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Europe and extraterritorial asylum

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8 | Conclusions

The late Professor Atle Grahl-Madsen, pioneer in the development of international refugee law, once explained why it is that states perceive their obligations towards refugees as being essentially territorial in character:

‘It must be remembered that the Refugee Convention to a certain extent is a result of the pressure by humanitarian interested persons on Governments, and that public opinion is apt to concern itself much more with the individual who has set foot on the nation’s territory and thus is within the power of the national authorities, than with people only seen as shadows or moving figures “at the other side of the fence.” The latter have not materialized as human beings, and it is much easier to shed responsibility for a mass of unknown people than for the individual whose fate one has to decide.’¹

This perception remains prevalent today. It underlies the United States’ ‘wet-foot/dry-foot policy’ (under which only those Cuban migrants ‘touching’ US soil become subject to US immigration legislation), it forms the justification of the Italian push-backs as advanced by Prime Minister Berlusconi (‘to take in only those citizens (...) who put their feet down on our soil, in the sense also of entering into our territorial waters’) and constitutes the essential rationale behind the Australian offshore programme as voiced by Prime Minister Howard (‘we will decide who comes to this country and the circumstances in which they come’). For individuals to successfully claim protection with a state other than their own, they need first to enter that state. And as long as they have not succeeded in doing so, the rationale goes, the approached state is discharged of its protection obligations under international law.

The present study was born out of the conception that the proliferation of practices of external migration control employed by major immigration countries, including the Member States of the European Union, warrant a reconsideration of this rationale. The Refugee Convention (and Grahl-Madsen’s commentary) was drafted in a time when states were passive recipients of refugees. Very few would derive from the Refugee Convention an obligation on the part of states to venture out of their territory to actively seek refugees and to offer them asylum – even though states are increasingly urged to do so by contributing to resettlement efforts on a voluntary basis. But the question

1 See chapter 4.3.1.1. at n. 108.

of the territorial scope of protection obligations towards persons seeking asylum does become manifest when states actively seek to *prevent* migrants, possibly including refugees, from arriving at their borders. Such activity would potentially allow for the circumvention of protection duties states normally incur in respect of asylum claimants presenting themselves at the state's border. The possible detrimental consequences in terms of obtaining access to protection gave rise to the study's thesis that when European states endeavour to control the movement of asylum-seekers outside their territories, they remain responsible under international law for possible wrongdoings ensuing from their sphere of activity. The general premise underlying this thesis is that the territorial scope of the state's obligations under international law, including human rights law, is congruent with – and must necessarily follow – the locus of state activity. To wit, this premise equals that of Grahl-Madsen noted above, in so far as he indicates that the degree to which a state incurs responsibility for protecting people should be commensurate with the degree to which people are 'within the power of the national authorities'.

This concluding chapter proceeds as follows. First, a number of final observations are made on the key thesis of the study mentioned above: in what manner, through which avenues and under what circumstances does international law, and in particular human rights and refugee law, *govern* the externalized migration practices of EU Member States. This includes an appraisal of the limits inherent in international and human rights law in responding to activity which takes place across legal orders and which may involve a plurality of actors: in particular the duty to respect other state sovereignties, limits inherent in substantive human rights norms, and the general boundaries inherent in the Law on State Responsibility and the extra-territorial application of human rights (section 8.1).

Second, some concluding observations are drawn as to the material and procedural obligations of international human rights and refugee law informing current and possible future practices of European states in the sphere of external migration control. In setting forth the dynamics explaining why states not always succeed in devising effective human rights strategies in their external migration practices, this section makes a number of recommendations for ensuring that fundamental rights are accorded higher priority in the external dimension of asylum and migration (section 8.2).

Finally, some concluding remarks are made on the potential of the European Union, both as a source of law and as a political actor, to contribute to appropriate norm-setting. This involves not only the manner in which EU law may set limits to individual Member State activities, but also the broader question of the capacity of the EU to address root causes for Member States' reluctance to implement respect for fundamental rights in their external activities (section 8.3).

8.1 SOVEREIGNTY, TERRITORY AND HUMAN RIGHTS: TOWARDS A GENERAL PROPOSITION

One of the reasons why only persons outside their country of origin are eligible for refugee status is that the protection of internal refugees, now commonly denoted as internally displaced persons, was seen as constituting an infringement of the territorial sovereignty of the country of origin.² Internal refugees were not deemed unworthy of protection, but the physical presence of the refugee within his country of origin was seen as a practical impediment for other states to effectively provide protection. Within human rights treaties of general scope, the possibility of colliding state sovereignties also constituted a decisive consideration for introducing restrictive clauses which made the existence of a state's human rights obligations dependent on a person being within its jurisdiction and/or territory. The division of the world in mutually exclusive state sovereignties was necessarily seen to implicate that the state is legally and practically handicapped in ensuring respect for human rights in another country.

The phenomenon of extraterritorial migration enforcement challenges this paradigm. It shows that exercises of state power may transcend predefined territorial demarcations. Although this re-opens the debate on the relationship between human rights protection and state sovereignty, it also opens up an area of legal indeterminacy. It should not be doubted that the process of relocating migration management and of dispersing control tasks to other actors severely hampers the identification of the applicable law and the actor who can be held internationally responsible for potential wrongful conduct. Typically this process of relocation and outsourcing is accompanied with the establishment of extraordinary procedures which fall outside the ambit of domestic migration statutes. Although this renders the identification of the international legal framework governing these activities all the more important, it presupposes an understanding and examination of doctrines of international law which not only deal with the substance of refugee rights and human rights, but also with some of the founding principles of human rights law and overarching regimes of international law. In essence, the questions raised in this study form part of one of the arguably most topical challenges within contemporary international law: how to formulate responses to shifting and colliding state sovereignties within an international legal order which is still premised on the foundational ideas of sovereign equality and territorial demarcation.

