

*Non-Refoulement* and Extraterritorial Immigration Control –  
The Case of Immigration Liaison Officers

Seminar in International Law:

EU – External and Internal Security

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Spring Term 2013

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Seminar Paper  
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## **Abbreviations**

ASR	Articles on State Responsibility
CAT	Convention against Torture
CESCR	Committee on Economic, Social and Cultural Rights
CFR	Charter of Fundamental Rights of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILO	Immigration Liaison Officer(s)
SIA	Schengen Implementation Agreement
UDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
VCT	Vienna Convention on the Law of Treaties

## I. Introduction

It has been said that one essential rule of international human rights law is the idea that state control entails state responsibility and that, more specifically, ‘state competences and individual rights are two sides of the same coin.’<sup>1</sup>

The topic of this paper, however, seems to challenge this essential paradigm. As immigration control is increasingly extraterritorialized, state responsibility and the ability of individuals to claim their rights under international law seem to fade. Moreover, control operations are not only shifted to the territory of non-EU Member States but also to the hands of those who cannot, in law or in practice, be held accountable for their potentially wrongful conduct. Prominent examples of this ‘offshoring and outsourcing’<sup>2</sup> of immigration control include the interception of migrant vessels in the high seas, the funding of migrant detention facilities on the territory of third states and the provision of surveillance equipment to non-EU Member States. There are, however, also more implicit forms of extraterritorial immigration control such as the posting of immigration liaison officers (ILO) and the imposition of sanctions on private carriers that transport persons without adequate documentation. It is this latter category of control that forms the content of this paper.

The issue of extraterritorial immigration control has attracted a great deal of criticism from various human rights actors and provoked a lively scholarly debate.<sup>3</sup> In particular, it has been

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<sup>1</sup> Maarten den Heijer, *Europe and extraterritorial asylum* (Hart 2012) 298.

<sup>2</sup> See Thomas Gammeltoft-Hansen, *Access to asylum: International refugee law and the globalisation of migration control* (Cambridge University Press 2011)

<sup>3</sup> See, among many others, HRC, *Report of the Special Rapporteur on the human rights of migrants, François Crépeau. Regional study: management of the external borders of the European Union and its impact on the human rights of migrants*. A/HRC/23/46, of 24 April 2003; the two recent reports by the EU’s Fundamental Rights Agency, FRA, *Handbook on European law relating to asylum, borders and immigration* (EDC collection, Publications Office of the European Union 2013) and FRA, *Fundamental rights at Europe’s southern sea borders* (EDC collection, Publications Office of the European Union 2013). For NGO reports see, in particular, ECRE, ‘Defending Refugees’ Access to Protection in Europe’ (2007); Refugee Council, ‘Remote Controls: how UK border controls are endangering the lives of refugees’ (2008) [http://www.refugeecouncil.org.uk/assets/0001/7043/Remote\\_Controls.pdf](http://www.refugeecouncil.org.uk/assets/0001/7043/Remote_Controls.pdf). For recent scholarly discussion see the collection of contributions in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial immigration control: Legal challenges* (Martinus Nijhoff Publishers 2010); Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd Oxford University Press, Oxford and New York 2007); Mariagiulia Giuffrè, ‘State Responsibility Beyond Borders: What Legal Basis for Italy’s Push-backs to Libya?’ (2013) 24 *International Journal of Refugee Law*; Violeta Moreno-Lax, ‘Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea’ (2011) 23 *International Journal of Refugee Law*; Jorrit J Rijpma and Marise Cremona, ‘The Extra-Territorialisation of EU Migration Policies and the Rule of Law’ (2007); Eleanor Taylor-Nicholson, ‘Cutting off the Flow: Extraterritorial Controls to Prevent Migration’ Berkely Law School Issue Brief (2011) [http://eucenter.berkeley.edu/files/Issue\\_Brief\\_2011\\_Final.pdf](http://eucenter.berkeley.edu/files/Issue_Brief_2011_Final.pdf) accessed 30 June 2013; Gammeltoft-Hansen (n 2); Den Heijer (n 1).

Moreover, the issue of extraterritorial control has been examined in several cases before international and national courts, most prominently by the ECtHR, see *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012), the US Supreme Court in *Sale v Haitian Centers Council* 509 U.S. 155 (US Supreme Court, 21 June 1993) and the UK House of Lords in *Regina v Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others* 55 (UK House of Lords, 9 December 2004) (henceforth *Roma Rights*). Recent media reports indicate that several complaints have been filed with various European courts concerning an incident where NATO naval vessels seem to have failed to rescue a migrant boat in the Mediterranean despite numerous distress calls, see <http://www.guardian.co.uk/world/2013/jun/18/boat-tragedy-migrants-sue-france-spain> accessed 30 June 2013.

questioned whether extraterritorial immigration control practices are compatible with the principle of *non-refoulement* under international refugee and human rights law. To date, there is no sufficient answer to this question, in particular as regards the activities of immigration liaison officers and private carriers that act upon their advice.

The present paper therefore asks whether the principle of *non-refoulement* applies in these specific, more indirect situations of immigration control and, if yes, how states could be held accountable for effectively guaranteeing the obligations flowing from it. It does so by, first, embarking on a legal analysis of the principle of *non-refoulement* under international refugee and human rights law. Section II identifies the legal sources of *non-refoulement*, its scope and content and concludes by making some general remarks on a state's responsibility to guarantee its effective implementation. Section III seeks to apply these theoretical considerations to the practical context of extraterritorial immigration control performed by ILO and their private and third states' counterparts. It briefly reviews state practice and the EU's legislation in the field and then turns to the human rights challenges posed by such an increasing privatization of immigration control. It observes trends that may risk effectively deconstructing refugee protection in certain extraterritorial situations and finishes by proposing three legal avenues that could contribute to their prevention. In doing so, the present paper challenges the idea that '[b]y shifting control to the territory or authorities of third states a space is [...] carved out where the sovereign prerogative to control entry into its territory may be asserted without the constraints ordinarily posed by refugee and human rights law.'<sup>4</sup>

## **II. Theoretical Part – The Principle of *Non-refoulement***

### **1. Legal Sources of *Non-refoulement***

The principle of *non-refoulement* is confirmed by a number of legal provisions among which Article 33(1) of the Refugee Convention is perhaps the most prominent. It states that

'[n]o 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.'

Moreover, all regional and international human rights treaties<sup>5</sup> as well as a number of other international instruments<sup>6</sup> contain prohibitions of *refoulement*. Consequently, an

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<sup>4</sup> Thomas Gammeltoft-Hansen, 'The Externalisation of European Migration Control and the Reach of International Refugee Law' (2010) 22.

<http://www.diis.dk/graphics/Events/2011/Thomas%20Gammeltoft%20Paper%20asylseminar.pdf> accessed 30 June 2013.

<sup>5</sup> As part of the prohibition of torture: cf. Article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 7 of the 1966 International Covenant on Civil and Political Rights and its interpretation by the UN Human Rights Committee in its General Comment No. 20 (1992), Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 22(8) of the 1969 American Convention on Human Rights; or explicitly as in Article 19(2) of the 2000 Charter of Fundamental Rights of the European Union.

overwhelming majority of States<sup>7</sup> is party to at least one treaty binding it to the principle of *non-refoulement*.

This, together with the fact that the State parties to the CRSR formally acknowledged *non-refoulement* as a principle ‘whose applicability is embedded in customary international law’<sup>8</sup> and its wide acceptance as a norm of fundamentally norm-creating character<sup>9</sup>, has led many scholars and UNHCR to conclude that it forms part of customary international law today.<sup>10</sup> However, this view has not been universally accepted. *Hathaway*, for instance, remains very skeptical about the customary law status of *non-refoulement* and notes that customary international law does not come into force by simple declaration but needs to be supported by widespread and consistent state practice. He goes on stating that in the case of *non-refoulement* it is ‘absolutely untenable to suggest that there is anything approaching near-universal respect among states’.<sup>11</sup>

While it is certainly true that there is no shortage of examples in which the respect for *non-refoulement* has been or still is at least highly questionable<sup>12</sup> – and it is indeed the object of this paper to explore one of them – this does not automatically exclude its customary law status. Even when engaging in legally dubious ways of extraterritorial immigration control, most States do not simply disregard the principle of *non-refoulement*. Quite to the contrary, they are commonly very eager to stress that their practices are in full conformity with their obligations under international law – a fact that may serve as proof that *non-refoulement* as a universally binding norm is practically unchallenged today.

