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Outsourcing & Offshoring Migration Management and Asylum Processing

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Table of Contents

LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
Art.	Article
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EC	European Council
Edn.	Edition
e.g.	exempli gratia
EU	European Union
GA	General Assembly
GC	General Comment
HRC	Human Rights Committee
IACtHR	Interamerican Court on Human Rights
ICCPR	International Covenant on Civil and Political Rights
i.e.	id est
No.	Number
OAS	Organization of American States
OAU	Organization of African Unity
Op.cit.	Opere citato
p.	page

Para.	Paragraph
Res.	Resolution
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	UN High Commissioner for Refugees
USA	United States of America

"No one leaves home,

unless home is the mouth of a shark"

Warsan Shire.

Introduction

With the passage of time, people in transit, people leaving their home countries in order to seek refuge in another state, wishing to either acquire a better life or to escape a danger to their life or freedom, become more and more, instead of decreasing. Especially, after the end of the Second World War and in the aftermath of the decolonization movement, numbers have spiralled. However, when individuals are forced to leave their home countries, due to the fact that they might be persecuted on various grounds, such as race, religion, nationality, membership of a particular social group or political opinion, States are under the obligation to provide protection to them, according to the prescriptions of international refugee law.

According to most recent estimates, the total number of migrants around the world has reached a new record, surpassing 244 million and continuously rising[1]. However, the most alarming fact is that the number of those who have been forced to leave and migrate **(**refugees, asylum seekers, and internally displaced persons) have also reached a historical record of 63,5 million. It should also be noted that the majority of these people remain close to their places of original displacement, with the number of internally displaced person's to be around 38 million in 2015. During the same year, the developing world had gathered over 13,9 million refugees, a number which corresponds to 86 percent of the world's refugees[2].

Such a percentage seems to be fictional, as one might assume that the biggest number of refugees would surge to the "developed world", in order to enjoy a higher quality of protection. However, this is not the case. More wealthy states have always sought to find ways of escaping the obligation to offer refugee protection and the recent "trend" among them is to adopt

[1] UNFPA (United Nations Population Fund). 2016. "Migration." http://www.unfpa.org/migration.

[2] UNHCR, 2016. *Global Trends: Forced Displacement in 2015.* Geneva: UNHCR. http://www.unhcr.org/en-us/news/latest/2016/6/5763b65a4/global-forced-displacementhits-record-high.html

practices of outsourcing or offshoring handling of migration flows, in order to manage them before they cross their borders.

Developed states engage themselves more and more into practices of extraterritorial migration controls and asylum processing. These practices can assume various forms and can either aim at intercepting migration flows before they reach the territory of a state, at reducing the number of refugees actually acquiring access to asylum or even at shifting responsibility of refugee protection away from them and towards third-states[3].

The present thesis will conduct a short overview of practices of outsourcing or offshoring of migration control, with due regard to processing of asylum claims, while at the same time examining the legal obligations of States vis-à-vis refugees met outside State territory according to international refugee law and international human rights law respectively.

The first part deals with issues arising from migration control at the borders of States. A short overview of refugee law regarding refugee status and the right to seek asylum is conducted. Furthermore, state schemes trying shift the notion of borders are examined parallel to their impact to access to asylum for individuals. The particular cases of the United States and Australia, which have engaged in practices of border externalization, are presented in contrast to the proscriptions of refugee law.

The second part conducts an analysis of the cornerstone of refugee protection, the principle of non-refoulement, as expressed in refugee law and human rights law, in order to prove its extraterritorial applicability to outsourcing and offshoring practices. Finally, in the present context, the last chapter examines European practice on the issue and the possible future attempts that European states might undertake over the next few years.

[3] Bill Frelick, Ian Kysel and Jennifer Podkul, '*The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*' (2016) 4 Journal on Migration and Human Security 190.

PART I: REFUGEES AT BORDERS: BORDER EXTERNALIZATION

CHAPTER 1: Offshoring migration control: extraterritorial asylum?

1.1: The notion of "refugee status" & asylum

The term "refugee" is commonly used and in recent years, has become a word of almost daily usage. In its common sense, it refers to any person trying to flee from unbearable conditions, either general or personal. These persons are on their quest of freedom and safety, no matter where they are able to acquire them. The aforementioned unendurable conditions may vary and their flight might be due to a variety of reasons, such as oppression, prosecution, deprivation, poverty, famine, threat to life or liberty, war, civil conflict or even natural disasters, e.g. earthquakes. Under no circumstances, could a person fleeing criminal prosecution – a "fugitive" as he or she would be described - be considered to be a refugee in any reading of the term. The notion of "refugee" is accompanied by the idea that he or she ought to be protected by the reason of his flight and provided with assistance[4].

In the concept of international law, the term "refugee" bears a more restrictive meaning. For a person to be recognized to be a refugee, certain criteria have to be met, as it will be further explained below. Some categories of people fleeing their home country for specific reasons, are excluded from the concept of refugee, e.g. the so-called "economic refugees". This situation has born the distinction between "refugees" and "migrants", with the latter being people who have abandoned their home country, but are not entitled to refugee protection. The process of determining someone's refugee status is not just a typical procedure or an expression of legalism. In the case of people seeking refuge due to a natural disaster, the classification might be an easier and clear process, but for other reasons of flight, such as oppression and persecution, other criteria and means of proof might be required. Therefore, this classification is carried out in order to justify aid and protection given and to establish the entitlement to the corresponding – post recognition- refugee rights. [5]

[4] According to Oxford's Learners Dictionary, the term "refugee" is defined as "a person who has been forced to leave their country or home, because there is a war or for political, religious or social reasons", available at: https://www.oxfordlearnersdictionaries.com/definition/english/refugee

[5] Guy S. Goodwin - Gill, *The Refugee in International Law* (2nd edn, Oxford University Press Inc 1998).,p. 3-4

1.1.1.: The "Refugee" according to the Geneva Convention (1951)

The end of the Second World War found humanity faced with a significant issue: the displacement of thousands of people that had fled their home countries in order to pursue safety and freedom after multiannual persecution, who were in need of international protection. This situation worked as a catalyst for the development of public international law in the field of refugee protection. With the creation of the United Nations, important steps were taken towards this. According to Article 1(3) of the Charter of United Nations, all States undertake the obligation to promote respect for human rights for all, without any discrimination[6]. This was further complemented with the adoption of the Universal Declaration of Human Rights, by the UN General Assembly in 1948. Article 14 of the Declaration reaffirms *"the right to seek and to enjoy in other countries asylum from persecution"*[7].

The international refugee protection system, which is applicable up to date, was updated by the famous **Convention Relating to the Status of Refugees,** signed in Geneva on 28/04/1951 (henceforth, Geneva Convention or Refugee Convention)[8] and the **Protocol Relating to the Status of Refugees**, signed in New York on 31/01/1967 (henceforth, New York Protocol or 1967 Protocol)[9]. The Refugee Convention entered into force on 22/04/1954 and has been signed by 146 States (as of September 2019) and the 1967 Protocol went into force the same year it was signed and has 147 signatories[10]. The Protocol has been signed by one extra State, something that highlights its uniqueness; the Protocol is independent from the Convention and a State need not be a signatory to the Geneva Convention, in order to accede to the 1967 Protocol. It is because of this that some States are parties only to the Geneva Convention (e.g. Turkey), others only to the Protocol (e.g. USA) and others have adopted both the Convention and the Protocol (e.g. most European states).

The Geneva Convention constitutes the *lex specialis* on refugee protection and asylum. It contains the definition of the term "refugee" in international law and also, the conditions under which international protection is granted, along with state responsibilities. The new

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[6] *"To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion"*, Article 1(3) of United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI

[7] *"Everyone has the right to seek and to enjoy in other countries asylum from persecution."*, Article 14(1) of UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III)

[8] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137

[9] UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267

[10] UN High Commissioner on Refugees, *The 1951 Refugee Convention: States parties, reservations and declarations (September 2019)*, available at: https://www.unhcr.org/1951-refugee-convention.html

developments that the adoption of this Convention has brought was the definition of the term "refugee" and mainly, the establishment of the *principle of non-refoulement*, which contains the prohibition to return any refugee to *"the frontiers of territories where his life or freedom would be threatened"* (Article 33). International refugee protection is complemented by "refugee rights", i.e. the rights that refugees are entitled to, post recognition and in the context of international protection (Articles 4, 15-19, 22, 24, 26, 28)[11].

It is noteworthy that the Refugee Convention was accompanied by geographical and temporal limitations. That is, refugee protection as per the Convention was accorded to people whose flight was a result of *"events occurring before 1 January 1951",* either *in Europe or in Europe and elsewhere in the world* (depending on the declaration made by each signatory state). However, reality as construed in the following years demanded the abolition of such temporal and geographical limitations, in order to expand refugee protection to thousands of people fleeing their home countries, especially African countries in the aftermath of decolonization. This was achieved by the adoption of the 1967 New York Protocol, by which these limitations were abandoned, thus expanding the scope of application of the Geneva Convention. According to the Protocol, geographical limitations are lifted[12] and the term "refugee" refers to *"any person owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country ; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."*[13].

1.1.2.: Criteria for the determination of refugee status

It is from the definition provided by the Geneva Convention – as amended by the 1967 Protocol - that we draw the criteria used to determine a person's refugee status, i.e. the Inclusion Clauses, as referred to in the previous section. According to Article 1.A(2) of the Refugee Convention:

"For the purposes of the present Convention, the term "refugee" shall apply to any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality,

[11] Guy S. Goodwin - Gill, op.cit., p. 18 - 20
[12] Article 1(3), UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267
[13] Article 1.A.(2) of the UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, as amended by Article I(2) of the UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267

membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country ; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

The first and one of the most important elements of the definition of a refugee, which is used as a starting point in the status determination procedure is the existence of a **"well-founded fear"** of persecution. This term can be further analyzed in two elements. On the one hand, there is the element of "fear". Fear is an emotion and as such it is subjective. Thus, the element of fear in total is a subjective element and unique per case. The aforementioned requires the individual examination of each case and even more, the evaluation of what each asylum seeker has stated in his or her application, rather than merely evaluate the overall situation. Upon this subjective element, an objective requirement is added; that is, for this "fear" to be "well-founded"; based on objective and real criteria and to be justifiable. During the examination of the claim of fear, the personal circumstances of the claimer are investigated along with the objective facts of each situation. Another prerequisite that is to be met is that the persecution or the fear of persecution has to be related with the element of persecution according to one of the reasons referred to in the Article above. In a few words, for an asylum seeker to be recognized as a refugee, there has to be a personal fear of persecution, which is also significant and justified[14].

The second element is **"persecution"** itself. The well-founded fear of the applicant is interrelated with the possibility, that he will be a subject of persecution, upon return to his home country (or country of residence). Despite the fact that persecution is in the centre of the definition of a refugee, this is a notion without a precise definition, neither in the Convention nor generally[15]. However, the text of the Geneva Convention specifies that this persecution should be on the grounds of i) race, ii) religion, iii) nationality, iv) membership of a particular social group or v) political opinion. By reading Article 1.A(2) in conjunction with Article 33(1) – which will be analysed in the following subchapter – it can be deduced that threat to one's life or freedom is considered to be persecution[16]. The fact that there is no precise definition of

[14] Hathaway J. και Hicks W., *Is There Subjective Element in the Refugee Convention's Requirement of "Well-founded Fear"?* (Michigan Journal of International Law 26, 2005), p.510

[15] The UN Refugee Agency, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Rev. 4, 2019), p. 21

[16] Maiani F. *The Concept of "Persecution in Refugee Law: Indeterminacy, Context-sensitivity, and the Quest for a Principled Approach* (Les Dossiers du Grihl 2010), p.2

the term might be the root of legal inconsistency, as States are able to interpret the Convention according to their will. However, this was not the result of oversight by the drafters, but an intentional omission, if it could be described as such. By not including a definition in the text of the Convention drafted in 1951, the notion of "persecution" is more flexible in order to cover all forms of persecution, that might arise in the future and post adoption, allowing for a per case examination of claims of persecution[17].

The next criterion to be met is that the asylum seeker be "**outside the country of his nationality**". For refugee status to be claimed, it is a precondition that the person be in flight, i.e. to have left his home country. If the person in fear of persecution remains within the territory of the State of his nationality, the latter bears the responsibility of his protection. However, this criterion covers also cases, where the person was already abroad, when the situation in his home country underwent changes, due to which fear of persecution arises and therefore, cannot return to his home country, since he would possibly face the danger of persecution. In sum, "outside the country of nationality" refers to refugees in flight of their home country and the so-called refugees "sur place"[18].

The fourth criterion is that the person be "***unable or, owing to such fear, unwilling to avail himself of the protection of that country****".* As mentioned above, the State responsible for a person's protection is primarily the State of his nationality. Having left his home country, there is another precondition for receiving protection by a third State, which is twofold: the refugee is either unable to receive protection or does not wish to. The first side is objective caused by insuperable reasons (e.g. civil war, armed conflict) and is not dependent upon the will of the refugee. On the other side, refusal to receive protection has a direct link with the aforementioned well-grounded fear of persecution, i.e. fear that if he is returned to his home country protection, he will be subjected to persecution. It should be clarified that this criterion to be met, protection by the home state must be unable (or his unwillingness) to be provided throughout the territory of the home state. If it is possible that the refugee receives protection in another area of his home country, then the "possibility of relocation" is applied, provided that he relocates to an area, which is accessible to him and where he is out of reach of his persecutor or anyone else that might persecute him[19].

[17] Grahl-Madsen A. *The Status of Refugees in International Law, vol. I* (Leyden: A.W. Sijthoff 1966), p. 193
[18] The UN Refugee Agency, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Rev. 4, 2019), p. 26
[19] Hathaway J. και Foster M. *The Law of Refugee Status* (Cambridge University Press, 2nd edition, 2014), p.342

Finally, refugee protection extends to cover **stateless persons**. It is not a prerequisite for a refugee to have the nationality of a certain State, from which he is in flight. Stateless persons is a distinct category of refugees and at the time of the adoption of the Geneva Convention, the most common one. The definition of a stateless person derives from Article 1(1) of the Convention on the Status of Stateless Persons and refers to "*a person who is not considered as a national by any State under the operation of its law*"[20]. However, a stateless person is not an ipso facto refugee, but can be a refugee, given that the criteria analysed above are met. In the case of stateless persons, given that there is no country of nationality, the country of their former habitual residence is taken into consideration. Therefore, a stateless person is considered to be a refugee when there is a well-grounded fear that he will be persecuted for one of the reasons established in the Geneva Convention in the country of his former habitual residence and thus, he cannot or does not wish to return to it[21].

1.1.3.: Refugee status recognition as a state obligation

The determination of someone's refugee status entails two parts; on the one hand, the ascertainment of the details of each individual case and on the other hand, the application of the refugee definition, given by the Geneva Convention and the 1967 Protocol, as described above. In the previous parts, it has been mentioned that there are certain conditions to be met, for someone to be classified as a refugee. These clauses can be divided into three categories: 1) Inclusion Clauses, 2) Cessation Clauses and 3) Exclusion Clauses. The first is of a positive nature and includes all those conditions, which when met lead to the recognition of refugee status. On the contrary, cessation clauses refer to the cases, when refugee status ceases to exist and exclusion clauses to the cases, when someone is excluded from refugee protection[22].

As clarified, the recognition of someone's refugee status is subject to specific criteria, even though procedure might vary between states, since procedure is determined by national law. This bears testament to the fact that recognition of refugee status is not owed to a state's discretion or political will, but rather it is a legal obligation of State- Parties to the Geneva Convention or the New York Protocol. When a person files an asylum claim, within the territory or jurisdiction of a State, this State is under the obligation to examine, whether this specific

[20] UN General Assembly, *Convention Relating to the Status of Stateless Persons,* 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117
[21] Hathaway J. και Foster M., op.cit., p. 64-75
[22] UN High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees,* April 2019, HCR/1P/4/ENG/REV. 4, p. 18 -37

person meets the conditions aforementioned and if yes, to make sure that he or she receives the international protection and the rights that refugee status comes with[23].

