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Europe and extraterritorial asylum

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Citation

Heijer, M. den. (2011, April 7). *Europe and extraterritorial asylum*. *Meijers-reeks*. Retrieved from <https://hdl.handle.net/1887/16699>

Version: Not Applicable (or Unknown)

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Note: To cite this publication please use the final published version (if applicable).

4 | Extraterritorial asylum under international law

4.1 OUTLINE OF THE CHAPTER

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

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

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

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

The right to grant asylum, explored in section 4.2., is understood as the right of the non-territorial state, vis-à-vis the territorial state, to confer asylum upon an individual situated in the latter state. Although the relationship between the state granting asylum and the state whose national is granted asylum is currently scarcely addressed in international refugee law discourse – and for a large part considered immaterial as a consequence of the principle of territorial sovereignty coming to prevail² – it remains of primordial importance in extraterritorial situations, precisely because those situations are characterised by the impossibility of the state addressed by the asylum-seeker to invoke the shield of territorial sovereignty. Section 4.2. explores the extent to which international law has recognised the institution of diplomatic and other forms of extraterritorial asylum, how the institution of extraterritorial asylum involves a reconciliation of potential conflicting claims of humanitarianism and territorial sovereignty, and how the law on diplomatic and consular relations may influence the legality and/or feasibility of grants of diplomatic asylum. It should be noted here that this section deals only with grants of asylum *within the territory of another state*. The other typical situation of extraterritorial asylum, namely at sea, is addressed in chapter 6, which discusses questions of competing state competences in the specific context of the Law of the Sea.

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

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

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

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

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

4.2 THE RIGHT TO GRANT ASYLUM

4.2.1 State sovereignty and extraterritorial asylum

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

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

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

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

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

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

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

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

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

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

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

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

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

In Latin America – described (35 years ago) as a continent 'where today's government officials may be tomorrow's refugees, and *vice versa*'¹¹ – the problem that extraterritorial asylum will normally encroach upon the sovereignty of the territorial state has to some extent been relieved by the accepted practice that states do not interfere with one another's grant of diplomatic asylum and that persons granted diplomatic asylum are allowed safe-conducts out of the country to the territory of the state granting asylum. These practices have – under strictly defined conditions – been codified in several regional treaties.¹² The general outline of these treaties is that diplomatic asylum may only be granted in urgent situations and for the period indispensable to ensure safety of the person seeking asylum¹³; that states may only grant diplomatic asylum to persons who are sought for political reasons as opposed to common criminals¹⁴; and that the territorial state may at all times request that the

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

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

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

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

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

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

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

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

16 1954 Caracas Convention, Article II.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.2.2 Extraterritorial asylum as humanitarian exception to state sovereignty

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

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

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

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

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

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

30 Morgensstern (1948), p. 236.

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

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

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

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

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

31 Morgenstern (1951), p. 376.

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

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

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

35 *Asylum Case*, p. 284.

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

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

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

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

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

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

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

41 Also Porcino (1976), p. 445.

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

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

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

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

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

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

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

4.2.3 Immunities and extraterritorial asylum

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

Historically, the bond between diplomatic asylum and the privileged position of diplomatic envoys was stronger than it is in current times. Early scholars such as Grotius explained the legality of diplomatic asylum from the fiction of extritoriality⁴⁵ – holding that the ambassador's premises are inviolable for they are outside the territory of the host state and placed in that of the sending state.⁴⁶ One of the first to reject this fiction was van Bynkershoek, in positing that the ambassador's immunities are functional and that the ambassador's premises may not be used to offer refuge to criminals.⁴⁷ Although no longer seen as valid, the fiction of extritoriality has on occasion resurfaced in defending the legality of diplomatic asylum.⁴⁸ Other writers

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

58 Article 22 paragraphs 1 and 3 VCDR.

59 See for example the Soviet conduct in respect of its citizens which had been granted asylum in United States embassies, in: Rossitto (1987), p. 120-127.

60 Emphasis added.

61 Lee (1991), p. 387.

62 Ibid, p. 398.

63 Grahl-Madsen (1972), p. 50.

64 Article 60 paragraph 2 (b) Vienna Convention on the Law of Treaties.

65 ICJ 24 May 1980, *United States Diplomatic and Consular Staff in Tehran*, I.C.J. Reports 1980, para 86.

66 Ibid, para. 85.

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

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

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

4.2.4 Interim conclusion

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

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

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

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

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

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

4.3 THE RIGHT TO OBTAIN ASYLUM

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

80 For an extensive overview see Hathaway (2005), p. 156-192.

81 Articles 4 (freedom of religion), 27 (right to identity papers), 31(1) (prohibition to impose penalties for illegal entry) Refugee Convention.

82 Articles 18 (right to self-employment), 26 (freedom of movement), 32 (prohibition of expulsion save on grounds of national security or public order).

83 Articles 14 (artistic rights and industrial property), 16(2) (access to courts).

84 Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC/32/SR.7, 23 January 1950.

85 Hathaway (2005), p. 157.

86 Also see Articles 3, 13, 16(1), 20, 22, 29 and 34.

87 Hathaway (2005), p. 157, 160-164.

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

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

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

89 See, more extensively, chapter 8.1.

90 *Sale* at 181-182.

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

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

4.3.1.1 *The judgments in Sale and Roma Rights*

The text, ordinary meaning and special meaning

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

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

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

⁹⁴ *Sale* at 181-182.

⁹⁵ *Ibid*.

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

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

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

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

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

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

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

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

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

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

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

100 Article 32 VCLT.

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

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

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

104 Hathaway (2005), p. 337.

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

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

The negotiating history

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

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

¹⁰⁶ *Sale* at 192-193.

¹⁰⁷ *Ibid*, at 184-186.

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

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

There are two reasons to treat the delegates remarks with caution. First, the declarations made by the Swiss and Dutch appear to have been instigated by a fear that Contracting States would be compelled to allow mass migrations across their frontiers.¹¹⁰ Indeed, the Dutch delegate had only wished 'to have it placed on the record that the Conference was in agreement with the interpretation that the possibility of mass migration across frontiers or of attempted mass migrations was not covered by article 33', to which no objections were made.¹¹¹ Accordingly, the only interpretation placed on the record (but not voted upon¹¹²) was that Article 33(1) was considered not to cover mass migrations – not that return only applies to those already within a country but not resident there.

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

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

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

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

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

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

Although one could contend that in using the *travaux* as means of treaty interpretation greater weight should be accorded to declarations made during the Conference on Plenipotentiaries than in the Ad Hoc Committee, the unequivocal and concerted nature of statements made in the latter undermines the House of Lords' observation that the *travaux préparatoires* yield 'a clear and authoritative' answer to the question of territorial scope of Article 33.¹¹⁸ It is regrettable that, while relying heavily on the *travaux*, the House of Lords and US Supreme Court failed to take note of these earlier discussions.¹¹⁹

Object and purpose

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

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

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

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

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

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

118 *Roma Rights*, para 17.

119 It remains unclear why no weight was accorded to those earlier proceedings. In its letter *amicus curiae* to the Supreme Court in *Sale*, UNHCR did refer to statements made in the Ad Hoc Committee, Office of the United Nations High Commissioner for Refugees, 'The Haitian Interdiction Case 1993, Brief *amicus curiae*', re-printed in 6 *IJRL* (1994), p. 100.

their borders and return them to persecution, a course of conduct striking at the heart of the provision's basic purpose and the humanitarian intentions of the Refugee Convention.¹²⁰ These authors underline that the essential purpose of Article 33 is to prevent refugees from ending up in the country they were fleeing to escape.¹²¹

Both in *Sale* and the *Roma Rights* case, the applicants had advanced that the object and purpose of Article 33(1) would militate against the conduct complained of. In the *Roma Rights* case, it was also contended that the principle of good faith, referred to in Article 26 and Article 31(1) VCLT, would oppose state conduct that would prevent the Refugee Convention of being triggered. The US Supreme Court admitted that to gather fleeing refugees and return them to the one country they were fleeing to escape, 'may violate the spirit of Article 33', but reasoned that 'a treaty cannot impose unanticipated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent'.¹²² Because it had already concluded that the text of Article 33(1) could not reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, the object and purpose of the treaty were too meager a basis for establishing a finding to the contrary. The House of Lords concurred with this reasoning and additionally observed that the facts of the *Roma Rights* case differed on a crucial point from the plight of the interdicted Haitians. The Haitians were clearly outside Haiti, their country of nationality, and could therefore be defined as refugees, while the Roma were still within their own country and could not be so defined.¹²³ Accordingly, the House of Lords understandably concluded that to rely on the principle of good faith in considering the Refugee Convention applicable to the Roma asylum-seekers, would impose new obligations on State Parties in conflict with the clear Convention wording that protection is only to be assured to persons who are in countries that are not their own.¹²⁴

120 See the dissent in *Sale*, at 197. Also see H.H. Koh, 'The "Haiti Paradigm" in United States Human Rights Policy', 103 *Yale Law Journal* (1994), p. 2417; Hathaway (2005), p. 318.

121 This also transpires from the drafting sessions of the Ad Hoc Committee on Statelessness and Related Problems. The Canadian chairman had gathered that there was agreement among the delegates on the principle that 'refugees fleeing from persecution on account of their race, religion, nationality or political opinions should not be pushed back into the arms of their persecutors', Statement of Mr. Chance of Canada, UN Doc. E/AC.32/SR.21, 2 February 1950, para. 26. In commenting upon the *Sale* judgment, Louis Henkin, former US delegate in the Ad Hoc Committee, had found it 'incredible that states that had agreed not to force any human being back into the hands of their oppressors intended to leave themselves free to reach out beyond their territory to seize a refugee and return him to the country from which he sought to escape'. Henkin (1993), p. 1.

122 *Sale* at 183.

123 *Roma Rights*, paras. 18, 21, 26, 64

124 *Ibid*, para. 63.

4.3.1.2 Interim conclusion

Following the VCLT rules on treaty interpretation and the considerations above, the most plausible approach for interpreting the territorial scope of Article 33(1) Refugee Convention would be to conceive the term 'return' in accordance with the French term '*refouler*', which translates as defensive or exclusive acts and which is not necessarily restricted to conduct undertaken within the state's territory (Article 31(4) VCLT). That Article 33(1) includes rejection at the border and outside the border is in line with the object and purpose of the provision (Article 31(1) VCLT). Because the meaning of the terms '*refouler*' (and hence, 'return') and the object and purpose of the provision shed sufficient light on the question of territorial scope, it is not necessary to have recourse to the preparatory work of the treaty (Article 32 VCLT), which in any event does not yield a clear answer to the anticipated territorial scope of the provision. This interpretation finds further contextual support in the phrase not to return a refugee 'in any manner whatsoever' laid down in Article 33(1) Refugee Convention, which reflects the notion that the form or manner of the act amounting to expulsion or return is immaterial and that it may cover a great variety of measures by which refugees are expelled, refused admittance or removed.¹²⁵

It does however not follow that Article 33(1) Refugee Convention can apply to all excluding acts vis-à-vis refugees undertaken outside the state's territory. Firstly, as mentioned above, the provision does not cover persons still within their country of nationality or habitual residence. Secondly, it follows from the words '*to the frontier of territories*' that only acts of return (or other defensive acts) taking place *outside* the territory where persecution is feared can come within its ambit. This not only affirms the finding that the Refugee Convention is anyhow not applicable to persons still within their country of origin, but also means that Article 33(1), which can also protect against persecution in

125 E. Lauterpacht and D. Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion', in: E. Feller c.s. (eds), *Refugee Protection in International Law. UNHCR's Global Consultations on International Protection*, Cambridge University Press (2003), p. 112. Hathaway (2005), p. 317-322. Note however that the formula 'in any manner whatsoever' does not detract from the requirement that the act must still qualify as an act of 'expulsion' or 'return ('refouler')'. It is unclear, for example, whether the act of extradition, in form and manner very similar to the act of expulsion, comes within the ambit of Article 33 Refugee Convention. Lauterpacht and Bethlehem infer from the wordings 'in any manner whatsoever' that Article 33 also covers extradition: Lauterpacht and Bethlehem (2003), p. 112-113. Goodwin-Gill and McAdam note that although the preparatory work indicates that Article 33(1) did not prejudice extradition, state practice indicates that *non-refoulement* also protects refugees from being extradited. This conclusion is however mainly based on developments under the ECHR, CAT and ICCPR; Goodwin-Gill and McAdam (2007) p. 257-262. Under the ECHR, the word expulsion is expressly understood not to cover extradition: 'With the exception of extradition, any measure compelling the alien's departure from the territory where he was lawfully resident constitutes "expulsion" for the purposes of Article 1 of Protocol No. 7'; ECtHR 12 February 2009, *Nolan and K. v Russia*, no. 2512/04, para. 112.

a third country,¹²⁶ cannot literally be construed as applying to excluding acts undertaken *within* a third country where persecution is feared: one cannot return (or 'drive back') a person *to* the territory of a third state if that person already finds himself in that territory. It appears, in other words, that Article 33(1) Refugee Convention can only apply to activity which involves the crossing of the border of the state where the persecution takes place.