Returning to the safer realms of positive law, the most important provisions stipulating the prohibition of *refoulement* are Articles 3 ECHR, Article 7 ICCPR, Article 3 CAT and Article

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<sup>6</sup> Cf. Article 3(1) of the 1967 Declaration on Territorial Asylum, adopted unanimously by the UNGA Resolution 2132 (XXII), Article II(3) of the 1969 Organization of Africa Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, Section III(5) of the 1984 Cartagena Declaration and Article 3(2) of the 1957 European Convention on Extradition, Article 4(5) of the 1981 Inter-American Convention on Extradition.

<sup>7</sup> *Lauterpacht and Bethlehem* speak of around 90 %, see Elihu Lauterpacht and Daniel Bethlehem, ‘The scope and content of the principle of non-refoulement: Opinion’ in Erika Feller (ed), *Refugee protection in international law: UNHCR's global consultations on international protection* (Cambridge University Press 2003) 147.

<sup>8</sup> Declaration of State Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, Ministerial Meeting of states Parties, Geneva, 12-13 December 2001, UN doc. HCR/MMSP/2001/09, 16 Jan. 2002. The Declaration was welcomed by the UN General Assembly in resolution A/RES/57/187, para 4, adopted on 18 Dec. 2001, see also James Hathaway, *The rights of refugees under international law* (Cambridge University Press 2005) 364.

<sup>9</sup> Lauterpacht and Bethlehem (n 7) 143.

<sup>10</sup> Goodwin-Gill and McAdam (n 3) 248, UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (2007) para 15 <http://www.refworld.org/docid/45f17a1a4.html> accessed 30 June 2013, Andrew Brouwer and Judith Kumin, ‘Interception and Asylum: When Migration Control and Human Rights Collide’ (2003) 21 *Refuge* 9.

<sup>11</sup> Hathaway (n 8) 363-64.

<sup>12</sup> Examples range from the US Haitian interdiction case and Australia’s ‘Pacific Solution’ to the EU Member States’ practices of interception in the high seas. For details see Guy Goodwin-Gill, ‘The Haitian *Refoulement* Case: A Comment’ (1994) 6 *International Journal of Refugee Law*, Taylor-Nicholson (n 3), Sandra Lavenex, ‘Shifting Up and Out: The Foreign Policy of European Immigration Control’ (2006) 29 *West European Politics* 343.

33(1) of the Refugee Convention.<sup>13</sup> Their development is, of course, closely interlinked. For instance, the definition of torture in the CAT was inspired by the ECtHR's case law on Article 3 ECHR and, *vice versa*, the ECtHR has made explicit reference to the CAT in several cases.<sup>14</sup> As a general rule, human rights treaties and the Refugee Convention should be seen as mutually reinforcing, something that has been regularly stressed by the UNHCR's Executive Committee and expressly acknowledged by the State parties to the Refugee Convention in a Declaration adopted in 2001.<sup>15</sup> This position seems also warranted in the light of Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties which requires the interpreter to take into account other treaty-based rules of international law in an effort to arrive at a consistent meaning.<sup>16</sup>

However, despite clear similarities and overlaps, there are also important differences between these provisions. A first major issue of differentiation concerns the existence or non-existence of a supervisory mechanism. In this regard, the ECHR is clearly the strongest instrument, as it provides for a judicial body competent to adjudicate individual cases which has resulted in a well-developed and legally binding body of case law.<sup>17</sup> The Refugee Convention, on the other hand, is the weakest treaty in this regard, as it provides for no supervisory body at all. While the conclusions issued by UNHCR's Executive Committee do play a significant role, they are non-legally binding and, as such, may not conceal the fact that defining *non-refoulement* under the Refugee Convention is a cumbersome task. As for the CAT and the ICCPR, their monitoring bodies' views are equally non-binding. However, their mere existence together with the State reporting systems in place, arguably positions them somewhere in the middle of the protection spectrum provided by international refugee and human rights law.<sup>18</sup>

Apart from these institutional factors, the second issue of differentiation concerns the scope and content of *non-refoulement* under the Refugee Convention on the one hand and the ECHR, ICCPR and CAT on the other. Before turning to these issues in greater detail in sections 2. and 3. below, three more general observations seem to be in order at this point as they directly relate to the nature of the treaties as being part of general international law on the one hand and human rights law on the other.

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<sup>13</sup> The present paper is not concerned with Article 14 UDHR or Article 18 CFR as the first is non-legally binding and the second, while being legally binding since the Treaty of Lisbon, contains no added value over the meaning of *non-refoulement* under the Refugee Convention to which it refers. See Gregor Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?' (2005) 17 International Journal of Refugee Law 547-48.

<sup>14</sup> *Soering v UK* App no 14038/88 (ECtHR, 7 July 1989), see also Kees Wouters, *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* (Intersentia 2009) 526.

<sup>15</sup> See UNHCR (n 10) para 34 and fn 70 for further references. See also Wouters (n 14) 526.

<sup>16</sup> UNHCR (n 10) at fn 83, referring to UN General Assembly, Report of the International Law Commission. Fifty-eighth session (1 May-9 June and 3 July- 11 August 2006) Supplement No. 10 A/61/10.

<sup>17</sup> Wouters (n 14) 528.

<sup>18</sup> Wouters (n 14) 529. Wouters also notes that it is unfortunate that no case has hitherto been brought before the ICJ, which, according to 38 CRSR and 30(1) CAT would have the authority to bindingly interpret the respective Convention.

Most importantly for the purposes of this paper, the protection obligation under the Refugee Convention only applies in situations where the individual is *outside* his or her country of origin.<sup>19</sup> This is an important restriction of the Convention and reflects its essentially territorial nature as a treaty rooted in general international law. Indeed, refugees that have not crossed a border<sup>20</sup> are not deemed less worthy of protection; however, stretching protection obligations to them has been perceived to be at odds with two of the arguably most central notions of international law: the principle of sovereignty and the rule of non-intervention. Second, *refoulement* under Article 33(1) of the Refugee Convention is only prohibited if a person's life or freedom would be threatened for specific reasons.<sup>21</sup> Persecution must therefore be discriminatory in nature. Third, protection under the Refugee Convention is not absolute; its Article 33(2) provides for exceptions in cases where a refugee is found to pose a threat to the country in which he or she claims protection.

In contrast, the prohibitions of *refoulement* under the ECHR, ICCPR and CAT do not explicitly provide for such limitations. These general human rights treaties appear to apply to everyone, irrespective of whether they are inside or outside their country of origin, irrespective of the reason for their risk of being persecuted and irrespective of any security concerns of the host state.<sup>22</sup> In this understanding, they provide a considerably broader scope of protection and thereby reflect the universal claim generally characterizing human rights treaties.

## 2. The Scope of *Non-refoulement*

### 2.1. The Personal Scope of *Non-refoulement*

The principle of *non-refoulement* clearly applies to all refugees within the meaning of Article 1 of the Refugee Convention (individuals who have a well-founded fear of persecution) and to those persons who are at a substantial risk of being subjected to torture, inhuman or degrading treatment or punishment upon return to a particular country. It is important to note that this also includes asylum seekers, i.e. persons whose claim to refugee status has not yet been formally determined. This is a necessary implication of the principle of *non-refoulement* for otherwise there would be not effective protection.<sup>23</sup> Moreover, it is also a consequence of the fact that refugee status determination is only declaratory.<sup>24</sup>

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<sup>19</sup> This conclusion is reached by reading Article 33(1) of the Refugee Convention in conjunction with its Article 1 that contains the definition of a refugee under the Convention.

<sup>20</sup> Now commonly referred to as Internally Displaced Persons (IDP).

<sup>21</sup> '[...] on account of his race, religion, nationality, membership of a particular social group or political opinion', see Article 33 of the Refugee Convention.

<sup>22</sup> Wouters (n 14) 531.

<sup>23</sup> Goodwin-Gill and McAdam (n 3) 232. This has been repeatedly emphasized by UNHCR's Executive Committee, see, *inter alia*, EXCOM Conclusions No. 79, 11 October 1996 para (j) and No. 82, 17 October 1997 para (iii) and affirmed by the UN General Assembly, see A/RES/52/103, 9 February 1998 para 5.