It is not incidental that we refer to "recognition" of refugee status, rather than "acquisition". A person does not acquire the refugee status post recognition, i.e. he or she does not become a refugee after he or she is recognized as such. On the contrary, a refugee possesses the refugee status and States only merely recognize this pre-existing status. Recognition is not the outcome of a State's act, but the corollary of someone being a refugee. Therefore, this act of recognition is of a declaratory character, rather than a constitutive one and in fact, reaffirms that each specific person is actually a refugee and entitled to international protection[24].

1.1.4.: The right to seek asylum

As mentioned in the subchapter above, Article 14 of the Universal Declaration of Human Rights refers to the right to seek and enjoy asylum from persecution in other countries. However, such right has not been reaffirmed by subsequent binding legal instruments on refugee or human rights law. The 1951 Refugee Convention, the *lex specialis* on refugee protection does not establish such right, thus creating a *lacuna* in refugee protection, nor has it been included in Human Rights Treaties adopted under the auspices of the United Nations.

The only exceptions are traced in regional human rights protection systems; the first is Article 12(3) of the African Charter on Human and Peoples' Rights, which reads as follows: "*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*"[25]. Accordingly, the right to seek asylum is also recognized by Article 22(7) of the American Convention on Human Rights, that reads: "*Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes*."[26].

In the European context, the European Convention on Human Rights does not contain an explicit reference to a right to seek or to be granted asylum. However, on the European Union level, there exists Article 18 of the EU Charter of Fundamental Rights, which establishes a

[23] UN High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, April 2019, HCR/1P/4/ENG/REV. 4, p. 17
[24] UN High Commissioner for Refugees (UNHCR),op.cit., p. 17, para. 28
[25] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5
[26] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969

general right to asylum and reads as follows: "*The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties')*"[27]. It is rather interesting that in the present Article there is direct reference to the 1951 Refugee Convention. At first reading, by referring to the rules of the Geneva Convention and following suit, one might assume that the Article does not establish an individual right to asylum, exactly because the Refugee Convention refrains from including such a right. Due to the lack of an implicit reference of the subject of the right to asylum, Article 18 could be interpreted to either refer to an individual right to seek and to be granted asylum or to a state right to grant asylum. Nonetheless, when interpreting the Article as part of a whole, i.e. the Charter, its meaning becomes clearer. The Charter establishes the fundamental rights of persons not States, as it is clearly stated in its preamble. Therefore, it can be deduced that Article 18 refers not to a state right to grant asylum, but rather to the fundamental right for persons to seek and receive asylum[28].

In any case, the examples mentioned above constitute exceptions to the legal provisions of international refugee law, which do not include an explicit right to asylum, i.e. a right to request asylum for fear of persecution. Such a right finds great significance, when it comes to offshoring practices of migration control, since these practices may obscure a person from arriving at a destination state in order to request asylum[29]. Protection in this scenario may derive from the right to leave and enter a country. The right to leave one's home country is an established right in human rights law and can be found in a series of human rights treaties, for example: Article 12(2) ICCPR[30], Article 2(2) Protocol 4 ECHR[31], Article 22 American Convention on Human Rights[32] and Article 12 African Charter of Human and Peoples' Rights[33], as well as in Article 28 of the Refugee Convention, Article 28 of the Convention on Stateless Persons[34] and Article

[27] European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02
[28] Gil- Bazo M.T. *The Charter of Fundamental Rights of the European Union and the right to be granted asylum in the Union's law* (2008) 3 Refugee Survey Quarterly 27, p.39-48
[29] Maarten Den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012)., p. 152
[30] UN General Assembly, *International Covenant on Civil and Political Rights, 16 December 1966*, United Nations, Treaty Series, vol. 999, p. 171, Article 12
[31] Council of Europe, *Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto*, 16 September 1963, ETS 46, Article 2
[32] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969, Article 22
[33] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 12
[34] UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117, Article 28

8 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[35]. As pronounced in the ICCPR and Protocol 4ECHR, the right is transcribed with the following wording: "*Everyone shall be free to leave any country, including his own*". As it can be deduced from the aforementioned wording, there exists no restriction regarding the reason why one might decide to leave a country. The self-standing character of the present norm has been reaffirmed by the Human Rights Committee in its General Comment 27[36] and by the European Court of Human Rights in its Decision in the *Napijalo v Croatia* Case (2003)[37]. The aforementioned right applies both to nationals of a State and aliens alike and limits the scope of infringements that a state can pose upon leaving its territory, but not only its territory, as the right covers cases where a state hinders a person from leaving a third country. These infringements may take various forms, e.g. issuing of travel documents, but in no case are dependent upon the admission of the person by a third state. That is, the right to leave a country does not have to meet the precondition that one has already been granted access to the territory of another country[38].

However, denial of entry into a state's territory might be interpreted as an infringement to the right to leave a third country. It has been argued by various scholars, that modern migration control practices and barriers posed affect adversely one's right to leave a country and, in some cases, practically eliminate his chances of doing so. This is the case, because even though the right to leave is not theoretically accompanied by the precondition to be granted entrance by a third country, on a more practical level, the two are interrelated. It should be clarified that the right to leave does not lead to an obligation of the state to accept entrance for reasons of relocation, as this case is covered by the right to emigration, a discernible right in international law. The prohibition under discussion is not unlimited. If it were to be extended, the right to leave the country would be transformed into a right to gain access into the territory of any state and the international community as a whole would be under the obligation to grant such entry and not pose any restrictions at all to the entrance of aliens or nationals leaving a third country. This approach is highly problematic and could lead to "traps". Therefore, the right to leave should be interpreted in a narrower sense, i.e. that it should be guaranteed by a certain State for everyone within its territory[39]. But what applies to extraterritorial migration control?

[35] UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158, Article 8
[36] UN Human Rights Committee (HRC), *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9, para.8
[37] ECtHR 13 November 2003, *Napijalo v Croatia*, no. 66485/01, para. 73
[38] Maarten Den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012), p.154-156
[39] Guy S. Goodwin - Gill, Jane McAdam, op.cit., p. 382

1.2.: Border externalization

Having demonstrated that there exists no established right to asylum in international refugee law, protection to asylum-seekers is offered by another provision; the principle of non-refoulement, which will be analysed in Part II of the present thesis. In short, the principle of non-refoulement dictates that no person is to be returned to a territory, where his life or freedom might be threatened[40]. When a refugee arrives at the border of a state and requests asylum, if the state denies entrance and this person is returned to an area, where he might undergo persecution or might be subjected to inhumane treatment, then the state is considered to have violated its obligations under the principle of non-refoulement. As shown in Chapter 3 of the present thesis, the principle of non-refoulement might give rise to the positive obligation of the state to allow entrance into its territory, despite the fact that control over who enters a state's territory is considered to belong within the sphere of state sovereignty.

In times of increased migration flows, states have always sought to find ways in order to control such flows. What is actually happening is that states are attempting to find a way to control migration "waves" before they reach their borders, in order to escape from fulfilling their obligations under refugee law and in order to avoid to give rise to the principle of non-refoulement, due to which they could be under the obligation to accept large numbers of migrants arriving at their ground all at once. Over the course of the years, various states have attempted to pose obstacles to refugees arriving at their borders, such as the establishment of border fences (for example, Austria, Bulgaria, Estonia, France, Hungary, Greece, Latvia, Lithuania, Norway, and Slovenia[41]). However, state practice is not limited upon management of the geographical, physical borders of states. On the contrary, more and more states are attempting to establish practices of extraterritorial migration control, some of which will be discussed in Chapter 2 of the present thesis.

1.2.1.: Borders: a notion under transformation

Borders are under construction. The strict geographical limits, as we know them, are becoming more and more flexible, when it comes to migration control; frontiers are being reinvented and moved either inwards or outwards, more commonly. As mentioned above, the aim of states is

[40] Article 33(1), UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137
[41] U.N. High Commissioner for Refugees (UNHCR), Border Fences and Internal Border Controls in Europe (Mar. 2017)

to carry migration handling before such flows actually arrive at their territory, thus constructing a "shifting border", which is not so much a physical barrier, rather than a legal fabrication[42]. Borders are to be found in every obstacle posed to individuals prior to arriving at the actual geographic border of a state. These obstacles could take the form of visa requirements, airline screening due to carrier sanctions imposed on transportation firms according to state legislation, airport check in, specific points of embarkation, transit points, international airports and seaports, where controls are conducted[43]. All these practices are to be considered as part of the general "shifting border" notion, concealed under the veil of "securitization" of borders[44].

In general, practices of border externalization are usually presented to be efforts to ensure national security, to combat international human trafficking systems, to aid developing transit countries in acquiring their own migration control systems and of course, to prevent migrants from making dangerous journeys, that could even cost them their lives[45]. On the contrary, they are usually deterrence plans. Apart from restrictions upon travelling procedures imposed by internal laws of the state, border externalization practices could also take the form of interdiction of refugee boats at the sea, a practice that moves the "border" to the high seas, a *res communis usus*[46]. Examples of the aforementioned practices will be examined in the following subsection.

Another form of border externalization can be carried through the conclusion of agreements with third states, allocating the burden of screening or containing migration flows within their borders, thus assuming responsibility of refugee protection. Third countries are enlisted in order to prevent migrants and asylum seekers, from actually destination states. These third-parties are often encouraged to apprehend migrants trying to leave their territories and return them. Even though this collaboration is presented to be carried out in the context of transnational crime-control efforts in order to combat human trafficking or migrant smuggling, in reality it leads to an undermining and infringement upon the rights of asylum- seekers, as neither the principle of non-refoulement nor the right to leave the country are taken into consideration. Quite often states offer law enforcement or military assistance in order to assist with the containment of

[42] Ayelet Shachar, *'Bordering Migration/Migrating Borders'* (2019) 37 Berkeley Journal of International Law 93, p. 95-96
[43] Ayelet Shachar, op.cit., p. 98
[44] *María Nagore Casas, The Instruments of Pre-border Control in the **EU:** A New Source of Vulnerability for Asylum Seekers?* (2019) *Paix et Securite Internaionales* 7, **p.** 163
[45] B Shaw Drake and Elizabeth Gibson, *'Vanishing Protection: Access to Asylum at the Border*' (2017) 21 CUNY Law Review 91, p.115
[46] Ayelet Shachar, op.cit., p. 98

illicit materials, e.g. weapons, drugs, but at the same time achieve to "close" borders, not only for the flow of illicit goods, but for migration, as well[47].

As mentioned above, border externalization can also be achieved by providing assistance to third countries with regard to migration control and management, i.e. in order to build capacity of their respective immigration or asylum systems. Such practices encourage third-states- or even countries of origin of refugees - to provide incentives for individuals to not leave the country for another destination state. When that fails, third – states are encouraged to proceed to ways of containment or return of migrants, e.g. pull-backs at sea. The incentives that destination states offer to third- states can be logistical, financial, or political support, or even military aid[48].

One could come to the conclusion that movement of borders constitutes a form of "jurisdiction shopping". States move their borders in order to avoid having asylum-seekers coming within their jurisdiction, which would trigger their obligations under international refugee law. Such an approach shows emphasis on the geographical scope of application of the provisions of the Geneva Convention and especially, of the principle of non- refoulement, thus limiting its application strictly within the territorial jurisdiction of each state[49].

1.2.2.: Access to asylum: "at the borders"

As far as borders are concerned, the previous subchapter has shown that they have become a mercurial notion; they do not have to correspond to the geographical borders of a state. Practice has shown that an asylum- seeker can encounter the State before arriving at its borders, thus state "borders" could be on the high seas or on the territory of another State. But what is the case when it comes to asylum claims?

Traditionally, a refugee "meets" the state authorities either at the border of the territory or after having crossed it and within the territory and territorial jurisdiction of the State. In either case, an asylum claim is presented and the State in under the obligation to examine it. To clarify, the state does not have the obligation to grant asylum, but has the obligation to screen such a request, under the principle of non- refoulement in order to avoid exposing the person to risk of life or liberty, if expelling him[50].

[47] Bill Frelick, Ian Kysel and Jennifer Podkul, '*The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*' (2016) 4 Journal on Migration and Human Security 190., p. 194
[48] Bill Frelick, Ian Kysel and Jennifer Podkul, op. cit., p. 195
[49] Ayelet Shachar, op.cit., p. 101-103
[50] Wouters, Cornelis, op.cit., p.24

When the asylum – seeker is within the territory of the State, the situation is rather clear-cut. What actually complicates the interpretation of the extent of the state's obligations is the geographical application of the principle of non-refoulement[51], which forms the basis of refugee protection. Much debate has occurred on its applicability both "at the borders" and beyond them, i.e. extraterritorially.

In the context of the Refugee Convention, the principle of non-refoulement is expressed with the usage of 'expel', 'return' and 'refouler' combined. Their grammatic and combined reading can imply both the territorial and the extra-territorial application of Article 33(1). Such an interpretation would be in conformity with the remaining text of Article 33(1) and its object and purpose, which prohibits the return of refugees 'in any manner whatsoever' to a place where their lives or freedom would be endangered[52]. The use of the term "in any manner whatsoever" could also be referring to rejection at the frontier, instead of merely expulsion[53], establishing thus the applicability of non-refoulement "at the borders" of the state. Non-refoulement can be conducted from the territory of a state, from its borders or even outside its borders and territory. The most important element is to be able to establish a causal link between the activity of the state to the return of the individual to a territory, where he might be exposed to risk for his life or liberty[54]. Especially, it has been clarified that the state's international responsibility arises in cases where the exists a state conduct, which is attributable to a state and which fulfills the test of the causal link, as referred to above, no matter where that action takes place[55].

It is not merely symbolic to establish the application of non-refoulement at the borders of a state, even though it could be argued so, given the fact that, when someone is at the borders of a state, he is considered to be within the territory of the said state. And it is not symbolic, because as explained in the previous subsection, States engage themselves in various practices in order to "move" migration flows away from their borders and territory and either conduct migrant screening prior to arrival or allocate this burden to third - states. However, the interpretation of non-refoulement as applying extraterritorially provides an answer to legal questions regarding such practices; states ought to respect the principle of non-refoulement, no matter where their actions take place, even when sanctions are posed in airports or visa requirements are posed etc[56]. The extraterritorial application of the principle of non-

[51] See further, Chapter 3 of the present thesis
[52] Wouters, Cornelis, op.cit., p.51
[53] Gammeltoft-Hansen T, op.cit., p. 78, see also: EXCOM Conclusion No. 6 (XXVIII), 1977, para. (c);
[54] Wouters, Cornelis, op.cit., p.53
[55] Goodwin-Gill & McAdam, op. cit., p. 248
[56] *Gregor Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?'* (2005) 17 International Journal of Refugee Law 542.

refoulement along with an analysis on state jurisdiction and its limits is carried through in Chapter 3 below, where the principle is analyzed from both the perspective of international refugee law and international human right law.

It is noteworthy, however, that legal practice is not completely unanimous and consistent with the aforementioned in reality. For example, the notorious Sale Case, which will be analyzed in Chapter 2, rejected the application of the principle of non-refoulement on the high seas and beyond state territory, contrary to what has been analyzed above.

