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Shared Responsibility for Refoulement Practices in the Mediterranean Sea

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Introductory Chapter

A. Introduction

Research Statement

The Freedom of Movement is a fundamental human right stipulated in article 13 of the Universal Declaration of Human Rights: "Everyone has the right to freedom of movement and residence within the borders of each State. Everyone has the right to leave any country, including his own, and return to his country." But, nowadays, we are rather moving towards the opposite direction as we stand observers in a persistence of the states concerning the so-called "irregular migration" and border controls, with smuggling, trafficking and searching for refuge and asylum being side issues. People have always been moving and among them there are those in need of international protection. The states have accepted and recognized these needs and therefore the movement of people's seeking asylum is regulated with a number of rules under Public International Law, International Refugee Law and Human Rights Law with the Principle of Non-Refoulement being one of the most important foundations. Nowadays, the arising conflicts around Mediterranean, the death toll in Arabic countries and especially Syria, the conflicts and oppressive regimes in Africa and the ongoing tension in the Middle East (ex. Afghanistan, Iraq etc.), are creating an unprecedented migration flow towards Europe. But the European Union seems to be quiet unprepared to handle this demanding situation and to ensure the rights and even the lives of people on the move. Recent incidents, like the loss of more than 250 lives on two shipwrecks in the shores of Italy, and Malta both near Lampedusa on October 2013 or the death of 8 children and 3 women on the Greek–Turkish borders near Farmakonisi on January 2014, are some examples of the practice of push backs that governments apply on their borders. The illegal deportations are raising concerns over the respect of human rights, and international law by the European Countries.

The principle of Non Refoulement generally prohibits returning an individual to any territory in which that person's life or freedom would be threatened. The principle applies independently of any formal recognition of refugee status or other forms of protection, such as subsidiary protection. The violations of the Principle of Non Refoulement are acts of the state or other international actors, which are exposing the individual to a serious risk of harm, contrary to international law and are connected

with violations of Human Rights, as article 3 of the European Convention for Human Rights, which has been interpreted to include the prohibition of refoulement to places where individuals may fear torture, inhuman or degrading treatment or punishment. Moreover, article 3 of the Convention against Torture prohibits States from removing a person to another State when there are substantial grounds for believing that he would be in danger of being subjected to torture. The prohibition of refoulement is applied as well as a component of the prohibition of torture or inhuman or degrading treatment under Article 7 of the 1966 International Covenant on Civil and Political Rights and in several cases it is also correlated with the respect of the right to life.

The recent incidents in Lampedusa and Farmakonisi have also raised questions as to whether the commitment to non-refoulement ends with the territorial borders of a state, allowing coastal states, like Italy, Greece, Malta (or, Spain and others) to implement any kind of interception measures on high sea or within the territorial waters of another state, in order to stop migrants' flows. In addition to the obligations that originate from the Principle of Non Refoulement, states have undertaken the responsibility under the Search and Rescue Convention, and a number of other treaties, to provide assistance in persons in distress at sea and deliver them to a place of safety. Along with states, Frontex, through the European Border Surveillance System, is supposed to ensure life in the Mediterranean but instead it has been accused of taking part in push backs operations, while it doesn't accept any responsibility for them. Frontex and states are carrying out joint operations with the requirement of the presence of local officers on EU vessels, whose responsibility to decide on returns is somehow thought to absolve any act that might generate international responsibility. On the same track, Italy has been insisting on the joint nature of patrols with Libya on the basis of a bilateral agreement to stress Libya's responsibility for the migrants, while the same method is used by Malta and Spain. All of the above compose the notion of "Fortress Europe", which is in contrast with International and European law. All these, are raising the issue of who does the responsibility for push backs operations and violations of the Principle of Non Refoulement, as well as the treatment of individual during those operations, lay with, the EU or member states? The answer to this question, in each case, will be given after the examination of whether the EU agency or Member States exercise effective control and what acts implicate this. The rhetoric of the EU and the involved states may be in favor of the protection of the rights of migrants and refugees but the

practice shows the opposite and the question still lies: Who is responsible for the Mediterranean turning into a vast graveyard?

Research Question

The existent legal framework, which is considered to be adequate for the protection of persons against refoulement, as an act that puts them under threat of degrading or inhuman treatment, torture, or places their lives in danger, is consisted of treaties as well as of international customary rules and maybe has even involved as jus cogens. Nevertheless, the constant violations of the principle of non refoulement especially in the region of the Mediterranean has laid to the loss of thousands of lives and raise the responsibility of all international actors in the area, both states and international organizations.

Throughout this thesis the current practices of states and the EU are examined with a focus on the case studies, the events that took place in Lampedusa in Italy and in Farmakonisi in Greece. These incidents will be used throughout the thesis as a mean to compare the approaches and measures implemented by European States on the field and also to draw conclusions concerning whether a positive obligation of the state is arising by the Principle of Non Refoulement and to what extent the refusal of admission or the deterrence is a pushback.

Another issue is the use of term “safe third countries”, especially within the scope of the Frontex agency and its cooperation with third countries in order to externalize border control and prevent people in move from reaching Europe. This cooperation does not prevent human rights violations by these third countries and it leaves empty space for further development of refoulement practices.

Finally, the question of the allocation of responsibility is not limited only to the directly involved states but it extends to all the countries of the European Union. The solidarity clause of the EU should be triggered in the case of refugee flows in the Mediterranean in order to both protect the people on the move and enforce the states’ capability in managing the mass influx. Solidarity, especially in this case, is not optional but a shared obligation of both the member states and the EU.

Research Methodology

The study will be conducted through review of available literature regarding the principle of non refoulement, which includes a selection of relevant texts of international and regional human rights instruments, relevant jurisprudence and various commentaries and texts. Interviews were also carried out in both Greece and Malta with officials from the authorities, NGOS, the International Commission of Red Cross and with victims of pushbacks.

Literature Review

A number of academics on refugee law have examined the context of the principle of non refoulement, as Goodwin-Gill and Hathaway, who have written extensively on international refugee law and in particular the principle of non refoulement, with some contracting elements. Of great importance is also the opinion of Sir Elihu Lauterpacht and Daniel Bethlehem who were requested by the Office of the United Nations High Commissioner for Refugees to examine the general scope and content of the principle of non-refoulement in international law. Moreover, a lot of articles and thesis enlightens specific aspects of the practices of refoulement and the deterrence policies in Europe. Another important issue on literature is the interdictions at sea, with a variety of articles examining the evolution of both practice and within the legal framework of the European Union. On the other hand there is a lack of literature on the attribution of accountability about practices of refoulement and the aspects of international responsibility for such international wrongs, with the exemption of a few articles and seminar's conclusions.

This research will focus on the lack of respect of the principle of non-refoulement in the Mediterranean Sea and will attempt to combine the above elements, the practices of pushbacks with allocation of the responsibility that derives.

B. Definition of Terms

Country / State of origin: the state of which the returnee is a national, or where he/she permanently resided legally before entering the host state.

Country / State of return: the state to which a person is returned.

Diplomatic Assurances: An undertaking by the receiving State to the effect that the person concerned will be treated in accordance with conditions set by the sending State or, more generally, in keeping with its human rights obligations under international law.

Deportation: Deportation is the expulsion of a person or group of people from a place or country. Today, the expulsion of foreign nationals is usually called deportation.

Expulsion: The process by which a refugee or an individual is ordered to leave the territory of a particular country. The decision to expel may be taken by a court of law or by administrative authorities charged with immigration duties. Expulsion mainly concerns refugees who have gained entry into the territory of a particular state, either legally or illegally. Expulsion is a more emotionally loaded term in this context than deportation. Deportation has an almost clinical sense of detachment where expulsion is more active and evokes more vivid imagery of people being forced to leave. Unlike extradition, which requires formal acts of two States, expulsion and deportation are unilateral procedures of the sending State. They are, however, subject to safeguards and guarantees, including, in particular, the requirement that they have a basis in national law which must conform to international standards, and that individuals concerned be given an opportunity to challenge the lawfulness of such procedures.

Extradition: A formal process involving the surrender of a person by one State to the authorities of another for the purpose of criminal prosecution or the enforcement of a sentence. In the context of extradition proceedings, the two States involved are usually referred to, as the “requesting” and the “requested” State. Unlike extradition, which requires formal acts of two States, expulsion and deportation are unilateral procedures of the sending State. They are, however, subject to safeguards and guarantees, including, in particular, the requirement that they have a basis in

national law which must conform to international standards, and that individuals concerned be given an opportunity to challenge the lawfulness of such procedures.

Extradition agreement: Bilateral, and usually reciprocal, treaty between sovereign states which upon request provides for the surrender of person accused of a crime under the laws of the requesting state. Extradition may be barred for offenses other than those punishable in the surrendering state, and commonly its courts must be convinced that a prima facie criminal case exists.

Interception: all extraterritorial activities carried out by a state to keep undocumented migrants, including refugees, away from their territory, thus preventing entry by land, sea, or air.

Mass Influx: Considerable numbers of people arriving over an international border or A rapid rate of arrival or Inadequate absorption or response capacity in host States, particularly during emergency or Individual asylum procedures, where they exist which are unable to deal with such large numbers

Readmission: act by a state accepting the re-entry of an individual (own nationals, third country nationals or stateless persons), who has been found illegally entering, being present in or residing in another state. Unlike extradition, which requires formal acts of two States, expulsion and deportation are unilateral procedures of the sending State. They are, however, subject to safeguards and guarantees, including, in particular, the requirement that they have a basis in national law which must conform to international standards, and that individuals concerned be given an opportunity to challenge the lawfulness of such procedures.

Readmission agreement: agreement setting out reciprocal obligations on the contracting parties, as well as detailed administrative and operational procedures, to facilitate the return and transit of persons who do not or no longer fulfil the conditions of entry to, presence in or residence in the requesting state.

Rejection: Rejection may mean the refusal of Refugee Status or the refusal of entry to a person at a border.

Refoulement: the French word “refouler” encompasses terms as repulse, repel, drive back and expel.

Rendition: the legal procedure or process of sending a suspected criminal to another country to be interrogated or detained, usually for law-enforcement purposes.

Extraordinary rendition or irregular rendition: The apprehension and extrajudicial transfer of a person assumed to be involved in terrorist activity from one country to another where due process of law is unlikely to be respected.

Removal: The expulsion of a person from a state. This expulsion may be based on grounds of inadmissibility or deportability. Removal includes a wide range of actions. It is irrelevant whether this is labelled expulsion, deportation, repatriation, rejection, informal transfer, rendition or extradition.

Repatriation: The process of returning a person to their place of origin or citizenship.

Repulse: It encompasses the term reject and repel, actions not needing necessarily the prior entry into the territory.

Resettlement: Permanent relocation of refugees in a place outside their country of origin to allow them to establish residence and become members of society there.

Return: the process of going back to one's state of origin, transit or other third state, including preparation and implementation. The return may be voluntary or enforced. Other opinions: a defensive act of resistance or exclusion at a border rather than an act of transporting someone to a particular destination.

Voluntary Return: the assisted or independent departure to the state of origin, transit or another third state based on the will of the returnee

Assisted Voluntary Return: the return of a non-national with the assistance of the International Organization for Migration (IOM) or other organisations officially entrusted with this mission.

Supervised Voluntary Return: any return which is executed under direct supervision and control of the national authorities of the host state, with the consent of the returnee and therefore without coercive measures.

Forced Return: The compulsory return to the state of origin, transit or other third state.

C. Presentation of Case Studies: The shipwrecks of Lampedusa and Farmakonisi

Farmakonisi

During the early hours of 20 January 2014, off the coast of Farmakonisi Island, within Greek waters and close to the border line, a small boat capsized, which carried 27 refugees from Afghanistan and Syria, including 4 women and 9 children. The boat capsized and sank, while it was towed by a vessel of the Greek Coast Guard[1]. The sinking resulted in the death of 11 persons, 3 women and 8 children. The corpses of one woman and two children were found at sea and the rest of them in the cabin of the vessel, when it was lifted one month after its sinking.

During their immediate contact with the representatives of the UNHCR, which took place the following day on the island of Leros, the 16 refugees who survived reported that their boat had approached the Greek coastline when it came across the Coast Guard and that the towing of the boat by the coast guard was conducted towards Turkey, in two stages at high speeds and resulting in water entering the boat. They also reported that the rope which kept the boat connected with the Coast Guard vessel was cut by the Coast Guard officers, who resulted in the boat being capsized and in the death of 11 persons, all women and children, while the necessary rescue actions were not taken. They also complained about further acts of mistreatment against them after they reached the island of Farmakonisi. The Coast Guard officers, on the contrary, have denied the complaints.