4.3.2 Extraterritorial application of the prohibition of *refoulement* under the Convention Against Torture

The Convention Against Torture does not contain a general clause setting out the personal or territorial scope of the treaty, but several provisions in the CAT limit their application to 'any territory under a State Party's jurisdiction'.¹²⁷ These terms have been interpreted by the Committee Against Torture much in line with the approaches of the ECtHR and HRC set out in Chapter 2 of this book. In response to the position recently taken up by the US government that Article 2 CAT (the obligation to prevent torture), applies only to US territory and not to the detention facilities located in Guantánamo Bay, Cuba, the CAT considered that

'the provisions of the Convention expressed as applicable to "territory under the State party's jurisdiction" apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world.'¹²⁸

A similar formula is now included in General Comment No. 2, on the scope of Contracting States' obligations under Article 2 CAT.¹²⁹ It may be noted that although Article 2 CAT speaks of jurisdiction over *territory*, the Committee speaks of jurisdiction – in the sense of effective control – over *persons*. To some

126 This follows from the words 'the frontiers of territories where (...)'. See E. Lauterpacht and D. Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion', in: E. Feller c.s. (eds), *Refugee Protection in International Law. UNHCR's Global Consultations on International Protection*, Cambridge University Press (2003), p. 122.

127 This wording is found in Articles 2(1), 5(2), 11, 12, 13 and 16 CAT.

128 Conclusions and recommendations of the Committee against Torture, United States of America, CAT/C/USA/CO/2, 25 July 2006, para. 15.

129 ComAT, General Comment no. 2, CAT/C/GC/2, 24 January 2008, para 16: 'The Committee has recognized that "any territory" includes all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law. The reference to "any territory" in article 2, like that in articles 5, 11, 12, 13 and 16, refers to prohibited acts committed not only on board a ship or aircraft registered by a State party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control.'

extent, this interpretation corresponds with the treaty's preparatory work. The original obligation to prevent torture had prevented torture from being practiced 'within its [a State Party's – author] jurisdiction',¹³⁰ but these words were replaced with the words 'any territory under its jurisdiction', under the reasoning that nationals (who for some purposes may be considered to fall under the state's legislative jurisdiction) living in another country should not be able to rely on such protection.¹³¹ It was nonetheless underlined that 'any territory under its jurisdiction' could also refer to acts taking place in such foreign locations as ships, aircrafts and occupied territories.¹³² Similar to the discussions in the preparatory stages of the ECRH and ICCPR therefore, the preparatory work of the CAT suggests that the drafters were well aware of the limits to a state's capacity to provide human rights protection abroad, but that they also agreed that when states would embark upon extraterritorial adventures, the CAT would not automatically be void of meaning.¹³³

Article 3 CAT explicitly prohibits *refoulement*. The provision was partly modeled after Article 33 Refugee Convention and is equipped with similar terminology.¹³⁴ It prohibits states to 'expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'. Article 3 CAT does not contain a reference to the jurisdiction or territory of the State Party, but the references in other Convention provisions to territories under a state's jurisdiction support a contextual understanding that Article 3 CAT may also apply extraterritorially. This was confirmed by the Committee in its view in the *Marine I case*, concerning the Spanish rescue and processing of a group of migrants whose ship had been in distress close to the shores of Senegal and who were subsequently brought to an abandoned fish processing plant in Mauritania. The Committee considered that its interpretation of the concept of jurisdiction as reflected in General Comment No. 2 is applicable in respect not only of Article 2, but of all provisions of the Convention, and that 'such jurisdiction must also include situations where a State Party exercises, directly or indirectly, de facto or de jure control over persons in detention'.¹³⁵ It observed that Spain maintained control over the persons on board the *Marine I* from the time the vessel was rescued and throughout the identification and repatriation process that took place at the plant in Mauritania and that, by

130 GA Res. 3452 (XXX) of 9 December 1975 and UN Doc. E/CN.4/1285.

131 UN Doc. E/CN.4/L. 1470, para. 30.

132 Ibid. For a commentary and further references, see M. Nowak and E. McArthur, *The United Nations Convention Against Torture. A Commentary*, Oxford University Press (2008), p. 92.

133 See chapter 2.3.

134 On the drafting of Article 3 CAT and its relationship with Article 33 Refugee Convention, see G. Noll, *Negotiating Asylum. The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, The Hague/Boston/London: Martinus Nijhoff (2000), p. 435-437 and Nowak and McArthur (2008), p. 134, 195.

135 ComAT 21 November 2008, *J.H.A. v Spain (Marine I)*, no. 323/2007, para. 8.2.

virtue of that control, the alleged victims were subject to Spanish jurisdiction for the purpose of the complaints regarding possible onward removal of the migrants to the conflict in Kashmir in violation of Article 3.

The extraterritorial application of Article 3 CAT was also addressed by the Committee Against Torture in the context of the transfer of detainees held in custody by United Kingdom military forces in Afghanistan and Iraq to the Iraqi and Afghan authorities. Regarding these transfers, the Committee observed that ‘the Convention protections extend to all territories under the jurisdiction of a State Party and considers that this principle includes all areas under the de facto effective control of the State Party’s authorities’. Specifically referring to the prohibition of *refoulement*, the Committee recommended that ‘the State Party should apply articles 2 and/or 3, as appropriate, to transfers of a detainee within a State Party’s custody to the custody whether de facto or de jure of any other State.’¹³⁶

It was concluded above that the wording of Article 33 Refugee Convention makes it difficult to bring persons under its ambit who are still within the country from which the threat with persecution emanates. This limitation is also present under Article 3 CAT, which speaks of ‘expel, return (“refouler”) or extradite a person to another State where (...)’.¹³⁷ A literal reading would implicate that Article 3 CAT can only apply to situations where a person is outside the country from which the threat stems: one can simply not transfer someone to a place where he already is. This was also the United Kingdom’s position in response to the Committee’s recommendations on the transfer of detainees held captive in Iraq and Afghanistan.¹³⁸ Nowak and McArthur endorse the Committee’s approach however by holding that ‘[t]aking into account the purpose of the absolute prohibition of *refoulement*, the term ‘another’ State should in fact be interpreted as referring to any transfer of a person from one State jurisdiction to another’.¹³⁹ It is indeed notable that, different from Article 33 Refugee Convention, Article 3 CAT does not speak of return ‘to the frontiers of territories’ but of return ‘to another State’. One could accordingly contend that because the word state not necessarily refers to a territorial entity but may also refer to all the organs making up a state, Article 3 CAT can be applicable to all situations where a person is transferred

136 Conclusions and recommendations of the Committee against Torture, United Kingdom, CAT/C/CR/33/3, 10 December 2004, paras. 4(b) and 5(e).

137 Emphasis added.

138 The UK government argued that ‘[a]lthough a detainee may be physically transferred from UK to Iraqi custody, there is no question of expulsion, return (*refoulement*) or extradition to another State, as referred to in Article 3, all of which include an element of moving a person from the territory of one State to that of another’, Comments by the Government of the United Kingdom of Great Britain and Northern Ireland to the conclusions and recommendations of the Committee Against Torture, CAT/C/GBR/CO/4/Add.1, 8 June 2006, para. 14.

139 Nowak and McArthur (2008), p. 199.

from the organ of one state to another, regardless of any territorial considerations. This suggestion remains problematic nonetheless, because the placement of the adverb 'where' immediately after the term 'State' in Article 3 CAT would appear to indicate that, in the context of Article 3 CAT, the term state has a geographical rather than a functional meaning (otherwise the adverb should have been 'which'). To wit, one could maintain that departure from the strict literal meaning of Article 3 CAT is justified by the purpose of the absolute prohibition of torture and the fact that the drafters of the CAT had probably not contemplated situations in which *refoulement* would take place in an extraterritorial setting. Construing Article 3 CAT in this way appears moreover better possible than under the Refugee Convention, because the CAT was not designed as an instrument to address the problem of persons having fled their country of origin, but to maximize the effectiveness of the struggle against torture throughout the world.¹⁴⁰

4.3.2 Extraterritorial application of the prohibition of *refoulement* under the ECRH and ICCPR

The difference in approach of, on the one hand, the House of Lords and the US Supreme Court in interpreting the extraterritorial applicability of Article 33 Refugee Convention, and, on the other hand, the Committee Against Torture in interpreting Article 3 CAT, is remarkable to say the least, given the similarity in wording of both provisions. This difference also points to the broader jurisprudential development in which human rights treaty monitoring bodies have construed the body of international human rights as having extraterritorial implications. On a general level, one may indeed contrast the presumption against extraterritoriality propounded by the House of Lords and the US Supreme Court in regard of Article 33(1) Refugee Convention not only with the position taken by the Committee Against Torture, but also with the considerably more lenient position of the ECtHR and HRC in matters involving extraterritorial acts of states as described in chapter 2. This difference in approaches may be explained from the explicit reference in the ECRH and ICCPR to the term jurisdiction, which is generally accepted to be not necessarily confined to a state's territory; and from the fact that Article 33 Refugee Convention speaks specifically of 'expel' and 'return', terms which are traditionally used only in relation to the deportation of persons from a state's territory. But it is perhaps also appropriate to acknowledge that, in interpreting treaty terms, human rights monitoring bodies have tended to attribute primary importance to a teleological interpretation focused on the object and purpose of the treaty. Meron and others have observed that this 'teleological bias' of human rights

140 See the CAT's preamble ('Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world').

courts has on occasion resulted in the ordinary meaning of treaty terms being overridden and the legislative history or preparatory work ignored.¹⁴¹

In the context of extraterritorial state activity, the Human Rights Committee's interpretation of the terms 'within its territory and subject to its jurisdiction' laid down in Article 2(1) ICCPR is perhaps the most salient example of this development. While it has been (tacitly) acknowledged by the Human Rights Committee – and explicitly in legal discourse¹⁴² – that a literal reading of this provision can only imply that 'territory' and 'jurisdiction' are cumulative requirements for attracting a state's obligations under the ICCPR, the Human Rights Committee, in a course later adopted by the International Court of Justice,¹⁴³ has discarded this ordinary grammatical meaning by concluding that 'it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State Party to perpetrate violations of the Covenant on the territory of another state, which violations it could not perpetrate on its own territory.'¹⁴⁴ One may continue to oppose this approach as being *contra legem* or as constituting an affront to the mainstream of international treaty law.¹⁴⁵ Nonetheless, the essentially convergent views of the different human rights treaty bodies and the confirmation thereof by ICJ, allow us to presently depart from the understanding that human rights treaties, including the ICCPR, bind states with regard to persons in foreign territories who can be considered to fall within the jurisdiction of that state.

Because the rights and freedoms defined in human rights treaties benefit anyone within the jurisdiction of a Contracting State, it may be assumed that extraterritorial acts of *refoulement* can bring potential victims within the ambit

141 T. Meron, *The Humanization of International Law*, Leiden/Boston: Martinus Nijhoff (2006), p. 193.

142 See esp. Noll (2000), p. 440; Noll (2005), p. 557.

143 ICJ 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 2004, paras. 108-111; ICJ 19 December 2005, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, para. 216.

