The concept of 'jurisdiction' will be the subject of the following chapter, but the question of singling out 'at the frontiers' as an intermediate category between inside and outside a state's territory may warrant a small digression here.

Exactly where is a refugee when at the border of a potential host state? Among social scientists it has become increasingly popular to speak of 'virtual' or 'blurry' borders in order to describe how migration control is increasingly carried out on each side of the geographic boundary (Gammeltoft-Hansen 2006b: 31). Similarly, under current EU law, member states may apply less favourable standards to asylum-seekers in designated border zones.[195] Yet, as a legal delimitation signifying a separate geographical sphere, 'at the border' makes little sense and it does not find support elsewhere in international law.[196] By common definition, the border is where one state's territory meets the territory of another state or of international waters (Lowe 2007: 151). In a world occupied by mutually sovereign territories, it is difficult to see how, logically, 'at the frontier' can be maintained as anything more than a fixture without any independent extension. In other words, the refugee is either in the territory or outside – there is no dancing on the line.

---

[195] See e.g. European Council. Directive 2005/85/EC. Minimum standards on procedures in Member States for granting and withdrawing refugee status. 1 December 2005, Art. 35.

[196] Few examples of distinct bilateral legal regimes in relation to the borders or frontiers are known, e.g. the notion of *voisinage*, but they generally contain few hard rules beyond cooperation among the parties (Lowe 2007: 150f).

Such considerations are not new. Goodwin-Gill has bluntly asserted that '[a]s a matter of fact, anyone presenting themselves at the frontier post, port or airport will already be within state territory and jurisdiction' (Goodwin-Gill 1996: 75; see also Hathaway 1995: 6). As the actual border checkpoint is presumably located inside the territory of the host state this is consequently where the asylum-seeker meets the state (Noll 2005: 552). This interpretation of course dissolves the dispute between territorial and border application by simply subsuming the latter delimitation within the former.

However, the argument could just as well be made the other way around. If border instances of *refoulement* are accepted to take place before the refugee has entered the territory, the wide support for border applicability may, *mutatis mutandis*, be taken to support an interpretation of extraterritorial applicability. Put differently, if situations 'at the frontier' are not co-extensive with 'in the territory', the former logically occur either in international waters or within the sovereign territory of a third state. The presumption would further favour a jurisdiction interpretation to the extent that migration control carried out in the immediate extension of a state's territory is likely to meet the tests for establishing extraterritorial jurisdiction.

3.8 Conclusion

This chapter has sought to probe the protective reach of the 1951 Refugee Convention. In this inquiry the *non-refoulement* principle enshrined in Art. 33.1 of this instrument acts as a threshold. For the refugee first encountering a state's migration control, the protection against *refoulement* is the right that access to virtually all other rights depends upon.

Great controversy has persisted as to the geographical application of this principle; in the first instance as to whether it applies to rejection at the border, and in the second instance as to whether it extends to state actions undertaken extraterritorially. A host of arguments in favour of different interpretations have been put forward throughout the last almost six decades, yet no clear and convincing answer to the resolution of this question has emerged.

A doctrinal analysis of the language alone does clearly extend geographical application of the *non-refoulement* principle to situations involving non-admittance at the frontier, something reaffirmed by the Ad Hoc Committee during the drafting and by subsequent soft law and state practice. As to the possibility of extraterritorial application however, no clear answer appears

from an analysis of the wording, purpose and object of Art. 33. Nor can the issue be resolved by looking to the *travaux préparatoires*. As one scholar has noted, '[p]robably the most accurate assessment of States' view in 1951 is that there was no unanimity, perhaps deliberately so' (Goodwin-Gill 1983: 74).

What emerges throughout these stages of analysis however, is a clear tension between a restrictive territorial or ad-territorial understanding, and a more universalist approach, arguing that Art. 33 applies wherever a state exercises jurisdiction or anywhere a state acts. As has been elucidated, this tension ultimately refers back to a conflict over interpretative rules, between those who emphasise the humanitarian purpose of the Refugee Convention and human rights law in general on the one hand, and those who maintain the national sovereign maxim that a state's obligations are primarily territorial and that even human rights instruments cannot be expanded beyond their wording and the intended reach of the state parties.

A broader contextual interpretation taking account of subsequent developments, however, somehow changes this picture. Support for an interpretation of the *non-refoulement* principle as extending to state jurisdiction has been expressed by both the Inter-American Commission on Human Rights and the UNHCR Executive Committee in relation to interdiction schemes undertaken on the high seas. An analysis comparing Art. 33 with *non-refoulement* principles set out in other human rights treaties may further bolster this view. In particular, the International Covenant on Civil and Political Rights, the Convention Against Torture and the European Convention on Human Rights all entail *non-refoulement* obligations that apply *ratione loci* everywhere a state can be shown to exercise jurisdiction.

As regards state practice, the recent surge in extraterritorial migration control schemes does not support a more expansive scope of Art. 33. Yet, a critical analysis of states operating extraterritorial migration control and/or asylum processing shows that actual practice and *opinio juris* are seldom unequivocal in rejecting extraterritorial application of the *non-refoulement* principle. Either such schemes incorporate some sort of mechanism, however incomplete, to avoid direct *refoulement*, or extraterritorial rejection is carried out while simultaneously paying lip service to the *refoulement* obligation at the rhetorical level.

In the opinion of the present author, it must thus be concluded that there has been a dynamic development in the application of the *non-refoulement* principle as enshrined in Art. 33.1 of the Refugee Convention. Although the issue may have been left unclear at the time of drafting and more than one possible interpretation is thus possible based on the wording of Art. 33, this interpretative space has been substantially narrowed as subsequent

developments in soft law and other human rights instruments point consistently towards a wider interpretation.

As state practices have developed, so has the normative reach of the Refugee Convention. From early on the *non-refoulement* principle has been challenged by states rejecting refugees at the borders and as a reply a wide number of resolutions and other soft law instruments have certified and affirmed the application of Art. 33 to these instances. In more recent years, states acting extraterritorially have prompted a similar response, not just with regard to the Refugee Convention, but more generally in international courts and supervisory bodies affirming the extraterritorial application of major human rights instruments to all instances where a state exercises jurisdiction.

The *non-refoulement* obligation set out in the Refugee Convention must be understood within this context. In the interplay between new state practices to extend control beyond the borders and normative developments to affirm extraterritorial human rights obligations, Art. 33.1 cannot be left unaffected. The question however remains how far one may reasonably stretch application. While the humanitarian *telos* of the Convention in principle speaks for universal application, the national lawyer may conversely be concerned that unrealistic obligations are not placed upon states parties.

3.8.1 A compromise: *non-refoulement* as effectiveness

In trying to resolve this issue, recourse may finally be had to the doctrine of effectiveness developed by Hersch Lauterpacht.[197] Much in line with the above, Lauterpacht argues that interpretation of the intention of the parties must not be used in isolation when discerning the purpose of a treaty. Rather the original *raison d'être* must be combined with a sense of its current usage and implementation in order to ensure that the treaty remains effective rather than becoming ineffective. In his own words, 'the maximum of effectiveness should be given to [an instrument] consistent with the intention – the common intention – of the parties' (Lauterpacht 1958: 229). Thus, an interpretation loyal to the wording and intention of the drafters at the time of conceptualisation may still be void if it fails to consider the applicability of this

[197] See Lauterpacht 1934: 69ff and Lauterpacht 1958: 225ff. On Lauterpacht's use of this principle see Scobbie 1997. Lauterpacht's doctrine of effectiveness should not be confused with the so-called 'principle of effectiveness' in international law stating that a state's jurisdiction is defined by the territory or individuals over which it exerts effective control (Spiermann 2006: 332f; Ross 1961: 159f). See further chapter 4.2.1.

interpretation to the current context and practices. A similar argument has been made by reference to the obligation enshrined in Art. 26 of the Vienna Convention that interpretation must be carried out in 'good faith' in order to ensure the performance of the treaty (Hathaway 2005: 62). [198]

One should be careful, however, of attempts to extend the notion of 'good faith' or 'effectiveness' as an independent legal basis for furthering expansive interpretations. The principle of good faith only operates to suggest preference to the interpretation that ensures the most effectiveness or actual performance of the treaty within the scope of possible interpretations set out by the text itself, its wording and intentions of the drafters.[199] As noted by Hersch Lauterpacht:

> 'This means that on occasions, if such was the intention of the parties, good faith may require that the effectiveness of the instrument should fall short of its apparent and desirable scope. The principle of effectiveness cannot transform a mere declaration of lofty purposes – such as the Universal Declaration of Human Rights – into a source of legal rights and obligations.' (Lauterpacht 1958: 292).

Still, the Refugee Convention is a binding legal instrument and, as evidenced above, an interpretative scope does exist in the determination of the scope *ratione loci* of Art. 33. How then would the introduction of a principle of effectiveness affect interpretation? On the one hand, if the purpose of Art. 33 is to prevent a certain consequence, namely the return of refugees to persecution, there is no *a priori* reason to limit this obligation to a state's territory (Meron 1995: 80). The fact that extraterritorial interception practices were not contemplated at the time of drafting cannot be taken as a valid argument for restrictive interpretation. Rather, in order to remain effective, the *non-refoulement* principle must be interpreted in a way that, while consistent with the text and overall intention of the drafters, does not make it redundant in the light of evolving state practice to establish migration control beyond state territory. Consequently, a basis of both border and extraterritorial

---

[198] See further references herein.

[199] This view has been seconded by both refugee scholars and national judiciaries. See Hathaway 2005: 62 and *R. (ex parte European Roma Rights Centre and others) v. Immigration Officer at Prague Airport and another*. 9 December 2004. House of Lords. UKHL 55, p 229, 249.

applicability could arguably be said to have been established much more firmly today much more than fifty years ago.[200]

On the other hand, a national sovereign perspective may equally rely on the principle of effectiveness as at least tempering somewhat what would otherwise be a claim for universal application. Acting or appearing extraterritorially, states may face a number of practical concerns and particular circumstances complicating their fulfilment of human rights obligations. An interpretation that binds state officials by a *non-refoulement* obligation in each and every situation a refugee is encountered may thus be practically impossible and thus ultimately ineffective. In view of this, the scope of Art. 33 may conversely be limited to situations in which states can be said to exercise a sufficient degree of power over either the refugee encountered or the geographic area in which control takes place. Such a view finds support from Hathaway and Dent noting that:

> 'Article 33 was not intended to compel States to take on protection responsibilities in the world at large, but it was clearly intended to constrain treatment of refugees within the scope of each State's authority.' (Hathaway and Dent 1995: 9)

This would extend application of Art. 33 of the Refugee Convention to anywhere a state exercises jurisdiction. As will be discussed in the subsequent chapter, this is by no means as straightforward a matter as some refugee scholars would like it to be. Nor is it an interpretation that necessarily favours an expansive *ratione loci.* As in the discussions over Art. 33, legal considerations to the concept of jurisdiction are equally wrought by competing claims between territorial and universalist positions.

Having considered the language and object of the *non-refoulement* obligation under the Refugee Convention, as well as the context, drafting history and subsequent developments in soft law, state practice and other instruments of human rights law, the uncertainty regarding the scope *ratione loci* of this provision can thus be absolved. Uncertainty and interpretative scope has, however, been evident at almost every stage of interpretation. Yet a systematic analysis, consideration of subsequent development and the introduction of a

---

[200] To this end Hathaway even speaks of an 'evolutionary principle' (2005: 67).

principle of effectiveness yield a clear result that extends the *ratione loci* to the effective control, or jurisdiction, of the acting state.

Nonetheless, this has not prevented a number of states from still maintaining that Art. 33 of the Refugee Convention only applies within the territory or at most at the borders of the state in question. The United States thus continues to uphold the position that Art. 33 does not apply extraterritorially.[201] Similarly, former German Minister of the Interior, Otto Schily declared in 2005 that the *non-refoulement* principle 'has no application on the high seas' (Garlick 2006: 620). While these views must be considered incorrect on the background of the present examination, their persistence may perhaps equally be understood in the light of the above analysis. The difficulty in reaching a clear interpretative result and the plethora of arguments in favour of different positions accumulated over the past six decades inevitably provide a scope for contestation, where governments may seek to pick and choose among arguments to bolster whatever reading is found to be most desirable.

[201] United States Mission to the United Nations and Other International Organisations in Geneva. 2007. Observations of the United States on the Advisory Opinion of the UN High Commissioner for Refugees on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol. Geneva, 28 December 2007.

4. Offshore migration control and the concept of extraterritorial jurisdiction

In the previous chapter, it was submitted that the core protection offered by the 1951 Refugee Convention, the *non-refoulement* obligation, may be claimed by refugees as soon as they find themselves within a state's jurisdiction. As also shown, such an interpretation essentially brings the applicability *ratione loci* of Art. 33 into line with the scope of a number of other human rights instruments. The question is, however, how much is gained by this. While refugee scholars have debated intensely over the geographical reach of the *non-refoulement* principle, few of those arguing in favour of jurisdiction have actually undertaken a systematic analysis of what this concept entails.

A number of refugee scholars seem to assume that any exercise of migration control activities, whether inside, at or beyond the border, necessarily entails an exercise of jurisdiction (Lauterpacht and Bethlehem 2003: 111; Willheim 2003: 175). This view, however, finds little support under general international law and current human rights jurisprudence. For the purpose of engaging human rights responsibilities the concept of jurisdiction is generally bound by a premise of effective control either over territory or individuals. Within the territory, this control is assumed to flow from the formal entitlement to exercise sovereign authority. Beyond the territory, however, the test for establishing such control is substantially more demanding. Not all actions a state undertakes outside its territory appear to bring about jurisdiction. Yet, the establishment of jurisdiction is conversely the premise for subjecting such states to relevant obligations under international refugee and human rights law.

The fundamental question addressed in this chapter may thus be phrased as follows: when, if ever, is extraterritorial migration control equivalent to effective control and may offshore migration control under any other circumstances bring about jurisdiction?

Trying to answer this question, the chapter will first proceed by examining the notion of extraterritorial jurisdiction as employed in general international law and human rights law respectively. Secondly, the chapter moves on to analyse the most important international human rights litigation in respect of this issue and its application to different practices of extraterritorial migration control. The chapter seeks to elucidate how the existing human rights jurisprudence seems to be split between two fundamentally different

interpretative starting points. The first extends from national sovereignty and the territoriality principle and emphasises the absolute and exclusive nature of jurisdiction even when established extraterritorially. The second starts from the basic tenet that 'power entails responsibility' and thus stresses the functional or causal relationship between the individual and the state in regard to a specific action or omission. Both perspectives may be evident in individual cases, but which remains dominant appears to depend on legal geography. When looking to establish jurisdiction in cases of offshore migration control, one may thus usefully distinguish between three spheres: first the excision of territory or withdrawal of territorial jurisdiction, secondly situations occurring in *terrae nullius* or on the high seas, and lastly cases where migration control is enacted within the territory or territorial jurisdiction of another state.

4.1 Rights owed to refugees within a state's jurisdiction

Before going into the more conceptual analysis of the meaning of jurisdiction, it may be useful to briefly review the legal protection available to the refugee who is presumed to be within a state's jurisdiction, yet still outside its territory. Moving beyond the *non-refoulement* obligation, what other rights are then applicable under international refugee law?

Looking to the Refugee Convention itself, the immediate answer would have to be relatively few. As described in chapter 2, the convention follows an incremental structure in which more and more rights are granted according to the level of attachment established between the refugee and the host state. By far the majority of entitlements are thus reserved for refugees who are already physically present within the territory or have some higher attachment to the host state. Where refugees have not yet reached the territory a state's obligations are therefore immediately reduced to a few core rights under the Convention for which no particular level of attachment is specified. In addition to the *non-refoulement* principle, these include access to courts (Art. 16) and non-discrimination (Art. 3), as well as the somewhat more specific issues concerning property (Art. 13), education (Art. 22) and rationing (Art. 20). If the analysis of the geographical scope of Art. 33 set out in the previous chapter is to be trusted we may assume, *mutatis mutandis*, that these obligations are similarly owed anywhere a state is held to exercise jurisdiction (Hathaway 2005: 160ff).

Additional protection may of course still be derived from general human rights law. As set out in the previous chapter, a number of key human rights instruments all extend the scope of application *ratione loci* to state jurisdiction, including the Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the Convention Against Torture (in regard to some articles), the American Convention on Human Rights and the European Convention on Human Rights. As shown by several scholars, a broad set of protections for refugees may be developed from these general human rights instruments; in some respects more encompassing than the protection offered by the *lex specialis* of the Refugee Convention (McAdam 2007; Mandal 2005; Anker 2002; Plender and Mole 1999; Gorlick 1999). On the other hand, while these instruments may all in principle be invoked wherever a state exercises jurisdiction, important differences may pertain between and within instruments in triggering protection obligations in the context of migration control (Noll 2005).

The additional protection provided by general human rights instruments may be particularly important in scenarios where extraterritorial migration control is coupled to schemes for extraterritorial asylum procedures in offshore or third country locations and the progression of rights under the Refugee Convention that flow from gaining access to the territory is thus cut short. Similarly, policies to summarily deflect asylum-seekers to designated 'safe third countries' may raise additional concerns when coupled with extraterritorial migration control. The present author concurs with the view that while 'safe third country' rules are not explicitly prohibited under international refugee law, such transfers of protection from one state to another do, as a minimum, require that the second state respects the full catalogue of rights already obtained by the refugee in the first state (Hathaway 2005: 333; Legomsky 2003: 612ff). This means that a refugee arriving at the territory of a more developed country would be entailed to any right owed by that country according to the level of attachment of the refugee as 'physically present' even when deflected back to a third state with more derogations to the Refugee Convention or a different interpretation of its obligations. Any shortcomings in this regard may entail the liability of the sending state.[202] Yet for the refugee who never sets foot on the soil of the controlling state before being deflected *en route* to a third country, the acting state will only be bound to guarantee that the limited number of rights pertaining to refugees 'within the jurisdiction' is guaranteed in the third country.

---

[202] *T.I. v. United Kingdom.* Appl. No. 43844/98. 7 March 2000 (Admissibility).

In addition, a particular concern may arise where migration control is carried out by a third state from within the country of origin. This can be the case where naval interception is granted permission to patrol the territorial waters of foreign states, where immigration liaison officers operate control in foreign airports or by the simple denial of visas at consulates thereby impairing the possibility of exiting the country of persecution (Byrne et al. 2002: 10ff). In such cases all rights under the Refugee Convention are lost, since refugee status is premised upon having left the country of origin (Art. 1). By moving control so far forward that it even precedes flight the very label 'refugee' is deconstructed. Here again, the protection offered by general human rights law becomes particularly important, and it should be noted that the *non-refoulement* principles flowing from general human rights law instruments do not have the 'outside his country of origin' requirement.[203] In addition, exercising migration control to the effect that individuals are prevented from leaving their country of origin may, depending on the circumstances, amount to a violation of the right to leave as established in, for example, Art. 12 of the Covenant on Civil and Political Rights (Harvey and Barnidge 2007; Weinzierl 2007: 49;Goodwin-Gill 1996b: 95).[204]

Beyond these scenarios, it is nonetheless fair to assume that respect for these core protection obligations owed anywhere a state exercises jurisdiction in practice will entail the transfer of asylum-seekers to the territory of the state for the purpose of engaging in an asylum procedure. From there on the rest of

---

[203] See further chapter 3.6. This point appears to have been gravely overlooked in *European Roma Rights Centre and others v. Immigration Officer at Prague Airport and another*. House of Lords. UKHL 55. 9 December 2004. It should also be remembered that a difference may still remain as to the amount of actual control a state exercises and its *de facto* possibilities for extending protection benefits between a situation where a state encounters a protection seeker in the territory of a third state and the situation in which the protection seeker is still within his or her country of origin. In particular, situations are conceivable in which the country of origin resists or prevents the granting of protection benefits by the extraterritorial state and even onwards passage out of the country by reference to its territorial sovereignty. See further section 4.8.

[204] However and as pointed out by several scholars the right to leave is by no means an absolute right, but subject to certain permissible restrictions, national security, public order, public health. From the perspective of the state to which entry is sought, passport control for example and visa requirements are in themselves unlikely to constitute a breach of Art. 12 of the covenant (Goodwin-Gill 1996b: 96; Hailbronner 1996: 111). First and foremost, the right to leave may thus be claimed vis-à-vis the home state if arbitrary exit control is imposed (Hathaway 2005: 308-9, 897-902). See also Human Rights Committee. General Comment No. 27: Freedom of Movement (Art. 12). UN Doc. CCPR/C/21/Rev.1/Add.9. 2 November 1999, par. 10.

the rights catalogue guaranteed by the Refugee Convention will eventually unfold itself. This is in line with the analysis in the previous chapter and flows from the fact that meeting the requirements of the *refoulement* prohibition ordinarily involves a refugee status determination process which again, in the majority of situations, entails access to the territory. Following on from the previous chapters, an essential question from a refugee protection perspective is thus establishing the meaning of jurisdiction for human rights purposes.

4.2 The general basis for conceiving of extraterritorial jurisdiction

4.2.1 Jurisdiction as a matter of public international law

A state's jurisdiction normally describes the limits of its legal competence or regulatory authority (Lowe 2006: 335; Oppenheim 1992: 456). As a concept concerned with boundaries, jurisdiction is thus best understood as one state's claim to exercise power vis-à-vis other states (Berman 2003: 4). Within the Westphalian state system, this claim is positively based on a state's own claim to territorial sovereignty and negatively limited by competing claims to authority by other states similarly claiming exclusive authority within their territory.

Doctrinal analysis of extraterritorial jurisdiction normally distinguishes between a state's prescriptive jurisdiction and its enforcement jurisdiction (Higgins 1984; Weil 1984).[205] As regards prescriptive jurisdiction, states are generally assumed to have a wider margin for extraterritorial application of laws and national courts. This was perhaps expressed most clearly in the 1927 *Lotus* case, in which the Permanent Court of International Justice held that:

> 'Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their

[205] Some authors further single out a third category of 'judicial jurisdiction'. To the present author this is a source of confusion, as judicial activity in the wider sense is arguably a composite of legislative and enforcement activities. In the present chapter, judicial decisions in themselves are considered as pertaining to prescriptive jurisdiction, whereas the enforcement of judicial decisions remains a feature of enforcement jurisdiction.

> courts to person, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules.'[206]

While this general presumption for extraterritoriality has since been somewhat moderated in light of egregious claims for extraterritorial jurisdiction, extraterritorial prescriptive jurisdiction is still accepted as long as the acting state can show some meaningful link with those over whom jurisdiction is asserted. Firmly established bases for doing this include territory and nationality; allowing states to assert legislative and judicial jurisdiction in extraterritorial incidents with a clear intraterritorial *effect*, or over nationals even though they are not present within the territory (Lowe 2007: 340-56). Especially within the fields of security and international crime claims for extraterritorial prescriptive jurisdiction have expanded in recent years. This includes the proliferation of treaty-based agreements to allow extraditions, claims to extraterritorial jurisdiction based on the protection of a state's vital interests (the protective principle), and claims for universal jurisdiction in relation to certain international crimes, e.g. piracy and genocide (Reydams 2003; Capps et al. 2003; Cassese 1989).

With regard to enforcement jurisdiction, the traditional presumption has been prohibitive rather than permissive. As equally established in the *Lotus* case:

> 'Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State.'[207]

As such, enforcement jurisdiction is in principle limited to the territory of the state and, with some limitations, the *res communis* such as the high seas (Lowe 2006: 374). Nonetheless, although this is the starting point and may cover the vast majority of a state's dealings, it is equally clear that jurisdiction cannot be entirely limited to the territory. As noted by the International Law Commission as early as 1975, 'international life provides abundant examples

---

[206] *Case of the S.S. Lotus*. Permanent Court of International Justice. PCIJ Series A - No. 10. 7 September 1927, p. 19.

[207] *Case of the S.S. Lotus*. Permanent Court of International Justice. PCIJ Series A - No. 10. 7 September 1927, p. 14.

of activities carried on in the territory of a state by agents of another state acting on the latter's behalf'.[208] Common examples of extraterritorial enforcement jurisdiction within a foreign territorial jurisdiction include consular activities and deployment of military personnel abroad. In addition, a treaty basis for extraterritorial enforcement jurisdiction is likewise developing: examples include the 'hot pursuit' rules under the Schengen framework allowing cross-border access for EU member state law enforcement agencies, and the 'ship rider' agreements allowing United States vessels access to the territorial waters of a number of Caribbean states to intercept drug smugglers. The latter in particular is conceptually very similar to the agreements such as that signed between Spain and Senegal to carry out migration control within Senegalese territorial waters. Lastly, under the Law of the Sea, states hold jurisdiction on board any vessel flying its flag (flag sovereignty) and states are permitted to extend enforcement jurisdiction for customs and immigration purposes for example, to parts of the high seas, namely the twelve mile contiguous zone extending from territorial waters, and for exploration purposes to the exclusive economic zone extending up to 200 miles (Gavouneli 2007).[209]

In summary, while jurisdiction as a concept of general and public international law does set out from territorial principles, the legal bases for extraterritorial jurisdiction are well developed regarding prescriptive jurisdiction and situations of extraterritorial enforcement jurisdiction are hardly exceptional. As noted by one scholar, the entire law of jurisdiction essentially concerns exceptions to the principle of territoriality (Milanovic 2008: 421). It is true, however, that issues of extraterritorial jurisdiction have always drawn contestation, both as a matter of state practice and within the legal field. Despite a surge in academic interest, jurisdiction is hardly an established field of legal enquiry and a variety of approaches is employed in different fields of international law (Capps et al. 2003: xvii). As shall be seen, this is no less true for the issue of extraterritorial jurisdiction as applied in the human rights context.

---

[208] International Law Commission. 1975. *Yearbook of the ILC*. Vol. II. p. 83.

[209] 1958 Convention on the Territorial Sea and Contiguous Zone, Art. 33.

4.2.2 Extraterritorial jurisdiction in the human rights context

The notion and function of jurisdiction in human rights law in at least one respect fundamentally differs from the notion of jurisdiction as employed in public international law. In the human rights context, the question of jurisdiction is not about whether a state's claim to exercise authority or some legal competence is lawful or not, but rather whether in a specific instance a particular state is bound to respect relevant human rights obligations (Roxtrom et al. 2005: 112). What matters here is not legal entitlement to exercise authority, but the *de facto* power or control exercised by the state in relation to a specific territory or individual (Milanovic 2008: 423; Lawson 2004: 87). Establishing *de jure* jurisdiction for the purpose of exercising certain powers abroad may be a premise for evaluating the actual power, yet it is not a necessary one. While different from the scenario above, this is still in line with general public international law. As held by the International Court of Justice in *Namibia*, 'Physical control of a territory, and not sovereignty or legitimacy of title, is the basis for state liability for acts affecting other states.'[210]

Keeping this distinction in mind, the notion of jurisdiction developed in human rights case law nonetheless still draws on the public international law doctrine of jurisdiction in important respects. Most crucially, human rights litigation has taken 'jurisdiction' to be understood in primarily territorial terms. In the *Bankovic* case involving the NATO bombing of a Serbian radio station killing sixteen employees, the Grand Chamber of the European Court of Human Rights had the opportunity to discuss the notion of jurisdiction at length and concluded that:

> 'Article 1 of the Convention must be considered to reflect the ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case.'[211]

Consequently, the court unanimously declared *Bankovic* inadmissible as the deceased were not deemed to be within the jurisdiction of the NATO states

---

[210] *Namibia (South West Africa) Case*. International Court of Justice. 26 January 1971, par. 53.

[211] *Bankovic and Others v. Belgium and Others*. European Court of Human Rights. Appl. No. 5207/99. 12 December 2001, par. 61.

during the attack. Notwithstanding the criticism this case and its conclusion has attracted, the premise set out here that a territorial limitation is ordinarily assumed in the exercise of state jurisdiction is both in line with public international law and generally supported in the international human rights jurisprudence.[212] The quote, however, also concedes that jurisdiction does in some instances extend extraterritorially. Reviewing existing case law, at least four distinctive bases for establishing extraterritorial jurisdiction for human rights purposes can be identified, some of which clearly derive from similar, or at least parallel, bases of extraterritorial jurisdiction as applied in other spheres of international law.

The first of these concerns *treaty-based assertions of administrative, legislative or judiciary jurisdiction* within another state.[213] Thus in *X and Y v. Switzerland* an immigrant prohibited entry into Liechtenstein was held to be subject to Swiss jurisdiction, as Switzerland legislated on immigration matters for both territories.[214] From this it follows that where extraterritorial migration control would amount to a direct exercise of judiciary or legislative powers abroad, there is a strong presumption that such exercise of authority will amount to extraterritorial jurisdiction in respect of individuals being subjected to that authority. While such arrangements are likely to be highly extraordinary, this line of cases may be relevant to some instances of offshore asylum processing.

Secondly, especially in regard to extradition and *refoulement* situations, an *extraterritorial effects* principle has developed. In *Soering*, the European Commission of Human Rights held that the extradition of a German national

---

[212] See e.g. Milanovic 2008; Loucaides 2006; Mantouvalou 2005: 157; Roxtrom et al. 2005, Lawson 2004. In particular, *Bankovic* has been read by some as setting out a geographical restriction to extraterritorial application; namely that the Convention is essentially regional and situations of extraterritoriality thus only applicable within the legal space or '*espace juridique*' of the convention, i.e. only in the territory of another contracting state (par. 80). Such an interpretation, however, is both out of line with previous and subsequent case law of the Court. See e.g. *X and Y v. Switzerland*. European Commission of Human Rights. Appl. No. 7289/75 and 7349/76. 14 July 1977 (Liechtenstein was not at the time a party to the Convention) and *Issa and Others v. Turkey*. European Court of Human Rights. Appl. No. 31821/96. 16 November 2004. For a convincing rebuttal of the restrictive *espace juridique* interpretation see Cerone 2006: 19-20; Gondek 2005: 375-77; Lawson 2004: 111-115 and Wilde 2005, 2005b.

[213] *Drozd and Janousek v. France and Spain*. European Court of Human Rights. Appl. No. 12747/87. 26 June 1992; *Gentilhomme and Others v. France*. European Court of Human Rights. Appl. No. 48205/99, 48207/99 and 48209/99. 14 May 2002.

[214] *X and Y v. Switzerland*. European Commission of Human Rights. Appl. No. 7289/75 and 7349/76. 14 July 1977.

facing capital murder charges in the United States engaged the jurisdiction of the United Kingdom as the act of extradition itself contained a foreseeable risk of leading to a violation of Art. 3.[215] While the judgement has been important in cementing the reach of the *non-refoulement* principle, this line of cases is not directly relevant to the present enquiry, as it concerns individuals already present within the territory of the state in question.[216]

The last two bases for establishing extraterritorial jurisdiction for the purpose of human rights responsibility are more directly related to the factual qualification of the authority exerted as opposed to formal principles under international law or any international agreement between the parties. In these cases, jurisdiction is dependent on establishing that the state exercises effective control or authority – either over a defined *territory* or over an *individual*. As regards *territory*, this has been argued in extension of the principle of effective sovereignty, extending jurisdiction to all geographical areas where a state exercises *de facto* control,[217] such as in the case of military occupation.[218] As was shown in *Cyprus v. Turkey*, responsibility in such situations not only pertains to acts of government agents, but any act or omission leading to human rights violations conducted within the area where effective control is upheld.[219]

---

[215] *Soering v. UK*. European Court of Human Rights. Appl. No. 14038/88. 7 July 1989. The extraterritorial effects notion has since been confirmed in, for e.g. *Chahal v. the UK*. European Court of Human Rights. Appl. No. 22414/93. 15 November 1996 and a similar approach has been taken by the Human Rights Committee in *Ng v. Canada*. UN Doc. A/49/40. 5 November 1993 and *Kindler v. Canada*. UN Doc. A/46/50. 30 July 1993.

[216] The extraterritorial effects principle may however be relevant in relation to the notion of extraterritorial 'due diligence obligations' in respect of the conduct of privte actors. See chapter 5.8.

[217] *Namibia (South West Africa) Case*. International Court of Justice. 26 January 1971, par. 53.

[218] See e.g. *Loizidou v. Turkey*. European Court of Human Rights. Appl. No. 15318/89. 18 December 1996; *Coard et al. v United States*. Inter-American Commission on Human Rights. Case 10.951. 29 September 1999; *Salas and Others v. the United States ('US military intervention in Panama')*. Inter-American Commission for Human Rights. Case No. 10.573, Report No. 31/93, Annual Report IACHR 1993, 312. 14 October 1993. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*. International Court of Justice. General List No. 131. 9 July 2004, par. 89-101.

[219] *Cyprus v. Turkey*. European Court of Human Rights. Appl. No. 25781/94. 10 May 2001, par. 77.

Extraterritorial jurisdiction conceived as effective control over an *individual* flows from the reasoning that 'a State may also be held accountable for violation of…rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State'.[220] This category was also acknowledged in *Bankovic*, though referring more specifically to 'the activities of diplomatic and consular agents acting abroad and on board craft and vessels registered in, or flying the flag of, that State'.[221] Again, this category may to some extent reflect similar bases of extraterritorial jurisdiction for consular activities or flag state sovereignty for 'floating territory' established under general international law.[222]

The cases falling under this category involve firstly actions undertaken by consular authorities at or in conjunction with embassies or consulates. Some of these are specifically connected to actions in regard to nationals and are thus not directly relevant to the present enquiry.[223] Yet, extraterritorial jurisdiction over foreigners in regard to consular activities has similarly been established.[224] Secondly, this notion of extraterritorial jurisdiction has been applied in a number of cases involving kidnapping or arrest of individuals on foreign territory and subsequent extradition to the territory of the acting state.[225] Though one could emphasise the inter-temporal aspect of

---

[220] *Issa and Others v. Turkey*. European Court of Human Rights. Appl. No. 31821/96. 16 November 2004, par. 71.

[221] *Bankovic and Others v. Belgium and Others*. European Court of Human Rights. Appl. No. 5207/99. 12 December 2001, par. 73. See also *Medvedyev and Others v. France*. European Court of Human Rights. Appl. No. 3394/03. 10 July 2008.

[222] See e.g. *Case of the S.S. Lotus*. Permanent Court of International Justice. PCIJ Series A - No. 10. 7 September 1927; Ross 1961: 172.

[223] See e.g. *X. v. Federal Republic of Germany*. European Commission on Human Rights. Appl. No. 1611/62. 25. September 1965; *X v. United Kingdom*. European Commission of Human Rights. Appl. No. 7547/77. 15 December 1977.

[224] *W.M. v. Denmark*. European Commission of Human Rights. Appl. No. 17393/90. 14 October 1992; *W v. Ireland*. European Court of Human Rights. Appl. No. 9360/81. 28 February 1983.

[225] See e.g. *López Burgos v. Uruguay*. Human Rights Committee. UN Doc. A/36/40. 6 June 1979; *Lilian Celiberti de Casariego v. Uruguay*. Human Rights Committee. UN Doc. CCPR/C/OP/1. 29 July 1981; *Freda v Italy*. European Commission on Human Rights. 8916/80. 7 October 1980; *Reinette v. France*. European Court of Human Rights. Appl. No. 14009/88. 2 October 1989; *Stocke v. Germany*. European Court of Human Rights. Series A, No. 199. 19 March 1991; *Sánchez Ramirez v France*. European Commission of

subsequently bringing individuals to the territory, case law in these cases has generally emphasised that jurisdiction was established 'directly after' the arrest or handover to the authorities in question (Gondek 2005: 374).[226] The correctness of this interpretation is supported by a number of cases where extraterritorial jurisdiction over individuals has been established in cases with no subsequent extradition, but where individuals have been physically detained or imprisoned abroad.[227]

Both for cases concerning effective control over territory and for those concerning authority over individuals, a tension is often evident between the universalist claim of human rights on one side, and on the other the seeming primacy and exclusivity of the territorial jurisdiction. Positively establishing extraterritorial jurisdiction has thus been motivated by a desire to avoid double standards or 'a gap or vacuum in human rights protection'[228] as it would be 'unconscionable…to permit a State party to perpetrate violations of the Covenant in the territory of another State, which violations it could not perpetrate within its own territory'.[229] Yet and especially regarding situations involving potential clashes with foreign territorial jurisdictions, this consideration is tempered by the primacy of the territorial state's jurisdiction. As a result, the test for extraterritorial jurisdiction in these cases becomes more demanding and in practice needs to *de facto* exclude the competing authority of the territorial state. In cases involving control over a geographic area, establishment of extraterritorial jurisdiction has thus so far demanded a

---

Human Rights. Appl. No. 28780/95. 24 June 1996; *Öcalan v. Turkey*. European Court of Human Rights. Appl. no. 46221/99. 12 March 2003.

[226] See e.g. *Öcalan*, par. 91.

[227] See e.g. *Ilse Hess v. United Kingdom*. European Commission of Human Rights. Appl. No. 6231/73. 2 DR (1975-76) 72. Though the case was rejected due the alleged impossibility of attributing the violation to any one of the four occupying powers holding Rudolf Hess, the Commission noted that 'there is, in principle, from a legal point of view, no reason why acts of the British authorities in Berlin should not entail the liability of the United Kingdom under the Convention.' (par. 72). As a national example, see e.g. *Al-Skeini and others v. Secretary of State for Defence*. House of Lords. UKHL 26. 13 June 2006. In this case, involving the detention and mistreatment resulting in loss of life of an Iraqi national, the basis for jurisdiction was established by, among other things, drawing a parallel to the embassy cases, see e.g. par. 132.

[228] *Cyprus v. Turkey*. European Court of Human Rights. Appl. No. 25781/94. 10 May 2001, par. 78.

[229] *López Burgos v. Uruguay*. Human Rights Committee. UN Doc. A/36/40. 6 June 1979, par. 12.3; *Issa and Others v. Turkey*. European Court of Human Rights. Appl. No. 31821/96. 16 November 2004, par. 71.

high degree of structural control over a well-defined area. For extraterritorial jurisdiction over individuals inside a foreign jurisdiction, affirmative case law has similarly been limited to instances involving physical arrest or detention.

4.2.3 A methodological note

At this stage, a few remarks about the methodological approach pursued may be in order. As may already be clear from the exposition above, and in line with the approach set out in chapter one,[230] the following analysis makes two assumptions of parsimony for the sake of clarity in the interpretation. The first is that an analysis of extraterritorial jurisdiction within human rights law cannot be divorced from considerations of how the concept of jurisdiction is employed in public international law. Reflecting a more 'fragmentary' approach, some scholars have argued that human rights law has developed a relatively autonomous status, in which questions of extraterritorial applicability cannot be limited by considerations such as that of how extraterritorial jurisdiction is understood within the more contractual framework of public international law (Milanovic 2008: 447; Scheinin 2004: 78-79).[231] The difference, as described above, between usage of jurisdiction to signify legal entitlement under public international law and jurisdiction as a premise of human rights responsibility should no doubt be borne in mind, and the warning that the two may easily be confused is thus apt. Yet, while distinct, the interpretation of extraterritorial jurisdiction in the human rights context cannot be completely disassociated from the jurisdictional framework within public international law (McGoldrick 2004: 42). This is especially evident when looking at the human rights case law on this issue as it is often explicitly informed by and reasoned from jurisdictional principles and typologies derived from general international law – correct or not (Milanovic 2008: 419).[232] Moreover, there is no need to think that such a starting point necessarily yields a more restrictive interpretation of extraterritorial

---

[230] See chapter 1.1.3.

[231] See more generally Pellet 2000; Simma 1995. Martin Scheinin has since lent support to a more 'reconciliatory' approach.

[232] See e.g. *Issa and Others v. Turkey*. European Court of Human Rights. Appl. No. 31821/96. 16 November 2004, par. 71; *Gentilhomme and Others v. France*. European Court of Human Rights. Appl. No. 48205/99, 48207/99 and 48209/99. 14 May 2002, par. 20 and *Bankovic and Others v. Belgium and Others*. European Court of Human Rights. Appl. No. 5207/99 (Grand Chamber). 12 December 2001, par. 59-61.

jurisdiction. First, human rights case law may equally inform general international law. Secondly, as will be demonstrated, resort to other areas of general international law may just as well support a more expansive interpretation of extraterritorial jurisdiction (Skogly 2006).

The second assumption concerns the case law from which interpretation is drawn. Some scholars argue that there are substantial differences among the human rights instruments and, more importantly, between different geographic human rights bodies and institutions in how extraterritorial jurisdiction is conceived and established (Gondek 2005; Coomans and Kamminga 2004: 4; Scheinin 2004). While this is almost inevitably true to some extent, the jurisprudence does not, to the mind of the present author, seem to systematically vary on this particular issue as presented by other authors. On the contrary, it is noteworthy that the different human rights institutions on several occasions cite and refer to each other on issues involving extraterritorial jurisdiction (Hathaway 2005: 165; Cerna 2004: 145; McGoldrick 2004: 68). Furthermore, it may be hard to draw convincing conclusions as to systematic differences from the relatively limited amount of case law under some institutions, (Cerna 2004; McGoldrick 2004). In the following analysis, an interpretation is thus presented in which legal geography or the extraterritorial venue of the act concerned, as opposed to institutional geography, is the organising principle.[233]

Lastly, and building on the methodological choices outlined above, the present chapter will primarily draw its analysis from the case law and general comments of the International Court of Justice and the international human rights bodies, notably the European Court of Human Rights, the Inter-American Commission on Human Rights, and the Human Rights Committee. Examples from national jurisprudence will be provided, but only to the extent that they help clarify and contextualise the interpretative basis established by the international human rights institutions.[234]

---

[233] A similar analytical framework has been adopted by two other studies, though both these focus more specifically on border controls at sea, see Fischer-Lescano and Löhr 2007 and Weinzierl 2007. As will be shown below, distinguishing between extraterritorial acts occurring on the high seas or in international airspace and acts occurring within a foreign territorial jurisdiction may account, for e.g., for the different approach taken by the European Court of Human Rights and the Inter-American Commission as pointed out by e.g. Coomans and Kamminga (2004: 4).

[234] On the relative merits of national and international jurisprudence Koh in relation to the *Sale* case notes that even though national decisions can be considered 'waypoints'"

As such, the chapter will not go into a doctrinal analysis of the meaning of 'jurisdiction' as set out in each of the relevant human rights instruments.[235] The reader should bear in mind that this starting point is not considered a primary source within the Statute of the International Court of Justice.[236] Yet, pre-existing case law does in practice seem to play an important role in both national and international litigation as well as in developing the understanding of more contentious areas or concepts of human rights law (Skogly 2006: 136). Further, it is exactly the current usage and different interpretations being proposed in the predominantly recent and still growing case law that is of particular interest to the present enquiry.

It could however be objected that existing case law as regards extraterritorial jurisdiction is scarce and may still be too limited too constitute a solid foundation for a more systematic interpretation. As Richard O'Boyle notes, 'the law on jurisdiction is still in its infancy' (2004: 139). Secondly, if one believes that there are important differences in the case law of the different international institutions, the more prolific case law of the European Court of Human Rights on this issue may be argued in the present approach to carry a risk of imbuing this work with a eurocentric slant.

4.3 Extraterritorial jurisdiction and migration control

In the following, establishing extraterritorial jurisdiction in cases of offshore migration control shall be considered with regard to three distinct spheres. The first sets out by examining not where extraterritorial obligations end, but rather where they start. State practices to excise parts of their territory or designate 'international zones' have become increasingly popular but do they

---

in the complex enforcement of the otherwise self-executing Refugee Convention, they should not be considered final settlements (Koh 1994: 2406).

[235] Some aspects of this issue have already been touched upon in the previous chapter, see chapter 3.6. For a list of jurisdiction clauses in human rights treaties, see Cooman and Kamminga 2004: 271-274. For an analysis of the origins of jurisdiction clauses in human rights treaties, see Milanovic 2008: 429-34. For examples of a doctrinal analysis of the jurisdiction clause as set out in the European Convention on Human Rights, see Pedersen 2004; Orakhelashvili 2003. Lastly, a more comprehensive analysis of extraterritorial human rights obligations across different treaties in relation to international cooperation has been undertaken by Sigrun Skogly (2006).

[236] Statute of the International Court of Justice, Art. 38.1(d). See further chapter 1.3

qualify as extraterritorial? Secondly, the 'basic' or 'pure' situations of extraterritorial obligations are analysed, such as when migration control is moved to the high seas or *terrae nullius*. And lastly the more 'complex' question of establishing extraterritorial jurisdiction where extraterritorial migration control is carried out within the territory or territorial waters of another state is taken on.

4.3.1 Withdrawal of authority and excision of territory

There has been a growing trend to withdraw authority from parts of a state's territory for the purpose of migration control, either by simple declaration or by excising certain geographic areas through national legislation. This may be argued by some to fall outside a discussion of extraterritoriality. Yet it is a logical corollary of applying the jurisdiction approach in order to delimit the scope of application *ratione loci* of state responsibilities towards refugees. If it is submitted that jurisdiction is primarily territorial and flows from a state's effective control over a given geographic area, does state jurisdiction collapse when this control ceases, either because another polity takes it over or because a state self-imposes restrictions to its territorial sway? The latter situation is particularly interesting as an affirmative answer would suggest that extraterritoriality can be constructed at will when states declare that parts of or all their authority is henceforth withdrawn from a given area.

A number of states seem to think that this is the case and that such a withdrawal of authority, whether *de facto* or *de jure*, may relinquish them of asylum and refugee protection obligations otherwise owed. This has found various expressions in national policies and legislation. In addition to its interdiction policies on the high seas, the United States has maintained a 'wet-foot, dry-foot' policy with regard to Cuban asylum-seekers that effectively exempts United States territorial waters for asylum purposes. Under the 1995 Cuban Migration Agreement all Cubans intercepted, whether on the high seas or in territorial waters ('wet-foots'), have thereby been returned directly to Cuba; whereas those who manage to reach the shores of the United States ('dry-foots') have been allowed to stay. Even though the agreement does include a concomitant obligation for Cuba not to subject those returned to reprisals and to allow resettlement of those found to have a valid refugee claim, the monitoring mechanisms of the United States to ensure that this is actually implemented are unlikely to be efficient (Werlau 2004: 11). The radical distinction reached absurd dimensions when, on 5 January 2006, fifteen Cubans clinging onto a bridge in the Florida Keys were repatriated by the

coastguard with the argument that the decommissioned bridge had been physically cut off from the beach and thus did not constitute United States soil (Wasem 2007).

Even more encompassing are the laws Australia has passed to excise more than 3,000 islands, certain coastal ports and northern coastal stretches as well as its territorial waters from its 'migration zone' (Kneebone 2006: 697). Under the amended Migration Act no asylum claims are permitted outside the migration zone. Asylum-seekers who arrive in the excised territories, dubbed 'offshore entry persons', have instead been transferred to Nauru or Papua New Guinea for offshore asylum processing or, since 2007, to the excised territory of Christmas Island (Goodwin-Gill and McAdam 2007: 256).

Lastly, several states have claimed that 'international zones' or 'transit areas' in ports and airports do not form part of their national territory. The United Kingdom has taken the position that an asylum-seeker arriving at one of its airports has not reached its territory until he or she encounters the United Kingdom immigration authorities (Nicholson 1997: 618). With the increased delegation of migration control to private carriers and security companies (Guiraudon 2002), refugees may find themselves unable to access such authorities post-arrival and instead be confined to these international zones effectively under private authority. Thus, the 'Sheremetyevo 2' transit zone at Moscow airport has been known to hold refugees denied onwards flights to Western Europe with no access to Russian immigration authorities and thus nowhere to direct asylum claims (Nicholson 1997: 598f).