During the course of the research for this thesis an interview was conducted with the survivors, which testified that there were 28 people on board the ship. Upon finding themselves approximately 100 meters from the shore of the island of Farmakonisi, they were warned by a Greek coastal guard boat not to approach the island. The coastal guard then tied the boat, and started to drag it back towards the Turkish coast, at great speed. Suddenly the part of the ship to which the Greek coastal guard's ship was tied, broke off from the ship carrying the refugees, causing great

[1] Hellenic Coast Guard, **"Διάσωση παράνομων αλλοδαπών και έρευνες για εντοπισμό αγνοούμενων στο Φαρμακονήσι"**, available at: *http://www.hcg.gr/node/6751*, last accessed 9 June 2014 and

Hellenic Coast Guard, **"Συνέχεια ενημέρωσης για τη διάσωση παράνομων αλλοδαπών και έρευνες για εντοπισμό αγνοούμενων στο Φαρμακονήσι την 20-01-2014"**, available at: *http://www.hcg.gr/node/6757*, last accessed 9 June 2014

damage to the boat and thus allowing water to flood the boat. The boat was old and frail, and began sinking. The Greek coastal guard boat then turned back and the refugees attempted to board the Greek coastal guard ship in order to save themselves. The coastal guard beat them in order to keep them out of their ship, forcing them to remain inside their own sinking vessel. Only 16 of those persons managed to board the coastal guard's boat. One of the survivors, from Syria, tried saving a woman by extending a stick from the safety of the coastal guard boat, but was brutally prevented by a member of the coastal guard. The same witness, as well as others, claims that no attempt was made by the coastal guard to save the drowning individuals.

In contrast to the survivors' accounts, the Greek Port Authority has alleged that due to bad weather conditions the Coast Guard had launched a rescue operation to tow the boat toward the Greek island of Farmakonisi. According to the Greek authorities, during the operation a large number of those on board gathered on one side of the boat, which resulted in its overturning and sinking.

The available data both from the file of the case, the Prosecutor's reasoning as well as the Parliamentary Records of a Special Session that took place on 29 of January 2014 leave no doubt that on 20 of January 2014 near Farmakonisi an operation of "border control" took place, in other words of deterrence and pushback but not of rescue. The competent Center for Rescue (ΕΚΣΕΔ) was only notified at 02:13am, after the boat had sunk and after the 16 survivors had boarded the boat of the Coast Guard.

The Prosecutor of the Marine Court ordered a preliminary investigation on this case, which was extensively covered by the Press and has been dealt with by the Greek[2] and the European Parliament[3]. After a preliminary investigation led by the Prosecutor of Piraeus' Marine Court, the case was considered to be "manifestly ill-

[2] Hellenic Parliament, Πρακτικα Ολομελειας, Συνεδριαση ΟΗ', Παρασκευή 31 Ιανουαρίου 2014, available at: *http://www.hellenicparliament.gr/UserFiles/a08fc2dd-61a9-4a83-b09a-09f4c564609d/es20140131.pdf*, last accessed 9 June 2014 and

Hellenic Parliament, Πρακτικα Ολομελειας, Συνεδριαση ΟΖ', Πέμπτη 30 Ιανουαρίου 2014,available at: *http://www.hellenicparliament.gr/UserFiles/a08fc2dd-61a9-4a83-b09a-09f4c564609d/es20140130.pdf*, last accessed 9 June 2014

[3] European Parliament, Parliamentary questions, **"Tragedy in Farmakonisi: people, possibly entitled to protection, drowned while their boat was being towed by a Coast Guard vessel"**, Question for written answer to the Commission, Rule 117, Nikos Chrysogelos (Verts/ALE), available at: *http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2014-000634&language=EN*, last accessed 9 June 2014 and

European Parliament, Parliamentary questions, **Answer given by Ms Malmström on behalf of the Commission**, E-000634/2014,10 March 2014, available at: *http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2014-000634&language=EN*, last accessed 9 June 2014

founded in substance" with regard to the Greek Penal Code and the file was archived. The decision to end the investigation was approved by the Prosecutor of the Military Court of Review, who has under the law the power to order a criminal prosecution.

Lampedusa

At 2am on 3 October 2013, an overcrowded fishing boat drifted less than half a mile off the Italian island of Lampedusa. It was reported that the boat had sailed from Misrata, Libya, but that many of the migrants were originally from Eritrea, Somalia and Ghana. An emergency response involving the Italian Coast Guard resulted in the rescue of 155 survivors. On 12 October it was reported that the confirmed death toll after searching the boat was 359, but that further bodies were still missing; a figure of "more than 360" deaths was later reported. A second shipwreck occurred 120 kilometres from Lampedusa on 11 October, within the Maltese search and rescue zone. The boat was reportedly carrying migrants from Syria and Palestine, and at least 34 individuals were later confirmed dead.

For the 3 October incident it was initially reported that over five hundred people were on board the 20-metre-long fishing boat when it began to have engine trouble less than a quarter-mile from Lampedusa, causing the ship to begin sinking. According to witnesses, the captain of the boat tried unsuccessfully to restart the engine and then poured petrol on to a blanket and set it on fire in an attempt to attract attention from the shore or to bring fishing boats to their aid. But as petrol had spilled on deck the fire instantly ignited. To avoid the flames, many people threw themselves into the water or moved away from the fire to the same part of the ship, which then capsized. At least 350 people were declared missing. On 8 November, it was reported that that the migrants had each paid at least $3,000 to the Libyan, Somali and Sudanese trafficking group before making the sea crossing from Libya. Women who were unable to pay were said to have been raped, and men who rebelled were tied up and tortured. The alleged captain of the boat, a 35-year-old Tunisian named as Khaled Bensalam, who was reported to have been deported from Italy in April 2013, was arrested under suspicion of being responsible for the sinking. It was reported that he could be charged with manslaughter. On 8 November, a 34-year-old Somali national, Mouhamud Elmi Muhidin, and a Palestinian man were also arrested under suspicion of having been among the traffickers that organized the voyage. Police indicated that

Muhidin was facing a series of charges, including people trafficking, kidnapping, sexual assault, and criminal association with the aim of abetting illicit immigration. The two men were detained by the Italian police after a number of the shipwreck survivors spotted and began attacking them.

The second incident on 11 of October has more similarities with the Farmakonisi incident. A boat, carrying over 200 migrants, reportedly from Syria and Palestine, and capsized when people on board moved to one side of the vessel as they tried to get the attention of a passing aircraft, 120 kilometers from Lampedusa within the territorial waters of Malta. Reports the following day stated that 34 were confirmed dead. The rescue operation was coordinated by the Maltese authorities, with the assistance of some of the Italian vessels involved after 3 October shipwreck at Lampedusa. Some 147 survivors were taken to Malta, and a further 56 were taken to Italy. According to some of the Syrian refugees, the boat was fired upon by Libyan militiamen during a trafficking gang dispute.

1st Part

1.1. The Principle of Non Refoulement in International and European Law

The countries around Mediterranean are bound by various treaties concerning the protection of refugees and the protection of human rights. In particular, the southern countries of the European Union, Spain, Malta, Italy and Greece, which are currently facing a wave of mixed migratory flows, consisting of people who are either looking for a better life or fleeing persecution, are bound to both the 1951 Convention for the Protection of Refugees and the international and regional human rights treaties. Also, these countries as members of the European Union should also apply the relevant European legislation. On the other side of the Mediterranean, there are the transit countries such as Turkey, Libya and Morocco and it is questionable whether they respect fundamental human rights of migrants and asylum seekers who are within their jurisdiction. Libya has acceded to the ICCPR and the CAT, but is not a member of the 1951 Convention and has no asylum system. Turkey has acceded to the ICCPR, the CAT and the ECHR but while it has also acceded to the 1951 Convention it has made a reservation that it applies only to persons who have become refugees as a result of events occurring in Europe. Finally, Morocco has ratified all the aforementioned international conventions, but only in 2013 the Government announced a plan towards the development and establishment of a national asylum system.

1.1.1. The Institutional Dimension of the Principle of Non Refoulement

Non refoulement is of a fundamental humanitarian character and of primary importance in refugee protection. As Newmark explains[4] "granting refugees, protection from refoulement once they have left their country is more consistent with the plainly stated goal of assuring refugees the widest possible exercise of their rights and freedom". The humanitarian character of refugee protection emerges from the

[4] Newmark RL, "**Non-refoulement run afoul: The questionable legality of extraterritorial repatriation programs**", Washington University Law Quarterly, Vol.71, 1993, pg 833-870, available at: *http://digitalcommons.law.wustl.edu/lawreview/vol71/iss3/9*, last accessed 9 June 2014

preamble of the 1951 Convention[5], which clearly states that the problem of refugees is of a social and humanitarian nature.

a. The evolution until 1951

The principle of non refoulement gained ground after the First World War, when large number of refugees fled Russia after the revolution as well as Spain, Germany and the Ottoman Empire. The history of the principle coincides with the increasing pressure to acknowledge the growing refugee problem in the twentieth century.

The first time an obligation against refoulement was mentioned in a multilateral international treaty was on article 3[6] of the 1933 Convention relating to the International Status of Refugees, which explicitly stated that states are obliged not to expel authorized refugees and included non-admittance at the frontier. The prohibition on refoulement, however, applied only to those refugees received as state-authorized arrivals. Moreover the 1933 Convention was ratified be very few states. The European countries were further activated to abide by the legal principle of non refoulement due to the refugees from Germany in 1934-38. The principle found expression in the 1936 Arrangement on the Status of Refugees[7] ratified by seven European states which went

[5] **Convention Relating to the Status of Refugees**, UN General Assembly, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: *http://www.refworld.org/docid/3be01b964.html*, last accessed 15 June 2014

[6] "Article 3: Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (refoulement), refugees who have been authorized to reside there regularly, unless the said measures are dictated by reasons of national security or public order. It undertakes in any case not to refuse entry to refugees at the frontiers of their countries of origin. It reserves the right to apply such internal measures as it may deem necessary to refugees who, having been expelled for reasons of national security or public order, are unable to leave its territory because they have not received, at their request or through the intervention of institutions dealing with them, the necessary authorizations and visas permitting them to proceed to another country."
Convention Relating to the International Status of Refugees, League of Nations, 28 October 1933, League of Nations, Treaty Series Vol. CLIX No. 3663, available at: *http://www.refworld.org/docid/3dd8cf374.html*, last accessed 9 June 2014

[7] "Article 4: 1. In every case in which a refugee is required to leave the territory of one of the contracting countries, he shall be granted a suitable period to make the necessary arrangement.
2. Without prejudice to the measures which may be taken within the country, refugees who have been authorized to reside in a country may not be subject by the authorities of that country to measures of expulsion of be sent back across the frontier unless such measures are dictated by reasons of national security or public order.
3. Even in this last-mentioned case the Governments undertake that refugees shall not be sent back across the frontier of the Reich unless they have been warned and have refused to make the necessary arrangements to process to another country or to take advantage of the arrangements made for them with that object. In such case the identity certificates may be cancelled or withdrawn."

one step further from the non-admittance at the frontier and stated that "No refugee shall be sent back across the frontier of the Reich", preventing that way what would be later become known as refoulement.

Following the Second World War a new era began for refugees. In February 1946 the United Nations expressly accepted that "refugees or displaced persons who expressed valid objections to returning to their country of origin should not be compelled to do so" by adopting a resolution in the UN General Assembly[8]. The need for protective principle of refoulement for refugees began to emerge. Also, the 1949 Geneva Convention on the Protection of Civilian Persons in Article 45[9] provides that "protected Persons shall not be transferred to a Power which is not a party to the Convention. In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs."

Still, most states were too concerned about surrendering any sovereign authority over admittance of aliens at their borders to accept such a potentially far reaching

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Provisional Arrangement concerning the Status of Refugees Coming from Germany, League of Nations, 4 July 1936, League of Nations Treaty Series, Vol. CLXXI, No. 3952, available at: http://www.refworld.org/docid/3dd8d0ae4.html, last accessed 9 June 2014

[8] UNGA, Resolution 8(1), **Question of Refugees**, 12 February 1946, available at: *http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/032/59/IMG/NR003259.pdf?OpenElement*, last accessed 9 June 2014

This resolution referred the problem of refugees to the Economic and Social Council which on its first session adopted a decision which led to the establishment of the International Refugees Organization. ECOSOC, E/236, **Refugees and Displaced Person**, 3 October 1946, available at: *http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NR0/752/39/IMG/NR075239.pdf?OpenElement*, last accessed 9 June 2014

[9] "Article 45: Protected persons shall not be transferred to a Power which is not a party to the Convention. This provision shall in no way constitute an obstacle to the repatriation of protected persons, or to their return to their country of residence after the cessation of hostilities. Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention. If protected persons are transferred under such circumstances, responsibility for the application of the present Convention rests on the Power accepting them, while they are in its custody. Nevertheless, if that Power fails to carry out the provisions of the present Convention in any important respect, the Power by which the protected persons were transferred shall, upon being so notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the protected persons. Such request must be complied with. In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs. The provisions of this Article do not constitute an obstacle to the extradition, in pursuance of extradition treaties concluded before the outbreak of hostilities, of protected persons accused of offences against ordinary criminal law."

Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), International Committee of the Red Cross (ICRC), , 12 August 1949, 75 UNTS 287, available at: *http://www.refworld.org/docid/3ae6b36d2.html*, last accessed 9 June 2014

obligation. Actually, this concern is still until today an obstacle in further expanding international refugee protection[10].

b. The 1951 Convention relating to the Status of Refugees and the 1967 Protocol

In the aftermath of the Second World War the refugee problem in Europe gained attention due to the big numbers of displaced populations. The non refoulement obligation evolved considerable during this period until its codification[11] in the 1951 Convention relating to the Status of Refugees. The obligations arising out of the UN Convention were limited. Notably, the definition of refugee applied only to persons displaced prior to 1951 and furthermore, signatories were given the option of limiting their obligations to refugees fleeing events in Europe only. These limitations should not be viewed as a retreat concerning the states obligations but as a response to a narrow crisis which was then considered to be temporary.

These limitations were lifted with the adoption of a Protocol relating to the Status of Refugees[12]. The Protocol, entered into force on 4 October 1967, is an independent legal instrument, but related to the Refugee Convention. It came as recognition that refugee problems are not limited in a temporal or geographical sense, and that the international community should be mobilized towards undertaking the responsibility to resolve those crises[13]. The adoption of the 1967 Protocol had no

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[10] Supra Note 4, Newmark (1993).

[11] In 1950, through the work of the Ad Hoc Committee on Statelessness and Related Problems of ECOSOC and after a Report of the UN Secretary-General prepared at the request of ECOSOC, the United Nations General Assembly adopted a resolution so as to convene a Conference of Plenipotentiaries to discuss and sign a convention on refugees and stateless persons. The Conference, held in Geneva from 2 to 25 July 1951 and attended by the delegates of 26 States, concluded with the adoption of the Convention Relating to the Status of Refugees on 28 July 1951. The Convention entered into force on 22 April 1954.

Memorandum by the Secretary-General, UN Ad Hoc Committee on Refugees and Stateless Persons, Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons - 3 January 1950, E/AC.32/2, available at: *http://www.refworld.org/docid/3ae68c280.html*, last accessed 9 June 2014

Draft Convention relating to the Status of Refugees, A/RES/429, UN General Assembly, 14 December 1950, available at: *http://www.refworld.org/docid/3b00f08a27.html*, last accessed 9 June 2014

[12] **Protocol Relating to the Status of Refugees**, UN General Assembly, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: *http://www.refworld.org/docid/3ae6b3ae4.html*, last accessed 15 June 2014

[13] States parties to the Refugee Protocol undertake to apply Articles 2 to 34 of the Refugee Convention without the temporal and optional geographical limitation contained in (Article 1A(2) and

practical effect on the interpretation of the non refoulement obligation, except of the fact that it was extended to displaced persons everywhere.

Nevertheless, the UN Convention Relating to the Status of Refugees is the first significant treaty involving the principle of non refoulement, in Article 33, which 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.*
>
> *2. the benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a 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.*

The principle of non refoulement as it appears in article 33 of the Convention applies clearly to refugees within the meaning of article 1[14]. This does not in any case mean that it is limited to those formally recognized as refugees. A person who satisfies the conditions of article 1 is a refugee regardless of whether he has been formally recognize or filed an asylum application. As it is indicated in UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status[15], "a person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of

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Article 1B of the Refugee Convention. States which had already opted for a geographical limitation in accordance with the Refugee Convention may however continue to use that limitation.

[14] Article 1A(2) of the Convention includes any person who "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."

[15] UNHCR, **"Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees"**, December 2011, HCR/1P/4/ENG/REV. 3, par.28, available at: *http://www.refworld.org/docid/4f33c8d92.html*, last accessed 15 June 2014

recognition, but is recognized because he is a refugee." Also, article 31[16] of the Convention prohibits the imposition of penalties on refugees who enter and are present in the territory of a State illegally. Since refoulement would put a refugee in greater risk than the imposition of penalties for illegal entry, it follows, a fortiori, that the same must apply to the operation of Article 33 of the Convention[17]. Thus, the different wording of article 1 and article 33 is not an indication of a distinction.

The principle on non refoulement generally requires an individual examination on the facts of each case. Usually, in state practice this equals to the assessment of an asylum application. A denial of protection based in the absence of an examination of individual circumstances would be inconsistent with the prohibition of refoulement[18]. This interpretation does not absolve the state from its obligations regarding non refoulement in cases of mass influx of asylum seekers. Although as proved by the travaux préparatoires[19] of the 1951 Convention it had been argued that the principle should not apply to such situations, this is not a view that is either supported by the text as adopted or by subsequent practice. Moreover, interpreted in the light of the humanitarian nature of the treaty the principle should be applied in all cases unless its application is clearly excluded. Towards that direction it should be added the application of the principle of non-refoulement in cases of temporary protection, a concept that is designed to address the difficulties posed by mass influx. Situations of mass influx might be said to pose a danger to the security of the country of refuge and thus to fall into the exceptions of article 33(2), but once again the wording of article 33 ("in any manner whatsoever") and the need of narrow interpretation of the

[16] "Article 31: Refugees unlawfully in the country of refugee. 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country."

Supra note 6 (1951 convention)

[17] Lauterpacht Sir Elihu, Bethlehem Daniel, **"The scope and content of the principle of non-refoulement: Opinion"**, Cambridge University Press, June 2003, par. 93, available at: *http://www.refworld.org/docid/470a33af0.html*, last accessed 10 March 2014

[18] Supra Note 17, Lauterpacht and Bethlehem (2003), par. 100.

[19] Paul Weis, ed., **"The Refugee Convention 1951: The Travaux Préparatoires Analysed with a Commentary by Dr Paul Weis"**, Cambridge, 1995, available at: *http://www.unhcr.org/4ca34be29.html*, last accessed 15 June 2014

exceptions of the refugee Convention, as will be further explained below, leaves no room for such an interpretation.

The fact that the refoulement prohibition is a cornerstone of the Refugee Convention and embodies its humanitarian essence is further proved by the non derogability of article 33[20]. The non-derogability of a norm emphasizes the special status of the right, holding that it cannot be set aside, even in circumstances that would justify derogation from other rights. This is evident from Article 42[21] which precludes reservations inter alia to Article 33. It is also affirmed by Article VII.1[22] of the 1967 Protocol. But although states cannot make reservations to article 33, the Convention foresees certain exceptions on article 33.2 and article 1.F.

The 1951 Convention in Article 1.F excludes from refugee status an individual for whom there are serious reasons for considering that he or she has committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime outside of the country of refuge prior to his admission as a refugee, or "has been guilty of acts contrary to the purposes and principles of the United Nations". Also, article 33.2 sets forth two potentially broad exceptions that the receiving state may exercise to protect the community or defend national security. The national security exception[23] demands "reasonable grounds for regarding the refugee in question as a danger to the security of the country" of refuge. Article 33.2 does not identify the types of acts that could trigger the national security exception but rather leaves that to the discretion of the states, allowing for the possibility of broad application. However, the state must have "reasonable grounds" for regarding a refugee as a danger to national security, but that only limits the state from acting in

[20] Bruin Rene and Wouters Kees, **"Terrorism and the Non-derogability of Non-refoulement"**, International Journal of Refugee Law, vol. 15, Oxford University Press 2003, available at: *http://oppenheimer.mcgill.ca/IMG/pdf/Bruin-2.pdf*, last accessed 20/04/2014 and Supra Note 17, Lauterpacht and Bethlehem (2003) par. 51, 52.

[21] "Article 42 Reservations: 1. 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. 2. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations."

[22] "Article VII Reservations and Declarations: 1. 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."

[23] Supra Note 17, Lauterpacht and Bethlehem (2003), par. 162 -179.

arbitrarily. The public order exception[24] applies to "a refugee … who, having been convicted by a final judgment of a particularly serious crime constitutes a danger to the community of that country". The requirement of a conviction at final judgment establishes an initial threshold before the exception can be applied. Once the final conviction has been established, the Article on its face calls for a determination that the individual poses a future threat to the community. The danger must be to the community of the country of refuge, not to any community elsewhere or the international community in general. The phrase "community" refers to the population in question, as opposed to the national security exception, which refers to threats to the state as a whole. There is an evident overlap between article 1.F and article 33.2. Scholars are divided on the issue of the interpretation of the relation of these two articles. Some[25] support that article 33.2 indicates a higher threshold and that addresses circumstances not covered by article 1.F. Others[26] support that Article 33.2 provides ample opportunity for states to construct exclusion regimes, to the great detriment of the refugee law regime.

The exemptions of article 33 have caused a conversation between academics and practitioners on the issue of their compatibility with the recent developments of human rights law[27]. These exceptions have been linked to the combat of international terrorism and especially after 9/11 have been used by states for massive violations of the principle of non-refoulement and human rights law[28]. The object and purpose of the 1951 Convention which is the protection of refugees, the humanitarian scope of

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[24] Supra Note 17, Lauterpacht and Bethlehem (2003), par.180 - 192

[25]Supra Note 17, Lauterpacht and Bethlehem (2003), par. 146 – 150 and

Aoife Duffy, **"Expulsion to Face Torture? Non-Refoulement in International Law"**, Oxford University Press, 25 June 2008, available at: *http://www.eui.eu/Documents/DepartmentsCentres/AcademyofEuropeanLaw/CourseMaterialsHR/HR2010/Chetail/ChetailReading1.pdf*, last accessed 10 March 2014

[26] Farmer Alice, **"Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures That Threaten Refugee Protection"**, Georgetown Immigration Law Journal, Volume 23, Number 1, Fall 2008, available at: *http://works.bepress.com/alice_farmer/1/*, last accessed 10 March 2014 and

Wouters Kees, **"International Legal Standards for the Protection from Refoulement"**, Intersentia, Antwerp, 2009, available at: *https://openaccess.leidenuniv.nl/bitstream/handle/1887/13756/000-wouters-B-25-02-2009.pdf?sequence=2*, last accessed 22/04/2014

Hathaway J. C. and Harvey C. J, **"Framing Refugee Protection in the New World Disorder"**, 2001, Cornell Journal of International Law, pg. 290, available at: *http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1940&context=articles*, last accessed 9 June 2014

[27] See Supra note 25 and 26.

[28] Farmer Alice, **"Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures That Threaten Refugee Protection"**, Georgetown Immigration Law Journal, Volume 23, Number 1, Fall 2008, available at: *http://works.bepress.com/alice_farmer/1/*, last accessed 10 March 2014

the Convention, the fundamental nature of non-refoulement and of course the close correlation with human rights principles must all be taken into account when interpreting the exceptions to non refoulement, suggesting they must be read in a restrictive manner.

c. The principle of non-refoulement applied as a component part of the prohibition on torture or cruel, inhuman or degrading treatment or punishment

The Human Rights Conventions provide more extensive protection against refoulement than the 1951 Convention relating to the Status of Refugees.[29] There is an obvious overlap of torture and refugee law in the context of non refoulement and the treaties have essentially a mutual enhancement effect. Indeed, the prohibition on refoulement in international law derives both from refugee-related sources and from other areas. UNHCR's Executive Committee acknowledges the considerable overlap, calling on states to strengthen the "institution of asylum" by upholding the principle of non-refoulement both in the refugee context and in the torture context.

However, the system of protection against refoulement offered by the Refugee Convention is distinct from that under the other three instruments, which have an international enforcement mechanism, while it relies on the power of the judiciary in each Member State to interpret the provisions of the Convention. Also, the Convention is limited to persons recognized as refugees and to asylum-seekers who are awaiting a decision on their refugee status, while the personal scope of human right treaties is far broader. The Human Rights Conventions offer considerable advantages over the Refugee Convention to persons not formally recognised as refugees against return to a country where they would fear for their security. The articles covering non refoulement on these Conventions are absolute and unconditional. Moreover, the individual does not need to be a citizen of a contracting party, or even to be inside the territory of a contracting State[30].

[29] Lambert Hélène, **"Protection Against Refoulement from Europe: Human Rights Law Comes to the Rescue"**, International and Comparative Law Quarterly, 48, pp 515-544, 1999, available at: *http://journals.cambridge.org/abstract_S0020589300063429*, last accessed 29 June 2014

[30] Ibid.

The European Convention for the Protection of Human Rights and Fundamental Freedoms[31] does not contain an explicit prohibition on refoulement, although Article 4 of Protocol No. 4 prohibits the collective expulsion of aliens and Article 1 of Protocol No. 7 contains some procedural safeguards relating to the expulsion of lawfully residing aliens. However, under Article 3 of the Convention a refoulement prohibition has been developed through the case law of the European Court on Human Rights the former European Commission on Human Rights. Furthermore, the Court has accepted the existence of a prohibition on refoulement under Article 2 (the right to live) and Article 1 of Protocols 6 and 13 (the abolition of the death penalty) to the Convention. The Court has also acknowledged the existence, in exceptional cases, of a prohibition on refoulement under Article 6 (the right to a fair trial).