<sup>24</sup> In this sense, international protection does not hinge on a person's official status. An individual that fulfills the criteria set out in Article 1 of the Refugee Convention is a refugee irrespective of a state formally declaring him or her to be one. In the words of Judge Albuquerque who delivered a concurring opinion in the *Hirsi* case: 'A

In practice, of course, it is downright impossible to distinguish refugees and migrants without protection needs. This problem, mostly referred to as the challenge of ‘mixed migration flows’, is particularly acute in situations at the border where immigration officials are expected to prevent irregular entries but are, at the same time, bound by the prohibition of *refoulement* with regard to refugees. These two tasks seem difficult to reconcile given the fact that refugees use irregular means of travelling like all other migrants (and even increasingly so as legal means to seek protection are being restricted by national governments).<sup>25</sup>

## 2.2. The Territorial Scope of *Non-refoulement*

As can be inferred from section 1, acknowledging the customary law status of *non-refoulement* is the prevailing doctrine today. At first glance, this seems to render superfluous any further discussion of its territorial scope. If every state is bound by it, why bother with difficult demarcation exercises?

This first impression does, however, not withstand closer scrutiny. As *Gammeltoft-Hansen* has pointed out, accepting *non-refoulement* as part of customary international law does not automatically imply its unlimited application *ratione loci*. The question of whether States that are not party to any treaty containing the *non-refoulement* principle are nevertheless bound by it under customary international law is separate from the question of the territorial scope of this obligation for a particular state.<sup>26</sup> While *non-refoulement* can be seen as a norm binding on all States, it does not bind all States in *all* situations. There still needs to be a certain causal relationship between a State’s conduct and the individual’s ability to seek international protection. In other words, accepting the customary status of *non-refoulement* does not entail universal state responsibility beyond the specific rules on the territorial scope established by the respective treaty.<sup>27</sup> It is therefore still, and in the light of recent strategies of extraterritorialization even more so, necessary to define the territorial scope of the principle.

In doing so, Article 33(1) of the Refugee Convention may serve as a starting point. The debate of whether or not the principle of *non-refoulement* under the Refugee Convention has extraterritorial effect is an old one, dating back to its original drafting process in the 1950s.

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person does not become a refugee because of recognition, but is recognised because he or she is a refugee’, see *Hirsi* (n 3). See also UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Reedited version of January 1992 para 28.

<sup>25</sup> This is done, in particular, by the restricting visa requirements for so-called ‘refugee-producing countries’ which has therefore been described as ‘the most explicit blocking mechanism for asylum flows [that] denies most refugees the opportunity for legal migration’, see John Morrison and Beth Crosland, ‘The trafficking and smuggling of refugees: the end game in European asylum policy?’ (UNHCR Working Paper No. 39 2001) 28. In this regard, it is important to note that irregular entry is in no way impairing a person’s right to seek asylum; *how* a refugee came into the jurisdiction of a state is wholly immaterial for his or her protection under the principle of *non-refoulement*. Cf. Article 31 of the Refugee Convention, see also Goodwin-Gill and Jane McAdam (n 2) 233.

<sup>26</sup> See Gammeltoft-Hansen (n 2) 89.

<sup>27</sup> See Article 1 ECHR, Article 2(1) ICCPR and below 2.2. on the territorial scope of the *non-refoulement* principle.

Here is not the place to give a full account of this ‘half-century old debate’<sup>28</sup>. However, the main positions that have been taken since its adoption shall be briefly recapitulated.<sup>29</sup>

Traditionally, when interpreting an international treaty, the first reference is made to its drafting process as reflected by the *travaux préparatoires*. In the case of the Refugee Convention, however, this exercise may not yield any concrete results as the positions taken by the various actors in debating its potential extraterritorial effect were rather different. While the Swiss and the Dutch delegates explicitly held that *non-refoulement* under the Refugee Convention has no extraterritorial implications – a position that was also supported by the early commentaries of the Convention<sup>30</sup> – these ‘rather isolated comments of the two delegates’<sup>31</sup> are not reflected by other, perhaps more authoritative parts of the *travaux* that suggest that *non-refoulement* indeed covers situations at the border.<sup>32</sup>

The wording of Article 33(1) of the Refugee Convention is equally inconclusive at first sight. However, notwithstanding some contextual arguments to the contrary<sup>33</sup> it has been convincingly argued that the deliberate insertion of the word ‘*refouler*’ next to the word ‘return’ in the English text serves as a strong indicator to embrace the broader ambit of the French term that includes rejection at the border.<sup>34</sup> Moreover, the emphasis of Article 33(1) on the question *to* where rather than *from* where an individual is returned also warrants a more expansionist reading.<sup>35</sup>

The object and purpose of Article 33(1) further support this position. Paragraph 2 of the preamble of the Refugee Convention clarifies its object to ‘assure refugees the widest possible

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<sup>28</sup> Gammeltoft-Hansen (n 4) 8.

<sup>29</sup> For the following see Gammeltoft-Hansen (n 4) 8-12. For a comprehensive analysis see Gammeltoft-Hansen (n 2) Chapter 3. For a discussion of the arguments presented in the two most pertinent cases concerning the extraterritorial application of Article 33(1) of the Refugee Convention, *Sale* and *Roma Rights* (n 3), see Den Heijer (n 1) 125-32.

<sup>30</sup> Nehemiah Robinson, *Convention relating to the status of refugees; its history, contents and interpretation; a commentary* (Institute for Jewish Affairs 1953) and Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951 (Articles 2-11, 13-37)* (1963, republished by the UNHCR Department of International Protection in October 1997).

<sup>31</sup> Den Heijer (n 1) 129

<sup>32</sup> In particular, this position was taken by the Ad-Hoc-Commission that was tasked with drafting the Convention, for details see Den Heijer (n 1) 129-30.

<sup>33</sup> There are two arguments that seem to favor a more restrictive reading. First, the exception in Article 33(2) of the Refugee Convention, that applies only to persons *within* the territory of state, has been understood to confine the scope of Article 33(1) as well. As the US Supreme Court maintained in its *Sale* case, it would be unreasonable to interpret the Convention so as to grant ‘dangerous aliens on the high seas’ the benefits of the Refugee Convention while those already on the territory could be exempted from it. This reasoning has, however, been harshly criticized as being logically flawed and was not even unanimously shared by the Court itself. See *Sale* (n 3), in particular the dissenting opinion by Judge Blackmun. See also Den Heijer (n 1) 130 for further references and Gammeltoft-Hansen (n 4) 9.

The second argument that seems to warrant a restrictive reading concerns the interpretation of the word ‘return’ as it appears in Article 33(1). For some authors it seems logically impossible to return a person if there is no previous sovereign relationship between the state and the individual.

For details on both arguments see Noll (n 13) 554-557.

<sup>34</sup> UNHCR, cited in Gammeltoft-Hansen (n 4) 10, Den Heijer (n 1) 125-127. Interestingly, the House of Lords in *Roma Rights* interpreted the insertion of the French word as supporting their conclusion that the Refugee Convention was *not* applicable; in their view ‘*refouler*’, whatever wider meaning the term might have in French law, must be understood as having the same meaning as ‘return’, see *Roma Rights* (n 3) para 17.

<sup>35</sup> Gammeltoft-Hansen (n 4) 10, also Noll (n 13) 553.

exercise of these fundamental rights and freedoms’ and its essential purpose seems clear by the wording of Article 33(1) itself, namely to prohibit return ‘in any manner whatsoever’. The drafters were therefore clearly in favor to include the widest possible array of practices, including not only extradition, expulsion and deportation but also non-admission at the border.<sup>36</sup>

Lastly, a review of developments in related areas of law and of state practice further strengthens this conclusion. International institutions such as UNHCR and the parliamentary assembly of the Council of Europe as well as judicial bodies such as the HRC, the ICJ, the Committee against Torture, the ECtHR and the IACHR all expressly favor the extraterritorial application of *non-refoulement* or allow for an extraterritorial reading of *non-refoulement* under their various instruments.<sup>37</sup> As to state practice, it has already been mentioned that despite incidents that clearly run counter to the principle of *non-refoulement*, states still attempt to justify these actions under international refugee law. By doing so, they seem to implicitly acknowledge its paramount importance.

In sum, the extraterritorial application of the principle of *non-refoulement* stands largely undisputed today. However, the question remains what is won by that conclusion. If the territorial element is essentially discarded, how else does an individual come into the purview of the protection under the Refugee Convention?