From the standpoint of international law, however, such arrangements for withdrawing specific exercises of executive power from geographic areas otherwise regarded as a state's sovereign territory have little merit. Under international maritime law the territorial waters of coastal states, no more than and generally equal to twelve nautical miles, all form part of that state's sovereign geographic sphere, and thus do not differ from the ordinary land territory for purposes of establishing state jurisdiction.[237] In addition, the question of international airport zones was specifically dealt with by the

[237] 1982 UN Convention on the Law of the Sea, Art 2(1). As other scholars have pointed out, the twelve mile delimitation in practice reflects customary international law (Fischer-Lescano and Löhr 2007: 17). The territorial sea should in this sense be distinguished from the contiguous zone (extending up to 24 miles) and the exclusive economic zone (EEZ). In both of these areas, states may claim certain sovereign rights, yet these zones do not amount to sovereign territory.

European Court of Human Rights in *Amuur v. France*,[238] concerning the detention and subsequent removal of four Somali asylum-seekers from the international zone of Paris-Orly airport. The French authorities held that the international zone was different from French territory. Within the zone no interpreters, legal assistance or private assistance was allowed, and the French Office for the Protection of Refugees denied the applicants access to the asylum procedure on the grounds that it lacked jurisdiction (Bello and Kokott 1997: 148). Nonetheless, the Court was quite assertive when concluding that '[d]espite its name, the international zone does not have extraterritorial status' and that regardless of national legislation to the opposite, holding the applicants in this zone made them subject to French law (par. 52). In its judgment, the Court put emphasis on the fact that for all other purposes, France exercised sovereign authority in this zone and thus that the protections afforded under both the Refugee Convention and the European Convention on Human Rights must be afforded (par. 43).

Yet, even in cases where such authority and control can be seriously questioned, case law seems to support the rule that jurisdiction extends to the entirety of a state's formally recognised territory. In *Ilascu and Others v. Moldova and Russia*,[239] concerning acts committed by the authorities of the Moldavian Republic of Transniestria (a self-proclaimed independent polity not internationally recognised), the Grand Chamber of the European Court of Human Rights asserted that *both* Russia and Moldova had jurisdiction: Russia by the fact that it asserted decisive influence over the regional regime and thus exercised effective control, Moldova by the fact that it held *de jure* sovereignty over the area. Notably, it was held that even though Moldova was 'prevented from exercising its authority over the whole of its territory … it does not thereby cease to have jurisdiction within the meaning of Article 1 of the Convention over that part of its territory' (par. 333). The court, however, did emphasise that 'such a factual situation reduces the scope of that jurisdiction in that the undertaking given by the state under Article 1 must be considered by the Court only in the light of the Contracting State's positive obligations towards persons within its territory' (par 334), meaning that Moldova had an obligation to use all available legal, political and diplomatic means to ensure that the rights of the Convention were respected, even if not able to ensure these rights directly. The establishment of Moldavian responsibility has been

---

[238] *Amuur v. France*. European Court of Human Rights. Appl. No. 19776/92. 25 June 1996.

[239] *Ilascu and Others v. Moldova and Russia*. European Court of Human Rights. Appl. No. 48787/99 (Grand Chamber). 8 July 2004.

substantially criticised as leapfrogging the necessary link between human rights obligations and the actual ability of states to ensure them (Skogly 2006: 182; Roxstrom et al. 2005: 127), yet the ruling does underline the primacy of formal territorial readings in ascribing human rights responsibility.

From the perspective of refugee rights, these rulings are important in cementing the conclusion that jurisdiction cannot be retracted at will and thus that as a matter of international law, situations of extraterritoriality do not arise despite the legal fictions attempted through national policies or legislation. This position finds ample support in the case law of other international human rights institutions. The principle that a state must be assumed to exercise jurisdiction within its entire territory, unless this assumption can be specifically rebutted, was thus affirmed by the International Court of Justice in its opinion on the *Construction of a Wall in the Occupied Palestinian Territories*,[240] and again by the European Court of Human Rights in *Assanidze v. Georgia*.[241]

The general principles set out in these cases may inform the ensuing quest to determine extraterritorial obligations vis-à-vis refugees on the high seas and in foreign territorial jurisdictions. The principal lesson from *Amuur* is that states cannot assume sovereign powers for one purpose whilst excluding them regarding others – authority in regard to migration control entails concomitant responsibilities in respect of asylum-seekers and refugees. From *Ilascu* it appears that even an actual withdrawal of authority over parts of the territory does not relieve states of all their obligations under international human rights and refugee law to asylum-seekers that might arrive there. A state is presumed to exercise jurisdiction throughout its entire territory and this presumption can only be rebutted in exceptional circumstances (Larsen 2009: 93). Even in the case of foreign occupation or where effective control over parts of the territory is taken by a separatist movement supported by a foreign state, certain positive obligations to ensure human rights may still remain with the territorial state.

Yet, even if there is no question that a state's jurisdiction extends to its entire territory, differentiating regulation for such 'international zones' or 'border areas' may still be a legal-political strategy from a national perspective.

---

[240] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*. International Court of Justice. 9 July 2004, par. 109-110.

[241] *Assanidze v. Georgia*. European Court of Human Rights. Appl. No. 71503/01. 8 April 2004, par.137-143.

The applicability of international refugee law does not preclude states from installing special border procedures under national law as long as they are consistent with international obligations. Notably, Australia's 'Pacific Strategy' never challenged its international obligations, but maintained either offshore asylum procedures or special procedures in the excised areas.[242] Similarly, a number of countries maintain particular expedient asylum procedures for those arriving at international airports or who are intercepted within territorial waters, and the EU Asylum Procedures Directive permits special and accelerated procedures for applications made at the borders.[243]

In this sense, a purely national strategy of jurisdiction shopping is pursued in which states with more developed asylum systems that normally ensure a wide and comprehensive rights catalogue to refugees arriving to their territories remain free to withdraw the application of any or all of these rights in such areas as long as the resulting treatment does not fall short of international obligations. Yet, needless to say, the risk of falling below this threshold increases the more closely a state seeks to approximate its policy thereto. This causes a particular concern for the refugees who, if they even makes it that far, often encounter the state within these marginal zones.

4.3.2 Interception on the high seas

Moving beyond the claims to extraterritoriality within a state's formal territory the first real situation of extraterritoriality appears when states act in geographic areas not pertaining to the territorial jurisdiction of any sovereign, also referred to as *terrae nullius*. Such considerations may in practice be limited to the high seas, but could also become relevant in cases where refugees find themselves within territories with no effective sovereign, such as in the case of buffer zones under international administration or failed states. Shifting migration control to international waters is not a new phenomenon. With the rise of boat refugees in the 1970s and 1980s, high sea interception practices quickly became a favoured response of coastal states concerned with mass influx. The United States interception program of Haitian boat refugees has already been mentioned. Similarly, the Australian 'Pacific Solution' also included interception of unauthorised migrant vessels in international waters (Kneebone 2006; Magner 2004). In Southern Europe, migration control on

[242] Whether the asylum procedures there are in conformity with international law, however, may well be questioned (Fischer-Lecano and Löhr 2007: 17; Kneebone 2006).

[243] Council Directive 2005/85/EC. 13 December 2005, Art. 35.

the high seas has been carried out by Italy in the Adriatic Sea, by France and Greece in the Mediterranean, and by Spain both in the Mediterranean and in the Atlantic Ocean around the Canary Islands (Lutterbeck 2006).

In the European context, international interception operations are currently being expanded and have now come under EU auspices with operational activities being coordinated by EU's border agency, Frontex. So far, two sets of operations have involved interdiction outside EU territorial waters. One was the 'Nautilus Operation' taking place in October 2006, during which patrols were carried out in the international waters of the Mediterranean to prevent migration from Libya reaching Malta, Sicily or Lampedusa. While this mission was originally conceived to incorporate Libya, thus allowing for EU vessels to patrol within Libyan territorial waters, it was nonetheless hailed as a success claiming to completely prevent migrants from arriving in Malta during the time of operation. The second operation was HERA II, initiated to curb the migration flow towards the Canary Islands, and which has involved an array of aeroplanes, helicopters and naval vessels. This operation intercepted 14,572 individuals on the high seas during its five month operation from August 2006 and the mission is being continued, covering both the high seas and the territorial waters of Senegal, Mauritania and Cape Verde.[244]

To what extent are states undertaking such interdiction operations on the high seas bound by international law not to return those intercepted claiming asylum or fearing torture? So far national courts and governments have varied somewhat in their interpretation of the jurisdictional implications in these situations. The Haitian interdiction policies operated by the United States were based on an exclusively territorial conception of the international *non-refoulement* obligation. This understanding was upheld by the United States Supreme Court in *Sale*, which not only proposed a strictly territorial reading of the Refugee Convention, but also denied that the United States had jurisdiction when operating coastguard vessels in international waters with reference to a general presumption against extraterritoriality emanating from principles of national sovereignty.[245]

Both the reasoning and the conclusions of the *Sale* verdict have however been widely criticised (Hathaway 2005: 339; Goodwin-Gill 1994). Clearly there are

---

[244] 'Longest Frontex coordinated operation – HERA, the Canary Islands'. Frontex News Releases. 19 December 2006. [cited 16 March 2007]. Available from http://frontex.europa.eu.

[245] *Sale, Acting Cmmr, Immigration and Naturalization Service v. Haitian Center Council*. United States Supreme Court. 113 S.Ct. 2549, 509 US 155. 21 June 1993.

exceptions to such a presumption against extraterritorial jurisdiction, and the United States Supreme Court soon after overturned it in its case law involving competition law (Koh 1994: 2418). The United Kingdom Court of Appeal bluntly concluded that *Sale* was 'wrongly decided; it certainly offends one's sense of fairness'.[246] *Sale* in this sense provides an excellent example of why national court decisions, even from the highest instance, should not be regarded as final settlements. As Harold Koh has pointed out, even though such cases are considered waypoints in the 'complex enforcement' of the otherwise self-executing Refugee Convention, in Europe such decisions are today regularly overturned by the European Court of Human Rights (Koh 1994: 2406).

Looking instead to the jurisprudence of international human rights institutions, the Inter-American Commission specifically rejected the Supreme Court's ruling in *Sale* and positively affirmed the applicability of Art. 33 of the Refugee Convention in situations involving migration control on the high seas.[247] This decision is fully in line with previous case law of the Inter-American Commission extending the notion of effective control over individuals in cases concerning international areas. In *Brothers to the Rescue*,[248] Cuba was never held to control any specific geographic area of the high seas or international air space when it shot down two planes outside Cuba's twelve miles of territorial waters. Yet, the Commission argued that a State's jurisdiction encompasses 'all the persons under their actual authority and responsibility' (par. 24) and that since an analysis of the facts found that 'the victims died as consequence of direct actions of agents of the Cuban State' this was 'sufficient evidence to show that the agents of the Cuban State, despite being outside its territory, subjected to their authority the civil pilots' (par. 25).

A similar line of reasoning is proposed by the European Court of Human Rights in *Isaak*.[249] The applicant crossed into the UN buffer zone in Cyprus and was beaten to death by Turkish controlled TRNC authorities and Turkish-

---

[246] *R. (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport*. Court of Appeal. QB 811 EWCA Civ 666. 20 May 2003, par. 34.

[247] *Haitian Center for Human Rights v. United States*. Inter-American Commission of Human Rights. Case 10.675. 13 March 1997, par. 156-157.

[248] *Armando Alejandre Jr. and Others v. Cuba ('Brothers to the Rescue')*. Inter-American Commission for Human Rights. Case 11.589. 29 September 1999.

[249] *Isaak and Others v Turkey*. European Court of Human Rights. Appl. No. 44587/98. 28 September 2006 (admissibility).

Cypriot protesters. Despite Turkish arguments that it exercised no jurisdiction within the buffer zone, the Court held that:

> 'even if the acts complained of took place in the neutral UN buffer zone, the Court considers that the deceased was under the authority and/or effective control of the respondent State through its agents.'[250]

It concludes, accordingly, that the matters complained of in the present application fall within the 'jurisdiction' of Turkey within the meaning of Art. 1 of the Convention and therefore entail the respondent State's responsibility under the Convention.

A single precedent for establishing jurisdiction in situations involving migration control in international waters can actually be found in the jurisprudence of the European Court of Human Rights. In *Xhavara*,[251] an Italian navy vessel seeking to stop and inspect suspected irregular migrants on board the Albanian ship 'Kater I Rades' ended up colliding with and sinking the ship. The incident became known as the 'Otranto tragedy' and 83 are assumed to have died as a result of the collision, though not all the bodies could be recovered. Italy operated under a bilateral agreement with Albania allowing them to board Albanian vessels wherever encountered, but the collision occurred in international waters, 35 miles off the Italian coast in the Strait of Otranto. While the case was declared inadmissible *ratione temporae*, the Court did consider Italy to have exercised jurisdiction and in principle held Italy responsible for instigating a full and independent investigation into the deaths under Art. 2 – a requirement that Italy was considered to have fulfilled already by having initiated proceedings against the captain of the Italian vessel.

In sum, the presumption that states do incur obligations under international refugee and human rights law when exercising migration control on the high seas is strong. Looking beyond rare examples of strictly territorial interpretations by national courts, international human rights jurisprudence uniformly supports an interpretation that jurisdiction is established when state agents undertake sovereign functions or otherwise assert authority in international airspace or on the high seas. In doing so, both the Inter-

---

[250] *Isaak and Others v Turkey*. European Court of Human Rights. Appl. No. 44587/98. 28 September 2006 (admissibility), p. 16.

[251] *Xhavara and fifteen v. Italy and Albania*. European Court of Human Rights. Appl. No. 39473/98. 11 January 2001 (admissibility).

American Commission and the European Court of Human Rights seemingly accept a lower threshold for establishing extraterritorial jurisdiction over individuals. While there is little doubt that bringing intercepted asylum-seekers aboard vessels of the intercepting states would reach the threshold of effective control over an individual set by cases such as *Öcalan* or *López Burgos*, the victims of *Xhavara* or *Brothers to the Rescue* were not physically apprehended or detained by the acting state. From a doctrinal perspective, one might equally emphasise flag state jurisdiction, or that jurisdiction was established by prior treaty in some of these cases, yet neither of these avenues appear to have been decisive nor especially relied upon in the reasoning provided by the human rights institutions.[252]

Rather, the reasoning in these cases appears to follow what could be termed a *functional* approach to jurisdiction. What matters is not a generalised test of personal or geographic control, but rather the specific power or authority assumed by the state acting extraterritorially in a given capacity. The concept of 'functional jurisdiction' is well known in international maritime law, where on the high seas extraterritorial jurisdictional interplays between flag states, coastal states and port states are the norm rather than the exception and 'sovereign rights' short of full jurisdiction may be claimed in relation to specific interests, e.g. for exploitation or protective purposes (Gavouneli 2007; Smith 1988).

In the human rights context, jurisdiction in this sense flows from the *de facto* relationship established between the individual and the state through the very act itself, or the *potential* of acting. As is also evident from *Brothers to the Rescue*, rather than having a general test as a distinct issue of admissibility, the issue of jurisdiction hereby becomes integrated in the analysis of the facts and liability of the state in question. This approach stands in some contrast to the examples of formal territorialism that may be relied upon in situations of excision and that have been expressed in cases such as *Ilascu*, where the lack of such a relationship was overlooked in favour of official sovereign entitlements. Under a functional conception of extraterritorial jurisdiction, the test becomes entirely case specific. Certain situations involving interception at sea may continue to fall below the threshold for establishing jurisdiction. Yet a case that on its merits would hold a state responsible under the *non-refoulement*

---

[252] In *Bankovic*, however, the European Court of Human Rights did emphasise that in *Xhavara* jurisdiction 'was shared by written agreement between the respondent States'. *Bankovic and Others v. Belgium and Others*. European Court of Human Rights. Appl. No. 5207/99. 12 December 2001, par. 37.

prohibition for actions occurring within the territory could be argued by this fact alone to engage the jurisdiction of states in similar instances occurring on the high seas.

Little thus changes in the jurisdictional analysis by moving migration control to the high seas. A strong presumption prevails that any interdiction measure, even if not amounting to effective control over individuals or a geographic area, through the act itself would entail jurisdiction and thus an obligation on behalf of the acting state to respect basic rights under international refugee and human rights law. This has not prevented some countries from arguing otherwise, however. Denying extraterritorial jurisdiction or the extraterritorial applicability of relevant human rights provisions still occasionally appears in the reasoning of governments and national courts. Furthermore, just as in the case of international zones, from the perspective of national law shifting the venue of regulation to the high seas may provide a context for denying certain protections under domestic legislation. Beyond the questioning of extraterritorial applicability of international *non-refoulement* obligations, the United States Supreme Court in *Sale* equally held that national asylum legislation, specifically §243(h)(1) of the 1952 Immigration and Nationality Act, did not protect aliens in international waters against *refoulement*.[253]

More fundamentally the shift towards carrying out interception in international waters may complicate the division of protection responsibilities as other legal frameworks are engaged, namely the Law of the Sea. This concerns firstly the still growing legal framework on combating human smuggling and trafficking at sea.[254] Under the Protocol Against Human Smuggling on Land, Sea and Air, states may intercept vessels on the high seas following consultation with the flag state if there is reason to suspect that the vessel is engaged in smuggling of migrants, thereby superseding the otherwise established norm prohibiting states from boarding or obstructing passage for vessels flying the flag of, and thus subject to the jurisdiction, of another state.[255]

---

[253] *Sale, Acting Cmmr, Immigration and Naturalization Service v. Haitian Center Council*. United States Supreme Court. 113 S.Ct. 2549, 509 US 155. 21 June 1993, pp. 15-21.

[254] See in particular the 2000 UN Convention Against Transnational Organized Crime and the associated Protocol Against Human Smuggling on Land, Sea and Air and Protocol to Suppress and Punish Trafficking in Persons, Especially Women and Children.

[255] Art. 19 of the Smuggling Protocol and similarly Art. 14 of the Trafficking Protocol. See further Art. 19 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.

Secondly, interception activities on the high seas are increasingly intermingled with situations defined as rescue operations.[256] Arguably, the condition of many vessels setting off to Lampedusa, the Florida Keys or Ashmore Islands is often deplorable, and over the last decade more than 10,000 refugees and migrants are assumed to have died trying to cross the Mediterranean (ICMPD 2004).[257] Yet beyond a humanitarian imperative, couching interception activities in international waters as search and rescue operations may also work as a pretext for migration control in its own right. First, performing a rescue mission supersedes the prohibition to board foreign vessels. Secondly, cooperation agreements in the context of search and rescue operations may provide a context for shifting asylum and human rights obligations to third states. Traditionally the maritime rescue regime has been marred by the lack of a mechanism to decide where rescued persons should be put ashore and an explicit obligation for states to allow disembarkation. This became a particularly problematic issue following the rise of 'boat refugees', which made states concerned that asylum processing and protection responsibilities would follow from the hitherto relatively trivial issue of disembarkation and subsequent return to the country of origin. The lack of legal clarity has resulted in a number of stalemates, in which coastal states, flag states, and the state of next port of call all argue against taking on disembarkation and protection responsibilities (Kneebone 2006; Barnes 2004; Pugh 2004).[258]

---

[256] In practice, situations originally framed as interception of irregular migrants may quickly change to search and rescue missions. In interviews with Spanish naval officers carrying out control on the high seas under the Frontex coordinated HERA operation they pointed out that occasionally engagement with migrant vessels may provoke capsizals or rescue, either deliberately as migrants seek to provoke a rescue operation, or involuntarily if the weight of those on board the often overcrowded ships shifts too much to one side. Interview with Spanish naval captain, Las Palmas, 23 April 2007.

[257] The reinforcement of controls and expansion of interception may in themselves bear part of the blame for such loss of lives. As the risk of getting caught on the shorter or easier crossings increases, many find themselves forced to take longer and more dangerous routes Legomsky 2006; Lutterbeck 2006; Pugh 2004.

[258] One of the more recent examples of such a detente is that of the 'Marine 1' that broke down in international waters and was rescued by the Spanish coastguard in February 2007. The ship was towed to Nouadhibou, the nearest port in Mauritania, but the Mauritanian government refused disembarkation on the grounds that the ship most likely originated from Guinea and should be returned there. After some negotiations Mauritania allowed disembarkation in return for guarantees by the Spanish government that all migrants and refugees would be returned or resettled elsewhere at Spanish expense. However, repatriation has proved equally difficult. Most of the approximately 200 passengers are believed to come from the Kashmir area but do not want to reveal

In 2004 however, amendments were made to the 1979 Convention on Maritime Search and Rescue (SAR) and the 1974 International Convention for the Safety of Life at Sea (SOLAS) attempting to clarify, amongst other things, disembarkation responsibilities.[259] Under the new amendments, the world's oceans are divided into thirteen search and rescue regions. In each region, the affected states are responsible for negotiating individual search and rescue areas, effectively partitioning responsibility for the high seas along geographic lines, within which each coastal state is responsible for coordinating search and rescue operations. According to the adjoining Guidelines on the Treatment of Persons Rescued at Sea, the state responsible for the search and rescue region in which survivors are recovered is responsible for providing a place of safety or ensuring that such a place of safety is provided, which in practice emphasises disembarkation in the respective state unless other states offer it.[260]

While these amendments have been broadly celebrated as closing a vital gap in the search and rescue regime, they may however at the same time help work to shift protection responsibilities. As interdiction schemes are moved into foreign search and rescue zones, a presumption may arise that the foreign SAR state would be responsible and take on disembarkation arises in cases where interception is not a matter of migration control but search and rescue. This argument was made by Malta when refusing to let the Spanish trawler La Valletta, carrying 51 rescued migrants dock at Maltese ports. The Maltese Foreign Minister, with the support of EU JHA Commissioner Franco Frattini, argued that 'the vessel had picked up illegal immigrants in Libya's Search and

---

their identities. Afghanistan and Pakistan have been reluctant to cooperate. Similarly, a plane with 35 migrants had to return in mid-air because Guinea-Bissau would not receive them (ECRAN Weekly Update, 9 February 2007 and 17 February 2007).

[259] The amendments to both Conventions were adopted by the International Maritime Organisation in 2004 and entered into force 1 July 2006. See MSC 78/26/Add. 1, Annex 3 and 5 respectively.

[260] The amended par. 3.1.9 of the Annex to the SAR Convention reads:

'The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring that such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization.'

Similar wording occurs in par. 1-1 of the SOLAS Convention. See further Maritime Safety Committee. Guidelines on the Treatment of Persons Rescued at Sea. IMO Resolution MSC.167(78). 20 May 2004, par. 2.5.

Rescue Area and that therefore Malta is under no obligation to take them in'.[261] The potential for jurisdiction shopping in such instances is exacerbated by the fact that none of the maritime conventions provide a solid definition of what constitutes 'distress' (Pugh 2004: 58). Instead, the master of the intercepting ship has authority to evaluate when a vessel is in need of rescue or when a vessel is merely unseaworthy by modern standards.

The question remains, of course, of whether defining a situation as a rescue mission legally supersedes any direct responsibilities vis-à-vis asylum-seekers on behalf of the acting state. The conventions in question do not deal specifically with asylum or protection issues. As such, there is no reason to think that states are relieved of protection obligations or referred to *lex specialis* in this regard when carrying out rescue operations. Given the above case law, and especially when taking rescued persons on board government vessels, there is a strong presumption that any such rescue operation would engage the jurisdiction of the acting state. Even if responsibility is thus subsequently transferred to the state in whose search and rescue area asylum-seekers have been salvaged, an indirect responsibility thus remains to avoid chain-*refoulement* (Fischer-Lescano and Löhr 2007: 40; Weinzierl 2007: 6).[262] The guidelines adopted by the Maritime Safety Committee of the International Maritime Organisation similarly emphasise that consideration should be given to avoid 'disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened'.[263] Lastly, UNHCR's Executive Committee has established the continued applicability of protection norms, including both *non-refoulement* and non-penalisation, when states act under search and rescue rules or to combat human smuggling.[264]

In practice however, it seems that the amalgamation of interception and search and rescue activities easily makes questions regarding refugee

---

[261] 'Malta migrant crisis'. BBC World Service. 19 July 2006. Available from www.bbc.co.uk. It should be noted, however, that Libya refused to take on any responsibilities in this matter, and that the migrants were disembarked in Spain after being stranded off the Maltese coast for eight days.

[262] *Soering v. United Kingdom*. European Court of Human Rights. Appl. No. 14038/88. 7 July 1989.

[263] Maritime Safety Committee. Guidelines on the Treatment of Persons Rescued at Sea. IMO Resolution MSC.167(78). 20 May 2004, par. 6.17.

[264] UNHCR Executive Committee. Protection Safeguards in Interception Measures. Conclusion No. 97 (LIV) 2003. See also Conclusions No. 23 (XXXII) and No. 20 (XXXI).

protection a secondary consideration. By referring solely to the legal regime surrounding search and rescue, any protection burden may be shifted away from the acting state and responsibilities assigned according to territorial or zone divisions as agreed among the states in the region (Noll 2006b: 5). The Valletta case mentioned above illustrates this quite clearly. Libya is not a signatory to the 1951 Refugee Convention and has a track record of onwards expulsion of asylum-seekers and migrants returned from Europe. Nonetheless, both the EU Commissioner and the Maltese government argued that responsibility rested solely with Libya and no considerations were seemingly made as to any protection issues.

While emphasising the disembarkation responsibilities of the state in whose search and rescue area measures take place is likely to be the most practical solution to the longstanding issue of disembarkation, it may however also serve as a pretext for burden shifting and in some cases carries a high likelihood of *refoulement*.

4.3.3 Migration control within a foreign territorial jurisdiction

Compared to the practices of excision or interception in international waters, migration control within a third state's territorial jurisdiction encompasses a much wider range of policies. From the control performed at visa consulates, the deployment of immigration officers at foreign airports to the interception within foreign territorial waters, policies to bring the different layers of migration control closer and closer to the sites of departure have expanded substantially over the last years.

The role and degree of control exercised by states engaging in these activities varies. The EU network of immigration liaison officers posted to airports, border crossings and national immigration authorities of key transit and origin countries emphasise that such officers 'do not carry out any tasks relating to the sovereignty of States',[265] yet in practice they 'advise' and 'support' national border guards, airline officials and in some situations have extended access to foreign police and border records (Gatev 2006: 10).[266] In other instances

[265] Council of the European Union. 2002. Proposal for a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union. 6621/1/02. 27 February 2002. Brussels, par. 67.

[266] On the 'advisory' role of immigration liaison officers in regard to private airlines, see further chapter 5.

authority is asserted more directly. Under the juxtaposed control scheme the United Kingdom thus carries out migration control within demarcated zones at the Ports of Calais, Dunkirk and Boulogne. Pursuant to agreements with France, within these zones British migration law is enforced directly by the United Kingdom Border Agency. Under more recent amendments the actual control may even be outsourced to private contractors.[267] Similarly, in extension of the Frontex interception mission outside the Canary Islands, bilateral arrangements have been made to allow interception not just on the high seas but also inside Cape Verde, Senegalese and Mauritanian territorial seas, contiguous zones and air space.

Practices to shift migration control to third country territories may thus often equally be characterised as processes of outsourcing rather than merely offshoring or extraterritorialisation. For the purpose of determining extraterritorial legal obligations, this raises a number of additional challenges. Establishing the international responsibility of states aiding and abetting other states or directing or instructing a private party in committing acts violating international refugee law introduces a question of attribution in addition to that of jurisdiction. Moreover, when the actual practices are examined, clearly characterising a particular situation as the one or the other easily becomes difficult, and creative labelling itself in some instances seems to be a strategy for avoiding correlated human rights obligations. As part of the HERA operations coordinated by Frontex, Senegalese immigration officers are thus brought aboard Spanish ships operating within Senegalese territorial waters. According to Frontex these officers are the ones formally in charge of enforcing migration control. Consequently, any vessel intercepted within the territorial waters of the cooperating states is turned back either to its port of departure or a port within the territorial waters where the interception occurred. During 2006 3,665 persons were intercepted in these zones and directly returned. No possibility to initiate asylum claims with European authorities was given.[268]

While there is thus often a grey zone and several interlinkages between these two questions in individual cases, the present chapter is confined to jurisdictional questions in respect of states' *own* actions outside their territory.

---

[267] Immigration, Asylum and Nationality Act 2006, sections 40 and 41. See further chapter 5.1.

[268] 'Longest Frontex coordinated operation – HERA, the Canary Islands' Frontex News release. 19 December 2006. [Accessed 16 March 2007]. Available from http://frontex.europa.eu.

While the involvement or complete outsourcing of migration control to the authorities or another state may weaken claims for extraterritorial jurisdiction, it does not mean, however, that responsibility is simply shifted. In such cases, recourse may be had to, for example, the International Law Commission's Articles on State Responsibility.[269] As a general principle of international law a state may thus be held internationally responsible for the act of another state if it 'aids or assists' these acts,[270] 'directs and controls' them,[271] or 'coerces' the state to commit them.[272]

In the present analysis however, the first question to ask is whether the jurisdictional assessment changes when migration control is moved onwards from the high seas to the territory or territorial waters of another state? Compared to interdiction on the high seas, the majority of migration control carried out inside foreign territory or territorial waters is specifically governed by political, administrative or treaty-based arrangements setting out the powers and competences of the extraterritorially acting state. Drawing a reference to the notion of extraterritorial jurisdiction within general public international law, one could thus argue that extraterritorial jurisdiction for the purpose of human rights responsibility in some instances would flow from these arrangements themselves. In *Bankovic*, the European Court of Human Rights did emphasise that in cases such as *Xhavara*, 'common jurisdiction was established by written agreement'.[273] It is less evident, however, that this was the deciding factor looking at the case itself. Since little comparable case law is available, it may be safer to argue that pre-established agreements between the territorial and the acting states may constitute part of the assessment for evaluating jurisdictional claims and, more importantly, indirect responsibility in cases of outsourcing. It should be remembered, however, that in most cases concerning migration control, such agreements are not readily available or

---

[269] An analysis of state responsibility in cases where migration control is outsourced to third states is outside the scope of the present work. Yet, the following chapter investigates situations where migration control is wholly or partly outsourced to non-state actors. For a discussion of the general relevance of the ILC Articles in human rights cases see therefore chapter 5.5. See also Crawford 2002.

[270] Art. 16.

[271] Art. 17.

[272] Art. 18. In all instances it is however a requirement that the first state has knowledge of the act in question and that the act is equally considered an international wrong by that state.

[273] *Bankovic and Others v. Belgium and Others*. European Court of Human Rights. Appl. No. 5207/99. 12 December 2001, par. 37.

conducted more informally, perhaps exactly to avoid public scrutiny. Furthermore, if the very purpose of carrying out controls in foreign territory or territorial waters is to shift jurisdictional responsibility, such agreements are unlikely to contain clauses or provisions explicitly acknowledging jurisdiction of the extraterritorially acting state.[274]

In cases where migration control is carried out as part of a state's control over a *geographic area* the presumption of jurisdiction would be strong, even for acts not directly associated to or carried out by the agents of the controlling state.[275] When, if ever, could such a situation apply to the issue of migration control? In the majority of the existing cases establishment of jurisdiction over a geographic area has depended on military invasion of larger territories and a certain duration of such presence, making its application to situations of extraterritorial migration control highly extraordinary. Yet in *Issa*, somewhat nuancing its previous practice in the *Cyprus* line of cases, the European Court specifically rejected both of these requirements and held that in principle Turkey could have exercised 'effective overall control' even though it had only established its military presence temporarily and only over smaller and possibly disjointed parts of Northern Iraq.[276]

This opens up for a more embracing approach where any exercise of overall control over even smaller parts of territory would suffice for the purpose of establishing jurisdiction (Mole 2005: 90). This could be argued to be the case in instances such as the United Kingdom juxtaposed control scheme operating at the French ports of Dunkirk, Boulogne and Calais. At each port a defined zone is appropriated within which the United Kingdom Border Agency has exclusive control to enforce its domestic immigration laws, carry out controls and retain fingerprints.[277] Some kind of lower threshold for what constitutes a

---

[274] So far, Frontex has thus denied access to the cooperation agreements signed between Spain, on the one hand, and Senegal and Mauritania, on the other, that were the basis for the Frontx HERA operations to prevent migrants to the Canary Islands.

[275] *Cyprus v. Turkey*. European Court of Human Rights. Appl. No. 25781/94. 10 May 2001.

[276] *Issa and Others v. Turkey*. European Court of Human Rights. Appl. No. 31821/96. 16 November 2004, par. 74. See also *Bankovic and Others v. Belgium and Others*. European Court of Human Rights. Appl. No. 5207/99. 12 December 2001, par. 80. The reasoning in the *Issa* judgement has however been criticised for somewhat mixing arguments concerning effective control over an area or territory and effective control over an individual (Gondek 2005: 374-75).

[277] At the international level, the juxtaposed control scheme is provided for by the Touquet treaty, which was signed on 4 February 2003, and given domestic effect by the

geographic area must however be assumed, and despite occasionally being described as 'floating territory' it seems unlikely that smaller entities such as ships or other government vessels, embassies, military installations or the like would reach this threshold.

In the majority of cases of extraterritorial migration control the relevant jurisdictional test is thus likely to be whether the state can be said to exercise sufficient authority over the individual asylum-seeker or refugee. The general recognition that extraterritorial jurisdiction may flow from 'the activities of diplomatic and consular agents acting abroad and on board craft and vessels registered in, or flying the flag of, that State'[278] could at face value encompass most types of migration control enacted by states themselves in the territory of another state (Lauterpacht and Bethlehem 2003: 109-10).

Yet, case law has so far set a high threshold for personal control, demanding that individuals are either under the full physical control of the extraterritorially acting state, or are on board vessels or within premises over which the extraterritorial state exerts some recognised form of extraterritorial jurisdiction. What was rejected in *Bankovic* was exactly the cause-and-effect notion of jurisdiction, as the Court did not find that the killing of relatives of the applicants by NATO smart bombs was enough to establish personal authority over the individuals in question. More recently, the boundaries of effective control in the personal sense was examined by the House of Lords in *Al-Skeini* with an extensive analysis of relevant international case law.[279] The case concerned six deaths of Iraqi civilians. Five of them had been shot by armed forces of the United Kingdom or caught in crossfire during British patrols. The last claimant, Mr. Mousa, had been detained at a British military base in Basra at which he was severely beaten and subsequently died from his wounds. Yet, according to the House of Lords only this last case fell within the jurisdiction of the United Kingdom.

As regards actions taking place in the territory of a foreign state it thus appears that a distinction is made between cases where states exercise complete and physical control over an individual, such as in the case of arrest or physical

---

Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls). Similar control arrangements have been made to give access to United Kingdom immigration officers to perform migration control at Eurostar stations in France and Belgium.

[278] *Bankovic and Others v. Belgium and Others*. European Court of Human Rights. Appl. No. 5207/99. 12 December 2001, par. 73.

[279] *Al-Skeini and others v. Secretary of State for Defence*. House of Lords. UKHL 26. 13 June 2006.

detention, and situations that only result in violations of human rights on foreign soil or territorial waters, even when these instances are so important that they infringe the right to life. Failing this test, jurisdiction conflicts are resolved by returning to the basic territorial principles for dividing responsibilities. Under such a reading it becomes substantially harder to establish refugee and human rights responsibility when a state operates migration control within the territorial jurisdiction of a foreign state. Does rejection of onwards passage by an immigration officer entail effective control in the personal sense? Does turning back a ship in foreign territorial waters?

Situations where migration control is followed by, or includes, transfer of asylum-seekers to defined camps or enclosures located outside the territory are likely to fulfil the criteria for establishing jurisdiction.[280] As part of the United States interception of Haitian boat refugees upwards of 4,000 Haitians were at one stage directed to the American naval base in Guantanamo where they were promised 'safe haven'. When subsequently forced back to Haiti, several refugee organisations considered this to constitute *refoulement* (Legomsky 2006). In 2003, the United Kingdom proposed a similar model whereby all asylum-seekers intercepted in the Mediterranean or at the borders of an EU country would be sent back to 'transit processing centres' in countries such as Morocco.[281] Even though the plan was never realised, scholars have argued that the operation of such centres would in all likelihood entail obligations under the European Convention of Human Rights (Noll 2003).

In cases where states operate interdiction schemes in foreign territorial waters an argument could be made that since a ship exercising government functions is recognised to hold certain jurisdictional entitlements under international maritime law as 'floating territory',[282] such activities necessarily entail jurisdiction. Where intercepting ships physically board migrant vessels or bring on board individuals a strong parallel would further be established to, for example, *Öcalan* and *López Burgos*.[283] It is more doubtful, however, whether this

---

[280] See e.g. *Ilse Hess v. United Kingdom*. European Commission of Human Rights. Appl. No. 6231/73. 2 DR (1975-76) 72 and *Al-Skeini and others v. Secretary of State for Defence*. House of Lords. UKHL 26. 13 June 2006.

[281] United Kingdom Home Office. 2003. New Vision for Refugees. 7 March 2003.

[282] *Case of the S.S. Lotus*. Permanent Court of International Justice. PCIJ Series A - No. 10. 7 September 1927. See further Ross 1961: 172.

[283] In *Medvedyev* the European Court of Human Rights thus held France to have exercised jurisdiction following the boarding and towing of a vessel flying the Cambodian flag suspected of drug smuggling. The vessel was intercepted in

jurisdictional basis extends to activities not actually aboard government vessels. Taking into account the reasoning in *Bankovic* and *Al-Skeini*, merely denying onwards passage or escorting vessels back may thus be insufficient to establish extraterritorial jurisdiction over the individuals concerned.[284]

In addition, states operating interception schemes appear to be going to some lengths to avoid jurisdictional responsibility in such interception schemes. The presence of Senegalese immigration officers on board Spanish ships participating in the HERA Frontex operation carrying out interdiction in Senegalese territorial waters may thus be seen as a move to underline that not only is this Senegalese territorial jurisdiction, but the actual denial of onwards passage is also conducted by Senegalese authorities. Whether this is a valid argument from a legal point of view is more questionable. As long as the intercepting vessel sails under a Spanish flag, Spain arguably retains effective control on board. In that context, the latest development in joint interception patrols between Libya and Italy will apparently see Italy supplying interception vessels to Libya, but staffed by both Italian and Libyan officials. In such situations the case for establishing direct Italian jurisdiction becomes even more difficult, though of course a claim may still be made for indirect Italian responsibility in the context of aiding another state conducting migration control that may violate international human rights obligations.[285]

Another issue to consider is whether activities of immigration officers posted at airports for example, or border crossings of third states may entail the jurisdiction of the posting state. As noted above, the use of such officers has become increasingly popular. As an example, more than 22 European and North American countries have deployed immigration liaison officers to the vulnerable and hard to patrol border lands between Russia and Ukraine (Gatev 2006: 10). In the United Kingdom, the network of United Kingdom airline liaison officers (ALOs) alone spans 32 countries, mainly in Africa, Asia and Europe. While the Border Agency notes that 'ALOs have no legal powers in foreign jurisdiction … the decision to carry a passenger or to deny boarding

---

international waters off Cape Verde and subsequently brought to the French port of Brest. It may be assumed that such a scenario would similarly suffice to establish jurisdiction over the individuals detained on board a vessel even if intercepted within foreign territorial waters. *Medvedyev and Others v. France*. European Court of Human Rights. Appl. No. 3394/03. 10 July 2008.

[284] But see section 4.5.

[285] 'Italy, Libya sign deal for joint patrol of Libyan coasts against illegal immigration'. *International Herald Tribune*, 29 December 2007. Available from http://www.iht.com. On Italian-Libyan cooperation in this area see further Lutterbeck 2006, Lavenex 2006.

is always made by the airline',[286] The Home Office nonetheless claims to have 'assisted in preventing nearly 180,000 inadequately documented passengers from boarding planes' in the period 2003-2007.[287] Similarly, following the transfer of migration control to the Department of Homeland Security, the United States has expanded its network of Customs and Border Protection Officers at strategic airports. These officers carry out individual checks and interviews but officially do not have legal authority to prevent individuals from boarding. As emphasised by the head of Customs and Border Protections however, economic penalties for bringing in unauthorised migrants make it 'very likely' that airlines would follow any recommendations by immigration officers.[288] While such situations are unlikely to amount to direct assertions of jurisdiction in the light of the existing case law, they may of course well give rise to indirect responsibility as a matter of outsourcing.[289]

In other cases however, immigration officers exercise authority more directly and may thus be argued to establish extraterritorial jurisdiction in the personal sense as government agents or consular officers acting abroad. Following a rise in Roma asylum-seekers arriving from the Czech Republic, the United Kingdom in February 2001 negotiated an agreement to install pre-clearance checks at Prague Airport, giving posted British immigration officers powers to conduct interviews and grant or deny onwards access to the United Kingdom. The scheme gave rise to complaints that not only was refusing entry for asylum-seekers likely to result in *refoulement*, but also that the operation was also highly discriminatory in its targeting of Romas.

The case reached the House of Lords. Guy Goodwin-Gill, intervening on behalf of UNHCR, argued that having 'effectively extended its frontiers into the Czech Republic', the United Kingdom exercised extraterritorial jurisdiction and thus had to respect international human rights obligations,

---

[286] United Kingdom Border Agency. 2008. *Entry Clearance Guidelines*. Home Office. 25 September 2008. [cited 26 October 2008]. Available from http://www.ukvisas.gov.uk/en/ecg/. Chapter 1, Annex 7.

[287] House of Lords. 2008. *Questions to the Her Majesty's Government, Lord Hansard, 25 June 2007*. United Kingdom Parliament. [cited 26 October 2008]. Available from http://www.publications.parliament.uk/pa/ld200607/ldhansrd/text/70625w0006.htm.

[288] Commissioner Robert C. Bonner. Remarks on the Immigration and Security Initiative. Paper read at Transnational Threats Audit Conference, 11 February 2004, Washington.

[289] See chapter 5.

including the *non-refoulement* obligation.[290] The House of Lords appears to have been somewhat divided on the jurisdiction issue. The duty to respect the *non-refoulement* obligation was rejected. First, the applicants were not outside their country of origin and thus did not fall within the scope of the Refugee Convention.[291] More generally, Lord Bingham, citing *Bankovic*, expressed 'the very greatest doubt whether the functions performed by the immigration officers at Prague, even though they were formally treated as consular officials, could possibly be said to be an exercise of jurisdiction in any relevant sense over non-UK nationals such as the appellants'.[292]

The appeal was however allowed on grounds of racial discrimination. The House of Lords mainly relied on national legislation in this regard, and specifically held that the specific targeting of travellers of Roma origin was contrary to section 1(1)a of the Race Relations Act 1976 (par. 104). Yet, consideration was equally given to international human rights treaties, and in particular whether the pre-clearance operation was contrary to Art. 26 of the International Covenant on Civil and Political Rights. Lord Steyn specifically held that:

> 'The United Kingdom purported to exercise governmental authority at Prague Airport. The operation carried out at Prague placed the United Kingdom in breach of the International Covenant.'[293]

---

[290] UNHCR. 2005. Brief Amicus Curiae: R (ex parte European Roma Rights Centre et al) v. Immigration Officer at Prague Airport and another (UNHCR intervening). *International Journal of Refugee Law* 17 (2):426-453, par. 103-6.

[291] *European Roma Rights Centre and others v. Immigration Officer at Prague Airport and another.* House of Lords. UKHL 55. 9 December 2004, par. 18. While this argument is valid when solely considering the 1951 Refugee Convention, the House however, did not consider similar *non-refoulement* obligations arising from other instruments of human rights law, nor whether the scheme could be considered a violation of the right to leave under Art. 12 of the International Covenant on Civil and Political Rights. See above section 4.1 and Hathaway 2005: 308-9.

[292] *European Roma Rights Centre and others v. Immigration Officer at Prague Airport and another.* House of Lords. UKHL 55. 9 December 2004, par. 21. Lord Bingham's analysis of the asylum issue was in general agreed to by Baroness Hale (par. 72) and Lord Carswell (par. 108).

[293] Par. 45. Baroness Hale further specifically held the Prague Airport scheme to be in violation of the Covenant on Civil and Political Rights (Par. 98-99).

While the concept of jurisdiction is not explicitly discussed, it is clear that the operations were thought to constitute an extraterritorial exercise of 'governmental authority' by the United Kingdom. For the responsibility of the Covenant to be engaged, the applicants would further have to be within the jurisdiction of the United Kingdom as specifically required by Art. 2.1.[294]

It is equally hard to reach a conclusive answer from the precedent set by existing international human rights case law. The threshold for establishing extraterritorial jurisdiction over an individual has so far only been met in cases involving full physical control. While there is therefore little doubt that extraterritorial jurisdiction will be established in situations where offshore migration controls entail the detention or otherwise apprehension or confinement of those intercepted, it is more doubtful whether merely carrying out immigration interviews and rejecting onwards passage as was the situation in the Prague Airport case will meet the test set by e.g. *López Burgos*, *Öcalan* and, as a national example, *Al-Skeini*.

Lastly, a particularly vexing question remains as to whether the enforcement of visa requirements is sufficient to bring applicants within the jurisdiction of the imposing state and whether a denial of such visas may consequently amount to a violation of the *non-refoulement* principle and other relevant norms of human rights law. Visas constitute one of the oldest and most widespread tools of extraterritorial migration control (Guild 2004, 2002; Guiraudon 2002; Goodwin-Gill 1996: 139-93).[295] While visa requirements are often justified by reference to general immigration purposes, it is clear that asylum-seekers and refugees are likely to be particularly affected. The EU has introduced common rules requiring visas for nationals of 128 countries, covering most of Africa, Asia and large parts of Central America (Guild 2004).[296] A special airport transit visa, limiting the otherwise established principle of free airport transit, is further required for nationals of those countries with particularly high asylum rates.[297] The obstacles presented to asylum-seekers through the visa

---

[294] See chapter 3.6.3.

[295] Visas were first introduced by the United States in 1924, effectively moving migration control abroad as consular offices became responsible for pre-screening passengers (Zolberg 1999: 75).

[296] Council Regulation (EC) No 539/2001. 15 March 2001. The list is set out in the Common Consular Instructions on Visas for the Diplomatic Missions and Consular Posts. 2005/C 326/01. 22 December 2005. Annex 1, as amended 17 December 2007.

[297] Common Consular Instructions on Visas for the Diplomatic Missions and Consular Posts. Annex 3, as amended 9 February 2009. At the time of writing these include Afghanistan, Bangladesh, Democratic Republic of the Congo, Eritrea, Ethiopia, Ghana,

regime are equally evident in the criteria set out for granting or refusing visas. The Common Consular Instructions direct consular officers to be 'particularly vigilant when dealing with … unemployed persons or those with irregular income' and to require supporting documentation in such 'high risk' cases. It should be clear that asylum-seekers are likely to fall into this category and often lack the possibility of producing such documentation.[298]

Some support may be found that visa applicants may in some circumstances come under the jurisdiction of the granting or denying State. In *W.M. v. Denmark*,[299] seventeen citizens of the former German Democratic Republic (DDR) entered the Danish Embassy for the purpose of seeking help to enter the Federal Republic of Germany. After having stayed at the embassy premises for one night, they were handed back to the DDR police and detained. On this basis, the Commission held that the applicant did come within Danish jurisdiction.[300] International law regarding consulates and embassies further provides the sending state with a recognised jurisdictional basis and certain immunities from the jurisdictional competence of the territorial state (Noll 2005: 567). From this one could argue that any asylum-seeker or refugee actually within the premises of an embassy or consulate may come under the jurisdiction of the sending state. As Noll concludes, the denial of a visa may thus in exceptional conditions trigger responsibility under the European Convention on Human Rights, including respect of the *non-refoulement* requirement that flows from Art. 3 (Noll 2005: 567).[301]

In general, however, granting or denying a visa, even if conducted directly by consular or embassy agents, has seldom been considered sufficient to constitute *refoulement* (Hathaway 2005: 310; Goodwin-Gill 1996: 252). Merely

---

Iran, Iraq, Nigeria, Pakistan, Somalia and Sri Lanka. Each member state may require similar visas for nationals of additional countries.

