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## Europe and extraterritorial asylum

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# 1 Introduction

## 1.1 THESIS OF THE STUDY

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

## 1.2 GENESIS OF THE STUDY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 1.3 SCOPE OF THE STUDY

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

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

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

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

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

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

can avoid its responsibilities under international law for the protection of refugees.<sup>17</sup>

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

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

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

18 Ataner (2004), p. 10.

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

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

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

#### 1.4 GOAL OF THE STUDY

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

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20 COM(2006) 733 final, esp. paras. 31-35.

21 COM(2009) 262 final, paras. 4.2.3.1 and 5.2.2.



exploration into possible avenues concerning access to asylum procedures targeting main transit countries.<sup>22</sup>

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

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

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

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

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

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

## 1.5 RESEARCH QUESTIONS AND STRUCTURE OF THE STUDY

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

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

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

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

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

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

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

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

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

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

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

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

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

The research questions to be addressed in chapters 4 and 5 may be summarized as follows:

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

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

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

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

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

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

## 1.6 DELIMITATIONS OF THE STUDY

### *Delimitation 1: International refugee and human rights law*

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

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

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

to be accorded to refugees and to those who can be qualified as 'subsidiary protection beneficiaries' under general human rights instruments.<sup>29</sup>

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

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

#### *Delimitation 2: Persons seeking international protection*

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

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

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

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

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

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

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

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

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

*Delimitation 3: The member states of the European Union*

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

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

## 1.7 SOURCES OF THE STUDY

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

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



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

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

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

## 1.8 SCIENTIFIC CONTEXT OF THE STUDY

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

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

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

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

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

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

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

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

## 1.9 TERMINOLOGY

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

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

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

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

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