Article 3

Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Even though States parties to the Convention have a right to control the entry, residence and expulsion of aliens, the removal of an individual by a State party to any country may give rise to an issue under Article 3 when substantial grounds have been shown for believing that the person in question, if removed, would face a real risk of being subjected to treatment proscribed by the article. The responsibility of a State party is then engaged because of the act of removal or, in general, any act exposing the individual to such a risk. As early as 1965 the Parliamentary Assembly of the Council of Europe acknowledged that "article 3 of the Convention for the Protection of Human Rights and Freedoms…by prohibiting inhuman treatment, binds contracting parties not to return refugees to a country where their life or freedom

[31] The ECHR was adopted by the Council of Europe on 4 November 1950 in Rome and entered into force on 3 September 1953. According to the preamble, the Convention was a first step towards collective enforcement of certain rights set out in the Universal Declaration of Human Rights (UDHR). The Convention contains clear individual human rights and correlative obligations on States parties which are of an objective nature and protect the fundamental rights of individuals rather than the interests of Contracting States.

European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, Council of Europe, 4 November 1950, ETS 5, available at: *http://www.refworld.org/docid/3ae6b3b04.html*, last accessed 17 July 2014

would be threatened"[32]. The obligation on States parties to protect an individual against refoulement was accepted for the first time by the Court in Soering v. the United Kingdom[33], which involved an extradition request by the United States of America to the United Kingdom. In the context of asylum a prohibition on refoulement was accepted by the Court for the first time in Cruz Varas and Others v Sweden[34]. Also, important is the ruling by the European Court of Human Rights, in the case of Chahal v. United Kingdom[35], that the "protection afforded by Article 3 is wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees". Furthermore, the protection of the European Convention is wider also in the sense of the personal scope of the provision as the word “everyone” in Article 1 of the Convention implies that no limitation as to the protected person’s nationality or legal status may be applied. So non refoulement is not limited to nationals of one or all States parties, but is guaranteed to all individuals, including stateless persons and illegal aliens.

Torture, inhuman and degrading treatment and punishment are prohibited by Article 3 of the ECHR in absolute terms. That means that the penalising nature and deterrent effect of judicial punishment, the conduct of the victim, serious socio-economic problems and the lack of resources of the State and the fight against organised crime and terrorism cannot be reasons for States to torture or ill-treat a person within the meaning of Article 3. Even though the text of the Article does not say so explicitly, it does not allow for any exceptions, contrary to many other Articles of the Convention, for such reasons as public order, health, morals or national security. Furthermore, Article 15.2 of the Convention explicitly prohibits derogations from Article 3 in times of war or other public emergencies threatening the life of the nation. The absolute character of Article 3 of the Convention has often been

[32] Council of Europe, **Recommendation 434 (1965) on the Granting of the Right of Asylum to European Refugees**, 1 October 1965, 434 (1965), available at: *http://www.refworld.org/docid/3ae6b38110.html*, last accessed 17 July 2014

[33] **Soering v. The United Kingdom**, 1/1989/161/217, Council of Europe: European Court of Human Rights, 7 July 1989, available at: *http://www.refworld.org/docid/3ae6b6fec.html*, last accessed 17 July 2014

[34] **Cruz Varas and Others v. Sweden**, 46/1990/237/307 , Council of Europe: European Court of Human Rights, 20 March 1991, available at: *http://www.refworld.org/docid/3ae6b6fe14.html*, last accessed 17 July 2014

[35] **Chahal v. The United Kingdom**, 70/1995/576/662, Council of Europe: European Court of Human Rights, 15 November 1996, available at: *http://www.refworld.org/docid/3ae6b69920.html*, last accessed 17 July 2014

emphasised by the Court in its case law, as in Saadi v Italy[36] and in Chahal v the United Kingdom[37] in which case the applicant, an Indian national and supporter of Sikh separatism, was suspected of having committed terrorist activities inside the United Kingdom. Although the British authorities considered a balancing act between the national security of the United Kingdom and Chahal's need to be protected to be necessary, the Court ruled that the absolute character of Article 3 of the Convention did not permit deportation to India if there was a real risk of his being subjected to torture or inhuman or degrading treatment or punishment, irrespective of the applicant's conduct, however undesirable or dangerous to the country's national security. According to the Court Article 3 ECHR leaves no room whatsoever for a balancing act between the national security of a State and the need of the individual for protection. A similar decision was taken by the Court in Ahmed v Austria[38] involving a Somalian national whose refugee status was revoked by Austria because of his conviction for attempted robbery. The Court concluded that expulsion by Austria to Somalia would be in breach of Article 3 of the Convention because of a real risk of proscribed ill-treatment irrespective of the applicant's criminal conviction. The Court reconfirmed the absolute character of Article 3 in a refoulement case, N. v Finland[39].

The International Covenant on Civil and Political Rights[40] does not explicitly foresee a prohibition of non refoulement but over the years the Human Rights Committee has developed a concept of non-refoulement obligations under the ICCPR.

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[36] **Saadi v. Italy**, Appl. No. 37201/06, Council of Europe: European Court of Human Rights, 28 February 2008, available at: *http://www.refworld.org/docid/47c6882e2.html*, accessed 17 July 2014

[37] Supra note 35.

[38] **Ahmed v. Austria**, 71/1995/577/663, Council of Europe: European Court of Human Rights, 17 December 1996, available at: *http://www.refworld.org/docid/3ae6b62f2c.html*, last accessed 17 July 2014

[39] **N. v. Finland**, 38885/02, Council of Europe: European Court of Human Rights, 26 July 2005, available at: *http://www.refworld.org/docid/437dcf4ea.html*, last accessed 17 July 2014

[40] The ICCPR was adopted in 1966 and entered into force on 23 March 1976. Together with the Universal Declaration of Human Rights and the 1966 International Covenant on Economic, Social and Cultural Rights the ICCPR forms the core of the international human rights protection instruments of the United Nations (the so-called International Bill of Human Rights). The ICESCR and ICCPR together give shape to most of the human rights listed in the UDHR. Unlike the UDHR, the ICESCR and ICCPR are treaties and therefore legally binding on the States party to them. The ICCPR is supplemented by two Optional Protocols. The First Optional Protocol grants individuals the right to complain about violations of their rights. The Second Optional Protocol provides extra protection to the right to life by prohibiting the death penalty.

International Covenant on Civil and Political Rights, UNGA, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: *http://www.refworld.org/docid/3ae6b3aa0.html*, last accessed 14 July 2014

The basis for the prohibition on refoulement developed under the ICCPR is the general obligation on States parties to respect and to ensure the rights of the Covenant to all those, irrespective of their nationality or legal status, who are within the State's territory and all those who are outside the State's territory but under its effective authority or control. No territorial limitations are implied. The prohibition on refoulement is an integral part of the right to life (article 6) and the prohibition on torture and cruel, inhuman or degrading treatment or punishment (article7). The Human Rights Committee has not ruled out the possibility of a prohibition on refoulement existing in relation to other provisions of the Covenant, but has failed to substantiate this[41].

Article 6

1. 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.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

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.

[41] Supra note 26 Wouters (2009).

The first time that the HRC was concerned with a refoulement issue was in March 1989 when it had declared Torres v Finland[42] admissible. This case involved a Spanish national who complained that his extradition by Finland to Spain would be in breach of Article 7 of the ICCPR because he would be at risk of being subjected to treatment contrary to Article 7. In Kindler v Canada[43] the prohibition on refoulement was for the first time confirmed by the Human Rights Committee as "…if a State party extradites a person within its jurisdiction in circumstances such 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". These decisions led to the second General Comment[44] on Article 7, in which the Committee explicitly stated that "States parties must not expose individuals to the danger of torture, cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement". Also, in General Comment 31[45] on general legal obligations imposed on States parties to the Covenant the Human Rights Committee considered that States parties have "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".

The prohibition of refoulement under the ICCPR is of an absolute character and is not subject to any exceptions as was acknowledged by the Human Rights Committee in various views. For example, in the Concluding Observations on Canada[46] the Committee expressed its concerns "that Canada takes the position that compelling security interests may be invoked to justify the removal of aliens to

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[42] **Torres v. Finland**, CCPR/C/38/D/291/1988, UN Human Rights Committee (HRC), 5 April 1990, available at: *http://www.refworld.org/docid/47fdfaf5d.html*, last accessed 14 July 2014

43 **Kindler v. Canada**, CCPR/C/48/D/470/1991, UN Human Rights Committee (HRC), 1993, available at: *http://www1.umn.edu/humanrts/undocs/html/dec470.htm*, last accessed 14 July 2014

44 Human Rights Committee, General Comment 2, **Reporting guidelines** (Thirteenth session, 1981), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 124, 2003, available at: *http://www1.umn.edu/humanrts/gencomm/hrcom2.htm*, last accessed 14 July 2014

[45] Human Rights Committee, **General Comment 31**, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 2004, available at: *http://www1.umn.edu/humanrts/gencomm/hrcom31.html*, last accessed 14 July 2014

[46] Human Rights Committee, **UN Human Rights Committee: Concluding Observations: Canada**, 7 April 1999, CCPR/C/79/Add.105, available at: *http://www.refworld.org/docid/3df378764.html*, last accessed 14 July 2014

countries where they may face a substantial risk of torture or cruel, inhuman or degrading treatment. The Committee … recommends that Canada revise this policy in order to comply with the requirements of article 7 and to meet its obligation never to expel, extradite, deport or otherwise remove a person to a place where treatment or punishment that is contrary to article 7 is a substantial risk". And in the Concluding Observations on Portugal[47] in 2003, with reference to asylum seekers who were excluded from refugee status under Article 1.F of the Refugee Convention, the Committee considered that "the State party should ensure that persons whose applications for asylum are declared inadmissible are not forcibly returned to countries where there are substantial grounds for believing that they would be in danger of being subjected to arbitrary deprivation of life or to torture or ill-treatment…". In Mansour Ahani v Canada[48] the Committee reiterated the absolute character of Article 7 and the prohibition on refoulement it entails. The Committee refered "…to the Supreme Court's holding that deportation of an individual where a substantial risk of torture had been found to exist was not necessarily precluded in all circumstances. While it has neither been determined by the State party's domestic courts or by the Committee that a substantial risk of torture did exist in the author's case, the Committee expresses no further view on this issue other than to note that the prohibition on torture, including as expressed in article 7 of the Covenant, is an absolute one that is not subject to countervailing considerations". In C. v Australia[49] the author had been convicted of aggravated burglary and threats to kill, for which he was sentenced to three-and-a-half years' imprisonment. For this reason Australia wanted to deport him in spite of his refugee status. The Committee remained silent about the author's criminal conviction and concluded that he could not be deported because he had a real risk of being subjected to proscribed ill-treatment. The Human Rights Committee generally remains silent in the case in which the persons concerned have been convicted of various crimes and posed a threat to the State party's public

[47] Human Rights Committee, **UN Human Rights Committee: Concluding Observations: Portugal**, 17 August 2003, CCPR/CO/78/PRT, available at: *http://www.refworld.org/docid/3f8d4d144.html*, last accessed 14 July 2014

[48] **Mansour Ahani v. Canada**, CCPR/C/80/D/1051/2002, UN Human Rights Committee (HRC), 15 June 2004, available at: *http://www.refworld.org/docid/4162a5a50.html*, last accessed 14 July 2014

[49] **C. v. Australia**, CCPR/C/76/D/900/1999, UN Human Rights Committee (HRC), 13 November 2002, available at: *http://www.refworld.org/docid/3f588ef00.html*, last accessed 14 July 2014

order and/or national security; so clearly; criminal conviction is not a material consideration for the Committee with regard to the prohibition on refoulement.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[50] is the only human rights' treaty, under examination on this framework, which contains an explicit prohibition on refoulement:

> ***Article 3***
>
> *1. 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.*
>
> *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 violations of human rights.*

The prohibition on refoulement in Article 3 of the Convention against Torture prohibits the return of a person to a country where he or she runs a risk of being subjected to torture. Sweden included what is now Article 3 in its initial draft of the treaty based on jurisprudence of the European Commission on Human Rights discussed above. This explicit prohibition on refoulement is partly based on Article 33 of the Refugee Convention and inspired by the development of a prohibition on refoulement under Article 3 of the ECHR. Article 3 of the Convention against Torture is one of a set of measures aimed at strengthening the struggle against practices of torture and preventing people from becoming victims of torture. The prohibition on refoulement applies to all people who are within the territory of a State party or, when outside the State party's territory, are under its actual control or authority. A person is not protected by Article 3 of the Convention when he remains in his country of origin.