Another famous case is the *Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others*[57], which was brought before the United Kingdom's House of Lords in 2004. This case concerned the British practice of placing British officials at the Prague Airport in the Czech Republic, as a way of establishing a pre-entry clearance procedure in order to control migration flows from the country. When examining the case at hand, the House of Lords reiterated the decision[58] of the Court of Appeal, which underlined:

> "that Article 33 of the 1951 Convention has no direct application to the Prague operation is plain: (…), it applies in terms only to refugees, and a refugee is defined by Article 1A(2) as someone necessarily "outside the country of his nationality" (or, in the case of a Stateless person, "former habitual residence"). For good measure Article 33 forbids "refoulement" to "frontiers" and, whatever precise meaning is given to the former term, it cannot comprehend action which causes someone to remain on the same side of the frontier as they began; nor indeed could such a person be said to have been returned to any frontier."[59]

Here the Court did not find a violation of the United Kingdom's obligation under the principle of non-refoulement. But, it is noteworthy that it based its previous assessment mainly on the restrictions of Article 1A(2), which pose as a precondition to refugee status, that the individual at hand should be in flight from his home country[60]. It is to the author's opinion, that the wording of the present Article – with a territorial restriction only posed upon having left one's

[57] *Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others* [2004] UKHL 55, House of Lords, 9 December 2004.
[58] Ibid, para. 16
[59] *European Roma Rights Centre and Others v. the Immigration Officer at Prague Airport and the Secretary of State for the Home Department* [2003] EWCA Civ 666, Court of Appeal (Civil Division), 20 May 2003, para. 31
[60] See analysis in Chapter 1.1.

home country – reaffirms the extraterritorial application of non – refoulement, as emphasis is not given to "where" the individual is met.

In fact, it was recognized that:

> "there appears to be general acceptance of the principle that a person who leaves the state of his nationality and applies to the authorities of another state for asylum, whether at the frontier of the second state or from within it, should not be rejected or returned back to the first state without appropriate enquiry into the persecution into which he claims to have a well-founded fear[61]."

But, despite the aforementioned, the House of Lords followed a more territorial interpretation of the principle of non – refoulement and rejected the extraterritorial application of Article 33(1)[62].

However, the British practice was considered to be discriminatory, as it mainly targeted Roma travelers and excluded them from entry clearance, thus violating both domestic law and UK's obligations under Human Rights Treaties[63].

In conclusion, access to asylum might be hampered from practices of border externalization, even when they do not assume forms of interdiction or push-backs, but simply through the establishment of Pre-Entry Procedures as well. To the author's opinion, the conformity of such practices with international law is questionable. If borders are to be "moved" beyond their geographical invariant, then jurisdiction needs to follow suit and cannot remain in its territorial model.

CHAPTER 2: State practice on outsourcing and offshoring migration handling: shifting borders?

Efforts of offshoring migration control have been undertaken only by a small number of States. The first of which were carried out by the United States of America and more recently, by Australia. Furthermore, efforts to establish extraterritorial management of migration and

[61] *Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others* [2004] UKHL 55, House of Lords, 9 December 2004., para.26
[62] Ibid., par. 68- 70 (Lord Hope of Craighead)
[63] Gammeltoft-Hansen T, op.cit., p. 171

refugee flows have also been undergone by European States and the European Union. As discussed in the previous Chapter, these states have attempted to shift the influx of migrants and refugees towards less developed states and to deter them from entering their territory in order to seek asylum, thus alleviating the offshoring states from the burden of offering refugee or temporary protection, until their applications are examined. The cornerstone of such practices is the so -called scheme of shifting state borders; that is theoretical "movement" of borders, so that migrants and refugees never achieve to reach them, most commonly by being returned to a third- State, which undertakes to examine their asylum claims and offer protection or even, back to their country of origin. The present chapter will offer a short overview of their respective practices.

2.1.: United States of America

The United States of America, a "traditional" destination for refugees from the American continent was one of the first states ever to attempt a shifting of its borders, in order to dissuade refugees from entering its territory. Such attempts were carried out from early 1980's, i.e. from the Reagan administration and have continued up to date, with the most recent being Donald Trump's campaign proclamation that we would build an "impenetrable, physical, tall, powerful, beautiful southern border wall"[64].

As mentioned above, practices of border externalization have been undergoing for almost 40 years now. Back in the 1980's, the main port of entrance into the United States was through the sea. Thousands of people wanted to leave their poor home countries in Latin America - which were quite often torn apart due to civil war or dictatorships – and seek refuge in the wealthy North. Over the course of time and obstacles posed for migration at sea, the trend shifted towards land migration through Central – American states. In the following pages, the American practice regarding extraterritorial migration control will be presented following the sea – land dipole, with a special mention to the "Sale Case", a landmark case regarding interdiction.

2.1.1.: Interdiction of refugee boats on the high seas

Large numbers of refugees arrived at the United States by boat in the second half of the 20th century, spiralled state reaction and triggered the search of means and ways to limit the number of migration flows, that the US was receiving. One of them was the interdiction of refugee boats

[64] *Transcript of Donald Trump's Immigration Speech*, N.Y. TIMES (Sept. 1, 2016),

on the high seas, before they could ever reach American soil. In 1981, the Reagan administration signed an Agreement with Haiti, the so-called 1981 Interdiction Agreement[65]. Under this Agreement, the US was authorised to interdict Haitian vessels, carrying refugees, on the high seas[66]. Apart from that, the Agreement also provided for the detention and return[67] of asylum seekers interdicted by the American coastguard back to Haiti[68]. What this practice concerned in reality was that the US coastguard would perform an initial screening of the passengers of Haitian borders and would lead "eligible" asylum seekers to US soil, while the others would be returned to Haiti. The Interdiction Agreement was drafted in the spirit of this practice and to this several provisions bear testament. For example, the Agreement provides that the US Coastguard can take "*such measures as are necessary to establish (….) and the status of those on board the vessel"* and also refers to establishing an "*offence against United States immigration laws.* Both quotes evince the initial intention of the involved States, at the time of conclusion, to allow for screening of migrants onboard Haitian vessel on the high seas, by the US, based on the notion of "relocating" the US borders to the high seas. The migrants would not meet US authorities at the borders, rather much prior to approaching and while, still onboard a vessel carrying the flag of a third-state.

It is remarkable that within almost a decade of carrying through this practice, i.e. from 1981 to 1990, US interdicted approximately 22.500 Haitians, but only a small clash of them (less than a dozen) was brought to USA for a further examination of their asylum claim[69]. The situation shifted drastically with the turn of the decade. The internal political situation in Haiti caused the instability of the regime and a coup d'état to overthrow the democratically elected government of the State, urged thousands of Haitians to leave the country and take the "road" towards USA, in order to seek asylum. Haitian boats full of refugees filled the high seas with the aim of reaching American soil, something that would cause the mass influx of migrants to

[65] Interdiction Agreement Between the United States of America and Haiti, Sept. 23, 1981, U.S.-Haiti, 33 U.S.T 3559, 3559-60; "Haiti-United States: Agreement to Stop Clandestine Migration of Residents of Haiti to the United States" (1981) 20 International Legal Materials 1198

[66] The Interdiction Agreement reads as follows: " *Upon boarding a Haitian flag vessel, in accordance with this agreement, the authorities of the United States may address inquiries, examine documents and take such measures as are necessary to establish the registry, condition and destination of the vessel and the status of those on board the vessel. When these measures suggest that an offence against United States immigration laws or appropriate Haitian laws has been or is being committed, the Government of the Republic of Haiti consents to the detention on the high seas by the United States Coast Guard of the vessels and persons found on board*."

[67] The Interdiction Agreement reads as follows: "*The Government of Haiti agrees to permit upon prior notification the return of detained vessels and persons to a Haitian port, or if circumstances permit, the United States Government will release such vessels and migrants on the high seas to representatives of the Government of the Republic of Haiti*."

[68] Gammeltoft-Hansen T, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2011), p. 112

[69] Bill Frelick, Ian Kysel and Jennifer Podkul, op.cit., p. 199

the state. As referred to above, the American practice involved screening of passengers upon Haitian boats, prior to their return to Haiti. This was because of Reagan's promise to upkeep the principle of non-refoulement, as established in his Executive Order, in 1981[70].

Faced with this mass influx of asylum-seekers from Haiti, the then President Bush decided to abolish Reagan's commitment to respect the principle of non-refoulement[71] and authorised the collective expulsion of Haitian onboard vessels on the high seas, without a prior examination of their status, according to his infamous Kennebunkport Order of 1992[72]. This decision and new form of practice gave rise to issues of violation of the principle of non- refoulement and human rights, as well. Subsequent practice has followed suit to the paradigm of summary returns. However, in 1994 the then President Clinton, allowed for the migrants interdicted at sea to be taken to the American base in Guantanamo, Cuba, prior to their return to Haiti, but with no perspective of relocation to the USA. Furthermore, he extended the reach of this practice to Cuban people leaving their home country for US. They would too be interdicted at sea and transported to Guantanamo, where the USA presented it to be "a safe haven". In this context, USA and Cuba signed a Joint Communique, which included a provision on the American practice of interdiction at sea and move to Guantanamo, but also the commitment of Cuba to deter migrants from leaving its territory and more particularly, to "*take effective measures in every way it possibly can to prevent unsafe departures using mainly persuasive methods*"[73]. The turn of the century did not bring a change about. The US practice of interdiction at sea was upheld by the Bush, the Obama and the Trump administration and up to date, refugee boats at sea are interdicted and asylum- seekers onboard are still being transferred to Guantanamo[74].

2.1.2.: Legal practice: The aftermath of the Sale Case

In the context of the practice described above, a landmark case was brought before the Supreme Court of the United States; the notorious, *Sale v. Haitian Centers Council* Case[75]. In the present case, the Supreme Court advocated for the Bush/ Clinton practices regarding interdiction of Haitian boats. The Court found that the interdiction of refugee boats on the high seas and the

[70] Bill Frelick, Ian Kysel and Jennifer Podkul, op.cit., p. 199
[71] United States. 1981. Executive Order 12324. Interdiction of Illegal Aliens. 29 September 1981
[72] Executive Order No. 12,807, 57 Fed. Reg. **23,** 133 (1992).
[73] Bill Frelick, Ian Kysel and Jennifer Podkul, op.cit., p. 200
[74] Ibid.
[75] United States Supreme Court, *Sale, Acting Commissioner, Immigration and Naturalisation Service, et al., Petitioners v HaitianCenters Council, Inc., et al*, 509 US 155, 21 June 1993.

transfer of persons to other locations or their return to their home country to not be in violation of USA domestic law nor of its obligations under the 1951 Refugee Convention[76].

In the Sale Case, the Supreme Court primarily focused on the applicability of the principle of non-refoulement as established by Article 33(1) of the Geneva Convention outside a state's territory and especially, on the high seas. It rejected the notion of extraterritorial application of the principle based on its interpretation of the Refugee Convention, by examining the travaux preparatoires of the Convention[77].

Even though a discussion on the extraterritorial application of the Convention was not held during the drafting of the Geneva Convention, the Supreme Court based its rejection to the application of non-refoulement on the high seas to the meaning of the French word "refouler", originally used during the travaux preparatoires. More specifically, it found that the phrases "whatsoever" and "in any manner" of Article 33(1) were to be read in a restrictive manner, referring only to persons already within the territory of a State, thus not applying to anyone beyond its borders. The Court found that the French word "refouler" used in the original French text referred only to expulsion and not to return, i.e. not to practices aiming at keeping asylum-seekers outside the borders of a state[78].

The present case was not left without opposition. Justice Blackmun was the first to criticize the Decision in his Dissenting Opinion[79]. He supported that *"[r]eliance on a treaty's negotiating history (travaux préparatoires) is a disfavoured alternative of last resort*" in his attempt to establish a more evolutionary reading than the one followed by the Court, i.e. he supported the extraterritorial applicability of the principle of non-refoulement. He reiterated the historical context of the adoption of the Refugee Convention in order to underline that the reason why Article 33 does not contain an explicit reference to extraterritorial application could be because of the lack of an extraterritorial interception scheme at the time of adoption. Specifically, he underlined that:

'[T]he Convention…was enacted largely in response to the experience of Jewish refugees in Europe during the period of World War II. The tragic consequences of the world's indifference

[76] Gerald L Neuman, *'Extraterritorial Violations of Human Rights by the United States'* (1994) 9 American University Journal of International Law and Policy 213, p. 216

[77] Wouters, Cornelis, W. *International Legal Standards for the Protection from Refoulement: A Legal Analysis of the Prohibitions on Refoulement Contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture* (1st edn., Intersentia, 2009), p. 54

[78] B Shaw Drake and Elizabeth Gibson, op. cit., p.116-117

[79] Dissenting opinion of Mr. Justice Blackmun in *Sale, Acting Commissioner, Immigration and Naturalization Service, et al., Petitioners v Haitian Centers Council, Inc., et al*, 509 US 155, US Supreme Court, 21 June 1993, pp. 71-84.

at that time are well known. The resulting ban on refoulement, as broad as the humanitarian purpose that inspired it, is easily applicable here…'

Furthermore, regarding the wording of the Article, Justice Blackmun commentated that the use of both "expel" and "return" indicates that non-refoulement is applicable in both cases, when a person is expelled from the territory of a state to his home country and when a person is "returned ….to his former position"[80], no matter where this occurs. The terms here are not read accumulatively, but rather disjunctively, allowing for both territorial and extraterritorial application of the principle of non- refoulement.

Many other scholars expressed their disagreement with the verdict of the Sale Case and many adjudicative bodies have followed a different approach regarding the applicability of the principle extraterritorially[81]. It is noteworthy that the United Nations High Commissioner on Refugees commented on the Case and called it "a setback in modern international law" [82].

Despite criticism on the case, the USA has not decided to abolish its practices and has reaffirmed on multiple occasions its strictly territorial approach to non- refoulement. For example, when UNHCR gave its Advisory Opinion on the extraterritorial application of the principle of non-refoulement, the United States highlighted its "*long-standing interpretation' that 'Article 33 of the 1951 Refugee Convention applies only in respect of aliens within the territory of the Contracting State', and emphasizes that any practice of the United States to respect the nonrefoulement principle when carrying out interception on the high seas was a matter of national policy, not international legal obligation*"[83]. One can draw a contrast to the position of the United States; on the one hand, they support the strictly territorial interpretation of non-refoulement, but on the other hand, deal with borders as a shifting and movable notion.

2.1.3.: Extraterritorial land control of Central-American migration flows

As mentioned in the beginning of the present Chapter, American practices of border externalization are formulated on the dipole of sea and land. As far as the sea dimension is

[80] Ibid., p. 2
[81] See Chapter 3 of the present thesis.
[82] UNHCR, 1993. "UN High Commissioner for Refugees Responds to U.S. Supreme Court Decision in Sale v. Haitian Centers Council." *International Legal Materials* 32
[83] United States Mission to the United Nations and Other International Organizations in Geneva. 2007. Observations of the United States on the Advisory Opinion of the UN High Commissioner for Refugees on the Extraterritorial Application of Non- Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol. Geneva, 28 December 2007, p. 9. (as cited by Gammeltoft-Hansen T, op.cit. p. 112)

concerned, border externalization by the United States takes the form of interdiction of vessels at high seas. But what is the case concerning land control of migration flows?

The main point of entrance of refugees attempting to cross USA's land borders is their southern part, their borders with Mexico. And this is the case, because as already underlined, the main source of refugees wishing to seek asylum at the States is Latin America. Much debate has been dedicated and concentrated upon the creation of a wall along the 2,000-mile southern border of USA with Mexico, in order to reduce the influx of migrants and refugees arriving yearly to the US. However, in practice, the main concern is to establish the "win" the cooperation of Mexico in the struggle of migration control. The main number of migrants arriving at the US borders are not Mexican nationals, but mostly migrants from Central – America, to whom Mexico serves as a transit country. Therefore, there have been many attempts from the USA to co-regulate these flows along with their southern neighbor[84].