[298] Common Consular Instructions on Visas for the Diplomatic Missions and Consular Posts, Section V. In addition, the cost of the visa itself works to reinforce this point. Whereas an early Directive relating to the issuing of visas for third country nationals that are members of the family of Community nationals working in another Community country [Directive 68/360] specifically required that such visas be issued free of charge, the price of a Schengen visa has risen from 35 to 60 Euros (Guild 2002: 89).

[299] *W.M. v. Denmark*. European Commission of Human Rights. Appl. No. 17392/90. 14 October 1992.

[300] The applicant's claim was however rejected as incompatible *ratione materiae*.

[301] In his analysis, however, Noll considers that responsibility only emerges as far as a positive duty to protect can be deduced in regard to the specific right violated (2005: 569-70). See also section 4.5.

refusing a visa does not necessarily provide a sufficient causal link to any future violation of the *non-refoulement* principle,[302] and visa controls in general thus seem to have been accepted as legitimate measures even by UNHCR.[303] The enforcement of visa requirements may on the other hand lead to *refoulement*. Yet the denying of onwards travel to an asylum-seeker due to a lacking visa will in most cases be performed either when arriving at the border of the destination state or be enforced by migration authorities of the territorial state and private carrier companies who for fear of being fined take on control functions pre-departure.[304]

Further, the claim for extraterritorial jurisdiction is likely to diminish where visa processing is conducted outside embassies and consulates (Noll 2005: 568). A number of states today require visa applicants to go and submit applications at visa application centres operated by private contractors, thus simultaneously moving visa processing away from member state embassies and outsourcing it in part to non-state agents (Guild 2004: 39).[305] The EU has further tabled plans for common visa application centres including the possibility of private companies obtaining and forwarding visa applications.[306] Visa controls may lastly operate entirely passively, with no need for the state

---

[302] Even though jurisdiction was established in *W.M. v. Denmark*, the European Commission of Human Rights did not consequently find that the handing over of the applicant to DDR police and subsequent amounted to any violation of Convention rights attributable to Denmark, and the case was thus declared inadmissible *ratione materiae*.

[303] UNHCR. 2000. Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach. UN Doc. EC/50/SC/CRP.17. 9 June 2000, par. 17. See further discussion in Hathaway 2005: 311. Noll however maintains that in the instances where such a causal link between the rejection of a visa and a high risk of subjecting such applicants to a situation of persecution, torture or other ill-treatment is evident, an obligation under e.g. Art. 3 of the European Convention on Human Rights may arise (Noll 2005: 564-70).

[304] The question of attributed state responsibility in regard to migration control carried out by carriers is discussed in chapter 5.

[305] Australia, the United States, the United Kingdom and several other EU member states thus require visa applicants in a range of countries to go through visa application centres operated by commercial partners such as VFS Global. VFS Global currently facilitates visa applications for 25 countries and operates visa application centres in 33 countries. See www.vfsglobal.com.

[306] European Commission. 2006. COM(2006) 403. Draft proposal for a Regulation of the European Parliament and of the Council establishing a Community Code on Visas. 19 July 2006, Arts. 37 and 38.

to establish its presence extraterritorially. In these cases visa applications may be handled, for example, by the consulates of a third state or be submitted online.

In sum, moving migration control onto the territory or territorial waters of another state complicates the jurisdictional assessment. The existing case law appears to balance opposing concerns between universal responsibility for extraterritorially acting states and a continued emphasis on principles of national sovereignty and primacy of the territorial jurisdiction. The result is an increasing difficulty in attaining legal clarity in terms of the exact reach of international refugee and human rights law, as quickly becomes apparent when considering different scenarios for extraterritorial migration control. Secondly, a further complicating factor arises as control practices within foreign territorial jurisdictions show a growing overlap between situations where states act extraterritorially in their own capacity, and varying degrees of delegation or outsourcing to private actors or the authorities of the territorial state in question.

4.4 Conclusion: double standards and jurisdiction shopping in the area of migration control

The above analysis set out to examine how the concept of 'jurisdiction' is applied in three distinct spheres. For situations involving excision of territory and claims of non-responsibility in 'international zones' the case law is so far unequivocal. States are not free to withdraw jurisdiction form certain parts of their territory and even in cases where effective control is doubtful, the presumption of jurisdiction may remain based on *de jure* sovereignty. In the second sphere, state actions undertaken on the high seas or in *terrae nullius*, the approach to jurisdiction has been quite different. The emphasis has not been on testing effective control *strictu sensu*, but on establishing a meaningful jurisdictional link based on the actual relation between the state and the individual in the specific situation and in regard to the rights violation in question. The interpretation in these cases seems to apply a somewhat broader, functional concept of extraterritorial jurisdiction in which the guiding principle is a concern to avoid 'double standards'.

For cases where extraterritorial actions occur within the realm of another territorial sovereign, yet another approach is taken. In this sphere the two

lenses applied above are seemingly interpolated. The aim to avoid a 'gap or vacuum in human rights protection'[307] in such situations remains, yet it is tempered by the conflicting concern that stresses territoriality as the primary basis for establishing jurisdiction. The result is the exceedingly abstract 'effective control' test employed in cases such as *Bankovic* and *Al-Skeini*. In this line of reasoning, jurisdiction is neither taken as a given, nor necessarily linked to the question of state responsibility. Instead it becomes a separate test in which the conflicting basis for territorial jurisdiction has to be overcome in order for the 'exceptional' situation of extraterritorial jurisdiction to materialise.[308]

Just as in the doctrinal approach to enforcement jurisdiction under public international law, the human rights case law as regards extraterritorial jurisdiction is borne by a strong desire to avoid overlapping or competing claims to jurisdiction by several states. For situations involving extraterritorial control over a geographic area, this conflict is easier to resolve, as a sufficient degree of structural and/or military authority would normally exclude the possibility of similar control being exercised by the territorial state within that area. In cases involving control or power exercised over an individual, the test becomes more difficult. The personal notion of jurisdiction does not exclude the presence of a territorial state holding simultaneous jurisdiction. Yet, from the existing case law the result seems to be a retreat to a micro-variation of the territorial interpretation. Extraterritorial jurisdiction in these cases has so far only been established when the individual is under the exclusive and full physical control of the extraterritorially acting state, which in practice is likely to nullify any competing authority in regard to any human rights violations occurring. Anything short of this threshold is defaulted back to the jurisdiction of the territorial state.

From the perspective of the refugee and other human rights victims, the regrettable thing about this jurisprudence is that it effectively ends up doing exactly what it set out to avoid. A 'double standard' is clearly created whereby states apparently remain free to engage in human rights violations on foreign soil that would in principle entail responsibility if similar conduct occurred at home and probably also if carried out on the high seas. In doing so the

---

[307] *Cyprus v. Turkey*. European Court of Human Rights. Appl. No. 25781/94. 10 May 2001, par. 78.

[308] *Bankovic and Others v. Belgium and Others*. European Court of Human Rights. Appl. No. 5207/99. 12 December 2001, par. 59-61.

jurisprudence on extraterritorial jurisdiction retains a structural incentive for states to engage in offshore migration control.

By shifting control to the territory or territorial waters of third states a space is carved out where the sovereign prerogative to control entry into its territory may be asserted without the constraints ordinarily posed by refugee and human rights law. In the process correlated protection obligations otherwise owed are either deconstructed or at best shifted to third states. Contrary to classical assumptions the regulatory capacity and power to enforce migration control seem to expand the further these acts are removed from the territory as the link between the *de facto* exercise of sovereign powers and the *de jure* responsibilities assumed to flow from these is strategically breached.

Notably, this move is premised on the exact same principles that cement a state's protection obligations *within* its own territory. As migration control is extraterritorialised the sovereignty and territorial jurisdiction of another state is invoked, which in turn creates an initial presumption against jurisdiction of the acting state. This is the core dynamic behind what may be characterised as a growing trend towards 'jurisdiction shopping' in the field of migration control. The more resourceful and traditional asylum countries increasingly negotiate access to carry out control within the territory of foreign states who, in turn, commercialise their sovereignty either for threats of sanctions or positive concessions – most often a combination of both (Pastore 2007; Lutterbeck 2006; Gammeltoft-Hansen 2006; Lavenex 2006; Lutterbeck 2006; Niessen and Schibel 2004).

The analysis above identifies several other dynamics which achieve the same or a similar effect. Common to these moves are that by shifting migration control further away from state territory both geographically and conceptually, control may be asserted more unconstrainedly, *de jure* or *de facto*.

The first of these concerns strategies to nationally deregulate parts of the sovereign territory, typically border zones, offshore locations or airports. What is created here is in effect a separate regulatory jurisdiction as a matter of domestic law, in which procedural and/or substantive protection guarantees are deliberately reduced compared to those applicable to asylum-seekers who manage to launch their claim from within the 'territory proper' of the state in question. Just as the tax-free zones of most international airports are meant to attract international currency, special migration zones operating in the same physical space are intended as a disincentive to asylum claims and a lowering of the cost associated with processing them through the application of for example 'manifestly unfounded' procedures. While such arrangements remain a 'legal fiction' from the perspective of international law, the differentiation of

national legislation may serve to approximate treatment to the very minimum of obligations owed under international refugee and human rights law and reduce the legal safeguards and procedural rights that in practice ensure their fulfilment.

The same logic applies to situations where migration control is moved to the high seas. While this jurisdictional move is unlikely to relieve states of jurisdictional obligations under international law, it may equally reduce obligations under domestic law and further open up a strategy for shifting protection obligations by shifting legal regimes. The definition of search and rescue zones represents in effect a remapping of the *res communis* for the purpose of dividing disembarkment responsibilities along geographic boundaries. Even though the recent amendments to the SAR and SOLAS Conventions do not provide binding obligations in this respect and some states continue to challenge these divisions, they still serve as a basis for intercepting states to argue that persons 'rescued' in foreign search and rescue zones do not have a protection claim in regard to the acting state. In cases where the state in whose search and rescue zone operations take place accepts this argument, this can be seen as an expansion of the notion of jurisdiction shopping, as protection obligations are in practice shifted - despite the conclusion above that rescuing states retain jurisdictional human rights obligations when operating on the high seas. In cases where the SAR state in question does not accept this argument, the result is likely to be détentes to the detriment of the wellbeing of migrants and asylum-seekers.

The practices described in this chapter have been characterised by some commentators as being 'outside the law' or creating a 'legal vacuum'. While evocative, this description is strictly speaking not correct. What this analysis has attempted to elucidate is that it is exactly through law that extraterritorial migration control becomes a feasible and attractive strategy for states keen to avoid protection responsibilities. It is the invocation of principles of national sovereignty and the primacy of territorial jurisdiction that establish the presumption against extraterritorial obligations in cases where migration control is carried out within foreign jurisdictions. Similarly, it is by reference to the Law of the Sea and related rules on search and rescue that intercepting states argue for shifting disembarkation and protection responsibilities to the state in whose search and rescue zone operations take place. Practices of extraterritorial migration control in this sense are not about moving outside of the law nor a question of non-compliance but, on the contrary, demonstrate the employment of creative strategies to shift refugee and human rights responsibilities within the structures afforded by international law.

Furthermore, it must be remembered that since jurisdiction shopping is realised precisely by reference to the jurisdiction and obligations of another state, the result is not necessarily a protection vacuum. Rather, human rights and protection responsibilities in principle remain with the territorial state. In practice however, this shifting of protection obligations raises a number of additional questions and concerns. Not only may certain rights not be realised in this transfer, as discussed in chapter 2 the content and extent of these obligations may substantially change as well.

4.5 Towards a functional reading of extraterritorial jurisdiction?

The above has attempted to present an analysis based on a doctrinal approach and an interpretation of the international human rights jurisprudence as it stands at present. Nonetheless, as is also evident above, somewhat different readings continue to be put forward and state practices denying extraterritorial jurisdiction both on the high seas and especially within third territory or territorial waters are still common. On a more general level, the debate regarding when states exercise extraterritorial jurisdiction is ongoing and has implications far beyond the issue of offshore migration control. Court cases to do with human rights responsibility during military missions abroad or responsibility when detaining suspected terrorists at Guantanamo or at secret detention facilities in third countries are likely to mark the resolution of this trench war where opposing arguments based in universalism and territorialism continue to provide ample cannon fodder.

As such, the dominant reading may well change and develop. Not only has the *Bankovic* ruling been severely criticised, some scholars argue that we may already be seeing the contours of a jurisprudence deviating from the strict 'effective controls' test (Cerone 2006: 14-19; Lawson 2006; Loucaides 2006; Mantouvalou 2005: 159). At least in a few cases the European Court of Human Rights does seem to have applied what might be identified as a more functional test, even in cases concerning extraterritorial jurisdiction within the territory of another state. In *Issa*, the Court thus argued that the question of jurisdiction was too closely linked to the facts of the case and thus reserved for the merits stage.[309] More expressly, *Andreou* seems to accept the cause and

[309] *Issa and Others v. Turkey*. European Court of Human Rights. Appl. No. 31821/96. 16 November 2004, par. 74.

effect approach to jurisdiction explicitly denied in *Bankovic*. The case concerned Turkish authorities standing behind the border but shooting down a demonstrator within the U.N. controlled demilitarised zone. In this case the European Court on Human Rights held that 'even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as within the jurisdiction of Turkey.'[310]

Furthermore, some scholars have suggested that offshore migration control, as an extension of essentially territorial, or ad-territorial, activities lends itself particularly well to a jurisdictional approach based on functionalist criteria:

> 'Border control measures, wherever they are carried out, have a functional territorial reference point since they are linked to the enforcement of state jurisdiction. This factually substantiated territorial reference significantly relativises exterritoriality and means that sovereign measures linked to border control activities fall within the ECHR's scope.' (Fischer-Lescano and Löhr 2007: 29)

However, when a functional jurisdiction has nonetheless to take proper foothold, it may point back to a more fundamental inability of legal interpretation in this field to escape principles of national sovereignty. For the purpose of jurisdiction this seems to entail at least two dogmas. First, jurisdiction is conceived to be *exclusive*. This can be derived from the *Lotus* quote above establishing the principle *par in parem non habet imperium* – a state has no authority within another state. Regardless of the fact that in most situations of extraterritorial migration control permission is granted by the territorial state, the jurisdiction case law seems adamant about avoiding conflicting claims. As a result, the test of effective control becomes a question of either-or, with any doubt cast in favour of the territorial state. The second

---

[310] *Georgia Andreou v. Turkey*. European Court of Human Rights. Appl. No. 45653/99. 3 June 2008 (Admissibility), p. 11. It could of course be contended that this case should be considered an example of 'extraterritorial effect jurisdiction' as the firing soldier was within Turkish jurisdiction. Yet, unlike in *Soering*, the applicant and human rights victim was not within Turkish jurisdiction. Importantly, the reasoning of the Court did not emphasise the act of shooting or the Turkish soldier as the jurisdictional base, but instead declared that by its actions, Turkey had brought the applicant within its jurisdiction.

dogma is that jurisdiction is conceived to be all-inclusive or *total*. As professed in *Bankovic*, 'Article 1 does not provide any support that … jurisdiction can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question'.[311] This view is equally derived from a territorial conceptualisation of jurisdiction and has been readily transferred to cases involving spatial extraterritorial control (Roxstrom et al. 2005: 84).[312]

However, the question is whether these two creeds can continue to be upheld in an increasingly globalised world. Both broader examples and specific case law seem to open up alternative interpretations. As for *exclusivity*, the proliferation of auxiliary legal bases for jurisdiction makes co-existing and competing jurisdictional claims unavoidable. This is most evident under the law of the sea where the potential for concurrent jurisdictions is obvious, and where cooperative arrangements for dividing or sharing liability are far from uncommon (Gavouneli 2007: 49, 53). But even for jurisdictional conflicts within the territorial jurisdiction of one state, deferral to territorial primacy may not always be the preferred solution (Lowe 2007: 181). The EU could be described as an example of a functionally limited polity essentially operating within the same geographic area as its sovereign member states that demands us 'to conceive of autonomy without territorial exclusivity' (Walker 2003: 23). Finally, while one may disagree with the premise for asserting Moldavian jurisdiction in *Ilascu*, it does set an important precedent for establishing double jurisdiction.

With regard to the question of *totality*, the conclusion that extraterritorial jurisdiction must in all cases encompass the entire rights catalogue owed seems equally flawed. Again, both the law of the sea and the EU spring to mind. The notion of the exclusive economic zone allows states a certain flexibility in terms of substantive contents, which allows the coastal state to essentially pick and choose the specific functions it wishes to exercise in the marine area it decides to designate as such (Gavouneli 2007: 94-6). Similarly, the EU and its member states constitute an example where authority is clearly divided and tailored along different competences and subject matters. Lastly,

---

[311] *Bankovic and Others v. Belgium and Others*. European Court of Human Rights. Appl. No. 5207/99. 12 December 2001, par. 75.

[312] See e.g. *Cyprus v. Turkey*. European Court of Human Rights. Appl. No. 25781/94. 10 May 2001; and *Loizidou v. Turkey*. European Court of Human Rights. Appl. No. 15318/89. 18 December 1996.

while rare, historical examples of legal arrangements of shared or mixed jurisdiction over the same territory do exist.[313]

In contrast to the conception of jurisdiction flowing from national sovereignty, the case law concerning state actions in *terrae nullius* is illuminating and provides another pathway to enter into the problem of extraterritorial jurisdiction. Within a *functional* conception of extraterritorial jurisdiction, the deciding factor is not 'the place where the violation occurred, but rather the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred'.[314] This approach applies the basic principle of human rights law that power entails obligations (Lawson 2004: 86). In the words of Cassel, summarising the jurisprudence of the Inter-American Commission: 'Where a State can kill a person outside its territory, it exercises sufficient control over that person to be held accountable for violating his right to life' (Cassel 2004: 177).

Accepting a functional approach to jurisdiction for human rights purposes, two issues however arise that need to be resolved. The first concerns limiting the range and extent of state obligations to what is realistic and practicable. Under the 1951 Refugee Convention itself this is less of an issue, as the rights are specifically afforded incrementally, taking heed of state concerns that not all obligations may be realisable as soon as state responsibility is triggered. A state establishing jurisdiction by virtue of exercising offshore migration control would thus only be responsible for ensuring a limited number of rights, centred around the *non-refoulement* obligation. Under instruments like the European Convention of Human Rights or the Covenant on Civil and Political Rights however, no similarly differentiated structure exists. It is clear that accepting a functional approach to jurisdiction would place an enormous burden upon states if they were to guarantee the entire nexus of rights owed under, for example, the European Convention of Human Rights merely by denying onwards access to an individual encountered on the high seas or the territory of another state.[315]

---

[313] One such being the Anglo-French condominium over the New Hebrides (Turpin 2002).

[314] *López Burgos v. Uruguay*. Human Rights Committee. UN Doc. A/36/40. 6 June 1979, par. 12.2.

[315] This point is similarly made by Craven:

'The general problem…is that the international human rights project, far from being one that is essentially antithetical to the inter-state order, is one that relies upon a relatively sharp demarcation between respective realms of power and responsibility.

Yet, there is no logical reason to assume that the extent of obligations cannot change and be adapted to the particular circumstances as a state moves outside its territory. Several avenues could be envisioned for doing so. First, one might seek to distinguish between positive and negative obligations. While a state would be under the obligation to abstain from any direct action that would result in rights violations, such as the rejection or return of an individual to persecution or torture, the scope of positive duties to secure rights under human rights would be more narrowly circumscribed by the practical possibilities to ensure such rights. This is already acknowledged in cases such as *Loizidou* and *Cyprus v. Turkey*, where positive extraterritorial obligations are imposed only to the extent that continued control over a geographic area and the presence of more permanent military and administrative structures merit it.[316]

Given the principal difficulties in properly distinguishing between negative and positive human rights obligations, one could however also imagine an approach where the scope and application of rights is more broadly assessed in relation to the degree of control and authority exercised in the specific situation. This was essentially the approach taken by the United States Supreme Court in *Boumediene*.[317] The case concerned the constitutional right to *habeas corpus* for detainees at Guantanamo, who have explicitly been barred from ordinary judicial review under the Detainee Treatment Act 2005. In the

---

Human rights obligations typically require not merely that states abstain from certain courses of action, but also act with 'due diligence' to protect individuals from others, and to progressively fulfil rights in certain circumstances. In order for these obligations to be in any way meaningful, some distinction has to be maintained between those contexts in which a state may reasonably be said to assume those responsibilities and those in which it does not. The test of 'effective control' seems to provide an initial basis for doing so.' (Craven 2004: 255)

Yet, Craven nonetheless acknowledges that there is no logical reasons why states may not be held responsible for specific conduct or actions that undermine the enjoyment of rights in other parts of the globe, even beyond the realm of their effective control (Craven 204: 255).

[316] *Loizidou v. Turkey*. European Court of Human Rights. Appl. No. 15318/89. 18 December 1996; and *Cyprus v. Turkey*. European Court of Human Rights. Appl. No. 25781/94. 10 May 2001. Conversely, in *Ilascu* Moldova was held to have jurisdiction and retain a positive obligation to take diplomatic or other measures within its power even though it did not have effective control over the area in question. *Ilascu and Others v. Moldova and Russia*. European Court of Human Rights. Appl. No. 48787/99. 8 July 2004. For a discussion of 'positive' or 'due diligence' obligations, see further chapter 5.8.

[317] *Boumediene et al. v. Bush*. United States Supreme Court. 06-1195, 553 US. 12 June 2008.

judgment the Court first rejected the 'formalistic, sovereignty-based test' put forward by the government (p. 33) and denied that arrangements to commercialise sovereignty mean that states can disclaim constitutional obligations:

> 'the Government's view is that that the Constitution had no effect there, at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term. The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for political branches to govern without legal constraint.
>
> Our basic charter cannot be contracted away like this.' (p. 35)

But even more interestingly the Court further advanced what they termed a 'functional approach' in establishing both where constitutional rights apply and how they may be interpreted. While the majority considered it clear that fundamental constitutional rights cannot be denied given the degree of actual control by the United States over detainees at Guantanamo, the 'inhererent practical difficulties of ensuring all constitutional provisions always and anywhere' nonetheless had to be acknowledged (p. 29). Rather than restricting the extraterritorial application of the Constitution *per se*, however, the solution adopted in *Boumediene* was to draw on the common law tradition and accept that *habeas corpus* has always been considered 'an adaptable remedy. Its precise application and scope changed depending upon the circumstances' (p. 50).

In developing a functional approach to extraterritorial jurisdiction under international refugee and human rights law, at least two sets of practical difficulties may similarly serve to limit the application and scope of rights owed. First, one should take heed of the fact that certain rights presuppose a specific institutional context that may be realisable in the territorial context, but not so, or only to a more limited extent, extraterritorially. While states may be expected to respect the *non-refoulement* obligation anywhere they exercise offshore migration control, ensuring certain procedural and material rights may only be practicable where extraterritorial jurisdiction has a more permanent character and/or involves effective control over local

administrative structures.[318] This is most evident in cases concerning interception at sea. In *Medvedyev*, concerning the boarding of a ship flying the Cambodian flag suspected of drug smuggling in international waters, the European Court of Human Rights thus held that while France was exercising jurisdiction on board, it could not be held responsible for not immediately bringing the crew deprived of their liberty before a judge in accordance with Art. 5.3 during the thirteen days it took before the ship arrived at the French port of Brest.[319] Secondly, the scope of a state's obligations must be assessed in the light of its possibilities of enforcing such rights vis-à-vis any territorial sovereign. Again, where a state holds exclusive sway over a offshore geographic area this may be less of a problem, but where jurisdiction is merely exercised for the purpose of something such as migration control, the extraterritorially acting state is unlikely to be able to proactively intervene in regard to wider human rights issues without triggering a sovereignty conflict with the territorial state.

The second issue arising if one adopts a functional jurisdiction test is of a more practical character. While the effective control test, as argued above, essentially serves to exclude any competing jurisdictional claims over the territory or individual concerned, a functional approach to jurisdiction would entail a plethora of situations where more than one state might exercise jurisdiction in a given situation or over an individual.

If it is accepted that jurisdiction is non-exclusive, the need arises to determine which among several competing states would take on and fulfil actual obligations. In the refugee context both the territorial state and the state exercising offshore migration control may be expected to respect the *non-refoulement* obligation, yet only one state will presumably be able to undertake a refugee status determination process and take on any subsequent protection responsibilities.

Today, division of protection responsibilities among several states is often done through mutual agreements, yet international law contains few clues as

---

[318] *Loizidou v. Turkey*. European Court of Human Rights. Appl. No. 15318/89. 18 December 1996. In *Boumediene* emphasis was similarly put on the longstanding and exclusive control over Guantanamo exercised by the United States, and that in this light the Detaineee Treatment Act was not an adequate substitute for *habeas corpus* (p. 67). For a similar analysis see Tomuschat 2008: 131.

[319] France was however held to be in violation of Art. 5.1 as a proper legal base for depriving the applicants of their liberty was not established. *Medvedyev and Others v. France*. European Court of Human Rights. Appl. No. 3394/03. 10 July 2008.

to how to resolve any conflicts in this regard. A natural recourse may of course be to emphasise the primacy of the territorial jurisdiction. This finds support from UNHCR's Executive Committee:

> [t]he State within whose sovereign territory, or territorial waters, interception takes place has the primary responsibility for addressing any protection needs of intercepted persons.[320]

This principle would seem to suggest that to the extent that full and effective protection can be guaranteed by the territorial state, this would be the preferred party to take on protection obligations. However, crucial in this interpretation is the establishment that where this is not the case an underlying responsibility is borne by the state exercising extraterritorial jurisdiction for ensuring that protection obligations are met, and this may involve initiating asylum procedures and relocation to the territory of the acting state where refugee rights cannot be guaranteed by the territorial state.[321]

Realising this underlying, or subsidiary, human rights responsibility will be particularly important in cases where offshore migration is carried out within the territory of a state with evidently lacking refugee protection and human rights standards. It is in this sense highly questionable whether current efforts by Italy to carry out migration control within Libyan territorial waters would in any way relieve the offshoring state of legal obligations in regard to asylum-

---

[320] UNHCR Executive Committee. Conclusion No. 97 (LIV) 2003.

[321] A similar principle of concomitant responsibility has arguably already been established by the European Court of Human Rights. In regard to the European Dublin Convention, the Court in *T.I. v. United Kingdom* held that the indirect removal of an asylum-seeker from the United Kingdom to an intermediary country, even if under a mutual agreement that this country would carry out a status determination procedure, did not absolve the United Kingdom from its obligations under Art. 3 in case that country (in this case Germany) did not fulfil its commitments. *T.I. v. United Kingdom*. European Court of Human Rights. Appl. No. 43844/98. 7 March 2000 (Admissibility).

This principle is easily transferred to cases where interception involves cooperative arrangements and the establishment of more than one state's jurisdiction. While a state carrying out offshore migration control may under agreement transfer any asylum-seekers to the authorities of the territorial state, this does not relieve the offshoring state of its international obligations under refugee and human rights law in case the territorial state does ensure refugee protection.

seekers given that Libya is not a signatory to the 1951 Refugee Convention and has a track record of summarily expelling both migrants and refugees.

What has been suggested above is that a functional approach to extraterritorial jurisdiction is not only desirable from a human rights perspective, it is also an entirely possible reading as the concept of jurisdiction has developed in both general international law and human rights law specifically. Nonetheless, it is clear that what is suggested above would go squarely against the reasoning put forward in *Bankovic*, for example, which explicitly held that the rights under the convention cannot be 'divided and tailored' to a given situation.[322] I, for one, find this to be an unduly conservative and frankly incorrect assumption. As indicated above, the notion of functionally divided competencies and rights is firmly entrenched in several other areas of international law. Moreover, a number of both national and international cases have already established that account needs to be taken of the context in which states operate and the scope and application of rights tailored accordingly, especially when states exercise extraterritorial jurisdiction.

It remains to be seen whether national and international judiciaries will continue to cling on to notions of national sovereignty or whether a functional conception more in line with progressions in other areas of international law will eventually find its way even in cases involving extraterritorial acts committed on a foreign state's territory. So far it is as if there is a fundamental barrier that is hard to move past, a conceptual history that makes it cognitively difficult to conceive of jurisdiction not tied to territorial claims.

---

[322] *Bankovic and Others v. Belgium and Others*. European Court of Human Rights. Appl. No. 5207/99. 12 December 2001, par. 75.

5. The privatisation of migration control and state responsibility

The 'externalisation' of migration control is not limited to states' own actions on the high seas or in foreign territory. In tandem with the horizontal shift in locations for migration control, a shift may also be traced in terms of the actors engaged. This includes first the increasing inter-state cooperation touched upon in the previous chapter that has pivoted migration management as a prominent foreign policy issue for the EU and many traditional asylum countries (Gammeltoft-Hansen 2006; Lavenex 2006; Niessen and Schibel 2004). Equally, however, migration and border control seem to have expanded vertically, enlisting private actors to perform crucial functions in regard to immigration control.

The present chapter sets out by tracing the developments in private involvement for the purpose of migration control. As will be seen, private actors today occupy an increasing and varied role in migration management systems and the effect of private migration control is increasingly felt by asylum-seekers and refugees.

Secondly, the present chapter tries to elucidate when and under what circumstances states may be held responsible under international refugee and human rights law when migration control is delegated to private actors, such as airlines, border contractors or private security companies. Attempts to this end have so far been marred by difficulties in matching the traditional dictum that states are not responsible for the conduct of private actors with the current political reality and increased privatisation. International refugee law itself does not foresee that refugees are met by anything other than a state's own officials. Nonetheless, the general principles of international law such as the Articles on State Responsibility and the notion of due diligence both provide avenues for establishing state accountability: in the first case when a state actively engages private parties and their actions thus become directly attributable to the state, in the second instance when states fail to take appropriate action to prevent non-state actors violating refugee rights and states thus become indirectly responsible for any subsequent human rights violations.

In each case however the requirements for establishing state responsibility and obligations remain high and ensuring accountability for privately operated migration control may thus be difficult both *de jure* and *de facto*. Despite the

popularity of privatisation as a form of governance in an ever increasing number of fields, state responsibility for human rights violations in such cases relies on general principles of attribution and indirect responsibility, the application of which remains complex. Limited case law further exists to help draw clearer thresholds for when states incur responsibility and what level of obligations may be expected. Lastly, as in the case of extraterritorialisation, determining legal responsibility is intimately dependent on establishing the factual relationship between a state, private actors and the human rights violation in question. Privatisation seldom lends itself to extensive public oversight and scrutiny and determining the reach of international refugee law may therefore be particularly complicated when private migration control is carried out extraterritorially.

The following uses the term 'privatisation' loosely, as a shorthand for a wide set of circumstances in which private actors carry out otherwise governmental functions and contains no implication as to whether these activities are in fact an act of state or not. The investigative purpose on the one hand necessitates that an initial assumption of separateness between private actors and state authorities is maintained, since the purpose of the analysis is precisely to show when private conduct may nonetheless be attributed to the state. Privatisation for the present purposes thus includes instances where it is evidently hard to separate private contractors or seconded staff from ordinary authorities. Conversely, the analysis also includes situations where there is hardly any formal link between states and private actors and where the state cannot be said to have actively instigated or even endorsed privately conducted migration control. As will be shown however, states may nonetheless retain indirect obligations where it is likely and foreseeable that the acts of such actors will lead to refugee and human rights violations. In the following, the 'privatisation of migration control' thus embraces all forms of involvement by non-state actors in the design, setting up and enforcement of migration controls.

5.1 The rise of the private border guard

Before embarking on the legal analysis, it may first be useful to trace the developments in private involvement for the purpose of migration control. While the co-optation or incorporation of private actors for the purpose of migration control is as such not a recent phenomenon, the last decades have seen a substantial expansion of privatisation, and non-state actors today

appear in a multitude of different settings connected to border control and migration management.

In the context of migration control, the oldest and most widespread example of privatisation is the imposition of carrier sanctions on private airlines and other international transportation companies. Transporters bringing in passengers without the required documents or visas are fined and made responsible for taking back and/or detaining passengers rejected by the immigration authorities. The threat of such fines has made private airline companies take on a number of control functions related to document checks, and lacking visas or suspicions of document forgery are likely to lead to carriers rejecting passengers at the point of departure. While the concept of carrier sanctions originally dates back to the early 20th century,[323] legislation penalising and placing migration control obligations upon carriers became popular and more developed from the second half of the 1980s, largely as a response to increasing number of 'jet age' asylum-seekers.[324] Today carrier sanctions thus constitute a primary tool for ensuring pre-arrival migration control and a major obstacle for many refugees to reach the territory of their prospective destination state and apply for asylum.

Yet the involvement of private actors for the purpose of migration control is far from limited to the case of carrier liability. At the physical border a number of states today employ private agents to assist national border authorities in performing immigration and security checks. Under the 2006 Immigration Asylum and Nationality Act, the power to search vehicles, vessels and trains in the United Kingdom may be transferred to private contractors certified by the

---

[323] As early as 1902, the United States Passenger Act demanded shipmasters to sign an affidavit to verify that all passengers were in good physical and mental health. Yet, unlike the modern variants, the original legislation did not invoke penal law but merely a civil law responsibility to take back those found inadmissible by United States immigration officers (Minderhoud and Scholten 2008: 123; Lahav 2003: 92; Zolberg 1999: 75).

[324] In the United States, in addition to 1902 Passenger Act, carrier liability for bringing in aliens without valid passports and visas has been part of the Immigration and Nationality Act since 1952 (the MacCarran-Walter Act, Section 273). In Canada, similarly, rules were introduced as part of the 1976 Immigration Act. In the European context, legislation to impose obligations and concurrent fines upon carriers was implemented by Belgium, Germany and the United Kingdom in 1987 (Cruz 1995: 5). In Denmark legislation was passed in 1986, but only came into force in 1989. Since 1990, Art. 26 of the Schengen Convention further imposes an obligation on all signatory states to impose sanctions on all carriers who transport aliens without the necessary travel documents.

Secretary of State.[325] As part of the Secure Borders Initiative a number of private security and defence companies have been contracted by the United States to assist national border control. Recently, Boeing won the bid for setting up SBInet: a 2.5 billion dollar high-tech border surveillance system along the United States-Mexico border including sensor towers, radar scanners and possibly aerial surveillance drones. The contract involves Boeing designing and setting up the system as well as Boeing operators directing United States border guards to intercept irregular border crossers.[326]

In other instances border security is being completely outsourced to private contractors. As part of the general privatisation trend entire ports and airports in both Europe and North America are now run and owned by private companies (Salter 2007: 50). Since 2005 Israel has privatised border control at the major crossing points between Israel and the West Bank. At several places, Israeli officials have been withdrawn from the border check areas and inspections are handled solely by private contractors such as the private military company Modiin Ezrahi. The Ministries of Defence and Public Security have justified privatisation on grounds related to efficiency and better service, yet several complaints have been filed by border crossers regarding harsh treatment and voices have been raised that privatisation is first and foremost a way for the Israeli authorities to absolve themselves of legal responsibility.[327]

Moreover, a number of countries have contracted private companies to operate immigration detention facilities as well as to organise and carry out deportations. In the United Kingdom and Australia, immigration detention along with a number of prisons is run by Group 4 Securicor.[328] In the United States, Haliburton was recently awarded a 410.2 million USD contract to expand detention and removal facilities and companies like Corrections Corporation of America already run a number of immigration detention

---

[325] 30 March 2006. Sections 40 and 41.

[326] Joseph Richey. 'Fencing the Border: Boeings high-tech plan falters'. Corpwatch. 9 July 2007. Available from: http://www.warprofiteers.com.

[327] M. Rapoport. 'Outsourcing the checkpoints'. Hareetz. 2 October 2007; G. Auda. 'Checkpoints go private'. France 24. 17 March 2008; T. Buch. 'Israeli shift to private security draws fire'. Financial Times. 3 June 2008.

[328] In 2004 Group 4 sold off part of their United Kingdom detention activities under the name Global Solutions Limited. Other private immigration detention actors in the United Kingdom include Premier Detention Services and United Kingdom Detention Services (Bacon 2005).

facilities.[329] Similarly, in 2006 Geo Group was given a 250 million USD contract to provide busses and armed security for deportations from the United States.[330] The same year, the United Kingdom paid almost 12,391,175 GBP to escort companies carrying out enforced removals.[331]

Private involvement in migration control is not necessarily initiated or even endorsed by the respective states or governments. In the United States both private associations and independent individuals have taken up border control functions on their own initiative. The self-proclaimed 'Minute Men' carry out armed patrols at the United States-Mexico border claiming to provide 'extra eyes and ears for national border security'.[332] Their relationship to official United States Border Patrols is unclear. While the Department of Homeland Security has described the Minute Men as 'vigilantes' and asked them to step down activities, local border patrol authorities have in some instances endorsed them as providing support and a positive supplement to official controls.[333] The actual activities and effects of these groups are difficult to gauge, though NGOs have reported a number of incidents in which both border-crossers and irregularly staying migrants have been subjected to violence and physical restraint.[334]

As in the case of carrier sanctions, several elements of this privatisation have a concurrent extraterritorial dimension by simultaneously shifting control away from the physical border. As part of the United Kingdom's juxtaposed control

---

[329] Joseph Richey. 'Border for Sale: Privatizing Immigration Control'. Corpwatch. 5 July 2006. Available from http://www.corpwatch.org.

[330] Joseph Richey. 'Border for Sale: Privatizing Immigration Control'. Corpwatch. 5 July 2006. Available from http://www.corpwatch.org.

[331] The main contractor for this purpose is Group 4 Securicor, yet a number of other private security firms are approved and used on a case by case basis. Frank Arnold, Emma Ginn and Harriet Wistrich. 'Outsourcing abuse: the use and misuse of state-sanctioned force during the detention and removal of asylum-seekers'. Joint report by Birnberg Peirce and Partners, Medical Justice and National Coalition of Anti-Deportation Campaigns. July 2008.

[332] 'Armed Americans patrol B.C.-Washington border'. CTV Global Media. 2 October 2005. Available from http://www.ctv.ca.

[333] 'Armed Americans patrol B.C.-Washington border'. CTV Global Media. 2 October 2005. Available from http://www.ctv.ca.

[334] 'Unlawful Imprisonment of Immigrant by Minuteman Volunteer'. American Civil Liberties Union. 7 April 2005. Available from http://www.aclu.org.

scheme operated at French ports,[335] recent amendments will extend the authority of private contractors for border controls at overseas control zones. Under the new legislation, private search officers will be able to act independently of government immigration officers to search vehicles and detain and escort any persons found to the nearest immigration detention facility.[336]

Another example concerns the enlisting of private visa application agents who collect, organise and present visa applications to the embassies or immigration authorities of the respective states. This practice is in some instances closely connected to or carried out by carriers themselves, as transportation companies due to the sanctions system have a vested interest in ensuring that travellers will be accepted by the destination state (Guild 2001: 49). Yet the use of visa handling agents also seems to be a growing business outside the carrier framework. From the perspective of the state, the use of a trusted intermediary to vouch for visa applicants may reduce the examination carried out by consular visa officers and from the perspective of the applicant, visa agents may of course increase the chances of a successful application (Guild 2001: 50).

Under EU law the use of commercial intermediaries is open to each member state and the Common Consular Instructions provide for private agents performing tasks ranging from the basic supply of identity and other supporting documents to tour organisers organising travel documents, insurance and internal transfers.[337] Private companies engaged in this field seem to operate in a grey zone lying between independent commercial interests and governmental structures. On the one hand visa facilitation seems to be a budding and lucrative market and on the other, such agents are often closely connected to airlines eager to avoid refused passengers or carrier fines. Furthermore, in some countries embassies refuse to process visa applications unless applicants go through a pre-approved handling agent. Moreover, policy proposals for common EU visa application centres foresee the possibility of outsourcing obtaining visa applications entirely to private contractors.[338]

---

[335] See chapter 4.3.3.

[336] The Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) (Amendment) Order 2006 No. 2908.

[337] Council Common Consular Instructions on Visas for the Diplomatic Missions and Consular Posts, OJ C 326, 22 December 2005, Section VIII, 5.

[338] European Commission. 2006. COM(2006) 269. Proposal for a Regulation of the European Parliament and of the Council amending the Common Consular Instructions

Finally, the delegation of migration control to private carriers in some instances entails a responsibility by carriers to take custody of rejected passengers in transit or at the point of destination until they can be returned. Consequently, carriers effectively become responsible for detaining migrants and asylum-seekers. A number of cases have thus emerged where passengers have been held either at hotels under guard by private security companies, or in privately managed detention zones at the airport (Abeyratne 1998: 681; Hughes and Liebaut 1998: 108-9). A notorious example is the transit zone at the 'Sheremetyevo 2' airport in Moscow which according to Nicholson 'has held up to 20 passengers at any one time, including refugees who have been denied flights to Western European States' (Nicholson 1997: 598f). While agreements or contracts with the host state have in some instances been formalised for the purpose of carrying out these tasks, detention zones are generally operated by airline companies with *de facto* no possibility of launching asylum claims (Guild 2004c; Guiraudon 2002: 203; Nicholson 1997: 598).

Parallel to the expansion of the forms of private involvement in migration control, one might also point to a number of qualitative changes and developments in the way that private controls are enacted. The first of these is closely connected to the *increased security concerns* in regard to migration and border control. The requirements placed on carriers to perform security checks; scanning and verifying documents and submitting data to national authorities have increased substantially since the attacks of 11 September 2001 (Salter 2007: 54; Guiraudon 2003b: 11-12). Both the United States and the European Union now operate schemes requiring carriers to deliver Advanced Passenger Information (API) data on all passengers to the authorities of the destination state before landing.[339] At the same time, profiling and behavioural

---

on visas for diplomatic missions and consular posts in relation to the introduction of biometrics including provisions on the organisation of the reception and processing of visa applications. 31 May 2006.

[339] Council directive 2004/82/EC. On the obligation of carriers to communicate passenger data. 29 April 2004. A number of carriers have complained that the categories of data required are too broad and put excessive demands on the airline companies. Furthermore, exchange of passenger name record (PNR) data between the United States and the EU has caused some concern with respect to data protection. See Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (2007 PNR Agreement). OJ L 204/18. 4 August 2007.

techniques aimed at identifying potential security threats may inadvertently target asylum-seekers; the fear and desperation leading to flight is easily mistaken by security officers for risk factors leading to a denial of boarding.[340] Lastly, given the nature of the attacks, airlines themselves are becoming increasingly concerned about security risks and thus occasionally on their own accord implement additional passenger screening and security procedures.

In some respects, the heightened security concerns could be argued to work against privatisation of migration control. Before the 2001 attacks, airport security in the United States, including passenger screening, was largely assigned to airlines and private airport companies under FAA oversight (Verkuil 2007: 58). Yet in November 2001 legislation was passed to renationalise airport security under the newly established Transport Security Administration leading to the creation of more than 60,000 new federal employee posts (Verkuil 2007: 59).[341] Similarly, the bid by Dubai Ports World, a government owned company of the United Arab Emirates, to purchase six already privately owned ports in the United States started a national debate about the security impact of completely privatised port facilities (Verkuil 2007: 69). No policy changes resulted from this debate, however, and despite the introduction of federal immigration officers, the use of and obligations placed on private agents for the purpose of migration control have continued to grow in other areas.

Secondly, the privatisation of migration control is becoming increasingly *multi-layered*. The imposition of control obligations upon carriers has not only resulted in carriers hiring and training their own security and inspection staff but also a growing use of sub-contractors and thus further outsourcing. As the demands and standards required of airlines, sea transporters and port companies by destination states keep developing, hiring specialised security agents to carry out these functions is becoming more attractive, and to some companies often the only viable option (Verkuil 2007: 68; Kruse 2003: 15; Guiraudon 2003: 9; Cruz 1995). Furthermore, more than 100 private sub-contractors have been engaged by Boeing under the SBInet programme.

---

[340] Refugee Council. 2008. Remote Controls: how UK border controls are endangering the lives of refugees. December 2008. London, p. 46.

[341] The Aviation and Transportation Security Act, 115 Stat. 597 (2001). 19 November 2001.

Information about which companies have been sub-contracted and what tasks they are performing has not been made publicly available.[342]

Similarly, private contractors are increasingly acting as intermediaries in the implementation of inter-state cooperation in regard to migration management. In the border region between Ukraine and Russia, a number of private or quasi-public companies funded by the EU and individual member states have thus provided technical material for border control, including document scanners, communication equipment and aeroplanes, as well as training Ukrainian border authorities in profiling techniques, deployment and organisational setup (Gatev 2008: 110-111). This equally complicates the question of legal responsibility. While migration control is not carried out directly by these companies, they arguably aid Ukrainian authorities in establishing controls in a country with a known record for refusing asylum-seekers and refugees at the border.[343]

Thirdly and finally, private involvement in migration control is being embedded in *more complex arrangements* between the relevant actors. While the imposition of, for example, carrier sanctions in principle leave the organisation and modes of control up to the airlines and transportation companies, in practice states exercise a great deal of influence over the control functions carried and more intimate relationships are thus developing between national immigration officers and airline employees (Scholten and Minderhoud 2008: 136; Vedsted-Hansen 1995: 173-5). The United Kingdom has thus offered to waive fines if airlines agree to comply with its 'approved gate check' regulations. This involves British immigration officers training airline staff in profiling techniques and detecting forged documents, the institution of an additional control procedure immediately prior to boarding and regularly audits of airline performance by government officials (Nicholson 1997: 592-3).

In a number of countries such training and monitoring is today carried out through the secondment of immigration liaison officers working with airlines at points of departure and transit (Scholten and Minderhoud 2008: 137;

---

[342] Joseph Richey. 'Fencing the Border: Boeings high-tech plan falters'. Corpwatch. 9 July 2007. Available from http://www.corpwatch.org.

[343] See e.g. Human Rights Watch. 2005. Ukraine: On the Margins - Rights violations against migrants and asylum seekers at the new Eastern border of the European Union. 29 November 2005. New York; and UNHCR Press Release. 'UN condemns refoulement of Sri Lankan asylum seekers from Ukraine'. UNHCR Regional Office for Belarus, Moldova and Ukraine. 11 March 2008. Available from https://www.unhcr.org.ua. Accessed 25 January 2009.

Goodwin-Gill and McAdam 2007: 379; Guild 2004: 41).[344] While such officers seldom have the authority to carry out migration control directly, they often advise carriers whether to take on board or deny individual passengers. In addition countries like the United Kingdom and the United States have introduced procedures requiring carriers to forward passenger bio-data to the destination country at check-in, thereby allowing national immigration authorities time to check relevant databases and on that basis notify carriers about whether to board passengers or not.[345] In sum, more hybrid public/private partnerships appear to be developing as part of the privatisation of migration control. As the intersections between public and private are becoming increasingly blurred and hard to disentangle, determining where private involvement begins and where public authority ends becomes likewise difficult.

5.2 The logic and consequences of privatising migration control

From the perspective of the outsourcing state, the appeal of privatising migration control may be found on several levels. To some extent, private involvement for the purpose of migration control may be seen as part of a much broader trend. The last decades have seen a rapid expansion in the privatisation and outsourcing of activities hitherto carried out exclusively by the state, from education and health services and prisons, to international security and peace-keeping (Alston 1997: 442).