The formulation of answers, in this study confined to issues relevant for human rights and refugee protection, is by no means an easy task. The conclusions drawn in the first chapters of this study are attempts at putting some

2 See, extensively, J.C. Hathaway, *The Law of Refugee Status*, Toronto/Vancouver: Butterworths (1991), p. 29-33; A.E. Shacknove, 'Who Is a Refugee?', 95 *Ethics* (1985), p. 282-283.

of the most topical issues in context and of contributing to ongoing discourse, but they leave ample room for debate and further questions. Undoubtedly, many of the rules and principles discussed in this study will remain contested. Not only because the legal complications are of magnitude, but also because the political stakes are high. In the specific context of migration, perceived gaps in international law are employed by states as a means to discharge themselves of protection obligations. They may allow for shifting the migrant burden and its concomitant administrative, social and financial implications. It is no surprise therefore, that some governments continue to deny the existence of extraterritorial human rights obligations, that they posit that humanitarian activity should not be conflated with human rights obligations, or that they point to other entities as being primary responsible for protection or controlling activities.

As this is a legal study which is not as such hampered by political ramifications, it is nonetheless possible to draw some general conclusions on the manner in which international law in general, and human rights and refugee law in particular, govern the external migration activities of states. One of the foremost conclusions must be that *international public law* contains a potent tool-box for holding states responsible for violations of international obligations occurring in the context of extraterritorial and/or joint activity of states. Under the general regime of international law, it is the *conduct* of the state, constituting a violation of its international obligations, which forms the essential source for arriving at the state's international responsibility.³ This basic rule is sufficiently wide to respond to the various atypical forms of state activity discussed in this study. Firstly, as a matter of principle, international obligations govern state conduct wherever it takes place, unless a particular territorial restriction flows from the text of a treaty or particular obligation.⁴ Secondly, the study has indicated that there are multiple avenues for holding states accountable for conduct which may have been committed by actors which are not normally classified as agents of the state. The study has extensively discussed how the legal constructs of attribution, derived responsibility and positive obligations constitute three separate but conjunctive instruments for identifying which conduct is attributable to the state or which conduct should dependently on conduct of another entity lead to the state's responsibility. It follows that, subject to limitations, international law must be considered as generally well-equipped to respond to the various forms through which European states implement their agendas of external migration control: including interceptions at sea, activities of private airlines which have been delegated powers in relation to immigration control, activities of immigration officers posted in a third country, joint operations of border

3 Chapter 2.1 and 3.1.

4 Chapters 2.6 and 4.3.

control, or schemes of external processing. The doctrine of positive obligations, or due diligence, is an especially potent jurisprudential tool for arriving at the international responsibility of a state in situations where another actor is the source of the violation complained of and where the state, on account of its facilitating activity or because of unduly passive conduct, has abused or failed to make use of material opportunities to ensure the upholding of human rights.

The study has proposed, secondly, that a similar rationale – i.e. the locus of obligations is commensurate with the locus of the exercise (or effects) of power – should serve as guiding principle for deciding upon questions of extraterritorial application of obligations under *human rights treaties*. The issue of whether a particular human rights norm binds a state who takes action in respect of an individual outside its territory involves both the debate on possible restrictions of general nature (and the oft-cited delimiting role of the notion of ‘jurisdiction’ in this respect) and the possible specific territorial limitations flowing from the text of a particular human right at issue. In respect of the second question, the foremost limits set to obligations of states to protect refugees outside their borders flow from the territorially restricted refugee definition in the Refugee Convention and the manner in which the prohibition of *refoulement*, the key norm to be respected under refugee law, has found expression in Article 33 Refugee Convention and Article 3 CAT. The literal wording of these provisions renders it problematic to construe them as applicable also to activity undertaken in respect of persons who are within their country of origin or within another territory from which the threat with persecution or torture stems. This limitation is not present under the prohibitions of *refoulement* established under the ICCPR and ECHR, which entail a protective duty of more general nature.

As regards the general debate on the extraterritorial application of human rights, the study has observed that the notion of jurisdiction under human rights law has been employed by national and international courts and bodies in divergent manner, making it difficult to make firm pronouncements on the precise circumstances giving rise to extraterritorial human rights obligations. The most contested issue in this respect appears to be whether any exercise of authority of the state, in whatever form it takes place, constitutes an ‘exercise of jurisdiction’ and can hence bring affected individuals within the personal scope of the state’s human rights obligations; or that it is only in exceptional cases that acts of the contracting states performed, or producing effects, outside their territories can bring individuals within the acting states’ ‘jurisdiction’. This latter approach appears to presume that there must be a pre-existing relationship between the state and the individual, normally conceptualized through the criterion of ‘effective control’, or, in the words of the European Court of Human Rights, ‘other recognised instances of the extra-territorial

exercise of jurisdiction'⁵ – a phrase relating to the *competence* of states to assert jurisdiction in respect of matters which may also affect the sovereignties of other states.