This question has been the issue of considerable dispute. *Lauterpacht* and *Bethlehem*, together with the UNHCR’s Executive Committee maintain that the decisive criterion is whether a person comes within the *effective control and authority* of a state, thereby applying the concept of jurisdiction as developed by the ECtHR.<sup>38</sup> In contrast, *Noll* remarks that a swift transferal of this human rights delimitation tool to the interpretation of the Refugee Convention is inappropriate as it would violate the hierarchy of interpretation rules set out by Articles 31 and 32 of the Vienna Convention on the Law of Treaties. According to his view, reference must first be made to the wording, context and *telos* of the norm that is to be interpreted.<sup>39</sup> However, as seen above, doing exactly this seems to lead to the conclusion that Article 33(1) has essentially the same meaning as *non-refoulement* under general human rights law.<sup>40</sup>

While it is certainly true that there have been some considerable differences in the interpretation of *non-refoulement* under the Refugee Convention and, for instance, Article 3 CAT – which is remarkable given the similar wording of the two provisions<sup>41</sup> – the broader

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<sup>36</sup> In the light of this, *Lauterpacht* and *Bethlehem* conclude that the *non-refoulement* principle is applicable ‘to the conduct of State officials or those acting on behalf of the State *wherever this occurs*, whether beyond the national territory of the State in question, at border posts or other points of entry, in international zones, at transit points, etc.’ See *Lauterpacht* and *Bethlehem* (n 7) para 67 and para 77-86. See also UNHCR (n 10) 24, Goodwin-Gill and McAdam (n 2) 244, 248 and Hathaway (n 8) 315-317 and *Noll* (n 13) 549 with further references.

<sup>37</sup> For an account of the views taken by international courts and treaty bodies see UNHCR (n 10) para 36-41.

<sup>38</sup> UNHCR (n 10) 43.

<sup>39</sup> *Noll* (n 13) 552.

<sup>40</sup> *Gammeltoft-Hansen* (n 4) 8-12.

<sup>41</sup> For a particularly remarkable contrast, see the reasoning in *Sale and Roma Rights* (n 3) on the one hand and the Committee against Torture in *Marine I (J.H.A. v Spain)* CAT/C/41/D/323/2007, 21 November 2008) on the

jurisprudential developments in human rights law cannot remain without ramifications for the interpretation of the Refugee Convention. The ECtHR, the Committee Against Torture, the HRC and the ICJ today all agree on the fundamental premise that human rights treaties cannot be interpreted in a way as to permit a Contracting State to violate treaty obligations on the territory of another state, which it could not violate on its own territory.<sup>42</sup> Continuing to criticize the ‘teleological bias’<sup>43</sup> of human rights monitoring bodies or their interpretations as being *contra legem*<sup>44</sup> will therefore do little to stop courts from being more and more susceptible to the idea that *non-refoulement* applies to all persons under the jurisdiction of a State – whether it is exercised territorially or extraterritorially.

Moreover, the fact that the Refugee Convention does not explicitly use the term ‘jurisdiction’ does not in itself prevent it from being interpreted with reference to this element. The available case law suggests that treaties without a jurisdictional clause have been treated in a similar way as the ECHR and the ICCPR that do provide for such a clause.<sup>45</sup> It therefore seems that, even after having had recourse to the classic elements of treaty interpretation, we are back to the one question dominating contemporary discourse on human rights law accountability, namely how to properly establish the relationship between the state and the individual that presupposes any claim to protection. Two concepts seem particularly relevant in this regard: (a) the concept of jurisdiction and (b) the concept of positive obligations.

*(a) The concept of jurisdiction*

There has been a considerable controversy on what the concept of jurisdiction entails<sup>46</sup>, which is also reflected by a rather inconsistent case law on the issue. However, more recent judgments, in particular those by the ECtHR, seem to provide clearer guidance for the interpretation of a state’s *non-refoulement* obligations.

Among the two concrete jurisdictional provisions, Article 2(1) ICCPR and Article 1 ECHR, the first seems to be the less problematic one. The HRC’s interpretation of this article has been quite straightforward in stating 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. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone

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other. See also Kees Wouters and Maarten Den Heijer, ‘The *Marine I Case*: a Comment’ (2010) 22 International Journal of Refugee Law.

<sup>42</sup> Den Heijer (n 1) 45-48 with references to the relevant case law.

<sup>43</sup> Theodor Meron, *The Humanization of International Law* (Martinus Nijhoff 2006) 193, cited in Den Heijer (n 1) 136.

<sup>44</sup> Noll (n 13) 558

<sup>45</sup> See Den Heijer (n 1) 51.

<sup>46</sup> As has been pointed out by *Den Heijer*, one of the reasons for the conceptual confusion surrounding ‘jurisdiction’ is perhaps the fact that its meaning in general international law is quite different from its meaning in human rights law. Whereas jurisdiction in general international law serves mainly as a delineator to allocate competences and clarify the question whether or not a state is entitled to act, it is used as a means to define a state’s obligations towards an individual in human rights law. In the latter context it is thus the concrete sovereign relationship between the state and the individual that is of interest and not whether a state has the legal competence to regulate its actions. For details see den Heijer (n 1) 19-28.

within the power or effective control of that State Party, *even if not situated within the territory of the State Party*.<sup>47</sup>

Although a strict legal reading of Article 2(1) ICCPR would probably lead to a different result – as it speaks of all ‘individuals within its territory *and* subject to its jurisdiction’<sup>48</sup> these two elements could well be interpreted as cumulative ones – the HRC’s interpretation of this ‘awkwardly formulated provision’<sup>49</sup> seems warranted in the light of its drafting history as well as its object and purpose.<sup>50</sup> Therefore, all persons on the territory of a Contracting State *and* those under its jurisdiction are protected under the ICCPR.<sup>51</sup>

The meaning of ‘jurisdiction’ under Article 1 ECHR has been interpreted in a less clear manner. While it is firmly established in the ECtHR’s case law that a state exercises jurisdiction in the total of its territory and that declaring parts of it as international zones does nothing to prevent this, matters become more complicated in situations of extraterritorial state conduct. Being confronted with cases concerning, *inter alia*, military occupation, the NATO bombings during the Yugoslavian war or extraterritorial detention, the Court has reached several different conclusions on what ‘jurisdiction’ entails. However, recent decisions confirm a trend in which the Court moves away from its previous territorially-based notion of jurisdiction<sup>52</sup> towards a more personal-based one<sup>53</sup>. The exercise of jurisdiction is not anymore limited to cases of effective control over a territory but may also be triggered by de facto control over a person.<sup>54</sup>

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<sup>47</sup> HRC, General Comment No. 31, CCPR/C/21/Rev.1/Add.13, 2004 para 10 (emph added)

<sup>48</sup> Emphasis added.

<sup>49</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary* (N.P. Engel 2004) Article 2, Section IV, para 27.

<sup>50</sup> Nowak (n 49) 42.

<sup>51</sup> See, in particular, the cases of *Lopez Burgos v Uruguay*, HRC Communication No. R 12/52, 6 June 1979 and HRC (n 47) para 10. See also Wouters (n 14) 370-72 for further arguments and references and Nowak (n 49) Article 2, Section IV, para 27-30.

<sup>52</sup> *Ilascu and others v Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004 as well as the Northern Cyprus cases before the ECtHR, *Loizidou v Turkey* App no 15318/89 (ECtHR, 23 March 1995) and *Cyprus v Turkey* App no 25781/94 (ECtHR, 10 May 2001).

<sup>53</sup> HRC (n 47) (‘power or effective control’), *Banković and others v Belgium and others* App no 52207/99 (ECtHR, 12 December 2001), *Al-Skeini and others v the UK* App no 55721/07 (ECtHR, 7 July 2011), *Issa and others v Turkey* App no 31821/96 (ECtHR, 16 November 2004), *Öcalan v Turkey* App no 46221/99 (ECtHR, 12 May 2005), *Medvedyev and others v France* App no 3394/03 (ECtHR, 29 March 2010), *Al-Sadoon and Mufdhi v UK* App no 61492/08 (ECtHR, 2 March 2010), *Pad and others v Turkey* App no 60167/00 (ECtHR, 28 June 2007), *Solomou and others v Turkey* App no 36832/97 (ECtHR, 24 June 2008), *Hirsi* (n 3).

<sup>54</sup> This evolution of the Court’s case law is not a stand-alone development but reflects an increasing consensus among international treaty monitoring bodies that de facto control over persons, irrespective of legal entitlements or territorial considerations, should trigger human rights responsibilities. For a more detailed assessment and a discussion of the relevant case law see Den Heijer (n 1) 28-48.