The motivation for privatisation is often argued in cost-efficiency terms – states will outsource certain tasks either if it is cheaper to do so or if it leads to a more efficient accomplishment of the task in hand (Scholten and Minderhoud 2008: 129; Lahav 2003: 91; Vedsted-Hansen 1995: 160-1). In the case of migration control both may apply, or at least be perceived to apply. Several authors have explained private involvement as a reaction to the alleged failure of traditional and state-led means of border control (Ayling and

---

[344] On the role of immigration liaison officers, see chapter 4.3.3.

[345] In the United Kingdom this is known as the e-Borders programme and provided for by the 2006 Immigration, Asylum and Nationality Act. Developing the technology and setting up the programme has similarly been outsourced, and a £650 million contract has thus been given to the American defence supply company Raytheon.

Grabosky 2006; Guiraudon and Lahav 2000: 164). By delegating control to, for example, airlines, states introduce a new layer of migration control that may effectively enforce visa requirements and reject undocumented travellers before they reach the physical border (Noll 2000: 108-9). At the same time, control is carried out by actors with a unique access to inbound immigrants and their data, and at locations, such as foreign airports that may otherwise be inaccessible to national immigration authorities (Vedsted-Hansen 1995: 160-1). Similarly, Scholten and Minderhoud have argued that carrier sanctions are perceived to be cost-saving by largely shifting costs for training and maintaining control personnel to transport companies as well as allowing for control to take place before the border, thus saving costs connected to asylum processing, accommodation and potentially expulsion (Scholten and Minderhoud 2008: 129).[346]

In the particular context of migration control, however, the regulatory rationale of enlisting private actors may be seen to serve at least two additional purposes – avoiding legal obligations vis-à-vis protection seekers and avoiding sovereignty conflicts when installing extraterritorial migration control. As regards the first of these, privatisation of migration control replaces the encounter between an asylum-seeker and the state, typically represented by national immigration or border authorities, with an encounter between *two* private parties, neither of which can be made directly responsible under international refugee and human rights law. The privatisation of migration control has thus been described as a strategy to circumvent legal constraints states otherwise face when carrying out border control (Lahav 2003: 89, 98; Guiraudon 2002: 195; Vedsted-Hansen 1999: 20).

Secondly, to the extent to which migration control is carried out extraterritorially, privatisation could be argued to avoid a potential sovereignty conflict with the territorial state. The posting of immigration officers exercising direct authority in foreign territory has so far been limited and requires detailed legal agreements between the sending and hosting state. As was evidenced in the previous chapter, many states emphasise that immigration liaison officers do not hold any direct authority and as such do

[346] Other costs may nonetheless be associated with the delegation itself and ensuring its effective implementation (Scholten and Minderhoud 2008: 129). Save for the examples of carrier sanctions, visa agents and vigilante border guards such as the Minute Men, states bear the cost of contractors. Further, as noted above, in many instances training of carrier personnel is still carried out by state officials and the enforcement of control monitored by deployed immigration liaison officers.

not interfere with the sovereign competence of the host state.[347] By having a private entity enforcing actual controls and rejections, the complicated and traditionally undesirable situation of overlapping enforcement jurisdictions is seemingly avoided.

On both accounts however the logic may at least be questioned. As will be shown in the following, as a matter of international law both carrier sanctions and other forms of privatised migration control do, under certain circumstances, incur state responsibility for violations of international refugee and human rights law. In particular, to the extent that a sufficient link between the state and the private actor can be established, the conduct of private agents is essentially identified with the outsourcing state for the purpose of any violation of international norms. Nonetheless, establishment of state responsibility with regard to private migration control is no straightforward matter and establishing the required link to hold states accountable may not always be possible.

5.3 Private migration control and international refugee law

The adverse effects of carrier sanctions and other forms of privatised migration control upon those seeking protection have been pointed out repeatedly (Abeyratne 1998; Nicholson 1997; Collinson 1996; Cruz 1995; Vedsted-Hansen 1995; Feller 1989; Ruff 1989; Meijers 1988).[348] Carrier sanctions are generally operated indiscriminately of protection concerns, and

---

[347] Council of the European Union. 2002. Proposal for a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union. 6621/1/02. 27 February 2002. Brussels, par. 67.

[348] For refugee and human rights organisations, see in particular Refugee Council. 2008. Remote Controls: how UK border controls are endangering the lives of refugees. December 2008, pp. 44-51; European Council for Refugees and Exiles. 2008. Defending Refugees' Access to Protection in Europe. December 2007, pp. 29-31; and Amnesty International. 'No Flights to Safety: Airline Employees and the Rights of Refugees'. ACT 34/21/97. November 1997, Group of Experts under the European Consultation on Refugee and Exiles. 'The Effects of Carrier Sanctions on the Asylum System'. Danish Refugee Council / The Danish Center of Human Rights. October 1991. Group of Experts under the European Consultation on Refugee and Exiles. 'The Role of Airline Companies in the Asylum Procedure'. Danish Refugee Council. July 1988.

asylum-seekers are particularly likely to be rejected as they are naturally prone to lack full documentation and unlikely to have been granted a visa (Goodwin-Gill and McAdam 2007: 377; Nicholson 1997: 598; Matas 1991: 27).[349]

While UNHCR in principle recognises carrier sanctions as a legitimate instrument of migration management, it does note that:

> 'Forcing carriers to verify visas and other travel documentation helps to shift the burden of determining the need for protection to those whose motivation is to avoid monetary penalties to their corporate employer, rather than to provide protection to individuals. In so doing, it contributes to placing this very important responsibility in the hands of those (a) unauthorized to make asylum determinations on behalf of States (b) thoroughly untrained in the nuances and procedures of refugee and asylum principles, and (c) motivated by economic rather than humanitarian considerations.'[350]

Placing obligations upon private actors such as carriers thus not only shifts responsibility for migration control but in effect equally the responsibility for asylum-seekers and refugees. Not only are private actors likely to be incompetent to take on such a task, but the outsourcing structure, in this case employing economic sanctions, is likely to work against private actors taking any risks in admitting asylum-seekers without the required documentation. Lastly, very little is known about the actual operation of private actors. Supervision and reporting are often lacking as control is shifted to private agents, and to the extent that they are implemented extraterritorially, access to

---

[349] See further chapter 4.3.3.

[350] UNHCR. 1991. Position on Conventions Recently Concluded in Europe (Dublin and Schengen Conventions). 16 August 1991. Geneva. See further UNHCR Position: Visa Requirements and Carrier Sanctions. UNHCR. Geneva. September 1995. A similar position has been taken by the Parliamentary Assembly of the Council of Europe:

'Airline sanctions…undermine the basic principles of refugee protection and the right of refugees to claim asylum while placing a considerable legal, administrative and financial burden upon carriers and moving the responsibility away from immigration officers.'

Council of Europe Parliamentary Assembly. 1991. Recommendation 1163 (1991) on the Arrival of Asylum-Seekers at European Airports. 23 September 1991, par. 10.

those rejected becomes inherently difficult (Verkuil 2007: 71; Nicholson 1997: 598; Vedsted-Hansen 1995: 176).[351]

In light of these concerns, it becomes natural to question to what extent carrier sanctions or other instances of privatised migration control conflict with obligations under international refugee and human rights law. While these questions have been flagged by refugee lawyers for more than two decades (Feller 1988; Meijers 1988; Vedsted-Hansen 1988), it arguably still remains a somewhat underdeveloped area and few attempts have been made towards a more systematic analysis of when states incur obligations under international refugee law as a result of the actions of private actors. The reasons for this may be several. The cases that have been brought before national courts mostly concern either the legality of upholding sanctions on carriers for persons already arrived or, occasionally, private suits brought against the airlines for refusal of boarding.[352] Secondly, lack of access to and monitoring of asylum-seekers rejected embarkation or actively turned back by private actors has left both NGOs and lawyers with rather few case studies (Nicholson 1997: 598).

The potential conflict between the control practices of carriers and international refugee law has indirectly been acknowledged as part of carrier legislation itself. Art. 26.2 of the Schengen Convention thus reads:

> 'The Contracting Parties undertake, subject to the obligations arising out of their accession to the Geneva Convention of 28 July 1951 relating to the Status of Refugees, as amended by the New York Protocol of 31 January 1967, and in accordance with their constitutional law, to impose penalties on carriers who transport aliens who do not possess the necessary travel documents by air or sea from Third States to their territories.'[353]

---

[351] Nicholson goes on to note that even when airlines are asked to provide 'denied boarding' figures, they do not always do so, and that the United Kingdom Immigration Service has been reluctant make data publicly available (Nicholson 1997: 598).

[352] See e.g. *Case Regarding Carrier Responsibilities*. Austrian Federal Constitutional Court (Verfassungsgerichtshof). G224/01. 1 October 2001 and *Scandinavian Airlines Flight SK 911 in Fine Proceedings*. Board of Immigration Appeals. NYC 10/52.6793. Interim Decision 3149. 26 February 1991. For further examples see Cruz 1995.

[353] A similar formulation was introduced in 1990 under the 9th edition of the ICAO standards under the 1944 Chicago Convention as an interpretative note to Standard 3.36.1 stating that 'nothing in this provision or in Note 1 is be constructed so as to allow

Very different interpretations have been applied by the various Schengen states and little effect has in practice been given to this clause.[354] In an attempt to remedy this, Art. 4.2 of the 2001 European Council Carrier Liability Directive introduced a slightly different formulation:

> 'Art. 4.1 is without prejudice to Member States' obligations in cases where a third country national seeks international protection.'[355]

While this formulation is wider in not only referring to obligations arising out of the 1951 Refugee Convention, it does however continue to spawn disagreement over interpretation. First, in referring to Art. 4.1 setting out the obligation to pay fines, it is not clear whether other obligations, e.g. to return inadmissible passengers, are similarly waived in the case of protection seekers declared manifestly unfounded or eventually rejected. Secondly, transposition seems to differ between member states as to whether fines are waived or reimbursed only when asylum or subsidiary protection is granted, or whether fines are waived for all passengers requesting asylum.[356]

---

the return of a person seeking asylum in the territory of a Contracting State, to a country where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion' (Cruz 1995: 70). The note, however, has not been carried over in the current edition (12th, 2005). Furthermore, no standard or recommendation is contained regarding non-penalisation for protection seekers or refugees, nor reference ever made to obligations in general human rights instruments.

[354] Some countries, such as France, Italy and the Netherlands, have waived or reimbursed fines in those cases where the person in question is subsequently admitted to the asylum system, as long the case is not considered 'manifestly unfounded'. Other countries, such as Germany and the United Kingdom, have argued that there is no connection between the transporting of a passenger without valid papers and the fact that they are asylum-seekers, fining carriers regardless of protection concerns. The latter argument seems, however, somewhat inconsistent with the actual implementation. Consequently, the United Kingdom has been seen to reimburse fines levied for those who eventually receive refugee status (though not subsidiary forms of protection) and Denmark conversely in periods only fined insufficiently documented asylum-seekers, but not *bona fide* tourists (Cruz 1995: 41, 50).

[355] Council Directive 2001/51/EC of 28 June 2001.

[356] In 2003 UNHCR thus approached the Irish authorities to have fines exempted in cases involving persons seeking refugee protection. The Irish Minister of Justice refused

A number of scholars have in addition proposed the argument that the imposition of carrier fines is inconsistent with Art. 31 of the Refugee Convention (Hathaway 2005: 386; Cruz 1995: 74; Vedsted-Hansen 1989: 188; Feller 1989: 58).[357] Art. 31 obliges states not to penalise refugees for irregular access to their territory and was specifically inserted to recognise that refugees may occasionally have an overriding need to seek entry, even if under false pretences or not in possession of proper documentation (Goodwin-Gill and McAdam 2007: 384; Vedsted-Hansen 1989: 130). It should be remembered, however, that Art. 31 is not an absolute prohibition and according to Art. 31.2 states may still uphold 'necessary' restrictions to the movement of refugees and other immigrants (Goodwin-Gill 2003: 185). While it may be applicable in some instances, it is thus uncertain whether it prohibits measures such as carrier sanctions more generally. Where countries explicitly waive fines in cases where inadmissible passengers subsequently seek asylum, this would seem to at least partly pre-empt the argument. Furthermore, to the present author it remains questionable whether carrier liability legislation may meaningfully be described as a penalisation of refugees as long as the carrier is fined, and not the refugee. Nonetheless, some carriers have been seen to introduce clauses into their general conditions of carriage that make passengers liable for any fines or other expenditure incurred as a result of improper documentation (la Cour Bødtcher and Hughes 1991: 10).[358] In such cases, it is arguable that carrier legislation indirectly leads to a penalisation of asylum-seekers in potential violation of Art. 31.

Even if these concerns are acknowledged and addressed by implementing states, however, neither is in practice likely to prove an effective guarantee for those in need of protection. Art. 31 only applies to refugees who have already entered the territory of the host state. As long as airline companies are faced with a prospect of substantial economic penalisation for erroneous decisions

---

to do this on the grounds that such a policy would make controls unworkable and further encourage false asylum claims (Hathaway 2005: 385).

[357] In addition, Cruz argues that the effect of carrier sanctions in preventing refugees to board aeroplanes in order to seek asylum may amount to a violation of Art. 31.2 prohibiting restrictions to the movement of refugees other than those necessary (Cruz 1995: 75). The argument, however, seems to overlook the territorial structure of the Refugee Convention. The application of this article is limited to refugees already 'in the country of refuge' and thus cannot apply to pre-departure rejection by carriers.

[358] Further, the ICAO Standards under the 1944 Chicago Convention provide that airlines may attempt to recover costs related to removal and return flights from inadmissible passengers. Annex 9, Standard 5.10.

regarding undocumented asylum-seekers, they are likely to adopt a preventive logic of 'if in doubt, leave them out' (Hathaway 2005: 384; Noll 2000: 177). Secondly, even in cases where governments have made exceptional arrangements to ensure that asylum-seekers may board without visas, a number of cases have been documented in which airlines have opted to reject passengers regardless (la Cour Bødtcher and Hughes 1991: 6-7). While the above considerations may thus bolster the position of asylum-seekers who have already arrived, they bring little consolation to those turned away by private agents at the border or point of departure (Nicholson 1997: 617).

This leads us to the more fundamental question, namely whether rejection by airlines or other private enforcers of migration control may raise state responsibility in regard to core refugee obligations, in particular the principle of *non-refoulement*. A number of scholars have argued that carrier sanctions and similar use of private agents undermines the effectiveness of the *non-refoulement* principle and other core refugee protection obligations, and as such these practices are therefore incompatible with an interpretation and implementation of Art. 33 of the Refugee Convention and similar requirements in *good faith* (Goodwin-Gill and McAdam 2007: 377-80, 387-90; Nicholson 1997: 618; Feller 1989: 59). Similarly, general concern over the effect of carrier sanctions has been expressed by the Human Rights Committee with regard to the right to leave any country expressed in Art. 12.2 of the International Covenant on Civil and Political Rights.[359]

Nonetheless, states have insisted on their right to impose carrier sanctions and generally rejected that such measures entail any human rights responsibility on behalf of the state implementing carrier legislation (Goodwin-Gill 1996: 252). Equally, in the *Prague Airport* case, the United Kingdom House of Lords argued that the long-standing and widespread state practice regarding visa regimes and carrier sanctions could not be interpreted as being contrary to international law.[360] Rather than relate to arguments concerning the effectiveness or good faith interpretation of refugee and human rights obligations, the main arguments for rejecting state responsibility under

---

[359] Concluding Observations of the Human Rights Committee: Austria. UN Doc. CCPR/C/79/Add.103. 19 November 1998, par. 11.

[360] *European Roma Rights Centre and others v. Immigration Officer at Prague Airport and another*. United Kingdom House of Lords. UKHL 55. 9 December 2004, par. 28. See further Goodwin-Gill and McAdams 2007: 371. The principal matter of the case, however, did not concern the use of carrier sanctions, but rather the responsibility of the United Kingdom's own authorities under the 1951 Refugee Convention and other human rights instruments when acting abroad. See discussion in chapter 3.5.2.5 and 4.3.3.

international refugee law seem to rely on the two premises that these measures are implemented by private actors and not states, and often extra-territorially beyond the sanctioning state's effective control.

The expansion of private involvement in migration control in recent years thus raises two questions. The first concerns when, if ever, the actions of private entities may give rise to state responsibility under refugee and human rights law. The second question is whether the geographical venue of such privatised migration controls matters in the assessment of possible state responsibility. To answer these two questions, the chapter will start by examining the fundamental, though often criticised, distinction between public and private in international law that continues to serve as a backdrop and creates an initial presumption against state responsibility for the conduct of private actors. Increasingly, however, principled exceptions are being carved out to hold states accountable for human rights violations carried out by non-state entities under international law.

5.4 The public/private distinction

Within both national and international law the dualism between public and private creates an initial presumption against engaging the responsibility of a state for actions not carried out by agents of the state (Schutter 2006: 18). Put plainly, private conduct is not in principle attributable to the state (Higgins 1994: 153). The separation between the public and private spheres has been a constitutive element of liberal societies and remains a key norm of both domestic and international law (Chinkin 1999: 389). In the modern vision of the nation state, regulatory functions and the exercise of power came to be centralised and monopolised by the state. Outside this, the market and private relations are both considered to be apolitical and thus subject to regulation under distinct legal regimes both at the national and the international levels (Sassen 2006: 187ff; Guild 2001: 45). Just as principles of national sovereignty and territory serve to delineate the state horizontally, the public/private distinction could thus be argued to delineate the state vertically, towards its subjects.

Arguably, the strict public/private dichotomy is a somewhat artificial legal construction (Sassen 2006: 188; Flinders 2006; Chinkin 1999: 389; Clapham 1993: 188). Neither historically, nor today, may clear and objective lines be drawn between the labels 'private' and 'public'. This concerns first the extent to which private actors, such as transnational companies and international

commercial institutions, independently exercise authority that may sometimes parallel or even challenge that of the state.[361] Secondly and more directly related to the present enquiry, private parties have always played a role in carrying out delegated government functions or assisting states in implementing governmental policies (Flinders 2006: 224). As noted above, the last decades have seen a rapid expansion in the privatisation and outsourcing of activities hitherto carried out exclusively by the state. In these processes, it not only becomes more difficult to draw a solid line between public and private entities, the very notion of governmental activity and functions becomes equally blurred (Clapham 2006: 11; Chinkin 1999: 390).

From the perspective of accountability under international law, privatisation prompts two questions. The first concerns the extent to which non-state actors themselves may be considered subjects of international law. Strong arguments have been forwarded in favour of the view that non-state actors, such as transnational corporations or international organisations do, in principle, have certain human rights obligations, both when acting independently and as a matter of complicity when acting in collaboration with states.[362] Theoretically, this view links to the view that international human rights law is a regime *sui generis*, with certain constitutional features that move beyond the public/private dichotomy otherwise assumed in international law (Clapham 1993: 188).

From a practical perspective, however, this position meets a number of challenges. As expressed in treaty law, human rights are arguably designed to limit the exercise of *state* power and as such only impose obligations on states (Lawson 1998: 92). Not under any of the regional human rights courts nor UN human rights complaint mechanisms may a claim be lodged against an individual or a private actor. As a matter of positive law, the effectiveness of international human rights law as it stands at present is thus dependent on

---

[361] Sassen to this extent talks about the rise of 'a new institutional zone of privatized agents' comprised of different entities such as international arbitration systems, debt security and bond-rating agencies and international professional associations that all act to shift governance of the global economy from the public to the private sphere (Sassen 2006: 246). Another example includes the rise of private urban governance through home-owner and condominium associations, what McKenzie describes as 'privatopia' (McKenzie 1994).

[362] See in particular Clapham 2006 and further references at p. 58.

either directly attributing violations to a state party or establishing an indirect obligation of the state in regard to the violation in question.[363]

This leads us to the second question and the focus of the present chapter: namely the extent to which the state may nonetheless be held accountable for violations of human rights by private actors. This can occur in two instances. The first concerns situations where violations of human rights are *directly* attributable to a state, despite the fact that the violation itself was caused by a private actor. To this end, a useful starting point is provided by the Articles on the Responsibility of States for Internationally Wrongful Acts. As shall be seen, the privatisation of migration control may entail state responsibility in several situations, though the threshold for attribution remains high. A state's human rights obligations may however also be engaged even in situations where the conduct of private actors is not, under the above framework, directly attributable to the state. This stems from the fact that human rights law places certain obligations on states to take measures to prevent, regulate or prosecute actions by private actors that violate human rights. In particular, all states have an obligation to exercise due diligence in regard to the conduct of private actors, both within and beyond the territory of the state in question.

In both instances, however, the public/private distinction remains significant. While principles of international and human rights law do foresee a number of situations where states are responsible for wrongful acts of non-state actors, a presumption against this situation remains the starting point and only upon fulfilling certain tests may this presumption be successfully rebutted. And though the world is rife with examples of privatisation and concurrent state

---

[363] See for example Art. 34 of the European Convention of Human Rights, Art. 44 of the American Convention on Human Rights, Art. 1 of the Optional Protocol to the International Covenant on Civil and Political Rights and Art. 22 of the UN Convention against Torture (Lawson 1998: 92). The question further remains as to how the establishment of human rights obligations of non-state actors would relate to obligations of states in respect of the same actions. Even though the two perspectives are often conceived of as being complementary (Clapham 2006: 23), the present author is inclined to take the view that in practice the assignment of obligations with non-state actors themselves easily becomes a pretext for simultaneously disavowing responsibility of the outsourcing state and legitimising the competence of non-state actors to carry out functions such as migration control. For a contrary view and discussion of this objection, however, see the contributions in Teubner, Günther, ed. 1997. Global Law Without a State. Dartmouth: Aldershot. For a general overview of the debate and arguments for and against human rights responsibility of non-state actors, see Clapham 2006: 25-58.

responsibility, as a matter of legal analysis attribution of private conduct to the state in this sense remains an exception to the primary rule.[364]

In the case of direct attribution, overcoming the public/private dichotomy is, furthermore, only the first step in establishing human rights responsibility. Any human rights claim will also depend on the ability to establish jurisdiction of the state in question and thus refers analysis back to the different jurisdictional tests set out in the previous chapter. Establishing human rights obligation of states outsourcing migration control to private agents acting abroad thus becomes doubly exceptional. In the case of due diligence obligations, however, the situation is different. As will be discussed, here it is not the location of private actors or human rights violations that matters, but the acts or omissions by the state in encouraging or not acting to prevent such violations. Whether or not a state is exercising *de jure* jurisdiction and the extent of actual control over the private actor will however still impact the extent and degree of a state's due diligence obligations.

Despite the fact that privatisation today constitutes a systemic feature of modern governance, legal responses have been characterised by *ad hoc* solutions with little coordination and few overarching principles (Flinders 2006: 299). The result may appear somewhat paradoxical, or at least circular in nature. The very definition of the private sphere is based on pertaining to its consisting of *non*-state actors; *inter alia* autonomous and independent of government funding, control, authority or direction. By defining private actors simply by what they are not it first of all becomes difficult to discern between the very different actors in this field and their rather different relationships to the state: from bands of private vigilantes to international security or military contractors. Secondly and more fundamentally, this dichotomous definition serves to reinforce the notion that private actors are *prima facie* removed from the sphere of public international law (Alston 2005: 3). It is in this sense that establishing state responsibility in cases of privatisation becomes problematic, as it sets out by assuming a distinction that may simply not be there in practice.

---

[364] The ILC Articles on State Responsibility equally have been criticised as reproducing an overly rigid public/private distinction. Chinkin thus argues that the Articles on State Responsibility fail to reflect the penetration of the private sphere indicated by state practice and growing jurisprudence and that if a state claims jurisdictifon over the totality of functions under its territorial control, it might then be appropriate to assert its responsibility for all wrongful acts emanating from it, or from nationals subject to its jurisdiction (Chinkin 1999: 389).

5.5 Private actors exercising governmental authority

Whereas the previous chapters have dealt primarily with the level and extent of obligations for extraterritorial acts, a key question in regard to private involvement in migration control becomes whether conduct by private actors can be attributed to the state. In such an enquiry recourse may be had to the International Law Commission's Articles on State Responsibility, which set out a number of general secondary norms regarding attribution and consequences of internationally wrongful acts. While not binding as a matter of treaty law, the principles may be considered customary international law (McCorquodale and Simons 2007: 601; Lauterpacht and Bethlehem 2003: 108).[365] That these principles are further applicable to human rights and refugee law has been affirmed both in the commentary to the Articles and through the reflection and application of the principles contained by the human rights treaty bodies (McCorquodale and Simons 2007: 602; McGoldrick 2004; Conforti 2004; Crawford 2002: 25; Lawson 1998: 115).[366]

---

[365] For an overview of the debate for and against codifying the Articles as a UN Convention, see Crawford and Olleson 2005.

[366] As noted in, for example, *Bankovic*, 'the Court recalls that the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law'. *Bankovic and Others v. Belgium, and Others*. European Court of Human Rights. Appl. No. 5207/99 (Grand Chamber). 12 December 2001, par. 57.

An argument may of course be set out that human rights constitute *lex specialis* and as such are specifically exempted from the scope of the ILC Articles under Art. 55. Clapham has argued that the Articles on State Responsibility are not, and should not be considered, appropriate in the context of human rights treaties (1993: 188). The argument seems in part to emanate from a general rejection of integrationist approaches to human rights and public international law:

'The public international law framework, on its own, is considered insufficient for the following reasons: The Convention does not primarily operate as an inter-State treaty as it grants remedies to individuals; effective protection demands that the Convention control private actors; the Convention takes effect in the national order of the Contracting Parties and constitutes a kind of European *ordre publique*; a public/private dichotomy is arbitrary, unreasonably discriminatory and perpetrates the exclusion of certain kinds of violations of rights which are then 'forgotten' (domestic violence, child abuse, discrimination against women in employment).' (Clapham 1993: 188).

Under the ILC Articles, state responsibility may arise in two types of instances when functions are delegated to private actors: where such actors are empowered to exercise governmental authority and where states authorise, direct or control otherwise private conduct. The first of these is set out in Art. 5:

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

This article was specifically included to take account of the growing number of situations in which governmental functions are outsourced or privatised to corporations, semi-public entities or public agencies. In such instances, otherwise private actors may be considered 'para-statal entities' to the extent that they are empowered to exercise specified elements of governmental authority (Crawford 2002: 100).

Importantly, the justification for attributing conduct of such entities to a state does not depend on the state exercising specific control in regard to the conduct, but rather on the conferral of authority through domestic law. The extent to which states carry out direct supervision and monitoring is thus not important. Neither is it decisive whether the conduct of private companies or other entities is carried out within or outside the territory, the link between the state and the entity is national law (Crawford 2002: 101).

Similarly, Evans has argued that the real thrust of the European Court of Human Rights is its ethical approach to human rights that may help break down traditional boundaries of attribution and territory in international law. As such, the principles of State Responsibility are best seen as 'operating in an altogether different realm' (Evans 2004: 160).

These positions have however met with some resistance (see in particular Lawson 1998 and the references herein for a critique and overview of this discussion). Furthermore, it does not appear from refugee and human rights instruments that they constitute *lex specialis* in this regard. As set out in chapter 1.3 the present analysis will thus pursue an integrationist or unitary approach. The ongoing discussion as to whether different standards for attribution are relevant in human rights cases may however account for the sometimes deviating case law both from human rights bodies and in connection to the International Criminal Tribunal for Yugoslavia position in the *Tadic* case discussed here, see section 5.6.

Yet, it is equally underscored that attribution of conduct under Art. 5 should be understood as a 'narrow category' and that its application is limited in several respects (Crawford 2002: 102). First, the law in question must specifically authorise the conduct as involving the exercise of public authority. Secondly, the conduct leading to a breach of an international obligation must be related to the exercise of this public authority or governmental activity and not other actions, private or commercial, by the actor in question.

Consequently, the scope of attribution clearly depends on how 'government authority' is conceived. The article itself is silent on this issue, nor does the commentary attempt any actual definition. The emphasis in the commentary that the actors in question are considered 'para-statal' entities could be read in at least two ways. In the first instance, attribution will depend on the authority exercised by non-state agents to *substitute* or replace regulation that would otherwise necessarily be carried out by the state itself. As an example of this, Crawford mentions the contracting of private prison guards to exercise public powers of detention pursuant to judicial sentencing or prison regulations (Crawford 2002: 100). The test of attribution is in this case rigourous and dependent on the authority exercised being a *necessary* governmental function.

A more contextual reading could however also be established. In this instance, attribution will depend on the extent to which authority is conferred on private actors to carry out regulatory functions in extension of and *parallel* to similar functions and powers exercised by the state. The nuance between these two tests may be subtle, yet it is likely to carry particular importance in regard to the present enquiry. Arguably, the expansion of migration control carried out by private actors at offshore locations may be seen as an exercise of governmental authority sanctioned by and parallel to that carried out by states themselves at the border and elsewhere. Yet, whether the control performed by an actor such as a private carrier substitutes an otherwise necessary exercise of government authority or not is at least more debatable.

The correctness of the latter reading is indirectly supported by the commentary. While acknowledging that the specific thresholds or criteria for defining government authority are to some degree dependent on the particular society, it is suggested that the test does not only rely on the content of powers conferred, but equally on the way in which powers are conferred, the purpose for which they are exercised and the extent to which entities are accountable to governments in their exercise of such powers (Crawford 2002: 101). Secondly, to clear any doubts that the application of Art. 5 is relevant in some cases relating to the privatisation of migration control, the commentary explicitly mentions the delegation of 'certain powers in relation to immigration

control or quarantine' to '[p]rivate or state-owned airlines' as an example of private actors exercising governmental authority (Crawford 2002: 100). As a sovereign prerogative of the state, the exercise of migration control may thus undoubtedly be characterised as an exercise of 'governmental authority'.

The general requirements set out above will however have to be fulfilled in regard to each type of delegation and the specific circumstances of the arrangement. Only in a few instances is delegation of migration control functions specifically and explicitly provided for in national law.[367] The situation is most likely to arise where private agents are formally incorporated to work alongside official border agents. An example is the use of private contractors by the United Kingdom both at its territorial borders and under the juxtaposed controls scheme. In both cases, the role of contractors is explicitly provided for in the 2006 Immigration, Asylum and Nationality Act.[368] The authority of contractors is further narrowly circumscribed (searching vehicles, detaining irregular entrants and escorting them to national authorities), and private agents undergo both an authorisation process and ongoing monitoring. Together, this makes a strong case that any exercise of authority by private search officers is directly attributable to the United Kingdom. The implementation of monitoring mechanisms to oversee the operations and address any complaints or failings could be taken as an indirect acknowledgement of this conclusion, and importantly private search officers may not themselves reject irregular entrants, but only escort them to governmental border officers.

---

[367] The concept of 'national law' remains debatable however. Within the human rights context the 'law'-requirement appears in a number of instruments to ensure the principle of legality and rule of law. It is however well-established that administrative decrees, incorporated international law and well-established customary law may equally amount to national law within the meaning of e.g. the European Convention on Human Rights. Yet, it remains decisive that rules of authority are accessible and reasonably clear (Lorenzen et al. 2004: 49-50). It is clear that too restrictive an interpretation of what constitutes 'empowered by national law' may lead some states to circumvent responsibility by delegating authority to private actors by other means. On the other hand, situations of *de facto* authorisation and instruction are covered by Art. 8 of the ILC Articles as dealt with later in this dissertation. While it may thus in some instances be hard to draw a solid line between situations where non-state actors are empowered to exercise governmental authority and situations where private agents are merely authorised to exercise certain powers by a state, it is nonetheless reasonable to assume that the respective applications of the two Articles are intended to close any gap in between.

[368] The Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) (Amendment) Order 2006 No. 2908, Sections 40 and 41.

A more contentious issue is whether, and under what circumstances, the widespread delegation of control functions to carriers may amount to an exercise of governmental authority in the meaning of Art. 5. On the one hand the legislative link is likely to be established in most cases. While national rules and requirements vary, the imposition of fines and sanctions is normally provided for by national law. On the other hand, whether such legislation amounts to an obligation to actually enforce controls remains debatable (Feller 1989). Sanctions constitute a third party liability mechanism that may compel carriers to take on migration control functions (Scholten and Minderhoud 2008: 134), yet to establish attribution it must be shown that legislation itself confers governmental authority in this respect.

As carrier liability has developed, however, legislation not only provides for a fines system, but also establishes a number of direct duties upon carriers to perform document and identity checks as well as an obligation to remove passengers without proper documentation from the host country (Nicholson 1997: 601; Cruz 1995; Feller 1989: 51). In the EU context, Art. 26.1(b) of the Schengen Convention requires member states to incorporate into national legislation that:

> 'The carrier shall be obliged to take all the necessary measures to ensure that an alien carried by air or sea is in possession of the travel documents required for entry into the territories of the Contracting State'

Further evidence of enforcement obligations can also be found in international aviation and maritime law. Under the 1944 Chicago Convention on Civil Aviation, standards have thus been developed essentially replicating key requirements of many states' national legislations.[369] Carriers are thus required to cooperate in establishing the validity of documents and visas and 'take necessary precautions at the point of embarkation to ensure that passengers are in possession of the documents prescribed by states of transit

[369] The ICAO Standards and Recommended Practices on Facilitation were first adopted in 1949 pursuant to Art. 37 of the 1944 Chicago Convention and designated as Annex 9 and subsequently developed and revised. While it is clear that recommendations are not binding, the legal status of standards has sometimes been questioned. According to Art. 38 of the Convention, 'standards' are 'recognized as necessary to facilitate and improve some aspects of international air navigation' and any non-compliance must be notified to the Council. As such standards are generally considered binding and an integral part of the Convention (Abeyratne 1998: 679; Nicholson 1997: 618).

and destination for control purposes'.[370] Carriers are further responsible for the cost of custody and care of persons found to be inadmissible by national immigration authorities and for ensuring their return flight.[371] Similar requirements have been introduced in regards to maritime carriers under the 1965 Convention on Facilitation of International Maritime Traffic.[372]

More than the mere conditionality of sanctions, carrier legislation thus introduces a set of mandatory obligations for carriers to act and report (Scholten and Minderhoud 2008: 135). The detailed provisions in this regard reinforce the notion that carriers are expected and empowered to perform migration control on the express requirement of national authorities (Abeyratne 1998). Rather than the sanctions themselves, the adjoined obligation placed on carriers to exercise certain functions of migration control may thus be argued to constitute a legislative conferral of governmental authority.

It has been objected that the extent of authority conferred does not amount to an express obligation to reject passengers, and in particular protection seekers, by the carrier. Yet, under Art. 5 of the ILC Articles it is not necessary to show that a private agent actually acts on the instructions of the state, as long as they act in the capacity or pursuit of the governmental functions conferred (Crawford 2002: 101). If it is accepted that carrier legislation in at least some respects empowers carriers to exercise elements of governmental authority to check and inspect documents, the state therefore remains responsible even if a carrier or other private agent acts in excess of their authority or exercises independent discretion (Crawford 2002: 102). The mere inclusion of provisions in, for example, European legislation to honour the obligations under the Refugee Convention and other human rights instruments is not sufficient to relieve states of their obligations. Any actual instance of *refoulement* by carriers may give rise to state responsibility and more concrete steps are thus required to ensure that private migration control does not amount to violations of international refugee and human rights obligations.

---

[370] Annex 9, Standard 3.33.

[371] Annex 9, Standards 5.9 and 5.11.

[372] Standards concerning carrier responsibility regarding inadmissible persons and immigration pre-arrival clearance were introduced in the 1996 amendments. In 2005 recommended practices expanded this responsibility to include digital transfer of pre-departure and pre-arrival information to the destination state (12th edition, Annex 9, Chapter 3.K).

In principle states thus remain responsible for some types of private migration control where, through a combination of national legislation and actual conferral of powers to private agents, these can be shown to exercise governmental authority. The criteria are most clearly fulfilled in cases where private contractors are granted direct powers or incorporated into otherwise national border functions. However, an argument could also be made that carrier legislation as it has developed may equally amount to a delegation of governmental authority.

The extent to which Art. 5 on State Responsibility can be made applicable in other cases concerning private migration control is more uncertain. From a legal perspective, it remains questionable whether the activities of self-proclaimed border patrol groups for example, or private visa handling agents can ever be argued to constitute governmental authority. Furthermore, in many instances the involvement of private actors for the purpose of migration control is not facilitated through law but rather administrative or otherwise *de facto* arrangements between authorities and the individuals or corporations involved.[373]

Secondly, it should be remembered that the notion of private actors exercising 'governmental authority' has deliberately been constructed as a narrow category under the ILC Articles, according to some scholars even 'exceptional' (Duffy 2005: 66), and that case law substantiating the principles set out in the ILC Articles on this issue is still rather limited, especially within the human rights field. In particular, the lack of a definition of what constitutes 'governmental authority' opens up another issue of contestation. For example, the United States, claiming to follow an overall principle not to outsource 'inherently governmental functions', is unlikely to accept that any actual privatisation of migration control functions amounts to this (Verkuil 2007: 58-60).

5.6 Private conduct authorised, directed or controlled by a state

Beyond situations where private actors can be established to exercise governmental activity, state responsibility may also arise where individuals or

[373] These instances may however be covered by Art. 8 dealt with below.

corporations are controlled or directed by a state. According to Art. 8 of the ILC Articles on State Responsibility:

> 'The conduct of a person or group of persons shall be considered an act of State under international law if the person of 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.'

Unlike Art. 5, the applicability of this article does not depend on establishing a *de jure* relation through national law, but rather a 'real link' or the *de facto* power exercised by a state over the private actor in question (Crawford 2002: 110). Following the commentary, this relationship may arise in two types of instances: first where conduct of private actors is in fact *authorised* by a state and thus acts on its instructions, and secondly where private agents act under the *direction* or *control* of a state (Crawford 2002: 110). State responsibility in situations where private actors have been authorised has been established in a number of cases where individuals or groups have been engaged or recruited to supplement or act as auxiliaries to state organs while still remaining outside the official state structures (Crawford 2002: 110). Attention has particularly been brought to this situation in the context of private military and security companies employed to carry out offshore tasks in, for example, Iraq (McCorquodale and Simons 2007: 610; Bina 2005; Coleman 2004).

That a state incurs responsibility when it instructs or authorises private actors has also been affirmed in the context of the European Convention on Human Rights. In *Stocke v. Germany*,[374] the German police enlisted the help of a private individual, Mr. Köster, to help retrieve Mr. Stocke from France, where he had fled following German allegations of tax offences. Köster managed to divert a private plane carrying both of them to Germany where Stocke was arrested. While the case was rejected on its merits, the European Commission of Human Rights as a general principle established that:

> 'In the case of collusion between State authorities, i.e. any State official irrespective of his hierarchical position, and a private individual for the

[374] *Stocke v. Germany*. European Commission of Human Rights. Appl. No. 11755/85. 19 March 1991. Nonetheless, neither the Commission nor the Court found any violations of the Convention based on the facts, and the Court has yet to reaffirm the principle set out above. See further Lawson 1998: 104.

> purpose of returning against his will a person living abroad, without the consent of his State of residence, to its territory where he is prosecuted, the High Contracting Party concerned is responsible for the acts of the private individual who *de facto* acts on its behalf.' (par. 168).

While it does not matter whether the delegation is carried out through national law, some degree of formalised agreement or pre-existing authorisation or instruction must however be shown in regard to the specific conduct carried out in these instances.[375]

In the context of migration control, states would thus only be responsible in situations where contracts or other arrangements are made authorising or instructing private agents to carry out tasks that may violate refugee or human rights. The first criterion is likely to be fulfilled where private individuals or corporations are formally employed or awarded contracts or grants related to migration control or migration management. This would include the incorporation of private search officers, such as in the United Kingdom, the wholescale privatisation of certain checkpoints as in the Israeli contract with private security firms along the West Bank wall, and the involvement of private contractors in setting up and running border control systems as in the case of the United States' contracts with Boeing. Following the *Stocke* case, it could further be argued that more practical arrangements may suffice as well. This could apply in situations where states for example ask or demand private carriers to ensure the forced return of denied passengers.

The second criterion however narrows application, as it must be established that the contract or instructions clearly relate to any human rights violation in question (Crawford 2002: 113). In many instances, authority and instructions of private contractors are explicitly limited to avoid the exercising of power by non-officials that may breach national or international law. Thus tasks delegated to Boeing for example in setting up the SBInet are unlikely to amount to human rights violations in themselves, nor are the limited powers given to private search officers in the United Kingdom likely to result in *refoulement*. Yet, this is not to say that instructions explicitly have to authorise

---

[375] In this sense, the cases where private actors act under the instructions of or have been authorised by the state do seem to share a number of features with the cases where states exercise governmental authority under Art. 5 and may perhaps usefully be thought of in close connection hereto. While Art. 5 concerns situations where states *de jure* delegate public functions, the first part of Art. 8 concerns situations where private actors are *de facto* authorised.

or demand conduct violating refugees' rights. Where a privately contracted border guard has the authority to reject an asylum-seeker directly, or where a carrier under orders returns a possible refugee to persecution, these actions and their consequences remain attributable to the state.[376]

State responsibility under Art. 8 may however also arise in situations where private agents are not directly authorised, but nonetheless act 'under the direction or control' of a state. In principle this may cover a wider set of instances, as it does not depend on any contract or formal attachment between the state and the private actors in question. Yet, conversely it must be established that the state directed or controlled the specific actions or operations in question (Crawford 2002: 110).

Furthermore, determining when private conduct is in fact controlled or directed by a state raises difficulties both at the abstract and practical levels. So far, the threshold has been set rather high. Thus, in the *Nicaragua* case[377] the International Court of Justice took the view that even though the United States had financed, supported and trained the *contras* fighting against the Nicaraguan government, it did not amount to 'such a degree of control in all fields as to justify treating the *contras* as acting on its behalf' (par. 17), and that for legal responsibility to arise it would have to be proved that the United States 'has effective control of the military or paramilitary operations in the course of which the alleged violations were committed'.[378] Though the United States was held responsible for its own actions and support to the *contras*, the acts of the *contras* themselves could not be attributed to the United States.

The reasoning of the International Court of Justice in *Nicaragua* underscores that the control must be specifically related to the actions or tasks leading to a possible rights violation or unlawful act.[379] Unlike under Art. 5, arguments

---

[376] That the latter case falls under the scope of Art. 8 can be verified by recourse to the suggested format for documents relating to the return of inadmissible persons set out in the ICAO standards. Following personal information regarding the returnee, the suggested format thus reads: 'The incoming carrier was instructed to remove the passenger from the territory of this State on flight (flight number) departing on (date) at (time) from (name of) airport.'. Appendix 9 of Annex 9.

[377] *Case Concerning Military and Paramilitary Activities in and against Nicaragua*. International Court of Justice. 27 June 1986.

[378] *Case Concerning Military and Paramilitary Activities in and against Nicaragua*. International Court of Justice. 27 June 1986.

[379] In this context, the notion of 'effective control' should not be confused with its use for the purpose of establishing extraterritorial jurisdiction as dealt with in chapter 4. In his Separate Opinion to the *Nicaragua* case, Judge Ago subscribed to the judgment as a

that control and direction only concern limited and inherently lawful functions related to migration control cannot therefore *prima facie* be disregarded. On the other hand, preventing access to seek asylum has been an explicit justification by a number of states for introducing carrier sanctions (Nicholson 1997: 588-90; Vedsted-Hansen 1995: 171-2; Cruz 1995: 85). Even where reasons for privatisation are not so bluntly expressed, this requirement is likely to be fulfilled where it can be shown that violations of refugee rights are an unavoidable or foreseeable consequence of the state-controlled private conduct (Crawford 2002: 113).

Control or direction over the specific actions or operations leading to a violation would, however, still have to be established. Where the involvement of private actors is based on contracts or grants with clear descriptions of tasks and correlate monitoring and reporting of activities this may be less of an issue. Yet, where arrangements are less tightly state-governed, it may become difficult in practice to show that states direct or control specific conduct leading to human rights violations.

A case in point concerns migration control functions performed by carriers. On the one hand, carrier legislation and general requirements to check documents etc. are in themselves unlikely to be sufficient to meet the specificity requirement set by the International Court of Justice in the *Nicaragua* case. On the other hand, the increasing involvement of state officials in how controls are carried out may amount to 'direction' or 'control', even within a restrictive interpretation of Art. 8. As Scholten and Minderhoud evidence, the Dutch government not only ensures general training of KLM employees, deployed immigration liaison officers also support and advise carriers in individual cases (Scholten and Minderhoud 2008: 137-40). While the carrier remains responsible for effecting any rejections, a passenger allowed to board against the advice of immigration liaison officers will be subjected to an additional check directly after disembarkation to ensure that a potential fine can be linked to the carrier in question (Scholten and Minderhoud 2008: 140). In practice, it may thus be hard to distinguish between 'advising' and direct 'instructions'. Notably in the Dutch case airlines have been shown to follow ILO advice in more than 99% of all cases (Scholten and Minderhoud 2008: 138).

---

whole but pointed to the need to define 'effective control', which in his opinion must involve some kind of specific instructions to commit a particular act or carry out a particular task (par 188-9). Cited in Lehnardt 2007: 13.

Recently developed systems to pre-authorise passengers in, for example, the United Kingdom and the United States may provide an even clearer example. Under the Secure Flight and APIS schemes operated by the United States, carriers are obliged to forward API data no later than 30 minutes prior to departure. The Transportation Security Administration will then vet passengers, and any passenger on a federal watch list or with insufficient information forwarded will result in a 'not-cleared' message prohibiting boarding being relayed back to the carrier.[380]

It should be noted that the test for 'control' or 'direction' established in the *Nicaragua* case has been challenged as being too inflexible in a world where privatisation is becoming prevalent in an increasing number of fields (Lehnart 2007: 14; McCorquodale and Simons 2007: 609). In the *Tadic* case,[381] the International Criminal Tribunal for Yugoslavia thus explicitly rejected the *Nicaragua* test arguing that:

> 'The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The degree of control may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.'[382]

Similarly, in *Ilascu* the European Court of Human Rights was of the view that Russia's 'decisive influence over' and 'military, economic, financial and political support to' the separatist regime in Moldova was sufficient to attribute the actions of the of the Moldavian Republic of Transdniestria to Russia and thus establish Russian jurisdiction and responsibility.[383] How much

---

[380] Department of Homeland Security, Bureau of Customs and Border Protection. Advance Electronic Transmission of Passenger and Crew Member Manifests for Commercial Aircraft and Vessels. Final rule. 19 CFR Parts 4 and 122. 7 December 2005; Department of Homeland Security. Transportation Security Administration. Secure Flight Program. Final rule. 49 CFR Parts 1540, 1544, and 1560. 28 October 2008.

[381] *Prosecutor v. Tadic*. International Criminal Tribunal for the Former Yugoslavia (Appeals Chamber). IT-94-1-A. 15 July 1999.

[382] *Prosecutor v. Tadic*. International Criminal Tribunal for the Former Yugoslavia (Appeals Chamber). IT-94-1-A. 15 July 1999, par. 117

[383] *Ilascu and Others v. Moldova and Russia*. European Court of Human Rights. Appl. No. 48787/99 (Grand Chamber). 8 July 2004, par. 392.

can be gained from these cases is however still unsure. The International Criminal Tribunal for Yugoslavia was arguably set up to consider issues of individual criminal responsibility, not state responsibility (Crawford 2002: 112). The International Court of Justice thus expressly rejected the 'overall control' test applied in *Tadic* and instead reaffirmed the notion of 'effective control' and principles for attribution set out in *Nicaragua*.[384] Even if the test applied in *Ilascu* is adopted, many cases where states engage private actors for the purpose of migration control will still fall below this threshold.