In respect of this issue, the study has proposed that both the reference to the competence (or the *right*) of a state to act and the employment of the factual criterion of 'effective control' as a basis for the establishment of a jurisdictional link between the acting state and the affected individual are problematic as delimiting concepts in defining the territorial scope of human rights obligations. Firstly, human rights bodies and the International Court of Justice have accepted as a general rule that *de facto* exercises of *power* (or control), regardless of whether the activity constitutes a legitimate exercise of the state's authority vis-à-vis another state, form the basis for enlivening the state's obligations under human rights treaties.⁶ Secondly, the criterion of 'effective control', although of potential use in situations of control over a foreign territory, is rather selectively used by human rights courts and supervisory bodies to determine the extraterritorial application of particular human rights provisions in respect of incidental exercises of power or authority over persons. There are several judgments and decisions in which, for example, the mere exercise of force, the refusal to issue a passport or visa to a person living abroad, or decisions such as the termination of pension rights or the freezing of assets in respect of persons living abroad, did attract the state's human rights obligations – without any particular examination of whether the affected individuals could be said to be within the state's 'effective control'.⁷ On a similar token, refusing migrants further passage at sea, refusing persons to board an airplane at a foreign airport or refusing to offer protection to persons who present themselves to a diplomatic mission are all acts which can in themselves – but see below – bring affected individuals within the purview of human rights protection. In sum, *de facto* exercises of authority over persons, in whatever form and wherever it takes place or where its effects are felt, should be considered sufficient for establishing a 'jurisdictional link' between the state and the affected individual. The evolving case-law supports a proposition that power or authority, rather than territory, engages the state's obligations under human rights treaties.

It follows that the thesis introduced in this study, i.e. European states remain responsible under international law for possible wrongdoings ensuing from their sphere of activity in pursuing their external migration policies, finds affirmation in both the general regime of international law and the subset of human rights. This having said, the thesis, which is formulated in rather broad terms, has its limits. Although it may serve as a general rule or axiom for deducing and inferring the scope and contents of a state's obligations in a

5 ECtHR 12 December 2001, *Bankovic v Belgium*, no. 52207/99, para. 72.

6 Chapter 2.4, 2.5.2.

7 Chapter 2.5.2.

particular case at hand, the exertion of power in and impacting upon other states' sovereignties may well give rise to further questions of demarcation. Firstly, there is the potential of *conflicting* state sovereignties: how do the sovereign interests of other states restrict the power of the state to ensure human rights within the other state? A second limitation concerns the potential of *conflating* state sovereignties: in which sovereign order (and concomitant sphere of responsibility) should particular violations of the law be placed which involve a causal chain of actions or multiple actors?

8.1.1 Conflicting sovereignties

To posit that international law recognizes for and follows exertions of state sovereignty outside the state's territory does not in itself resolve the question of a potential conflict between human rights obligations and the duty not to interfere within the sovereign order of another state. Although they may seem hypothetical, there can be all sorts of situations where to guarantee human rights to persons outside the state's territory could come in conflict with the (sovereign) interests of another state. A grant of diplomatic asylum by a sending state in opposition to demands of the host state is a classic example, but similar situations of norm conflict may arise when, for example, a border guard official of a sending state is confronted with an asylum claim of a fugitive national of the host state, or when a state interdicts a migrant vessel flying a foreign flag and where the flag state demands the return of the passengers. The study has identified several cases before British courts and the ECtHR in which such precise issues arose but where the courts followed different approaches in reconciling human rights obligations with the rule of non-intervention.⁸ Somewhat simplified, approaches have been adhered to under which human rights can simply not come into play when this would conflict with sovereign decisions of the territorial state (*Gentilhomme*); under which the protection of human rights can only be deemed compatible with public international law if it constitutes a recognised humanitarian exception to the principle of state sovereignty (*B and others*); or that in principle all acts or omissions of the state require compliance with human rights, regardless of whether the act or omission in question is a consequence of the necessity to comply with international legal obligations, leaving room for an argument that extraterritorial human rights obligations may trump the principle of respect for the territorial sovereignty of the host state (*Al-Saadoon and Mufdhi*). Although one may tentatively infer from this case law a development under which the notion of state sovereignty is no longer seen as necessarily discharging the sending state of its own human rights obligations, it neither seems

8 Chapter 4.5.

that international law is as of yet sufficiently developed to provide unequivocal guidance for addressing this type of situations.

The absence of a set of guiding principles in this respect should not come as a surprise. The relationship between human rights and state sovereignty is such a central and contested topic in international law that it is arguably too much to expect courts to develop a normative framework for reconciling these two core notions in the context of rather isolated cases. Failing the existence of this guiding framework, appropriate solutions could however be sought, not (only) on the level of legal doctrine or progressive jurisprudential developments, but also, by analogy to the conventions on diplomatic asylum concluded in Latin-America, in arrangements of practical character between host and sending states which address the human rights concerns of specific extraterritorial practices. Hence, should states for example agree on the placement of border guards of one party in that of the other, on the conducting of joint border controls or on the setting up of centers for the reception of migrants, states could avoid being confronted with situations of norm conflict by agreeing upon conditions with the host state which pay regard to their reciprocal interests. An apt illustration in this respect concerns the case of *Al-Saadoon and Mufdhi*, where the ECtHR had faulted the United Kingdom for having failed to make use of material opportunities to secure arrangements with the Iraqi government which would both respect the proper treatment of prisoners in custody of British forces in Iraq as well as the sovereign interest of the Iraqi authorities to allow its justice system to have its course. The challenge for states concluding arrangements providing for competences to undertake particular enforcement activity in another state is thus to include in those arrangements, where relevant, agreements on respect for human rights as well.

8.1.2 Conflating sovereignties

A second topical problem which rises in the context of activities described in this study concerns the identification of the degree of causality between a state's sphere of activity and the eventual violation of human rights. Not all extraterritorial activity which in some way negatively impacts upon human rights must necessarily attract the acting state's responsibility. Perceiving the term jurisdiction under human rights law in the manner as described above – a term which first and foremost gives expression to merely an exercise of state power – is only one element in establishing whether the state has acted in contravention of its human rights obligations. A further question, which is especially salient in the context of the present study, is whether exercises of authority which only remotely or indirectly affect an individual in enjoying fundamental rights should also attract the state's responsibility. Here, the study has tentatively drawn a distinction between, on the one hand, enforcement

activity in which there is a direct or sufficiently close link between the state and the alleged misconduct, such as joint operations of border control or schemes of external processing involving a decisive amount of involvement and influence of a state; and, on the other hand, programmes of aid or cooperation of more general nature, such as development assistance targeted at root causes of migration, the supply of surveillance equipment, the training of border guards, or capacity building for the reception and treatment of migrants.