144 HRC 29 July 1981, *Delia Saldias de Lopez v. Uruguay*, no. 52/1979, para. 12.3. In justifying this departure from the text of Article 2(1) ICCPR, the Committee referred to Article 5 (1) ICCPR, which stipulates that: '[n]othing in the present Covenant may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant'. Article 5 ICCPR, a provision otherwise rarely invoked, is reminiscent of the good faith argument brought forward by the applicants in the *Roma Rights* case. Tomuschat however, found Article 5 ICCPR to be incorrect as a basis for affirming the applicability of the Covenant outside a State's territory and instead suggests that construing the words "within its territory" pursuant to their strict literal meaning must be rejected because that would lead to 'utterly absurd results'. See Individual opinion appended to the Committee's views of Mr. C. Tomuschat.

145 Noll (2005), p. 558-564, who, while acknowledging the HRC's divergent position on the matter, maintains that '[t]he expansion of Article 2(1) ICCPR (...) is hard to justify in dogmatic terms', and that the Committee's interpretation 'runs counter to the ordinary meaning of its terms (an 'and' not being synonymous to an 'or')', at p. 563.

of a Contracting State's obligations. In *Roma Rights*, Lord Bingham of Cornhill expressed doubts as to whether the functions performed by British immigration officers at Prague airport could be said to be an exercise of jurisdiction 'in any relevant sense', but eventually discarded the *refoulement*-argument based on Articles 2 and 3 ECHR by submitting that the agreed facts did not disclose any threat to treatment sufficient to engage Articles 2 and 3.¹⁴⁶ It is remarkable that where the Law Lords scrupulously addressed the issue of extraterritorial applicability of Article 33 Refugee Convention – which even broadly interpreted could not benefit the Roma asylum-seekers since they had not left their country of origin and could accordingly not be defined as refugees – they only succinctly touched upon the relevance of the ECHR, which has a considerable less disputed capacity for giving rise to extraterritorial obligations. What is also remarkable is that the issue of jurisdiction apparently played a role in establishing whether Articles 2 and 3 ECHR were applicable to the case, but was not deemed relevant in concluding that the United Kingdom had violated the prohibition of discrimination under various international treaties, with explicit references to Articles 2 and 26 ICCPR, Article 14 ECHR, Article 2 ICERD and Article 3 Refugee Convention.¹⁴⁷

Article 3 ECHR and Article 7 ICCPR have been construed by the ECtHR and HRC as implicitly containing a prohibition of *refoulement*. Article 3 ECHR and Article 7 ICCPR do not make mention of such acts as expulsion or return, do not refer to a location to which the transfer of persons is prohibited, but simply and boldly pronounce that no one is to be subjected to torture or inhuman or degrading treatment or punishment. Accordingly, the nature of a state's obligations under Article 3 ECHR and Article 7 ICCPR is substantially different from that under Article 3 CAT and Article 33 Refugee Convention. The prohibition of *refoulement* under the ECHR and ICCPR would not appear to hinge on the question whether an act can be labeled as 'expulsion' or 'return'; nor on the question whether a person is actually outside the state from which the threat with ill-treatment stems.

The rationale for reading a prohibition of *refoulement* into Article 3 ECHR was articulated by the ECtHR as follows:

'In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms (...). Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective (...). In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with

146 *Roma Rights*, para. 21.

147 *Roma Rights*, paras. 98-100, per Baroness Hale of Richmond. Like Article 33, Article 3 Refugee Convention does not refer to a required level of attachment between the refugee and the state.

“the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society” (...).

The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture [Article 3 CAT- Mdh] does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention. It would hardly be compatible with the underlying values of the Convention, that “common heritage of political traditions, ideals, freedom and the rule of law” to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court’s view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.¹⁴⁸

Accordingly, with references to the object and purpose of both the Convention as a whole and Article 3, a prohibition of *refoulement* is inserted in the European Convention. This is notwithstanding the fact that neither the text nor the drafting history indicates that Article 3 was envisaged to apply to such situations, notwithstanding that it concerns acts taking place outside a country’s territory, notwithstanding that it concerns acts committed by or under the responsibility of another state, and notwithstanding that it concerns conduct which is yet (and may indeed prove never) to materialize.

In *Soering*, the key criterion for engaging a State’s responsibility was formulated as there ‘having been shown substantial grounds for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.’¹⁴⁹ On a more general note, the Court added that the extraditing Contracting State’s liability is incurred ‘by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.’¹⁵⁰ These considerations put the prohibition of *refoulement* under Article 3 ECHR much in line with the Court’s doctrine on positive obligations, and in particular the duty to protect, requiring states to take measures designed to ensure that individuals within their jurisdiction are not subjected to treatment contrary to Articles 2 and 3. Under this doctrine, states are required to undertake reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge, regardless of whether the ill-treatment stems from private persons, from state organs or from naturally occurring

148 ECtHR 7 July 1989, *Soering v the United Kingdom*, no. 14038/88, paras. 87-88.

149 Ibid, para. 91.

150 Ibid.

illnesses.¹⁵¹ These categories are also covered by the protection against *refoulement*.¹⁵² And similar to cases concerning expulsion or extradition (or foreign cases), the existence of a 'real risk' of treatment contrary to the Convention has in domestic situations been considered decisive in enlivening a duty on the side of the state to undertake protective measures.¹⁵³

Accordingly, the case law of the European Court is highly supportive of a general rule that, whenever it is known or when it ought to have been known that an individual within the jurisdiction of a Contracting State is exposed to a real risk of ill-treatment, it is incumbent on that state to take steps to prevent that risk from materializing. Decisive, in this regard, for engaging a state's duty to protect is not the form or manner in which the risk materializes, nor the manner in which the state can negate this risk (be it through providing police protection,¹⁵⁴ through providing necessary medical services,¹⁵⁵ by removing abused children from parental care,¹⁵⁶ through not releasing a dangerous criminal from prison,¹⁵⁷ or, indeed, by not expelling a person) but whether the state has taken reasonable and appropriate preventive measures to remove the risk of ill-treatment, or at the least to alleviate that risk to such a level that it is no longer 'real' or 'immediate'.

So construed, the prohibition of *refoulement* under the ECRH and ICCPR is essentially an obligation to shield a person from harm. This protective duty is well apt to apply regardless of territorial considerations, provided that a person is within the jurisdiction of a Contracting State. In the context of Article 2 ECRH, the right to life, the ECtHR has confirmed that states may also incur protective duties in respect of persons outside their national boundaries.¹⁵⁸ The ECtHR has affirmed that the same rationale applies to situations where a state transfers or hands over a person in and to a potentially maltreating state. In the case of *Al-Saadoon and Mufdhi*, further discussed in section 4.5 below, the ECtHR found the physical transfer of two Iraqi detainees held in a British military facility in Iraq to the custody of the Iraqi authorities to have breached the United Kingdom's obligations under Articles 2 and 3 of

151 ECtHR 28 October 1998, *Osman v the United Kingdom*, no. 23452/94, para. 115. ECtHR 10 May 2001, *Z. a.o. v the United Kingdom*, no. 29392/95, para. 73; ECtHR 4 May 2001, *Kelly a.o. v the United Kingdom*, no. 30054/96, paras. 94-95; ECtHR 9 June 1998, *L.C.B. v the United Kingdom*, no. 23413/94, para. 38.

152 ECtHR 29 April 1997, *H.L.R. v France*, no. 24573/94 (non-state organs); ECtHR 27 May 2008, *N. v the United Kingdom*, no. 26565/05 (natural illness).

153 *L.C.B. v the United Kingdom*, para. 38; ECtHR 10 October 2000, *Akkoc v Turkey*, nos. 22947/93 and 22948/93, para. 81; ECtHR 28 March 2000, *Mahmut Kaya v Turkey*, no. 22535/93, para. 89; *Osman v the United Kingdom*, para. 116.

154 *Osman v the United Kingdom*, para. 115-121.

155 *L.C.B. v United Kingdom*, paras. 36-41.

156 *Z. a.o. v the United Kingdom*, para. 74.

157 ECtHR 24 October 2002, *Mastromatteo v Italy*, no. 37703/97, para. 69.

158 ECtHR 11 January 2001, *Xhavara a.o. v Italy*, appl. 39473/98. ECtHR 24 June 2008, *Isaak v Turkey*, appl. 44587/98.

the Convention and Article 1 of Protocol No. 13 because there were substantial grounds for believing that the applicants would face a real risk of being sentenced to death and executed.¹⁵⁹ A similar reasoning, although no finding of a violation of the ICCPR, was adopted by the Human Rights Committee in the case of *Munaf v Romania*, concerning the handover of an Iraqi-American dual national from the Romanian embassy in Baghdad to the multinational forces in Iraq who was subsequently sentenced to death. The Human Rights Committee held its previous jurisprudence in *refoulement*-cases to also apply to the circumstances of this case, but considered that the Romanian authorities could not have known that the complainant would face criminal charges.¹⁶⁰

To conclude, the prohibition of *refoulement* established under the ECHR and ICCPR articulates the essential protective duty of a State Party to not expose a person within its jurisdiction to a real risk of ill-treatment. If established that a person can be considered to be within the state's jurisdiction, the state becomes bound to comply with this protective duty, regardless of whether the person is on the territory of that state, in his country of origin or in a third state from which the threat with ill-treatment stems. This is not to exclude however, that the limited practical and/or legal capabilities a state in certain foreign situations may have, can inform (or displace) the substance (or material scope) of a state's protective duties.¹⁶¹

4.4 THE RIGHT TO SEEK ASYLUM

4.4.1 The right to seek asylum in international law

There is no common understanding of 'the right to seek asylum' in international law. Although pronounced in Article 14 of the Universal Declaration of Human Rights (together with the right to 'enjoy' asylum), the right to seek asylum was not codified in binding human rights treaties adopted under the auspices of the United Nations or regional organizations, with the exception of Article 12(3) of the African Charter on Human and Peoples' Rights.¹⁶² Possibly, the right to seek asylum could be read into the broadly formulated 'right to asylum' laid down in Article 18 of the EU Charter of Fundamental Rights.¹⁶³

159 ECtHR 2 March 2010, *Al-Saadoon and Mufdhi v the United Kingdom*, no. 61498/08.

160 HRC 21 August 2009, *Mohammad Munaf v Romania*, no. 1539/2006, paras. 14.2, 14.5.

161 See, in general, chapter 2.5.2; and specifically with respect to situations where human rights obligations may conflict with obligations vis-à-vis the host state, section 4.5.

162 Article 12(3) African Charter on Human and Peoples' Rights: 'Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.'

163 OJ 2007 C303/01. See further chapter 5.3.3.

Although lacking a clear basis in treaty law, legal scholars have employed the right to seek asylum as informing a variety of rights associated with the institution of asylum, albeit in divergent manner. Some perceive the right to seek asylum as covering the entire range of rights associated with receiving a proper status determination in and from the desired state of refuge,¹⁶⁴ while others connect the right to persons who try to flee from persecution but who are subjected to deterrent mechanisms preventing them from reaching and successfully claiming asylum in a safe country.¹⁶⁵ Notably, most authors derive from the right to seek asylum obligations of destination countries vis-à-vis asylum-seekers instead of what could perhaps be its most obvious and immediate significance: a right to escape from persecution – which is first and foremost exercisable vis-à-vis the country which one attempts to flee.