The criteria for attribution and state responsibility in respect of actions by private agents thus remain evidently higher than in the case of outsourcing or relations between states where merely 'aiding or assisting' another state in committing an internationally wrongful act is sufficient to establish collaborative or derivative state responsibility.[385]

Moreover, establishing the 'real link' between an outsourcing state, the private actor and the human rights violation in question becomes further complicated when public/private relationships grow more complex and multi-layered. The widespread use of sub-contractors by airline companies and large-scale border

---

[384] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. International Court of Justice. 26 February 2007, par. 403. See also *Case concerning Armed Activities on the Territory of the Congo (DR Congo v. Uganda)*, International Court of Justice. 19 December 2005.

[385] ILC Articles on State Responsibility, Art. 16. See further Crawford 2002: 148-51.

Nonetheless, some scholars have argued that while Art. 16 only covers inter-state relations, the increased direct liability of corporations and private actors under international law may extend it to apply in relations between outsourcing states and private corporations as well (McCorquodale and Simons 2007: 613-4). If this view is correct, it would substantially lower the threshold for attributing private conduct to states and correlate legal responsibility. The argument, however, seems to build on at least two assumptions. First, as discussed above, it is still questionable to what extent private corporations do incur direct responsibility under international law, and though one may point to specific examples, the position hardly finds general support and to wit lacks any precedent within refugee law. Secondly, it seems uncertain at best whether the requirements laid down in Art. 16 even lend themselves to extending their application to private actors. In particular, application of Art. 16 requires that the act is considered 'internationally wrongful' both by the acting and by the aiding or assisting state. This would seem to require a firm legal basis for the international liability of the private actor that matches that of the state in the specific case. Consequently, one would have to conclude that if the International Law Commission intended to set a similar threshold for establishing state responsibility in the case of private actors as in the cases of outsourcing or of assisting third states, the Commission would have used similar language.

contractors such as Boeing adds another layer to the attribution analysis, both as a matter of law and in the often complex matter of ascertaining the facts of the case. The determination of state responsibility in these instances will have to rely on either directly showing that the sub-contractor is acting under state instructions or control, or a two-step analysis first attributing the conduct of the main contractor to the state and secondly establishing the relationship of the sub-contractor vis-à-vis the carrier.[386]

Additional complications further arise where private actors act as intermediaries between two or more states. As noted above, this is the case in the Ukraine for example, where a number of security companies funded by EU member states assist Ukrainian authorities in reinforcing border control between the Ukraine and Russia (Gatev 2008). Such situations are likely to become more typical as cooperation with third countries on migration is increasingly facilitated through financial framework programmes predominantly implemented by non-state actors.[387] Establishing any legal responsibility of the outsourcing or funding state in these situations is complicated by the fact that private involvement often only amounts to assistance to third country national authorities, which remain the agents carrying out actual controls. If such cooperation is facilitated directly between the national authorities of two states, the first state may be held responsible if it is found to assist or aid the second state in committing an internationally wrongful act.[388] Yet, where non-state entities act as intermediaries, it would first have to be proved that, for our Ukrainian example, private security companies operating in the Ukraine act under the direction and control of the funding state, and secondly that the attributable conduct of these companies aids or assists foreign authorities in violating refugee law or other international norms (McCorquodale and Simons 2007: 611; Clapham 2006: 263).

---

[386] For a parallel issue, McCorquodale and Simons discuss the problems of 'penetrating the corporate veil' and establish state responsibility for transnational corporations with legally separate sub-entities (McCorquodale and Simons 2007: 616-7).

[387] In the EU context, see in particular the AENEAS programme and the succeeding Thematic Programme of Cooperation with Third Countries in the Areas of Migration and Asylum. Under the 2006 call for proposals, 31 of a total of 40 awarded grants thus went to private corporations, NGOs and IGOs. European Commission. Grants awarded under Call for Proposals 'EuropeAid/124151/ACT/Multi. 15 September 2006. Available from: https://ec.europa.eu/europeaid.

[388] ILC Articles on State Responsibility, Art. 16. See further Crawford 2002: 148-51.

5.7 The concomitant requirement of jurisdiction

So far state responsibility for conduct of private actors has been considered in general terms with little consideration as to geography and territorial sovereignty principles. Yet, what happens to the assessment of state responsibility when private migration control is carried out extraterritorially as opposed to at the border or inside the territory? As noted above, the privatisation of migration control has a strong extraterritorial component. This does not just concern carrier sanctions, but also the use of contractors at offshore migration control zones, privately operated holding zones and the increased use of private visa handling agents.

For the initial step of attributing conduct of private actors to a state it does not matter whether this conduct takes place inside or outside the state's territory (Lawson 1998: 95-6). Yet, in the second step of establishing state responsibility under international refugee and human rights law, jurisdiction, territorial or extraterritorial, in most cases remains a requirement. When attributing otherwise private conduct to a state, this conduct becomes an 'act of state', and thus for all purposes under international law such conduct is considered as if it were carried out by the state itself. It logically follows that the scope of state responsibility *ratione loci* for attributed conduct of private actors cannot extend beyond that of state responsibility for the actions of its own agents and authorities.

Since the applicability of the *non-refoulement* principle and other key human rights norms remains limited to a state's jurisdiction, any instance where private migration control attributable to a state is carried out extraterritorially thus refers analysis back to the jurisdictional assessment dealt with in the previous chapter. As in the case of extraterritorial acts by a state's own agents, the threshold for establishing state responsibility will depend on the legal geography and jurisdictional test applied. Where private migration control is enacted on the high sea or in international airspace, or a functional approach to jurisdiction for other reasons is applied, there is a strong argument that, for example, denial of boarding by carrier personnel would amount to jurisdiction and the state attributable may thus be held responsible for any violations of extraterritorially applicable refugee and human rights obligations.

Yet, where private agents act within the sovereign territory of a third state and the stricter framework of extraterritorial jurisdictions is applied, the relevant tests for establishing personal or geographical control must be borne in mind. Overall control of an area could be argued to apply, for example, in the case of the United States enforcement of pre-embarkation controls at designated

zones within foreign airports or the United Kingdom's juxtaposed controls scheme. In both instances, however, this is dependent on the acceptance of the reasoning forwarded in *Issa v. Turkey* following which 'geographic area' may be conceived of as a much smaller geographic area than what is assumed in, for example, *Cyprus v. Turkey* or other cases concerning military occupation.[389]

Equally, in situations where the rejection of passengers either at the country of destination or in transit countries is followed by detention or forced return, this would in all likelihood bring about extraterritorial jurisdiction in the personal sense. Reports regarding the restraint of unwilling deportees through drugs, physical restraint aids and other measures of physical force not only cause concern in themselves, but also clearly underline that forced return flights may well amount to the full and physical control over individuals.[390] Whether or not detention and return flights are managed by private actors or the outsourcing state in principle does not matter. If rejection to board by a private airline can be attributed to the state, jurisdiction and a possible violation of the *non-refoulement* principle may be established in the combination with subsequent measures, for example where refugees are detained in waiting zones or during forced removal.

Nonetheless, not all conduct by private actors in regard to migration control, even though attributable to the outsourcing state, may amount to jurisdiction. As in the case of pre-clearance schemes operated directly by national immigration officers, it is at least debatable whether this is sufficient to establish extraterritorial jurisdiction in the personal sense.[391] Furthermore, in some instances the use of private agents clearly works to distance asylum-seekers further from otherwise established jurisdictional bases. A case in point is the increased use of commercial visa handling agents and concomitant plans to outsource the running of common EU visa application centres entirely to private contractors. The private intermediary means that asylum-seekers are not only prevented access to embassy or consulate premises, but even denied

---

[389] *Issa and Others v. Turkey*. European Court of Human Rights. Appl. No. 31821/96. 16 November 2004; *Cyprus v. Turkey*. European Court of Human Rights. Appl. No. 25781/94. 10 May 2001. See further chapter 4.3.3.

[390] International Transport Workers Federation. Controlling travel document fraud and illegal migration. Working paper presented at the ICAO FAL Division meeting in Cairo, Egypt, 22 March to 2 April 2004. FAL/12-WP/59. 9 March 2004.

[391] *European Roma Rights Centre and others v. Immigration Officer at Prague Airport and another*. House of Lords. UKHL 55. 9 December 2004. See further chapter 4.3.3.

any direct contact with consulate or other government officials – both something that may otherwise be at least partly relied upon to establish jurisdictional commitments and thus in some instances human rights obligations of the sending state (Noll 2005).[392]

Where privatised migration control operates extraterritorially, overcoming the public/private distinction to rebut the basic presumption against attributing responsibility for private conduct to the state is thus only the first step. In addition, extraterritorial jurisdiction of the state in question will have to be established. Even though the analysis above points to the conclusion that both carrier sanctions and other forms of private migration control may under certain circumstances be attributed to the outsourcing state, it may not always amount to extraterritorial jurisdiction. In effect what is created is another barrier. At least under more doctrinal analyses of both attribution and extraterritorial jurisdiction, access to refugee and human rights protection thereby becomes doubly 'exceptional'.

That being so, it should be borne in mind that a jurisdictional assessment would have to be carried out looking at the combined degree of control exercised by both private and public actors. Thus, where private conduct can be attributed to a state, this adds to any assessment of extraterritorial control exercised by a government's own agents. This is particularly relevant in cases where private and public forms of migration control are exercised in close connection or take the shape of hybrid public/private partnerships. One could thus imagine situations where neither the degree of authority exercised by immigration liaison officers, nor the controls effected by carriers on their own might suffice to establish extraterritorial jurisdiction, but where the close inter-operation between the two means that they cumulatively reach the threshold for extraterritorial jurisdiction.

5.8 Due diligence and indirect responsibility for conduct of private actors

While the principles of state responsibility may be a useful starting point for analysing when the conduct of private actors is directly attributable to a state, the law on state responsibility should not be considered a 'straightjacket' [sic] (1998: 109). Human rights jurisprudence has thus on several accounts

[392] See chapter 4.3.3.

extended the scope of state obligations in regard to private conduct and human rights violations, even where these are not directly attributable to the state in question.

Within international human rights law it is thus acknowledged that a state has certain positive or due diligence obligations to ensure the fulfilment of human rights protection, not just in regard to its own actions, but also where human rights violations are carried out by private individuals or other non-state actors (Reinisch 2005: 79-80).[393] These obligations do not stem from the conduct of private actors being attributed to the state, but from the requirement of states to exercise due diligence in preventing, investigating and providing remedies for human rights violations regardless of who commits them (McCorquodale and Simons 2007: 617-8; Barnidge 2007: 55-112; Clapham 2006: 239; Evans 2004: 151, 157).

As a matter of general international law, the due diligence principle has been affirmed by the International Court of Justice in several cases concerning inter-state relations. In the *Corfu Channel* case, the Court thus held Albania responsible because of its 'grave omissions' in removing mines in its territorial waters or at least warning foreign nations of their existence and location.[394] In the human rights context, the Inter-American Court of Human Rights in *Velásquez Rodríguez v. Honduras* similarly found that the widespread occurrence of disappearances in Honduras, even though it could not be proved that these were directly imputable to the Honduran government, nonetheless engaged the responsibility of Honduras; not 'because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the convention'.[395] Similarly, the European Court of Human Rights in *Osman v. United Kingdom* recognised it as undisputed that core

---

[393] The concept of due diligence is retained here as opposed to positive obligations. The duty to exercise due diligence actually entails both positive and negative obligations. As discussed below, the latter may be particularly important where the locus of rights violations is to be found outside a state's territory and jurisdiction.

[394] *Corfu Channel Case*. International Court of Justice. 9 April 1949.

See further *United States Diplomatic and Consular Staff in Tehran*. International Court of Justice. 24 May 1980. Similarly, the notion that an occupying power has certain positive obligations towards civilians within the occupied territory was reaffirmed by the International Court of Justice in the *Congo* case. *Case concerning Armed Activities on the Territory of the Congo (DR Congo v. Uganda)*. International Court of Justice. 19 December 2005.

[395] *Velásquez Rodríguez v. Honduras*. Inter-American Court of Human Rights. Series C, No. 4 (1988). 29 July 1988, par. 88.

obligations such as the right to life protected under Art. 2 of the European Convention on Human Rights may imply a 'positive obligation for states to take preventive operational measures to protect an individual whose life is at risk from criminal acts of another individual'.[396] As emphasised in *Velásquez Rodríguez*, it is this omission to exercise due diligence on behalf of the state that is determinating and not the establishment of any causal relationship between the state and privately committed human rights violations.

The content of due diligence obligations is hard to determine in the abstract. The extent of state responsibility will depend on both the actual power and possibility of the state to intervene, and the foreseeability and knowledge of any human rights violations. Thus, the Inter-American Court of Human Rights in *Velásquez Rodríguez* points out that a state must:

> 'take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.'[397]

While such a reasonability test is inherently malleable, it does suggest that due diligence obligations must be assessed in light of the issue at hand and the state's practical ability to prevent and investigate human rights violations (Chirwa 2004: 10). In *A v. United Kingdom*, the European Court thus found that the existing criminal law was insufficient to ensure protection against child abuse.[398] In *Z. v. United Kingdom*, the Court argued that the United Kingdom had a positive obligation to remove children from abusive situations.[399] And in *Siliadin v. France*, the Court established a due diligence obligation under Art. 4 that states must apply effective criminal sanctions to deter situations where

---

[396] *Osman v. United Kingdom*. European Court of Human Rights. Appl. No. 23452/94. 28 October 1998, par. 1. See further Chirwa 2004: 9-11; Scheinin 2002: 35

[397] *Velásquez Rodríguez v. Honduras*. Inter-American Court of Human Rights. Series C, No. 4 (1988). 29 July 1988, par. 174.

[398] *A. v. United Kingdom*. European Court of Human Rights. Appl. No. 25599/94. 23 September 1998.

[399] *Z. v. United Kingdom*. European Court of Human Rights. Appl. No. 29392/95. 10 May 2001.

persons are held in slavery, servitude or forced labour by private individuals or groups.[400]

Further, in *Osman v. United Kingdom* the European Court of Human Rights underlined that while positive obligations do flow from, in this case, Art. 2 of the Convention:

> 'it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals'[401]

The obligation incumbent upon states to exercise due diligence in securing and protecting the rights of asylum-seekers is equally established to extend not only to situations within a state's territory but also to where states exercise extraterritorial jurisdiction through effective control over a geographic area. As noted by the European Court of Human Rights in the *Cyprus* case, the mere:

> 'acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that State's responsibility under the Convention'.[402]

To what extent does such indirect responsibility arise in the context of privatised migration control? Notably, the *non-refoulement* principle itself is essentially a due diligence obligation. It requires states to prevent individuals from being subjected to persecution, torture or other inhuman treatment,

---

[400] *Siliadin v. France*. European Court of Human Rights. Appl. No. 73316/01. 26 July 2005.

[401] *Osman v. United Kingdom*. European Court of Human Rights. Appl. No. 23452/94. 28 October 1998, par. 116. Both reasonability and knowledge of the violation were similarly emphasised by the International Court of Justice in establishing the positive obligations of Iran in regard to the United States embassy staff held hostage in Tehran. *United States Diplomatic and Consular Staff in Tehran*. International Court of Justice. 24 May 1980, par. 32-33.

[402] *Cyprus v. Turkey*. European Court of Human Rights. Appl. No. 25781/94. 10 May 2001, par. 81.

even when these human rights violations are carried out in another country outside the jurisdiction of the state in question. Barring intervention in the sovereign sphere of another state, what may reasonably be expected from states in this regard is primarily coached in a negative obligation: not to expel or turn back asylum-seekers where there is a substantial risk that they may be subjected to such treatment upon return.

Yet, there is nothing to support a reading that this obligation only applies to situations where persons are rejected or sent back by a state's own authorities. On the contrary, the embracing language employed in Art. 33 of the 1951 Refugee Convention prohibiting *refoulement* 'in any manner whatsoever' could be interpreted to provide an obligation even when rejection or returns are carried out by non-state actors. This does not turn on interpreting 'in any manner whatsoever' to imply a geographical extension of the *refoulement* prohibition itself, but rather that a state has an obligation to prevent *refoulement* no matter how and by whom it is carried out.[403]

Equally, the *Soering* line of cases could be said to establish a due diligence obligation as part of the prohibition against torture and inhuman and degrading treatment enshrined in Art. 3 of the European Convention on Human Rights (Crawford 2002: 145-6; Lawson 1998: 110; Lillich 1991: 142).[404] The *Soering* case involved the pending extradition of a murder suspect from the United Kingdom to face trial and a possible death sentence in the United States. The United Kingdom flatly rejected having any responsibility for ill-treatment taking place in the United States clearly outside its jurisdiction. Nor could the United Kingdom be held to have facilitated a violation of Convention rights by the United States, since the United States is not a party to the Convention. Nonetheless, the European Court of Human Rights in effect established a due diligence obligation and held that through the act of extradition itself, the United Kingdom would have breached its

---

[403] See chapter 3.2.1.

[404] *Soering v. United Kingdom*. European Court of Human Rights. Appl. No. 14038/88. 7 July 1989. As early as the 1960s, Art. 3 of the European Convention was interpreted as encompassing a *non-refoulement* principle (Goodwin-Gill and McAdam 2007: 210). See e.g. *X v. Belgium*. European Commission on Human Rights. Appl. No. 984/61. 29 May 1961. The principle has equally been affirmed since. See e.g. *Chahal v. United Kingdom*. European Court of Human Rights. Appl. No. 22414/93. 15 November 1996.

On the general nature of the *Soering* doctrine see further chapter 4.2.2 and UNHCR. 2000. Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach. UN Doc. EC/50/SC/CRP.17. 9 June 2000, par. 62.

obligations under Art. 3 of the Convention not to act in a way that carried a 'real risk' of exposing individuals to ill-treatment by another state (par. 88-91).[405]

As regards private involvement in migration control, the notion of due diligence is likely to impose indirect obligations upon states in a number scenarios where the private conduct cannot be directly attributed to the state in question. This concerns first of all cases where migration control or border patrols are carried out on private initiative with no official links to the authorities, such as the self-proclaimed Minute Men in the United States. Following from the above, the United States is not only under an obligation to examine and prosecute any alleged abuse of immigrants or asylum-seekers by these groups, but also has a responsibility to preventively intervene in respect of groups or individuals where there is knowledge that their activities are likely to result in violations of the rights of immigrants and asylum-seekers.

Moreover, within a state's jurisdiction the due diligence principle may impose an obligation upon states in respect of private border or immigration contractors, even where these clearly act outside or in excess of instructions and their conduct thus cannot be directly attributed to the state. In practical terms, this may require states to, for example, ensure strict regulatory

---

[405] That states may incur responsibility if they by acts or omissions fail to exercise due diligence in preventing rights violations carried out by non-state actors was more directly affirmed in *Elmi v. Australia*. Here, the Committee Against Torture argued that the return of a Somali national to a situation where he had a well-founded risk of being subjected to torture by Somali clans would constitute *refoulement* in violation of Art. 3 of the convention, despite the submission by the Australian government that these clans did not constitute public authorities or act in any official capacity. *Sadiq Shek Elmi v. Australia*. Committee against Torture. Comm. No. 120/1998. 25 May 1999. A similar question was brought before the European Court of Human Rights in *H.L.R. v. France* concerning the return of a Colombian drug trafficker who feared repercussions for cooperating with the French police. While the Court did not find any violation of Art. 3 in the present instance, it did note that:

'Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups or persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.'

H.L.R. v. France. European Court of Human Rights. Appl. No. 24573/94. 29 April 1997, par. 40. This has been affirmed by later case law.

frameworks for all such contractors, relevant training and regular monitoring (Hoppe 2008: 993).

Lastly, the due diligence principle could be argued to impose a responsibility on the territorial states hosting private contractors or other agents carrying out elements of migration control on behalf of or instructed by other states. This may close an important legal gap in putting an obligation upon transit countries in respect of carriers or other private migration control companies operating at their borders, ports or airports. States hosting private migration control agents may thus in principle be held indirectly liable for not regulating conduct of such agents and looking into any claims of unlawful detention or refusal to travel.[406]

While the existence of due diligence obligations in regard to private migration control is unquestionable for actions occurring within a state's jurisdiction, a more vexing question is whether due diligence obligations may similarly be extended in respect of private conduct and human rights violations taking place outside the state's jurisdiction. In principle, the application of positive human rights obligations does not depend on whether the violation occurs within the jurisdiction of the state. As noted above, the obligation to exercise due diligence may be violated wherever there is an omission to act or, as in the case of *Soering*, where a state's own actions will evidently lead to a human rights violation by other actors. The obligation to exercise due diligence is in this sense tied to the state's own actions or omissive delicts, not the state's control over the private actor (attribution) or the human rights victim (jurisdiction) (Cerone 2006: 27).

While such a view has still to find a foothold in human rights case law, the argument that states may retain certain obligations for rights violations or harm inflicted by non-state actors outside their jurisdiction has been affirmed more generally by the International Court of Justice. In *Nicaragua*, the Court thus held the United States to be 'under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua' to act in violation of the Geneva Conventions and general principles of international humanitarian law, even though the acts of the *contras* could not in themselves be attributed

[406] Of course, like all due diligence obligations, a host state responsibilities in this regard would be tempered by its actual powers to intervene; something that may not always be fulfilled. Furthermore, such interventions may naturally create tensions in regard to the countries demanding carriers carry out immigration checks.

to the United States.[407] Parallels may also be drawn to the principle of good neighbourliness and environmental law. As early as 1938, the *Trail Smelter* case established that:

> 'no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing fact.'[408]

Both these cases support the general notion that states may carry due diligence obligations in regard to the conduct of non-state actors and where rights violations or harm occur outside its jurisdiction.

In the human rights context this has so far only been confirmed in cases concerning extraterritorial effect. As the European Court concluded in *Soering*, state parties are responsible 'for all and any foreseeable consequences of extradition suffered *outside their jurisdiction*' (own emphasis).[409] Arguably however, the *Soering* line of cases differs from most cases of extraterritorial migration control in that the applicant was already within the territorial jurisdiction of the state at the time of application. While Mr. Soering's presence within the United Kingdom is naturally a precondition for extradition, the court however emphasised that it was the act of extradition itself that triggered the responsibility of the United Kingdom and that this act was within its jurisdiction (Lillich 1991: 133).[410] Seen in this light, it has thus

---

[407] *Case concerning Military and Paramilitary Activities in and against Nicaragua.* International Court of Justice. 27 June 1986, par. 221-20.

[408] *Trail Smelter Arbitral Decision (United States v. Canada).* Trail Smelter Arbitral Tribunal. Reports of International Arbitral Awards 3 1938. 1941, p. 1965. For a more contemporary affirmation of this principle see further *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*. International Court of Justice. 8 July 1996, par. 29.

[409] *Soering v. United Kingdom.* European Court of Human Rights. Appl. No. 14038/88. 7 July 1989, par. 86.

[410] This was expressed most clearly by the Commission:

'If, for example, a Convention State deports or extradites a person to a country where it is certain or where there is a serious risk that the person will be subjected to torture or inhuman treatment the deportation or extradition would, in itself, under such circumstances constitute inhuman treatment for which the deporting or extraditing State would be directly responsible under Article 3 of the Convention. The basis of State

been argued that the *Soering* doctrine may, *mutatis mutandis*, serve as a basis for equally evaluating the scope of the due diligence principle in situations where a state's conduct in regard to private actors carrying out migration control abroad has a foreseeable risk of entailing *refoulement* or other human rights violations (Lawson 1998: 111).[411]

If this view is accepted the content of due diligence obligations would however be substantially more limited. Where a state does not exercise overall control of the territory in question, what may 'reasonably be expected' in this regard would be much more narrowly circumscribed by the degree of influence and power exercised over private actors and the knowledge and foreseeability of rights violations.[412]

Where more direct forms of control are exercised over the conduct of carriers or other private agents, e.g. by the positioning of immigration liaison officers to advise and check airline controls, the due diligence principle could be argued to impose a positive requirement on states to ensure that in the

---

responsibility in such cases lies in the exposure of a person by way of deportation or extradition to inhuman or degrading treatment in another country.'

Soering v. United Kingdom. European Commission on Human Rights. Appl. No. 14038/88. 19 January 1989, par. 96. See further the similar reasoning of the Court on this matter, 7 July 1989, par. 88-91.

[411] This reading was indirectly supported by the Court in Al-Adsani v. United Kingdom. The case involved concerned a claim that by granting the State of Kuwait immunity in a case concerning the alleged torture by Kuwait authorities of the applicant during his stay in Kuwait, the United Kingdom had failed to secure his right not to be tortured and denied him access to a court contrary to Art. 3 and 6 of the Convention. While the court rejected that there was a violation of Art. 3, in doing so it specifically reflected on the precedent set by Soering. According to the Court, Art. 3 imposes an obligation to 'secure' the rights under the Convention and thus both 'to take certain measures to ensure that individuals within their jurisdiction are not subjected to torture' (par. 38), but also where the 'Contracting State by reason of its having taken action which had as a direct consequence the exposure of an individual to proscribed ill-treatment' (par. 39). According to the Court, 'the applicant does not contend that the alleged torture took place within the jurisdiction of the United Kingdom or that the United Kingdom authorities had any causal connection with its occurrence' (par. 40, own emphasis). A contrario, it may then be argued that an obligation to prevent persons being returned to torture and inhuman or degrading treatment may persist even where the violation occurs outside the state's jurisdiction, but where a 'causal connection with its occurrence' nonetheless can be established. *Al-Adsani v. United Kingdom*. European Court of Human Rights. Appl. No. 25763/97. 21 November 2001.

[412] See, *inter alia*, *United States Diplomatic and Consular Staff in Tehran*. International Court of Justice. 24 May 1980, par. 32-33.

implementation of privatised controls, reasonable measures are taken to avoid the summary rejection of protection seekers, including vetting procedures, regular monitoring of performance and ensuring that relevant personnel have received adequate training to carry out their task in respect of international legal obligations.[413]

But even where such control or influence cannot be established, certain negative and preventive obligations may remain with states which, through incentives or otherwise, encourage private actors to engage in migration control. Rick Lawson takes the broad view that a state may be held responsible under the European Convention of Human Rights 'if it has encouraged individuals to engage in acts contrary to human rights' (Lawson 1998: 104). The International Court of Justice in its *Wall* opinion has similarly suggested that a negative obligation 'not to raise any obstacle to the exercise' of fundamental refugee and human rights may remain even where the state does not exercise effective control.[414]

This is exactly what emerges from the *Soering* case – an obligation to abstain from acts that indirectly may lead to human rights violations by other actors. Such a principle is likely to be particularly relevant where conduct of private actors exercising extraterritorial migration control either cannot be directly attributed to sanctioning states or where jurisdiction cannot be established. In the instance of carrier sanctions, states could thus be argued to be under a negative obligation not to pass legislation or in practice to refrain from implementing sanction schemes that carry a 'real risk' that asylum-seekers or refugees will be summarily rejected or turned back by private airline officers.

---

[413] The extraterritorial dimension of due diligence obligations has also found expression in regard to the parallel issue of private military contractors. Art. 4 of the Montreux document, currently signed by seventeen states and aimed at restating relevant obligations under international law, establishes that:

'Contracting States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations. To this end they have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel.'

Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict. UN Doc. A/63/467. 17 September 2008.

[414] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*. International Court of Justice. General List No. 131. 9 July 2004, par. 111. See further Cerone 2006: 23-6

The notion of due diligence obligations may thus go some way to closing the responsibility gap, especially in situations where states have only limited control over private agents operating migration control within its jurisdiction, but also possibly in situations where privatised migration control is clearly linked to a state's own actions yet does not suffice to establish extraterritorial jurisdiction. Yet, it should be borne in mind that the content of such obligations is not unaffected by considerations similar to those faced when directly attributing private conduct under the ILC Articles on State Responsibility: what may reasonably be expected from a state is likely to be considerably more limited in respect of private conduct taking place where the state only exercises more temporary or limited authority abroad than in respect of private conduct taking place within a state's territory.

Furthermore, determining the exact content of diligence obligations is essentially a matter of interpretation and concrete assessment. Although the existence of a due diligence principle is not disputed in itself, it is hard, if not impossible, to give the concept and its content a clear-cut definition (Lehnart 2007: 18). Any application of the due diligence principle is highly dependent on the factual circumstances of the case, its legal geography and the content of the relevant norms. As a result, assessing what may reasonably be expected from a state is inherently open to contestation both at the normative and evidentiary level.

This is especially true in situations where states do not exercise direct control over the act in question, nor effective control over the space in which it is carried out. In such situations states are more likely to argue that they lack the factual capabilities or means at their disposal required to honour due diligence obligations under refugee and human rights law, either for lack of actual control over the private actors in question or for lack of knowledge of their activities. The lack of specific case law so far testing the due diligence content of relevant norms under refugee and human rights law further exacerbates this problem and leaves the principled arguments with few anchor points for establishing the exact content of state obligations in regard to private migration control.

9. Conclusion

The involvement of private actors in migration control is a growing phenomenon. Over the last twenty years the widespread implementation of

carrier liability legislation has *de facto* turned all the world's major airlines into pre-frontier border guards rejecting thousands of travellers each year. Today however, the privatisation of migration control is far from limited to airlines or other transport companies. From the use of private contractors to run immigration detention facilities and enforce returns and the use of private search officers both at the border and at offshore control zones, to the increasing market for visa facilitation agents, privatised migration control is both expanding and taking new forms.

For the asylum-seeker the encounter with the entry management mechanisms of the host state is thus increasingly likely to take the form of a meeting between an individual and something other than a national border guard or state official. In the case of carriers, it is already well-documented that the control carried out by employees of these companies constitutes a major impediment for any asylum-seeker wishing to reach his or her country of refuge by air or sea. For other types of private migration control knowledge is still scarce, yet it is safe to assume that similar problems may occur where asylum-seekers are refused entry by contracted migration officers or private groups carrying out border control on their own initiative.

This chapter has demonstrated when and under what circumstances states may be held responsible under international refugee and human rights law when migration control functions are handed over to or taken up by private actors. While the traditional starting point remains that states cannot be held responsible for the conduct of private actors, a number of principled exceptions nonetheless apply. Under the ILC Articles on State Responsibility, private conduct may thus be attributed to states in two sets of circumstances: when private actors in reality constitute para-statal entities and thus exercise governmental authority, and when states can be shown to have authorised, controlled or directed the actions of private individuals or groups.

Both instances may be relevant to the case of migration control. In at least some cases the control functions performed by carriers may thus be argued to constitute an exercise of governmental authority within the meaning of Art. 5. So may the incorporation of private border guards or outsourcing of immigration detention centres to private contractors as long as these powers are provided for by national law. Even where this is not the case, states may still be held responsible under Art. 8 for the conduct of private contractors where they can be shown to have authorised such conduct, e.g. through contracts, grants or other specific administrative arrangements. Lastly, the close monitoring of carrier control duties and case-by-case 'advice' by

immigration liaison officers or national authorities may well amount to *de facto* 'control' or 'direction'.

Yet in each case the requirements for attributing private conduct to the outsourcing state remain substantial. Far from all private involvement in migration control is likely to be regulated through national law and the notion of 'governmental authority' remains undefined and open to contestation. Similarly, states must be shown to exert a high degree of control or direction over the specific actions leading to, for example, *refoulement*; something that may be hard to prove in practice as few public accountability and monitoring mechanisms tend to exist in these situations.[415]

The high threshold for attribution shows that while the public/private distinction is not set in stone, it nonetheless retains importance even though it appears more and more artificial in relation to the reality surrounding us. By starting out presuming the separateness between public and private, an extra legal operation is demanded in order to rebut this presumption. In this sense, the public/private distinction continues to constitute a '*Grundnorm'* that has to be overcome in order for the somewhat more exceptional situation of state responsibility for private actions to occur. While case law and interpretation are likely to continue to develop, analysis of the ILC Articles and current international case law points to the conclusion that many but unlikely all instances where states engage private actors for the purpose of migration control may be attributed to the outsourcing state under international law.

Furthermore, where private migration control is carried out extraterritorially attribution is only the first step in holding states accountable under refugee and human rights law. For the purpose of international law, private conduct attributed to a state may be equated with an act of that state's own authorities. As such, even though human rights responsibility may be attributed to a state, refugee or human rights obligations do not extend further than in respect of a state's own actions. This basically refers analysis back to the preceding chapter and the question of what constitutes extraterritorial jurisdiction. While the relevant tests for effective control over individuals or territory may be fulfilled in some cases, in others they may not. Even though the control functions carried out by airlines may be attributed to the sanctioning state, the rejection of an asylum-seeker at the gate of departure does not *necessarily* amount to jurisdiction and thus an obligation to respect the *non-refoulement* principle.

---

[415] See chapter 6.

Beyond questions of direct attribution, the notion of due diligence obligations may however go some lengths in filling the responsibility gap left above. State responsibility in this regard is not dependent on attributing the private conduct to the state, nor whether or not migration control is carried out within the state's territory or jurisdiction. Rather it stems from the state's own actions or omissions in not taking reasonable steps to prevent or react to a given human rights violation. While the exact nature of due diligence obligations is difficult to extract in the abstract, it has been shown that certain positive or due diligence obligations flow from both the *non-refoulement* principle enshrined in the 1951 Refugee Convention and similar obligations under other human rights instruments.

Again, however, is the assessment of such obligations not independent of legal geography. More may naturally be expected in terms of a state's ability to prevent or react to any violation of refugees' rights by private actors within a state's territory or where extraterritorial jurisdiction is exercised through overall control over a geographic area. Yet, even where states do not exercise such control or jurisdiction, certain negative obligations could be argued to remain not to encourage or actively assist human rights violations by private actors.

The growing privatisation and delegation of regulatory functions away from the state has been argued to lead to a loss of control from the perspective of the state (Verkuil 2007; Flinders 2006: 245). Yet, nothing in the above analysis indicates that states are loosing influence as part of the privatisation of migration control. On the contrary, through a mixture of law, economic incentives and direct authority, the state in most instances retains close managerial powers or behavioural influence in terms of how privatised migration control is enacted and carried out.

From a governance perspective, the appeals of privatisation may be several. Privatisation and deregulation are often done to obtain flexibility, efficiency or cost-efficiency in service-delivery. As such, the privatisation of migration control is of course not an isolated phenomenon, but embedded in a much larger trend to outsource and privatise even core sovereign functions that it was not long ago unimaginable to separate from the state. Yet, as Alston correctly points out, in the pursuit of these objectives, the element of

accountability, central to the human rights regime, may be significantly reduced (Alston 2001: 361).[416]

The privatisation of migration control is no exception. Activating the public/private divide makes it both legally and institutionally more difficult to establish responsibility of the outsourcing state under international refugee law. Moreover, unlike situations where a state's own migration control is carried out in the territory or territorial waters of another state, the inability of establishing such responsibility does not simply mean that refugee protection obligations are shifted to the territorial state, with all that may follow in terms of the quality of protection from such a shift. Rather, as long as private actors do not incur direct responsibility under international refugee law, the privatisation of migration control easily risks deconstructing refugee rights altogether.

From the perspective of the lawyer hoping to mend the responsibility gap brought about by the increasingly blurred distinction between the state and private actors in the management of migration the outlook is mixed. On the one hand, because privatisation of otherwise sovereign functions is a more general phenomenon, heightened attention to human rights issues in other contexts, e.g. the use of private military companies, may bring about a push for codification of principles and both national and international judicial review that positively spills over into other areas. The ILC Articles themselves could be considered an example of this. On the other hand, the specificity demanded in attributing private conduct to states and establishing the content of due diligence obligations is closely tied to the relevant norms as well as the factual circumstances of the issue at hand. As such, it is difficult to rely on case law and precedent not directly related to the present context

[416] Even more so, accountability and government control may even be considered as an enemy to privatisation, as it may reduce rather than add to these objectives (Clapham 2006: 12).

6. Hic abundant Leones! The institutional reach of refugee protection when offshoring and outsourcing migration control

At the British Library hangs one of the earliest maps of Europe. The Cotton Tiberius Map[417] bears few resemblances to modern maps, but it represents the world as it was known at around the first millennium A.D. The cartographer may have been aware that some areas were left a little sketchy and largely unexplored. In the top left corner, near the east coast of Asia, one thus finds a drawing of a lion and the inscription, 'Hic abundant Leones'. Since then, the expression 'here lions abound' has been copied by several cartographers to describe partly or wholly uncharted territories. More generally, the expressions 'here be lions' or 'here be dragons' have occasionally been used to imply that on this or that issue little is known and less can thus be said with any degree of certainty. [418]

Today, few such places remain on geographical maps. Satellite images and GPS ensure that we have constant access to an updating picture of the world around us. This knowledge is not only used to ensure our own navigation, it has also become a key tool in the attempt by governments to control or manage migration flows and international travel. Examples of the surveillance technologies employed for this purpose have already been mentioned in the previous chapters: carriers and visa consulates forward biometric data, immigrant and asylum-seeker databases exist and radar stations, satellites, warships and AWACS are being used to monitor irregular migrants at many of the world's migratory hot spots. In the current migration management strategies, global surveillance and data collection are a necessary prerequisite for all following interventions (Gammeltoft-Hansen 2006b).

Yet, where a parallel to the Tiberius Map may nonetheless be drawn, is in regard to the invisibility of the encounter between the asylum-seeker and states exercising offshore or outsourced migration control. A methodological challenge throughout the research for this dissertation has been accessing and comprehensively documenting concrete cases and practices of offshore and

---

[417] Cotton MS Tiberius B.V., fol. 56v. British Library. Approximately 1025 A.D.

[418] The variation 'Hic sunt Dracones' has also appeared on a number of later maps and globes.

outsourced migration control. Despite the communications revolution and all the surveillance technology to render the irregular traveller visible and thereby subject to control, the control performance itself remains strangely opaque. As seen throughout the previous chapters, very little case law exists regarding offshore and outsourced migration control specifically which is surprising given the dimension and proportions these practices seem to be taking on.

While a challenge for legal analysis, the lack of knowledge and visibility in this regard could however also be said to constitute an important finding in itself. While the preceding chapters have sought to trace the boundaries of legal responsibility, this last chapter inquires into the possibilities for and barriers to the practical realisation of protection obligations. In other words, how is access to asylum institutionally secured or denied when the encounter between the refugee and the state moves off the territory or when migration control is carried out by private actors?

The following is a brief sketch which draws out a few examples and highlights the general issues at stake. A comprehensive investigation of this area would easily take up a separate volume. Nonetheless, a legal analysis of offshore and outsourced migration control would be incomplete without some considerations as to how refugee and human rights are accessed in practice by those entitled to them.

In the following it is firstly suggested that there is an 'out of sight, out of mind' effect attached to the offshoring and outsourcing of migration control which makes it particularly difficult for refugees to effectively claim their rights and which also, to a large extent, leaves states unchecked in how this control is being enacted. Secondly it is argued that there is a close interrelation between the continued contestation of legal responsibility and the lack of mechanisms ensuring accountability, monitoring and *de facto* access to rights. The institutional structures facilitating the implementation of refugee rights and human rights, to an even greater extent than legal norms, seem to reflect state-centric and territorial principles of organisation. This has important consequences, not only for those asylum-seekers who find themselves unable to access rights in principle owed to them. It also affects the legal understanding as rather than closing the legal uncertainties pertaining to this area by engendering relevant cases to set before national and international judiciaries, the exact scope of refugee and human rights obligations may remain contested.

6.1 The 'out of sight, out of mind' effect

On the 26 September 2006, 31 migrants, including a number of asylum-seekers from Iraq and Palestine, were picked up from the open sea by the Turkish coastguard and brought to shore. Six others were later found drowned and three are still missing. The survivors claimed that they had paid a human smuggler to take them to Europe and that their original destination thus had been Greece. Off the Greek island of Chios they had been stopped by the Greek coastguard, who had sailed them back to Turkish territorial waters and thrown them overboard to swim ashore.

Legally speaking this situation is simple. There is no doubt that Greece exercised jurisdiction, territorially and subsequently extraterritorially, in this scenario. Yet, the problem in the case above is that no one but the migrants themselves have been able to confirm it. There were no independent witnesses and no one had seen the Greek vessel. Greece subsequently rejected the migrants' story in the strongest possible terms, while Turkey conversely used the incident to accuse Greece of systematically 'dumping' irregular migrants in their territorial waters.[419]

The same cannot be said about the more recent Thai returns of Rohingya migrants and refugees from Myanmar. Tourists managed to take photographs of Thai army officers rounding up arriving boat migrants and subsequently dragging them and their boats back to international waters and abandoning them.[420] In yet other cases, knowledge may come from the agents of control themselves. Speaking at an industry round table, a representative of British

---

[419] 'Greece Denies Dumping Illegal Immigrants into the Sea'. *Spiegel Online*. 28 September 2006. www.spiegel.de.

NGO reports have however detailed a number of similar stories. According to testimony, Greek authorities even appear to have gone to some lengths to conceal any objective evidence that migrants have entered Greek jurisdiction or had contact with Greek authorities. Returned migrants thus describe how Greek authorities have removed any aid or materials supplied and punctured inflatable boats that may link migrants to Greece before forcibly returning migrants and asylum-seekers to Turkish waters or islands. See e.g. Pro-Asyl. 'The truth may be bitter, but it must be told. The Situation of Refugees in the Aegean and the Practices of the Greek Coast Guard'. October 2007; and Human Rights Watch. 'Stuck in a Revolving Door: Iraqis and Other Asylum seekers and Migrants at the Greece/Turkey Entrance to the European Union'. November 2008, p. 42-4.

[420] Dan Rivers. 'Probe Questions Fate of Refugees in Thailand'. CNN. 26 January 2009. www.cnn.com.

Airways, speaking against the unfair imposition of control responsibilities on carriers, thus regrettably noted that the company had no idea how many among those denied boarding by the airline might have had a claim to refugee status, but that since 1987 no less than 400 improperly documented passengers nonetheless carried into the United Kingdom had subsequently received full refugee status.[421]

While the above stories may be particularly harsh, there is little to suggest that similar practices do not occur elsewhere. What may be most surprising is that we even hear about them. In many other situations private actors are unlikely to have an interest in revealing details about rejected passengers, control is carried out further away from the coast, far from the cameras of curious tourists, and those turned back may simply not make it to subsequently tell their story to anyone.

Problems in assuring the realisation of rights are nothing new to refugees. Examples of states not respecting national and international obligations are, regrettably, plentiful (Hathaway 2005: 279-93). The asylum-seeker is almost inevitably a stranger to his or her host country, unfamiliar with legal and bureaucratic structures, with no or limited personal networks and may not speak the language. In recent years, a trend may further be observed in a number of countries to isolate asylum-seekers in remote or inaccessible locations and mandatory detention of asylum-seekers has been introduced by a number of countries (Edwards 2008: 790). Thus, Australia has been known to confine asylum-seekers not only at offshore processing facilities, but also in detention centres in the Australian desert.[422] Likewise, asylum-seekers intercepted by the Italian authorities in the Mediterranean have been detained on the small island of Lampedusa, 200 km south of Sicily.[423] While such places

---

[421] Remarks by James Forster, British Airways. Round Table on Carriers' Liability Related to Illegal Immigration. Brussels. 30 November 2001. Minutes available from: www.iru.org/index/cms-filesystem-action?file=en_events_2001/illegal2001.pdf. Last accessed 15 March 2009.

[422] The most notorious example concerns the Woomera Immigration Reception and Processing Centre located in the South Australian desert, approximately 300 km away from Adelaide. The centre was established in 1999. Following accusations of human rights abuses and a number of riots and protests outside the centre, the culmination of which involved a mass breakout in 2002 aided by protesting social activists, it was finally closed down in 2003.

[423] While the Lampedusa facility was originally merely a reception centre, since December 2008 the Italian government appears to have ceased transferring asylum-seekers to other processing centres on the Italian mainland. The conditions at the centre, lack of access to legal advice and counselling contrary to Italian law and

are not offshore in the legal sense, they nonetheless have a similar effect of separating migrants and refugees further from the ordinary institutions guaranteeing the rule of law. As well as this, journalists, NGOs and even the UN High Commissioner for Human Rights have on several occasions been barred access to these facilities and locations.[424]

The question remains as to what extent extraterritorialisation and privatisation may further exacerbate these problems. Shifting jurisdiction eclipses many of the ordinary institutional mechanisms for securing the realisation of refugee and human rights, just as privatisation may shortcut ordinary procedures of public transparency and scrutiny. The offshoring and outsourcing of migration control may thus create an 'out of sight, out of mind' effect, where actual control practices and any violations of refugee and human rights that may ensue remain largely invisible.

6.2 Looking beyond the fence: offshoring and institutional protection capacity

International refugee law, like other areas of human rights law, operationally functions through a complex network of institutions and actors to ensure both clarification of legal norms and the monitoring of state performance. Internationally these include organisations like UNHCR, other UN agencies and the UN human rights treaty bodies. Regionally, adjudicatory bodies include the Inter-American Court of Human Rights and the European Court of Human Rights, as well as international institutions such as the Council of Europe Human Rights Commissioner, the European Parliament, the EU Fundamental Rights Agency, the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights. At the national level one may equally point to public institutions such as domestic

summary expulsions to Libya have received substantial criticism from both NGOs and the European Parliament. See e.g. European Parliament. Resolution on Lampedusa. P6_TA(2005)0138. 14 April 2005.

[424] UN High Commissioner for Human Rights, Mary Robinson, was denied access to Woomera in 2002, though later admitted. Similarly, UNHCR was in 2004 'for security reasons' denied access to the Lampedusa centre during certain periods of large-scale arrivals and expulsions. Amnesty International. Italy: Lampedusa, the Island of Europe's Forgotten Promises. EUR 30/008/2005. 5 July 2005. UNHCR has gained access since then and the centre has received inspection visits from, among others, delegations from the European Parliament.

courts and ombudsman institutions, to quasi-public actors like national human rights institutions and publicly employed academics, and last, but not least, civil society, including national and international NGOs, grassroots organisations, associations, journalists and lawyers.

At the core of all these activities is the gathering of precise and updated information about human rights conditions, both generally and in regard to individual cases (Forsythe 2000: 166). Each of the institutions and actors mentioned above are in that sense part of a 'food chain', sharing and exchanging such information. It is well recognised that even the most resourceful and well-established organisations ensuring refugee protection, e.g. UNHCR or the international human rights bodies, are intimately dependent on the information gathered and attention given to individual cases by national NGOs for example and human rights activists (Tomuschat 2008: 184, 285-90; Fernando 2004: 154; Wiseberg 2003: 349; Steiner and Alston 2000: 938 ff.; Lindsnæs and Lindholdt 1998). It is only through the interplay between these very different institutions that the international refugee and human rights regime can be said to achieve any kind of efficiency at all.

The concern arises as the central links in this chain may often be nationally anchored and territorially limited in their outlook and accessibility. From the perspective of the individual refugee, offshore migration control means that it is harder to access human rights institutions. While an asylum-seeker arriving at the border or already within the territory of the potential host state will normally have access to the whole range of existing human rights institutions, an asylum-seeker rejected on the high seas or by an immigration officer posted abroad will have obvious difficulties in both identifying and accessing the UNHCR, refugee assisting NGOs, national human rights institutions or lawyers of the state carrying out control (Mohamedou 2001: 52-3).