More specifically, already from 1989, the US Immigration and Naturalization Service (INS) has worked together with Mexican authorities to control migration flows and establish checkpoints along their borders and also, cooperate in cases of deportation south of the border. However, the "American dream" regarding migration control would be to shift the center of screening away from the actual, geographical US borders, south to the borders of Mexico with Guatemala[85].

In the context of this aspiration, USA has provided financial support to Mexico for the purposes of capacity building for handling the migration flows coming south of its border. Furthermore, the two States concluded in 2008 a bilateral security agreement based on cooperation, the so-called Merida Initiative[86]. This Agreement is structured on the basis of 4 basic pillars[87]:

(a) disrupting capacity of organized crime to operate
(b) institutionalizing capacity to sustain rule of law
(c) creating a twenty-first century border structure
(d) building strong and resilient communities

Co-operation on migration management is based on the third pillar of the Merida Initiative, the central aim of which is to: "*Facilitate legitimate commerce and movement of people while curtailing the illicit flow of drugs, people, arms, and cash. The Merida Initiative will provide*

[84] B Shaw Drake and Elizabeth Gibson, op. cit., p.200-201
[85] Ibid., p. 201
[86] For more info on the Merida Initiative see also: https://mx.usembassy.gov/our-relationship/policy-history/the-merida-initiative/
[87] Ibid., p. 201

the foundation for better infrastructure and technology to strengthen and modernize border security at northern and southern land crossings, ports, and airports. Professionalization programs will transfer new skills to the agencies managing the border and additional non-intrusive technologies will assist in the detection of criminal activities."[88]

2.2.: Australia: "The Pacific Solution"

Australia enacted its involvement with border externalization practices in the turn of the 21st Century and more specifically, after 2001 and the much-discussed "Tampa Incident". It has been argued that the source of inspiration for the Australian practices were the US practices carried out in the sea, as described in the subchapter above. However, Australia did not limit itself to border externalization practices, but also enacted legislation reforms in order to "escape" from migration flows reaching its borders.

In the summer of 2001, "Tampa", a Norwegian freighter rescued a large number of migrants, which were originally onboard an overcrowded ship. According to maritime law, after having rescued people in distress at sea, the captain of Tampa ought to take them to the nearest "safe haven", the next place of safety, which was Christmas Island, an Australian Territory. However, Australia instructed the captain to not do so and ordered him to not disembark the migrants to the Island. The captain – following the prescriptions of maritime law – defied the Australian order and approached the territorial sea of Christmas Island. This caused the reaction of the Australian authorities, which by military forces stopped Tampa before reaching its coast and instead of allowing rescued passengers to disembark, they moved them to another military vessel, where they remained for weeks, pending an Australian decision on how to manage them[89].

Following the Tampa Incident, Australia reformed its legislation on migration control, transferred the detained rescued passengers to third -countries and established a migration control system based on interstate co-operation among states in the area, which was named the "Pacific Solution"[90]. In the context of this system, Australia engaged itself in a year long practice of interceptions at sea and subsequent relocation of migrants to third countries, as it will be presented below.

[88] US Embassy & Consulates in Mexico, The Merida Initiative, available at: https://mx.usembassy.gov/our-relationship/policy-history/the-merida-initiative/
[89] Bill Frelick, Ian Kysel and Jennifer Podkul,op.cit, p. 203-204
[90] Ibid., p. 204

2.2.1: Legal reforms regarding migration control

The Tampa incident led to a legal reform of Australia's migration control system. In the fall of 2001 and within weeks of the incident, Australia adopted three different pieces of legislation on the topic of migration:

First, Australia adopted the 2001 Border Protection Act[91], by which it established interdiction powers in the territorial sea, contiguous zone and in international waters, in order to upkeep a practice of interdiction of migrant boats at sea, before reaching Australian soil. More specifically, it provides that:

> *"Powers of officers in respect of people found on detained ships or aircraft*
>
> *(3A) If an officer detains a ship or aircraft under this section, the officer may: (a) detain any person found on the ship or aircraft and bring the person, or cause the person to be brought, to the migration zone (within the meaning of the Migration Act 1958); or (b) take the person, or cause the person to be taken, to a place outside Australia. The definition of* ***place outside Australia*** *in subsection 4(1) does not apply for the purposes of paragraph (b).*
>
> *Powers to move people*
>
> (3AA) For the purpose of moving a person under subsection (3A), an officer may, within or outside Australia: (a) place the person on a ship or aircraft; or (b) restrain the person on a ship or aircraft; or (c) remove the person from a ship or aircraft."

Furthermore, two (2) amendments were passed to the Migration Act:

(a) Excision of certain northern islands from its 'migration zone'. Therefore, these islands were considered to not be part of its territory from where an asylum claim can be filed
(b) Australian authorities were authorized to send interdicted asylum-seekers or persons arriving at the aforementioned territories to countries that could provide effective protection in accordance with relevant human rights standards[92].

However, the legislative reform did not stop there. On the contrary, Australia has continued to adopt new legislative measures that allow for the continuance of its practices along the Pacific

[91] Border Protection (Validation and Enforcement Powers) Act 2001
[92] Gammeltoft, Hansen, T., op. cit. 110; Migration Amendment (Consequential Provisions) Act of 2001, § 198A.

Area, thus having formed its own interpretation of International Refugee Law. In this spirit, with the adoption of new pieces of legislation in 2014, Australia remove most references to the Refugee Convention from Australia's Migration Act of 1958. This had as result the creation of « *a "new, independent and self-contained statutory framework" to allow Australia to pursue its own interpretation of its obligations under the Convention*»[93]. What demonstrates great interest in the present reform is that the Minister of Immigration and Border Protection was given the power to order the detainment of individuals on the high seas and their transfer to other territories. Furthermore, regarding these other territories, the legislation clarified that "*the designation of a country to be an offshore processing country need not be determined by reference to the international obligations or domestic law of that country*", thus abolishing the notion of the safe third-country[94].

Another legislative reform of great significance is the adoption of the "*Offshore Processing and Other Measures Bill*". Under the auspices of this Bill, Australian authorities were given the discretion to transfer irregular migrants arriving by sea to Nauru or to Manus Island in Papua New Guinea. There they would be held for the duration of the processing of refugee claims. This practice resembles much the American practice and the indefinite detention at Guantanamo. It is surprising that the target of this legislative piece was only asylum seekers arriving irregularly through the sea and not the one arriving by air. The latter were and are still able to lodge asylum claims and remain within Australia. On the contrary, the former, i.e. those arriving by boat, are to be transferred to Nauru or Papua New Guinea, without being ever given the option of resettlement to Australia[95].

2.2.2: "Deterring" migration: Interdiction of refugee boats & Resettlement to Nauru and Papua New Guinea

As evidenced from the examination of the legislation adopted by Australia in the previous sub-section, Australia has constructed a specific practice regarding migration handling over the past 20 years and has shifted its legislation, in order to accommodate such practice, while at the same time it seems as if Australia is creating its own interpretation of the rules of international law, so that they fit its needs. Scholars have strongly criticized the Australian approach mainly on two issues[96]:

[93] Bill Frelick, Ian Kysel and Jennifer Podkul,op.cit, p. 205
[94] Ibid, p. 205
[95] Ibid, p. 205
[96] Gammeltoft, Hansen, T., op. cit. 110-111

(a) The fact that Australia decided to define and delimit the territory on which the states would honor its international obligations , even though it is an established rule of international law, that state obligations are owed throughout the sovereign territory of the state, which cannot be modified by individual announcement, but is de facto delimited by effective possession and exercise of power.

(b) The fact that Australia based the characterization of Nauru and Papua New Guinea as countries providing effective protection based solely on its own declaration and not on the fulfilment of objective criteria, thus creating issues of allocation of state responsibility.

Australian practice follows a specific pattern, wishing to mimic the example of the United States. First, Australian authorities interdict boats carrying refugees on the high seas. Then, these vessels are either pushed back to Indonesia, on the presumption that Indonesia is a "safe country of origin" or refugees on board are apprehended and transferred to either Nauru or Papua New Guinea, where they are detained in specially designated camp sites, until the processing of their asylum claims is completed, no matter how long this process might take. If the respective States grant them asylum, then they get to stay within one of them. If not, they are to be returned to their country of origin. Nowhere along this process are asylum-seekers or refugees offered the option to be resettled to Australia[97].

It is noteworthy that at the time of the conclusion of the Resettlement Agreements with Nauru and Papua New Guinea, neither of the States had acceded to the 1951 Refugee Convention, thus both lacked one crucial element in order to be deemed as "safe third-countries" for relocation. The fact that Australia ignored this deficit and recognized these states as safe third-countries based solely on its own declaration, might give rise to issues regarding the prohibition of non-refoulement. At that time, Australia did not have enough evidence, that the asylum-seekers would not be submitted to chain- refoulement or that their lives or freedom would not be endangered[98].

However, this practice seems to be coming to an end. In recent years, both Nauru and Papua New Guinea decided to shift away and abandon the Resettlement Agreements with Australia. Despite this fact, Australia has sought alternatives and more specifically, alternative partners in order to continue its practices. Therefore, it signed an Agreement in 2014 with Cambodia, whereby the latter agreed to accept detainees from Nauru[99].

[97] Bill Frelick, Ian Kysel and Jennifer Podkul,op.cit, p. 205
[98] Ibid., p.205
[99] Ibid, p. 205

PART II: PROTECTION OF ASYLUM SEEKERS FROM EXTRATERRITORIAL HUMAN RIGHTS VIOLATIONS

CHAPTER 3: Non- Refoulement as the core of Human Rights protection for asylum-seekers

3.1.: The principle of non-refoulement

One of the most important and integral elements of international refugee protection and generally, international refugee law is the principle of non – refoulement. Lacking a general right to be granted asylum, "non-refoulement" has been referred to as the "cornerstone" of refugee law. This principle is established in the much-discussed Article 33 of the Refugee Convention[100], but over the years and according to the relevant jurisprudence and state practice, it has evolved into a fundamental principle of international law[101]. Furthermore, it is of particular significance during practices of externalization of handling migration and refugee flows, as it is a key principle for avoiding malpractices, due to its extraterritorial application, which will be analysed below.

According to the Geneva Convention and the 1967 Protocol[102], States undertake the responsibility to not expel or return ("refouler") refugees to the frontiers of territories, where their life or freedom would be threatened. It is evident that the Convention aims at protecting refugees from being send to countries where they might fall victims of torture, inhuman or degrading treatment, in order to prevent their return to the hands of their persecutors, who could be located either in their country of origin or their country of usual residence[103]. Taking into consideration the essence of this provision, it can be said that it constitutes the strongest commitment that States undertake against refugees and also, the foundation of the complex of

[100] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137
[101] Report of the Working Group on Current Problems in the International Protection of Refugees and Displaced Persons in Asia: International Institute of Humanitarian Law, San Remo, 1981, p. 9.
[102] UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267
[103] N. Robinson, *Convention relating to the status of refugees, its history, contents and interpretation*, Institute of Jewish Affairs, World Jewish Congress, N.Y., 1953, p.161

rights granted to them by the 1951 Convention, as all other rights follow the right not to be returned[104].

The significance and the fundamental character of the said principle has been ascertained on multiple occasions. This is also clear from the Geneva Convention. As mentioned above, the principle of non- refoulement is established in Article 33(1) of the Convention. According to Article 42(1)[105] of the Convention and to Article VII (1)[106] of the New York Protocol, Article 33 belongs to those provisions which are not receptive to any reservation at all, confirming the importance of upholding the obligations established in this Article. Furthermore, the fundamental character of the principle has been confirmed by multiple Conclusions of the Executive Committee of UNHCR[107] and also, by Resolutions of the UN General Assembly, which has called upon Member- States to respect the fundamental principle of non-refoulement, with no exception[108].

3.1.1.: Personal scope of application

Article 33(1) in the original English text reads as follows:

> *Article 33: PROHIBITION OF EXPULSION OR RETURN ("REFOULEMENT")*
>
> *1.No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*

It is noteworthy that the English text is complemented by the French term "refouler" added in brackets in order to further clarify the meaning of the terms used and to specify the intention of the drafters, due to the lack of an equivalent term in English, as expulsion and return are similar to the French "refoulement", but each of them does not cover its full meaning. With the passing of the years, the word "refoulement" has been integrated and used broadly in English, covering both expulsion and return.

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[104] Gammeltoft-Hansen T, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2011), p. 77

[105] Article 42(1) Refugee Convention: "*At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1), 33, 36-46 inclusive*."

[106] Article VII (1) New York Protocol: "*At the time of accession, any State may make reservations in respect of article IV of the present Protocol and in respect of the application in accordance with article I of the present Protocol of any provisions of the Convention other than those contained in articles 1, 3, 4, 16 (1) and 33 thereof, provided that in the case of a State Party to the Convention reservations made under this article shall not extend to refugees in respect of whom the Convention applies."*

[107] For example, Executive Committee of UNHCR, Conclusion No. 6 (XXVIII), para. (c)

[108] United Nations GA/RES/51/75, 12 February 1997, para. 3,

The principle of non- refoulement and hence the obligation not to return someone to a territory where he or she might be endangered, is not only applicable to refugees, but also to asylum seekers. Therefore, when a person seeks asylum from a State, the latter State is obliged to refrain from sending this said person to any territory, where his life or freedom might be compromised or where he might undergo torture or degrading treatment. State obligations under this principle extend further and also cover cases of a person being send to a territory, where he might be at risk of being returned to his home country or country usual residence, from where he or she had originally fled on the grounds of fear of persecution. Due regard to the aforementioned analysis, the scope of application of this provision includes would-be refugees, i.e. persons who intend to seek asylum, but have not yet been able to enter the territory of the State.

However, the provision at hand is not without any restrictions at all. On the contrary, refugees may not claim this benefit, when there are reasonable grounds for them to be considered as "*danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country*", according to Article 33(2) of the Geneva Convention.

3.1.2: Geographical scope of application

Even though there exists a general unanimity regarding the fundamental character of the principle of non-refoulement, its exact extent and scope of application continues to be a subject of debate up to date. More specifically, the debate is even more intense, regarding its geographical coverage. It has been argued that the geographical scope of the principle is primarily territorial, i.e. that the provision of Article 33 is only applicable within the territory of a Contracting State. To elaborate further on this interpretation, an asylum seeker can file an asylum claim and call upon the principle of non-refoulement, when within the territory of the receiving State, regardless of whether his entrance into the territory was conducted legally or illegally. On the contrary, Article 33 does not cover refugees, who ask admittance into the territory at the border of the said State[109]. This interpretation has been upheld by various States from time to time and has also been expressed in the Sale Case by the United States Supreme Court[110], regarding the interdiction of Haitian refugees on the high seas, as it will be further analysed in Chapter 4 of the present thesis.

[109] UN High Commissioner for Refugees (UNHCR), *Convention relating to the Status of Stateless Persons. Its History and Interpretation*, 1997, p. 163

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

Others have argued it does not concern only refugees on the territory of a given State, but also refugees arriving at the borders of this State, requesting asylum, even before they cross them and enter its territory. The basis for this interpretation is the use of the phrase "*in any manner whatsoever*" in Article 33(1) of the Geneva Convention, which could be interpreted to mean non-admittance at the frontier, instead of only return or expulsion. Furthermore, this approach has been complemented by the idea that it would be illogical to provide greater protection to refugees illegally crossing borders than to refugees who present themselves at the borders requesting protection in a lawful manner[111].