In the latter type of situations, assistance is normally rendered without specific knowledge or presumed awareness of the circumstances in which it will be used. This renders it difficult to establish a sufficiently close causal link between the state's sphere of activity and the eventual misconduct complained of. Although this may allow a critical observer to conclude that European states can simply shift all responsibilities for controlling the border to other states – by funding, training and supplying equipment – this essential limit of international law must generally be deemed as beneficial for the promotion of international cooperation. Further, this does not as such deprive states from being receptive to human rights concerns in deciding upon such forms of cooperation, since there may be circumstances, especially in situations of systematic violations, where the link between general programmes of aid and human rights does become legally relevant.

A preliminary issue within human rights law complicating the identification of the required causal link concerns the choice of the appropriate jurisprudential tool. The study has identified several cases (*Tugar*, *Hess*, *Ben El Mahi*) where the absence of a 'direct' link between the exercise of authority and the alleged violation was addressed in the context of the jurisdiction-requirement under human rights treaties, leading to the conclusion that the relationship between the state and the alleged victim was 'too remote' (*Tugar*), that there was simply no 'jurisdictional link' (*Ben El Mahi*) or that an exercise of 'joint' authority cannot be divided into 'separate jurisdictions' (*Hess*).⁹ There have however also been cases (*Ilascu*, *Treska*, *Application of the CERD (Georgia v Russia)*) where, also in the absence of an act 'directly' targeted at an individual, the notion of jurisdiction was not perceived as a *prima facie* barrier for accepting that the relationship of a state with a particular set of circumstances can be of such special nature, that the state's (positive) human rights obligations may become engaged in respect of the individual.¹⁰

In respect of this issue, the study has questioned whether the requirement of 'jurisdiction' is the appropriate tool for giving expression to the link which must exist between the acting (or omitting) state and the eventual wrongful conduct committed in respect of an individual. In particular, employing the notion of jurisdiction in this vein may compete with, or potentially displace,

9 Chapters 2.5.2, 3.2.4.2, 3.3.2.

10 Chapters 2.5.2, 2.5.3, 3.2.2.4, 3.2.4.2, 3.3.2.

other legal constructions which also bridge acts of the state with eventual wrongful conduct: the concept of positive obligations, the doctrine of derived responsibility (or 'aid and assistance'), but also the 'victim-requirement' as laid down in Article 34 ECHR, which requires the existence of a 'sufficiently direct link between the applicant and the damage allegedly sustained'.¹¹ This is not the place to repeat the differences in nature between these legal concepts and the respective requirements to be met for holding a state to have violated its human rights obligations. It suffices to emphasize that these other legal concepts have been developed precisely to provide guidance as to the circumstances giving rise to international responsibility for violations of international law in situations where the establishment of the link between the state and the affected individual is not straightforward. The tendency, in particular within the case law of the European Court of Human Rights, to bring together questions of extraterritorial applicability with those of causality under the single denominator of 'jurisdiction' hence appears to conflate issues which are conceptually distinct. Especially a narrow outlook on the 'jurisdiction'-requirement in this respect risks opening up an area within human rights law where the state's activity may be material or decisive in the eventual manifestation of human rights violations, but without a concomitant level of international responsibility.

8.2 THE IMPLEMENTATION OF A HUMAN RIGHTS STRATEGY: TOWARDS RECOMMENDATIONS

The main task undertaken by this study has been to clarify the applicable law and to derive from that law the essential conditions for the extraterritorial treatment of refugees and other persons entitled to international protection. The key conclusion in this respect is not that extraterritorial migration enforcement is *against* the law, but rather that it is *within* the law: external migration enforcement cannot be implemented in terms of unfettered discretion of states to control migration, but takes place within the ambit of well-established guarantees of international law on the treatment of aliens in general and refugees in particular.

Current and past practices of external migration control employed by EU Member States and other Western countries display notable discrepancies in the level of human rights protection. Some policies have been accompanied by strict procedural safeguards; others aim at respecting human rights but without a system of procedural rights guaranteeing their effectiveness; and some proceed from the assumption that states enjoy an unassailable discretion in deciding upon the treatment of migrants.

11 See chapters 2.5.3, 3.2.2.4, 3.3.

By way of good practice, mention can be made of the United Kingdom's scheme introduced in 1999 of enabling its immigration rules to be operated extraterritorially rather than only at UK points of entry. Although this scheme expressly aimed at stemming the flow of asylum-seekers coming from countries not subject to the UK's visa regime (through the posting of immigration officers in foreign countries to conduct pre-clearances), the tasks and duties of the immigration officers operating that scheme were expressly incorporated in the UK immigration statute.¹² In granting or refusing leave to enter the immigration officers were bound by the ordinary grounds for refusing entry and those refused leave to enter enjoyed the right to lodge an appeal. Although the House of Lord held the relevant obligations not to include respect for the prohibition of *refoulement*,¹³ the arrangement evidences that it is well possible to export domestic legislation on entry and border controls to controlling activity of state agents in a foreign country.