[50] The Convention against Torture was adopted by the United Nations General Assembly on 10 December 1984 and entered into force on 26 June 1987. The Convention against Torture consists, in total, of 33 Articles divided into three parts. Part I (Articles 1 to 16) contains the substantive provisions of the Convention, entailing various obligations for States parties as well as a general definition of torture (Article 1). Part II (Articles 17 to 24) contains implementation provisions and those regarding the establishment and operation of the Committee against Torture, and Part III of the Convention (Articles 25 to 33) contains a variety of final treaty clauses.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: *http://www.refworld.org/docid/3ae6b3a94.html*, last accessed 14 July 2014

However, Article 3 of the Convention has its own limitations. Firstly, it is limited to acts of torture and does not refer to other acts of cruel, inhuman or degrading treatment or punishment and secondly the potential danger must emanate exclusively from state actors. During the drafting of the Convention it was discussed whether or not the prohibition on refoulement in Article 3 of the Convention should also apply to such treatment. The decision of the drafters not to include a prohibition on refoulement regarding cruel, inhuman or degrading treatment or punishment and the explicit wording of Article 16 of the Convention imply that Article 16 does not contain a prohibition on refoulement, as it is further confirmed by the Committee against Torture in the T.M. v Sweden[51] as it was considered "…that the scope of the non-refoulement obligation described in Article 3 does not extend to situations of ill-treatment envisaged by Article 16…". Although Article 16 of the Convention does not protect from refoulement when there is no risk of torture, it can be applicable in situations of refoulement, when the removal itself would be inhuman or degrading. In G.R.B. v Sweden[52], for example, the Committee considered the possibility that the aggravation of the author's state of health caused by deportation itself could amount to cruel, inhuman or degrading treatment envisaged in Article 16. These limitations have several consequences. First, for conduct to amount to torture it is necessary for it to cause severe physical or mental pain or suffering. Secondly, such pain or suffering must be inflicted intentionally. Thirdly, the pain or suffering must be inflicted for a certain purpose which relates, even remotely, to the interests or policies of the State. Fourthly, torture can only be inflicted by, at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In other words, the State authorities must somehow be responsible for the act of torture to occur, because the State either acted or refrained from acting. Consequently, an act committed by non-State actors can amount to torture if the State knew, could have known or ought to have known that it was about to be committed or had been committed and the State failed to respond to the best of its de facto capabilities and in accordance with its legal obligations[53].

[51] **T.M. v. Sweden**, CAT/C/31/D/228/2003, UN Committee Against Torture (CAT), 2 December 2003, available at: *http://www.refworld.org/docid/404887e41.html*, accessed 16 July 2014

[52] **G.R.B. v. Sweden**, CAT/C/20/D/083/1997, UN Committee Against Torture (CAT), 15 May 1998, available at: *http://www.refworld.org/docid/3f588ee53.html*, accessed 16 July 2014

[53] Supra note 26 Wouters (2009).

Article 3 of the Convention against Torture is formulated in absolute terms. Article 2, which contains the negative duty not to torture, includes an express prohibition on justifications for torture; a prohibition not replicated in Article 3. Nevertheless, the Committee considers that the test of Article 3 of the Convention is absolute and that no exceptions are permitted. In Paez v Sweden[54] the Committee stated that "…the test of article 3 of the Convention is absolute. Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention"[55]. Also, in M.B.B. v Sweden[56] the Committee claimed that "…the legal status of the individual concerned in the country where he/she is allowed to stay is not relevant…" Therefore, it is obvious that no-one can be removed by a State party because he poses a threat to the national security of that State or its people or because he has committed serious criminal offences within a State party to the Convention and is therefore ineligible for asylum under domestic law. Furthermore, whatever the nature of the activities in which the person concerned was, or still is, engaged, they cannot be a material consideration under Article 3. These include activities which would, for example, lead to the exclusion of refugee status under Article 1.F of the 1951 Convention relating to the Status of Refugees.

d. European Law

Under EU law, Article 78 of the TFEU[57] stipulates that the EU must provide a policy for asylum, subsidiary protection and temporary protection, "ensuring

[54] **Gorki Ernesto Tapia Paez v. Sweden**, CAT/C/18/D/39/1996, UN Committee Against Torture (CAT), 28 April 1997, available at: *http://www.refworld.org/docid/3ae6b6de10.html*, last accessed 15 July 2014

[55] The same view was supported by the Committee also in other cases as in Seid Mortesa Aemei v. Switzerland (CAT/C/18/D/34/1995), AT, V.X.N. and H.N. v Sweden (CAT/C/24/D/130/1999 and CAT/C/24/D/131/1999), Chahin v. Sweden (CAT/C/46/D/310/2007), Nirmal Singh v. Canada (CAT/C/46/D/319/2007), Harminder Singh Khalsa et al. v. Switzerland (CAT/C/46/D/336/2008) et al.

[56] **M.B.B. v. Sweden**, CAT/C/22/D/104/1998, UN Committee Against Torture (CAT), 21 June 1999, available at: *http://www.refworld.org/docid/3f588edba.html*, last accessed 15 July 2014

[57] Article 78: (ex. Articles 63, points 1 and 2, and 64(2) TEC) 1. 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 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

compliance with the principle of non-refoulement. This policy must be in accordance with the 1951 Geneva Convention and its Protocol and other relevant treaties", such as the ECHR, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the ICCPR. The EU asylum measures that have been adopted under this policy, includes the Dublin Regulation[58], the Qualification Directive[59], the Asylum Procedures Directive[60] and the Reception Conditions Directive[61].

The Qualification Directive brought into EU law a set of common standards for the qualification of persons as refugees or those in need of international protection. This includes the rights and duties of that protection, a key element of which is non-refoulement under Article 33 of the 1951 Geneva Convention. However it does not absolutely prohibit such refoulement. The articles allow for the removal of a refugee in very exceptional circumstances, namely when the person constitutes a danger to the security of the host state or when, after the commission of a serious crime, the person

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other relevant treaties. 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising: (a) a uniform status of asylum for nationals of third countries, valid throughout the Union; (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection; (c) a common system of temporary protection for displaced persons in the event of a massive inflow; (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status; (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection; (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection; (g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection. 3. In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament."

Treaty on the Functioning of the European Union, European Union, 26 October 2012, OJ L. 326/47-326/390; 26.10.2012, available at: *http://www.refworld.org/docid/52303e8d4.html*, last accessed 15 July 2014

[58] Council Regulation (EC) No 604/2013 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, (Dublin III Regulation), available at: *http://www.refworld.org/docid/51d298f04.html*, last accessed 15 July 2014

[59] Council 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**, 20 December 2011, OJ L 337; December 2011, pp 9-26, available at: *http://www.refworld.org/docid/4f197df02.html*, last accessed 15 July 2014

[60] Council 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**, 29 June 2013, L 180/60, available at: *http://www.refworld.org/docid/51d29b224.html*, last accessed 15 July 2014

[61] Council 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**, 29 June 2013, L 180/96 , available at: *http://www.refworld.org/docid/51d29db54.html*, last accessed 15 July 2014

is a danger to the community. When implementing the Qualification Directive in Salahadin Abdulla and Others[62], the CJEU underlined "that it is apparent from recitals 3, 16 and 17 in the preamble to the Directive that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the Directive for determining who qualifies for refugee status and the content thereof were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria".

Also, under the EU Charter of Fundamental Rights[63] Article 18 guarantees the right to asylum, which includes compliance with the non-refoulement principle and article 19 of the Charter provides that no one may be removed, expelled or extradited to a state where they would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. The Explanation to the Charter[64] states that Article 19.2 incorporates the relevant case law of the ECtHR regarding Article 3 of the ECHR. Therefore any form of removal under the Return Directive or transfer of an individual to another EU Member State under the Dublin Regulation must be in conformity with the right to asylum and the principle of non-refoulement. Lastly, under EU law and more specific Articles 3 and 3a of the Schengen Borders Code[65], stipulates that border management activities must respect the principle of non-

[62] **Salahadin Abdulla and Others v. Bundesrepublik Deutschland**, C-175/08; C-176/08; C-178/08 & C-179/08, Court of Justice of the European Union, 2 March 2010, available at: *http://www.refworld.org/docid/4b8e6ea22.html*, last accessed 15 July 2014

[63] Article 18 (Right to asylum): 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').

Article 19 (Protection in the event of removal, expulsion or extradition): 1. Collective expulsions are prohibited. 2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

European Union, **Charter of Fundamental Rights of the European Union**, 26 October 2012, 2012/C 326/02, available at: *http://www.refworld.org/docid/3ae6b3b70.html*, last accessed 15 July 2014

[64] European Union, **Explanations Relating To The Charter Of Fundamental Rights**, 2007/C 303/02, *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF*, last accessed 15 July 2014

[65] Council Regulation (EU) No 610/2013 Of The European Parliament And Of The Council of 26 June 2013 amending Regulation (EC) No 562/2006 of the European Parliament and of the Council **establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), the Convention implementing the Schengen Agreement, Council Regulations (EC) No 1683/95 and (EC) No 539/2001 and Regulations (EC) No 767/2008 and (EC) No 810/2009 of the European Parliament and of the Council,** available at: *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:182:0001:0018:EN:PDF*, last accessed 15 July 2014

refoulement. Given the complexity of the issue[66], the EU adopted guidelines to assist Frontex in the implementation of operations at sea[67]. In European Parliament v. Council of the EU[68], the European Parliament called on the CJEU to pronounce itself on the legality of the guidelines for Frontex operations at sea. The guidelines were adopted without full involvement of the European Parliament. The CJEU annulled them, despite stating that they should continue to remain in force until replaced. The CJEU pointed out that the adopted rules contained essential elements of external maritime border surveillance and thus entailed political choices, which must be made following the ordinary legislative procedure with the Parliament as co-legislator. Moreover, the Court noticed that the new measures contained in the contested decision were likely to affect individuals' personal freedoms and fundamental rights and therefore these measures again required the ordinary procedure to be followed. The European Commission presented a proposal for a new regulation[69].

e. Other treaties

Except from the main treaties that were examined until now, there are also other international instruments that deal with the prohibition of non refoulement.

The International Convention for the Protection of all Persons from Enforced Disappearance[70], in article 16 includes an obligation not to transfer someone to a State where there are substantial grounds for believing he will be subjected to enforced disappearance.

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[66] For further analysis see below Part 2

[67] Council Decision of 26 April 2010 **supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union**, (2010/252/EU), available at: *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:111:0020:0026:EN:PDF*, last accessed 15 July 2014

[68] **European Parliament v. Council of the European Union, C-133/06**, European Union: Court of Justice of the European Union, 6 May 2008, available at: *http://www.refworld.org/docid/4832ddb92.html*, last accessed 15 August 2014

[69] European Commission, COM(2013) 197 final, Brussels, 12 April 2013

[70] Article 16:1. No State Party shall expel, return ("refouler"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.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 violations of human rights or of serious violations of international humanitarian law. **International Convention for the Protection of All Persons from Enforced Disappearance,** UN General Assembly, 20 December 2006, available at: *http://www.refworld.org/docid/47fdfaeb0.html*, last accessed 15 July 2014

Also, the Committee on the Rights of the Child has interpreted the Convention on the Rights of the Child[71] to include an open-ended obligation not to transfer children "where there are substantial grounds for believing that there is a real risk of irreparable harm to the child." The Committee suggested that a wide range of potential post-transfer problems should preclude transfer, including inadequate access to food or health care services and real risk of underage recruitment for sexual abuse or military service[72].

Lastly, as far as activities on the high seas are concerned, the Law of the Sea plays also an important role. Such activities are regulated by the UN Convention on the Law of the Sea[73] as well as by the Safety of Life at Sea (SOLAS)[74] and Search and Rescue (SAR) Conventions[75]. These instruments contain a duty to render assistance and rescue persons in distress at sea. A ship's captain is furthermore under the obligation to deliver those rescued at sea to a 'place of safety'. In this context, one of the most controversial issues is where to disembark persons rescued or intercepted at sea[76].

1.1.2. Non Refoulement as Customary International Law

The emergence of the principle of non refoulement as part of international customary law is important as there are aspects concerning the matter of non refoulement that are not covered by the aforementioned treaties. Even though almost 90 per cent of the states are obliged by some treaty to a non refoulement close there are still states that are not contradictory parties in any such legal binding text. But these states are not free of the obligations relating to the treatment and the movement of people. The same applies to the states with no relevant legislation but with a

[71] **Convention on the Rights of the Child**, UN General Assembly, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: *http://www.refworld.org/docid/3ae6b38f0.html*, last accessed 15 July 2014

[72] Padmanabhan Vijay, **"To Transfer or Not to Transfer: Identifying and Protecting Human Rights Interests in Non-Refoulement"**, 80 FordhamL.Rev. 73, 2011, available at: *http://ir.lawnet.fordham.edu/flr/vol80/iss1/3*, last accessed 22 April 2014

[73] **Convention on the Law of the Sea**, UN General Assembly, 10 December 1982, available at: *http://www.refworld.org/docid/3dd8fd1b4.html*, last accessed 15 July 2014

[74] **International Convention for the Safety of Life At Sea,** International Maritime Organization, 1 November 1974, 1184 UNTS 3, available at: *http://www.refworld.org/docid/46920bf32.html*, last accessed 10 March 2014

[75] **International Convention on Maritime Search and Rescue**, International Maritime Organization (IMO), 27 April 1979, 1403 UNTS, available at: *http://www.refworld.org/docid/469224c82.html*, last accessed 15 July 2014

[76] For further analysis see chapter 2.1.

provision that the national courts are able to treat customary international law as part of the national law[77].