It transpires from the drafting history of Article 14 UDHR that the right to seek asylum was perceived as a right to escape persecution and that this right did not prejudice the right of the petitioned state to deny asylum. The Drafting Committee, responsible for preparing the text of the UDHR, had recommended to include a provision stipulating that “Everyone has the right to escape persecution on grounds of political or other beliefs or on grounds of racial prejudice by taking refuge on the territory of any State willing to grant him asylum”, a right which could be read as exercisable by both the individual and the state granting asylum vis-à-vis the country of persecution but which falls short of endowing the individual with a right to be granted asylum.¹⁶⁶ Later discussions in the drafting sessions predominantly concerned the question of whether the provision on asylum should not explicitly recognize a right of the individual to be granted asylum by another state. A majority of representatives in the Working Group of the Commission on Human Rights was in favor of including such a right and provisionally agreed upon the formula that “Everyone has the right to seek and be granted, in other countries, asylum from persecution.”¹⁶⁷ During the final negotiations in ECOSOC however,

164 D. Stevens, ‘The Asylum and Immigration Act 1996: Erosion of the Right to Seek Asylum’, 61 *The Modern Law Review* (1998), p. 207-222; K. Coffey, ‘The Due Process Right To Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy’, 19 *Yale Law and Policy Review* (2001), p. 255-291; E. Ferris, ‘Internal Displacement and the Right to Seek Asylum’, 27 *Refugee Survey Quarterly* (2008), p. 76-92; H. O’Nions, ‘The Erosion of the Right to Seek Asylum’, 2 *Web Journal of Current Legal Issues* (2006)

165 M. Kjaerum, ‘Article 14’, in: A. Eide et al. (eds), *The Universal Declaration of Human Rights. A Commentary*, Oslo: Scandinavian University Press and Oxford University Press (1992), p. 221-224; B. Frelick, ‘Preventive Protection’ and the Right to Seek Asylum: A Preliminary Look at Bosnia and Croatia’, 4 *IJRL* (1992), p. 439-454; T. Gammeltoft-Hansen and H. Gammeltoft-Hansen, ‘The Right to Seek – Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU’, 10 *EJML* (2008), p. 439-459.

166 UN Doc. E/CN.4/21, Annex F. For commentaries to the drafting of Article 14 UDHR see A. Grahl-Madsen, *The Status of Refugees in International Law*, vol. II, Leiden: Sijthoff (1972), p. 100-102; H. Lauterpacht, *International Law and Human Rights*, Hamden: Archon Books (1968 reprint), p. 421-422; Gammeltoft-Hansen and Gammeltoft-Hansen (2008), p. 442-446.

167 UN Doc. E/CN.4/SR.57, p. 11.

several delegations firmly opposed any reference to a right to be granted (or to obtain) asylum because it was felt that states were not under a general obligation to admit to their territories all persons fleeing from persecution.¹⁶⁸ The United Kingdom delegation instead proposed to refer to the right ‘to seek and to enjoy asylum’, with the term ‘enjoy’ referring to an individual right of asylum which is subject to approval of the petitioned state. Even though some delegations opposed this formula because there was ‘no point in a guarantee of enjoying asylum unless there was also established the right to obtain it’, subsequent proposals to insert some form of moral obligation to grant asylum were all defeated.¹⁶⁹

Noting the explicit disclaimer of an intention to assume an obligation to grant asylum, Lauterpacht concludes that Article 14 of the Declaration is ‘artificial to the point of flippancy’ and that it would be confusing ‘to refer in this connection to the “right of asylum” – a phrase implying that it is a right belonging to the individual’.¹⁷⁰ Rather, as is also underlined by Grahl-Madsen, Article 14 of the Declaration refers primarily to the right of states to grant asylum to non-nationals – the right to offer refuge and resist demands for extradition as discussed in section 4.2.1 – and a corresponding duty of respect for it on the part of the state of which the refugee is a national (which primarily finds reflection in the word ‘enjoy’).¹⁷¹ In so far as Article 14 UDHR does provide for a right which can be labeled as a human right, it is the mere right to *seek* asylum – a right which, according to Grahl-Madsen, does not say much more than the right to leave any country including his own, as already secured by Article 13 (2) UDHR.¹⁷²

The right to seek asylum is taken here as giving expression to the right of persons fearing persecution to make use of their right to leave a country for the specific purpose of trying to obtain asylum. Although the right to seek asylum and the more generally applicable right to leave a country are only scarcely touched upon in international refugee law, they would appear to have special significance in the context of extraterritorial migration controls, precisely because those controls may prevent persons from approaching a destination country in order to apply for asylum. In the absence of self-standing legal

168 UN Doc. A/C.3/253, UN Doc. A/C.3/SR.121, see in particular statements by Mrs. Corbet from the United Kingdom; cf. UN Doc. E/800.

169 UN Doc. A/C.3/244, Statement of Mr. Pavlov from the Soviet Union.

170 Lauterpacht (1968), p. 422 at n. 72.

171 Ibid; Grahl-Madsen (1972), p. 101.

172 Ibid. In this vein also Kjaerum, in: Eide (1992), p. 224-225: ‘The right to seek asylum has, in fact, one of its basis in the ‘right of emigration’’, referring to Article 13(2) UDHR, Article 12(2) ICCPR and Protocol No. 4 to the ECHR. *Contra*, Gammeltoft-Hansen and Gammeltoft-Hansen (2008) p. 446, who, after a lengthy review of the drafting history of Article 14 UDHR posit that the right to seek asylum should be perceived as a procedural right: the right to be allowed access to an asylum procedure, which should be guaranteed by the receiving state.

provisions giving substance to the right to seek asylum, this section describes the contents of the right to seek primarily by analogy to the conditions under which the right to leave can be asserted. Particular attention is paid to the following questions: under what circumstances can refusing leave to migrants in general, and asylum-seekers in particular, be considered in breach of the right to leave? What is the relationship between measures of entry control and the right to leave? Can the right to leave only be invoked vis-à-vis the territorial state or also against a state employing extraterritorial border measures?

4.4.2 The right to leave in international law

Although often not codified in national constitutional charters, the freedom to leave any country, including his own, is a historical norm in human society, and has found expression in virtually all modern human rights treaties.¹⁷³ The right to leave is pronounced in Article 12(2) ICCPR, Article 2(2) Protocol 4 ECHR, Article 22 American Convention on Human Rights and Article 12 African Charter of Human and Peoples' Rights. It has also been codified in treaties guaranteeing human rights for specific categories of persons, including the Refugee Convention, the Convention relating to the Status of Stateless Persons and the International Convention on the Protection of the Rights of All Migrant

173 The origins of the right to leave can be traced back to the Magna Carta of 1215 which stipulated that 'All merchants may safely and securely go away from England, come to England, stay in and go through England, (...)' and that 'Every one shall henceforth be permitted, saving our fealty, to leave our kingdom and to return in safety and security, by land or by water (...)', Articles 41 and 42. Grotius also connected the right to leave to the idea of free trade. He defended the axiom that '[e]very nation is free to travel to every other nation, and to trade with it', by observing that nature had not supplied every place with all the necessities of life and that, given the need for mutual exchange of resources and services, '[n]ature has given to all peoples a right of access to all other peoples', Hugo Grotius, *The Freedom of the Seas*, originally published 1608, trans. by R. Van Deman Magoffin, New York: Oxford University Press (1916), Ch. 1. Vattel recognised the right of a citizen 'to quit his country', which in some cases he regarded as absolute: '[t]here are cases in which a citizen has an absolute right to renounce his country, and abandon it entirely – a right founded on reasons derived from the very nature of the social compact.' Vattel distinguishes the right to quit a country from the right of emigration, which he also sees as a natural right with which the state may not interfere: '[i]f the sovereign attempts to molest those who have a right to emigrate, he does them an injury; and the injured individuals may lawfully implore the protection of the power who is willing to receive them.' E. de Vattel, *The Law of Nations*, originally published 1758, trans. J. Chitty, Philadelphia: Johnson (1867), Bk. 1, Ch. XIX, paras. 223-226. For modern appraisals of the right to leave, see eg R. Higgins, 'The Right in International Law of an Individual to Enter, Stay in and Leave a Country', 49 *International Affairs* (1973), p. 342; S. Juss, 'Free Movement and the World Order', 16 *IJRL* (2004), p. 292; H. Hannum, *The Right to Leave and Return in International Law and Practice*, Dordrecht/Boston/Lancaster: Martinus Nijhoff (1987), p. 4; C. Harvey and R.P. Barnidge, 'Human Rights, Free Movement, and the Right to Leave in International Law', 19 *IJRL* (2007).

Workers and Members of Their Families.¹⁷⁴ Discrimination with respect to the right to leave is prohibited under Article 5(d) of the International Convention on the Elimination of All Forms of Racial Discrimination. Of the relevant treaty monitoring bodies, it are predominantly the HRC and ECtHR which have examined the scope of the right to leave in significant detail.

The right to leave is pronounced in the exact same terms in Article 12 (2) ICCPR and Article 2(2) Protocol 4 ECHR: Everyone shall be free to leave any country, including his own.¹⁷⁵ The HRC and ECtHR have interpreted the right to leave broadly and have affirmed that the right to leave is a self-standing norm, the enjoyment of which does not depend on the purposes of travel.¹⁷⁶ Apart from travel bans or border-police measures preventing persons from leaving a country,¹⁷⁷ the HRC and ECtHR have accepted that that the confiscation, refusal to issue or refusal to renew a passport can also come within the ambit of the right to leave. According to the ECtHR '[a] measure by means of which an individual is dispossessed of an identity document such as, for example, a passport, undoubtedly amounts to an interference with the exercise of liberty of movement'.¹⁷⁸ The Human Rights Committee has explained that '[s]ince international travel usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents'.¹⁷⁹ Although passports are indeed the *sine qua non* of the right to leave,¹⁸⁰ analogous considerations apply to all identity

174 Refugee Convention, Article 28; Convention on Stateless Persons, Article 28; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 8.

175 This is not a coincidence. While the original draft of Article 2 (2) Fourth Protocol to the ECHR spoke of the right 'to leave any State', the Committee of Experts decided to substitute the word 'State' for 'country', by referring to the text of Article 12 (2) ICCPR. The difference appears marginal, although it was considered that the term 'country' could also apply to regions which could not be designated as states. Council of Europe Committee of Experts, 'Explanatory reports on the Second to Fifth Protocols to the European Convention for the Protection of Human Rights and Fundamental Freedoms', Doc. H (71) 11, Strasbourg (1971), para. 10.

176 HRC, General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9, para. 8. ECtHR 13 November 2003, *Napijalo v Croatia*, no. 66485/01, para. 73.

177 Eg ECtHR 23 May 2006, *Riener v Bulgaria*, appl. 46343/99, para. 110 (travel ban); ECtHR 17 July 2003, *Luordo v Italy*, appl. 32190/96, para. 92 (travel ban). With regard to the former East-German border-policing regime, see ECtHR 22 March 2001, *Streletz, Kessler and Krenz v Germany*, appls. 34044/96, 35532/97 and 44801/98, paras. 98-101.

178 *Napijalo v Croatia*, para. 69. Also see ECtHR 31 October 2006, *Földes and Földesné Hajlik v Hungary*, no. 41463/02, para. 33; ECtHR 22 May 2001, *Baumann v France*, no. 33592/96, para. 62; ECtHR 21 December 2006, *Bartik v Russia*, no. 55565/00, para. 36.

179 HRC, General Comment 27, para. 9.

180 Harvey and Barnidge (2007), p. 7

and travel documents necessary for exercising the right to leave, such as exit visa.¹⁸¹

Other infringements of the right to leave may consist of the imposition of various legal and bureaucratic barriers, such as exceedingly high fees for travel documents,¹⁸² the obligation to describe precisely the envisaged travel route,¹⁸³ the requirement to be in the possession of a return ticket,¹⁸⁴ or such far-reaching measures as a prohibition on women to leave without the consent of their husband.¹⁸⁵ It has also been considered that to make departure of a mentally deranged offender conditional on the receiving country placing that offender in a mental hospital may fall under Article 2 (2) Protocol No. 4 ECHR.¹⁸⁶

The expression *any country* in Article 12 (2) ICCPR and Article 2(2) Protocol 4 ECHR is important and implies, firstly, that the right to leave is applicable to nationals and aliens alike, which also follows from the word 'everyone'.¹⁸⁷ Secondly, and of particular importance for this study, the expression has been interpreted as obliging states not only to secure the right to leave from their own territories, but also from that of territories of other states. In *Peltonen v Finland*, the European Commission of Human Rights held the right to leave to be applicable to a situation in which a Finnish national had already left Finland for Sweden and when the Finnish authorities consecutively took measures which prevented him from leaving Sweden.¹⁸⁸ Similarly, the Human Rights Committee has repeatedly accepted that to refuse a passport to a national living abroad can impede a person from leaving that other country and therefore come within the ambit of the right to leave.¹⁸⁹ In *Peltonen v Finland*, the European Commission did not address the question whether

181 On exit visas, see HRC 26 April 2005, Concluding observations on Uzbekistan, CCPR/CO/83/UZB, para. 19; HRC 24 April 2001, Concluding observations on Syrian Arab Republic, CCPR/CO/71/SYR, para. 21; HRC 18 November 1996, Concluding observations on Gabon, CCPR/C/79/Add.71, para. 16.