The schemes of migrant interdiction at sea and the subsequent processing of asylum claims in an extraterritorial facility employed by the United States and Australia, and arguably also the ad hoc agreement between Spain and Mauritania on the passengers of the *Marine I*, are examples of arrangements which do in themselves aim at respecting human rights, and in particular the plight of refugees, by providing for a form of refugee screening and subsequent status determination. These arrangements accordingly reflect a recognition that human rights do matter and that refugees should not be put at risk of being returned to persecution. However, this pledge to safeguard rights of refugees was implemented within systems designed to prevent migrants from invoking any right which could effectuate their entry into the state. Ultimately, these arrangements made the upholding of refugee and other fundamental rights subject to the exclusive discretion of the state. As observed in chapter 7, this is highly problematic from a human rights perspective, because human rights by their nature require the existence of mechanisms allowing for their enforcement.

There are, finally, arrangements which do not appear to recognize any human rights considerations whatsoever. The most clear examples are diversions or 'push-backs' at sea which take place outside the realm of domestic legislation and neither allow for surrogate forms of protection. These arrangements have been widely criticized by legal commentators and international supervisory bodies, including the European Committee for the Prevention of

12 The relevant UK legal framework is amongst others set out in: Court of Appeal (England and Wales) 20 May 2003, *R (European Roma Rights Center) v Secretary of State for the Home Department* [2003] EWCA Civ 666, paras. 7-15. See, on the right of appeal against entry clearance decisions under UK law extensively: G. Clayton, 'The UK and Extraterritorial Immigration Control: Entry Clearance and Juxtaposed Control', in: B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control*, Leiden/Boston: Martinus Nijhoff (2010), p. 407-411.

13 See extensively chapter 4.3.1.1.

Torture and UNHCR. The key issue raised is that this form of interdiction strikes at the heart of interests protected under refugee law, by not allowing for a procedure capable of establishing whether among the migrants there are persons in need of international protection. The governments operating these diversions have nonetheless upheld their legitimacy by relying on assertions derived from the contested extraterritorial application of human rights and refugee law. Typical other forms of migration control where claims are upheld that they do not engage duties under human rights law are those which involve the sharing of shifting of specific tasks to other states or entities. These include the joint maritime patrols of EU Member States and third countries, the activities of immigration officers posted in third countries who are said to only fulfill an advisory role, and schemes of external processing where multiple states and other entities jointly arrange for the reception and treatment of migrants. In these situations, states have employed the fiction of mutually exclusive state sovereignties and concomitant spheres of responsibility to renounce distinct obligations flowing from their own acts or omissions.

To observe that current European practices of externalised migration control do not always pay due respect for human rights is a worrisome conclusion. Although we could leave it at that – and hope for the better in the future – it is appropriate at this concluding moment to move beyond the letter and spirit of the law and to address the broader legal-political context of the phenomenon of external migration controls. It is only within that broader context where the reasons, and hence also suggestions for solutions, for the states' reluctance to devise effective human rights strategies can be found.

8.2.1 Clarifying the law

A first factor explaining why states do not always pay due account to human rights in the course of external migration enforcement is the contested nature of the law. As noted above, some of the most crucial issues discussed in this study are burdened with a lack of consensus within legal doctrine, contrasting opinions of courts and sometimes conflicting regimes of law. The resulting legal ambiguity occasions states to legally justify their activities. The judgments, for example, of the US Supreme Court in *Sale* and the House of Lords in *Roma Rights*, endorse rather than restrict the liberty of states to take enforcement action in respect of persons claiming protection in the course of sea operations or pre-clearances at airports. On a more general note, the externalization of migration enforcement can be depicted as a trend under which states unilaterally and broadly interpret the scope of their competencies and where the law, including its institutionalised supervisory structures, encounters problems in providing acute responses. This calls for the continuation of efforts to clarify the relevant legal framework. The present study has taken up this challenge and constitutes one attempt at contributing to ongoing discourse and at identi-

ifying the proper application of the law to a number of past and current practices. Beyond academic legal discourse, which on the subject matter of this study continues to produce a considerable collection of literature, there are a range of other actors, stakeholders and supervisory bodies which play a role in identifying and setting limits to the external migration policies of states.

On the international level, which by its nature offers the best chances of arriving at harmonious interpretations, the topic of this study also enjoys an increasing amount of interest. Especially UNHCR has ever since the exodus of Vietnamese boat people in the 1970s shown an unremitting effort in explaining and emphasizing the rights of refugees who are subjected to extraterritorial enforcement activity. In more recent years, other relevant international organizations have followed suit. Amongst many other efforts, the International Maritime Organization has pressed for and adopted amendments to maritime treaty law and guidelines on the treatment of persons rescued at sea; the European Union, whose role is more extensively discussed in section 8.3, has called for studies and arrangements setting forth the applicable law in respect of interdiction activities; the International Organisation for Migration has regularly organized round tables and expert seminars on diverse issues of external migration management and the European Committee of Torture has published a highly critical report on the Italian push-back strategy. On a more general level, international courts and supervisory bodies have issued a range of pronouncements on the relevant framework governing extraterritorial activity of states.

Although it is difficult to estimate the effect these norm-setting activities have had on the actions of individual states, the continuous attention for the extraterritorial treatment of migrants of international supervisory bodies is a welcome development. Although they may not always offer uniform interpretations nor receive unequivocal support, they allow for progressive standard-setting and provide a forum for discussion and the exchange of good practices. Perhaps more importantly, the sense of involvement displayed by international organizations indicates that there exists a shared international concern for persons who are at risk of not finding protection with any state and that therefore collective responses should be formulated.