There are some academics and commentators[78] arguing that the principle of non-refoulement couldn't be considered as part of the customary law. Most of them argue that there is no consistency in state practice and focus on states of Asia that have been repeatedly violating the law with refugees' deportations. Hathaway claims that "there is a real risk that wishful legal thinking about the scope of the duty of non-refoulement may send the signal that customary law as a whole is essentially rhetorical, with a resultant dilution of emphasis on the real value of those norms which really have been accepted as binding by a substantial majority of states. There is no doubt that many refugees will benefit from at least one of the various treaty-based duties of non-refoulement; it may also be the case that the increasing propensity of states to embrace non-refoulement of some kind in their domestic laws may at some point give rise to at least a lowest common denominator claim based on a new general principle of law". Others support that after the changes since the events of 11 September 2001 "the existence of terrorist exceptions to the prohibition on refoulement, either through the use of a balancing test in some jurisdictions or the current practice of rendition, alongside Refugee Convention exceptions, indicates that the goal of acquiring peremptory status for the principle of non-refoulement in international law has yet to be reached"[79]. But this position ignores the lengths to which states have gone to characterize returns as something other than refoulement[80].

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[77] Supra Note 17, Lauterpacht and Bethlehem (2003).

[78] Hathaway James C., **"The Rights of Refugees under International Law"**, Cambridge University Press, 2005

Hathaway James C., **"Leveraging Asylum",** (November 16, 2009), University of Melbourne Legal Studies, Research Paper No. 430; Texas International Law Journal, Vol. 45, No. 3, available at SSRN: *http://ssrn.com/abstract=1507308*, last accessed 10 March 2014

Hathaway James C, **"Why Refugee Law Still Matters"**, available at: *http://law.queensu.ca/events/lectureshipsVisitorships/hathawayPaper.pdf*, last accessed 10 March 2014

and the response to the latter:

Gregor Noll, **"Why Refugees Still Matter: A Response To James Hathaway"**, available at: *http://www.law.unimelb.edu.au/files/dmfile/download08831.pdf*, last accessed 10 March 2014

Gammeltoft-Hansen Thomas, **"Access to Asylum: International Refugee Law and the Globalisation of Migration Control"**, Cambridge University Press, 2011

[79] Duffy Aoife, **"Expulsion to Face Torture? Non-refoulement in International Law"**, available at:
http://www.eui.eu/Documents/DepartmentsCentres/AcademyofEuropeanLaw/CourseMaterialsHR/HR2010/Chetail/ChetailReading1.pdf, last accessed 10 March 2014

[80] Guy S. Goodwin-Gill and Jane Mc Adam, "The Refugee in International Law", Cambridge University Press: Cambridge, 2005

According to Article 38 par. 1 of the Statute[81] of the International Court of Justice international custom is a general practice accepted as law. Therefore, for an international custom to exist there are two elements that are necessary: the effective and actual practice of state and the opinio juris sive necessitatis. In the case of refoulement, as we show above, all the articles containing the prohibition are of a fundamentally norm creating character such as could be regarded as forming the basis of a general rule of law[82]. The universality of the principle of non refoulement has nevertheless been a constant emphasis of other instruments, including declarations, recommendations and resolutions at both international and regional level.

When examining state practice to determine relevant rules of international law, it is necessary to take into account every activity of the organs and officials of states that relate to that purpose. There has been continuing debate over where a distinction should be drawn as to the weight that should be attributed to what states do, rather than what they say that represents the law. The notion of practice establishing a customary rule implies that the practice is followed regularly or that such state practice must be "common, consistent and concordant"[83] Given the size of the international community, the practice does not have to encompass all states or be completely uniform. There has to be a sufficient degree of participation, especially on the part of states whose interests are likely be most affected[84], and an absence of substantial dissent[85]. There have been a number of occasions on which claims that a customary rule existed were rejected because of a lack of consistency in the practice[86]. A dissenting state is entitled to deny the opposability of a rule in question if it can demonstrate its persistent objection to that rule, either as a member of a regional

[81] United Nations, **Statute of the International Court of Justice**, 18 April 1946, available at: *http://www.refworld.org/docid/3deb4b9c0.html*, last accessed 15 March 2014

[82] Supra Note 80, Goodwin-Gill and Jane Mc Adam (2005).

[83] **Fisheries Jurisdiction (United Kingdom v. Iceland)**, Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, available at: *http://www.icj-cij.org/docket/files/55/5749.pdf*, last accessed 15 March 2014

[84] **North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)** Judgment, I.C.J. Reports 1969, available at: *http://www.icj-cij.org/docket/files/51/5535.pdf*, last accessed 15 March 2014

[85] **Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)**, Merits, Judgment, I.C.J, Reports 1986, available at: *http://www.icj-cij.org/docket/files/70/6503.pdf*, last accessed 15 March 2014

[86] **Asylum case (Colombia v Peru)**, Judgment of November 20th 1950: I.CJ, Reports 1950, available at: *http://www.icj-cij.org/docket/files/7/1849.pdf*, last accessed 15 March 2014

group or by virtue of its membership of the international community[87]. It is not easy for a single state to maintain its dissent.

State practice before 1951 is not clear as to whether article 33 of the 1951 Convention crystallized a rule of customary international law. However, state practice since then, is a persuasive evidence of the concretization of a customary rule. The near universal participation by States in one or more treaty regimes embodying as an essential element the principle of non-refoulement has already been noted. To this practice may also be added the widespread practice by States of either expressly incorporating treaties embodying non-refoulement into their national legal order or enacting more specific legislation reflecting the principle directly. The widespread incorporation of this principle into the internal legal order of States can be taken as evidence of State practice and opinion juris in support of a customary principle of non-refoulement[88].

State actual practices of not rejecting, removing and returning refugees within their territory to a frontier where the refugees will be persecuted or their life and liberty are at risk of persecution, torture or any inhumane and degrading treatment, including their practice in relation to extradition is perhaps the most controversial argument. Despite their compliance to the rule of non refoulement, at the same time, many states do act against the principle and justify the breach and violation by citing security, socio and economic reasons. States for instance, adopt a restrictive legal measures which indirectly preventing persons in need of international protection from entering a safe territory to enable them to apply for asylum. In mass influx situations, some states have deliberately closed their borders to asylum seekers. Nevertheless, none of this state have cited non obligation or denied their responsibility under the rule of non refoulement. The various form of violation therefore, will not undermine the consistency and uniformity of non refoulement practice[89].

The completion of the notion of custom demands the acts concerned not only to amount to a settled practice, but to be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law

[87] Supra Note 84.

[88] Supra Note 17, Lauterpacht and Bethlehem (2003).

[89] Supaat Dina Imam, **Escaping The Principle Of Non- Refoulement**, International Journal of Business, Economics and Law, Vol. 2, Issue 3, available at: *http://klibel.com/wp-content/uploads/2013/05/kll2347-dina-imam-supaat-escaping-the-principle-of-non-refoulement.pdf*, last accessed 15 March 2014

requiring it[90]. Because opinio juris refers to the psychological state of the state actor, asking why the state behaved as it did, it can be difficult to identify and to prove. In practice, a variety of sources tend to be used to demonstrate the existence of opinio juris, including evidence such as diplomatic correspondence, press releases and other government statements of policy, opinions of legal advisers, official manuals on legal questions, legislation, national and international judicial decisions, legal briefs endorsed by the state, a pattern of treaties ratified by the state that all include the same obligations, resolutions and declarations by the United Nations, and other sources[91]. The two elements of custom are equal.

In addition to the normative character of the principle of non-refoulement in various treaties, the principle is also reflected in a number of important nonbinding international texts either expressed in normative terms or affirming the normative character of the principle. A particularly important example is the Declaration on Territorial Asylum[92] adopted by the UNGA unanimously on 14 December 1967. Other instruments of a similar character include the Asian-African Refugee Principles (The Bangkok Principles)[93], the Cartagena Declaration[94], the Sanremo Declaration[95] and various expressions of the principle by the Council of Europe. Although non-binding in character, the State practice and opinion juris which these instruments reflect support the existence of a customary principle of non-refoulement.

The view that the principle of non refoulement is now part of the international customary law has been also expressed in successive Conclusions of the Executive Committee[96]. For example, in Conclusion No. 6[97], the Executive Committee observed

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[90] Supra note 84.

[91] Emmanouel I. Roukounas, **"International Law (Διεθνές Δίκαιο)"**, Sakkoulas, 3rd edition, 2004

[92] UNGA, **Declaration on Territorial Asylum**, 14 December 1967, A/RES/2312(XXII), available at: *http://www.refworld.org/docid/3b00f05a2c.html*, last accessed 21 July 2014

[93] **Bangkok Principles on the Status and Treatment of Refugees ("Bangkok Principles")**, Asian-African Legal Consultative Organization (AALCO), 31 December 1966, available at: *http://www.refworld.org/docid/3de5f2d52.html*, last accessed 21 July 2014

[94] **Cartagena Declaration on Refugees**, Regional Refugee Instruments & Related, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, available at: *http://www. refworld.org/docid/3ae6b36ec.html*, last accessed 10 March 2014

[95] **Sanremo Declaration on the Principle of Non-Refoulement**, International Institute of Humanitarian Law and UNHCR, Sanremo Italy, 2001, available at: *http://tinyurl.com/ppl4t3v*, last accessed 21/07/2014

[96] ECOSOC, by Resolution 672 (XXV) of 30 April 1958, established the Executive Committee of the High Commissioner's Programme ('Executive Committee') with a membership of twenty-four States. Resolution 672 (XXV) provided that the Executive Committee shall determine the general policies under which the High Commissioner shall plan, develop and administer the programmes and projects required to help solve the problems referred to in resolution 1166 (XII)'.26 Membership of the Executive Committee, progressively expanded since its establishment, currently stands at fifty-seven

that "…the fundamental humanitarian principle of non-refoulement has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States". In Conclusion No. 17[98], the Executive Committee "reaffirmed the fundamental character of the generally recognized principle of non-refoulement". The point was expressed more forcefully in Conclusion No. 25[99] in which the Executive Committee "…reaffirmed the importance of the basic principles of international protection and in particular the principle of non-refoulement which was progressively acquiring the character of a peremptory rule of international law". Similar statements are to be found in more recent Conclusions of the Executive Committee[100]. The conclusion of the EXCOM carry a disproportionate weight in the formation of custom, as they express the consensus of the states, acting in their advisory capacity, most specifically affected by issues related to non refoulement[101].

In this content special regards should also be paid to the practice of international organizations, such as the United Nations General Assembly and the UNHCR. General Assembly resolutions dealing with the annual report of the High Commissioner tend to be adopted by consensus, as well as the Conclusions of the Executive Committee, and are consistently endorsing the principle of non refoulement. No formal or informal opposition to the principle of non refoulement is to be found. UNHCR in numerous instances has made representations to States not

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States. Participation in Executive Committee meetings is at the level of Permanent Representative to the United Nations Office in Geneva or other high officials (including ministers) of the Member concerned. The Executive Committee holds one annual plenary session, in Geneva, in October, lasting one week. The Executive Committee's subsidiary organ, the Standing Committee, meets several times during the year. The adoption of texts takes place by consensus. In addition to participation in Executive Committee meetings by members of the Committee, a significant number of observers also attend on a regular basis and participate in the deliberations.

The Executive Committee was established by ECOSOC at the request of the UNGA. The Committee is thus formally independent of UNHCR and operates as a distinct body of the United Nations. In the exercise of its mandate, the Executive Committee adopts Conclusions on International Protection addressing particular aspects of UNHCR's work. While Conclusions of the Executive Committee are not formally binding, regard may properly be had to them as elements relevant to the interpretation of the 1951 Convention

UNHCR, **Executive Committee of the High Commissioner's Programme (ExCom)**, available at: *http://www.unhcr.org/pages/49c3646c83.html*, last accessed 21 July 2014

[97] UNHCR, **Conclusions Adopted by the Executive Committee on the International Protection of Refugees**, December 2009, 1975-2009, Conclusion No. 1-109, available at: *http://www.refworld.org/docid/4b28bf1f2.html*, last accessed 21 July 2014

[98] Ibid.

[99] Ibid.

[100] Ibid.