Another approach to the geographical applicability of non- refoulement supports that it is not merely geographical, but an issue of jurisdiction. That is, the prohibition of refoulement is not contained within the territory of a State or at its borders. State responsibility arises for any refugee within its jurisdiction. Therefore, when States exercise effective control beyond their borders, i.e. on the high seas or on the territory of another State – due to reasons of occupation for example, but not only- these areas are considered to be within their jurisdiction. When a refugee comes within the jurisdiction of a State, the latter is bound by the obligations arising from the principle of non-refoulement. The aforementioned approach regarding jurisdiction is derived from human rights law, which is applicable anywhere within a State's jurisdiction, allowing for its extraterritorial application. Given that the principle of non-refoulement is incorporated in most human rights treaties, as presented in the following subsection, the approach of its applicability according to jurisdiction gains more support[112].

Finally, there exists another interpretation regarding the geographical extent of the principle. That is the universal application of the prohibition of refoulement, regardless of territory or jurisdiction. According to this approach, the principle is applicable, wherever state conduct may take place. This derives from the wording of Article 33(1), which clearly refers to a prohibition not to return a refugee to another territory, but without restricting "from where". Given that there is no such restriction, the provision can be interpreted to apply universally[113]. However, there is an exception to this interpretation; universally, cannot mean within the state of origin of a refugee, due to the fact that in order to be a refugee, a person should be in flight from his country, i.e. to have already left it[114].

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[111] Gammeltoft-Hansen T, op.cit., p. 78
[112] Gammeltoft-Hansen T, op.cit., p.79
[113] Guy S. Goodwin - Gill, Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press Inc 2007).,p. 244
[114] UN High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, April 2019, HCR/1P/4/ENG/REV. 4, par.88

3.2: The principle of non – refoulement in Human Rights Law

3.2.1: "Non-refoulement" in International Human Rights Treaties

The principle is not found only in the Geneva Convention and refugee law. On the contrary, the principle has been expressed and included in a number of Human Rights Treaties, either expressly – with an according provision in the text of the legal document – or indirectly, through its evolutionary interpretation. "Non-refoulement" in Human Rights Law has a complimentary role in the interpretation of the principle of non-refoulement, as found in refugee law and Article 31(3), since they concern norms of a similar content. These legal documents can be considered to be subsidiary sources of interpretation, as they are treaties in *pari materia*[115]. Therefore, when discussing the principle of non-refoulement, it is of outmost importance to approach through refugee law and human rights law, as well.

The plurality of legal documents on human rights law do not include a specific provision regarding non- refoulement, but the principle has been linked to other provisions and rights protected, mainly with the prohibition of torture, as it will be discussed below. However, there is one exception to this phenomenon. More specifically, the principle of non-refoulement is explicitly found in the **Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment** (CAT henceforth)[116]. Article 13 of the Convention reads as follows:

> "*1. No State shall expel, return 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.*
>
> *2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violation of human rights.*"

The object and purpose of the CAT is to strengthen the prohibition of torture and other cruel, inhuman or degrading treatment and punishment, as proscribed by international law, by offering clarifications to the prohibition, in order to further protect the rights of people. In this context, returns and expulsions are not permitted, when they could lead the subject of return to face

[115] Gammeltoft-Hansen T, op. cit., p. 118
[116] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85

torture or other degrading or inhuman treatment. In this context, this prohibition expresses the "heart" of the principle of non- refoulement, which establishes that States are to refrain from returns, when the subject of return might be exposed to danger of his life, freedom or torture. To be more precise, as Article 1 of the CAT defines torture, no person shall be returned, when and where he might be subjected to: "*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions*."[117].

It is noteworthy that the scope of application of the present application has been significantly widened and the protection offered by Article 3 has been extended through the work of the Committee against Torture and the examination of individual claims. The prohibition of expulsion is also applicable, when a person is expelled to any state, from where he might be "re-expelled" to another state – a third state – where he might face torture or inhuman or degrading treatment, covering cases of the so – called indirect or "chain refoulement"[118]. Furthermore, another significant element of the present prohibition is its absolute character. From the wording of the Article, it can be deduced that no exception to the prohibition of return to torture can be made, no matter the reason. That is because, under no circumstances, can torture or inhuman or degrading treatment be allowed and considered to be an acceptable practice[119]. The prohibition of torture and its absolute character is part of customary international law and even more, a peremptory norm of international law, constituting, thus, a *jus cogens*[120], which is binding upon all States of the international community, whether signatories to the CAT or not[121].

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[117] Article 1, UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85

[118] Aoife Duffy, *Expulsion to Face Torture? Non-refoulement in International Law*, vol. 20, no. 3,International Journal of Refugee Law, 2008, p. 378

[119] Wouters, Cornelis W. *International Legal Standards for the Protection from Refoulement: A Legal Analysis of the Prohibitions on Refoulement Contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture* (1st edn., Intersentia, 2009), p. 502 - 504

[120] De Wet, Erika, *The Prohibition of Torture as an International Norm of Jus Cogensand its Implications for National and Customary Law*, (2004) 15 European Journal of International Law, p. 97

[121] UN High Commissioner for Refugees (UNHCR), Advisoy Opinion on the Extraterritorial Application of Non-refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, para 21.

Moving towards the examination of other binding legal documents on human rights, one can come to the conclusion that the prohibition of refoulement is incorporated into human rights law in conjunction with the prohibition against torture or inhuman or degrading treatment, by the interpretation of the relevant provisions of each respective treaty. Below follows a short overview of such cases.

The **International Covenant on Civil and Political Rights**[122] (ICCPR henceforth) does not contain an explicit reference to the principle of non-refoulement, but the principle has been mostly linked to Article 7 of the Covenant and the prohibition of torture, inhuman or degrading treatment[123]. The Human Rights Committee (HRC henceforth) in its General Comment 20 (1992) has reaffirmed the principle of non-refoulement in relation to the prohibition of Article 7. Specifically, HRC has stressed that "*States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement*."[124]. The first case that was brought before the HRC regarding Article 7 and the prohibition of expulsion was in 1989 and was the renowned case Torres v. Finland, which concerned the expulsion of Mr. Torres from Finland to Spain and which would lead to an infringement to the enjoyment of his rights and the prohibition of Article 7 ICCPR, as he would be subjected to treatment contrary to this provision. The case was deemed admissible, but it was later dismissed, when the HRC found that his fear was not based on substantial grounds[125].

However, the first ever case, where the HRC confirmed the principle of non-refoulement within ICCPR was a few years later, in 1993, in the Case of *Kindler v Canada*[126]. Specifically, the HRC held in para. 13.2 that:

"If a State extradites a person within its jurisdiction in circumstances such as that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant"

It is noteworthy, however, that this individual complaint was filed on the basis of both Article 7 and 6 as well. This fact leads to conclusion that the principle of non-refoulement is expressed

[122] UN General Assembly, *International Covenant on Civil and Political Rights, 16 December 1966*, United Nations, Treaty Series, vol. 999, p. 171
[123] Article 7 ICCPR: *"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."*
[124] UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, para.9
[125] UN Human Rights Committee (HRC), *Torres v Finland*, 5 April 1990, no. 291/1988
[126] UN Human Rights Committee (HRC), *Kindler v Canada*, 18 November 1993, no. 470/1991

in the ICCPR not only through Article 7 – and the prohibition against torture and inhuman or degrading treatment -, but also through Article 6 of the Covenant, regarding the right to life[127]. The aforementioned view was reaffirmed with the Committee's General Comment No. 31 in 2004, where it underlined that there exists: "*an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.*"[128].

It is to the author's opinion that the linkage of non- refoulement to the right to life is rather logical and even closer to the principle of non- refoulement as established by international refugee law and Article 33 of the Geneva Convention. In its essence, the prohibition of refoulement from the ICCPR is activated, when the return of a certain person to another territory might cause an irreparable harm to this person, in reference to Articles 6 and 7 of the Covenant, in any case, i.e. when his or her life might be endangered or where he might become the subject of inhuman or degrading treatment. Thus, the material scope of the prohibition is linked to the prohibitions found in Articles 6 and 7 of the ICCPR and the risk that they might not be upheld, due to the expulsion of a person[129].

As analyzed previously regarding the CAT, the prohibition of torture cannot be derogated from according to the wording of the Convention. In the case of the ICCPR, this absolute character of the prohibition is expressly stated within the text of the Covenant. Article 4(2) of ICCPR establishes certain rights included in the Covenant as non-derogable[130]. That means that their protection cannot be suspended for any reason at all, not even on the basis of public order, public health or national security. Both Articles 6 and 7 belong to the category of non-derogable

[127] Article 6(1) ICCPR: "*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life*."
[128] UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 12
[129] Wouters, Cornelis, op. cit., p. 377
[130] Article 4 ICCPR: "*1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.*
2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision."

rights and their absolute character has been reaffirmed the Human Rights Committee through its General Comments 29[131] and 20[132] respectively.

The **Convention on the Rights on the Rights of the Child[133]** (CRC henceforth) also includes an indirect reference to non-refoulement through the prohibition of torture or inhuman or degrading treatment, as expressed in its Article 37[134]. Furthermore, such a prohibition can be deduced by the interpretation of Article 6 CRC, which refers to the right of the child to life[135]. The present has been reaffirmed by the Committee on the Rights of the Child in its General Comment No.6, which reads as follows: "*Furthermore, in fulfilling obligations under the Convention, States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed. Such non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction. The assessment of the risk of such serious violations should be conducted in an age and gender-sensitive manner and should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services.*"[136]. However, in legal theory, it has also been supported that the prohibition of non – refoulement could also be deduced from other provisions of the CRC, such as Article 3[137], which establishes the "best interest of the child" principle[138].

[131] UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para.7
[132] UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, para. 3
[133] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3
[134] Article 37 CRC: "*States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age*;"
[135] Article 6 CRC: "*1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child."*
[136] UN Committee on the Rights of the Child (CRC), General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6, para. 27
[137] Article 3 CRC: "*1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*
[138] Gammeltoft-Hansen T, op. cit., p. 120

3.2.2: "Non-refoulement" in regional Human Rights Treaties

Regional Human Rights Treaties have followed suit regarding the inclusion of the principle of non-refoulement in the protection of human rights. It is remarkable, though, that in the case of regional treaties, there is no uniformity regarding the reference to non-refoulement. In America and Africa, one can locate an explicit reference to the principle; in the first case, it is incorporated within the text of the respective human rights convention and in the latter, a specialized convention relating to refugee issues has been adopted with a provision on non-refoulement. However, this is not the case, when it comes to the European Convention on Human Rights, as this will be discussed below.

In the context of the American continent, the **American Convention on Human Rights**[139] (ACHR) refers to the prohibition of torture and inhuman or degrading treatment in Article 5(2)[140]. In relation to this, subsequent legal practice and case law have introduced the principle of non- refoulement into the American Human Rights Protection system[141]. This has been reaffirmed by the Advisory Opinion that the Inter-American Court of Human Rights in 2018 after the request of the Republic of Equador and specifies that: "*Thus, under the American Convention, other human rights provisions such as the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, recognized in Article 5 of the American Convention, provide a solid basis for protection against refoulement. In this regard, this Court has already indicated that, based on Article 5 of the American Convention, read in conjunction with the erga omnes obligations to respect and ensure respect for human rights protection norms, it follows the State's duty not to deport, return, expel, extradite or otherwise remove a person subject to its jurisdiction to another State, or to a third State that is not safe, when there is a well-founded presumption that he or she would be in danger of being subjected to torture, cruel, inhuman or degrading treatment.*"[142]

In addition, ACHR includes also an explicit reference to the prohibition of refoulement in its Article 22(8), which reads as follows: "*In no case may an alien be deported or returned to a*

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[139] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969

[140] Article 5(2) ACHR: "*No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person*."

[141] See for example, *Advisory Opinion OC-21/14, "Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection"*, OC-21/14, Inter-American Court of Human Rights (IACrtHR), 19 August 2014, para. 226 & Judgment, Case of Wong Ho Wing v. Peru, Inter-American Court of Human Rights (IACrtHR), 30 June 2015, para.227

[142] *ADVISORY OPINION OC-25/18 OF 30 MAY 2018 REQUESTED BY THE REPUBLIC OF ECUADOR*, Inter-American Court of Human Rights (IACrtHR), 30 May 2018, para. 181

country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.". It is evident that the text of the treaty was influenced by the wording of Article 33 of the Geneva Convention. At the time of the drafting of the ACHR, the States Members of the Organization of American States were rather origin countries of refugees rather than recipient states. Therefore, it is in conformity with the overall situation, that they decided to follow suit to the Refugee Convention and include a provision that would protect the rights of refugees. However, the prohibition of Article 22, contrary to what has been analysed in the previous subsection, is derogable from according to Article 27 of the Convention, which allows for derogation from upkeeping the prohibition "in time of war, public danger, or other emergency that threatens the independence or security of a State Party"[143]. Such derogation is not in accordance with the Convention, as far as Article 5 is concerned. Thus, the prohibition of refoulement within ACHR is derogable in the sense of Article 27, but non-derogable, when established under Article 5 and the prohibition of inhumane treatment.

As far as Africa is concerned, the prohibition of non- refoulement has been indirectly expressed in the **African Charter on Human and Peoples' Rights[144]** (Banjul Charter) with Article 5[145] and the prohibition of torture, following the reasoning of international treaties. Furthermore, the Organization of African Unity, instead of incorporating a provision regarding non-refoulement in the Banjul Charter, adopted the **Convention Governing the Specific Aspects of Refugee Problems in Africa[146]** (OAU Convention), in order to regulate refugee protection within the continent. The aftermath of decolonization and the instability of newly created states in the area created significant refugee flows, the rights of which had to protected. As far as the principle of non- refoulement is concerned, it was incorporated in Article II (3) of the Convention, which reads as follows: " *No person shall be subjected by a Member State to*

[143] Article 27 ACHR: "*1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin. 2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.."*

[144] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

[145] Article 5 Banjul Charter: Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

[146] Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")*, 10 September 1969, 1001 U.N.T.S. 45

measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.".It should be highlighted that the OAU Convention takes a step further than the Refugee Convention and explicitly refers to rejection at the frontier of the state, as a case of refoulement, thus a prohibited practice.

In contrast with the aforementioned, the European context lacks a legal document on human rights with an explicit reference to non-refoulement. However, Protection from refoulement is offered through the **European Convention on Human Rights** (ECHR)[147] and through a number of Articles, as developed by relevant case law. Most importantly, non-refoulement is established on the basis of: Article 2[148] (right to life), Protocol 6 Article1[149] (abolition of the death penalty), Protocol 13 Article 1[150](abolition of the death penalty) and in certain cases, Article 6 (right to a fair trial)[151]. Furthermore, Protocol 4 establishes in its Article 4[152] the prohibition of collective expulsions of aliens and Protocol 7 in its Article 1[153] establishes "procedural safeguards relating to expulsion of aliens". Protection of refoulement has mostly been developed through caselaw on its Article 3, which reads as follows: "*Prohibition of torture: No one shall be subjected to torture or to inhuman or degrading treatment or punishment*.". If an act of the State leads to a person being transferred to another country, where he might be submitted to treatment contrary to Article 3 of the Convention, i.e. inhumane, then the sending state is considered to have violated the provision, because its act exposed the person at risk and the said treatment[154]. Even though the link of Article 3 to the principle of non-refoulement was already accepted by 1965 by the Parliamentary Assembly of the Council of

[147] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5

[148] Article 2 ECHR: "*1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection*."

[149] Article 1, Protocol No.6, ECHR: "*The death penalty shall be abolished. No one shall be condemned to such penalty or executed*."