From the perspective of resolving legal ambiguities, one problem remains that most of the adopted standards are of soft law character, such as is the case with UNHCR conclusions and recommendations, IMO guidelines and the EU guidelines for Frontex rescue operations at sea. Another factor which explains the limited observance by states is the lack of effective individual complaint mechanisms, as is the case under international maritime law treaties and the Refugee Convention. More may be expected in this regard of obligations of European states under the European Convention of Human Rights and the capacity of the European Court of Human Rights to issue binding judgments in respect of individual claims. The pending case of *Hirsi v Italy*,

on the Italian push back-policy, is the first case in which the European Court is specifically asked to dwell upon the issue of migrant interdiction at sea and could therefore set an important precedent.¹⁴

It may, in view of the abundant amount of literature and debate on the topic, perhaps come as a surprise that the issue of legality of external migration policies, and in particular enforcement activities such as pre-clearances and interdictions, have not attracted a more robust collection of international jurisprudence. An important explanation may lie in the fact that the outsourcing of control tasks engenders intrinsic obstacles in the sphere of justiciability. On the one hand, we have seen that domestic courts, for example in Spain (*Marine I*) and the United States (*Sale* and others) have considered the activities of states to be exempt from judicial prosecution because they fall under the 'political question'-doctrine or because domestic courts simply lack jurisdiction to apply domestic laws to foreign cases.¹⁵ On the other hand, the physical distance of controls and the resulting difficulty of monitoring and ensuring legal representation constitutes a potent barrier for individual migrants to lodge complaints or appeals and to present themselves before a court. And even in the exceptional situation that a migrant or a group of migrants, often due to the unrelenting efforts of specialized NGOs or UNHCR, succeed in bringing a complaint, the problem of keeping track of migrants and of obtaining authentic authorization of attorney may pose a bar for the complaint's admissibility. Thus, in the case of *Hussun a.o. v Italy*, concerning the expulsion of a group of 84 migrants who had landed in Lampedusa and who had subsequently absconded or were expelled, the European Court of Human Rights declared the complaints inadmissible on account of the representatives having lost all contact with the applicants and because the powers of attorney of 34 of the applicants had in fact been written and signed by one and the same person.¹⁶ The complaint in the *Marine I* case failed on a similar ground, namely because the organization lodging the complaint could not demonstrate that it was duly competent to represent the alleged victims. In order to preclude repetition, and in the light of the high profile it has accorded to the case, UNHCR has made special arrangements for keeping track of the whereabouts of the complainants and for ensuring their proper representation in the pending case of *Hirsi v Italy*. But in the vast majority of cases where persons are subjected to extraordinary controls or diversions, this service will be unavailable, rendering the lodging of (successful) complaints a distant likelihood. There is, in sum, no shortage of factors explaining why it is that so little cases on the topic of this study have resulted in successful litigation: admissibility thresholds of domestic and international courts; a lack of procedural safeguards and information about avenues for obtaining redress; the

14 See chapter 6.4.2.

15 Chapters 4.3.1.1, 6.4.2, 7.3.

16 ECtHR 19 January 2010, *Hussun a.o. v Italy*, nos. 10171/05, 10601/05, 11593/05 et 17165/05.

ignorance and limited resources on the part of migrants to individually vindicate their rights; and a lack of access to legal aid. This creates a troublesome dynamic in which the absence of institutionalized safeguards for protecting human rights is able to sustain itself.

The identification of the legal framework governing external migration practices of states involves not only relevant international norms but also the application of domestic statutes. As indicated, the formulation or extrapolation of domestic guarantees to foreign conduct of states is crucial in ensuring respect for human rights. Procedural duties inherent in human rights protection require domestic law to restrict the scope of discretion offered to competent authorities and to protect against arbitrariness. This is a proposition states find difficult to accept. The widening of the state's competences to undertake enforcement activity outside its ordinary legal order is only seldom accompanied with an extrapolation of individual guarantees. This has resulted in constructions of enigmatic legal character, under which domestic immigration laws are selectively employed as a basis for undertaking enforcement activities. Thus, whereas the US Supreme Court in *Sale* denied the extraterritorial application of US immigration statutes, the Presidential Order allowing for the interdiction of aliens at sea derives a competence to return vessels from a 'reason to believe that *an offense is being committed* against the United States immigration laws'. This begs the question how one can violate a law which in the circumstances of the case does not apply. The alternative solution of prospective nature created by the EU Council Decision on maritime Frontex operations ('reasonable grounds for suspecting that they carry persons *intending* to circumvent the checks at border crossing points'), is semantically more sound, but it neither complies with the essential rule that state competences and individual rights are two sides of the same coin.

8.2.2 Clarifying reality

A second and related factor which helps understanding why the protection of human rights in externalised migration controls often falters is the lack of information and visibility of what goes on in practice. This study itself has encountered the problem that very little is disseminated about the actual manner of, for example, joint controls coordinated by Frontex or between EU Member States and third countries or of the activities of immigration officers posted at foreign airports. This is due not only to governments displaying reluctance in making public the relevant arrangements, but also due to the physical distance of the relevant activities. In the first place, both governmental and non-governmental stakeholders such as human rights institutions, NGOs, the media and legal advisers have no self-evident access to persons who are subjected to external controls. The fact that activities are undertaken within territories of regimes which are not always used to the same standards of

public scrutiny is a further obstacle for these actors to fulfill their traditional role of informing the public and of monitoring human rights compliance. Secondly, the physical distance of the control activities may lead to the sociological effect pointed to by Grahl-Madsen in this conclusion's introduction, namely that public opinion feels less concerned with people who remain outside national borders and who are therefore not deemed to be of society's primary concern. These dynamics, which may be mutually reinforcing, explain the lack of reliable and systematic information on what precise activity states undertake outside their borders, which in turn renders it difficult to make firm statements on whether such activity complies with the law or not. Although this study has not refrained from taking a critical stance towards particular state practices, this criticism was often couched in terms of 'may', 'if' and 'probably'. This also points to the incentive of states to preserve the obscure character of some of their external strategies. It allows not only for a maximization of their discretionary powers, but also for rebutting allegations that human rights are violated. To give an example, it is sheer impossible to verify Italy's claim that none of the persons intercepted in the course of its push-back policy expressed an intention to apply for asylum, in which case they would allegedly have been promptly brought to Italy.