The same is true of public institutions. Offshoring of migration control typically entails a physical distancing of different specialised authorities. A border guard is first and foremost trained to exercise control and check documents, and any knowledge of asylum will be secondary to this task.[425] Under ordinary circumstances cases that raise any doubt will normally be referred to the competent national asylum authorities. Yet, where migration control moves to the high seas and asylum authorities remain ashore, this exchange of knowledge and mutual appraisal is made more difficult, and the

[425] UNHCR ExCom. Determination of Refugee Status. Conclusion No. 8 (XXVII) 1977.

asylum-seeker is unlikely to be able to access specialised asylum authorities, including translators.

Authority specialisation may be compounded by limited and incoherent mandates and jurisdictions. During the preparations for the Frontex operations outside the Canary Islands in 2006, Denmark offered to assist Spain by sending a number of Danish asylum experts to the Canary Islands.[426] Yet, this was refused by Frontex as lying outside the organisation's mandate, which is limited to border management.

The disconnection of asylum and border authorities increases the risk of overlooking or wrongly rejecting asylum-seekers. The Spanish immigration authorities at the Canary Islands have repeatedly stressed that the vast majority of those intercepted were 'illegal immigrants'. Despite an increase in irregular immigration, the number of asylum-seekers has hardly risen and the rate of recognition has even gone down, leading Amnesty International to suggest that asylum claims are being allowed to fall on deaf ears or deterred.[427]

Even where referral mechanisms are formally in place for asylum-seekers as part of offshore migration control, the lack of competent asylum authorities on the spot may render them practically ineffective. From 1981 to 1990, the period before the *non-refoulement* principle was declared strictly intra-territorially applicable, the United States maintained a referral mechanism for asylum-seekers interdicted on the high seas provided that their case was not considered manifestly unfounded. Yet despite the grave human rights situation in Haiti during this period, the United States coastguard only found six out of more than 21,000 persons intercepted to have a case that merited referral to an onshore asylum procedure (Legomsky 2006: 679).

From the perspective of national institutions, gathering knowledge about offshore activities is often equally challenging. By definition *refoulement* can only be established *post facto*, after rejection or expulsion to another country, and many cases for this reason never come to public attention (Lynch 2004). Few institutions, public or private, have the possibility or means to follow up

---

[426] Claus Krag. 'EU-lande i aktion mod folkevandring fra Afrika'. Berlingske Tidende. 3 June 2006.

[427.] Amnesty International. 2005. Spain: The Southern Border. EUR 41/008/2005. The low percentage of asylum-seekers may however also be a result of strategic choice. Applying for asylum in the Canary Islands normally entails detention for the duration of the procedure. Yet irregular migrants that cannot be identified or for whom there is no return agreement with Spain are typically transferred to the mainland after 40 days and allowed freedom of movement.

on the fate of rejected asylum-seekers. Even well established national human rights organisations are often in their organisation and mandate focused on monitoring human rights conditions within the country in question (Wilde 2005: 754).[428]

For organisations that do try to follow up asylum-seekers post return, it is typically a precondition that the person is identified before rejection. For an asylum-seeker arriving at the territory some kind of case file will usually be opened by either the public authorities and/or refugee assisting organisations such as UNHCR or national NGOs. In cases where rejection or return is suspected to result in *refoulement*, the more resourceful human rights organisations may try to trace individuals using this information, either following the person back or contacting the relevant country office or partner organisations in the country of return.

However, where asylum-seekers are rejected before they reach the territory, the likelihood that any national human rights institutions will even know about the incident is greatly reduced. And even where such knowledge is available, the lacking registration makes tracing the fate of those rejected a most difficult task. Even though Frontex reported that 3,665 persons were directly returned after being intercepted in Senegalese or Mauritanian waters, European refugee organisations have little knowledge of who these persons are and which among them might have had a well-founded asylum claim. Those intercepted did not have access to UNHCR or other refugee assisting organisations, nor access to any public authorities allowing them to launch an asylum claim or appeal against their return.[429]

Lastly, even where cases are brought before national courts, offshoring may entail certain problems. Domestic courts do not always have adjudicative jurisdiction over extraterritorial acts of government authorities. The

---

[428] An exception being international NGOs like Amnesty International which, exactly to avoid complaints from national authorities, always assign investigation and lobbying for political prisoners to groups outside the country of imprisonment. Nothing quite similar is known among refugee NGOs, though in Europe the introduction of 'safe third country' policies prompted a number of NGOs to establish 'early warning' systems in order to follow chain deportations, a practice that more recently has been replicated and sought to be expanded to EU neighbouring countries under the coordination of the European Council for Refugees and Exiles in order to monitor the results of offshore migration control and returns.

[429] Notably, no similar figures have been released for 2007 or 2008. In addition, requests for public access to the agreements between Spain and Senegal/Mauritania have so far been denied.

controversy over whether Guantanamo detainees have access to *habeas corpus* is perhaps the strongest example in this regard, but the lack of remedy before domestic courts has long been an issue in regard to carrier enforced controls (Nicholson 1997: 623-7).[430] Moreover, national courts have on occasion rejected requests for investigations of extraterritorial actions. In *Al-Skeini* the applicants demanded a full, open and independent investigation of the shooting incidents and the related facts of the case in line with other Strasbourg case law relating to Arts. 2 and 3 of the European Convention on Human Rights. The House of Lords, however, turned down this demand as unfeasible given the 'real practical difficulties' in carrying out a technical investigation of this sort in Basra.[431]

6.3 Penetrating the corporate veil: privatisation of migration control and institutional protection capacity

Additional barriers to access may arise where migration control is delegated to private actors. As privatisation of governmental functions has become more prevalent, the impact of privatisation on public transparency and accountability has received increasing attention. On the one hand, proponents of privatisation argue that accountability may be increased by governing through market mechanisms. Noting that control and accountability of governmental actors and institutions is often far from perfect, it has been argued that clear economic incentives and contracts may actually prove more efficient in regulating agent behaviour. Secondly, the distance between governments and private contractors makes it easier to carry out a critical appraisal and private entities may be more open to reform and change. Thirdly, the competitive environment surrounding private contractors may lead major corporations in a given market to themselves develop codes of

---

[430] Under the 2006 Military Commissions Act, prisoners held at Guantanamo Bay were stripped of their right to *habeas corpus* under United States district courts based, amongst other things, on the argument that the constitutional right to *habeas corpus* does not extend to non-citizens outside the sovereign territory of the United States. This provision of the Act was however declared unconstitutional by a 5-4 Supreme Court ruling in June 2008. *Bourmediene et al. v. Bush.* United States Supreme Court. 06-1195, 553 US. 12 June 2008. See further the dissent by judge Scalia upholding the territorialist interpretation.

[431] *Al-Skeini and others v. Secretary of State for Defence.* House of Lords. UKHL 26. 13 June 2006, par. 26.

conduct and accept accountability mechanisms in order to create a market brand vis-à-vis potential customers (Dickinson 2007: 230; MacDonald 1991: 189; Logan 1990).

On the other hand, those more sceptical of privatising governmental functions argue that by its very nature the market is inherently difficult to govern. Thus, the corporate veil works not only to separate legal responsibilities but also to cloak the practices of private actors (Verkuil 2007; Leander 2006: 98-103). Even where clear contracts or other regulatory frameworks are in place, the legal barrier between states and private actors breaks the ordinary administrative chain of command (McDonald 1991: 188). Even the best of contracts may not foresee the full need for appraisal and monitoring and may thus equally become a straitjacket preventing further action and scrutiny (Leander 2006). Secondly, public employees are both more visible and typically have more 'freedom of speech', whereas there are few whistle-blowers in private employment. Thirdly, practice in regard to private military companies seems to indicate that even where legal provisions for public scrutiny are in place, the resources for governmental monitoring often lag behind the pace and scale of privatisation itself (Isenberg 2007: 87-8). Lastly, private companies seldom have a direct interest in public oversight as any critique may entail negative economic consequences and be detrimental to the company's competitive position. Where such an interest convergence, for image reasons nonetheless exists, voluntary codes of conduct or soft law accountability mechanisms have so far not proven particularly efficient (Cockayne 2007: 207; Leander 2007).[432] Rather, the danger of such arrangements is that accountability is further removed from state authority and 'ceremonialised' in offering lip service to official principles without any efficient enforcement mechanisms (Cockayne 2007: 207-8).

As far as carriers are concerned, little has generally been done to ensure accountability or monitoring of those rejected from boarding by airline staff. As several scholars have noted, governments have been reluctant to produce figures regarding the amount of fines imposed publicly available and seldom systematically gather data in regard to numbers and the identity of those rejected (Guiraudon 2003b; Nicholson 1997: 598). Sanctions legislation is by design weak in terms of judicial remedies for those rejected, democratic control and accountability (Scholten and Minderhoud 2008: 131). Save for

[432] The privately contracted interrogators involved in the Abu Ghraib prisoner abuse thus clearly acted contrary to the employing company, CACI's self-imposed Standards of Ethics and Business Conduct (Cockayne 2007: 207).

reasons of protesting against the imposition of fines mentioned above, carriers themselves have little further incentive for giving out information on these issues which may convey a negative picture of companies to customers. Even where airlines are asked by governments or NGOs to provide 'denied boarding' figures, they do not always do so (Nicholson 1997: 598).

As Guiraudon further points out, rejection by a private company such as an airline is not subject to national administrative regulations. It is not a public decision, and those rejected can thus be sent back without any notification of the decision and in principle without leaving any trace (Guiraudon 2003b: 8). As dealt with in the previous section, the extraterritorial venue of most rejections makes it even more difficult for both national institutions and civil society to access those rejected (Nicholson 1997: 598; Vedsted-Hansen 1995: 176).[433] As a result, only a handful of cases concerning carrier controls have ever been brought before national courts, despite modern carrier legislation having been in place for more than twenty years.[434]

Where privatisation of migration control is governed by contracts, the possibilities for monitoring and visibility are improved somewhat. The higher likelihood of state responsibility for any human rights violations in these situations as compared with the mere use of economic sanctions may first of all give a greater incentive for governments to ensure accountability. Secondly, contracts give added possibilities for states to require vetting, adequate training of privately employed personnel, regular monitoring and performance reports. As was seen in the previous chapter, the United Kingdom has thus introduced both clear contractual limits for responsibility as well as a national supervisory function for the use of privately contracted immigration search officers.[435]

Nonetheless, even where a clear contractual relationship is established, accountability and public scrutiny may still remain insufficient. This is particularly evident in the growing number of cases concerning privately operated detention facilities. In Australia, the conditions in some privately managed asylum and immigration detention centres have been described as 'almost intolerable' and gravely lacking in external accountability and

---

[433] In principle, this problem could be somewhat remedied by the development of close monitoring procedures and the positioning of national immigration liaison officers as detailed in the previous chapter. Yet, this does not seem to be within the intended mandate of such officers.

[434] See chapter 5.3.

[435] See chapter 5.5.

monitoring.[436] Access to information about conditions in the centres has been further hampered by attempts by those managing them to prevent access from outsiders. Australasian Correctional Management running four detention centres in Australia has thus been known to require all external professionals, such as medical staff or teachers, entering ACM facilities to sign confidentiality agreements preventing them from disclosing any information regarding detainees or the administration of the centres.[437]

Parallels may be found in other countries using private contractors to run asylum and immigration detention facilities. Following a BBC documentary documenting racism and physical abuse of immigrant detainees at Oakington detention centre, the United Kingdom Prisons and Probation Ombudsman issued a report pointing to several cases of misconduct by Group 4 Securicor running the centre and carrying out forced escorts and removals. The report further pointed to a number of problems relating to monitoring and oversight.[438] Similarly, in a 2007 lawsuit, the American Civil Liberties Union pointed to the lack of oversight of privately operated detention facilities and accused Corrections Corporation of America of overcrowding cells and cutting supplies and medical care to save costs.[439]

To some extent pushes for better monitoring of private actors may be facilitated through developments in general human rights law. The Optional Protocol to the Convention Against Torture[440] both establishes an international sub-committee with authority to visit places of detention (Art. 2) and requires states to set up or designate national bodies with similar powers

---

[436] Professor Richard Harding, Inspector of Custodial Services of Western Australia, speaking of Curtin detention centre, speech delivered at International Corrections and Prisons Association. 30 October 2001. Excerpt available from http://www.refugeeaction.org/inside/curtin.htm. Last accessed 17 March 2009.

[437] Australian Lawyers for Human Rights. Submission to the National Inquiry into Children in Immigration Detention. Submission No. 168. Australian Human Rights Commission. 10 October 2002.

[438] Inquiry into allegations of racism and mistreatment of detainees at Oakington immigration reception centre and while under escort. Report by the Prisons and Probation Ombudsman for England and Wales. July 2005.

[439] Leslie Berestein. 'Immigration agency, contractors are accused of mistreating detainees'. San Diego Union Tribune. 4 May 2008. *Kiniti et al v. Myers et al Second Amended Complaint*. United States District Court of the Southern District of California. Appl. No. 3:05-cv-01013-DMS-PCL. Filed 24 January 2007. The case was settled with the Department of Homeland Security and CCA, 4 June 2008.

[440]UN Doc. A/RES/57/199 (2002), entered into force 22 June 2006.

to conduct visits, and comment on general conditions of detention (Art. 3). In both cases, the Protocol states explicitly that visits may be conducted to:

> 'any form of detention or imprisonment or the place of a person in a *public or private* custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.' (Art. 4.2, own emphasis)

The formulation is clearly relevant not only to asylum and immigration detention facilities in general, but also to situations where asylum-seekers are detained by non-state actors, whether it be in privately operated detention centres or though confinement by carrier personnel in airport zones for example (Edwards 2008: 799). The protocol has further prompted an expansion of the mandate of national institutions in some cases. In most countries, the national monitoring will fall to national human rights institutions or ombudsmen. In Denmark, legislative proposals have thus been tabled to extend the monitoring mandate of the Parliamentary Ombudsman to include visits to persons detained at quasi-public and private institutions.[441]

In sum, even where privatised migration control is clearly contractually regulated and carried out within the territorial jurisdiction, effective monitoring still risks being hampered. This situation is only exacerbated when private actors are engaged in migration control extraterritorially as in the case of carrier sanctions. An important lesson in this regard may be learned from the related field of private military companies. Despite an apparent desire on the part of governments to regulate PMC activities and a number of national and international efforts to implement regulatory frameworks, accountability mechanisms and various standards and codes of conduct, it has been difficult to effectively implement them and very few cases have been brought against private military companies, and even companies with established records of mismanagement continue to receive new contracts (Leander 2007, 2006; Singer 2003).

---

[441]Danish Parliament (Folketinget). 2009. Forslag til Lov om ændring af Lov om Folketingets Ombudsmand. Legislative proposal publicised 9 March 2009, amendment to § 7(1). In Denmark the national visits and monitoring functions relating to OPCAT are carried out by the Parliamentary Ombudman in cooperation with the Rehabilitation Centre for Torture and the Danish Institute for Human Rights.

The engagement of private actors in migration control shares a number of similarities in these respects. One may even fear that governments have less of an interest in ensuring effective oversight and monitoring in this area, and that the consequences of private migration control are easier to keep invisible than the actions of private military operators. So far this area has certainly received much less public attention. The privatisation of migration control in this sense thus not only serves as a legal barrier to establishing state responsibility, but also as an institutional distancing of control practices away from the state and thus the gaze of those normally watching the exercise of state power.

6.4 Capacity and limits of international human rights bodies

Lastly, it may be worth considering how offshore and outsourcing practices and the constraints identified at the national level affect the litigation and monitoring practices of international human rights institutions. Establishing proper and impartial evidence or facts in international human rights cases is a general concern and arguably particularly pertinent for the international refugee regime. The Refugee Convention is one of the few major human rights treaties without a dedicated independent mechanism to facilitate inter-state accountability. Nonetheless, refugee rights violations are routinely brought to the attention of general human rights bodies and regional human rights courts, both as general issues and in the context of the specific instruments (Hathaway 2005: 994-7).

Until recently, the very idea of international human rights bodies seeking to obtain facts other than, and possibly contradictory to, those submitted by governments was close to unthinkable (Steiner and Alston 2000: 602). Nonetheless, most international bodies today in principle retain a fairly wide scope for drawing on a range of independent sources for ascertaining the facts of a given case or country report and may undertake independent fact-finding missions. In practice, however, the limited resources of such bodies and their position in the human rights machinery means that review of evidence and facts is highly dependent on national institutions, NGOs and domestic courts (Tomuschat 2008: 184, 285-90).

The procedure of the European Court of Human Rights may serve as an example. Following the admissibility stage, the relevant facts of a case will have to be established 'beyond reasonable doubt' and the court may for this purpose in principle draw on all available sources. In practice, however, the

court applies a subsidiarity principle maintaining that domestic authorities have the primary role in the assessment of evidence (Christoffersen 2008: 272).[442] The requirement to exhaust domestic remedies (Art. 35) means that a case will normally already have been through national courts, and the court has emphasised that it does not see it as its purpose to replace national courts' assessments of the facts with that of its own (Kjølbro 2007: 73).[443] Where evidence is clearly lacking or the assessment of the facts is contested the Court will normally exercise more caution in how assessments of the parties are used and make more efforts to carry out oral interviews of witnesses and investigations on location (Kjølbro 2007: 74).[444]

Similar issues arise under other human rights bodies, and some may even face further constraints. As a rule the individual communications procedures under the human rights monitoring bodies are carefully limited to written evidence of the parties when considering the facts of the case (Tomuschat 2008: 215).[445] The inability to conduct oral interviews and inspect locations for alleged human rights abuses considerably limits the gathering of evidence, which becomes particularly problematic in situations where the state and individuals submit conflicting depictions of the facts (Nowak 1993: 692). The Optional Protocol to the Convention Against Torture may perhaps be taken as an example to the contrary. As mentioned above, the protocol established both a subcommittee of international experts and a national monitoring mechanism to visit places of detention, private and public.

---

[442] *Vidal v. Belgium*. European Court of Human Rights. Appl. No. 12351/86. 22 April 1992, par. 33; and *Edwards v. the United Kingdom*. European Court of Human Rights. Appl. No. 13071/87. 16 December 1992, par. 34. See Christoffersen 2008: 273-4 for further examples and discussion.

[443] *Klaas v. Germany*. European Court of Human Rights. Appl. No. 15473/89. 22 September 1993, par. 29.

[444] Art. 38(1a). On-site investigations remain infrequent. For an example, see *N v. Finland*, in which the court undertook a fact-finding mission to Finland to take oral evidence to assess whether the expulsion of an asylum-seeker to the Democratic Republic of Congo would constitute a violation under Art. 3 of the Convention. *N v. Finland*. European Court of Human Rights. Appl. No. 38885/02. 26 July 2005.

[445] See e.g. Art. 5(1) of the Optional Protocol 1 to the International Covenant on Civil and Political Rights. The specific limitation to 'written information' is however absent in Art. 22(4) of the Convention against Torture and Art. 7(1) of the Optional Protocol to the Convention on the Elimination of All Discrimination against Women. See further (Tomuschat 2008: 215-6).

In cases involving private actors and/or an extraterritorial locus, these issues gain additional dimensions. Carrying out fact-finding is substantially harder when alleged human rights abuses take place in a foreign jurisdiction of a state not party to, for example, the European Convention on Human Rights and thus are not under any obligation to aid the court in resolving the case and undertake an efficient assessment of the facts.

The question also arises in connection with the subcommittee established under the Optional Protocol to the Convention Against Torture. In principle the protocol provides that visits may be conducted to 'any place under [a state's] jurisdiction or control where persons are or may be deprived of their liberty' (Art. 4.1). Since deprivation of liberty or physical custody, as discussed in chapter 4, will normally always bring about jurisdiction, this must be interpreted to equally cover situations of extraterritorial detention, confinement and control whether managed by private or public authorities. As Alice Edwards points out, however, that the application of these mechanisms to offshore asylum detention facilities or processing centres remains a question of practical access. Even though the state responsible for detention may be obliged to allow visits, if the state on whose territory or territorial waters detention is taking place is not a party to the Optional Protocol, it will have no obligation to cooperate with the subcommittee or allow inspection visits (Edwards 2008: 819).[446]

Cases concerning interception on the high seas entail similar issues. To the extent that asylum-seekers or immigrants even get the chance to bring a case before an international body, it is likely to remain a question of the state party's word against that of the asylum-seeker. In cases of doubt, it may further be difficult to establish whether interception occurred in the territorial sea of the acting state, international waters, or in foreign territorial waters; just as it may be difficult to objectively determine whether an encounter at high seas is an act of interception or of search and rescue, the definition of which is left to the captain of the 'rescuing' vessel.[447]

---

[446] A different scenario, however, is the situation where the territorial state is a party to the Optional Protocol but the state responsible for offshore detention is not. Arguably, the territorial jurisdiction of the former imposes an obligation under the protocol to allow visits by the subcommittee as well as national institutions despite the fact that it may not be responsible for these detentions. This point may be important not just in regard to situations of immigrant detentions, but also to extraordinary rendition flights for example, or extraterritorial military detention facilities.

[447] See chapter 4.3.2.

The problems are no less onerous in situations where private actors are involved in migration control. International human rights bodies are likely to have limited possibilities for independently probing into the actual relations between governmental authorities and private actors, especially where these are not explicitly regulated by national legislation or contracts. Assessing the facts of cases concerning airline staff denying asylum-seekers from boarding thus face a double evidentiary challenge. First the facts surrounding the actual rejection and the relation between the applicant and the private actor have to be established. Secondly the relationship between the private airline and the destination state would have to be assessed and thus whether the specific rejection may be attributed to the state and thereby give rise to state responsibility.

Both treaty law and human rights institutions nonetheless emphasise the obligation to conduct proper investigations in connection with suspicions of *refoulement*, torture or other inhumane treatment (Kessing 2008: 288-90). Art. 12 of the 1984 Convention Against Torture sets out that contracting states must ensure that competent authorities undertake 'a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction'.[448] Likewise, General Comment 20 to the 1966 International Covenant on Civil and Political Rights establishes that any complaint of *refoulement* to torture set out in Art. 7 'must be investigated promptly and impartially by competent authorities'. Similar requirements have been set out by the European Court of Human Rights, which has further emphasised that the responsibility for carrying out an efficient investigation into human rights violations cannot be displaced by particularly difficult or dangerous circumstances for doing so (Kessing 2008: 289).[449]

Nonetheless, lack of evidence has been decisive in the rejection of some cases concerning extraterritorial jurisdiction. In *Issa*, the European Court of Human

---

[448] Thus presumably also cases of alleged *refoulement* prohibited under Art. 3. The formulation is of course curious as it would seem to rule out exactly those situations where states exercise non-territorial jurisdiction, such as when carrying out interdiction on the high seas or carrying out individual migration control in the territory of third states.

[449] See e.g. *Ergi v. Turkey*. European Court of Human Rights. Appl. Nos. 66/1997/850/1057. 28 July 1998. These cases concerned deaths (Art. 2) in south-east Turkey, but it would not be unreasonable to assume that a similar principle would apply to cases of *refoulement* under Art. 3 (Kessing 2008: 290), and to situations involving extraterritorial jurisdiction.

Rights thus held that the Turkish military operations could in principle bring about extraterritorial jurisdiction of Turkey over certain geographic areas of Iraq. Yet, the facts of the case were insufficient to establish that the killed shepherds were within an area over which Turkey exercised efficient control.[450]

One may further speculate whether practical concerns may also have influenced the much debated passage in the *Bankovic* case professing that the Convention is intended to apply:

> 'in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States… The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States.'[451]

As a matter of law, the notion that the Convention only applies within a certain regional '*espace juridique*' has been convincingly refuted by scholars as well as prior and subsequent judgements of the Court.[452] However, this reference to the 'design' of the Convention may perhaps be better interpreted as a concern that the already overburdened court would have to take on an additional range of complicated complaints over the actions of contracting states in countries outside the Council of Europe (Roxstrom et al. 2005: 135).[453]

---

[450] *Issa and Others v. Turkey*. European Court of Human Rights. Appl. No. 31821/96. 16 November 2004, par. 76.

[451] *Bankovic and Others v. Belgium and Others*. European Court of Human Rights. Appl. No. 5207/99. 12 December 2001, par. 80.

[452] *W.M. v. Denmark*. European Commission of Human Rights. Appl. No. 17392/90. 14 October 1992; *Issa and Others v. Turkey*. European Court of Human Rights. Appl. No. 31821/96. 16 November 2004. See further Gibney 2008: 73-5; Kessing 2008: 225; Roxstrom et al. 2005: 79; Wilde 2005b: 115-24; Lawson 2004: 114.

[453] At time of writing, the European Court of Human Rights had a backlog of more than 100,000 cases, corresponding to somewhere between two and three years of its annual working capacity (Tomuschat 2008: 245).

6.5 Conclusion: the chicken and the egg, law and institutions

As noted at the outset of this chapter, specific case law related to offshore and outsourced migration control is sparse both at the domestic and the international levels. Beyond constituting a methodological challenge for the legal analysis, this chapter has proceeded to ask why that may be. One answer may of course be that offshoring and outsourcing indeed does achieve a legal shifting of responsibility away from the acting state so successfully that claims against it become fruitless. While the preceding chapters point to the sometimes limited reach of international refugee rights and human rights in this regard, it should nonetheless be clear that this is far from always true. To the extent that the exact scope of legal obligations remains contested, if anything this ought to bring about an increased interest in achieving legal clarification from national and international courts.

When this has not been the result, it is because offshoring and outsourcing also in a more institutional sense seem to eclipse a number of the mechanisms that normally ensure the individual asylum-seeker access to rights, monitor state behaviour and ensure accountability for the exercise of power. When migration control is carried out extraterritorially it becomes inherently harder for asylum-seekers to access civil society actors, national asylum authorities and international organisations. The complex human rights enforcement machinery is still largely organised around territorial delineations and ensuring oversight oversight of extraterritorial actions encounters a number of difficulties.

Similarly, the privatisation of migration control raises a number of issues regarding accountability and transparency. While privatisation in general has been argued by some to lead to increased accountability, this does not seem to be the case for migration control. The control performed by carriers is largely invisible to public scrutiny and little is done to register or keep track of those rejected onwards travel. The situation may be somewhat better where private actors are governed through clear contractual relationships. Yet, the case of privately operated immigration detention centres still points to several shortcomings that reinforce the notion of a corporate veil complicating both governmental and civil society monitoring.

The issues are essentially replicated at the international level. With limited resources, UNHCR and human rights bodies are intimately dependent on information provided by governments and national civil society organisations. Regional human rights courts are often worse positioned than national

institutions when it comes to independently establishing the facts of a given case and have thus exercised some caution in embarking upon independent fact-finding missions. As a result, cases may end up being a matter of the applicant's word against that of the accused state party and situations of impunity persist due to lack of evidence.

In short, offshoring and outsourcing migration control creates an 'out of sight, out of mind' effect. Because the ordinary institutional human rights mechanisms seldom see what goes on when states leave their territory or delegate authority to private entities, it is less often picked up upon. When Grahl-Madsen wrote in his commentary to the *non-refoulement* principle that refugees who have not yet crossed into the territory are 'only seen as shadows or moving figures at the other side of the fence…not [yet] materialized as human beings' this may be much more true as a matter of practice than as matter of law (Grahl-Madsen 1963). The refugee encountering the state outside its territory and/or in the form of a private agent does have certain rights in most instances and as such has already materialised as a subject under refugee and human rights law. Yet offshoring and outsourcing will often mean that he or she is likely to have a much harder time physically accessing asylum and *de facto* claiming any legal entitlement owed.

At this stage it is almost impossible not to draw parallels to the Foucauldian notion of 'biopolitics' or Agamben's concept of 'bare life'. Following Carl Schmitt, Agamben argues that the sovereign is defined precisely by deciding who are included in the legal order and who are refused access to the rule of law (Schmitt 2003; 1985; Agamben 1998). The sovereign is in this sense constituted in a position beyond the law, and the rejected reduced to '*homo sacer*', life without the protection of the law, or bodies that may be controlled and disciplined at will (Agamben 1998, Foucault 1976).[454] While states cannot

[454] Several authors have previously employed the Foucaultian notion of biopolitics to the issue of migratation control. See in particular the contributions in Bigo, Didier and Guild, Elspeth, eds. 2005. Controlling Frontiers: Free Movement into and Within Europe. London: Ashgate. Similarly, Gregor Noll has convincingly employed Agamben's concept of bare life to the analysis of offshore asylum processing centres and regional protection zones (Noll 2003). Yet, Noll's analysis is based first on a primarily legal analysis as the premise of bare life, and secondly on Agamben's use of Hannah Arendt's notion of the 'camp' as a closed site for exceptional measures beyond the law. In contrast, it may be more correct to identify the premise of the exceptional not only at the level of law but equally, and often more importantly, at the level of institutions. Secondly, in the context of extraterritorial migration control, the offshore venue is seldom a closed site. Rather, the national realm becomes the bounded sphere of justice. I am indebted to Gregor Noll for this last point.

wholly rid themselves of legal obligations by offshoring or outsourcing migration control, the limited reach of the institutional mechanisms ensuring their accessibility may be an even more important factor in realising migration control unfettered by the ordinary constraints imposed by international refugee law. In the unchecked encounter between the individual and offshore or outsourced migration control, state authorities (or their delegates) are free to label those encountered as 'illegal migrants', 'rescuees' or 'asylum-seekers' – all of which produce and institutionalise very different legal entitlements.

The present chapter has only attempted to sketch a few issues pertaining to the question of institutional enforcement of refugee rights. Yet it is important to realise that the question of institutional capacity is not separate from but endemic to the question and determination of legal norms. The two are intrinsically connected. On the one hand, the lack of institutional capacity means that fewer cases ever reach domestic or international human rights courts, and even if they do difficulties in establishing objective facts entail a risk that cases fail. Little judicial clarity is thus provided to help resolve the existing contestation of the exact scope and application of relevant norms, which in turn leaves states with a wider scope for national interpretation and domestic implementation of international obligations.[455]

On the other hand, the lack of institutional capacity to create accountability in situations of offshoring and outsourcing is also partly a reflection of the somewhat unclear or only recently developed norms in this area. Extraterritorialisation and privatisation still remain somewhat the exception. The vast majority of human rights abuses are still likely to pertain to a state's *own* actions *within* its territory. Extending institutional capacity beyond this may not be very costly, but is hard to argue as long as the legal need is not clearly established.

In effect, the clarification of legal norms and institutional monitoring capacity thus becomes a 'chicken and egg' problem. Lack of institutional oversight and monitoring may reflect legal ambiguity, yet legal clarity can only be obtained with the availability of knowledge of practices and concrete cases that may be brought before national courts and international human rights bodies.

Nonetheless, both lessons from other fields and some of the examples for improving accountability and monitoring mentioned in the previous section

---

[455] As Jonas Christoffersen points out, countries such as Denmark normally require a fairly high degree of clarity for implementing human rights obligations in national adjudication. National courts tend to await developments from the European Court of Human Rights (Christoffersen 2008: 523-4).

suggest that breaking this cycle is not impossible. The effect of simply casting light on situations of offshoring and outsourcing may create a political impetus for accountability beyond legal and institutional barriers (Fernando 2004). The success of economic offshore centres like the Cayman Islands has been accompanied by increasing pressure for control and regulation, both from the countries seeing their tax base being exploited, and from governments fearing that offshore tax havens may work as financial hubs for international crime and terrorism (Brittain-Catlin 2005: 170-5). In June 2000 the Cayman Islands was thus 'named and shamed' on a G7 blacklist of havens for money laundering, and the IMF named it as having 'serious deficiencies in supervision' (Brittain-Catlin 2005: 185). As a result, the United States Treasury took an initiative to form what was described as a 'coalition of the willing [countries]…to successfully influence and enforce international standards' upon offshore states, and national legislation has been passed by a number of countries to revoke financial privacy privileges. Finally, to rid itself of its bad image, the Cayman Islands themselves have gone to great lengths to introduce regulation, change secrecy laws and prosecute a number of bankers suspected of money laundering (Brittain-Catlin 2005: 216-8).

What the Cayman case points to is that there is a link between visibility and political and societal acceptance. When offshoring arrangements become too exposed in the way they elude ordinary norms and moral standards of regulation, it creates a tension that may eventually lead to their demise. As these lines are being written, the United States President, Barack Obama, has just signed the bill to eventually close down the prison programme at the Guantanamo base. While knowledge of individual cases continues to be sparse, the visibility and general knowledge that Guantanamo represented an offshore detention scheme where ordinary legal safeguards were suspended eventually made it politically unsustainable. Similarly, following a change in government, Australia in 2008 decided to end the 'Pacific Solution' scheme developed following the Tampa incident. The practice of intercepting asylum-seekers and transferring them to camps at Nauru or other island states for offshore asylum procedures had been substantially criticised by both national and international organisations.

The present dissertation has argued that offshoring and outsourcing practices have become a systemic feature of the late-sovereign order. Yet, the above examples may be taken to suggest that individual offshore and outsourcing schemes are fickle things that do not hold up well in the face of overexposure. As the practice becomes more visible, political tension builds to achieve a renormalisation of regulation that may end up making the offshoring and outsourcing arrangements purposeless. If this is indeed so the question, of

course, is whether this applies equally to the offshoring and outsourcing of migration control and what happens in this process of rendering otherwise discrete forms of migration control increasingly visible to the national publics. Most of the practices described in the previous chapters are inherently harder to pin down and visualise than are the full-blown asylum processing camps in Nauru and the United States military bases in Cuba. The control performed by airline officers at foreign airports is much more incidental, and successful offshore interception schemes have tended to work through the national sovereign structures of foreign states that maintain the illusion of normality.

Secondly, even though individual outsourcing and offshoring programmes may be vulnerable to overexposure, little prevents offshoring and outsourcing practices from simply moving elsewhere. While the Cayman Islands has lost some of its attraction as an offshore tax haven, capital has simply diverted elsewhere; to Hong Kong, the Bahamas and Nauru, all of them willing to ensure secrecy and lax regulation in order to attract free floating capital. Similarly, while the Guantanamo detentions are destined to end, the word is still out on the equally criticised extraordinary rendition flights operated by the United States. Again, such flights are much harder to pin down; by their very design they are never tied to any specific physical location.

The actual practices of offshoring and outsourcing of migration control thus continue to be largely uncharted and opaque. International organisations, journalists and in particular NGOs have made laudable efforts to change this and bring visibility to the offshoring and outsourcing of migration control.[456] Ultimately however, casting light upon these practices and ensuring accountability mechanisms depends on the political will of the governments themselves engaged in offshore and privatised migration control, which has so far been limited.

Until that happens, lions remain abound.

---

[456] See in particular European Council for Refugees and Exiles. 2007. Defending Refugees' Access to Protection in Europe. Brussels. December 2007; and Refugee Council. 2008. Remote Controls: how UK border controls are endangering the lives of refugees. London. December 2008. Of note is further the 'Ten Point Plan of Action' initiative launched by UNHCR in 2006. The initiative highlights a number of protection concerns and policy recommendations in connection with border management and extraterritorial and privatised border control. UNHCR. Refugee Protection and Mixed Migration: A 10-Point Plan of Action, Revision 1. January 2007.

7. Concluding observations and wider perspectives

7.1 Recapitulation

This dissertation started by asking the simple question: 'When does a refugee encounter the state?' As a matter of practice something is clearly changing in the encounter between the asylum-seeker and the potential asylum state. Rather than the traditional image of the refugee arriving at the border and claiming asylum with national authorities, more and more often asylum-seekers find themselves confronted with measures of migration control before arriving at their prospective destination state and with controls carried out by agents other than the state's own authorities.

Throughout the preceding chapters it has been attempted to give examples of these practices. It has been argued that this 'offshoring' and 'outsourcing' of migration control is not just a growing trend among both old and new asylum and immigration countries, it may well be a systemic feature of the world we currently inhabit and as such finds parallels in a number of other fields.

The driving force behind this volume has been to ask whether this *de facto* shift in location and actors for the encounter between the refugee and the state is accompanied by an equal *de jure* shift in the reach of international refugee law. To what extent are states bound by international refugee and human rights obligations when carrying out extraterritorial migration control or delegating control functions to private actors? The preceding chapters have attempted to critically probe the boundaries of international refugee law in this respect, in particular the geographical application of the *non-refoulement* principle, the bases of extraterritorial jurisdiction in cases of offshore migration control and the principles for establishing state responsibility when outsourcing migration control to private parties.

The outcome of this inquiry however, may be read in several ways. The first part of this chapter (7.2) relates to the above questions at the most immediate level. It affirms that in many situations of extraterritorial or privatised migration control states do retain core obligations under refugee and human rights law. Seen thus the legality of many current state practices is highly questionable and the general lack of protection safeguards as an integral part of offshore and outsourced migration control begs remedying.

The second part of the chapter (7.3) reflects on the responsibility gaps nonetheless identified in the legal analysis. While a critical analysis goes some way towards bringing international obligations to bear on situations of extraterritorial and privatised migration control, some situations remain legally unclear and certain legal and evidentiary thresholds must be overcome in order for international refugee rights and human rights obligations to apply. To understand why this is so, three dynamics can be identified that permeate this field: the contestability of norm application, the instrumentalisation of sovereignty norms and the invisibility of control practices. All contribute to the ongoing difficulty in establishing human rights responsibility in situations of offshoring and outsourcing.

The last and final part of the chapter (7.4) is devoted to a few considerations regarding the wider perspectives, and the implications of the present analysis.

7.2 The reach of international refugee law

The most important conclusion of the present investigation is that states do not rid themselves of international obligations by offshoring and outsourcing migration control. Contrary to the vivid claims that extraterritorial actions or privatisation are carried out in a 'human rights vacuum' or 'legal black hole', the preceding chapters have affirmed that core norms under international refugee law and human rights law, even in their most restrictive readings, undeniably remain applicable in many of these situations.

The geographical scope of the 1951 Refugee Convention and in particular the *non-refoulement* principle, have been the subject of debate since its very inception. Even though a number of rights under this instrument are clearly reserved for refugees already present and staying within the territory, the prohibition against *refoulement* set out in Art. 33 does not carry such a limitation. Looking to the wording, object and purpose as well as the drafting documents, an interpretative scope does exist regarding the applicability *ratione loci* of this article. Yet, a comprehensive interpretation taking account of subsequent developments in other human rights instruments, soft law and state practice points to a development in favour of a more expansive interpretation. Even if it was not clear fifty years ago, it is today clear that the *non-refoulement* principle must be interpreted to apply everywhere a state exercises jurisdiction.

This brings Art. 33 of the Refugee Convention into line with the majority of international and regional human rights instruments, yet necessarily begs a

more general analysis of the concept of jurisdiction as used and conceived in human rights law. As shown in chapter 4, even though jurisdiction is understood in primarily territorial terms, a growing body of case law provides a firm basis for extending jurisdiction to a number of situations where states act outside their territory. Thus states will normally bring about jurisdiction when carrying out migration control and rejecting asylum-seekers in international waters or in designated 'international zones'. Where migration control is carried out within the territory or territorial waters of another state, establishing extraterritorial jurisdiction depends on the level of control exercised over the area or individual concerned. Yet, in cases where offshore migration control involves exclusive control over parts of another state's territory, such as establishing closed camps or control facilities, or physical apprehension of asylum-seekers and migrants on board ships, aeroplanes or elsewhere, there is equally little doubt that this will entail jurisdiction and thus responsibility under both refugee and human rights law.

The same conclusion applies regarding the outsourcing of migration control to private actors. Even though the public/private distinction has been a key feature of international law, it is far from impenetrable. While there is little specific human rights case law in this area, general principles of international and human rights law may be relied upon to provide a basis for establishing state responsibility in cases of private involvement in migration control. As seen in chapter 5, the use of private contractors for the purpose of migration control or immigration detention will thus entail responsibility of the outsourcing state in most instances. A strong case may equally be made that carrier liability legislation combined with the degree of supervision and case-by-case 'advice' provided by immigration liaison officers gives rise to state responsibility either as an exercise of governmental authority or as situations where states may be said to direct or control the conduct of otherwise private actors. In both instances the conduct of private actors may be considered an 'act of state' for the purpose of international law and thus entails human rights obligations on a par with a state's own actions in similar circumstances.

Lastly, the preceding chapters have pointed to a dynamic potential both within the law on state responsibility and regarding the establishment of extraterritorial jurisdiction. While gaps may thus still exist regarding human rights accountability for situations of offshoring and outsourcing, there is little to suggest that these areas of law are at a standstill. Several judgements regarding extraterritorial jurisdiction already seem to suggest somewhat of a revision of the strict 'effective control' test applied in cases like *Bankovic*. As suggested in chapter 4 we may yet see the emergence of a more functional approach to jurisdiction, not just to cases on the high seas but also to

situations where migration control is carried out within the territorial jurisdiction of another state. Similarly, the concept of due diligence, though difficult to operationalise in the abstract, has already been relied upon in a number of human rights cases to establish state responsibility for conduct of private actors. As argued in chapter 5, such obligations are not only likely to be important in cases where private migration control within the territory cannot be directly attributed to the state, but may also extend at least a negative obligation to not aid or assist rights violations by other actors in cases where private migration control takes place extraterritorially and possibly even outside the jurisdiction of the state in question.

Even under a more restrictive reading of current international law, the analysis carried out above seriously questions the legality of many current practices of offshoring and outsourcing migration control. Accepting the conclusion that international refugee and human rights law does apply to at least some situations of extraterritorialisation and privatisation, it is hard to see how, for example, current interception schemes on the high seas or the rejection of asylum-seekers in so-called 'international zones' can be carried out without violating the *non-refoulement* obligation and other core human rights norms.

Offshore and outsourced migration control generally operates with few if any protection safeguards. The legal analysis of the present work suggests that if conformity with international law is to be ensured, a number of current practices must either be abandoned or, perhaps more realistically, adequate protection mechanisms implemented that ensure access to asylum for refugees among general migration flows. A number of recommendations and best practices to achieve the latter have already been put forward by UNHCR, NGOs and scholars.[457] Proposals for 'protection-sensitive' migration control include legislative and regulative changes to allow such measures as the issuing of 'protection visas' by ILOs or embassies; to impose clearer monitoring and

---

[457] See for example European Council for Refugees and Exiles. 2007. Defending Refugees' Access to Protection in Europe. Brussels. December 2007; Refugee Council. 2008. Remote Controls: how UK border controls are endangering the lives of refugees. London. December 2008; and UNHCR. Refugee Protection and Mixed Migration: A 10-Point Plan of Action, Revision 1. January 2007.

It remains outside the scope of the present work to go into a more thorough and critical examination of the potential and pitfalls of different proposals and suggestions tabled. Moreover, it should be noted that I have actively contributed to both of the above NGO reports and, to a smaller extent, been consulted as part of the ongoing UNHCR 10-Point Plan of Action process. Any reflections in respect of these would therefore not be impartial.

reporting obligations upon both government officials and private actors involved in migration control, and to establish referral mechanisms for asylum-seekers stopped by carriers. Secondly, there is a clear need for training of both border authorities and private actors involved in migration control to better identify protection seekers and ensure proper procedures to avoid *refoulement*.[458] Thirdly, UNHCR in particular has pushed for better dialogue and cooperation between the authorities of territorial and offshoring/outsourcing states as well as cooperation with and the involvement of NGOs and UNHCR in border management programmes. And lastly, there is a suggestion to create alternative pathways ensuring access to asylum, for example by way of 'protected entry procedures' allowing asylum applications to be lodged at embassies in third states.[459]

The implementation of such protection safeguards would no doubt go a long way to ensuring access to asylum as part of offshore and outsourced migration control. Whether it would be sufficient to completely avoid situations of *refoulement* or other rights violations remains a more open question. Save a few positive examples, the political will to implement protection safeguards as part of offshore and outsourced migration control has largely been missing. Indeed, such safeguards may go against the very reason for introducing such offshoring and outsourcing policies in the first place. Even where such political will is present, offshore and outsourced migration control will inevitably continue to eclipse many of the ordinary institutions ensuring access to asylum, accountability and human rights monitoring. To some extent refugees encountering the state outside its territory or by proxy are thus likely to keep on experiencing additional barriers in claiming their legal entitlements.

Finally, attention should be paid to the possible wider effects of carrying out offshore and outsourced migration control without adequate protection safeguards for refugees and asylum-seekers. By preventing access to asylum, refugee protection is at worst entirely deconstructed and at best shifted to the countries in which controls are conducted. This strategic shifting of protection

---

[458] See further UNHCR ExCom. Protection Safeguards in Interception Measures. Conclusion No. 97 (LIV) 2003.

[459] The Commission released a study on protected entry procedures in 2003 based on the existing practice of a number of EU member states. Though no concrete EU policy proposals have been tabled at the time of writing, the concept still figures as part of the policy discussions for the second phase of the common EU asylum system. See Noll, Gregor, et al. 2003. Study on the Feasibility of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum System and Goal of a Common Asylum Procedure. Brussels: European Commission.

obligations places an extra burden on countries in the region of origin and countries of transit, states that already host the large majority of the world's refugees.

Where protection obligations are deflected to less developed countries, states with poor human rights records or undeveloped asylum systems, the quality of protection provided to individual refugees may be severely eroded. As shown in chapter 2, the structure of the Refugee Convention is such that the more substantial protection obligations owed are specifically granted relative to the human rights and socio-economic situation in the specific host country. To the extent that offshoring and outsourcing migration control works to strategically shift protection obligations to states where the cost of protection is perceived to be lower, the result may be the emergence of 'protection lite', a market for realising refugee protection at the lowest level still possible within a restrictive reading of the obligations owed under the Refugee Convention.

Ultimately, the effect of offshoring and outsourcing migration control seems destined to create a mimicry effect in the states where such controls are carried out. Faced with increased protection burdens these countries are likely to adopt similar policies and mechanisms to restrict access to asylum and push protection obligations further away. Interception policies, carrier sanctions, safe country rules and readmission agreements are already flourishing among east European, north African, central American and some Asian countries. Often such policies are implemented with the active help and assistance of the countries originally implementing offshoring and outsourcing mechanisms in exchange for cooperation, readmission agreements and/or access to operate control within foreign territory. In the long run the offshoring and outsourcing of migration control is thus unlikely to prove sustainable. Rather, these policies seem to constantly push refugees back to sites closer and closer to the state of persecution; a development that ultimately threatens to undermine the very concept of refuge.

7.3 The limits of international refugee law

While a positive appraisal shows that international refugee and human rights do extend to encompass a wide range of offshoring and outsourcing practices, the analysis carried out in the preceding chapters also merits a more critical assessment of the legal framework. As has been seen, establishing extraterritorial jurisdiction or attributing conduct of private actors to a state is often a complicated legal manoeuvre and subject to a number of limitations.

States may not be bound in all situations of offshore or outsourced migration control, and in particular under the Refugee Convention the content and extent of obligations change as migration control is moved outside the territory. This is particularly worrisome as a number of recent offshoring and outsourcing practices seem to be carefully designed expressly to avoid establishing extraterritorial jurisdiction or attribution of private conduct.

If we accept that the legal framework as it stands at present does allow certain responsibility gaps where migration control can be carried out with no or substantially reduced obligations under refugee and human rights law, it becomes alluring to ask why this is so. If the basic tenet of human rights law is that wherever there is power, there should be constraint of that power, why is it then so difficult for refugee and human rights law to encompass the obvious developments in state practices? The answer suggested in this dissertation is that the otherwise universal aspirations of human rights law must, in its application, be reconciled with core norms of general international law, namely the principle of territoriality and the public/private distinction. In this clash a new playing field is opened up where legal interpretation may be challenged from both sides and thus constantly has to balance universalist and particularist claims. Specifically, three interrelated dynamics can be traced throughout the analysis that may help to understand the difficulties in fully bridging remaining responsibility gaps and bringing more legal clarity to this field.