[150] Article 1, Protocol No.13, ECHR: "*The death penalty shall be abolished. No one shall be condemned to such penalty or executed.*"

[151] Wouters, Cornelis, op.cit., p. 187

[152] Article 4, Protocol 4, ECHR: "Collective expulsion of aliens is prohibited"

[153] Article 1, Protocol 7, ECHR: "*1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed: (a) to submit reasons against his expulsion, (b) to have his case reviewed, and (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority, 2. An alien may be expelled before the exercise of his rights under paragraph 1.(a), (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security."*

[154] Wouters, Cornelis, op.cit., p. 187-188

Europe[155], the first case where the Court reaffirmed this position was in 1991 with the *Cruz Varas and Others v Sweden Case[156]*. However, the basis of this decision was the much-discussed Soering Case, brought before the Court in 1989. In this case, the Court recognized a violation of Article 3, due to the extradition of Mr. Soering by the UK to the United States, where he would be faced with the death penalty, a treatment incompatible with the content of Article 3 ECHR[157].

It is noteworthy that Article 3 and the prohibition of torture is a non-derogable provision of the European Convention, i.e. no exceptions from this prohibition are allowed, not even "*in time of war or other public emergency threatening the life of the nation*"[158]. Its absolute character is established in Article 15(2) of the Convention, which reads as follows: "*No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision*.". The Court reaffirmed Article 3 as non-derogable as early as 1977, in the Case of Ireland v. United Kingdom[159], where it found that no derogation was admissible, even in times of national emergency. Specifically, it reiterated that: "'*Article 3 makes no provision for exception ... there can be no derogation therefrom even in the event of a public emergency threatening the life of the nation*". The Court continues to clarify, that no exceptions from the prohibition are admissible, not even on the grounds of the victim's "malconduct"[160], thus emphasizing the unconditional character of the protection offered by Article 3[161]. The former position, i.e. the absolute character of the prohibition against torture even in times of national emergency, was reiterated in the Case of Chahal v. United Kingdom[162]. In this case, the Court underlined that the scope of Article 3 of the European Convention is wider than the respective scope of the principle of non-refoulement, as established by Article 33(1) of the Refugee Convention[163].

[155] Wouters, Cornelis, op.cit., p. 188 & also, Council of Europe, Parliamentary Assembly, Recommendation 434 (1965) *on the granting of the right of asylum to European refugees*, para. 3.
[156] ECtHR, *Cruz Varas and Others v Sweden*, 20 March 1991, Appl. No. 15576/89, para. 76
[157] ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88
[158] Article 15, Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5
[159] ECtHR, Ireland v United Kingdom, 18 January 1978, App No 5310/71, A/25
[160] Ibid, para. 65: "*the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct*"
[161] Aoife Duffy, op.cit., p. 379
[162] ECtHR, *Chahal v United Kingdom*, 15 November 1996, Appl. No. 22414/93
[163] Aoife Duffy, op.cit., p. 379

3.3.: Extraterritorial applicability of the principle of non-refoulement

As discussed in the present thesis, the principle of non- refoulement constitutes the cornerstone of protection for asylum – seekers, especially for those that face state practices of extraterritorial migration control, beyond the territory of the recipient State. As shown in part 3.1.2., the geographical scope of application of the principle of non- refoulement is a contested issue, that has been much debated. Generally, a state exercises its legal authority according to the extent of its state sovereignty, i.e. within its territory or jurisdiction. When within state territory, the situation is clearer; the state is the only sovereign and thus, can manage legal relationships and obligations[164]. However, when it comes to cases of activity beyond its borders, the situation is not so clear and an examination of jurisdiction must be conducted. Given the interplay between refugee law and human rights law, the following section will analyse jurisdictional issues regarding non-refoulement, with a special reference to jurisdiction according to Human Rights Law. This is the case because jurisdiction in human rights law differs from jurisdiction in general international law; the goal is not to determine whether a State can or should exercise its legal authority, but whether and to what extent it should respect its human rights obligations[165].

3.3.1: Jurisdiction in Human Rights Law

The plurality of Human Rights Treaties provide that their State Members are under the obligation to respect and ensure the human rights of every person within their jurisdiction[166]. However, they refrain from defining the term jurisdiction and giving a specific delimitation to its boundaries. Originally, the term "jurisdiction" was a clear-cut notion in the context of public international law, but over the course of the years it has evolved and become a notion under construction. Below models of jurisdiction will be analysed.

First and foremost, in general international law, when referring to jurisdiction, the territorial model is followed. More specifically, jurisdiction is interrelated with state sovereignty and can be exercise within it and with due respect to sovereignty of third states, i.e. insofar as it does not encroach upon another state's sovereignty and respective jurisdiction[167]. Therefore, according to this model and due to this close link to sovereignty, an aspect of which is territory,

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[164] Shishir Lamichhane, 'The Extra-Territorial Applicability of the Principle of Non-Refoulement and Its Interception with Human Rights Law' (2017) 5(2) Kathmandu School of Law Review 137, p. 143-144

[165] Michal Gondek, *The Reach of Human Rights in a Globalizing World: Extraterritorial Application of Human Rights Treaties,* The School of Human Rights Research Series, vol. 32, 2009, p. 5.

[166] For example, Article 1 ECHR: "*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*" or Article 2(1) ICCPR: " *Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*."

[167] Maarten Den Heijer, op. cit., p. 25

jurisdiction is exercised within the territory of a state. State sovereignty is delegated on a territorial basis and jurisdiction follows suit. The aforementioned has been confirmed by the Permanent Court of Justice in the Lotus Case (1927)[168], where the PCIJ stressed that:

"[F]ailing the existence of a permissive rule to the contrary – [a state] may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention."

However, this "containment" within the borders of a state is not absolute, especially when it comes to cases, when human rights protection issues arise. When States enter a Human Rights Treaty, do not simply assume multilateral conventional obligations towards other states on a reciprocal basis, but most importantly assume the responsibility of protecting the rights of persons, which gives rise to state obligations vis-à-vis individuals[169]. The present opinion has been reaffirmed on multiple occasions and for example, the Interamerican Court of Human Rights has underlined that: "*modern human rights treaties (…) are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction*."[170].

Having due regard to the nature of Human Rights obligations, international jurisprudence has in many cases established and accepted the extraterritorial jurisdiction of states in various situations, such as acts of diplomatic and consular agents in foreign territory, military interventions and occupation, the detention and custody of individuals abroad, the interception of vessels on the high seas, and international peace-keeping or peace-enforcement operations[171]. Special mention is to be made to the ECtHR jurisprudence, that has developed three (3) models / levels of jurisdiction beyond the territory of a state, which were accumulatively expressed in

[168] PCIJ 7 September 1927, *S.S. 'Lotus' (France v Turkey),* PCIJ Series A. No. 10, p. 18-19.
[169] Maarten Den Heijer, op. cit., p. 28
[170] Advisory Opinion OC-2/82, *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (Arts. 74 and 75), IACtHR, 24 September 1982, para. 29
[171] *María Nagore, '"Impact on Rights" As a Form of Extraterritorial Jurisdiction: A New Legal Restriction on Border Controls Through International Cooperation*' (2019) 23 Spanish Yearbook of International Law 235., 238 -239

its decision on the much – discussed Al-skeini Case[172]. The three levels of jurisdiction have as follows:

(a) Jurisdiction based on State agent authority and control[173]

(b) Jurisdiction based on the effective control over an area[174]

(c) Jurisdiction based on the notion of the legal space ("*espace juridique*") of the Convention[175]

Furthermore, the interpretation of the Human Rights Committee regarding jurisdiction in the context of the International Covenant on Civil and Political Rights shows much interest. The ICCPR dictates in its Article 2 (1) that "*Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant*". In the present Article, there is a reference to both territory and jurisdiction. The wording of the Covenant has been the cause of debate on the issue of interpretation, i.e. whether it should be read disjunctively or conjunctively. If the latter were the case, the scope of application of the ICCPR would be significantly limited within the limits of the notion of territorial jurisdiction, not allowing for the extraterritorial application of its provisions[176].

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[172] ECtHR, *Al-Skeini and Others* ***v.*** *United Kingdom*, App. 55721 /07, 15 June 2011

[173] Al- Skeini Case, para. 137: *"It is clear that, whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored""*

[174] Al- Skeini Case, para. 138. "*Another exception to the principle that jurisdiction under Article 1 is limited to a State's own territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration (see Loizidou (preliminary objections), cited above, § 62; Cyprus v. Turkey, cited above, § 76; Banković and Others, cited above, § 70; Ilaşcu and Others, cited above, §§ 314-16; and Loizidou (merits), cited above, § 52). Where the fact of such domination over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and actions. The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights (see Cyprus v. Turkey, cited above, §§ 76-77)*"

[175] Al- Skeini Case, para. 142. "*The Court has emphasised that, where the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and would result in a "vacuum" of protection within the "legal space of the Convention" (see Cyprus v. Turkey, cited above, § 78, and Banković and Others, cited above, § 80). However, the importance of establishing the occupying State's jurisdiction in such cases does not imply, a contrario, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe member States. The Court has not in its case-law applied any such restriction (see, among other examples, Öcalan; Issa and Others; Al-Saadoon and Mufdhi; and Medvedyev and Others, all cited above)*."

[176] *María Nagore, op. cit., p. 239 -240*

The HRC, in its General Comment 31[177] in 2004, clarified its interpretation of the Article and confirmed the disjunctive reading of its requirements. The Committee reiterated that "*States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction.*"[178]. From the aforementioned interpretation one can draw many similar points to the interpretation of ECtHR on jurisdiction. First of all, jurisdiction arises in all cases, where a state exercises effective control over the individuals, whether lawfully (within its territory) or unlawfully (e.g. occupation). Furthermore, it adopts the personal model of jurisdiction, escaping from the restrictions of the territorial model, making the ICCPR applicable to all individuals within state territory and to all individuals within state jurisdiction, even extraterritorially[179].

In recent developments, the Committee further developed its interpretation on jurisdiction under ICCPR in its General Comment 36[180]. With this, the Committee reiterated the territorial and personal model of jurisdiction, as described above. However, the HRC took a step forward and introduced the notion of "impact or effect on human rights" as a basis for jurisdiction. More specifically, the HRC underlined that: "*In light of article 2 (1) of the Covenant, a State party has an obligation to respect and ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control.* ***This includes persons located outside any territory effectively controlled by the State whose right to life is nonetheless affected by its military or other activities in a direct and reasonably foreseeable manner*** *(see para. 22 above). States also have obligations under international law not to aid or assist activities undertaken by other States and non-State actors that violate the right to life. Furthermore, States parties must respect and protect the lives of individuals located in places that are under their effective control, such as occupied territories, and in territories over which they have*

[177] UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.1

[178] GC 31, para.10: "*States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace enforcement operation*"

[179] *María Nagore, op. cit., p. 239 -240*

[180] UN Human Rights Committee (HRC), *General comment no. 36, Article 6 (Right to Life)*, 3 September 2019, CCPR/C/GC/35

assumed an international obligation to apply the Covenant. States parties are also required to respect and protect the lives of all individuals located on marine vessels and aircraft registered by them or flying their flag, and of those individuals who find themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea. Given that the deprivation of liberty brings a person within a State's effective control, States parties must respect and protect the right to life of all individuals arrested or detained by them, even if held outside their territory.[181]".

Based on the wording of the General Comment, state jurisdiction and responsibility to protect an individual's right to life even when persons are "located outside any territory effectively controlled by the State", but their "right to life is nonetheless affected by its military or other activities in a direct and reasonably foreseeable manner". It can be deduced that States ought to protect the rights of individuals, when their activity, even when not directly enforced at these individuals, can be assumed to affect negatively the enjoyment of their rights under ICCPR, and more specifically, their right to life. This approach entails two elements: first, the rights of the individuals should be affected by state activities, i.e. a causal link should be established between them and secondly, this effect should be "in a direct and foreseeable manner"[182]. However, this approach is not as limitative as the personal model of jurisdiction, which requires physical contact with the individuals affected by state actions. This new model could also cover cases, where state activity occurs within the territory of a state, but its effects can also be extraterritorial, e.g. cases of targeted killings using drones and foreign surveillance programs. Following these reasoning, it could be argued that the model of jurisdiction on the basis of impact or effect on human rights can also be used to offer human rights protection in cases of cooperative deterrence migration practices, where the personal model of jurisdiction under human rights law does not offer protection[183].

Following the analysis of the interpretation of ECtHR and HRC on models of jurisdiction, one can come to the conclusion that jurisdiction for the extraterritorial conduct of states can arise on multiple occasions, establishing thus the extraterritorial application of human rights protection. As discussed in Part 3.2. of the present thesis, non-refoulement is an embedded notion in human rights protection and thus, deductively one can reach to the conclusion that non-refoulement – in the context of human rights – is also extraterritorially applicable.

[181] UN Human Rights Committee (HRC), *General comment no. 36, Article 6 (Right to Life)*, 3 September 2019, CCPR/C/GC/35, para. 63
[182] *María Nagore, op. cit., p. 241-242*
[183] *María Nagore, op. cit., p. 242*

3.3.2: Obligations of States under Human Rights Law regarding non-refoulement in offshoring practices

When it comes to the protection of Human Rights, State obligations are of a twofold nature. There are negative obligations, which demand that the state refrains from actions that could inhibit the enjoyment of human rights by individuals. But, also, there are positive obligations, which presuppose that the state should act in order to prevent infringements of such rights and offer individuals its protection, whether the source of infringement is statal or private, i.e. states have the responsibility to prevent and protect[184]. This "positive obligations doctrine" has been reaffirmed on multiple occasions, by international jurisprudence. For example, in the Genocide Case, the ICJ found that FYROM was obliged to act to prevent the massacres of Srebenica under the Genocide Convention[185] and its inaction was thus a violation of the Convention[186]. Accordingly, the ECtHR jurisprudence has established a rather advanced notion of the "positive obligations" doctrine. One of the most well-known cases, where ECtHR is López Ostra v Spain, where the Court found Spain to have violated the European Convention, due to its lack of measures to protect the rights or Ms. Lopez Ostra[187].

From a comparative reading of ECHR, ICCPR, CAT and their respective jurisprudence on cases regarding non – refoulement, one can reach to the conclusion that certain negative and positive obligations form under the umbrella of all three human rights protection systems. However, the exact content of the protection from refoulement is conditional upon the circumstances of each case and a categorization of negative and positive obligations should not be deemed exhaustive in any case[188]. A short overview of such obligations follows below.

On the one hand, the negative obligations stemming from the prohibition of non-refoulement are multidimensional. The first and most essential aspect is the obligation not to expel, deport, return, extradite or generally remove an individual to a territory, where his life might be threatened or where he might be exposed to risk of subjection to inhuman treatment. Likewise, states are under the obligation not to extradite a person to a state, when there exists a risk of being exposed to ill-treatment. Such an obligation is referred to explicitly in the text of the

[184] Maarten Den Heijer, op. cit., p. 85
[185] UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277
[186] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, International Court of Justice (ICJ), 11 July 1996
[187] ECtHR, López Ostra v Spain, 9 December 1994, App no 16798/90
[188] Wouters, Cornelis, p. 564

CAT[189] and has been reaffirmed by jurisprudence of the ECtHR[190] and the HRC[191]. Another significant aspect of the negative obligations of states under the principle of non-refoulement is the prohibition of indirect refoulement or "chain-refoulement"[192]. Under this obligation, states ought not to return individuals to third- countries, when there is a risk that they will be subjected to refoulement, i.e. to be returned by this said third-state to their home countries or another country, where they might be exposed to danger of ill-treatment or risk their lives. Within this umbrella, the notion of the "safe third country" has been developed. Refoulement is not prohibited, when it occurs towards a "safe third country", where the individual will not be exposed to risk and will be able to enjoy his rights[193]. Finally, the state is also under the obligation not to reject a person at the frontier of its territory (both the de facto and the de jure frontier)[194], when such rejection might lead to the individual being exposed to ill-treatment[195]. The issue of the meaning of "frontier" or "border" has also been approached in Chapter 1 of the dissertation at hand.