Typically, states and other entities responsible for border controls invoke the ground of public security or the preservation of international relations to refuse the disclosure of specific information on the conducting of controls. In requesting a copy of the Operation Plan of the Hera 2007 operation, the present author was informed by the Frontex agency that disclosure of the documents would undermine the course of external border controls and therefore fell under the public security exception of the EC Regulation on public access to documents. The CPT delegation which visited Italy in July 2009 to verify whether the push-back policy complied with the prohibition of *refoulement*, was denied access to *inter alia* the logbooks of the operations and inventory lists of objects seized from the migrants on grounds of confidentiality, even though Italy could have requested the CPT not to make the information public. Despite repeated requests of European Parliament, the biannual report on the functioning of EU networks of immigration liaison officers remains classified and although a proposal is now pending to better inform the European Parliament on the activities of the network, the European Commission has refused to include in this information specific data on how the functioning of the network affects asylum-seekers.¹⁷ This is not the place to extensively discuss whether all aspects of border controls, and in particular information on procedures to be followed, the grounds for refusing further passage and the numbers of affected persons must necessarily fall under the protected interests of public security or international relations. It suffices to

17 Chapter 5.2.2.3.

observe that the veil of security interests obstructs transparency and public understanding of practices which due to their physical distance and isolated location are already highly invisible to the public.

NGOs and UNHCR have recognized the imperative of ensuring that more information is disseminated on what goes at and beyond the EU's external borders. UNHCR is engaged in the screening of (returned) migrants for refugees and on assembling data on the number of migrants who indicate a wish for and who subsequently receive a form of international protection. Organizations such as Amnesty International, Human Rights Watch, the European Council on Refugees and Exiles and Pro-Asyl report on incidents occurring at sea and collect stories and travel accounts of individual migrants in an effort to give some impression of the consequences of externalized controls for individual migrants. Other privately instigated activities concern those of 'United for Intercultural Action' and 'Fortress Europe', internet-based action groups which collect press accounts on migrant deaths and other incidents along the EU's external border and which compile data and publish yearly statistics on the loss of immigrant life at sea or in African transit countries. Governmental information, on the other hand, is normally restricted to persons who have presented themselves at their borders. Although these data present reliable accounts on, for example, the nationalities of the migrants and the ratio between successful and unsuccessful asylum claimants, they do not shed clear light on the plight of those who have not succeeded in arriving at their border.

8.2.3 Clarifying political aims

The essential political challenge underlying the subject of this study is that of reconciling rights of refugees and other migrants with the goal of preventing unsolicited migration. The idea of protection elsewhere and of outsourcing and externalizing control mechanisms was born out of, as Lord Justice Simon Brown of the England and Wales Court of Appeal put it, 'the great public concern' on 'asylum overload' and illegal immigration.¹⁸ The 'problem' caused by this phenomenon was initially sought to be controlled by imposing visa regimes upon states from which most asylum-seekers or irregular migrants come, coupled with a system of carrier's liability to ensure that the requirement for prior entry clearances would be effectively enforced. The very object of these controls is 'of course' – again quoting Lord Justice Brown – to prevent these persons from reaching our shores: 'the very arrival of asylum-seekers at the border entitles them to apply for asylum and thus defeats the visa regime'. The conducting of pre-clearances by immigration officers at foreign airports and the establishment of controls at the high seas or territorial waters of third countries are additional instruments ensuring that only persons with

18 *Supra* n. 12, para. 1.

prior admission arrive at the state's border. The foremost rationale of all these policies is to prevent unauthorized migrants from effectuating an unauthorized entry – as this would automatically set in motion administrative and societal burdens.

Yet, there is notable consensus among the major immigration countries, including the Member States of the European Union, that refugees form a particular vulnerable group and that external migration controls should, if possible and manageable, pay account to their particular entitlements under international law – or at the least their precarious humanitarian position. Thus, even Justice Stevens, delivering the majority opinion in the contested judgment of the US Supreme Court in *Sale*, acknowledged that 'the gathering of fleeing refugees and their return to the one country they had desperately sought to escape' may 'violate the spirit of the Refugee Convention'. In order to take heed of this spirit, governments have chosen to devise schemes of external processing so as to preclude refugees from being sent back to countries of persecution. It is for the same reason that many states, in implementing schemes of carrier's liability or border controls at sea, make reference to the upholding refugee rights. It must therefore also be concluded that, even in the absence of forthright acknowledgments that human rights and refugee law constrain external migration activities, their underlying humanitarian aspirations are generally embraced as a standard for the treatment of migrants.

This study has indicated that although the twin aims of preventing unauthorized migration and respecting refugee rights may find reconciliation in the context of policy documents, round table discussions or press releases issued by responsible agencies, they are much more difficult to reconcile in practice. Border guards may be trained in understanding refugee law, but if the domestic procedures under which they operate do not allow for referring claimants to a protection mechanism, the training remains an academic exercise. The Dutch immigration service may have opened up a special phone number for private carriers in case they are confronted with persons claiming asylum, but in the absence of a duty on the part of carriers to entertain asylum applications, it is no surprise that the phone never rings.¹⁹ Other questionable attempts at reconciling human rights with control concerns are the 'shout-test' of the US Navy, under which persons are only given a credible fear interview if they spontaneously show or state a fear of return²⁰; and the more recent Italian practice of only bringing to its shore those persons who, upon being rescued or interdicted, declare immediately a wish to apply for asylum.

The essential challenge therefore, is not only to formulate political aims, but also to make – and to account for – political choices. Despite increasing discourse, especially within the European Union, on establishing 'protection-sensitive' entry management systems, current practices do appear to sub-

¹⁹ Chapter 5.2.2.2 at n. 45.