[101] Joanne van Selm, **"The Refugee Convention at Fifty: A View from Forced Migration Studies"**, Lexinghton, 2003

party to the Convention relying on the principle of non refoulement as part of customary international law and those states "…have almost invariably reacted in a manner indicating that they accept the principle of non-refoulement as a guide for their action. They indeed have in numerous instances sought to explain a case of actual or intended refoulement by providing additional clarifications and/or by claiming that the person in question was not to be considered a refugee. The fact that States have found it necessary to provide such explanations or justifications can reasonably be regarded as an implicit confirmation of their acceptance of the principle."[102] In this connection, reference can appropriately be made to the Judgment of the International Court of Justice in the Nicaragua Case[103] that "in order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule."

Moreover, there is the issue of whether conventional rules can coexist with customary ones of similar content. The article 38 of the Vienna Convention[104] provides that a treaty could become binding upon a third State as a customary rule of international law, recognized as such. Due to the increasing emphasis upon individual consent, custom is becoming more and more identified with treaties. In an international system where treaties play the role of the most usual tool of international legislation, custom may prove very valuable by playing the equally important role of assisting, as a universally recognized process, changes of law in all cases where the inelasticity of written law does not allow rapid modifications to cope with new

[102] UNHCR, **The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93**, 31 January 1994, available at: *http://www.refworld.org/docid/437b6db64.html*, last accessed 19 July 2014

[103] Supra Note 85.

[104] United Nations, **Vienna Convention on the Law of Treaties**, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: *http://www.refworld.org/docid/3ae6b3a10.html*, last accessed 15 March 2014

needs[105]. For example, in the *Nicaragua case*[106], the ICJ accepted that the prohibition on the threat or use of force in Article 2.4 of the UN Charter also applied as a principle of customary international law.

The interpretation of the prohibition of torture or cruel, inhuman or degrading treatment or punishment contained in Article 3 of the European Convention on Human Rights, Article 7 of the ICCPR, and Article 3 of the Convention against Torture as including an essential non-refoulement component further confirms the normative and fundamental character of the principle, particularly as the relevant texts make no explicit reference to non-refoulement. Lauterpacht and Bethlehem took this on step further by identifying the exact term of the principle of non refoulement in the context of the human rights law as follows:

"(a) No person shall be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or return to a territory where substantial grounds can be shown for believing that he or she would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment. This principle allows of no limitation or exception.

(b) In circumstances which do not come within the scope of paragraph 1, no person seeking asylum may be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or to return to a territory where he or she may face a threat of persecution or a threat to life, physical integrity, or liberty. Save as provided in paragraph 3, this principle allows of no limitation or exception.

(c) Overriding reasons of national security or public safety will permit a State to derogate from the principle expressed in paragraph 2 in circumstances in which the threat of persecution does not equate to and would not be regarded as being on a par with a danger of torture or cruel, inhuman or degrading treatment or punishment and would not come within the scope of other non-derogable customary principles of human rights. The application of these exceptions is conditional on the strict compliance with principles of due process of law and the requirement that all

[105] Christos L. Rozakis, **"Treaties and Third States: a Study in the Reinforcement of the Consensual Standards in International Law"**, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, 1975, available at: *http://www.zaoerv.de/35_1975/35_1975_1_a_1_40.pdf*, last accessed 15 March 2014

[106] Supra Note 85.

reasonable steps must first be taken to secure the admission of the individual concerned to a safe third country"[107].

In the light of the factors mentioned above, and in view also of the evident lack of expressed objection by any State to the normative character of the principle of non-refoulement, we consider that non-refoulement must be regarded as a principle of customary international law.

1.1.3. Non Refoulement towards Jus Cogens

A number of academics and commentators[108] take the notion of non refoulement one step further by indicating that the principle has acquired the status of jus cogens. The repercussion of being a jus cogens rule is that the rule cannot be breached or violated for any reason and any kind of derogation from the rule is prohibited. As Allain argued "if it can be demonstrated that the notion of non-refoulement has attained the normative value of jus cogens, then States are precluded from transgressing this norm in anyway whatsoever. Much can be gained by insisting on the jus cogens nature of non-refoulement."[109]

By virtue of Article 53[110] of the Vienna Convention on the Law of the Treaties the principle of non refoulement can be categorised as jus cogens if the rule is "…a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a

[107] Supra Note 17, Lauterpacht and Bethlehem (2003), par 253.

[108] Some of the most important are the following:

Allain Jean, **"The jus cogens Nature of non-refoulement"**, International Journal of Refugee Law Vol. 13 No. 4, Oxford University Press, 2002, available at: *http://ijrl.oxfordjournals.org/content/13/4/533.abstract*, last accessed 22/04/2014

Bruin Rene and Wouters Kees, **"Terrorism and the Non-derogability of Non-refoulement"**, International Journal of Refugee Law, vol. 15, Oxford University Press 2003, available at: *http://oppenheimer.mcgill.ca/IMG/pdf/Bruin-2.pdf*, last accessed 20/04/2014

Farmer Alice, **"Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures That Threaten Refugee Protection"**, Georgetown Immigration Law Journal, Volume 23, Number 1, Fall 2008, available at: *http://works.bepress.com/alice_farmer/1/*, last accessed 10 March 2014

Lauterpacht Sir Elihu, Bethlehem Daniel, **"The scope and content of the principle of non-refoulement: Opinion"**, Cambridge University Press, June 2003, available at: *http://www.refworld.org/docid/470a33af0.html*, last accessed 10 March 2014 10

Wouters Kees, **"International Legal Standards for the Protection from Refoulement"**, Intersentia, Antwerp, 2009, available at: https://openaccess.leidenuniv.nl/bitstream/handle/1887/13756/000-wouters-B-25-02-2009.pdf?sequence=2, last accessed 22/04/2014

[109] Allain Jean, **"The jus cogens Nature of non-refoulement"**, International Journal of Refugee Law Vol. 13 No. 4, Oxford University Press, 2002, available at: *http://ijrl.oxfordjournals.org/content/13/4/533.abstract*, last accessed 22/04/2014

[110] Supra note 104

subsequent norm of general international law having the same character". Article 53 has plainly designate that clear and strong corroboration is needed to prove that there is a real acceptance and recognition by a large majority of states that the non refoulement principle is indeed a jus cogens rule. A conflict of treaty obligations raises questions of priority and responsibility, not of validity, except when there is a conflict between a treaty obligation and a rule of jus cogens. In such a case the treaty is void.

The arguments that are used to support the view that non refoulement is jus cogens are based on the conclusions of the Executive Committee and the Cartagena Declaration. The first mention that the principle of non-refoulement amounts to a rule of jus cogens can be found in Conclusion No. 25 of the Executive Committee as early as 1982, where the States members determined that the principle of non refoulement "was progressively acquiring the character of a peremptory rule of international law"[111]. By the late 1980s, the Executive Committee concluded that all States were bound to refrain from refoulement on the basis that such acts were "contrary to fundamental prohibitions against these practices". Finally in 1996, the Executive Committee concluded that non-refoulement had acquired the level of a norm of jus cogens when it determined that the "principle of non refoulement is not subject to derogation". As such, the member States of the Executive Committee concluded by consensus that the norm of non-refoulement was in fact a norm of jus cogens from "which no derogation is permitted".

Further evidence of the jus cogens nature of non-refoulement is to be found in the State practice which has emerged in Latin America on the basis of the 1984 Cartagena Declaration on Refugees[112]. The Colloquium on the International Protection of Refugees in Central America adopted a declaration that reiterated "…the importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a cornerstone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of jus cogens." Another supporting argument is that the fundamental nature of non-refoulement comes from its status as a non-derogable part of the 1951 Convention. If a right is denoted as non-derogable under a human rights treaty, that fact can provide evidence

[111] Supra note 97
[112] Supra note 94

for clarifying whether the given right is a jus cogens norm. Of course, as Orakhelashvili[113] points out, the categorization of rights into derogable and non-derogable is not the same as dividing rights into jus cogens and jus dispositivum. The fact of the non-derogability of non-refoulement serves not as conclusive proof, but as support for its status as a jus cogens norm. Orakhelashvili calls non refoulement a "firmly established peremptory norm," the peremptory character of which is "reinforced by its inseparable link with the observance of basic human rights such as the right to life, freedom from torture, and non-discrimination."[114]

The main reason that legal scholars push for the recognition of non refoulement as a principle of jus cogens is that if this is accepted as a fact, the norm must be seen as absolute, unconditional, and assuming a place in the hierarchy of international law above that of treaties. The principle of non-refoulement as defined by the Refugee Convention is subject to significant exceptions and discriminations, as it was discussed above. Recognition as jus cogens is going to conclusively liberate the principle from its restrictive Refugee Convention definition. Furthermore, the recognition as jus cogens is going to clarify that a collection of States forming an intergovernmental organization is not exempt from the peremptory nature of non refoulement. Therefore, one must question the ability of institutions such as the United Nations Security Council or the European Union to violate such norms through their collective endeavours. It would thus appear that the Security Council could sanction refoulement, if it made a determination under Chapter VII that such an action was required as a mean of restoring international peace and security. The Security Council came quite close to such an exercise in allowing for refoulement in 1991 when, with Resolution 688[115], it expressed its grave concern over Iraqi Kurds seeking safety in Turkey and Iran and considered that such 'massive flow of refugees towards and across international frontiers … threaten international peace and security in the region'. Goodwin-Gill has noted that this resolution remains 'ambiguous' and 'controversial', in part, because while not saying so, it sanctioned Turkey's policy and

[113] Orakhelashvili Alexander, **"Peremptory Norms In International Law"**, The American Journal of International Law, Vol. 101, No. 4 (Oct., 2007), pp. 913-917, American Society of International Law, available at: *http://www.jstor.org/stable/40006344*, last accessed 28 July 2014

[114] Ibid.

[115] UNSC, **Resolution 688**, 5 April 1991, available at: *http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/596/24/IMG/NR059624.pdf?OpenElement*, last accessed 28/07/2014

sought to work around it[116]. Non-refoulement meeting the threshold of jus cogens means that individuals can challenge the actions of both states and international organisations and hold them accountable.

On the other hand, the major practical problem remains the burden of proof to be able to actually characterize the obligation of non-refoulement as a peremptory norm of general international law and to claim this in a court of law. It is likely that the mixed practice whilst not sufficient to prevent recognition of the norm's customary international law status is an obstacle to the norm attaining jus cogens status. There is insufficient evidence to prove that states as a whole have accepted and recognised the status. It is highly doubtful that the rule has gained enough support from states to become a jus cogens norm[117]. But that should not stop recognition of the non refoulement principle as jus cogens in the future as the impact of being a jus cogens rule entails a far reaching effect in terms of state practice and the implementation of the rule in domestic laws and governance. However, even if the view that non refoulement is jus cogens lacks significant arguments, the rule is solidly grounded in international human rights and refugee law, in treaty, in doctrine, and in customary international law. Moreover, it is an inherent aspect of the absolute prohibition of torture, even sharing perhaps in some of the latter's jus cogens character.

The prohibition on torture has evolved into a rule of jus cogens and permits no derogation[118]. Arguably, a prohibition on refoulement which is aimed at preventing

[116] Supra Note 80, Goodwin-Gill and Jane Mc Adam (2005).

[117] Supra Note 89

[118] The UN Human Rights Committee in General Comment 24 has concluded that "provisions that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would not be." Human Rights Committee, **General Comment No. 24**, Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, 4 November 1994, CCPR/C/21/Rev.1/Add.6, available at: *http://www.refworld.org/docid/453883fc11.html*, last accessed 29 July 2014

Also see cases that have attested the jus cogens nature of the prohibition on torture:

Prosecutor v. Anto Furundzija (Trial Judgement), IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, available at: *http://www.refworld.org/docid/40276a8a4.html*, last accessed 29 July 2014

subjection to torture must prevail over any legal obligation to extradite a person to a State in which he is likely to be tortured. This leaves unresolved a possible conflict between an obligation to extradite and a prohibition on refoulement which prohibits removal to territories where there is a risk of subjection to other forms of serious harm. Non-refoulement in the torture context protects norms that are as serious as some norms protected by refugee law, such as the right to life. Unlike refugee law, however, non-refoulement in the torture context offers unqualified protection.

A very important addition to this discussion is the Concurring Opinion of Judge Pinto De Albuquerque in Hirsi Jamaa and Others v. Italy[119]. As Albuquerque determined, "since refugee status determination is instrumental in protecting primary human rights, the nature of the prohibition of refoulement depends on the nature of the human right being protected by it. When there is a risk of serious harm as a result of foreign aggression, internal armed conflict, extrajudicial death, forced disappearance, death penalty, torture, inhuman or degrading treatment, forced labour, trafficking in human beings, persecution, or trial based on a retroactive penal law or on evidence gathered by torture or inhuman and degrading treatment in the receiving State, the obligation of non-refoulement is an absolute obligation of all States. With this extension and content, the prohibition of refoulement is a principle of customary international law; binding on all States, even those not parties to the UN Refugee Convention or any other treaty for the protection of refugees. In addition, it is a rule of jus cogens, on account of the fact that no derogation is permitted and of its peremptory nature, since no reservations are admitted."