182 HRC 19 November 1997, Concluding observations on Iraq, CCPR/C/79/Add.84, para. 14.

183 HRC, General Comment 27, para. 17.

184 *Ibid.*

185 HRC 1 April 1997, Concluding observations on Lebanon, CCPR/C/79/Add.78, para. 18.

186 EComHR 4 October 1989, *I.H. v Austria*, appl. 10533/83, par. 11. For a situation of compulsory care preventing a person from leaving his country see also EComHR 13 October 1993, *Nordblad v Sweden*, appl. 19076/91.

187 To this effect, see eg HRC Concluding Observations on Lebanon, 1 April 1997, CCPR/C/79/Add.78, para. 22; and HRC 18 November 1996, Concluding observations on Gabon, CCPR/C/79/Add.71, para. 16, concerning the confiscation of passports of foreign workers and exit visa requirements imposed on foreign workers, respectively.

188 EComHR 20 February 1995, *Peltonen v Finland*, no. 19583/92.

189 HRC 15 November 2004, *Loubna El Ghar v Libya*, no. 1107/2002, para. 7.3.; HRC 29 July 1994, *Peltonen v Finland*, no. 492/1992, para. 8.4.; HRC 23 March 1982, *Vidal Martins v Uruguay*, no. R.13/57, para. 7; HRC 31 March 1983, *Montero v Uruguay*, no. 106/1981, para. 9.4.; HRC 31 March 1983, *Lichtensztejn v Uruguay*, no. 77/1980, para. 8.3.; HRC 22 July 1983, *Nunez v Uruguay*, no. 108/1981, para. 9.3.

Peltonen actually was ‘within the jurisdiction’ of Finland for the purposes of Article 1 ECHR. The Human Rights Committee, on the other hand, has explicitly accepted that nationals living abroad who are refused a passport, come within the jurisdiction of the refusing state.

In the case of *Baumann v France*, the ECtHR considered that ‘the right to leave implies a right to leave for such country of the person’s choice to which he may be admitted’.¹⁹⁰ Although this reasoning could be taken as to imply that a right to leave only exists in so far as another country is willing to accept a person,¹⁹¹ the better interpretation is that the Court indicates that the right to leave can also be interfered with in situations where a person may be able to leave for one particular country, but is prohibited from going to another.¹⁹² This is also apparent from the earlier Commission decision in the case of *Peltonen v Finland* – from which the quote in *Baumann* was taken – in which the denial to issue a passport to Mr. Peltonen was considered to constitute an interference with the right to leave, even though the refusal did not prevent him from leaving Sweden for another Nordic country. It is from a similar rationale that the Human Rights Committee has frequently stressed that ad hoc travel documents such as *laissez-passeurs* or safe conducts out of the country are no adequate substitutes for a passport, since they only allow for travel to one particular destination.¹⁹³ According to the Human Rights Committee: ‘the right of the individual to determine the State of destination is part of the legal guarantee’.¹⁹⁴

In line with the interpretation that an interference of the right to leave does not depend on there being another country willing to grant entry, the ECtHR has on multiple occasions stated that measures making it impossible for persons to travel abroad must be considered as automatically restricting the right to leave, also when the person concerned has no inclination to travel abroad. Thus, in *Napijalo v Croatia*, the Court held that to deny the use of an identity document to the applicant which, ‘had he wished’, would have permitted him to leave the country, restricted his right to liberty of movement.¹⁹⁵ And in *Luordo v Italy*, the Court found an order to stay in a place of residence

190 *Baumann v France*, para. 61, emphasis added. The formulation was repeated in *Földes and Földesné Hajlik v Hungary*, para. 32; *Napijalo v Croatia*, para. 68; *Bartik v Russia*, para. 36.

191 G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, Oxford University Press (2007), p. 381; V. Moreno Lax, ‘Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers’ Sanctions with EU Member States’ Obligations to Provide International Protection to Refugees’, 10 *EJML* (2008), p. 352.

192 On the relationship between the individual right to leave and the right of the state to control entry, see section 4.4.3 below. It does not transpire from the case of *Baumann* or from later judgments of the ECtHR that the question of whether another country is in fact prepared to allow entry is material for applicability of the right to leave.

193 *Loubna El Ghar v Libya*, para. 7.2; *Nunez v Uruguay*, para. 9.2; *Lichtensztejn v Uruguay*, para. 8.2; *Vidal Martins v Uruguay*, paras. 6.2, 9; *Montero v Uruguay*, paras. 9.2, 10.

194 HRC, General Comment 27, para. 8.

195 *Napijalo v Croatia*, para. 73. Also see *Bartik v Russia*, para. 36.

to be in violation of Article 2 Protocol No. 4, '[e]ven though there is nothing in the case file to indicate that the applicant wished to move away from his place of residence or was refused permission to do so.'¹⁹⁶ Apparently, the mere fact of being unable to travel a fortiori constitutes an interference with the right to leave.¹⁹⁷

Because the right to leave encompasses departure from any country where a person is, because it covers departure to any country of the person's choice, and because a state's obligations are not necessarily confined to its own territories but may extend to the territories of other states; it would logically follow that states may also interfere with a person's right to leave by imposing measures of immigration control which have the effect of preventing a non-national from leaving another country. Although the case law referred to above on measures having the effect of preventing persons from leaving another country concerned restrictions imposed on nationals living abroad, there is nothing in the text of Articles 12(2) ICCPR and 2(2) Protocol No. 4 ECHR which prevents non-nationals present in a foreign country from also coming within the potential ambit of a state's obligation to respect the right to leave. The Human Rights Committee has endorsed this view in its General Comment on Article 12 ICCPR by inviting States to 'include information in their reports on measures that impose sanctions on international carriers which bring to their territory persons without required documents, where those measures affect the right to leave another country'.¹⁹⁸ And in its concluding observations on Austria, the HRC expressed concerns about certain features of Austria's law on asylum-seekers and immigrants, amongst which 'sanctions against passenger carriers and other pre-frontier arrangements that may affect the rights of any person to leave any country, including his or her own'.¹⁹⁹ This supports the proposition that immigration policies having effects in other countries *can* (but see below) be construed as infringements of the right to leave another country.

¹⁹⁶ *Luordo v Italy*, para. 96.

¹⁹⁷ This position was nonetheless contested by dissenting judges Costa, Bratza and Greve in the *Baumann* judgment, who pointed out that the contested measures 'must also have actually interfered with the right to liberty of movement', and that, because the seizure of Baumann's passport had not deprived him of his right to leave France and because it had never been alleged that he was prevented from leaving Germany, there was no causal link between the impugned seizure and the applicant's freedom of movement. Joint partly dissenting opinion judges Costa, Bratza and Greve in *Baumann v France*.

¹⁹⁸ HRC, General Comment 27, para. 10.

¹⁹⁹ HRC 19 November 1998, Concluding observations on Austria, CCPR/C/79/Add.103, para. 11.

4.4.3 The right to leave and the right to enter

It was posited above that a state may interfere with the right to leave also if no other state is in fact willing to grant entry. The question may be posed, conversely, whether a state, by refusing *entry* into its territory, may also interfere with a person's right to leave the territory of *another* state. It is, indeed, sometimes argued that measures of immigration control imposed by countries of destination have a negative impact, or may even nullify, a person's right to leave his country of residence. Juss, stressing that 20th century restrictions on migration are a departure from the historical norm of free movement, posits that immigration barriers render the right to leave practically meaningless.²⁰⁰ Nafziger argues that the right to leave imposes an implicit obligation on territories not to entirely deny entry to foreign nationals.²⁰¹ And Dummett goes so far as to state that an individual authorized to leave his country but not accepted by any other country would see his right to emigration violated.²⁰² Although it is certainly true that the practical meaning of the right to leave depends on a corresponding right to be allowed entry into another country, one must, for a number of reasons, be careful in construing immigration restrictions as infringements of the right to leave. Such pronouncements risk neglecting that the rights to enter and to leave are firmly set apart in human rights law and subject to different principles of international law.

First, one must not confuse the right to leave with a right to emigrate. The latter is not a right in international law. Although the HRC states that the freedom to leave covers 'departure for permanent emigration', this pronouncement must be understood from the HRC's insistence that the right to leave is to be secured regardless the purpose of travel, and that it may not, for example, be made dependent on whether a person intends to return or not.²⁰³ Conceptually, the difference between a right to emigrate and the right to leave is that the former encompasses not only the activity of leaving but also that of (permanent) settlement in another country. It is clear that the possibility of obtaining permission to settle in another country is a totally different matter than the act of leaving a country. It may well be that persons who will not be able to enter a country for purposes of settlement, are able to enter that country for other purposes, such as business or family visits.²⁰⁴

200 Juss (2004), p. 294.

201 J.A.R. Nafziger, 'The General Admission of Aliens Under International Law', *AJIL* Vol. 77 (1983), p. 842.

202 A. Dummett, 'The Transnational Migration of People seen from within a Natural Law Perspective', in: B. Barry and R.E. Goodin (eds), *Free Movement. Ethical Issues in the Transnational Migration of People and of Money*, New York: Harvester Wheatsheaf (1992), p. 169-180.

203 HRC, General Comment 27, para. 8.

204 Hannum concludes that, in combination with the right to return to one's own country, the right to leave must be interpreted as embodying a right to travel: Hannum (1987), p. 20.

Secondly, rights can exist without possibilities – and vice versa. While the possibility to leave a country can very well be dependent on another country allowing entry (unless one wishes to sail the Seven Seas), the right to leave is not in principle affected by the unwillingness of other countries to allow entry. To be sure, a person could still endeavor to make lawful use of his right to leave in order to try to gain illegal entry. Vattel, therefore, after positing that there is not only a right of citizens ‘to quit’ their country but also a ‘right to emigrate’, rightfully submits that this is not a ‘full’ right ‘but imperfect with respect to each particular country’, because the citizen ‘must ask permission of the chief of the place; and, if it is refused, it is his duty to submit’.²⁰⁵ Such interpretation does not render the right to leave nugatory. While one may perceive the right to leave as an ‘imperfect’, ‘half’ or ‘dormant’ right when no other country is willing to open its doors, its *practical* consequences get in full swing once another country is willing to grant entry.

Thirdly and most fundamentally, the problem with construing entry restrictions as potential infringements of the right to leave is that this would in effect transform the right to leave into a qualified right of entry into another state which would then only be subject to the restrictions permitted under Articles 12 (3) ICCPR and 2(3) Protocol No. 4 ECHR.²⁰⁶ Such interpretation would seriously transgress upon the axiom that states have, subject to their treaty obligations, exclusive control over the admittance of aliens into their territory. To account for the latter problem, Nafziger has submitted that the right to leave would seem to require states, *taken together*, to respect the right by not totally barring entry.²⁰⁷ This view corresponds with the one of Vattel, when he speaks of the right as perfect in the general view but imperfect with respect to individual countries. The reasoning would be, accordingly, that the international community as a whole is under the duty to complete the right to leave by allowing entry into at least one its constituents. As Nafziger admits however, construing the right to leave as imposing a corresponding duty of entry on the international community at large would have practical meaning only if that duty is made more concrete and specific, by negotiating and formulating agreements giving expression to the notion that a state has a qualified duty to admit aliens.²⁰⁸ And as long as such agreements do not exist, it remains problematic to construe the right to leave as more than a right engaging the responsibility of individual states, in which the starting point is that each state is primarily to guarantee this right to those within their own territories.²⁰⁹

205 de Vattel (1758), Bk. 1, Ch. XIX, par. 230.

206 See also *Lichtensztejn v Uruguay*, para. 8.3 and *Nunez v Uruguay*, para. 9.3: ‘On the other hand, article 12 does not guarantee an unrestricted right to travel from one country to another. In particular, it confers no right for a person to enter a country other than his own.’