This position has also been reflected at the national level with the UK Supreme Court’s ruling in *Smith and others v The Ministry of Defence* (UKSC 41, 19 June 2013) being the most recent example. In this decision, the UK Supreme Court found that the ECHR was applicable also in extraterritorial situations that are *not* marked by effective territorial control. It thereby takes into account the ECtHR’s *Al-Skeini* reasoning that overturned several key concepts of its earlier *Banković* judgment, most notably the territorial-based notion of jurisdiction and the idea that the Convention can not be ‘divided and tailored’ to the specific circumstances of the case. For a first assessment of the case see Marko Milanovic, ‘UK Supreme Court Decides *Smith* (No. 2) v. The Ministry of Defence’ of 24 June 2013 at <http://www.ejiltalk.org/uk-supreme-court-decides-smith-no-2-v-the-ministry-of-defence/> accessed 30 June 2013.

However, widening ‘jurisdiction’ to include situations of a state’s control over persons does not seem to solve all problems related to this concept. First, the definition of ‘effective control’, in particular with regard to persons, remains elusive. Second, the notion of jurisdiction seems ill-suited to cover some of the more subtle forms of exercising control.

As to the first argument, it has been persuasively argued that the element of ‘personal control’ is an impracticable one and ‘ill-equipped to respond adequately to the very large variety of ways in which states may impact on the fundamental rights of persons who remain outside their territory.’<sup>55</sup> Finding a definition to the notion of control is an inherently difficult task – and even more so when seeking to apply it to persons. While it is well conceivable that a state effectively controls ‘an inert object, such as a strip of land’ it is hard to imagine how a state ‘effectively controls a human being – which has the tendency to engage in all sorts of activities of its own accord.’<sup>56</sup>

Second, ‘jurisdiction’ in the form of ‘effective control’ seems likely to fail in situations where a state does not exercise direct control but engages in more implicit forms of influence, for instance by obliging private carriers to check travelers’ documentation or by funding border control operations operated by third states. Approaching these situations based on the understanding that human rights protection is triggered only once a person is under the effective control of the state would most likely significantly reduce its reach.

*(b) The concept of positive obligations*

For these two reasons, it seems appropriate to explore other avenues for establishing a state’s human rights accountability. The doctrine of positive obligations, or due diligence, lends itself to further examination in this regard.<sup>57</sup> Based on the position taken by CESCR and expressed in several of its General Comments<sup>58</sup>, it may be argued that a state incurs obligations towards an individual whenever it is capable to positively influence this person’s human rights situation. This includes, for instance, the obligation of the state to prevent third parties from violating human rights extraterritorially if it has the legal or political means to do so.

While it is true that there is a certain tension with central notions of international law, in particular with the principle of sovereignty and the rule of non-intervention, there seems to be growing support for the doctrine of positive obligations.<sup>59</sup> Lawson, for instance, broadly acknowledges the responsibility of a state under the ECHR ‘if it has encouraged individuals to engage in acts contrary to human rights’.<sup>60</sup> Moreover, both the ECHR in *Soering* and the ICJ in its *Wall Opinion* adhere to the doctrine that a state must refrain from any acts that may give

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<sup>55</sup> Den Heijer (n 1) 54.

<sup>56</sup> Den Heijer (n 1) 54.

<sup>57</sup> See below III.5. for an application of the concept of positive obligations in the context of ILO.

<sup>58</sup> Discussed extensively in Sigrun Skogly, *Beyond National Borders: States’ Human Rights Obligations in International Cooperation* (Intersentia 2006), 83-98 and 144-53.

<sup>59</sup> For the following references see Gammeltoft-Hansen (n 2) 202-03.

<sup>60</sup> Rick Lawson, ‘Out of Control – State Responsibility and Human Rights: Will the ILC’s Definition of the ‘Act of State’ meet the Challenges of the 21<sup>st</sup> Century?’ in Monique Castermans-Holleman, Fried van Hoof and Jacqueline Smith, *Human Rights, International Organisations and Foreign Policy. Essays in Honour of Peter Baehr* (Martinus Nijhoff 1998) 111.

rise to human rights violations by other actors, even if it does not exercise effective control in this specific situation. Consequently, a state is required to take all reasonable measures to prevent human rights violations, such as establishing monitoring procedures, providing training or facilitating access to complaints mechanisms. This obligation also stretches to extraterritorial situations as it is derived not from ‘the oversimplified shorthand of effective factual control over the individual, but rather from the power, or capability, of the state to positively influence a person’s human rights situation.’<sup>61</sup> In sum, legal doctrine and case law do indeed allow for an interpretation that

‘it is not the fact that the affected person has been directly affected or placed under the effective control of a state, but rather the relationship of the state with a particular set of circumstances being of such a unique nature, that is decisive in triggering a state’s positive obligations.’<sup>62</sup>

However, it has to be acknowledged that it is very hard to define more precisely what the concept of positive obligations actually entails.<sup>63</sup> Its content is, by nature, highly case-specific and the existing case law has not yet come up with a more systematic framework of positive obligations. ‘As a result, assessing what may reasonably be expected from a state is inherently open to contestation at both the normative and the evidentiary level.’<sup>64</sup>

### 3. The Content of *Non-refoulement*

After having discussed extensively the issue of its territorial scope, the question of the content of *non-refoulement* can be answered rather briefly. Despite some differences in the various provisions, *non-refoulement* essentially prohibits to return a person to a place where he or she is at risk of persecution or where his or her life or freedom would be threatened. Now which individual rights can be derived from this prohibition? Which safeguards must be put in place to make it effective?

It is difficult to give a general answer to these questions as the obligations incurred by the state depend very much on the specific circumstances of the case. However, two general observations seem to be in order.

First, the principle of *non-refoulement* prohibits a particular *result*, not a particular conduct. None of the *non-refoulement* provisions mention specific forms of action that are prohibited. As explicitly held by the Refugee Convention, *refoulement* is prohibited ‘in any manner whatsoever’.

Second, despite this seemingly all-encompassing protection, the principle of *non-refoulement* does not contain a right for the individual to be granted asylum. It does not even explicitly grant a right to be admitted to a state’s territory. Rather, it is a ‘right to transgress an administrative border’ which is ‘something quite different’ than transgressing a territorial

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<sup>61</sup> Den Heijer (n 1) 48.

<sup>62</sup> Den Heijer (n 1) 48.

<sup>63</sup> Gammeltoft-Hansen (n 4), Noll (n 13) 569.

<sup>64</sup> Gammeltoft-Hansen (n 2) 204.

border.<sup>65</sup> However, it is commonly held that every person who claims asylum at the border ‘must have the merits of that claim considered before being removed’.<sup>66</sup> In practice, it therefore seems difficult to envisage scenarios of effectively complying with *non-refoulement* obligations without admitting asylum seekers to a national asylum procedure.

#### 4. The Responsible Actor

In discussing the concept of jurisdiction<sup>67</sup>, we have already seen that international law may hold ready more appropriate concepts of linking a state’s conduct to the affected individual than the ‘effective control’ criterion that is currently employed by the ECtHR and other judicial bodies. So far, however, we have been only concerned with the question of ‘linking’ or, in other words, the scope of *application* of human rights. While this is a necessary precondition for the question of human rights *responsibility*, it is yet a separate issue. As emphasized by *Den Heijer*, the issues of determining the applicable law on the one hand and allocating responsibility on the other should be conceptually kept apart.<sup>68</sup>

The principal regime for identifying the responsible actor under international law is the law of state responsibility as it is codified in the Articles on State Responsibility (ASR). With a view to the issues of interest here, namely the outsourcing of immigration control to private and third state’s actors, two provisions are particularly relevant. First, Article 8 ASR, which states that the conduct of a person shall be considered an act of a State if the person ‘is in fact acting on the instructions of, or under the direction or control of, that State’. Therefore, as a matter of principle, a State remains responsible even if it outsources immigration control to private actors. Second, Article 16 ASR, which comes into play in cases where a State outsources control functions to third states’ actors. It stipulates that a State is internationally responsible if it aids or assists another State in the commission of an internationally wrongful act under the conditions that it has knowledge hereof and the act would be equally wrongful if committed directly by that state.