²⁰ Chapter 7.2.1 at n. 25.

ordinate human rights to the goal of preventing illegal entries. States have refrained from establishing (or have abolished) protected entry procedures; from granting a general waiver for private carriers bringing persons claiming asylum to their territories; from exporting asylum guarantees inherent in border controls standards to pre-clearances; or from establishing external processing arrangements capable of granting rights of entry for those who are found to be a refugee. The underlying political choice is clear but rarely ventilated by government officials: the advantage such arrangements may bring in terms of human rights are outweighed by the risk that they may facilitate irregular entries.

Proper understanding of the legal challenges raised by this study would be much enhanced if states would more clearly acknowledge that it is inherently difficult to ensure respect for human rights in the course of external controls. This study has, in fact, not been able to identify a single example of where a system of procedural guarantees for the upholding of refugee and human rights has been successfully implemented within a control mechanism which ensures that persons without legal entitlements of entry are precluded from arriving in the state. This is not due to a lack of creativity on the part of states, but because the contents of procedural and material duties of human rights impose a heavy burden on states, in particular in respect of claims for asylum. It is well-nigh impossible to install status determination procedures of sufficiently quality, coupled with access to legal assistance and effective remedies, in the context of controlling procedures which aim at the swift and efficient checking of persons outside the state's territory and which may further be of only temporary character. This is not necessarily the case in respect of more durable arrangements of external processing of asylum applications, but, as concluded in chapter 7, these schemes are in themselves resource-intensive and can only be deemed a legal success if accompanied with guarantees on timely repatriation and resettlement which may be difficult to procure.

The bleak prospect that emerges is that European and other immigration countries will continue to employ and expand their arsenals of external migration instruments without them finding effective ways of ensuring that these instruments do not jeopardize access to protection for refugees. Although the further crystallisation of the law and efforts of procuring and disseminating information on the human rights effects of certain state practices may contribute to better human rights compliance or even force states to abandon some of the most legally questionable practices, adherence to human rights is ultimately premised on a requisite amount of societal and political support. Because the deterrent effect of external migration controls is widely perceived as crucial for preserving essential societal interests, it is likely that fundamental rights will face continuous contestation and that therefore external migration enforcement remains in a constant state of tension with both the letter and spirit of human rights and refugee law.

8.3 THE EUROPEAN UNION AS A PANACEA FOR UPHOLDING REFUGEE RIGHTS?

The European Union may, both as a source of law and as a collective platform for action, be better placed than individual Member States to address some of the challenges discussed above. The policy strategies of the EU in the sphere of external migration and asylum display a firm commitment to the vulnerable position of refugees. The EU's programme of enhancing refugee protection capacities in regions of origin and transit must be commended from the perspective of ensuring that refugees have access to effective protection and for contributing to global efforts to alleviate the needs of refugees. These activities see in particular to promoting accession and adherence of third countries to refugee instruments, to the creation of national protection systems consistent with international rules on refugees and asylum, and to contributing to the durable solutions of resettlement, local integration and voluntary return.

This commitment to refugees also features in respect of the strategy of integrated border management, which includes the multi-layered system of pre-entry control measures. The goal to make these measures more 'protection-sensitive' has already produced some concrete results, such as in the sphere of border guard training on asylum issues, a more firm embedding of fundamental rights in the recast of the Frontex Regulation and a recognition that the compilation of data and incident reporting contributes to an understanding of the nature and effects of particular forms of border control. The European Asylum Support Office, established in May 2010, has an express mandate to be involved in the external dimension of the Common European Asylum System and to contribute to ensuring that the international protection needs of refugees in the context of the external dimension are met.²¹

Further, in respect of clarifying the law, the study has forecasted a trend under which EU law pertaining to border controls and fundamental rights may compensate for the substantial amount of discretion the current EU policy on external migration is perceived to accord to Member States. This prospect concerns not only instances where Member States implement relevant EU instruments on, for example, carrier's liability, Frontex operations or the deployment of immigration officers, but also involves the broader matter of identifying which activities of Member States should be deemed as falling within the remit of the EU's common border crossings regime. The action brought before the European Court of Justice for annulment of the Council Decision on maritime Frontex operations is a very welcome and timely one, since it deals with the essential issue of whether ordinary EU safeguards on border checks must also apply to extraordinary checking procedures.

Yet, when it comes to those situations where control concerns may warrant diametrically opposed solutions as respect for rights of refugees and other irregular migrants, the EU has shown to be little more than the sum of its parts.

21 Articles 2(1) and 7 Regulation EU No. 439/2010.

Although it is instrumental in exchanging good practices and in providing support and technical assistance to Member States subject to particular migration pressures, the EU has not been able to agree upon more far-reaching arrangements in the sphere of burden sharing of migrant arrivals among Member States or the obligatory allocation of rescued or intercepted migrants. Although these mechanisms may ultimately be much more effective in guaranteeing that Member States respect procedural and other rights of migrants, they face the obstacle of the Member States' sovereign prerogative of deciding upon questions of entry and residence.

Council Decision 2010/252/EU on maritime Frontex operations is symptomatic of the EU's limited capacities in this respect. Despite its aim to ensure uniform application of relevant aspects of international maritime law and international law on refugees and fundamental rights, the Decision has not succeeded in creating a binding arrangement for the disembarkation of migrants, it does not define what procedural duties flow from the prohibition of *refoulement* in the course of interdictions at sea, and it has disconnected external controls from the ordinary regime on border crossings instead of bringing them within that framework. In sum, the decision epitomizes rather than resolves the contested applicability of fundamental rights and EU law to operations undertaken outside EU territory.