207 Emphasis added.

208 Nafziger (1983), p. 842-847.

209 Goodwin-Gill and McAdam (2007), p. 382.

4.4.4 Extraterritorial migration control and the right to leave

The question remains whether this reasoning – i.e. entry controls should not be construed as coming within the scope of the right to leave – should also apply to pre-frontier border control arrangements, which sort their practical or legal effect already within the territory of the country of departure. There is as of yet only scarce legal authority addressing the issue. Although, as noted above, the HRC has accepted that carrier sanctions and other pre-frontier arrangements do attract a state's duties under the right to leave, the ECtHR, in *Xhavara v Italy*, considered the ramming of an Albanian migrant boat by an Italian coast guard vessel in international waters not to raise an issue under the right to leave because the aim of the Italian operation was not to prevent Albanians to depart from their country, but rather to prevent their entry into Italy:

'La Cour relève que les mesures mises en cause par les requérants *ne visaient pas à les priver du droit de quitter l'Albanie, mais à les empêcher d'entrer sur le territoire italien*. Le second paragraphe de l'article 2 du Protocole n° 4 ne trouve donc pas à s'appliquer en l'espèce.'²¹⁰

Although *Xhavara* concerned measures undertaken in the high seas instead of on the territory of another country, the statement of the ECtHR could be taken as a general rule that measures which have the goal of preventing entry can simply not come within the scope of the right to leave. If this is indeed correct, it would follow that the entire range of pre-border control measures employed by a country – which, we may assume, all have the aim of preventing unsolicited migration into the state's territory in one way or the other – cannot attract applicability of the right to leave. But the pronouncement of the Court is rather crude and difficult to reconcile with the ordinary approach of the Court under which the purpose for taking a particular measure is not considered relevant for delineating the material scope of a particular human right, but rather for determining whether an interference can be deemed to serve a 'legitimate aim' and hence justifies a restriction of the right. It is, on a general note, anathema to human rights law to refer to the goal of a measure in order to define the scope of a particular right, because many infringements of human rights may come about for other reasons than to expressly deprive a person of his fundamental rights.

A more meaningful distinction between measures which essentially fall within the state's sovereign prerogative to control the entry of aliens and measures which interfere with the right to leave another country would be to construe measures of entry control as coming within the ambit of the right to leave only if the measure already sorts its legal or practical effect in the

210 ECtHR 11 January 2001, *Xhavara v Italy*, no. 39473/98, emphasis added.

country of departure. If a control measure is implemented within the territorial boundaries of another country, resulting in the legal and/or practical impossibility for a person to leave that country, there is little doubt that the measure interferes with the right to leave. But when the measure sorts its practical or legal effect only at the threshold of entry into the state of destination, the measure should be examined in the sphere of the right of the state to set limits to the entry of aliens. In the case of visas, for example, a person who is refused a visa will not normally be prevented from leaving his country of origin for the non-issuing state, although he will be refused entry at the moment he presents himself at the border of that state. Should that state however enforce the visa obligation already within the country of origin – for example by making use of pre-clearance controls – the person is effectively prevented from leaving his country. In the latter situation, immigration control not only prevents a person from effectuating an illegal entry, but has the additional effect (and aim) to obstruct the person from leaving the other country and would thus interfere with his right to leave.

Although this distinction seems sound and practicable, there may also be intermediate situations where measures of entry control sort their primary effect outside the territory of the country of departure but which may additionally compel the person concerned to return to that country. In respect of enforcement activities at sea for example, migrant vessels may be intercepted at the high seas and immediately returned to the territorial waters or ports of the country of embarkation. Could the migrants then contend that – perhaps as soon as their boat would re-enter the territory of the country they intend to leave – the intercepting state would infringe their right to leave? And if one would accept this line of reasoning, should it then also be accepted that every forcible return of a migrant, by which the expelling state ensures that the migrant is physically returned to his country of origin, interferes with that person's right to leave – perhaps as soon as the airplane transporting him enters the territory of the country of origin?

It cannot be denied that such lines of reasoning would stretch the right to leave to proportions hitherto unexplored. Nonetheless, those intermediate situations may lend themselves for meaningful further distinction. There are, for example, notable differences in nature between extraterritorial border measures and measures of forcible expulsion or removal. In the context of forcible returns, migrants have already left their country proper, have been granted the opportunity to claim a right of entry in another country and, if that claim was denied, will often have first been granted the opportunity to voluntarily leave the country. All this does not seem to interfere with a person's right to leave. It is only after it has been established that the migrant has no right to stay and when that migrant does not leave on its own accord, that the state enforces its immigration laws by forcibly returning a person to his country of origin. In the context of sea border controls on the other hand, when migrants are immediately and forcibly returned as soon as they have

crossed the border of the territorial sea, a person's right to leave his country is deprived of any meaningful effect and the preventing of departure constitutes an essential element of the enforcement activity. As is explained in the section below, it does not follow from this reasoning that such controls are necessarily in *violation* of the right to leave, but rather that the interference must find justification in the particular circumstances of the case.

4.4.5 Permitted restrictions to the right to leave

Different from the prohibition of *refoulement* under Articles 3 ECHR and 7 ICCPR, the right to leave is not absolute. Although external migration controls restricting persons from leaving another country may well serve a legitimate purpose and can hence find justification in international law, the cardinal implication of the finding that such measures may interfere with the right to leave is that they should comply with the requirements of Articles 2(3) Protocol No. 4 ECHR and 12(3) ICCPR.²¹¹ This has profound consequences for the manner in which such controls must be conducted: they are exported from the realm of a state's discretionary powers regarding entry and admittance, and placed in the regime of human rights scrutiny in which it must be assessed whether a person's right to leave is affected, whether the restrictions are taken in pursuit of a legitimate aim, whether they are in accordance with the law, and whether they can be considered necessary and proportionate. A general framework for assessing the legitimacy of restrictions under Article 12 ICCPR is set out in General Comment 27 of the HRC. Although more scarce than under other qualified rights, the available case law of the ECtHR on permitted restriction under Article 2(3) Protocol No. 4 ECHR indicates that the test to be applied is similar to that under other provisions.²¹²

What follows from these requirements, in particular, is that restrictions which are applied outside a legal and procedural framework and implemented not on an individual but general basis are problematic. The quality of law-doctrine requires the law not only to establish the grounds for restricting the right to leave but also to protect against arbitrary interferences, which implies that the law 'must indicate the scope of any such discretion conferred on the

211 It is said, in the context of the ECHR, that the right to leave a country does not have a very broad effective scope, because practically all conceivable motives on the part of the authorities to refuse a person this right can be brought under the permitted restrictions: Van Dijk, F. van Hoof, A. van Rijn et al (eds), *Theory and Practice of the European Convention on Human Rights*, Antwerpen/Oxford: Intersentia (2006), p. 942. This argument is not very persuasive, as the permitted restrictions under Articles 2(3) Protocol No. 4 ECHR and 12(3) ICCPR do essentially not differ from those listed under other qualified human rights.

212 See, in particular, *Bartik v Russia*, *Luordo v Italy*, *Napijalo v Croatia*, *Földes and Földesné Hajlik v Hungary*, *Riener v Bulgaria*.

competent authorities and the manner of its exercise with sufficient clarity.²¹³ It follows from the requirements of necessity and proportionality that restrictions must be assessed in the light of the individual circumstances of the case, implying that restrictive measures must always take account of the particular situation of each individual subjected to the measure.²¹⁴ Further, the right to an effective remedy requires allegations of violations of the right to be subject to the possibility of thorough and effective scrutiny by the responsible authorities.²¹⁵

In view of current practices of external immigration control, several more specific remarks are in order. Firstly, as regards the requirement of 'legitimate aim', it can be observed that the aim of immigration controls conducted in foreign countries which may prevent foreigners from leaving that country not necessarily corresponds with that of border checks and border surveillance conducted along the state's own territorial border. These latter, 'regular' controls are normally conducted as a measure of immigration enforcement, to prevent illegal entry and to prevent persons from circumventing border checks.²¹⁶ Pre-border controls, on the other hand, have been described as primarily aiming at reducing the potential burden posed by 'failed' migrants altogether: by preventing persons who are unlikely to have a right of entry from presenting themselves at the border, the risk of having to incur administrative, financial and social costs as a result of processing asylum-seekers and not being able to enforce the removal of failed asylum-seekers or other categories of migrants is minimized.²¹⁷ If it can be established that this is indeed the aim of a particular measure of pre-border control, the question rises under what legitimate aim the measure must fall. Notably, the aim of 'economic well-being' of the country, which is frequently referred to by the European Court as justification of measures of immigration control interfering with

213 ECtHR 2 August 1984, *Malone v the United Kingdom*, no. 8691/79, paras. 66-68; ECtHR 24 March 1988, *Olsson v Sweden (No. 1)*, appl. 10465/83, para. 61; ECtHR 20 June 2002, *Al-Nashif v Bulgaria*, 50963/99, para. 119; ECtHR 24 April 2008, *C.G. a.o. v Bulgaria*, no. 1365/07, para. 39. For the application of these requirements to restrictions on the right to leave, see in particular *Riener v Bulgaria*, paras. 112-113.

214 The ECtHR has derived a duty on the side of the authorities under Article 2 of Protocol No. 4 'to take appropriate care that any interference with the right to leave one's country should be justified and proportionate throughout its duration, in the individual circumstances of the case': *Riener v Bulgaria*, para. 128. Similarly, the Human Rights Committee speaks of the application of restrictions which, 'in any individual case', must be based on clear legal grounds and meet the test of necessity and proportionality, HRC, General Comment No. 27, para. 16.

215 Article 13 ECHR; Article 2(3) ICCPR.

216 This is also the manner in which border controls are defined in the Schengen Borders Code, see Articles 2 (9)-(11) EC Regulation 562/2006.

217 In this vein: *Roma Rights*, para. 2, where the posting of British immigration officers at the airport of Prague was explained from the background of there being an 'administrative, financial and indeed social burden borne as a result of failed asylum-seekers'.

a person's family life,²¹⁸ is no recognised legitimate aim under Articles 12(3) ICCPR and 2(3) Protocol No. 4 ECHR. While the prevention of having to tolerate persons without a legal residence status may be deemed to be for the benefit of 'public order' (which is explicitly mentioned as a legitimate aim for restricting the right to leave), it is more difficult to apply this reasoning to the goal of reducing economic and social costs involved in processing and harboring migrants.²¹⁹

Secondly, one of the problems identified in the context of measures of migration control employed in territories of foreign countries is that they do not always have a clear legal basis, that the agents involved in these controls have rather wide discretionary powers and that no legal remedies are offered to persons refused leave to enter. This appears to be the case, for example, with regard to interception and diversion measures undertaken by European states in territorial waters in third countries, which fall beyond the scope of domestic statutes or European law and are grounded in bilateral agreements which are often outside the public domain.²²⁰ Similar concerns have been voiced with regard to controls conducted by private air and sea carriers and by immigration or border guard officers stationed in foreign countries.²²¹ In respect of the conduct of immigration officers stationed at Prague airport, the House of Lords concluded that the tasks performed by these officers had a clear basis in domestic immigration rules, which included a description of their competences and the grounds under which the officers were allowed to refuse leave to enter. The relevant legislation moreover allowed for judicial review.²²² But it does not seem, as is further explored in chapters 5-7, that European countries commonly consider their domestic immigration statutes to apply to controls undertaken in third countries, raising the question on what

218 For instance ECtHR 21 June 1988, *Berrehab v the Netherlands*, no. 10730/84, para. 26; ECtHR 31 January 2006, *Rodrigues da Silva and Hoogkamer v the Netherlands*, no. 50435/99, para. 44.

219 The question whether limitations for economic reasons can be brought under the permitted restrictions of Article 2(3) Protocol No. 4 ECHR and Article 12(3) ICCPR has received considerable attention, although mainly in the context of limitations imposed by countries of departure for purposes of preventing 'brain drain'. Van Dijk, van Hoof and van Rijn (2006), at p. 944, conclude, in the context of Article 2(3) Protocol No. 4 ECHR, that the freedom to leave may not be restricted on purely economic grounds. Hannum (1987), at p. 40, in respect of Article 12(3) ICCPR, concludes that 'most limitations imposed on the right to leave on economic grounds must be judged in the context of good faith – or lack thereof – of the government concerned. If the limitation of a particular right is necessary to deal with a demonstrable socio-economic problem that threatens public order in a country – particularly when the limitation is proportional, temporary, and determined with adequate notice to those affected by it – it may well fall within the narrow range of limitations permitted under article 12(3) of the Covenant.'