Accordingly, subject to the specific circumstance of the case, the prohibition of *refoulement* principally applies to all circumstances where private carriers or third states’ border guards perform immigration control on behalf of a Contracting State and potentially triggers the latter’s responsibility.<sup>69</sup> While it may be subsidiary to the territorial’s state’s ‘principal responsibility’<sup>70</sup> to protect refugees on its territory from *non-refoulement*, acknowledging this responsibility is the more important the lower the human rights standards in this territorial state. In many cases, effectively realizing this ‘subsidiary responsibility’ will

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<sup>65</sup> Noll (n 13) 548.

<sup>66</sup> Brouwer and Kumin (n 10) 9.

<sup>67</sup> See section II. 2.2. above.

<sup>68</sup> Den Heijer (n 1) 58.

<sup>69</sup> Lauterpacht and Bethlehem (n 7) 109-10.

<sup>70</sup> This idea of a ‘principal’ and a ‘subsidiary’ protection responsibility appears also in the European Commission’s response to a question from the European Parliament (E-3228/2008, 9 June 2008) on the influence of ILO on the number of asylum seekers in the EU.

therefore require the assisting state to initiate asylum procedures during the course of which persons will have to be admitted to its own territory.<sup>71</sup>

### III. Practical Part – Immigration Liaison Officers

The remainder of this paper seeks to apply the theoretical issues described above to the practical case of immigration liaison officers (ILO) and to determine whether their current use is consistent with international refugee law.

#### 1. Member State Practice and EU Legislation on ILO

Posting ILO to airports, border crossings or foreign national immigration authorities is a widespread practice among EU Member States, with the UK, the Netherlands and France being among those using it most.<sup>72</sup> ILO are tasked with reducing the number of undocumented migrants arriving in the European Union and fulfill this task by checking travelers' documentation, offering advice on the destination's country legislation or providing training on the identification of false documents.<sup>73</sup> In the case of the UK, full immigration checks are carried out within demarcated zones at the ports of Calais, Dunkirk and Boulogne. Pursuant to an agreement with France, UK immigration law directly applies within these zones.<sup>74</sup> In 2001, the UK also started to operate a pre-clearance scheme at Prague Airport that consisted of full checks, including interviews, in order to decide whether or not a person was eligible to enter the UK.<sup>75</sup>

In most other cases, however, immigration liaison officers perform their tasks more indirectly, namely by assisting private carriers or third states' officials on the decision of whether or not a traveler should be allowed embarkation.<sup>76</sup> In these cases, states have been

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<sup>71</sup> Gammeltoft-Hansen (n 4) 21.

<sup>72</sup> ECRE, 'Defending Refugee's Access to Protection in Europe' (2007) 30, see also Council of the European Union, 'Draft Common Manual for ILO' 8418/06 (Brussels 2006); Refugee Council, 'Remote Controls: how UK border controls are endangering the lives of refugees' (2008) 35; Areti Sianni, 'Interception Practices in Europe and Their Implications' (2003) 21 Refugee Survey Quarterly 28, Brouwer and Kumin (n 10) 10.

<sup>73</sup> See International Air Transport Association, 'A Code of Conduct for Immigration Liaison Officers' (2002).

<sup>74</sup> Gammeltoft-Hansen (n 2) 125-26, for details see Refugee Council (n 72) 39-41, Sianni (n 72) 28.

<sup>75</sup> As this scheme was explicitly aimed at reducing the number of Czech nationals of Roma ethnic origin it was eventually challenged before UK courts for being discriminatory and in contradiction with the Refugee Convention. The House of Lords agreed with the first point and declared the controls to be discriminatory in nature; the Refugee Convention, however, was found to be inapplicable on the grounds that the applicants were still in their country of origin.

During the case, the UK Immigration Service maintained the position that the UK is not obliged under the 1951 Refugee Convention to consider applications outside the UK, nor to facilitate travel to the UK for the purpose of applying for asylum. However, Goodwin-Gill, intervening as an *amicus curiae* on behalf of UNHCR, pointed out that the control scheme violated the object and purpose of the Refugee Convention, rendering it nugatory in effect. See Guy Goodwin-Gill, Submission on behalf of UNHCR to the Court of Appeal considering the Roma Rights Case. C1/2002/2183/QBACF. For a further discussion see Den Heijer (n 1) 125-32, for a summary see also Refugee Council (n 72) 37-38.

<sup>76</sup> This is the case for Australia, Canada, the Netherlands and the UK where ILO offer pre-boarding recommendations to private carriers instead of issuing refusals themselves. Den Heijer (n 1) 178, at fn 53.

careful to stress that ILO solely act in an advisory capacity and do not have any operational powers that could conflict with the sovereignty of the host state.<sup>77</sup>

In 2004, the European Council passed Regulation No 377/2004, establishing a network of immigration liaison officers posted at international airports around the world. It defines ILO as ‘a representative of one of the Member States, posted abroad [...] in order to establish and maintain contacts with the authorities of the host country with a view to contributing to the prevention and combating of illegal immigration, the return of illegal immigrants and the management of legal migration.’<sup>78</sup> Despite this broad mandate and its obvious implications for refugees, the document makes no reference to the Member States’ obligations under international refugee law.

## **2. Making the System Work: Carrier Sanctions**

In order to facilitate the work of ILO, EU member states impose civil penalties on private carriers that transport inadequately documented persons (‘carrier sanctions’). The fines imposed by the UK, for instance, go up to £ 2000 for transporting a person without proper documentation. Additionally, the carrier must bear all related costs for returning this person.<sup>79</sup> As in the case of ILO, carrier sanctions, too, have a basis in EU law. They have been provided for in Article 26 of the 1985 Schengen Implementation Agreement which was later supplemented by the Carriers’ Liability Directive<sup>80</sup>. Since then, Member States are required to introduce a minimum penalty of € 3000 per person that is transported without the required documentation as well as the obligation for carriers to return those whose entry is refused or else to bear the cost of onward transportation, including all related costs such as accommodation.

In contrast to the 2004 ILO Regulation, Article 26 does make a reference to Member State’s obligations under international refugee law. It states that its rules shall be ‘subject to the obligations resulting from [...] the Geneva Convention relating to the Status of Refugees’. However, given the vague formulation of this provision, Member States are left with a wide margin of appreciation in dealing with the inherently difficult task to reconcile the obligation to fine private carriers under Article 26 SIA with their obligations under international refugee law. In particular, the Directive does not require Member States to exempt carriers’ liability in cases that involve refugees.<sup>81</sup> This has resulted in highly divergent national implementation with some Member States waiving the fines if a person is later admitted to an asylum procedure, others waiving sanctions only if the person is ultimately granted (some form of)

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<sup>77</sup> Brouwer and Kumin (n 19) 10, Gammeltoft-Hansen (n 2) 126, Refugee Council (n 72) 36.

<sup>78</sup> Article 1, Council Regulation (EC) No 377/2004 of 19 February 2004.

<sup>79</sup> Refugee Council (n 72) 46.

<sup>80</sup> Council Directive 2001/51/EC of 28 June 2001.

<sup>81</sup> This obligation was included in the original proposal but later dropped on the basis of Germany’s rejection, see Sianni (n 72) 27.

protection<sup>82</sup> and still others fining carriers regardless of any protection concerns.<sup>83</sup> Given the financial risk that this system places on private carriers, they are very likely to follow the ‘advice’ offered by ILO on the acceptability of travel documents presented by the individual traveler.<sup>84</sup> From a business point of view, not listening to them can prove very costly.

### 3. The Privatization of Immigration Control

From a human rights perspective, this constellation is of course highly problematic and has therefore attracted a great deal of criticism.<sup>85</sup> It has been repeatedly held that the combination of visa requirements, carrier sanctions and the activities of ILO seriously affect the ability of refugees to seek protection from *refoulement*.<sup>86</sup> Many observers noted that by obliging carriers to verify travel documents, refugee protection has been effectively privatized and indeed ‘turned all the world’s major airlines into de facto pre-frontier border guards rejecting thousands of travellers each year.’<sup>87</sup> UNHCR criticizes that the responsibility for determining protection needs is put in the hands of actors, that are

‘(a) unauthorized to make asylum determinations on behalf of States (b) thoroughly untrained in the nuances and procedures of refugee and asylum principles, and (c) motivated by economic rather than humanitarian considerations.’<sup>88</sup>

A further obvious concern is that private actors, as a matter of principle, cannot be held accountable for respecting refugee rights under international law.<sup>89</sup>

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<sup>82</sup> However, even in these cases, carriers must initially pay the fine which is only later reimbursed if the person is granted protection. This decision generally takes at least several months during which the carrier bears the financial risk. Moreover, distinguishing between whether a person is later granted refugee status or subsidiary protection (like the UK legislation does) ‘appears to be entirely arbitrary, and means that all improperly documented passengers who subsequently receive some form of subsidiary protection constitute a financial burden for carriers.’ Thirdly, it seems that many carriers are not aware of the fact that they are exempted from liability when transporting refugees. For further evidence concerning these three arguments see Refugee Council (n 72) 45.