State responsibility to ensure protection from non-refoulement arises, when the individual is under the control of the State, whether this occurs within its territory, at its borders or beyond. It should be highlighted that the aforementioned applies, also, when state authorities "meet" the individual at sea. The much-discussed Hirsi Jamaa Case, which was brought before the ECtHR, established the state obligation to refrain from practices of refoulement, even when in the high seas, if state authorities have boarded the ship, taken control of the ship, where individuals (asylum-seekers) are on board, or control its course[196]. Thus, practices of push-backs at sea are interdicted to the degree that individuals on board ships might be exposed to risk and to risk of being returned to territories where their lives might be threatened and their right might be infringed.

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[189] Article 3(1) CAT: "*No State Party shall 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*."

[190] See for example, ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88, paras. 90 and 91 & ECtHR, *Cruz Varas and Others v Sweden*, 20 March 1991, Appl. No. 15576/89, paras. 69 and 70

[191] HRC, General Comment No. 20 (1992), para. 9 & HRC, *Kindler v Canada*, 18 November 1993, no. 470/1991, HRC, General Comment No. 31 (2004), para. 12.

[192] See for example, ECtHR, *T.I. v United Kingdom*, 7 March 2000, Appl. No. 43844/98 & HRC, General Comment No. 31 (2004), para. 12; ComAT, *Mutombo v Switzerland*, 27 April 1994, no. 13/1994, para. 10; ComAT, *Korban v Sweden*, 16 November 1998, no. 88/1997

[193] The "safe third country" notion will be further analysed in Chapter 4 of the present thesis.

[194] See for example, ECtHR, *Amuur v France*, 25 June 1996, Appl. No. 19776/92, para. 52.; ECtHR, *Xhavara and 12 Others v Italy and Albania*, 11 January 2001, Appl. No. 39473/98; HRC, General Comment No. 15 (1986), para. 5.; ComAT, Concluding Observations on France, 27 May 1998, UN doc. A/53/44, paras.137-148, para. 147

[195] Wouters, Cornelis, p. 564-577

[196] *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012

Specific cases don't always involve one form of state obligations, i.e. either negative or positive. For example, in cases of interdiction at sea, a state should refrain from pushing back a vessel, but might also be under the obligation to allow the individuals to enter its territory. This observation leads us to the positive obligations that a state might have under the principle of non-refoulement, with the first to mention being the obligation to allow entrance into the country. Even though, admittance to a state's territory belongs to the sphere of state sovereignty, the latter is limited due to the prohibition of refoulement. When non-admittance to the country would lead to an individual being exposed to risk, then the State has the obligation to allow its entry or to find an alternative solution, as the Committee against Torture has clarified and as the "safe third country" practice allows. This obligation might evolve into an obligation to grant asylum or to an obligation to allow a person to remain within a state[197]. Finally, states are under the obligation to form procedural safeguards[198], as far as protection from refoulement is concerned[199].

CHAPTER 4: Outsourcing migration control in the European Union context

As repeated on multiple occasions throughout the present thesis, the European continent has been the traditional destination for refugees – and especially, after World War II. It is not surprising that in its original text the 1951 Refugee Convention was applicable to Europe only and that was the situation for the first 16 years of the "life" of the Convention, until the adoption of the 1967 Protocol. Over the passage of time, migration flows have not shifted away from Europe, but instead have increased, with refugees arriving from multiple sources. In the aftermath of the decolonization movement and due to the instability, that prevailed in multiple

[197] See for example: ECtHR, *Sisojeva and Others v Latvia*, 15 January 2007, Appl. No. 60654/00, ECtHR, *G.H.H. and Others v Turkey*, 31 August 1999, Appl. No. 43258/98; HRC, General Comment No. 15 (1986), para. 5.; HRC, *Stewart v Canada*, 16 December 1996, no. 538/1993, para. 12.5. HRC, *Canepa v Canada*; ComAT, *Aemei v Switzerland*, 29 May 1997, no. 34/1995, para. 11
20 June 1997, no. 558/1993, para. 11.3.

[198] See for example: ECtHR, *Jabari v Turkey*, 11 July 2000, Appl. No. 40035/98; HRC, Concluding Observations on Italy, 24 April 2006, UN doc. CCPR/C/ITA/CO/5, para. 15.; HRC, *Bhullar v Canada*, 13 November 2006, no. 982/2001, para. 7.3; ComAT, General Comment No. 1 (1997), paras. 6 and 7 & ComAT, *Mutombo v Switzerland*, 27 April 1994, no. 13/1993, para. 9.2

[199] Wouters, Cornelis, p. 564-577

African States, a great number of African nationals decided to abandon their homes and embark upon their quest of a better life, far from danger or fear of persecution. Due to the colonial ties that the European States had with African states and their year-long presence in the continent, it would only make sense that Europe would be the destination of preference for many asylum-seekers. Furthermore, due to its vicinity with Asia and the land borders or small distances in the Mediterranean Sea, Europe has also become the destination of preference for asylum – seekers arriving from the East.

For quite a long time, European States have tried to shift away the burden of mass influx of migrants, both immigrants and refugees and manage them in alternative ways and before entering European borders. Even within the EU, an elaborate system on asylum has been constructed, with an original aim to limit these migration flows to the outer limits of the EU, thus presenting great deficiencies. Due to the elaborate human rights protection system in Europe, provided mainly by the jurisprudence of the European Court of Human Rights, but also by EU law and the respective jurisprudence of the Court of Justice of the EU, special scrutiny should be paid to mechanisms of offshoring migration control outside of the EU, in order to avoid breaches of state obligations under European Human Rights law.

4.1.: EU Attempts at outsourcing migration handling

Attempts to adopt practices of extraterritorial processing of asylum claims have been enacted from the beginning of the 21st century, following the paradigm and trend that the US and Australia had set with their respective practices, as presented in Chapter 2. In the EU, the proposal came in 2003 by the United Kingdom. The then Prime Minister presented UK's "New Vision for Refugees"[200], which was highly criticized with strong opposition coming from Germany and Sweden, that actually posed a veto upon its adoption, leading to its abandonment. The "vision" consisted of two distinct elements:

(1) The creation of Regional Protection Areas (RPAs) in the vicinity of traditional countries of origin of refugees, so that they could serve as countries of first arrival, where refugees could be contained and places of deportation for asylum seekers that had already arrived in Europe[201].

[200] "New International Approaches to Asylum Processing and Protection," Correspondence from H.E. Tony Blair, Prime Minister of the United Kingdom to H.E. Costas Simitis, Prime Minister of Greece and President of the European Council (hereinafter Blair-Simitis Correspondence) March 10, 2003

[201] Noll, Gregor. 2015. "Visions of the Exceptional" *Open Democracy*, September 28, reposted from June 2003. https://www.opendemocracy.net/gregor-noll/visions-ofexceptional

(2) The establishment of "Transit Processing Centres" in third countries on the major transit routes to the EU, where asylum seekers wishing to seek refuge in Europe would be transported in order to have their claim examined and legal status determined. These centers would be managed by the International Organization of Migration (IOM) and the determination procedures to be followed, would be elaborated by the United Nations High Commissioner on Refugees (UNHCR)[202].

Even though UK's proposal was not accepted, it was not completely scrapped. On the contrary, it worked as inspiration for the European Commission's proposal of "Regional Protection Programmes (RPPs)". RPPs goal would be to strengthen protection capacity in the regions close to refugee flows, so that they could assume the functions of the proposed RPA's[203]. The Commission's proposal raised the awareness of the Human Rights Watch, which in its report underlined that:

> "*the RPPs' goals of strengthening the protection capacity and improving access to durable solutions in the target countries are laudable, [t]he RPPs concept raises concerns, that the EU will use the existence of such programs as a pretext to declare the target countries 'safe third countries.' The EU could then return asylum seekers and migrants who transited through these countries even though effective protection could not be guaranteed*"[204]

In the following years, various efforts were made in order to establish practices of offshoring or outsourcing migration handling in neighboring countries. The refugee crisis and the dramatic increase of the number of refugees arriving at European soil made this perspective appear as the only viable solution to the overcrowded detention centers and long-lasting procedures of refugee status determination within European States.

An example of such a practice could be considered to be the notorious EU – Turkey Statement of March 2016[205], according to which EU and Turkey undertook to co-operate in order to reduce migration flows in the Aegean and through Turkey into Europe. The Statement contemplated

[202] United Kingdom Home Office. 2003. New Vision for Refugees. London: United Kingdom Home Office. 7 March 2003, p. 11-13f.
[203] European Commission. 2005. "Communication from the Commission to the Council and the European Parliament on Regional Protection Programmes." Brussels: European Commission.
[204] Human Rights Watch (HRC), 2006. *European Union: Managing Migration Means Potential EU Complicity in Neighboring States 'Abuse of Migrants and Refugees.* New York: HRW, available at: https://www.hrw.org/report/2006/10/17/managing-migration-means-potential-eucomplicity-neighboring-states-abuse-migrants.
[205] European Union: Council of the European Union, *EU-Turkey statement, 18 March 2016*, 18 March 2016

the EU-Turkey Joint Action Plan of November 2015[206] and specifically referred to the following points:

> *1)* ***All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey****. This will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement. It will be a temporary and extraordinary measure which is necessary to end the human suffering and restore public order. Migrants arriving in the Greek islands will be duly registered and any application for asylum will be processed individually by the Greek authorities in accordance with the Asylum Procedures Directive, in cooperation with UNHCR. Migrants not applying for asylum or whose application has been found unfounded or inadmissible in accordance with the said directive will be returned to Turkey. Turkey and Greece, assisted by EU institutions and agencies, will take the necessary steps and agree any necessary bilateral arrangements, including the presence of Turkish officials on Greek islands and Greek officials in Turkey as from 20 March 2016, to ensure liaison and thereby facilitate the smooth functioning of these arrangements. The costs of the return operations of irregular migrants will be covered by the EU.*
>
> *2) For every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria. A mechanism will be established, with the assistance of the Commission, EU agencies and other Member States, as well as the UNHCR, to ensure that this principle will be implemented as from the same day the returns start. Priority will be given to migrants who have not previously entered or tried to enter the EU irregularly. On the EU side, resettlement under this mechanism will take place, in the first instance, by honouring the commitments taken by Member States in the conclusions of Representatives of the Governments of Member States meeting within the Council on 20 July 2015, of which 18.000 places for resettlement remain. Any further need for resettlement will be carried out through a similar voluntary arrangement up to a limit of an additional 54.000 persons. The Members of the European Council welcome the Commission's intention to propose an amendment*

[206] EU- Turkey Joint Action Plan, 15 November 2015, available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_5860

to the relocation decision of 22 September 2015 to allow for any resettlement commitment undertaken in the framework of this arrangement to be offset from non-allocated places under the decision. Should these arrangements not meet the objective of ending the irregular migration and the number of returns come close to the numbers provided for above, this mechanism will be reviewed. Should the number of returns exceed the numbers provided for above, this mechanism will be discontinued.

3) ***Turkey will take any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU, and will cooperate with neighbouring states as well as the EU to this effect****.*

Four years after the EU – Turkey Statement, it seems as if its effects are visible and its adoption could be described almost as a success story for the decrease of the number of refugees arriving at European borders. This "success" has provided incentive for further adoption of offshoring practices and has reignited talks concerning the proposed model of European outsourcing of migration control[207].

4.2.: Proposed models of extraterritorial processing: distinct or joined handling by EU Member States?

Earlier attempts on establishing extraterritorial processing have failed, due to the elaborate construction that needs to be implemented in order to come up with a functional system that bears the consent of all 28 Member States of the EU and that shows respect to the standard of human rights protection established within the Union[208]. However, over the course of years and the failure of the Dublin System to regulate migration and refugees within European states, another idea is gaining more and more ground. Since containment and control failed within EU borders, why not move such procedures abroad, in order to alleviate the countries bearing the burden of having to care for thousands of refugees, simply because they were the first point of entrance to the Union? If migration flows are controlled effectively, then there would be less pressure for burden sharing among EU Member States**.** The main idea is to create asylum

[207] Collett, Elizabeth, "New EU Partnerships in North Africa: Potential to Backfire?", Migration Policy Institute, February 2017, available at: https://www.migrationpolicy.org/news/new-eu-partnerships-north-africa-potential-backfire

[208] Garlick, Madeline, "The Potential and Pitfalls of Extraterritorial Processing of Asylum Claims", Migration Policy Institute, March 2015, available at: https://www.migrationpolicy.org/news/potential-and-pitfalls-extraterritorial-processing-asylum-claims

processing centers beyond the borders of the European Union, which (borders) would be much more strengthened[209].

External processing can refer to a wide variety of practices whereby an asylum claim is examined before arrival at the destination country. To this end is the creation of processing centres in third countries. Benefits of such practices could be a lower cost of such procedure, when conducted within non-EU countries and also, having to deal with fewer challenges regarding removal of those rejected. But this could entail a pitfall: scrutiny is demanded in order to ensure that practices of removal will be conducted according to international law and not lead to a violation of the prohibition on refoulement, through the collective expulsion of asylum-seekers already within EU[210]. Due to this wide variety different EU Member States have submitted different proposals, e.g.: Austria: Future European Protection System, Italy: "centers of international protection in transit countries", Denmark: centers to host failed asylum seekers in "undesirable" parts of Europe[211]. This raises the question: which form should extraterritorial processing take?

In order to answer the question above, a number of issues needs to be addressed first. By conducting a detailed analysis on the issue, one can find three (3) basic questions that need to be answered before concluding to a proposed model[212]. These are: Where?, Who? And What?. More specifically, the questions to be answered are:

1) Where would (or could) the extraterritorial processing take place?
2) Who will conduct it?
3) What follows the extraterritorial processing?

Regarding the first question, many proposals have been offered. For example, France has suggested that it should take place in transit countries, like Niger, Libya, Chad or regions in the vicinity of countries of origin, with an aim at keeping migration control as close to the origin of the flow as possible. Others have suggested the North African coast, which is closer to EU, so assistance and control could be carried through more easily, and where attempts of cooperation with the states of the area are already underway. The creation of centers off EU within the areas mentioned above would offer the possibility to stop individuals during their flight, i.e. en route or even, prior to their journey. But they would not be immediately returned

[209] Ibid.
[210] Garlick, Madeline, op.cit.
[211] Collett, Elizabeth and Fratzke, Susan, "Europe Pushes to Outsource Asylum, Again", Migration Policy Institute, June 2018, available at: https://www.migrationpolicy.org/news/europe-pushes-outsource-asylum-again
[212] Collett, Elizabeth and Fratzke, Susan, op. cit.

to their home country. On the contrary, they would be offered a form of resettlement: the ones selected, i.e. the ones recognized as refugees or in need of international protection would be offered ways of entry into EU, thus combatting practices of migrant smuggling. This approach seems more in conformity with the provisions of international refugee law and human rights protection, rather than others, e.g. the proposition to create "safe zones" in Africa, where migrants would stay or be returned, even if having achieved to arrive at the external EU border, obscuring them from the possibility to ever file an asylum claim and be granted refugee protection[213].