220 See extensively chapter 6.

221 P. Minderhoud and S. Scholten, 'Regulating Immigration Control: Carrier Sanctions in the Netherlands' 10 *EJML* (2008), p. 131, 137-138; Gammeltoft-Hansen and Gammeltoft-Hansen (2008), p. 450-451.

222 *Roma Rights*, paras. 5, 77-86.

legal basis particular enforcement activity is undertaken and whether that activity takes sufficient account of procedural guarantees which must accompany restrictions to the right to leave.

Thirdly, it follows from the requirements of necessity and proportionality that a fair balance must be struck between the public interest and the individual's rights at issue.²²³ The Human Rights Committee indicates that for the necessity-requirement to be satisfied, it is not sufficient that the restrictions serve the permissible purposes, they must also be necessary to protect them.²²⁴ For measures to be in conformity with the principle of proportionality, they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.²²⁵ In the case of *Streletz, Kessler and Krenz v Germany*, the European Court addressed the former East German border-policing regime entailing the pertinent refusal to allow GDR citizens to travel to Western Germany, without giving reasons and enforced by unparalleled technical sophistication and the indiscriminate use of firearms. The Court concluded not only that the shooting of persons attempting to flee the GDR failed to have a basis in domestic GDR law, but also that '[i]t cannot be contended that a general measure preventing almost the entire population of a State from leaving was necessary to protect its security, or for that matter the other interests mentioned.'²²⁶ Although the case of East Germany is extreme, certain practices of external migration control, and this argument applies in particular to general diversions schemes coupled with summarily returns at sea, do by their nature not seem to take account of any individual considerations, making it difficult to evaluate their legitimacy in the light of their proportionality vis-à-vis each individual.²²⁷

4.4.6 Asylum-seekers and the right to leave

Although the *material* scope of the right to leave is limited on account of its qualified nature, the *personal* scope is wider than that of duties inherent to the prohibition of *refoulement* as discussed in section 4.3. The right to leave not only benefits persons who are seeking – and entitled to – international protection, but can be invoked by anyone who wishes to leave a country, for whatever (or indeed: no) purpose he may have in mind.

223 *Földes and Földesné Hajlik v Hungary*, para. 32; *Riener v Bulgaria*, para. 109.

224 HRC, General Comment 27, para. 14.

225 *Ibid.*

226 *Streletz, Kessler and Krenz v Germany*, para. 100.

227 G. Cornelisse, 'European Vessels, African Territorial Waters and 'Illegal Emigrants': The Right to Leave and the Principle of (Il)legality in a Global Regime of Mobility', available at <www.libertysecurity.org>.

It could be posited that the specific plight of asylum-seekers warrants a more thorough scrutiny of the justifiability of restrictions to the right to leave. The argument would be that the notorious repercussions an impossibility of departure may have for asylum-seekers render restrictions to the right to leave particularly problematic, implying that the interests of persons fleeing from maltreatment should more readily outweigh the interest of authorities to prevent departure. One manner to incorporate this line of thought into an assessment of permitted restrictions to the right to leave would be, as has been suggested, to accord additional weight to the interests of the individual in examining the proportionality of the measure.²²⁸ The difficulty with this argument is however that not to be persecuted or not to be subjected to maltreatment is normally seen as an – absolute – *right* which is difficult to incorporate in a test of proportionality. If it is the territorial state which prevents departure, and if this state is also the actor of persecution, one may well defend the reasoning that a refusal to leave is an act contributing to persecution and on that account attracting the state's human rights obligations. If, on the other hand, the persecution stems from non-state actors and the territorial state prevents persons from escaping that persecution, the state may be held responsible under human rights law for failing to provide protection against maltreatment – in this case by allowing or facilitating a safe conduct out of the country – as is inherent to the rights to life and to be free from torture, both phrased in absolute terms. A similar reasoning applies to a non-territorial state employing measures which prevent asylum-seekers from fleeing another country. If the other requirements for attracting the responsibility of such a extraterritorially operating state are met, a refusal to leave which results in a real risk that the person concerned will be exposed to maltreatment can possibly come within the ambit of Articles 2 and 3 ECHR, 6 and 7 ICCPR and/or Article 33 Refugee Convention, as discussed in section 4.3. It follows that the 'aggregate right to leave to seek asylum'²²⁹ constitutes a *lex specialis* of absolute character to the general and qualified right to leave. In the context of the right to leave, this implies that restrictions to that right which result in a violation of other protected fundamental rights must automatically be construed as disproportionate to the aim pursued.²³⁰

228 See, in this connection, Moreno Lax (2008), p. 356; who argues that 'the aggregate right to leave to seek asylum imposes a stricter principle of proportionality'.

229 Ibid.

230 This reasoning corresponds to the requirement under Article 12(3) ICCPR that restrictions of the right to leave may not impair other rights of the Covenant.

4.5 A RIGHT TO BE PROTECTED BUT NO RIGHT TO PROTECT?

The previous sections 4.3 and 4.4 concluded that the prohibition of *refoulement* and the right to leave any country, including his own, inform the duties of states who are confronted with asylum-seekers in another state. But it was also concluded in section 4.2 that the conduct of the sending state must as a rule respect the sovereignty of the host state and that the sending state has a right to grant extraterritorial protection only in so far as that right does not intervene in matters which are essentially within the domestic jurisdiction of the host state. Scenarios may arise in which the sending state is approached by a person requesting asylum or another form of protection but where the host state opposes to the grant of protection. These scenarios are not merely hypothetical. Persons subjected to pre-entry clearances at a foreign airport who wish to exit that country without valid identity papers, for example, will normally offend the laws of that country and immigration officers of a sending state conducting pre-clearances must respect the local laws in force. But they may also be confronted with valid individual claims for asylum. This may confront the sending state with a conflict of norms, one stemming from being party to a human rights treaty, the other stemming from the principle of territorial sovereignty and the derivative rule of non-intervention. How should a state reconcile these opposing norms?

This question should be addressed in conjunction with the deliberations on the different meaning of the term jurisdiction in general international law and human rights law as set out in Chapter 2. It would follow from that analysis that essentially two approaches to the question would be conceivable. First, it could be argued, in line with the ordinary meaning of the term 'jurisdiction' in general international law, that the requirement of 'jurisdiction' under a human rights treaty may avoid a situation of norm conflict from arising, by considering the person in question not to fall under the jurisdiction of the sending state. The reasoning would be that even though a person may (initially) be within the 'jurisdiction' or 'effective control' of the sending state, any act with regard to that person which constitutes an affront to the territorial sovereignty of the host state is an act over which the sending state *de jure* lacks 'control' or 'authority', because this control and authority accrues to the host state in its capacity as the sovereign power. It would follow from this reasoning that the sending state is only obliged to secure the human rights of the person concerned in so far as doing so will not encroach upon the host state's sovereignty.²³¹

The other conceivable approach would be to argue that the term 'jurisdiction' within human rights law has clearly distanced itself from the original notion under international law and has attained *sui generis* standing. This

231 See chapter 2.4.

approach would not preclude the possibility of a state being obliged to ensure human rights to persons who are within their 'jurisdiction' in the human rights meaning of the term, also if they remain subject to the concurrent jurisdiction of another state and if an act regarding that person would transgress upon the sovereignty of the other state. In this approach, the mere existence of a sufficiently close legal or physical relationship between the extraterritorial state and the individual suffices to enliven the state's human rights obligations vis-à-vis the individual. The question whether this would conflict with obligations stemming from other sources of international law is then not relevant for the jurisdiction issue, but may alternatively be incorporated in defining the scope of a state's substantive human rights obligations.

Outside the asylum context, confirmation of the first proposition can be found in the case of *Gentilhomme*, concerning complaints lodged against the refusal of French state schools situated in Algeria to continue to enrol several children with dual French and Algerian nationality. The refusal was in compliance with an indication of the Algerian government to the French government that French state schools in Algeria should close their doors for children with Algerian nationality. The ECtHR, while expressly noting that 'a State may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence',²³² considered that the French refusal constituted an implementation of a decision imputable to Algeria, taken by the sovereign on its own territory and therefore beyond the control of France.²³³ Accordingly, it found that the children could not be said to fall within French jurisdiction.

In the particular context of grants of protection which may run counter to demands of the host state, a similar approach was followed by the England and Wales Court of Appeal in the case of *Al-Saadoon and Mufdhi*, which was later brought before the European Court of Human Rights. The case concerned the lawfulness of the proposed transfer of two Iraqi nationals, who were accused of the murder of two British soldiers, from British military facilities in Iraq to Iraqi custody for trial by the Iraqi High Tribunal. The Iraqi Tribunal had repeatedly requested their transfer and the United Kingdom was, under the various agreements concluded with the interim government of Iraq, obliged to comply with these requests. The Court of Appeal, quoting at length from the ECtHR decision in *Banković* and recalling that the ECtHR, in interpreting the term jurisdiction, had underlined that account had to be taken of 'of any relevant rules of international law applicable in the relations between the

232 ECtHR 14 May 2002, *Gentilhomme v France*, nos. 48205/99, 48207/99 and 48209/99, para.

20. The Court referred here to its earlier pronouncements in *Banković*, paras. 59-61.

233 *Ibid.*

parties' (Article 31(3)(c) VCLT),²³⁴ held that for a person to come within 'Article 1 jurisdiction' a mere exercise of *de facto* power – in the meaning of effective control or authority – is insufficient. Instead, Lord Justice Laws formulated four 'core propositions' from which it would follow, amongst other things, that the question of jurisdiction must be ascertained in harmony with other applicable norms of international law and that it implies the possibility of exercising sovereign legal authority.²³⁵ Observing that the British forces in Basra were not, from at least May 2006 until 31 December 2008, entitled to carry out any activities on Iraq's territory in relation to criminal detainees save as consented by Iraq and that the British forces no longer enjoyed a legal power to detain any Iraqi from 1 January 2009 onwards, Lord Justice Laws concluded that the United Kingdom 'was not exercising any autonomous power of its own as a sovereign state' and that 'the detention of the appellants by the British forces at Basra did not constitute an exercise of Article 1 jurisdiction by the United Kingdom'.²³⁶

The England and Wales Court of Appeal had approached the matter differently in the earlier case of *B and others*, on the traditional question of diplomatic asylum. The case concerned the legality under the United Kingdom Human Rights Act and the ECHR of the refusal of the British authorities to comply with a request for asylum lodged by two minor Afghan brothers in the British consulate in Melbourne, Australia, who submitted that their return

234 Court of Appeal (England and Wales) 21 January 2009, *R (on the application of (1) Faisal Attiyah Nassar Al-Saadoon (2) Khalaf Hussain Mufdhi) v. Secretary of State for Defence*, [2009] EWCA Civ 7, para. 25.

235 *Ibid.*, para. 37: 'It is not easy to identify precisely the scope of the Article 1 jurisdiction where it is said to be exercised outside the territory of the impugned State Party, because the learning makes it clear that its scope has no sharp edge; it has to be ascertained from a combination of key ideas which are strategic rather than lexical. Drawing on the *Bankovic* judgment and their Lordships' opinions in *Al-Skeini*, I suggest that there are four core propositions, though each needs some explanation. (1) It is an *exceptional* jurisdiction. (2) It is to be ascertained *in harmony* with other applicable norms of international law. (3) It reflects the *regional* nature of the Convention rights. (4) It reflects the *indivisible* nature of the Convention rights. The first and second of these propositions imply (as perhaps does the term *jurisdiction* itself) an exercise of sovereign *legal* authority, not merely *de facto* power, by one State on the territory of another. That is of itself an exceptional state of affairs, though well recognized in some instances such as that of an embassy. The power must be given by law, since if it were given only by chance or strength its exercise would by no means be harmonious with material norms of international law, but offensive to them; and there would be no principled basis on which the power could be said to be limited, and thus exceptional.'