<sup>83</sup> ECRE (n 72) 28-29.

<sup>84</sup> For the UK context, this is confirmed by a study from 2008 that found that private airlines prioritized the avoidance of fines and rapid processing over potential protection needs of their passengers. They were ‘keen to avoid long delays, endless security checks and suspicious questioning for fear of antagonising passengers. As a result, airlines sought to make speedy judgments about the validity of a passenger’s documents and the likelihood of incurring a fine upon arrival.’ As they were frequently unable to communicate with the passenger and under heavy time pressure, they relied on ‘gut feeling’ and ‘body language’ to decide whether a person should be allowed boarding. Under these circumstances, the UK Home Office’s recommendation for carriers confronted with asylum claims to ‘contact the nearest UNHCR or United Kingdom representative or the United Kingdom port of arrival, for advice and guidance on how best to proceed’ is likely to remain ineffective. See Refugee Council (n 72) 46-47. For the Netherlands, there is a similar obligation to contact the national immigration authorities. However, there is no evidence that this procedure is effectively in use. cf. Den Heijer (n 1) fn 45. See also International Air Transport Association (n 73) section 2.3.

<sup>85</sup> ECRE (n 72), Brouwer and Kumin (n 10), Elspeth Guild, *Moving the Borders of Europe*. Inaugural lecture (Nijmegen 2001). See also Gammeltoft-Hansen (n 2) 169, fn 46 for further evidence.

<sup>86</sup> ECRE (n 72) 32, Den Heijer (n 1) 178.

<sup>87</sup> Gammeltoft-Hansen (n 2) 204.

<sup>88</sup> UNHCR, *UNHCR Position on Conventions Recently Concluded in Europe (Dublin and Schengen Conventions)*, 16 August 1991, 3 European Series 2, 385.

<sup>89</sup> ECRE (n 72) 30. This fact has played a major role in a 2001 decision by the Austrian Constitutional Court in which it annulled several provisions of the 1997 Austrian Aliens Act concerning carrier sanctions on the grounds that they did not specify which obligations are incumbent on carriers and whether, or how, should take into

#### 4. Deconstructing Refugee Protection?

As a result of the above, it seems safe to conclude that current ways of restricting legal ways to migrate and extending extraterritorial controls by the use of ILO and carrier sanctions, may seriously hinder refugees' access to protection in Europe. While it is impossible to determine exactly how many refugees are turned away at the border, it can be assumed that they are 'particularly likely to be rejected as they naturally tend to lack full documentation and are unlikely to have been granted a visa.'<sup>90</sup> This has also been acknowledged by a Council of Europe/UNHCR round table in 2002:

"It is impossible to be precise about the number of refugees who are denied escape due to stringent checks by transport companies. The number is considered to be on the rise, however, not least since transport companies have been assisted by Governmental liaison officers in verifying travel documents."<sup>91</sup>

Moreover, the figures provided by the UK Cabinet Office on the 'success' of interception measures of UK ILO may give an overall idea on the extent of interception: between 2001 and 2007, 180,000 inadequately documented persons were denied to board flights destined to the UK. Here too, it is not known how many among them were in need of international protection.<sup>92</sup>

This is particular problematic where such controls are carried out in countries that are known to systematically violate international refugee law. For instance, the UK keeps posting ILO in countries such as Sri Lanka, Ethiopia, the DRC and Sudan despite the fact that their nationals continue to receive refugee status in the UK. By preventing them from leaving their country of origin the UK's ILO risk exposing them 'to the very authorities they are attempting to escape.'<sup>93</sup>

Therefore, it seems reasonable to conclude that the use of ILO and carrier sanctions that may prevent refugees from reaching asylum is inconsistent with the EU Member States' obligations under the Refugee Convention.<sup>94</sup> By effectively outsourcing immigration control to actors that incur no direct responsibility under international refugee law, they risk deconstructing refugee protection altogether.<sup>95</sup>

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account Austria's international obligations under the Refugee Convention. See G224/01. See also Sianni (n 72) 27-28.

This problem of lack of accountability is further aggravated by the fact that carriers, faced with the obligation to take all adequate steps to intercept undocumented persons but often lacking expertise to do so, subcontract this duty to security companies specialized in identifying forged, stolen or false documents and refusing boarding to those they suspect to use them. For the UK context, see Refugee Council (n 72) 44.

<sup>90</sup> Gammeltoft-Hansen (n 2) 169-70.

<sup>91</sup> Council of Europe and UNHCR, *Proceedings: "Round Table Process" on carriers' liability-Second expert meeting on carriers' liability, Topic B: Respect of the humanitarian dimension*, Brussels, 24 June 2002, 3, cited in Brouwer and Kumin (n 19) 11 (original document not accessible anymore).

<sup>92</sup> Refugee Council (n 72) 36.

<sup>93</sup> Refugee Council (n 72) 41, see also Sianni (n 72) 28.

<sup>94</sup> UNHCR, *Round Table on Carriers' Liability Related to Illegal Immigration*, Brussels, 30 November 2001, [http://www.iru.org/cms-filesystem-action?file=en\\_events\\_2001/Illegal2001.pdf](http://www.iru.org/cms-filesystem-action?file=en_events_2001/Illegal2001.pdf) accessed 30 June 2013.

<sup>95</sup> Gammeltoft-Hansen 2011 (n 2) 208.

The last section of this paper briefly discusses the question that logically flows from such a conclusion: which legal avenues exist to challenge these practices and to ultimately re-establish the link between state control and responsibility?<sup>96</sup>

### **5. Re-linking Control and Responsibility**

Under international law, there seem to be three ways to link a state's actions with the affected individual in cases where this link is not straightforward. First, there is the concept of jurisdiction that has been widely accepted to include certain extraterritorial situations.<sup>97</sup> Where a state conducts full immigration checks via its ILO, the element of jurisdiction will most certainly be fulfilled and trigger a state's responsibility under human rights law. The UK's juxtaposed control scheme in French ports, where UK officials are permitted to enforce British immigration laws, including by arrest, detention and transferring persons to the UK, is perhaps the most prominent example in this regard.<sup>98</sup> As has been demonstrated above, the concept of jurisdiction under international law has evolved substantially and increasingly allows for an understanding that it is the concrete relationship between the State and the individual, regardless of any territorial considerations, that is the decisive criterion. Refusing refugees to board a plane at a foreign airport may therefore be well be interpreted to bring them within the purview of a state's human rights obligations.<sup>99</sup> We have seen, however, that the concept of jurisdiction – being defined as exercising effective control over persons – poses certain conceptual problems and may be ill-suited to capture the broad variety of forms in which a state may interfere with an individual's human rights.

In search for an adequate answer to these challenges, a range of authors proposed a second concept, namely the one of positive obligations.<sup>100</sup> It appears to offer solutions in cases where a state engages in more indirect forms of immigration control, for example by posting ILO that it maintains to have a purely advisory role. The doctrine of positive obligations seems particularly relevant if one agrees with the view that, despite the growing privatization and delegation of control functions, this has in no way diminished a State's influence but, quite on the contrary, gave rise to close managerial state powers created 'through a mixture of law, economic incentives and direct authority' over private actors.<sup>101</sup> These concrete means of

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<sup>96</sup> The following section is solely concerned with instruments under international law. For an analysis under EU law see Den Heijer (n 1), Chapter 5 and, in particular 174-79, 198-99. *Den Heijer* basically states that the EU's carrier sanctions regime could be interpreted as being inapplicable to asylum seekers in the light of the Schengen Borders Code that exempts asylum seekers from the requirement to present valid travel documents and EU norms protection refugees such as Article 7 of the Asylum Procedures Directive. He concedes, however, that this interpretation is likely to be unacceptable for national governments as it could easily undermine the very purpose of carrier sanctions. With regard to ILO, *Den Heijer* suggests that they should be seen as border guards in the sense of the Schengen Borders Code which means that the procedural safeguards contained therein apply in extraterritorial immigration control performed by them. He concludes that any other interpretation would lead to 'virtually complete and unchecked state power, which has the potential to displace the Union's substantive rules on legal migration and asylum.' Den Heijer (n 1) 203.