7.3.1 Contesting the applicability of refugee and human rights law

What is perhaps most remarkable about the legal discourse pertaining to refugee and human rights in cases of offshoring and outsourcing is the difficulty in reaching general consensus on even basic issues of legal interpretation. The meaning of and exact principles for establishing 'jurisdiction' are subject to intense debate among both lawyers and governments. Equally, while general principles for attributing private conduct to states may be agreed upon, their concrete application is marred by a range of different interpretations as regards both the meaning of the international norms and their applicability to concrete cases. Furthermore, the exact scope of application of different human rights instruments and specific articles within them continues to spur disagreement.

In the academic world the result has been a wave of books, articles and dissertations, such as the present work, on the extraterritorial application of

human rights norms and state responsibility for the conduct of private actors. From proclamations of 'legal black holes' to arguments that human rights apply everywhere and to everyone - states, corporations and individuals alike, there seems to be an inherent scope for contesting the applicability of refugee and human rights law when states act beyond their territory or delegate power to private actors.

In the context of refugee law this is probably best seen in connection with the continuing disagreement over the scope of application *ratione loci* of the *non-refoulement* principle as enshrined in Art. 33 of the Refugee Convention. As evidenced in chapter 3 this issue has been a bone of contestation even during its drafting with no clear resolution. Differing interpretations ranging from the strictly territorial to border, jurisdictional and universal application have since been proposed by governments, UNHCR, national courts and scholars. The lack of specific foresight about current practices of offshore migration control may well be to blame, and no clear and convincing answer thus appears from the wording of the article itself or the drafting history.

While the present work proposes a jurisdictional interpretation based on a more thorough analysis of subsidiary sources and subsequent developments, the tension between territorialist and universalist arguments remains evident throughout every stage of interpretation. And while a growing consensus seems to be mounting in favour of a jurisdictional interpretation, this has not prevented individual states from maintaining strong positions in favour of a more restrictive reading. Most notably, the United States has expressed strong criticism of UNHCR's Advisory Opinion on this matter and instead maintained that not only is the *non-refoulement* obligation under the Refugee Convention strictly territorially limited, so are obligations under the International Covenant on Civil and Political Rights in general.[460]

The inherent contestability of refugee and human rights norms in situations of offshoring and outsourcing may ultimately point back to a deeper conflict within human rights law itself. In their idea and inception human rights are conceived of as universal. Yet in their codification and institutionalisation as treaty law, this aspiration has to be reconciled with general principles of international law, which inevitably ties the human rights project to a legal

[460] United States Mission to the United Nations and Other International Organisations in Geneva. 2007. Observations of the United States on the Advisory Opinion of the UN High Commissioner for Refugees on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol. Geneva, 28 December 2007.

conceptualisation of the state still largely built on the principle of territoriality and the public/private distinction.

7.3.2 Instrumentalising sovereignty norms against responsibility

Somewhat related to the contestation of refugee and human rights obligations is what could be termed the instrumentalisation of sovereignty norms to avoid protection obligations. Yet rather than contesting or refusing the applicability of human rights norms as such, the attempt to reduce protection obligations are, in this dynamic, made by reference to the territorial and state-centric structure of refugee and human rights law in order to shift or deconstruct protection burdens. What becomes essential here is the instrumentalisation of another sovereign or entity as part of the offshoring and outsourcing process in order to limit or disclaim the sovereign responsibility and obligations over the polity or acts concerned.

Under the EU Frontex operations to prevent irregular migrants from arriving at the Canary Islands, Spanish ships not only carry out interdiction in Senegalese waters, but also take on board Senegalese coast guards. In each case Senegal's sovereignty is instrumentalised to boost the claim that not only does interception take place within the jurisdiction of Senegal, but also that any migrants intercepted are also rejected by Senegalese authorities, and any protection obligations thus fall to Senegal. Similarly, governments have been keen to emphasise that immigration liaison officers posted to foreign airports do not exercise direct authority but only maintain an advisory role. In this way, the posting state maintains the claim that the territorial state still holds exclusive jurisdiction and that the control carried out by airlines remains legally distinct from the state imposing fines and advising on which passengers to carry.

The introduction of another sovereign in this way may severely impact the application of legal norms. As was seen in chapter 4, moving interdiction from the high seas to foreign territorial waters substantially changes the thresholds for establishing extraterritorial jurisdiction. As long as states are operating in the *res communis,* a more functional approach has so far been applied in which the mere cause-and-effect relationship appears to be enough to invoke the human rights responsibility of the acting state. But where another sovereign is added to the equation, the tests for establishing extraterritorial jurisdiction become much more demanding. In these cases the offshoring states must be shown to exercise 'effective control' in such a way that *de facto* excludes the

authority of the territorial state over the geographic area or individual involved.

This is where the two basic norms of international law, the territoriality principle and the public/private distinction come most clearly to the fore. They do not limit state responsibility in cases of offshoring and outsourcing *per se*, yet they create a strong presumption for the exclusivity of the territorial sovereign and distinctiveness of private actors. Only when these presumptions are successfully rebutted does responsibility arise on behalf of the offshoring or outsourcing state.

These legal structures are what give rise to the political commercialisation of sovereignty and more specifically the increasing market for migration control. Horizontally, the market for migration control takes the form of jurisdiction shopping as states purchase access to exercise migration control in foreign jurisdictions where correlate refugee and human rights obligations are perceived to be lower or less precise. Vertically, a market is created for private actors, in which the very label of being 'private' may be exploited to shed responsibility by outsourcing governmental functions through tenders or threats of economic sanctions.

7.3.3 Rendering migration control invisible

The third dynamic concerns the lack of knowledge of offshore and outsourced migration control. The distinct invisibility of actual practices in this field fundamentally impacts both legal interpretation and the effectiveness of legal entitlements owed. The previous chapter identified an 'out of sight, out of mind' effect surrounding much of what takes place when states extraterritorialise or privatise migration control. The knowledge relied upon in the present analysis generally builds on overall policy documents, incidental reports and writings by organisations, scholars and media and what testimony is available from asylum-seekers and migrants. Yet, what goes on in the actual control situation generally remains opaque, and it is only incidental information that tends to reach the media and the public of states carrying out control.

The lack of knowledge seems to be a reflection of the institutional structures facilitating the realisation and monitoring of human rights. These are, to an even greater extent than legal norms, organised along state-centric and territorial principles. Shifting jurisdiction thus eclipses many of both the public and private mechanisms normally facilitating access to asylum, and

privatisation may shortcut the traditional accountability procedures ensuring public oversight. These limitations not only pose important problems for the individual asylum-seeker who in these situations does not have access to any of the ordinary institutions: the specialised authorities, translators, UNHCR or refugee-assisting NGOs who normally guide and aid the launching of an asylum application. From the perspective of refugee and human rights institutions working to monitor state performance in this field, offshoring and outsourcing also tends to render the effects of migration control largely invisible.

Save the occasional stories from asylum-seekers and migrants themselves very little is known of what goes on when migrant boats are intercepted on the high seas or in foreign territorial waters. Independent monitors, the press or NGOs are not allowed on board Frontex vessels for example. While Frontex has been keen to launch press statements, pictures and videos of its operations, it seldom if ever documents the interception situation itself. Rather, most pictures concern parading vessels or the return of migrants supposedly rescued at sea. Situations where migrant and authority accounts of events differ are thus inherently difficult to objectively resolve or verify. Similarly, following the fates of asylum-seekers rejected as part of offshore migration control is nearly impossible if their identities have not been established and recorded prior to rejection.

Even where controls are operated within the territory, privatisation may create a distance for both governmental accountability mechanisms and independent monitoring. The numerous reports on mistreatment of asylum-seekers and immigrants in privately operated detention centres are a case in point and fully illustrate the difficulties of penetrating the corporate veil, even where private actors are governed by strict contracts, are subject to public inspection and are located within the territory. In the case of extraterritorially operated controls such as those enacted by carriers, the problems are only further exacerbated. A denial to board by an airline official is not considered a public decision and no record or justification is thus given. As a result very little is known about rejected persons and how many may have had a valid protection claim.

The invisibility of offshore and outsourced migration control has important consequences not only for the effective enforcement of refugee and human rights law, but also for the possibilities of establishing legal clarity. Resolving existing legal gaps or interpretative uncertainties is crucially dependent on concrete cases being taken forward and placed before national and international judiciaries. Even where this is possible, evidentiary problems are likely to persist for both national courts and international human rights bodies

in assessing the facts of extraterritorial actions or specific power relations between governments and private actors. In sum, even beyond the *de jure* constraints, offshoring and outsourcing migration control seems to create a number of *de facto* barriers for accessing asylum.

7.4 Wider perspective and implications

The above has sought to draw together the more immediate conclusions of the legal analysis as well as address the wider explanatory research questions posed at the outset of this volume. Before coming to an end however, a few remarks are in order as regards the possible wider significance of and the questions raised by the present analysis. What follows should not thus be read by way of a conclusion, but rather as an attempt to point onwards and to spark further debate.

7.4.1 The role and importance of refugee and human rights law

The above analysis may have painted a somewhat bleak picture of state practices hardly in conformity with international refugee and human rights obligations, and of offshoring and outsourcing as deliberate strategies to avoid legal constraints otherwise imposed by national and international law. At face value this could be taken to support the growing realist critique of refugee and human rights law as increasingly irrelevant and powerless to constrain state behaviour. As political concerns over immigration and refugees have arisen, refugee and human rights, at least in these areas, no longer constitute a 'self-enforcing equilibrium' where the states participating have clear interests and where there are obvious payoffs for abiding by the rules (Krasner 2004: 1075; Watson 1999).

Such a reading would, however, overlook one of the most important premises for offshoring and outsourcing migration control. As has been seen, offshoring and outsourcing exercises are often costly affairs and may demand substantial concessions, for example to territorial states to achieve access and cooperation. While some effectiveness benefits may accrue from intercepting persons pre-arrival and enlisting private actors, the logic of offshoring and outsourcing cannot be understood in purely managerial or economic terms. At least in the field of migration control a key purpose rather seems to be to

reduce, shift or deconstruct legal obligations otherwise owed, *de jure* and/or *de facto*.

Yet, such ambitions necessarily assume that refugee responsibilities imposed by national and international law do actually, under ordinary circumstances, constrain state behaviour. If governments felt they could simply disrespect international refugee and human rights law there would be little need to engage in cumbersome and costly offshoring and outsourcing exercises. The contestability of legal norms, burden-shifting possibilities and invisibility achieved by offshoring and outsourcing is exactly what makes it possible for some states to avoid protection obligations but nonetheless still situate themselves as countries abiding by their international refugee and human rights commitments. As such, the very practices of offshoring and outsourcing migration control may be taken as an argument that norms do matter and as a reaffirmation of refugee and human rights law in a more general sense.

The result, however, is not the liberal or cosmopolitan vision of international law as bringing about a legalisation of world politics and global human rights application normally contrasted to the more realist accounts. Rather, offshoring and outsourcing states are instrumental in their relationship with refugee and human rights norms. While international refugee and human rights obligations may be accepted as such, their applicability to certain situations may be contested and legal gaps deliberately exploited to realise sovereign power and prerogatives unconstrained by refugee and human rights law. Secondly, the normative framework may not only constrain but also enable certain policies. As has been seen, states have been keen to exploit the territorial structure of the refugee regime in order to realise protection differentials. Similarly, when offshoring migration control to third state territory or territorial waters, it is exactly by claiming the sovereign jurisdiction and concomitant refugee protection obligations of the territorial state that the responsibility of the offshoring state is sought to be avoided.

To the extent that these observations hold true for other fields, a new position between the dominant black and white readings of human rights law may need to be staked out. One that on the one hand acknowledges the liberal/constructivist notion that refugee and human rights law does influence state behaviour despite the lack of any effective enforcement mechanisms. Yet on the other hand, the notion that states simply submit to human rights obligations needs to be critically reassessed. The emergence of offshoring and outsourcing policies are indicative that states are much more creative and instrumental in their relationship to international refugee and human rights law than normally assumed.

7.4.2 The *sollen* and the *sein* of refugee and human rights law

The impression that states are constantly seeking to affect legal interpretation to their own advantage and position practices to avoid legal constraints points back to a deeper conflict within refugee and human rights law. Inherent in the very idea of human rights is the assumption of their universality, or at least a normative ideal that they ought to be respected everywhere and regardless of whom is exercising power. At the same time, however, human rights are equally put forward as positive law, clad and locked in the form of international treaties. In becoming positive law normative ideals may first of all be cut down to what states in the end are willing to sign up for. The difficulty in codifying an actual 'right to asylum' as a matter of binding international law is an example in point. But equally, as positive law the normative ideals are awkwardly sought reconciled with an existing normative framework structured around idealised but ever strong principles of national sovereignty.

It is around this tension between the '*sollen*' and the '*sein*' of refugee and human rights that interpretation in cases concerning offshoring and outsourcing revolves. The particularity of human rights law is that it necessarily remains both a normative ideal and a body of positive law, simultaneously both the *sollen* and the *sein*. The present analysis has initially advanced from the latter, taking heed of both the territorial structure of instruments like the Refugee Convention and the limitations posed by national sovereignty principles in establishing extraterritorial jurisdiction or state responsibility for private conduct. Yet, as should also be clear from the preceding analysis, the ideal of universality is equally present at every stage of interpretation and has in several respects served to extend the scope of refugee and human rights responsibility in the light of new practices, beyond what drafters might originally have intended or foreseen.

The *sein* and the *sollen* of human rights law could be argued to constitute a double structure that may help in understanding not just the enduring conflicts over interpretation, but also the particular dynamic quality of refugee and human rights law. How an issue is framed within this double structure is crucial, as the perspective from which arguments are advanced will often be determinative of the interpretative outcome. Those who hope to expand the reach of human rights law will tend to start from a conceptualisation of human rights as a universal ideal and from there emphasise their relevance and application to the reality of current day practices. Conversely, from the

perspective of offshoring and outsourcing states, an argument advancing from national sovereignty may be employed to superimpose territorial and public/private divisions of authority, regardless of *de facto* practices to the contrary, in order to shed or limit correlate human rights responsibilities.

Just as international refugee and human rights law may be seen to constrain or condition the politics of migration control, deciphering the legal structures surrounding extraterritorial application of human rights and state responsibility for private conduct thus conversely lays bare a playing field for the political in the interpretation of the exact scope of human rights obligations. In this process international human rights law no longer merely serves to harness the exercise of political power, it may also be sought to be instrumentalised as a juridical cover in order to exercise power unconstrained by law.

7.4.3 Reconciling national sovereignty and the effectiveness of human rights law

In light of these considerations, the final question of course remains how this field will develop in the future. This concerns not only the offshoring and outsourcing of migration control, but more generally the application of human rights law to situations of extraterritorial action and where private actors are involved in the exercise of otherwise public powers.

Arguably, the stakes are high. On the one hand there is a real risk to the effectiveness of international refugee and human rights law from those building an interpretation entirely based on principles of national sovereignty. As Theodor Meron concluded in response to the United States Supreme Court judgement in the *Sale* case, '[n]arrow territorial interpretation of human rights treaties is anathema to the basic idea of human rights' (Meron 1995: 82). A blind refusal of state responsibility in cases of privatisation and extraterritorial application of refugee and human rights instruments would only create a further incentive for states to move the less palatable issues of governance to foreign territories and private actors with all that follows from this in terms of a shrinking of the rule of law and breaking of the link between legitimacy and power. Even the current *status quo* may be argued to constitute a severe legitimacy crisis allowing obvious gaps in which states seem to strategically position interception measures.

On the other hand however, only relying on the *sollen* of human rights and completely giving up geographical and public/private boundaries for state

responsibility may entail equal complications. This not only relates to the tricky issue of dividing up and tailoring responsibility between states – if all states are responsible everywhere is anyone in particular in practice liable anywhere, and how are positive and more material human rights obligations effectively guaranteed beyond borders? Or to the more practical and resource-based arguments sometimes put forward by national administrations, that opening up human rights instruments for extraterritorial application would unleash a horde of hard to assess complaints on already overburdened international and national judiciaries. More fundamentally, simply doing away with the principle of territoriality and the public/private distinction in order to realise human rights responsibility in situations of offshoring and outsourcing is unlikely to be compatible with general international law. Claiming that human rights is a legal regime *sui generis* will almost inevitably undermine the claim of human rights to be exactly positive law. Even more than the offshoring and outsourcing practices themselves, such a move may risk overstretching the politico-legal conception of 'the state' and thereby shake the very foundations upon which not just international refugee and human rights law but our entire political imaginary is founded.

A balanced approach may ultimately be both most desirable and most realistic. The contours of one such may already be appearing. The developing case law and writings on both extraterritorial jurisdiction and attribution of private conduct suggest that clearer legal principles for both of these are being developed and reinforced through each concrete case application. Yet, rather than becoming 'mainstream' or 'business as usual', certain thresholds are still being upheld and instances are repeatedly presented as *extra*-ordinary or as exceptions to the ordinary *modus operandi*. While human rights jurisprudence in cases of offshoring and outsourcing may thus develop a more functional conception of extraterritorial jurisdiction and make wider references to due diligence obligations, these developments do not seem to revoke more traditionalist approaches. It is as if there is a fundamental barrier that is hard to move past, a conceptual history that makes it cognitively difficult to conceive of jurisdiction not tied to territorial claims or human rights obligations not exclusively concerned with the actions of states' own authorities.

In that sense, one might expect extraterritorial human rights obligations and state responsibility for private actions to develop as a 'border theorem'. That is, a conceptual framework employed to describe a certain confined field or issue, yet one that does not replace the ordinary paradigm, but merely limits its field of application (Rozental 1955: 327). The concept has been used to describe the relation between Newtonian physics and quantum mechanics.

Quantum mechanics was developed because classical physics theory proved insufficient to explain phenomena at the atomic level. Quantum mechanics dissolves the distinction between waves and particles, and light and matter, much as a notion of functional jurisdiction dissolves the distinction between each polity's exclusive sphere of authority and attribution of private conduct the private/public distinction. Yet, as Niels Bohr was acutely aware, even though the phenomena he wanted to explain fell outside existing theory, the very description of his theory, and of the experimental set-up, would have to conform to the language and rules of traditional physics for others to accept it (Bohr 1957: 88). Thus, the distinction between particles and waves has survived both in everyday usage and as epistemically distinct categories.

Similarly, the language of national sovereignty and its associated norms of territorial exclusivity and distinction between public and private are unlikely to falter with the advent of offshoring or outsourcing. Territorial jurisdiction and state-centrism will remain the epistemic starting points as long as the world still consists of sovereign states, and remain an appropriate and sufficient normative framework to guide the majority of situations where the exercise of public power is carried out by states' own authorities and effected within their respective national boundaries. When confronted with the, albeit growing, exception of extraterritoriality and privatisation, this framework is the backdrop for any judiciary. This is not to say that the law on jurisdiction and state responsibility will remain at *status quo*, far from it. Within their spheres of application we may well see gradual and potentially far-reaching developments in both. Yet, there is little to suggest that such developments will substantially alter the ordinary *modus operandi* of international law which springs from a conception of the state as defined through geographic boundaries and a sovereign-subject dichotomy. To the extent that refugee and human rights law wants to be considered a genuine part of general international law, these norms are likely to continue to exercise importance. It will thus remain the challenge for both national and international judiciaries to develop a concept of jurisdiction and attribution that fits our global age while still couching it within the language of national sovereignty.

International Treaties

American Convention on Human Rights. 22 November 1969. 1144 UNTS 123.

Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. 10 December 1984. 1465 UNTS 85.

Convention on the Law of the Sea. 10 December 1982. 1833 UNTS 397.

Convention on the Rights of the Child. 20 November 1989. 1577 UNTS 3.

Convention on the Territorial Sea and Contiguous Zone. 29 April 1958. 516 UNTS 205.

Convention Relating to the International Status of Refugees. 28 October 1933. 159 LNTS 3663.

Convention Relating to the Status of Refugees. 28 July 1951. 189 UNTS 2545.

European Convention for the Protection of Human Rights and Fundamental Freedoms. 4 November 1950. 213 UNTS 221.

Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War. 12 August 1949. 75 UNTS 287.

International Covenant on Civil and Political Rights. 16 December 1966. 999 UNTS 172.

International Covenant on Economic, Social and Cultural Rights. 16 December 1966. 993 UNTS 3.

International Convention for the Safety of Life at Sea. 1 November 1974. 1184 UNTS 3.

International Convention on Maritime Search and Rescue. 29 April 1979. 1405 UNTS 97.

International Convention on the Elimination of All Forms of Racial Discrimination. 21 December 1965. 60 UNTS 195.

OAU Convention governing Specific Aspects of Refugee Protection in Africa. 10 September 1969. 10011 UNTS 14691.

Statute of the International Court of Justice. 26 June 1945. 1 UNTS XVI.

Universal Declaration of Human Rights. 10 December 1948. UN General Assembly Resolution 217A(III).

Vienna Convention on the Law of Treaties. 24 May 1969. 1155 UNTS 331.

Case law

International Court of Justice

Case concerning Application of the Convention on the Prevention and Punishment of Genocide (Bosnia-Herzegovina v. Yugoslavia) (Preliminary Objections). International Court of Justice. 11 July 1996.

Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro). International Court of Justice. 26 February 2007.

Case concerning Application of the Convention on the Prevention and Punishment of Genocide (Bosnia-Herzegovina v. Yugoslavia) (preliminary objections). International Court of Justice. 11 July 1996.

Case concerning Armed Activities on the Territory of the Congo (DR Congo v. Rwanda). International Court of Justice. 3 February 2006.

Case concerning Armed Activities on the Territory of the Congo (DR Congo v. Uganda). International Court of Justice. 19 December 2005.

Case concerning Military and Paramilitary Activities in and against Nicaragua. International Court of Justice. 27 June 1986.

Case concerning the Barcelona Traction, Light and Power Company, Ltd. International Court of Justice. 5 February 1970 (Second Phase).

Corfu Channel Case. International Court of Justice. 9 April 1949.

Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras). International Court of Justice. 11 September 1992.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion. International Court of Justice. 9 July 2004.

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion. International Court of Justice. 8 July 1996.

Namibia (South West Africa) Case. International Court of Justice. 26 January 1971.

Reservations to the Convention on the Prevention of and Punishment of the Crime of Genocide,

Advisory Opinion. International Court of Justice. 28 May 1951.

United States Diplomatic and Consular Staff in Tehran. International Court of Justice. 24 May 1980.

Permanent Court of International Justice

Case of the Island of Palmas. Permanent Court of International Justice. R.I.I.A. Vol II. 4 April 1928.

Case of the S.S. Lotus. Permanent Court of International Justice. PCIJ Series A - No. 10. 7 September 1927.

Case of the S.S. Wimbledon. Permanent Court of International Justice. PCIJ Series A - No. 1. 28 June 1923.

International Arbitral Tribunal

Trail Smelter Arbitral Decision (United States v. Canada). Trail Smelter Arbitral Tribunal. Reports of International Arbitral Awards 3 1938. 1941.

International Criminal Tribunal (ICTY)

Prosecutor v. Tadic. International Criminal Tribunal for the Former Yugoslavia (Appeals Chamber). IT-94-1-A. 15 July 1999.

Human Rights Committee

Kindler v. Canada. Human Rights Committee. UN Doc. A/46/50. 30 July 1993.

Lilian Celiberti de Casariego v. Uruguay. Human Rights Committee. UN Doc. CCPR/C/OP/1. 29 July 1981.

López Burgos v. Uruguay. Human Rights Committee. UN Doc. A/36/40. 6 June 1979.

Ng v. Canada. Human Rights Committee. Complaint No. 469/1991. UN Doc. A/49/40 Vol. II. 5 November 1993.

Committee Against Torture

Sadiq Shek Elmi v. Australia. Committee Against Torture. Comm. No. 120/1998. 25 May 1999.

European Court of European Rights

A. v. United Kingdom. European Court of Human Rights. Appl. No. 25599/94. 23 September 1998.

Ahmed v. Austria. European Court of Human Rights. Appl. No. 25964/94. 17 December 1996.

Al-Adsani v. United Kingdom. European Court of Human Rights. Appl. No. 25763/97. 21 November 2001.

Amuur v. France. European Court of Human Rights. Appl. No. 19776/92. 25 June 1996.

Assanidze v. Georgia. European Court of Human Rights. Appl. No. 71503/01. 8 April 2004.

Bankovic and Others v. Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxemburg, Netherlands, Norway, Poland, Portugal, Spain, Turkey and the UK. European Court of Human Rights. Appl. No. 5207/99. 12 December 2001 (Grand Chamber).

Behrami and Behrami v. France and Saramati v. France, Germany and Norway. European Court of Human Rights. Appl. No. 71412/01 and 78166/01. 2 May 2007 (Admissibility).

Bertrand Russell Peace Foundation Lim. v. United Kingdom. European Court of Human Rights. Appl. No. 7597/76. 2 May 1978.

Bosphorus Airways v. Ireland. European Court of Human Rights. Appl. No. 45036/98. 30 June 2005.

Chahal v. United Kingdom. European Court of Human Rights. Appl. No. 22414/93. 15 November 1996.

Cyprus v. Turkey. European Court of Human Rights. Appl. No. 25781/94. 10 May 2001.

Drozd and Janousek v. France and Spain. European Court of Human Rights. Appl. No. 12747/87. 26 June 1992.

Edwards v. the United Kingdom. European Court of Human Rights. Appl. No. 13071/87. 16 December 1992.

Ergi v. Turkey. European Court of Human Rights. Appl. Nos. 66/1997/850/1057. 28 July 1998.

Freda v. Italy. European Commission on Human Rights. 8916/80. 7 October 1980.

Gentilhomme and Others v. France. European Court of Human Rights. Appl. No. 48205/99, 48207/99 and 48209/99. 14 May 2002.

Georgia Andreou v. Turkey. European Court of Human Rights. Appl. No. 45653/99. 3 June 2008 (Admissibility).

H.L.R. v. France. European Court of Human Rights. Appl. No. 24573/94. 29 April 1997.

European Roma Rights Centre and others v. Immigration Officer at Prague Airport and another. House of Lords. UKHL 55. 9 December 2004.

Ilascu and Others v. Moldova and Russia. European Court of Human Rights. Appl. No. 48787/99. 8 July 2004 (Grand Chamber).

Ilse Hess v. United Kingdom. European Commission of Human Rights. Appl. No. 6231/73. 2 DR (1975-76) 72.

Isaak and Others v. Turkey. European Court of Human Rights. Appl. No. 44587/98. 28 September 2006 (admissibility).

Issa and Others v. Turkey. European Court of Human Rights. Appl. No. 31821/96. 16 November 2004.

Klaas v. Germany. European Court of Human Rights. Appl. No. 15473/89. 22 September 1993.

Loizidou v. Turkey. European Court of Human Rights. Appl. No. 15318/89. 18 December 1996.

Medvedyev and Others v. France. European Court of Human Rights. Appl. No. 3394/03. 10 July 2008.

N v. Finland. European Court of Human Rights. Appl. No. 38885/02. 26 July 2005.

Öcalan v. Turkey. European Court of Human Rights. Appl. no. 46221/99. 12 March 2003.

Osman v. United Kingdom. European Court of Human Rights. Appl. No. 23452/94. 28 October 1998.

Reinette v. France. European Court of Human Rights. Appl. No. 14009/88. 2 October 1989.

Sánchez Ramirez v. France. European Commission of Human Rights. Appl. No. 28780/95. 24 June 1996.

Siliadin v. France. European Court of Human Rights. Appl. No. 73316/01. 26 July 2005.

Soering v. United Kingdom. European Court of Human Rights. Appl. No. 14038/88. 7 July 1989.

Solomou v. Turkey. European Court of Human Rights. Appl. No. 36832/97. 18 May 1999 (admissibility).

Stocke v. Germany. European Commission of Human Rights. Appl. No. 11755/85. 19 March 1991.

T.I. v. United Kingdom. European Court of Human Rights. Appl. No. 43844/98. 7 March 2000 (Admissibility).

Vidal v. Belgium. European Court of Human Rights. Appl. No. 12351/86. 22 April 1992.

W v. Ireland. European Court of Human Rights. Appl. No. 9360/81. 28 February 1983.

W.M. v. Denmark. European Commission of Human Rights. Appl. No. 17392/90. 14 October 1992.

X and Y v. Switzerland. European Commission of Human Rights. Appl. No. 7289/75 and 7349/76. 14 July 1977.

X v. Belgium. European Commission on Human Rights. Appl. No. 984/61. 29 May 1961.

X v. United Kingdom. European Commission of Human Rights. Appl. No. 7547/77. 15 December 1977.

X. v. Federal Republic of Germany. European Commission on Human Rights. Appl. No. 1611/62. 25. September 1965.

Xhavara and fifteen v. Italy and Albania. European Court of Human Rights. Appl. No. 39473/98. 11 January 2001 (Admissibility).

Z. v. United Kingdom. European Court of Human Rights. Appl. No. 29392/95. 10 May 2001.

Inter-American Court and Commission on Human Rights

Armando Alejandre Jr. and Others v. Cuba ('Brothers to the Rescue'). Inter-American Commission on Human Rights. Case 11.589. 29 September 1999.

Coard et al. v. United States. Inter-American Commission on Human Rights. Case 10.951. 29 September 1999.

Haitian Center for Human Rights v. United States ('US Interdiction of Haitians on the High Seas'). Inter-American Commission of Human Rights. Case 10.675. 13 March 1997.

Rafael Ferrer-Mazorra and Others v. United States. Inter-American Commission of Human Rights. Case 9903. 4 April 2001.

Salas and Others v. the United States ('US military intervention in Panama'). Inter-American Commission for Human Rights. Case No. 10.573. 14 October 1993.

Velásquez Rodríguez v. Honduras. Inter-American Court of Human Rights. Series C, No. 4 (1988). 29 July 1988.

National courts

Al-Skeini and others v. Secretary of State for Defence. House of Lords. UKHL 26. 13 June 2006.

Boumediene et al. v. Bush. United States Supreme Court. 06-1195, 553 US. 12 June 2008.

Case Regarding Carrier Responsibilities. Austrian Federal Constitutional Court (Verfassungsgerichthof). G224/01. 1 October 2001.

Linea Aerea Nacional de Chile, SA v. Messner. United States Court of Appeals for the Second Circuit. 65F 3d. 1034 (2nd Cir. 1995).

R. (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport. Court of Appeal. QB 811 EWCA Civ 666. 20 May 2003.

R. v. Secretary of State for the Home Department, ex parte Robert Denzil Sritharan and Benet Marianayagam. United Kingdom High Court (England and Wales). Immigration Appeal Reports 184 1993. 24 February 1992.

R. v. Secretary of State for the Home Department, ex parte Yogathas. United Kingdom House of Lords. 29 October 2002.

Sale, Acting Cmmr, Immigration and Naturalization Service v. Haitian Center Council. United States Supreme Court. 113 S.Ct. 2549, 509 US 155. 21 June 1993.

Scandinavian Airlines Flight SK 911 in Fine Proceedings. Board of Immigration Appeals. NYC 10/52.6793. Interim Decision 3149. 26 February 1991.

Bibliography

Aalberts, Tanja E., and Wouter Werner. 2008. Sovereignty Beyond Borders: Sovereignty, Self-Defense, and the Disciplining of the State. In *Sovereignty Games: Instrumentalising state sovereignty in Europe and beyond*, edited by R. Adler-Nissen and T. Gammeltoft-Hansen. New York: Palgrave-Macmillan. 129-150.

Abeyratne, R.I.R. 1998. Air Carrier Liability and State Responsibility for the Carriage of Inadmissible Persons and Refugees. *International Journal of Refugee Law* 10 (4):675-687.

Adler-Nissen, Rebecca, and Thomas Gammeltoft-Hansen, eds. 2008. *Sovereignty Games: Instrumentalizing State sovereignty in Europe and beyond*. New York: Palgrave.

Agamben, Giorgio. 1998. *Homo Sacer: Sovereign Power and Bare Life*. Stanford: Stanford University Press.

Allains, Jean. 2001. The *Jus Cogens* Nature of *Non-Refoulement*. *International Journal of Refugee Law* 13 (4):533-558.

Allott, Philip. 1990. *Eunomia: New Order for a New World*. Oxford: Oxford University Press.

Alston, Philip. 1996. Introduction. In *Human Rights Law*, edited by P. Alston. Aldershot: Dartmouth. xi-xxvi.

———. 1997. The Myopia of Handmaidens: International Lawyers and Globalization. *European Journal of International Law* 8:435-448.

———. 2001. Downsizing the State in Human Rights Discourse. In *Democracy and the Rule of Law*, edited by N. Dorden and P. Grifford. Washington, DC: Congressional Quarterly Press. 357-368.

———. 2005. The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors? In *Non-State Actors and Human Rights*, edited by P. Alston. Oxford: Oxford University Press. 3-36.

Amerasinghe, Chittharanjan Felix. 1990. *Local Remedies in International Law*. Cambridge: Cambridge University Press.

Andrisani, Paul J., et al. 2002. *The New Public Management: Lessons from Innovating Governors and Mayors*. Norwell, MA: Kluwer.

Anker, Deborah E. 2002. Refugee Law, Gender and the Human Rights Paradigm. *Harvard Human Rights Journal* 15:133-154.

Armstrong, David, et al. 2007. *International Law and International Relations*. Cambridge: Cambridge University Press.

Ayling, J., and P. Grabosky. 2006. Policing By Command: Enhancing Law Enforcement Capacity through Coercion. *Law and Policy* 28 (4):420-443.

Bacon, Christine. 2005. The Evolution of Immigration Detention in the UK: the Involvement of Private Prison Companies. RSC Working Paper No. 27. Oxford: Refugee Studies Centre.

Barnes, Richard. 2004. Refugee Law at Sea. *International and Comparative Law Quarterly* 53 (1):47-77.

Barnett, Laura. 2002. Global Governance and the Evolution of the International Refugee Regime. New Issues in Refugee Research No. 54. Geneva: United Nations High Commissioner for Refugees.

Barnidge, Robert P. Jr. 2008. *Non-State Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle*. The Hague: Asser Press.

Barutciski, Michael, and Astrid Suhrke. 2001. Lessons from the Kosovo Refugee Crisis: Innovations in Protection and Burden-Sharing. *Journal of Refugee Studies* 14 (2):95-134.

Beck, Robert J. 1999. Britain and the 1933 Refugee Convention: National or State Sovereignty? *International Journal of Refugee Law* 11 (4):597-623.

Bello, Judith Hippler, and Juliane Kokott. 1997. Amuur v. France. *American Journal of International Law* 91 (1):147-152.

Bem, Kazimierz. 2004. The Coming of a 'Blank Cheque' - Europe, the 1951 Convention and the 1967 Protocol. *International Journal of Refugee Law* 16 (4):609-627.

Berman, Franklin. 2003. Jurisdiction: The State. In *Asserting Jurisdiction*, edited by P. Capps, et al. Portland: Hart Publishing. 2-15.

Betts, Alexander. 2005. International Cooperation Between North and South to Enhance Refugee Protection in Regions of Origin. RSC Working Paper No. 25. Oxford: Refugee Studies Centre.

———. 2006. Towards a Mediterranean Solution? Implications for the Region of Origin. *International Journal of Refugee Law* 18 (3/4):652-677.

Bigo, Didier. 2000. When two becomes one: Internal and external securitisations in Europe. In *International Relations and the Politics of European Integration: Power, Security and Community*, edited by M. Kelstrup and M. C. Williams. London: Routledge. 171-205.

———. 2002. Security and Immigration: Towards a Critique of the Governmentality of Unease. *Alternatives* 27:63-92.

Bigo, Didier, and Elspeth Guild, eds. 2005. *Controlling Frontiers: Free Movement Into and Within Europe*. London: Ashgate.

Bina, Mark. 2005. Private Military Contractor Liability and Accountability after Abu Ghraib. *John Marshall Law Review* 39.

Blandhol, Sverre. 2003. Nordisk rettspragmatisme: Savigny, Ørsted og Schweigaard om vitenskap og metode, Oslo Universitet. Oslo.

Bohr, Niels. 1957. *Atomfysik og Menneskelig Erkendelse*. København: Schultz.

Bolton, John. 2000. Is There Really "Law" in International Affairs? *Transnational Law and Contemporary Problems* 10:1-48.

Bostock, Chantal Marie-Jeanne. 2002. The International Legal Obligations owed to the Asylum Seekers on the MV Tampa. *International Journal of Refugee Law* 14 (2/3):279-301.

Boswell, Christina. 2003. The 'external dimension' of EU immigration and asylum policy. *International Affairs* 79 (3):619-638.

Brittain-Catlin, William. 2005. *Offshore: The Dark Side of the Global Economy*. New York: Picador, Farrar, Straus and Giroux.

Brouwer, Andrew, and Judith Kumin. 2003. Interception and Asylum: When Migration Control and Human Rights Collide. *Refuge* 21 (4):6-24.

Brownlie, Ian. 1998. *Principles of Public International Law*. Oxford: Oxford University Press.

Buergenthal, Thomas. 2001. The U.N. Human Rights Committee. *Max Planck Yearbook of United Nations Law* 5:341-98.

Bullard, Alice. 2008. *Human Rights in Crisis*. Aldershot: Ashgate.

Burchill, Richard. 2008. International Human Rights Law: Struggling between Apology and Utopia. In *Human Rights in Crisis*, edited by A. Bullard. Aldershot: Ashgate. 49-68.

Byers, Michael, ed. 2000. *The Role of Law in International Politics: Essays in international relations and international law*. Oxford: Oxford University Press.

Byrne, Rosemary, et al. 2002. *New Asylum Countries? Migration control and refugee protection in an Enlarged European Union*. Edited by E. Guild and J. Niessen. Vol. 4. Immigration and Asylum Law and Policy in Europe. The Hague: Kluwer Law International.

Camilleri, Joseph A., and Jim Falk. 1992. *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World*. Aldershot: Edward Elgar Publishing Limited.

Capps, Patrick, et al., eds. 2003. *Asserting Jurisdiction*. Portland: Hart Publishing.

Carling, Jørgen. 2007. The Merits and Limitations of Spain's High-Tech Border Control. *Migration Information Source*.

Carty, Anthony. 1991. Critical International Law: Recent Trends in the Theory of International Law. *European Journal of International Law* 2 (1):66-96.

Cassarino, Jean-Pierre. 2007. Informalising Readmission Agreements in the EU Neighbourhood. *The International Spectator* 42 (2):179-96.

Cassel, Douglas. 2004. Extraterritorial Application of Inter-American Human Rights Instruments. In *Extraterritorial Application of Human Rights Treaties*, edited by F. Coomans and M. T. Kamminga. Antwerp: Intersentia. 175-182.

Cassese, Antonio. 1989. *Terrorism, Politics and The Law*. Cambridge: Polity Press.

Castles, Stephen, and Mark J. Miller. 2003. *The Age of Migration: International Population Movements in the Modern World*. 3rd ed. New York: Palgrave-Macmillan.

Cerna, Christina M. 2004. Extraterritorial Application of the Human Rights Instruments of the Inter-American System. In *Extraterritorial Application of Human Rights*, edited by F. Coomans and M. T. Kamminga. Antwerp: Intersentia. 141-174.

Cerone, John. 2006. Out of Bounds? Considering the reach of international human rights law. Working Paper No. 5. New York: Center for Human Rights and Global Justice.

Charlesworth, Hilary, and Christine Chinkin. 2000. *the boundaries of international law: A feminist analysis*. Melland Schill Studies in International Law. Manchester: Manchester University Press.

Chimni, B.S. 1999. The Geopolitics of Refugee Studies and the Practice of International Institutions: A View from the South. *Journal of Refugee Studies* 11 (4).

———, ed. 2000. *International Refugee Law - A Reader*. New Delhi: Sage Publications.

Chinkin, Christine. 1999. A Critique of the Public/Private Dimension. *European Journal of International Law* 10 (2):387-395.

———. 2000. Human Rights and the Politics of Representation: Is there a role for international law. In *The Role of Law in International Politics*, edited by M. Byers. Oxford: Oxford University Press. 131-148.

Chirwa, Danwood Mzikenge. 2004. The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights. *Melbourne Journal of International Law* 5 (1):1-36.

Christoffersen, Jonas. 2008. Fair Balance: A Study of Proportionality, Subsidiarity

and Primarity in the European Convention on Human Rights. LL.D. dissertation, Faculty of Law, University of Copenhagen. Copenhagen.

Clapham, Andrew. 1993. *Human Rights in the Private Sphere*. Oxford: Clarendon Press.

———. 2006. *Human Rights Obligations of Non-State Actors*. Oxford: Oxford University Press.

Clapham, Christopher. 1999. Sovereignty and the Third World State. *Political Studies* 47 (3):522-537.

Clark, Tom. 2004. Rights Based Refuge, the Potential of the 1951 Convention and the Need for Authoritative Interpretation. *International Journal of Refugee Law* 16 (4):584-608.

Clausewitz, Karl von. 1997. *On War*. Kent: Wordsworth. Original edition, 1832.

Cockayne, James. 2007. Make or buy? Principal-agent theory and the regulation of private military companies. In *From Mercenaries to Markets*, edited by S. Chesterman and C. Lehnart. Oxford: Oxford University Press. 196-216.

Coleman, James R. 2004. Constraining Modern Mercenarism. *Hastings Law Journal* 55 (June):1493-537.

Coleman, Nils. 2009. *European Readmission Policy*. The Hague: Martinus Nijhoff Publishers.

Collinson, Sarah. 1996. Visa requirements, carrier sanctions, "safe third countries" and "readmission": the development of an asylum "buffer zone" in Europe. *Transactions* 21 (1):76-90.

Coomans, Fons, and Menno T. Kamminga, eds. 2004. *Extraterritorial Application of Human Rights Treaties*. Antwerp: Intersentia.

Craven, Matthew. 2004. Human Rights in the Realm of Order: Sanctions and Extraterritoriality. In *Extraterritorial Application of Human Rights Treaties*, edited by F. Coomans and M. T. Kamminga. Antwerp: Intersentia. 233-258.

Crawford, James. 2002. *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*. Cambridge: Cambridge University Press.

Crawford, James, and Patricia Hyndman. 1989. Three Heresies in the Application of the Refugee Convention. *International Journal of Refugee Law* 1 (2):155-179.

Crawford, James, and Simon Olleson. 2005. The Continuing Debate on a UN Convention on State Responsibility. *International and Comparative Law Quarterly* 54 (4):959-968.

Cruz, Antonio. 1994. Carriers Liability in the Member States of the European Union. CCME Briefing Paper no. 17. Brussels: Churches Commission for Migrants in

Europe.

———. 1995. *Shifting Responsibility: Carriers' liability in the Member States of the European Union and North America*. Stoke-on-Trent: Trentham Books.

Dahlberg-Larsen, Jørgen. 2001. *Pragmatisk Retsteori*. København: DJØF.

Davy, Ulrike. 1996. *Asyl und internationales Flüchtlingsrecht*. Vol. I: Völkerrechtlicher Rahmen. Wien: Österreichische Staatsdruckerei.

de Vattel, E. 1883. *The Law of Nations*. Philadelphia: T. & J.W. Johnson & Co.

Dickinson, Laura. 2007. Contract as a tool for regulating PMCs. In *From Mercenaries to Markets*, edited by S. Chesterman and C. Lehnart. Oxford: Oxford University Press. 217-38.

Dixon, Martin. 1990. *Textbook on International Law*. London: Blackstone Press.

Duffy, Helen. 2005. *The "War on Terror" and the Framework of International Law*. Cambridge: Cambridge University Press.

Dupuy, Pierre-Marie. 1998. International Law: Torn between Coexistence, Cooperation and Globalization. General Conclusions. *European Journal of International Law* 9 (2):278-86.

Durieux, Francois, and Jane McAdam. 2004. *Non-Refoulement* through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies. *International Journal of Refugee Law* 16 (1):4-24.

Edwards, Alice. 2008. The Optional Protocol to the Convention Against Torture and the Detention of Refugees. *International and Comparative Law Quarterly* 57:789-825.

Elias, T. 1992. *New Horizons in International Law*. Dordrecht: Martinus Nijhoff.

Escorihuela, Alejandro Lorite. 2003. Alf Ross: Towards a Realist Critique and Reconstruction of International Law. *European Journal of International Law* 14 (4):703-766.

Espersen, Ole, et al. 2003. *Folkeret: De internationale retsforhold*. Copenhagen: Christian Ejlers' Forlag.

Evald, Jens, and Sten Schaumburg-Müller. 2004. *Retsfilosofi, Retsvidenskab og Retskildelære*. København: DJØF.

Evans, Malcolm D. 2004. State Responsibility and the European Convention on Human Rights: Role and Realm. In *Issues of State Responsibility before International Judicial Institutions*, edited by M. Fitzmaurice and D. Sarooshi. Oxford: Hart Publishing. 139-60.

Falk, Richard. 1964. The inadequacy of contemporary theories of international law -

gaps in legal thinking. *Virginia Law Review* 50 (2):231-265.

———. 2005. Human Rights: A Descending Spiral. In *War on Terror*, edited by R. A. Wilson. Cambridge: Cambridge University Press. 225-41.

Fastenrath, Ulrich. 1993. Relative Normativity in International Law. *European Journal of International Law* 4:305-340.

Feller, Erika. 1988. Transport Carriers and Refugee Protection. In *The Role of Airline Companies in the Asylum Procedure*, edited by M. Kjærum. Copenhagen: Danish Refugee Council. 6-13.

———. 1989. Carrier Sanctions and International Law. *International Journal of Refugee Law* 1 (1):48-66.

———. 2006. Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come. *International Journal of Refugee Law* 18 (3-4):509-536.

Fernando, Basil. 2004. The Role of NGOs in Policy-Making: Campaigns against torture as an illustration. In *Revisiting the Role of Civil Society in Promoting Human Rights*, edited by L. Dhundale and E. A. Andersen. Copenhagen: Danish Institute for Human Rights. 143-63.

Finnis, John. 1980. *Natural Law and Natural Rights*. Oxford: Oxford University Press.

Fischer-Lescano, Andreas, and Tillmann Löhr. 2007. Border Control at Sea: Requirements under International Human Rights and Refugee Law. Berlin: European Center for Constitutional and Human Rights.

Fitzpatrick, J. 1996. Revitalizing the 1951 Refugee Convention. *Harvard Human Rights Journal* 9.

———. 2000. Temporary Protection of Refugees: Elements of a Formalised Regime. *American Journal of International Law* 94 (2):279-306.

Flinders, Matthew. 2006. The Politics of Public-Private Partnerships. *British Journal of Politics and International Relations* 7 (2):215-39.

Forsythe, David P. 2000. *Human Rights in International Relations*. Cambridge: Cambridge University Press.

Foucault, Michel. 1976. *The History of Sexuality*. Vol. 1. London: Penguin Press.

Fourlanos, Gerassimos. 1986. *Sovereignty and the Ingress of Aliens*. Stockholm: Almquist and Wiksell International.

Franck, Thomas. 1992. The emerging right to democratic governance. *American Journal of International Law* 86.

———. 1998. *Fairness in International Law and Institutions*. Oxford: Oxford University

Press.

Friedmann, Wolfgang. 1964. *The Changing Structure of International Law*. London: Stevens & Sons.

Fukuyama, Francis. 1989. The End of History. *The National Interest* 16:3-18.

Furuseth, Rita. 2003. Creating Security through Immigration Control: An analysis of European immigration discourse and the development towards a common EU asylum and immigration policy. NUPI Report 274. Oslo: Norsk Utenrikspolitisk Institutt.

Gammeltoft-Hansen, Hans. 1984. *Flygtningeret*. Copenhagen: Jurist- og Økonomforbundets Forlag.