Starting on the presumption that the first question has been answered, we move onwards to the next basic issue to be resolved: who will be conducting the screening of migrants? There are three possible answers to this question as well[214]:

- First of all, screening could be conducting by asylum agencies of individual Member Stares, already doing so within their countries. However, this is not an answer without any problems. If all Member States conduct extraterritorial asylum processing, then which state will examine which claim? This cannot be answered according the claimant's preference, but should be resolved, by taking into consideration the capability of each Member State and the notion of "burden sharing". Furthermore, asylum systems among EU states do not present uniformity[215]. On the contrary, some of them present differences that could even lead to different outcomes for asylum – seekers, depending the State that would assume responsibility to carry through the examination of individual claims[216]. However, it is to the author's opinion that the luck of people cannot be determined with the toss of a coin, therefore there should be extensive central coordination, by the European Union, both on a logistical level, as to the distribution of asylum claims to be examined among Member States, and on the level of essence, as regards to the harmonization of procedural criteria to be followed.
- A more long-term solution could be to create an EU asylum agency with the competence to conduct assessments of asylum claims on behalf of Member States. As mentioned above, EU lacks uniformity regarding handling of asylum claims, both on a substantial and procedural level. This constitutes a problem regarding the creation of such an agency: states would have to come to an agreement regarding joint procedures and standards for asylum claims to be processed. Consensus on this might have to be the

[213] Collett, Elizabeth and Fratzke, Susan, op. cit.
[214] Collett, Elizabeth and Fratzke, Susan, op. cit.
[215] Collett, Elizabeth, op.cit.
[216] Collett, Elizabeth and Fratzke, Susan, op. cit.

result of long-lasting negotiations. In order for this attempt to be successful, confidence in the decision- making process by Member states is a *condition sine qua non*, especially in order to circumvent issues of public distrust[217].

- Last but not least, there is also a more conciliatory approach. Borrowing the idea from UK's "New Vision on Refugees"[218], one could argue that a suitable choice for the management and oversight of extraterritorial processing of asylum claims could be the United Nations High Commissioner on Refugees (UNCHR), in order to ensure the impartial management of the undertaking and adherence to the standards of international refugee law. However, this proposal comes with certain limitations. It is doubtable whether the already understaffed UNHCR could undertake such a grandiose attempt and whether it actually should. Granting asylum could be considered to fall within the ambit of a State's rights and discretionary power, thus, many States could prove to be reluctant to transfer the decision-making capability to UNHCR[219].

Finally, we arrive to the last and probably the most important issue to be answered: What? What happens after having examined the asylum claim? Certain hints of what could follow have already been given in the analysis above. Certain have made proposals following the Australian example and practice[220], something that mean to not permit entry to anyone who had attempted to cross the Mediterranean in order to reach Europe. However, this is highly problematic, as to those found to be in need of protection. As proved in the previous Chapter, states in the context of the principle of non-refoulement are under the positive obligation to provide means of protection to refugees, parallel to their obligation not to return them to territories, where their lives or freedom might be endangered. That leads to the conclusion that states ought to either allow entrance and provide refuge or to transfer refugees to a "safe third-country", where they could enjoy international protection and their freedom and life would be out of risk. However, the level of protection offered within EU is relatively higher than that offered by third-countries, thus making the finding of such a "safe third-country", which will actually be able to accommodate an almost unlimited number of refugees and at the same time, provide an equivalent level of protection as within the EU[221], an almost unachievable feat[222].

[217] Collett, Elizabeth and Fratzke, Susan, op. cit.
[218] United Kingdom Home Office. 2003. New Vision for Refugees. London: United Kingdom Home Office. 7 March 2003, p. 13f.
[219] Collett, Elizabeth and Fratzke, Susan, op. cit.
[220] See Chapter 2 above.
[221] See the following subchapter for the obligation of EU States regarding "safe third-countries"
[222] Collett, Elizabeth and Fratzke, Susan, op. cit.

During the screening process of the migration flow, certain individuals will be recognized to possess the refugee status and thus, to be entitled to international protection. It is those belonging to this category that are to be allowed entrance into the European Union, in order to receive refugee protection and enjoy the rights of refugees, to which they bear an entitlement. Here lies the challenge of the structure: EU States ought to find a modus vivendi among them and share the burden of the ones entitled to protection. Given the experience of the Dublin system and their failure of "burden sharing", this has proven to be an issue not easy to be solved within EU. This could also work as an assurance for countries that host these extraterritorial activities of the EU, that they will not have to bear an unbearable load and provide protection to all refugees arriving at screening spots within their territory[223].

Special regard should be provided to the ones denied refugee status and therefore, not allowed entry and resettlement in the European Union. States ought to facilitate voluntary return, a process which could be further facilitated by a collaboration with IOM. However, there might be cases, where individuals are not able to return home, but are also not provided with the option of resettlement. Special provisions should cover their cases, e.g. with the possibility of relocation within the host country or another third-country, in order to prevent a phenomenon of a "population in limbo", in the case of prolonged detention without the option to either return or relocate.[224]

4.3.: Constraints on extraterritorial migration handling: EU law & ECtHR jurisprudence

As one can deduct from the previous section, extraterritorial processing comes hand in hand with multilevel implications. Especially in the context of the European Union, where a highly advanced system of human rights protection has been established through EU law and the European Convention on Human Rights. Such protection has been further enhanced through the dialogue between the Court of Justice of the European Union on the one hand and the European Court of Human Rights on the other.

When it comes to European law, Member States have developed a Common European Asylum System (CEAS), according to Article 78 (1) of the TFEU which reads as follows:

> "*The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the*

[223] Collett, Elizabeth and Fratzke, Susan, op. cit.
[224] Collett, Elizabeth and Fratzke, Susan, op. cit.

principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.[225]"

In the context of this CEAS, some of the most important legal documents, which build a complex system of procedures and practices to be followed by EU Member States

(a) "Temporary Protection Directive[226]"

(b) "Reception Directive[227]"

(c) "Dublin Regulation III[228]"

(d) "Qualification Directive[229]"

(e) "Asylum Procedures Directive[230]"

Regarding possible offshoring practices of the EU, as described in the previous subchapter, special mention should be made to the Asylum Procedures Directive, which establishes the notion of "safe third-country", a notion to be widely utilized, regarding the fate of asylum-seekers, if the Union commences to engage itself with extraterritorial asylum processing. More specifically, the Directive indicates that:

"*A key consideration for the well-foundedness of an application for international protection is the safety of the applicant in his or her country of origin. Where a third country can be regarded as a safe country of origin, Member States should be*

[225] European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, Article 78

[226] European Union: Council of the European Union, *Council Directive 20 01/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof*, 7 August 2001, OJ L.212/12-212/23; 7.8.2001, 2001/55/EC

[227] European Union: Council of the European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, OJ L. 180/96 -105/32; 29.6.2013, 2013/33/EU

[228] European Union: Council of the European Union, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, 29 June 2013, OJ L. 180/31-180/59; 29.6.2013

[229] European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU

[230] European Union: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU

able to designate it as safe and presume its safety for a particular applicant, unless he or she presents counter-indications.[231]"

Furthermore, the Directive continues to define the term "safe third-country":

"*Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the following principles in the third country concerned: (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; (b) there is no risk of serious harm as defined in Directive 2011/95/EU; (c) the principle of non-refoulement in accordance with the Geneva Convention is respected; (d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and (e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.*[232]"

And "European safe-third country", as follows:

"*A third country can only be considered as a safe third country for the purposes of paragraph 1 where: (a) it has ratified and observes the provisions of the Geneva Convention without any geographical limitations; (b) it has in place an asylum procedure prescribed by law; and (c) it has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and observes its provisions, including the standards relating to effective remedies.*[233]"

It is evident that scrutiny is demanded, when deeming a state, as a "safe third-country". If this alleged "safe third-country" proves to not be truly safe for the individual concerned, then the sending state is considered to have violated its obligations under international refugee law, human rights law and European law.

Furthermore, even the concept of the "European safe third-country" is not uncontested. In the famous *M.S.S. v. Belgium and Greece Case*[234], a case concerning asylum and return to a "European safe third-country", the European Court of Human Rights found that Belgium was in violation of article 3 of the ECHR in the implementation of the provisions of EU law.

[231] Ibid., para.40
[232] Ibid, Article 38
[233] Ibid, Article 39
[234] ECtHR, *M.S.S. v. Belgium and Greece*, 21 January 2011, Appl. no. 30696/09

Belgium argued that under the Dublin II Regulation it returned the applicant to Greece, which was the state of first entry for the specific individual, therefore it was Greece's responsibility to examine the applicant's asylum claim. However, the ECtHR though found that Belgium had breached article 3 of the Convention because of this "Dublin transfer" of the applicant to Greece. The Court further clarified that Belgium "knew or ought or to have known" that by implementing the Regulation and transferring the applicant to Greece, it exposed him to treatment contrary to Article 3 ECtHR, given the situation faced by asylum claimants in Greece. With the present decision of the ECtHR, the presumption that every EU Member-State is to be considered automatically a "safe third-country" collapsed and State obligation to perform a case by case examination was reaffirmed.

Apart from the aforementioned case, ECtHR has issued a series of Judgments that could be applicable to practices of extraterritorial processing. Probably, the most important of them, is the much- discussed Hirsi Jamaa and others v. Italy Case[235]. The Court's ruling in the present case offers the link between the concept of jurisdiction in the ECHR and the extraterritorial reach of the principle *of non-refoulement.* Particularly, the Court found that Italy had violated Article 3 of the Convention, by pushing back a refugee boat from the high seas to Libya, since "the applicants were under the continuous and exclusive *de jure and de facto* control of the Italian authorities", given the fact that they were under the exclusive control of Italian military personnel (de facto) and they were transferred to ships flying the Italian flag(de jure)[236]. Here the Court comes to regulate cases of interdiction on the high seas, reaffirming the extraterritorial applicability of non-refoulement in the sense of Article 3 ECHR, thus giving a solution to the issue of the "shifting border". In short, whenever and wherever (including international waters, border zones, or a third-state's territory) a country exercises control or jurisdiction over a person that could be in need of protection, then those people cannot be returned to territories, where they will be persecuted or subjected to torture, inhuman or degrading treatment, nor can they be expelled to countries from where they could be returned and exposed to such risks[237].

4.4.: New Pact on Migration and Asylum

The European system regarding migration is currently under construction once more. The refugee crisis of 2015 and the continuing flow of migrants has shown the weaknesses of the

[235] *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012
[236] Seunghwan Kim, 'Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context' (2017) 30 LJIL 49, p. 58
[237] Garlick, Madeline, "The Potential and Pitfalls of Extraterritorial Processing of Asylum Claims", Migration Policy Institute, March 2015, available at: https://www.migrationpolicy.org/news/potential-and-pitfalls-extraterritorial-processing-asylum-claims

current system governing migration in the European Union and the need for it be reformed. On 23rd September 2020, the European Commission announced the adoption of a "New Pact on Migration and Asylum"[238].

The New Pact announced will be based on the following pillars[239]:

(a) More efficient and faster procedures (Integrated border procedure & Pre – entry screening)
(b) Fair sharing of responsibility and solidarity
(c) Tailor-made and mutually beneficial partnerships with third countries.
(d) A comprehensive approach: Common EU System for Returns, Uniform legal framework, Improved management of external borders

These aforementioned pillars are to be achieved through the adoption of 9 proposed legal documents, which are the following[240]:

- A new Screening Regulation
- An amended proposal revising the Asylum Procedures Regulation
- An amended proposal revising the Eurodac Regulation
- A new Asylum and Migration Management Regulation
- A new Crisis and Force Majeure Regulation
- A new Migration Preparedness and Crisis Blueprint
- A new Recommendation on Resettlement and complementary pathways
- A new Recommendation on Search and Rescue operations by private vessels
- New Guidance on the Facilitators Directive

It is to the author's opinion that at first sight, this New Pact on Asylum and Migration presents two (2) significant elements, that should be highlighted. First, it abolishes the Dublin Regulation, which has been proven to be highly problematic in practice and has hindered the perspective of burden-sharing among EU-member States and which has therefore been criticized. The other important element is its "extraterritorial tendency". The reforms proposed could lead to the adoption of offshoring practices of migration control, as described under the present chapter. With the abolishment of the Dublin

[238] European Commission, "A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity", 23 September 2020, EC Press Release, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706
[239] Ibid.
[240] European Commission, "Roadmap to implement the New Pact on Migration and Asylum", 23 September 2020, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601287338054&uri=COM%3A2020%3A609%3AFIN#document2

Regulation, which some states used to contain refugee flows within states of first entrance of migrants, the burden is now shifting outwards. At establishing partnerships with third-states and at strengthening the Union's borders, one can detect a tendency to contain refugees beyond EU borders, but without excluding them from seeking protection, something that could be achieved through the establishment of pre-entry screening.

Concluding Remarks

Having concluded an examination of contemporary practices of outsourcing and offshoring of migration control, while scrutinizing various aspects of relevant schemes under the lens of international refugee law and international human rights law, one can draw certain conclusions regarding future developments of this "phenomenon"

First and foremost, practices of externalization used as a scheme in order to escape responsibility and shift away the burden, towards third-states will become practically void. International law is undergoing a continuing process of evolution, in order to adapt and moderate aspects of modern issues arising within the international society. Reluctance of States to enter into legally binding agreements on the topic of refugee protection, as a means of escaping the assumption of responsibility, has spiralled the growth of an ever-growing jurisprudence from Human Rights adjudicative bodies, in order to cover the gap. International refugee law and human rights law have entered an interplay, which leads to the dynamic evolution of notions covering refugee protection.

As international jurisprudence grows, accordingly support to the extraterritorial applicability of provisions regarding human rights and refugee protection is gaining more and more ground. Human Rights Courts and Treaty Bodies have gradually laid down the grounds for the extraterritorial application of the principle of non- refoulement, which is the cornerstone of refugee protection, due to the absence of an explicit right to asylum.

Furthermore, state activities reaching beyond a state's borders are not without reverberations. As states extend the limits of state activity – referring to geographical limits, they also extend the limits of jurisdiction. The latter has long ago abandoned its territorial limitations, as long as human rights protection is concerned. The notion of jurisdiction has been transformed in order to cover activities under the effective control of a state or activities carried out by organs of a state, but it is still undergoing transformation. The newly- introduced idea of jurisdiction based on the impact of effect on human rights – if accepted and established – will transform the extraterritorial activity of states, especially in terms of migration control.

However, the lack of a universal legally binding text could lead to the creation of a patchwork of obligations and rights protected, which transform and acquire a different meaning depending on the State at hand in each case.

The aforementioned is rather evident, when examining the practice of the United States and Australia. Both States present a reluctance to assume obligations vis-à-vis refugees and prefer to spent billions of dollars yearly on practices of border externalization and shifting of responsibility towards third-states. Neither seems willing to abolish such practices, given that both States have worked over a long period of time, in order to construct the migration control "system" that they are enforcing. On the one hand, the US has paid more attention into collaborating with third-states and providing assistance to them, so that the latter can acquire the capacity to handle migration flows stemming from Latin America. On the other hand, Australia has built a tale around migration control through a legal reform that has been undergoing for nearly two decades now and which has required the crafting of a different and unique approach to obligations arising from international law. When Australia lost its original counterparts – Nauru and Papua New Guinea, after their decision to abandon the Resettlement Agreements, it did not give up on the scheme and its idea of extraterritorial screening of migration flows. On the contrary, Australian authorities were eager to find either new partners or new incentives for old partners, in order to upkeep its practice.

The situation is slightly different, when it comes to Europe. And this is due the fact that the European human rights protection system is one of the most evolved, advanced and at the same time, strict systems of human rights protection. The jurisprudence of the European Court of Human Rights, along with the asylum acquis of the European Union pose significant obstacles to efforts of outsourcing migration handling. In this case, escaping responsibility and human rights protection might prove a rather stringent task. And this is why, despite long-lasting efforts to establish a system of offshore migration control, no effort has been proven fruitful.

The "New Pact on Asylum" might prove to be the nudge towards extraterritorial migration control. It is to the author's understanding that the main idea behind the Pact is to transfer the weight of migration screening at the borders or even beyond them, allowing European States to engage into outsourcing activities. However, such an undertaking is to be conducted with the outmost scrutiny and respect of human rights protection obligations – both negative and positive – in order for it to be successful.

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