<sup>97</sup> See above section II. 2.2.

<sup>98</sup> Refugee Council (n 72) 38, 40.

<sup>99</sup> Den Heijer (n 1) 289.

<sup>100</sup> See, for instance, Den Heijer (n 1) 45-48 and Gammeltoft-Hansen (n 2) 195-204.

<sup>101</sup> Gammeltoft-Hansen (n 2) 207

influence must therefore be seen to imply direct responsibility in the form of positive obligations. For example, states could be required to take reasonable steps to ensure that privatized controls do not violate the principle of *non-refoulement*, e.g. by establishing monitoring and complaints mechanisms. Moreover, states could be obliged to provide human rights trainings to private carriers.<sup>102</sup> However, as described in section II.2.2. above, the contours of this concept are entirely dependent on the particular circumstances of the case in question. As such, it remains rather vague and open to contestation.

In the eyes of the present author, a third approach merits particular attention, namely one that relies on the concept of state responsibility as codified in the Articles on State Responsibility (ASR). They might be the most appropriate tool for assessing a state's extraterritorial conduct in cases where it does not act via its own agents but relies on other means of control. Two basic scenarios must be distinguished here: either, the proscribed conduct is carried out by private actors, such as airline staff or ship operators, a situation that should be assessed with regard to Article 8; or, it is carried out at the hands of third states' officials, which potentially triggers obligations under Article 16.

With regard to the first scenario, it may be well be argued that certain current forms of cooperation between EU Member States and private carriers, based on legislation or, rather, on specific administrative arrangements, fulfill the requirements of Article 8 ASR.<sup>103</sup> Due to carrier sanction legislation, close governmental supervision by ILO or state-sponsored training, private carriers will in many cases act on the instructions of, or under the direction or control of the State. Again, the UK may serve as a particularly illustrative example:<sup>104</sup> First, it uses a particularly stringent regime of carrier sanctions, that in itself may amount to de facto 'control' or 'direction' as the financial risk imposed on carriers will mostly determine the outcome of their decision whether or not to allow embarkation for inadequately documented passengers. Second, it has installed a 24-hour hotline to provide on-the-spot advice for carriers which means that, upon request, UK officials will appear in person to verify documentation and occasionally also conduct in-depth interviews with persons suspected of using false documents. Third, the UK government provides training for private carriers, covering issues such as detection of forged documents. Fourth, it provides new surveillance equipment, including carbon dioxide detectors, X-ray scanners and heartbeat monitors free of charge to private carriers. Because fines are only waived if a carrier can show that it has taken all reasonable measures to prevent irregular migrants from boarding, they are effectively obliged to use this equipment. Failure to do may result in reduced access to UK ports.<sup>105</sup> In sum, the actions of private carriers, that act upon the advice of government officials and face substantial financial risks if they fail to listen to them, can be qualified as being sufficient to establish a state's responsibility.

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<sup>102</sup> Gammeltoft-Hansen (n 2) 202f

<sup>103</sup> This view is also supported by ECRE (n 72) 30, Gammeltoft-Hansen (n 2) 205, Refugee Council (n 72) 48, 50.

<sup>104</sup> See Refugee Council (n 72) 35-49.

<sup>105</sup> Refugee Council (n 72) 45.

In the second scenario, where ILO are liaising with third states' authorities, essentially the same logic applies: where a state substantially contributes to a human rights violation by another actor, it may incur responsibility. The situation is of course somewhat different from the first scenario as, unlike private carriers, the third state itself incurs responsibility under international law. However, this does not absolve the posting state from being simultaneously bound by, in particular, the *non-refoulement* principle. Where it 'aids or assists another state in the commission of an international wrongful act by the latter [it] is internationally responsible for doing so'. While this contribution needs to reach a certain level, the provision of material aid is covered by Article 16<sup>106</sup>, which makes it well conceivable that its requirements are fulfilled in many cases where states employ a mix of providing advice, sponsoring trainings or providing surveillance equipment to the authorities of a third state.

#### IV. Conclusion

The present paper started out on the basic tenet that a state's responsibility is directly linked to the powers it exercises over an individual, be it within or outside its own territory. Its subject matter, however, has been found to fundamentally challenge this idea. The issue of extraterritorial immigration control is a blatant example in which the extension of a state's competences has not been accompanied by an equivalent extrapolation of individual rights and a concomitant level of state responsibility. This has been explained by the fact that it touches upon one of the most central challenges of international law today, namely 'how to formulate responses to shifting and colliding state sovereignties within an international legal order which is still premised on the foundational ideas of sovereign equality and territorial demarcation.'<sup>107</sup>

In contrasting the most important principle of international refugee law, the principle of *non-refoulement*, with two widespread practices of extraterritorial immigration control, namely the use of immigration liaison officers and carrier sanctions, the present paper found a strong presumption of these practices being inconsistent with the EU Member States international obligations. If it is accepted that the principle of *non-refoulement* entails an obligation for the state to guarantee an effective examination of asylum applications, it is very hard to imagine how extraterritorial procedures, operated by private or third state's actors and aiming at swiftly checking for documentation fraud rather than protection concerns, may live up to this obligation. Rather, these practices effectively lead to the relocation of the border closer and close to the place of departure and thereby threaten to undermine the very concept of refugee protection.

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<sup>106</sup> ILC, Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), Article 16 para 9.

<sup>107</sup> Den Heijer (n 1) 286

However, in answering the research question originally posed in the introduction of this paper, the outlook may be less gloomy for persons seeking protection at the borders of the European Union. In reviewing existing instruments, it appears that international law is, in principle, well-equipped to guarantee that the exercise of state power goes not unchecked in situations of extraterritorial immigration control. The three concepts of extraterritorial jurisdiction, positive obligations and state responsibility constitute potentially powerful tools to give effect to the assertion ‘that the territorial scope of a state’s obligations under international law [...] is congruent with – and must necessarily follow – the locus of state activity.’<sup>108</sup>

It can tentatively be expected that refugee scholars and international courts will further develop these concepts in responding to new forms of extraterritorial state practice. In the meantime, however, it seems essential that, instead of waiting for these advancements in legal doctrine and human rights jurisprudence, practical alternatives are sought in order to effectively protect refugee rights.<sup>109</sup> The engagement of a broad coalition of actors, including national parliaments, UN bodies and NGOs, as well as ensuring greater transparency of the extraterritorial activities of ILO<sup>110</sup> seem to be crucial factors in this process.

First of all, however, it is paramount to clarify the policy conflict underlying the twin goals of combatting irregular migration and ensuring refugee protection, as it has the potential to undermine the effect of any of such practical solutions. To conclude with the words of *Den Heijer*<sup>111</sup>:

“Border guards may have a grounding in refugee law, but if the domestic procedures under which they operate do not allow for claimants to be received into a protection mechanism, such training remains an academic exercise. The Dutch immigration service may have opened up a special phone number for private carriers in case they are confronted with persons claiming asylum, but in the absence of a duty on the part of carriers to entertain asylum applications, it is no surprise that the phone never rings.”

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<sup>108</sup> Den Heijer (n 1) 285.

<sup>109</sup> Den Heijer (n 1) 290f.

<sup>110</sup> So far, each Member State holding the EU Council’s Presidency is required to draw up a report on the activities of ILO during the period it has held the presidency. However, this report is classified on the grounds that it contains ‘sensitive information’ and the summary provided by the European Commission does not contain any details on the specific activities of ILO and, in particular, no information on how their activities affect asylum seekers. For the most recent summary see European Commission, Commission Staff Working Document accompanying the document Communication from the Commission to the European Parliament and the Council, 4<sup>th</sup> Annual Report on Immigration and Asylum COM(2013) 422, 55-57, [http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/immigration/general/docs/4th\\_annual\\_report\\_on\\_immigration\\_and\\_asylum\\_SWD\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/immigration/general/docs/4th_annual_report_on_immigration_and_asylum_SWD_en.pdf) accessed 30 June 2013.

For this basic problem of lack of information see also ECRE (n 72) 31, Refugee Council (n 72) 36, Gammeltoft-Hansen (n 2) 170-71, Den Heijer (n 1) 297. The general lack of information on the activities of ILO is, of course, also part of the reason why there is so little case law on the issue despite its obvious human rights implications.

<sup>111</sup> Den Heijer (n 1) 301. See further Den Heijer (n 1) 300-303.

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