Gammeltoft-Hansen, Hans, and Thomas Gammeltoft-Hansen. 2007. Retten til at søge: Om FN's Menneskerettighedsdeklaration art. 14 og EU's asylpolitik. In *Denne verden fortjener at blive forandret*, edited by E. Ersbøll, et al. Copenhagen: DJØF. 67-89.

Gammeltoft-Hansen, Thomas. 2005. The Risk of Migration Control: A reflexive analysis of the common EU asylum and immigration policy, Institute of Political Science, University of Copenhagen. Copenhagen.

———. 2006. Outsourcing Migration Management: EU, power, and the external dimension of asylum and immigration policy. DIIS Working Paper no 2006/1. Copenhagen: Danish Institute for International Studies.

———. 2006b. Filtering Out the Risky Migrant: Migration control, risk theory and the EU. AMID Working Paper Series 52/2006. Aalborg: Academy for Migration Studies in Denmark.

———. 2007. The Extraterritorialisation of Asylum and the Advent of 'Protection Lite'. Working Paper 2/2007. Copenhagen: Danish Institute for International Studies.

———. 2008. The Refugee, the Sovereign and the Sea: EU interdiction policies in the Mediterranean. In *Sovereignty Games: Instrumentalising Sovereignty in Europe and Beyond*, edited by R. Adler-Nissen and T. Gammeltoft-Hansen. New York: Palgrave.

Gammeltoft-Hansen, Thomas, and Rebecca Adler-Nissen. 2008. An Introduction to Sovereignty Games. In *Sovereignty Games: Instrumentalizing State sovereignty in Europe and beyond*, edited by R. Adler-Nissen and T. Gammeltoft-Hansen. New York: Palgrave.

Gammeltoft-Hansen, Thomas, and Hans Gammeltoft-Hansen. 2008. The Right to Seek Revisited: On the UN Human Rights Declaration Article 14 and Access

to Asylum Procedures in the EU. *European Journal of Migration and Law* 10 (4):439-459.

Garlick, Madeline. 2006. The EU Discussions on Extraterritorial Processing. *International Journal of Refugee Law* 18 (3/4):601-630.

Gatev, Ivaylo. 2006. Very Remote Control: Policing the Outer Perimeter of the EU Neighbourhood. Paper presented at The External Dimension of European Immigration Policies. European University Institute, Florence, 23-24 November.

———. 2008. Border Security in the Eastern Neighbourhood: Where Biopolitics and Geopolitics Meet. *European Affairs Review* 13:97-116.

Gavouneli, Maria. 2007. *Functional Jurisdiction in the Law of the Sea*. Hague: Martinus Nijhoff Publishers.

Geddes, Andrew. 2009. Migration as Foreign Policy? The External Dimension of EU Action on Migration and Asylum. SIEPS Report 2009:2. Stockholm: Swedish Institute for European Policy Studies.

Gibney, Mark. 2000. In Search of U.S. Refugee Policy. In *The United States and Human Rights: Looking inward and outward*, edited by D. P. Forsythe. University of Nebraska Press: Lincoln. 52-72.

———. 2008. *International Human Rights Law: Returning to Universal Principles*. Lanham, Maryland: Bowman & Littlefield.

Gibney, Mark, and Sigrun Skogly. 2009. *Extraterritorial Obligations in Human Rights Law*. University of Pennsylvania Press.

Gibney, Mark, et al. 1999. Transnational State Responsibility for Violations of Human Rights. *Harvard Human Rights Journal* 12:267-296.

Gibney, Matthew J., and Randall Hansen. 2003. Asylum Policy in the West: Past Trends, Future Possibilities. Poverty, International Migration and Asylum, Helsinki.

Gil-Bazo, Maria-Teresa. 2006. The Practice of Mediterranean States in the context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited. *International Journal of Refugee Law* 18 (3-4):571-600.

Glahn, Gerhard von. 1981. *Law Among Nations: an Introduction to Public International Law*. 4th ed. New York: Macmillan.

Goldsmith, Jack L., and Eric A. Posner. 2005. *The Limits of International Law*. Oxford: Oxford University Press.

Gondek, Michal. 2005. Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization. *Netherlands International Law Review* (2):348-387.

Goodwin-Gill, Guy. 1983. *The Refugee in International Law*. Oxford: Clarendon Press.

———. 1986. *Non-refoulement* and the New Asylum Seekers. In *The New Asylum Seekers: Refugee Law in the 1980s*, edited by D. Martin. Dordrecht: Martinus Nijhoff Publishers.

———. 1994. The Haitian Refoulement Case: A Comment. *International Journal of Refugee Law* 6 (1):103-109.

———. 1996. *The Refugee in International Law*. 2nd ed. Oxford: Oxford University Press.

———. 1996b. The Right to Leave, Return and Remain. In *The Problem of Refugees in the Light of Contemporary International Law Issues*, edited by V. Gowlland-Debbad. The Hague: Martinus Nijhoff Publishers. 93-108.

———. 2003. Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalisation, detention, and protection. In *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, edited by E. Feller, et al. Cambridge: Cambridge University Press. 185-252.

Goodwin-Gill, Guy, and Jane McAdam. 2007. *The Refugee in International Law*. 3rd ed. Oxford: Oxford University Press.

Gorlick, Brian. 1999. The Convention and the Committee against Torture: A Complementary Protection Regime for Refugees. *International Journal of Refugee Law* 11 (3):479-495.

Gornig, Gilbert-Hanno. 1987. *Das Refoulement-Verbot im Völkerrecht*. Vol. XVIII. Abhandlungen zu Flüchtlingsfragen: Wilhelm Braumüller.

Grahl-Madsen, Atle. 1963 (republished 1997). *Commentary on the Refugee Convention 1951 Articles 2-11, 13-37*. Geneva: Division of International Protection of the United High Commissioner for Refugees.

———. 1980. *Territorial Asylum*. Stockholm: Almqvist & Wiksell International.

Greenwood, Christopher. 2003. Jurisdiction, NATO and the Kosovo Conflict. In *Asserting Jurisdiction*, edited by P. Capps, et al. Portland: Hart Publishing.

Guild, Elspeth. 2001. Moving the Borders of Europe. Inaugural professorial lecture delivereat CPO Wisselleerstoel at the University of Nijmegen, 30 May 2001.

———. 2002. The Border Abroad - Visas and Border Controls. In *In Search of Europe's Borders*, edited by K. Groenendijk, et al. The Hague: Kluwer Law

International. 87-104.

———. 2004. Jurisprudence of the ECHR: Lessons for the EU Asylum Policy. In *The Emergence of a European Asylum Policy*, edited by C. D. U. d. Sousa and P. d. Bruycke. Brussels: Bruylant. 329-342.

———. 2004b. Seeking Asylum: storm clouds between international commitments and EU legislative measures. *European Law Review* 29 (2):198-218.

———. 2004c. The Borders of the European Union: Visas and carrier sanctions. *Tidsskriftet Politik* 7 (3):34-43.

———. 2005. What is a Neighbour? Examining the EU Neighbourhood Policy from the Perspective of Movement of Persons. Paper presented at Western NIS Forum for Refugee-Assisting NGOs. Yalta. 1-3 June 2005.

———. 2006. The Europeanisation of Europe's Asylum Policy. *International Journal of Refugee Law* 18 (3/4):630-652.

Guiraudon, Virginie. 2002. Before the EU Border: Remote Control of the "Huddled Masses". In *In Search of Europe's Borders*, edited by K. Groenendijk, et al. The Hague: Kluwer Law International. 191-214.

———. 2003a. The Constitution of a European Immigration Policy Domain: a political sociology approach. *Journal of European Public Policy* 10 (2):263-282.

———. 2003b. Enlisting Third Parties in Border Control: A comparative study of its causes and consequences. Paper presented at Managing International and Inter-Agency Cooperation at the Border. Working Group on Democratic Control of International Security Services of the Geneva Centre for the Democratic Control of Armed Forces. Geneva. 13-15 March 2003.

Guiraudon, Virginie, and Gallya Lahav. 2000. The State Sovereignty Debate Revisited: The Case of Migration Control. *Comparative Political Studies* 33 (2):751-78.

Haddad, Emma. 2003. The Refugee: The Individual between Sovereigns. *Global Society* 17 (3):297-322.

Hailbronner, Kay. 1980. Asylrecht in Völkerrecht. In *Handbuch des Asylrechts*, edited by W. Beitz and M. Wollenschläger. Baden-Baden.

———. 1988. Non-refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking. In *The New Asylum Seekers: Refugee Law in the 1980s*, edited by D. Martin. Dordrecht: Martinus Nijhoff Publishers.

———. 1996. Comments on the Rights to Leave, Return and Remain. In *The Problem of Refugees in the Light of Contemporary International Law Issues*, edited by V.

Gowlland-Debbad. The Hague: Martinus Nijhoff Publishers. 109-118.

———. 2006. Book Review of James C. Hathaway, The Rights of Refugee under International Law, Cambridge University Press, 2005. *International Journal of Refugee Law* 18 (3-4):722-725.

Hänggi, H., and F. Tanner. 2005. Promoting Security Sector Governance in the EU's Neighbourhood. Chaillot Paper No. 80, . Paris: European Union Institute for Security Studies.

Harvey, Colin. 1999. Regionalism, asylum and solidarity in Europe. In *Renegotiating Westphalia*, edited by C. Harding and C. M. Lim. The Hague: Martinus Nijhoff. 219-256.

Hathaway, James. 1992. The Emerging Politics of Non-Entree. *Refugees* 91:40-41.

———. 1995. New Directions to Avoid Hard Problems: The Distortion of the Palliative Role of Refugee Protection. *Journal of Refugee Studies* 8 (3):288-294.

———, ed. 1997. *Reconceiving International Refugee Law*. The Hague: Kluwer Law International.

———. 2005. *The Rights of Refugees under International Law*. Cambridge: Cambridge University Press.

———. 2007. Forced Migration Studies: Could We Agree Just to 'Date'? *Journal of Refugee Studies* 20 (3):349-369.

Hathaway, James, and John A. Dent. 1995. *Refugee Rights: Report on a Comparative Survey*. Toronto: York Lanes Press.

Helton, A.C. 2002. *The Price of Indifference: Refugees and Humanitarian Action in the New Century*. Council on Foreign Relations. Oxford: Oxford University Press.

Henkin, Louis. 1989. International Law: Politics, Values and Functions. *Collected Courses of Hague Academy of International Law* 216 (IV):9-416.

———. 1993. Notes from the President. *ASIL Newsletter*.

———. 1995. *International Law: Politics and Values*. The Hague: Kluwer Law International.

———. 1999. That "S" Word: Sovereignty, and Globalization, and Human Rights, etc. *Fordham Law Review* 68 (1).

Higgins, Rosalyn. 1984. The Legal Bases of Jurisdiction. In *Extra-territorial Application of Laws and Responses Thereto*, edited by C. J. Olmstead. Oxford: International Law Association / ESC Publishing Lim. 3-14.

———. 1994. *Problems and Process: International Law and How We Use It*. Oxford: Clarendon Press.

Hoppe, Carsten. 2008. Passing the Buck: State Responsibility for Private Military Companies. *European Journal of International Law* 19 (5):989-1014.

Hughes, Jane, and Fabrice Liebaut, eds. 1998. *Detention of Asylum-Seekers in Europe: Analysis and Perspectives*. The Hague: Martinus Nijhoff.

Huysmans, Jef. 2000. The European Union and the Securitization of Migration. *Journal of Common Market Studies* 38 (5):751-777.

ICMPD. 2004. Irregular transit migration in the Mediterranean—some facts, futures and insights. Vienna: ICMPD.

Isenberg, David. 2007. A government in search of cover. In *From Mercenaries to Markets*, edited by S. Chesterman and C. Lehnart. Oxford: Oxford University Press. 82-93.

Kagan, Robert. 2002. Power and Weakness. *Policy Review* 113 (3).

Kamminga, Menno T., and Martin Scheinin. 2009. *The Impact of Human Rights Law on General International Law*. Oxford: Oxford University Press.

Kelsen, Hans. 1920. *Das Problem der Souveränität und die Theorie des Völkerrechts*. Tübingen.

———. 1934. *Reine Rechtlehre. Einleitung in die rechtwissenshaftliche Problematik*. Leipzig and Vienna: Scientia Verlag.

Keohane, R. O. 1995. Hobbe's Dilemma and Institutional Change in World Politics: Sovereignty in International Society. In *Whose World Order? Uneven Globalization and the End of the Cold War*, edited by H. H. Holm and G. Sørensen. Boulder: Westview.

Keohane, R. O., and J. S. Nye. 1977. *Power and Interdependence: World Politics in Transition*. Boston: Brown Little.

Kessing, Peter Vedel. 2007. Skal danske styrker i udlandet overholde Danmarks menneskeretlige forpligtelser? *Juristen* 1.

———. 2008. Terrorbekæmpelse og menneskeret, Faculty of Law, Copenhagen University. Copenhagen.

Kjær, Kim U. 2001. *Den retlige regulering af modtagelsen af asylansøgere i en europæisk kontekst*. Copenhagen: Jurist- og Økonomforbundets Forlag.

Kjærum, Morten. 1988. The Role of Airline Companies in the Asylum Procedure. Group of Experts under the Auspices of European Consultation on Refugees and Exiles (ECRE). Copenhagen: Danish Refugee Council.

Kjølbro, Jon Fridrik. 2007. *Den Europæiske Menneskerettighedskonvention - for praktikere*. 2nd ed. Copenhagen: Jurist- og Økonomforbundets Forlag.

Klaauw, Johannes van der. 2002. European Asylum Policy and the Global Protection Regime: Challenges for UNHCR. In *Migration and the Externalities of European Integration*, edited by S. Lavenex and E. M. Ucarer. Lanham: Lexington Books. 33-54.

Kneebone, Susan. 2006. The Pacific Plan: The Provision of 'Effective Protection'? *International Journal of Refugee Law* 18 (3/4):696-722.

Koh, Harold Hongju. 1994. The "Haiti Paradigm" in United States Human Rights Policy. *The Yale Law Journal* 103 (8):2391-2435.

Koskenniemi, Martti. 1989. *From Apology to Utopia: The Structure of International Legal Argument*. Helsinki: Finnish Lawyers' Publishing Company.

———. 1997. Hierarchy in International Law: A Sketch. *European Journal of International Law* 8 (4):566-582.

———. 2000. Carl Schmitt, Hans Morgenthau and the Image of Law. In *The Role of Law in International Politics*, edited by M. Byers. Oxford: Oxford University Press. 17-34.

Krasner, Stephen D. 1999. *Sovereignty - Organized Hypocrisy*. Princeton: Princeton University Press.

———. 2004. The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law. *Michigan Journal of International Law* 25:1075-1101.

Kratochwil, Friedrich V. 1989. *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*. Cambridge: Cambridge University Press.

Kruse, Imke. 2003. Creating Europe Outside Europe: Externalities of the EU Migration Regime. Paper presented at ECPR Conference, Theories of Europeanisation. Marburg. 18-21 September 2003.

la Cour Bødtcher, Anne, and Jane Hughes. 1991. The effects of legislation imposing fines on airlines for transporting undocumented passengers. In *The Effects of Carrier Sanctions on the Asylum System*, edited by M. Kjærum. Copenhagen: Danish Refugee Council and the Danish Center of Human Rights. 6-13.

Lahav, Gallya. 2003. Migration and Security: The role of non-state actors and civil liberties in liberal democracies. Second Coordination Meeting on International Migration. New York: United Nations, Department of Economic and Social Affairs, Population Division.

Lambert, Hélène. 1999. Protection against Refoulement from Europe: Human Rights Law Comes to the Rescue. *The International and Comparative Law Quarterly* 48 (3):515-544.

Landgren, Karin. 1999. Deflecting international protection by treaty: bilateral and multilateral accords on extradition, readmission and the inadmissibility of asylum requests. New Issues in Refugee Research No. 10. Geneva: UNHCR.

Larsen, Kjetil M. 2009. Territorial Non-Application of the European Convention on Human Rights. *Nordic Journal of International Law* 78:73-93.

Lassen, Nina, and Jane Hughes. 1997. *"Safe Third Countries" - Policies in European Countries*. Copenhagen: Danish Refugee Council.

Lassen, Nina, et al. 2004. The transfer of protection status in the EU, against the background of the common European asylum system and the goal of a uniform status, valid throughout the Union, for those granted asylum. Brussels: European Commission. 25 June 2004.

Lasswell, H., and M. McDougal. 1992. *Jurisprudence for a Free Society: Studies in Law, Science and Policy*. New Haven: New Haven Press.

Lauterpacht, Elihu, and Daniel Bethlehem. 2003. The scope and content of the principle of *non-refoulement*: Opinion. In *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, edited by E. Feller, et al. Cambridge: Cambridge University Press. 87-177.

Lauterpacht, Hersch. 1934. *The Development of International Law by the Permanent Court of Justice*. New York: Longmans, Green & Co.

———. 1949. Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties. *British Yearbook of International Law* 26:48-85.

———. 1958. *The Development of International Law by the Permanent Court of International Justice*. London: Stevens & Sons.

Lavenex, Sandra. 1999. *Safe third countries: extending the EU asylum and immigration policies to Central and Eastern Europe*. New York: Central European University Press.

———. 2006. Shifting up and out: The foreign policy of European immigration control. *West European Politics* 29 (2):329-350.

Lavenex, Sandra, and Emek M. Ucarer (eds.). 2002. *Migration and the Externalities of EU Integration*. Lanham: Lexington Books.

Lavenex, Sandra, and Emek M. Ucarer. 2004. The External Dimension of Europeanization: The Case of Immigration Policies. *Cooperation and Conflict* 39 (4):417-445.

Lawson, Rick. 1998. Out of Control - State Responsibility and Human Rights: Will the ILC's Definition of the "Act of State" meet the Challenges of the Nation State in the 21st Century? In *The Role of the Nation State in the 21st Century - Essays in Honour of Peter Baehr*, edited by M. C. Castermans-Holleman, et al. The

Hague: Martinus Nijhoff. 91-116.

———. 2004. Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights. In *Extraterritorial Application of Human Rights Treaties*, edited by F. Coomans and M. T. Kamminga. Antwerp: Intersentia. 83-123.

———. 2004b. The concept of jurisdiction in the European Convention of Human Rights. In *Globalisation and Jurisdiction*, edited by P. J. Slot and M. Bulterman. Leiden: Kluwer Law International. 202-218.

———. 2006. Moving Beyond Bankovic: The Gradually Expanding Reach of the European Convention of Human Rights. Paper presented at International Society for Military Law and the Law of War XVIIth Congress. Scheveningen. 16-21 May 2006.

Leander, Anna. 2006. *Eroding State Authority? Private Military Companies and the Legitimate Use of Force*. Rome: Centro Militare di Studi Strategici.

———. 2007. The Impunity of Private Authority: Understanding PSC accountability. Paper presented at Standing Group of International Relations, ECPR. University of Torino. 12-15 September 2007

Leben, Charles. 1997. Symposium: The Changing Structure of International Law Revisited: By Way of Introduction: . *European Journal of International Law* 8 (3):399-408.

Legomsky, Stephen H. 2003. Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: the Meaning of Effective Protection. *International Journal of Refugee Law* 15 (4):567-667.

———. 2006. The USA and the Caribbean Interdiction Programme. *International Journal of Refugee Law* 18 (3/4):677-696.

Lehnart, Chia. 2007. Private Military Companies and State Responsibility. IILJ Working Paper 2007/2. New York: Institute for International Law and Justice, New York University School of Law.

Lillich, Richard B. 1991. The Soering Case. *American Journal of International Law* 85 (1):128-49.

Linderfalk, Ulf. 2001. *Om tolkningen av traktater*. Lund: Lund University.

Lindsnæs, Birgit, and Lone Lindholdt. 1998. National Human Rights Institutions: Standard Setting and Achievements. In *Human Rights Development Yearbook 1998*, edited by H. Stokke and A. Tostensen. The Hague: Kluwer Law International.

Loescher, Gil. 1992. *Refugee movements and international security*. Adelphi papers 268.

London: International Institute for Strategic Studies.

Logan, Charles H. 1990. *Private Prisons: Cons and Pros*. Oxford: Oxford University Press.

Longo, Michael. 2006. *Constitutionalising Europe: Processes And Practices*. Aldershot: Ashgate.

Lorenzen, Peer, et al. 2003. *Den Europæiske Menneskerettighedskonvention: med kommentarer (art 1-10)*. København: Jurist- og Økonomforbundets Forlag.

Loucaides, Loukis G. 2006. Determining the Extra-territorial Effect of the European Convention: Facts, Jurisprudence and the Bankovic Case. *European Human Rights Law Review* 4:391 - 407.

Lowe, Vaughan. 2000. The Politics of Law-Making: Are the Method and Character of Norm Creation Changing. In *The Role of Law in International Politics: Essays in international relations and international law*, edited by M. Byers. Oxford: Oxford University Press. 207-226.

———. 2006. Jurisdiction. In *International Law, 2nd edition*, edited by M. D. Evans. Oxford: Oxford University Press. 335-360.

———. 2007. *International Law*. Oxford: Oxford University Press.

Lucht, Hans. 2007. Ud af den globale verdens skygger. *Den Ny Verden* (2):73-82.

Lutterbeck, Derek. 2006. Policing Migration in the Mediterranean. *Mediterranean Politics* 11 (1):59-82.

Lynch, M. 2004. Forced Back: International Refugee Protection in Theory and Practice. Washington: Refugees International.

MacCormick, Neil. 2007. *Institutions of Law: An Essay in Legal Theory*. Oxford: Oxford University Press.

Magner, Tara. 2004. The Less than 'Pacific' Solution for Asylum Seekers in Australia. *International Journal of Refugee Law* 16 (1):53-90.

Malekian, Farhad. 1987. *The System of International Law: Formation, Treaties, Responsibility*. Uppsala: Uppsala University.

Malunczuk, Peter. 1997. *Akehurst's Modern Introduction to International Law*. Oxford: Routledge.

Mandal, Ruma. 2005. Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection"). Legal and Protection Policy Research Series. Geneva: UNHCR.

Mantouvalou, Virginia. 2005. Extending Judicial Control in International Law: Human Rights Treaties and Extraterritoriality. *International Journal of Human*

Rights 9 (2):147-163.

Matas, David. 1991. Carrier Sanctions: Alternatives or amendments to existing legislation. In *The Effects of Carrier Sanctions on the Asylum System*, edited by M. Kjærum. Copenhagen: Danish Refugee Council and the Danish Center of Human Rights. 27-34.

Mathew, Penelope. 2002. Australian Refugee Protection in the Wake of the Tampa. *American Journal of International Law* 96 (3):661-676.

McAdam, Jane. 2006. Seeking Asylum under the Convention on the Rights of the Child: A case for Complemtary Protection. *International Journal of Children's Rights* 14:251-274.

———. 2007. *Complementary Protection in International Refugee Law*. Oxford: Oxford University Press.

McCorquodale, Robert, and Rebecca La Forgia. 2001. Taking Off the Blindfolds: Torture by Non-State Actors. *Human Rights Law Review* 1 (2):189-218.

McCorquodale, Robert, and Penelope Simons. 2007. Responsibility Beyond Borders. *Modern Law Review* 70 (4):598-625.

McDonald, Douglas, ed. 1991. *Private Prisons and the Public Interest*. Piscataway, New Jersey: Rutger's University Press.

McGoldrick, Dominic. 2004. Extraterritorial effect of the International Covenant on Civil and Political Rights. In *Extraterritorial Application of Human Rights Treaties*, edited by F. Coomans and M. T. Kamminga. Antwerp: Intersentia.

McKenzie, Evan. 1994. *Privatopia*. Newhaven: Yale University Press.

Meijers, H. 1988. Possibilities for Guaranteeing Transport to Refugees. In *The Role of Airline Companies in the Asylum Procedure*, edited by M. Kjærum. Copenhagen: Danish Refugee Council. 16-23.

Meron, Theodor. 1995. Extraterritoriality of Human Rights Treaties. *American Journal of International Law* 89:78-82.

Milano, Enrico. 2006. *Unlawful Territorial Situations in International Law*. The Hague: Martinus Nijhoff.

Milanovic, Marko. 2008. From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties. *Human Rights Law Review* 8 (3):411-448.

Miltner, Barbara. 2005. Rescue-at-Sea and Maritime Interceptions: Issues of Refugee Protection. Paper presented at Talking Across Borders: New Dialogues in Forced Migration Studies. 10th Conference of the International Association

for the Study of Forced Migration. Centre for Refugee Studies, York University, Toronto, Canada. 18-22 June.

———. 2007. Case Comment: Broadening the Scope of Extraterritorail Application of the European Convention on Human Rights. *European Human Rights Law Review* 2:172-182.

Mohamedou, Mohammad-Mahmoud. 2001. The Effectiveness of National Human Rights Institutions. In *National Human Rights Institutions: Articles and Woking Papers*, edited by B. Lindsnæs, et al. Copenhagen: Danish Institute for Human Rights. 59-58.

Mole, Nuala. 2005. Case analysis: Issa v. Turkey: delineating the extra-territorial effect of the European Convention on Human Rights. *European Human Rights Law Review* (1):86-91.

Morgenthau, Hans J. 1940. Positivism, Functionalism and International Law. *American Journal of International Law* 34 (2):260-284.

———. 1948. The Problem of Sovereignty Reconsidered. *Columbia Law Review* 48 (3):341-365.

———. 1985. *Politics Among Nations: The Struggle for Power and Peace*. 6th ed. New York: McGraw-Hill.

Morris, Jessica, C. 2004. The Spaces In Between: American and Australian Interdiction Policies and Their Implications for the Refugee Protection Regime. *Refuge* 21 (4):51-62.

Muhm, Raoul. 2004. *The renaissance of natural law and crimes against humanity*. Roma: Vecchiarelli Editore Manziana.

Nicholson, Frances. 1997. Implementation of the Immigration (Carriers' Liability) Act 1987: Privatising immigration Functions at the Expense of International Obligations. *International and Comparative Law Quarterly* 46 (3):586-634.

Nicholson, Frances, and Volker Türk. 2003. Refugee protection in international law: an overview. In *Refugee Protection in International Law*, edited by E. Feller, et al. Cambridge: Cambridge University Press.

Nicolaidis, Kalypso, and Joyce L. Tong. 2004. Diversity or Cacophony? The continuing debate of new sources of international law. *Michigan Journal of International Law* 25:1349-1375.

Niessen, Jan, and Yongmi Schibel. 2004. International migration and relations with third countries: European and US approaches. MPG Occasional Paper. Berlin. Migration Policy Group.

Noll, Gregor. 2000. *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the*

Common Market of Deflection. The Hague: Martinus Nijhoff.

———. 2003. Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones. *European Journal of Migration and Law* 5 (3):303.

———. 2005. Seeking Asylum at Embassies: A Right to Entry under International Law? *International Journal of Refugee Law* 17 (3):542-573.

———. 2006. Asylum Claims and the Translation of Culture into Politics. *Texas International Law Journal* 41 (3):491-501.

———. 2006b. The Politics of Saving Lives: Interception, Search and Rescue and the Question of Human Rights at Sea. Paper presented at The Future of Asylum Policy in the European Union. Finnish EU Presidency, Åbo Academy, University of Turku and the Odysseus Network. Turku. 10 October 2006.

Noll, Gregor, et al. 2003. Study on the Feasibility of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum System and Goal of a Common Asylum Procedure. Brussels: European Commission.

Noll, Gregor, and Jens Vedsted-Hansen. 1999. Non-Communitarians: Refugee and Asylum Policies. In *The European Union and Human Rights*, edited by P. Alston. Oxford: Oxford University Press.

Nowak, Manfred. 1993. *U.N. Covenant on Civil and Political Rights: CCPR Commentary*. Kehl am Rhein: Engel.

O'Boyle, Richard. 2004. The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on Life after

Bankovic. In *Extraterritorial Application of Human Rights Treaties*, edited by F. Coomans and M. T. Kamminga. Antwerp: Intersentia.

Okoth-Obbo, Georges. 1996. Coping with a complex refugee crisis in Africa: Issues, problems and constraints for refugee and international law. In *The Problem of refugees in the light of contemporary international law: papers presented at the colloquium organized by the Graduate Institute of International Studies in collaboration with the United Nations High Commissioner for Refugees, Geneva 26 and 27 May 1994*, edited by V. Gowlland-Debbad. Dordrecht: Martinus Nijhoff Publishers.

Olmstead, Cecil J., ed. 1984. *Extra-territorial Application of Laws and Responses Thereto*. Oxford: International Law Association / ESC Publishing Lim.

Oppenheim, Lassa. 1992. *Oppenheim's International Law, 9th edition*. Edited by R. Jennings and A. Watts. Harlow: Longman.

Orakhelashvili, Alexander. 2003. Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights. *European Journal of International Law* 14 (3):529-568.

Osbourne, Davis, and Ted Gaebler. 1992. *Reinventing Government*. New York: Addison-Wesley.

Palan, Ronen. 2002. Tax Havens and the Commercialization of State Sovereignty. *International Organization* 56 (1):151 - 176.

———. 2003. *The Offshore World: Sovereign Markets, Virtual Places and Nomad Millionaires*. Ithaca: Cornell University Press.

Pashukanis, Evgeny. 2001 (1924). *The General Theory of Law and Marxism*. Somerset NJ: Transaction Publishers.

Pastore, Ferruccio. 2002. Aeneas' Route - Euro-Mediterranean relations and international migration. In *Migration and the Externalities of EU Integration*, edited by S. Lavenex and E. M. Ucarer. Lanham: Lexington Books. 105-123.

Pellet, Alain. 2000. "Human Rightism" and International Law. *Italian Yearbook of International Law*:3-16.

Peral, Luis. 2005. EU Protection Scheme for Refugees in the Region of Origin: Problems of Conditionality and Coherence. Paper presented at ESIL Research Forum on International Law: Contemporary Issues. Graduate Institute of International Studies (HEI). Geneva. 26-28 May.

———. 2006. Book Review: Tom Clark, The Global Refugee Regime: Charity, Management, and Human Rights. *International Journal of Refugee Law* 18 (2):475-477.

Perdersen, Michael Purchardt. 2004. Territorial Jurisdiction in Article 1 of the European Convention on Human Rights. *Nordic Journal of International Law* 73:279-305.

Plender, Richard, and Nuala Mole. 1999. Beyond the Geneva Convention: constructing a *de facto* right of asylum from international human rights instruments. In *Refugee Rights and Realities*, edited by F. Nicholson and P. Twomey. Cambridge: Cambridge University Press. 81-105.

Pugh, Michael. 2004. Drowning not Waving: Boat People and Humanitarianism at Sea. *Journal of Refugee Studies* 17 (1):50-68.

Purvis, Nigel. 1991. Critical legal studies in public international law. *Harvard International Law Journal* 32 (1):80-127.

Reinisch, August. 2005. The Changing International Framework for Dealing with Non-State Actors. In *Non-State Actors and Human Rights*, edited by P. Alston.

Oxford: Oxford University Press. 37-89.

Reisman, M. 1992. The view from the New Haven school of international law. Proceedings from the 86th Annual Meeting of the American Society of International Law, Washington DC.

Reus-Smit. 2004. *The Politics of International Law*. Cambridge: Cambridge University Press.

Reydams, Luc. 2003. *Universal Jurisdiction: International and Municipal Legal Perspectives*. Oxford: Oxford University Press.

Riedel, Eibe. 1991. Standards and Sources. Farewell to the Exclusivity of the Sources Triad in International Law. *European Journal of International Law* 2:58-84.

Robinson, Nehemiah. 1953. *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation - A Commentary*. New York: Institute for Jewish Affairs.

Rodger, Jessica. 2001. Defining the Parameters of the Non-refoulement Principle. LLM Research Paper International Law. Wellington: Faculty of Law, Victoria University.

Rodier, Claire. 2006. Analysis of the external dimension of the EU's asylum and immigration policies'. European Parliament, Directorate-General for External Policies of the Union Directorate B - Policy Department. 08.06.2006.

Ross, Alf. 1953. *Om Ret og Retfærdighed: En indførelse i den analytiske retsfilosofi*. København: Nyt Nordisk Forlag Arnold Busck.

———. 1961. *Lærebog i Folkeret*. 4th ed. København: Munksgaards Forlag.

Roxstrom, Erik, et al. 2005. The NATO Bombing Case (Bankovic et al. v. Belgium et al.) and the Limits of Western Human Rights Protection. *Boston University International Law Journal* 23 (1):56-136.

Rozental, Stefan. 1955. Om komplementaritet i atomfysikken. *Fysisk Tidsskrift*:325–342.

Rudolph, Christopher. 2003. Globalization and Security: Migration and the Evolving Conceptions of Security in Statecraft and Scholarship. *Security Studies* 13 (1):1-32.

Ruff, Anne. 1989. The Immigration (Carriers' Liability) Act 1987: its Implications for Refugees and Airlines. *International Journal of Refugee Law* 1 (4):481-500.

Ruggie, John Gerard. 1993. Territoriality and Beyond: Problematizing Modernity in International Relations. *International Organization* 47 (1):139-174.

Rutinwa, Bonaventure. 1999. The end of asylum? The changing nature of refugee

policies in Africa. New Issues in Refugee Research Working Paper No. 5. Geneva: UNHCR.

Sakellaropoulos, Spyros. 2007. Towards a Declining State? The Rise of the Headquarters State. *Science and Society* 71 (1):7-34.

Salcedo, Juan Antonio Carrilo. 1997. Reflections on the Existence of a Hierarchy of Norms in International Law. *European Journal of International Law* 8 (4):583-595.

Salter, Mark B. 2007. Governmentalities of an Airport: Heterotopia and Confession. *International Political Sociology* 1 (1):49-66.

Samers, Michael. 2004. An emerging geopolitics of illegal immigration in the European Union. *European Journal of Migration and Law* 6 (1):27-45.

Sassen, Saskia. 1995. *Losing Control? Sovereignty in an age of globalization*. New York: Columbia University Press.

———. 2006. *Territory, Authority, Rights: From Medieval to Global Assemblages*. Princeton: Princeton University Press.

Scheinin, Martin. 2002. State Responsibility, Good Governance and Indivisible Human Rights. In *Human Rights and Good Governance: Building bridges*, edited by H.-O. Sano and G. Alfredssson. The Hague: Martinus Nijhoff. 29-45.

———. 2004. Extraterritorial effect of the International Covenant on Civil and Political Rights. In *Extraterritorial Application of Human Rights Treaties*, edited by F. Coomans and M. T. Kamminga. Antwerp: Intersentia. 73-82.

Schieder, Siegfried. 2000. Pragmatism as a Path towards a Discoursive and Open Theory of International Law. *European Journal of International Law* 11 (3):663-698.

Schmitt, Carl. 1985. *Political Theology: Four Chapters on the Concept of Sovereignty*. Boston: Massachussets Institute of Technology Press. Original edition, 1922.

———. 2003. *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*. New York: Telos Press. Original edition, 1950.

Scholten, Sophie, and Paul Minderhoud. 2008. Regulating Immigration Control: Carrier Sanctions in the Netherlands. *European Journal of Migration and Law* 10:123-47.

Schutter, Olivier De. 2006. Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations. Background paper to the SRSG on human rights and transnational corporations. New York: UN High Commissioner for Human Rights.

Schwarz, Rolf, and Oliver Jütersonke. 2005. Divisible Sovereignty and the

Reconstruction of Iraq. *Third World Quarterly* 26 (4-5):649-665.

Scobbie, Ian. 1997. The Theorist as a Judge: Hersch Lauterpacht's Concept of the International Judicial Function. *European Journal of International Law* 8 (2):264-298.

Selm, Joanne van. 2001. Access to Procedures, 'Safe Third Countries', 'Safe Countries of Origin' and 'Time Limits'. Global Consultations on International Protection, Third Track, Background Paper. Geneva: UNHCR.

Shahabuddeen, M. 1994. Developing countries and the idea of international law. In *Essays in Honour of Wang Tieya*, edited by R. Macdonald. Dordrecht: Martinus Nijhoff.

Sianni, Areti. 2003. Interception Practices in Europe and Their Implications. *Refuge* 21 (4):25-34.

Simma, Bruno. 1995. International Human Rights and General International Law: A Comparative Analysis. In *Collected Courses of the Academy of European Law, Volume IV, Book 2*, edited by A. o. E. Law. The Hague: Kluwer Law International. 153-236.

Singer, Peter W. 2003. *Corporate Warriors: The Rise of the Privatized Military Industry*. Ithaca: Cornell University Press.

———. 2004. War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law. *Colombia Journal of Transnational Law* 42:521-49.

Sinha, S. Prakash. 1971. *Asylum and International Law*. The Hague: Martinus Nijhoff.

Skogly, Sigrun. 2006. *Beyond National Borders: States' Human Rights Obligations in International Cooperation*. Antwerp: Intersentia.

Skogly, Sigrun, and Mark Gibney. 2002. Transnational Human Rights Obligations. *Human Rights Quarterly* 24 (3):781-798.

Slaughter, Anne-Marie. 1993. International Law and International Relations: A Dual Agenda. *American Journal of International Law* 87.

———. 2000. Governing the Global Economy through Government Networks. In *The Role of Law in International Politics: Essays in international relations and international law*, edited by M. Byers. Oxford: Oxford University Press.

Smith, Brian D. 1988. *State Responsibility and the Marine Environment: The Rules of Decision*. Oxford: Clarendon Press.

Sørensen, G. 1999. Sovereignty: Change and Continuity in a fundamental institution. *Political Studies* 47 (3):590-604.

Spiermann, Ole. 1995. *Enten & Eller: Studier i suverænitetsbegreber*. Copenhagen: Jurist-

og Økonomforbundets Forlag.

———. 2004. *Moderne Folkeret*. 2nd ed. Copenhagen: Jurist- og Økonomforbundets Forlag.

———. 2006. *Moderne Folkeret*. 3rd ed. Copenhagen: Jurist- og Økonomforbundets Forlag.

Spijkerboer, Thomas. 2007. The Human Cost of Border Control. *European Journal of Migration and Law* 9:127-39.

Steiner, Henry. 2006. International Protection of Human Rights. In *International Law, 2nd edition*, edited by M. D. Evans. Oxford: Oxford University Press. 753-782.

Steiner, Henry, and Philip Alston, eds. 2000. *International Human Rights in Context: Law, Politics, Morals*. 2nd ed. Oxford: Oxford University Press.

Sterkx, Steven. 2004. Curtailing the comprehensive approach: governance export in EU asylum and migration policy. Paper presented at ECPR Joint Sessions of Workshops. Uppsala 13-18 April 2004.

Steyn, Johan. 2004. Guantanamo Bay: The legal black hole. *International and Comparative Law Quarterly* 53 (1):1-15.

Strange, Susan. 1996. *The Retreat of the State*. Cambridge: Cambridge University Press.

Stuart, Allison. 2005. The Inter-American System of Human Rights and Refugee Protection: Post 11 September 2001. *Refugee Survey Quarterly* 24 (2):67-82.

Stuer Lauridsen, Preben. 1992. *Om ret og retsvidenskab: Lærebog i almindelig retslære*. København: Gyldendal.

Sur, Serge. 1997. The State between Fragmentation and Globalization. *European Journal of International Law* 8 (3):421-435.

Sztucki, Jerzy. 1989. The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme. *International Journal of Refugee Law* 1 (3):285-318.

Taylor, Savitri. 1994. Australia's implementations of its non-refoulement obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights. *University of New South Wales Law Journal* 17 (2).

———. 2006. Protection Elsewhere/Nowhere. *International Journal of Refugee Law* 181 (2):283-312.

Tesón, F. 1998. *A Philosophy of International Law*. Boulder: Vestview.

Teubner, Günther, ed. 1997. *Global Law Without a State*. Dartmouth: Aldershot.

Tomuschat, Christian. 1996. State Responsibility and the Country of Origin. In *The Problem of Refugees in the Light of Contemporary International Law Issues*, edited by V. Gowlland-Debbad. The Hague: Kluwer. 59-80.

———. 2008. *Human Rights: Between Idealism and Realism*. 2nd ed. Oxford: Oxford University Press.

Toope, Stephen J. 2000. Emerging Patterns of Governance and International Law. In *The Role of Law in International Politics*, edited by M. Byers. Oxford: Oxford University Press.

Turner, Simon, et al. 2006. European Attitudes and Policies towards the Migration/Development Nexus. In *Mediterranean Transit Migration*, edited by N. N. Sørensen. Copenhagen: Danish Institute for International Studies. 67-100.

Turpin, James. 2002. *The Jurisdictional Art of Separation: the role of jurisdiction in the management of territorial and self-determination disputes - mixed jurisdiction in the Anglo-French condominium of the new Hebrides 1906-1980*. PhD dissertation. Florence: European University Institute.

UNHCR. 1995. *The State of the World's Refugees: In Search of Solutions*. Oxford: Oxford University Press.

———. 2006. *The State of the World's Refugees: Human Displacement in the New Millennium*. Oxford: Oxford University Press.

Vandvik, Bjarte. 2008. Extraterritorial Border Controls and Responsibility: A view from ECRE. *Amsterdam Law Forum*:27-36.

Vedsted-Hansen, Jens. 1988. Transporters' Responsibilities under the Chicago Convention on International Civil Aviation. In *The Role of Airline Companies in the Asylum Procedure*, edited by M. Kjærum. Copenhagen: Danish Refugee Council. 14-16.

———. 1989. Sanktioner mod transportselskaber med "inadmissible passengers". *Juristen* 71 (6):219-233.

———. 1995. Privatiseret Retshåndhævelse og Kontrol. In *Ret og Privatisering*, edited by L. Adrian. København: Gad Jura.

———. 1999. Europe's response to the arrival of asylum seekers: refugee protection and immigration control. New Issues in Refugee Research No. 6. Geneva: United Nations High Commissioner for Refugees.

———. 1999b. Non-admission policies and the right to protection: refugees' choice vs. states' exclusion? In *Refugee Rights and Realities: Evolving International Concepts and Regimes*, edited by F. Nicholson and P. Twomey. Cambridge: Cambridge University Press. 269-288.

Verdross, Alfred, and Bruno Simma. 1984. *Universelles Völkerrecht: Theorie und Praxis*. Berlin: Duncker and Humblot GmbH.

Verkuil, Paul R. 2007. *Outsourcing Sovereignty: Why privatization of government functions threatens democracy and what We can do about it*. Cambridge: Cambridge University Press.

Walker, Neil. 2003. Late Sovereignty in the European Union. In *Sovereignty in Transition*, edited by N. Walker. Oxford: Hart Publishing.

Waltz, Kenneth N. 1979. *Theory of International Politics*. New York: McGraw-Hill.

Wasem, Ruth Ellen. 2007. Cuban Migration Policy and Issues. CRS Report for Congress RS20468. Washington: Congressional Research Service.

Watson, James Shand. 1999. *Theory and Reality in the International Protection of Human Rights*. New York: Transnational Publishers Inc.

Weil, Prosper. 1983. Towards Relative Normativity in International Law? *American Journal of International Law* 77 (3):413-442.

Weiler, J.H.H., and Andreas L. Paulus. 1997. The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law? *European Journal of International Law* 8 (4):545-565.

Weiner, Myron. 1996. Ethics, National Sovereignty and the Control of Immigration. *International Migration Review* 30 (1):171-197.

Weinzierl, Ruth. 2007. Border Management and Human Rights: A Study of EU Law and the Law of the Sea. Berlin: Deutches Institut für Menchenrechte. December 2007.

Weis, Paul. 1995. *The Refugee Convention, 1951: The travaux preparatoires analysed with a commentary by the late Dr. Paul Weis*. Cambridge International Documents Series. Cambridge: Cambridge University Press.

Wendt, Alexander. 1992. Anarchy is what states make of it: the social construction of power politics. *International Organization* 46 (2):391-425.

Werlau, Maria C. 2004. International Law and other considerations on the repatriation of the Cuban balseros by the United States. *Cuba in Transition* 14.

Werner, Wouter. 2004. State Sovereignty and International Legal Discourse. In *Governance and International Legal Theory*, edited by W. Werner and I. F. Dekker. Leiden: Brill Academic Publishers.

Werner, Wouter, and Jaap De Wilde. 2001. The Endurance of Sovereignty. *European Journal of International Relations* 7 (3):283-313.

Wilde, Ralph. 2005. Legal "Black Hole"? Extraterritorial State Action and

International Treaty Law on Civil and Political Rights. *Michigan Journal of International Law* 26:739-806.

———. 2005b. Opinion: The "Legal Space" or "*Espace Juridique*" of the European Convention on Human Rights: Is It Relevant to Extraterritorial State Action? *European Human Rights Law Review* 2:115-124.

Willheim, Ernst. 2003. MV Tampa: The Australian Response. *International Journal of Refugee Law* 15 (2):159-191.

Wiseberg, Laurie S. 2003. The Role of Non-Governmental Organizations (NGOs) in the Protection and Enforcement of Human Rights. In *Human Rights: International Protection, Monitoring, Enforcement*, edited by J. Symonides. Aldershot: Ashgate. 347-372.

Zahle, Henrik. 2001. *Rettens Kilder*. København: Christian Ejlers Forlag.

———. 2007. *At forske ret: Essays om juridisk forskningspraksis*. København: Gyldendal.

Zolberg, Aristide. 1983. The Formation of New States as a Refugee-Generating Process. *The Annals of the American Academy of Political and Social Science* 467 (1):24-38.

———. 1999. Matters of State. In *The Handbook on International Immigration*, edited by C. Hirschman, et al. New York: Russell Sage Foundation. 71-93.

———. 2001. Beyond the Crisis. In *Global Migrants, Global Refugees*, edited by P. M. Benda and A. Zolberg. New York: Berghahn Books. 1-19.

Abstract

When does a refugee encounter the state? The traditional answer would be when arriving at the border and uttering the magical word 'asylum'. Today, however, refugees are much more likely to meet the authorities of their prospective asylum country well before arriving at the border. Over the last decades migration control has increasingly moved to the high seas and the territory of transit and origin countries. Navy vessels are patrolling the Mediterranean and the Caribbean along the popular migration routes, and immigration officers are being deployed overseas to carry out pre-departure checks at airports and other travel hubs. At the same time migration control is increasingly outsourced to private actors. Under threat of financial penalties airlines today reject any passenger not in possession of a valid visa, private contractors are running detention centers, and private security companies employed to man border crossings.

In this dissertation the author traces and exemplifies these practices, which are often carried out far away from public eyes and scrutiny. At the same time this offshoring and outsourcing of migration control raises important questions under international refugee law. The refugee has always been the exception to the state's sovereign prerogative to carry out migration control, necessitating that a door be kept open for asylum-seekers. But, does this commitment equally apply where migration control is carried out extraterritorially or by private actors? Governments have argued that neither the Refugee Convention nor other human rights instruments are applicable where migration control takes place beyond their borders or asylum-seekers are rejected by private actors such as airline officials. As a result, refugees encountering these forms of control are routinely denied access to asylum.

The present volume offers a critical examination of the reach and limits of international refugee law to situations of offshored and outsourced migration control. It argues that states do retain certain obligations even when migration control is carried out extraterritorially or by private actors. Yet, the application of refugee law to these situations is far from straight forward. The scope and nature of rights may be substantially reduced, and certain gaps in the legal framework persist where interpretation remains open. The dissertation also suggests how interpretation in this field might constructively develop as to better ensure access to asylum without undermining fundamental principles of international law. Lastly, a more general account is forwarded of offshoring and outsourcing practices as 'politics through law', where governments strategically seek to shift or deconstruct legal responsibilities otherwise owed by reference to law itself.