236 *Ibid.*, paras. 32-36, 40. The language used may be taken to suggest that the actions of the British forces should not be attributed to the United Kingdom but to Iraq. The Court of Appeal only dealt with the jurisdiction issue however; the High Court had already concluded that, in view of the autonomous tasks performed by the Multi-National Forces, the detention and possible transfer of the appellants were properly attributable to the United Kingdom: High Court (England and Wales) 19 December 2008, *Al-Saadoon & Anor, R (on the application of) v Secretary of State for Defence*, [2008] EWHC 3098 (Admin), para. 79.

to the Australian authorities would subject them to treatment contrary to Articles 3 and 5 ECHR on account of the circumstances of aliens detention in Australia.²³⁷ While within the consular premises, the Australian authorities informed the British consulate that they sought the earliest possible return of the two brothers. On the jurisdiction issue, the Court of Appeal, after an extensive review of relevant Strasbourg case law on the extraterritorial applicability of the European Convention, proceeded from the assumption that, while in the consulate, the applicants were sufficiently within the authority of the consular staff to be subject to the jurisdiction of the United Kingdom for the purpose of Article 1 ECHR.²³⁸ It chose subsequently to define the scope of the United Kingdom's substantive obligations under the ECHR in accordance with its concomitant obligation vis-à-vis Australia in holding that the 'Soering principle' (or: the prohibition of *refoulement* as implied under Article 3 ECHR), should not have automatic application in situations where asylum is sought in consular premises. It inferred from relevant passages in *Oppenheim's International Law* and the fate of the Durban Six, both discussed in section 4.2.2. above that the 'basic principle' that the authorities of the territorial state can request surrender of a fugitive allows only for limited exceptions, although the exact scope of the exceptions is ill-defined.²³⁹ One situation identified by the Court of Appeal in which a state is entitled to refuse requests for surrender identified was where the territorial state intends to subject the fugitive to treatment amounting to a crime against humanity.²⁴⁰ Applying these general principles to the facts of the case, the Court of Appeal found the type and degree of the threat to be insufficiently serious to justify a grant of diplomatic asylum and that, in the absence of an entitlement under international law to grant asylum, neither could the ECHR be construed as imposing an obligation on the United Kingdom to grant asylum.²⁴¹

The European Court of Human Rights, in *Al-Saadoon and Mufdhi*, approached the jurisdiction issue in a similar vein. It observed that the applicants

237 Court of Appeal (England and Wales) 18 October 2004, *R (B and others) v Secretary of State for Foreign and Commonwealth Affairs* [2004] EWCA Civ 1344, [2005] QB 643.

238 *Ibid*, para. 66. In particular, the Court of Appeal relied on an analogy with the case of *WM v Denmark*, which had also concerned a person seeking refuge at an embassy (the Danish embassy in Eastern Berlin), and where the European Commission of Human Rights had applied the test of whether the acts of the Danish ambassador constituted an 'exercise of authority' over the person in question to an extent sufficient to bring him within the jurisdiction of Denmark: EComHR 14 October 1992, *W.M. v Denmark*, no. 17392/90. Also see chapter 2.5.2.

239 *Ibid*, paras. 85-89.

240 *Ibid*, para. 88. The Court of Appeal further did not exclude the possibility that a lesser level of threatened harm could also justify an entitlement to grant diplomatic asylum, but the law to provide insufficient guidance on the issue.

241 *Ibid*, paras. 93-94. This approach was followed in the first instance decision in *Al-Saadoon and Mufdhi*: High Court 19 December 2008, *Al-Saadoon & Anor, R (on the application of) v Secretary of State for Defence*, [2008] EWHC 3098 (Admin).

were arrested by British armed forces, that they were detained in premises which were inviolable and subject to exclusive control and authority of the Multi-National Forces and that, 'given the total and exclusive *de facto*, and subsequently also *de jure*, control exercised by the United Kingdom authorities', the individuals were within the United Kingdom's jurisdiction.²⁴² As to the question whether the obligations vis-à-vis Iraq could nonetheless 'modify or displace' the obligations under the ECHR, the Court found that this was a matter to be considered in relation to the merits of the complaints.²⁴³ In its judgment on the merits, the ECtHR refrained from according the principle of territorial sovereignty overriding importance however. Instead of defining the scope of a contracting state's duties under the ECHR in accordance with that principle, the Court referred to the principles set out in its earlier case law – which concerned situations where the guaranteeing of human rights *within* a state's territory potentially conflicted with other international law obligations – in holding that 'a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question is a consequence of domestic law or of the necessity to comply with international legal obligations.'²⁴⁴ It made a reference to the *Soering* case, in observing that the Court in that case had neither limited the application of Article 3 ECHR on account of a conflicting obligation on the part of the United Kingdom under the Extradition Treaty it had concluded with the United States in 1972. It follows, according to the Court, that in principle all acts and omissions attributable to the state are subject to the Court's scrutiny.²⁴⁵ Although the Court did not explicitly consider that this can also imply that the European Convention may require a contracting state to act in contravention of another state's sovereignty, it found the United Kingdom to have made insufficient attempts at procuring a guarantee that the detainees would not be subjected to the death penalty and to have entered into an arrangement with another state which conflicted with its obligations under Articles 2 and 3 of the Convention and Article 1 of Protocol No. 13.²⁴⁶ And, in respect of the complaint under Article 34 ECHR, it considered that the

242 ECtHR 30 June 2009, *Al-Saadoon and Mufdhi v the United Kingdom*, no. 61498/08 (admissibility), paras. 86-88.

243 *Ibid*, para. 89.

244 ECtHR 2 March 2010, *Al-Saadoon and Mufdhi v the United Kingdom*, no. 61498/08 (merits), para. 128, referring to ECtHR 30 June 2005, *Bosphorus v Ireland*, no. 45036/98, para. 153. Also see ECtHR 18 February 2009, *Andrejeva v Latvia*, no. 55707/00, para. 56: 'the fact that the factual or legal situation complained of is partly attributable to another State is not in itself decisive for the determination of the respondent State's "jurisdiction".'

245 Also see *Bosphorus*, para. 137. Although this may be different in situations where state activity serves the effective fulfillment of the mandate of United Nations Security Council, see ECtHR 2 May 2007, *Behrami v France and Saramati v France and Norway*, nos. 71412/01 and 78166/01, para. 149 and ECtHR 9 June 2009, *Galić v the Netherlands*, no. 22617, paras. 47-48.

246 *Al-Saadoon and Mufdhi* (merits), paras. 141-143.

absence, on 31 December 2008, of any available course of action on the part of the United Kingdom consistent with respect for Iraqi sovereignty other than the transfer of the applicants, was of the respondent state's own making and did not modify its duty to comply with an interim measure indicated by the Court.²⁴⁷

The case law above signifies that courts have developed divergent lines of reasoning in reconciling the rule of non-intervention with human rights obligations. The different approach of the ECtHR in *Gentilhomme* and *Al-Saadoon and Mufdhi* on the question whether respect for the territorial sovereignty of another state is relevant for the jurisdiction issue underscores the conclusion in chapter 2 that the European Court's interpretation of that term is not always consistent and that the Court tends to confuse the ordinary meaning of the term jurisdiction under international (i.e. to allocate state competences) with the more specific delimiting function it fulfils in human rights law. The most recent approach of the ECtHR in *Al-Saadoon and Mufdhi* also affirms the conclusion of Chapter 2 however that the ECtHR is distancing itself from the imperative to interpret the term jurisdiction in conformity with its 'ordinary meaning', leaving room for an interpretation that limits set by other norms of international law do not as such prevent the Convention from being applicable. Other and potentially conflicting international obligations remain subject to the scrutiny of the Court, which also implies that the Court leaves open the possibility that extraterritorial human rights obligations may trump the principle of respect for the territorial sovereignty of the host state.

What is notable in this respect is that the ECtHR in *Al-Saadoon and Mufdhi* does not appear to distinguish as a matter of principle between state activity carried out on its own territory and activity carried out within the territorial sovereignty of another state. Its reference to the *Soering* case appears to indicate that in establishing whether other international obligations can modify the scope of a state's obligations under the ECHR, the obstacle of the territorial sovereignty of another state should not be addressed fundamentally different from ordinary extradition obligations. This raises questions in view of the ICJ's emphasis in the *Asylum Case* on the fundamental distinction which exists between situations involving extradition and situations of extraterritorial asylum, with the latter constituting a potential intervention in the sovereign matters of the other state. It should also be observed however that the Court underlined the lack of genuine efforts on the part of the United Kingdom's authorities to ensure that a potential future transfer would not expose the applicants to treatment contrary to the Convention. The Court hence avoids an explicit pronouncement that human rights must prevail over territorial sovereignty, and instead appears to argue that because the United Kingdom

247 Ibid, para. 162.

had knowingly allowed a situation of irresolvable norm conflict from coming into being, that norm conflict cannot serve to justify non-applicability of the ECHR. On this point, the case of *Al-Saadoon and Mufdhi* differs from the situation present in *B and others*: while in the former case the British forces had decided of their own accord to arrest and detain the applicants and to enter into bilateral arrangements setting the conditions for the exercise of prosecution activities and cooperation with the local Iraqi criminal procedures, the United Kingdom authorities in *B and others* were more or less accidentally confronted with a fugitive asylum-seeker and had no means at their disposal to avoid a situation of norm conflict from coming into being. It can therefore not be excluded that the ECtHR would accord greater value to the principle of territorial sovereignty in situations of diplomatic asylum proper.²⁴⁸

4.6 FINAL REMARKS

This chapter has conceptualized the international legal framework which regulates the relationship between the individual, the territorial state and the non-territorial state in situations of extraterritorial asylum. Because this relationship is triangular and takes place within the territory and sovereignty of a foreign state, the international law notion of 'extraterritorial asylum' differs from 'territorial asylum' in three respects.

First, it is not self-evident that human rights regulate the conduct of sending states in a similar vein as that of host states which receive asylum-seekers. Although it was concluded that the prohibitions of *refoulement* established under the Refugee Convention, CAT, ECHR and ICCPR do not as such oppose extraterritorial application, a first complication is that the wording of Article 33 Refugee Convention and Article 3 CAT renders it problematic to construe these prohibitions as applicable also to activity undertaken in respect of persons who are in the territory from which the threat with persecution or torture stems. This limitation is not present under the prohibitions of *refoulement* established under the ICCPR and ECHR, which entail a protective duty of more general nature. Secondly, because the presumption that an individual is subject to the jurisdiction of the state in which he is does not apply to activity which may affect a person in a foreign territory, the actual applicability of human rights to the relationship between an individual and a sending state requires prior examination of the nature of this relationship, as discussed in chapter 2.

Second, when states act in a foreign territory, their actions must as a rule respect the territorial sovereignty of the foreign state. When the host state requests a person to remain within its own authority, the sending state may be confronted with a conflict between, on the one hand, humanitarian concerns

248 The ECtHR appears to hint in this direction in para. 140 of the judgment.

and/or human rights obligations in respect of the individual and the rule of non-intervention on the other hand. As was shown in the last section of this chapter, attempts undertaken in recent case law to reconcile the norms in question have not been consistent, which is due not only to divergent interpretation of the notion of 'jurisdiction' in human rights law, but also to the fundamental status of both human rights and the notion of territorial sovereignty in international law.

Third, the right to seek asylum – understood as the right to leave a country in order to escape persecution – remains crucial for asylum-seekers who are subjected to measures of border enforcement in countries of origin or countries of transit. Policies aimed at preventing persons from leaving another country may well interfere with the right to leave. Although there can be legitimate reasons for placing restrictions on that right, those restrictions must have a basis in law, may not be applied arbitrarily and must be subject to meaningful and independent review. These conditions constrain the liberty of states to deter or prevent migrants from leaving another country and ordain that such activity is grounded in norms of procedure and good administration. Although persons fearing ill-treatment or persecution who are restricted in their right to leave may also base a claim directly on one of the prohibitions of *refoulement* (or the underlying prohibition of exposure to ill-treatment), the fact that the right to leave may be invoked by anyone, regardless of protection entitlements, implies that it engenders a general procedural framework for employing measures of external migration control which have the potential to deprive persons of the factual possibility to leave the country in question.