Even if non refoulement in refugee content hasn't yet reached the threshold of jus cogens, to characterize the obligation of non-refoulement as such might be a powerful weapon to guarantee protection of individuals and their human rights. Therefore, it is important to see the obligation of non refoulement accepted and recognized as a peremptory norm of international law. If so, every treaty obligation

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Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Judgment (1999), and **Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet** (On Appeal from a Divisional Court of the Queen's Bench Division), House Of Lords, available at: *http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm*, last accessed 29 July 2014

[119] **Hirsi Jamaa and Others v. Italy**, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, available at: *http://www.refworld.org/docid/4f4507942.html*, last accessed 29 July 2014

and every unilateral, bilateral or multilateral act by a State or international organization that is in conflict or violation with this norm will be considered void.

1.2. Acts considered as Refoulement

The substance and the personal scope of the prohibition of non refoulement were discussed in the previous chapter. In this section will be outlined the concrete obligations which derive from the states' responsibility to protect individuals against refoulement. After determining that a State is responsible for guaranteeing an individual's right to be protected from refoulement, the next question is what obligations a State does have then. Denials of access, pushback or turn-back policies, non-entry policies, the closing of borders, summary rejections from a country, inappropriate use of the safe third country concept, or the notion of manifestly unfounded claims for refugee are all policies that could potentially trigger the prohibition on refoulement.

1.2.1. The ratione materiae of the principle of Non Refoulement

In general, the prohibition on refoulement refers to any conduct whereby the individual is exposed to a risk of being subjected to a certain proscribed harm. The basic premise of the prohibition on refoulement is that an alien finds himself in the safety of a State as a result of which the State is responsible for guaranteeing protection from refoulement. The obligations must result in effective protection and may involve single or multiple duties. A State may have both negative and positive obligations to ensure effective protection[120]. Negative obligations include such obligations as not to expel, deport, return, extradite or in any other way, directly or indirectly, forcibly remove a person to a country where he is at risk of being subjected to serious harm. Positive obligations include such obligations as allowing the individual to enter and remain in the State's territory, allowing access to a procedure determining the right to and need for protection, legalizing the individual's presence, and granting substantive rights. An interesting question is whether the obligations can also include less direct actions of a State, for example, deprivation of basic rights and needs as a result of which it will be virtually impossible for an individual to stay, resulting in him being forced to return to another country, or measures such as visa

[120] Supra note 26 Wouters (2009).

requirements, airline sanctions or even measures against human trafficking and/or smuggling[121].

In general, article 33.1 of the Refugee Convention, provides that a State is to avoid any conduct whereby the refugee is forced to go to the frontiers of territories in which there is a threat to his life or freedom[122]. This can imply that a State is obliged to refrain from any action which would force the refugee to go to his country of origin, or that the State is obliged to take action in order to prevent the refugee from returning. More ambiguous has been the issue whether rejection at the frontier is also covered by the article 33. In other words, the question is whether the principle also extends its protection to people not yet on the state territory, indirectly providing for guarantees for admission of asylum seekers. In spite of the fact that the 1951 Convention does not provide for the right to asylum[123], the article 33.1 has been construed in a way that it "…applies to the moment at which the asylum seekers present themselves for entry"[124]. Considering the personal scope of the principle covering asylum seekers as well, the only way for the state to determine whether the risk of persecution is real for persons arriving, is to admit them on its territory. Thus, the concept of non refoulement provides for protection from return as well as rejection at the frontiers.

This concept is even more expanded under human right law. Under Article 3 of the ECHR, the State must act or must refrain from acting when, as a result of that action or omission, the individual is directly exposed to a risk of treatment contrary to Article 3 and when the State party in question has a real and effective power to protect the individual against refoulement. Also, according to Article 2.1 of the ICCPR every State party undertakes to respect and to ensure the rights and freedoms of the Covenant. While the language is general, the word respect indicates a negative obligation, for example States parties must refrain from taking action, thereby restricting the exercise of the rights of the Covenant where such is not expressly allowed. The word ensure on the other hand implies a positive obligation by the State. According to the Human Rights Committee Article 2.1 includes the requirement for States parties to respect and ensure the prohibition on refoulement developed under

[121] Supra note 26 Wouters (2009).
[122] Supra Note 19
[123] Supra Note 17, Lauterpacht and Bethlehem (2003).
[124] Supra Note 80, Goodwin-Gill and Jane Mc Adam (2005).

the Covenant, in particular under Articles 6 and 7 ICCPR[125]. Article 3 of the Convention against Torture prohibits the expulsion, return or extradition of a person to another State where there is a risk of his being subjected to torture, too. In general, a State is obliged to avoid the situation where, as a consequence of its conduct, a person for whom it is responsible is forced to go to a State where he will be in danger of being subjected to torture. Such conduct includes expulsion, return and extradition, as well as any other conduct as a result of which the individual is forced to return or to go to a State where he will be at risk. Depending on the specific situation in which the individual finds himself, then the State could have negative or positive obligations to protect the individual from refoulement.

The practices of refoulement are usually considered either direct or indirect. Direct in the sense of a state undertaking the actual act of removing a refugee or asylum seeker from its territory or its borders to another territory. Indirect may have a double meaning. The usual use of the term indirect refoulement is implying "chain refoulement", refoulement through a third country, which is considered safe from the sending state, but it actually expels the concerned individual in a place where there is a risk of being subjected to persecution, torture or inhuman and degrading treatment or where his life will be in danger. The second meaning of the term indirect refoulement is broader and is identified as the inaction and reluctance on behalf of state to undertake the appropriate measures to protect an individual or the adaptation of indirect measures, like deprivation of basic rights and needs, resulting in the individual being forced to return to another country or the practice of deterrence, with measures aiming to combat irregular migration, smuggling and human trafficking and to ensure national security but in reality they violate the state's obligation's concerning international protection. The above classification is particularly important when it comes to cases of deterrence in the sea as we will see below.

An important case in which an international court actually dealt with those issues is ECtHR's Hirsi Jamaa v. Italy[126]. According to the court "the act of refoulement may consist in expulsion, extradition, deportation, removal, informal transfer, rendition, rejection, refusal of admission or any other measure which would result in compelling the person to remain in the country of origin. The risk of serious harm may result from foreign aggression, internal armed conflict, extrajudicial death,

[125] Supra Note 45, para. 12.
[126] Supra Note 119

enforced disappearance, death penalty, torture, inhuman or degrading treatment, forced labour, trafficking in human beings, persecution, trial based on a retroactive penal law or on evidence obtained by torture or inhuman and degrading treatment, or a flagrant violation of the essence of any Convention right in the receiving State (direct refoulement) or from further delivery of that person by the receiving State to a third State where there is such a risk (indirect refoulement)"[127].

a. Direct forms of Refoulement

Direct refoulement is committed by a state when refugees or asylum seekers are directly returned to a state in which he or she will be exposed to persecution or other harm. There are two possibilities of direct refoulement. The first one is the forced return of a refugee or asylum seeker after he has already crossed the borders - and in some cases even after he has already acquired a protection status in the country of asylum and it may contain a notion of a more permanent settlement. The second one is the rejection at the borders which may have the form of pushbacks operations.

The prohibition on removal includes a wide range of actions whereby the refugee is forcibly removed from or forced to leave the territory of a host State. As the words "in any manner whatsoever" indicates in article 33 of the Refugee Convention, the evident intent was to prohibit any act of removal or rejection that would place the person concerned at risk. It is irrelevant whether this is labelled expulsion, deportation, repatriation, rejection, informal transfer, rendition or extradition.[128]

Forced Return and Extradition

It is commonly accepted that States have the right to control the entry, residence and expulsion of aliens. It is, however, well established in the case law that expulsion by a State party may give rise to an issue under Article 3 of the ECHR[129]; Article 4 of

[127] Supra Note 119
[128] Supra Note 17, Lauterpacht and Bethlehem (2003), para. 69.
[129] See further the cases: ECtHR, Soering v. United Kingdom; ECtHR, Cruz Varas and Others v Sweden; ECtHR, Vilvarajah and Others v United Kingdom; ECtHR, Chahal v United Kingdom; ECtHR, Nsona v Netherlands; ECtHR, Ahmed v Austria; ECtHR, H.L.R. v France; ECtHR, D. v United Kingdom; ECtHR, Jabari v Turkey; ECtHR, Bensaid v United Kingdom; ECtHR, Hilal v United Kingdom; ECtHR, Thampibillai v Netherlands; ECtHR, Venkadajalasarma v Netherlands; ECtHR, Mamatkulov and Askarov v Turkey; ECtHR, Said v Netherlands; ECtHR, N. v Finland;

Protocol No. 4 to the ECHR[130]; Articles 6 and 7 of the ICCPR or Article 3 of the CPT, obliging the State party not to expel the person in question to that country. The primary responsibility for protecting a person from refoulement implies an obligation not to expel, deport, return, extradite or in any other way forcibly remove a person to a country or territory where he will be unsafe, where he will face a risk of being subjected to serious harm. The legal setting in which removal takes place is irrelevant. The character of these obligations is primarily negative, requiring States to refrain from transferring a person to a place where there is a risk of subjection to ill-treatment. The prohibition on forcibly removing a person continues to exist for as long as a real risk of proscribed ill-treatment in the country of origin exists. As the ECtHR implied in Ahmed v Austria[131], in which Austria wanted to expel the applicant to Somalia after his refugee status had been revoked, expulsion of the applicant would be in breach of Article 3 of the Convention, based primarily on the fact that the situation in Somalia for the applicant had not changed since he was granted refugee status and it was acknowledged that he faced a real risk of ill-treatment upon return. Also, the Human Rights Committee in C. v Australia[132] attached weight to the fact that the author had been granted refugee status and that the State party had not established that the current circumstances in the country of origin were such that the grant of refugee status was no longer valid. The Committee against Torture in its Concluding Observations on France recommended that "States party should introduce an appeal with suspensive effect for asylum applications conducted under the priority procedure. It is also recommended that situations covered by article 3 of the Convention be submitted to a thorough risk assessment, notably by ensuring appropriate training for judges regarding the risks of torture in receiving countries and

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ECtHR, Shamayev and 12 Others v Georgia and Russia; ECtHR, Bader and Others v Sweden; ECtHR, Salah Sheekh v Netherlands.

[130] Cases pending before the ECtHR: Khlaifia and Others v. Italy and Sharifi and Others v. Italy and Greece. Cases in which the Court found a violation of Article 4 of Protocol No. 4 to the Convention: Čonka v. Belgium; Hirsi Jamaa and Others v. Italy; Georgia v. Russia.

[131] **Ahmed v. Austria**, 71/1995/577/663, Council of Europe: European Court of Human Rights, 17 December 1996, available at: *http://www.refworld.org/docid/3ae6b62f2c.html*, last accessed 17 July 2014

[132] **C. v. Australia**, CCPR/C/76/D/900/1999, UN Human Rights Committee (HRC), 13 November 2002, available at: *http://www.refworld.org/docid/3f588ef00.html*, last accessed 14 July 2014

by automatically holding individual interviews in order to assess the personal risk to applicants"[133].

An important element of the prohibition on removal is the issue of where the person is prohibited to go. The scope of protection from refoulement is not limited to the country of origin of the person, but to any State where he would be at risk. Article 33.1 of the Refugee Convention refers to the frontiers of territories. Article 3 of the CAT refers to another State. The ECtHR has been silent on the issue of the legal status of the territory to which removal is prohibited and has only dealt with the removal to States. Finally, the Human Rights Committee has used a variety of terms, including State, country, place, location and jurisdiction. Only under CAT it is required that removal take place to an area which is under the sovereign control of a State.

It has sometimes been suggested that non-refoulement does not apply to acts of extradition or to non-admittance at the frontier. In support of this suggestion, reference has been made to comments[134] by a number of delegations during the drafting process to the effect that Article 33.1 was without prejudice to extradition. Moreover, the Refugee Convention does not prohibit extradition. In fact, people who are suspected of having committed certain serious crimes are excluded from refugee protection under Article 1.F of the Refugee Convention and are therefore not protected by Article 33, and may thus be extradited. In addition, other suspected criminals whom there are reasonable grounds to regard as a danger to the security of the country in which they are, may also be extradited.

The prohibition on refoulement covers all forms of forced removal, including the extradition of a criminal and the expulsion or deportation of an alien[135]. Even

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[133] Committee Against Torture, **Conclusions and recommendations of the Committee against Torture: France**, 20 May 2010, available at: *http://tinyurl.com/l9oqzw8*, last accessed 9 August 2014

[134] Supra Note 19

[135] Extradition cases include: ECtHR, Soering v United Kingdom; ECtHR, Mamatkulov and Askarov v Turkey; ECtHR, Shamayev and 12 Others v Georgia and Russia; ECtHR, Olaechea Cahuas v Spain,
Cases involving the expulsion of aliens include: ECtHR, Cruz Varas and Others v Sweden; ECtHR, Vilvarajah and Others v United Kingdom; ECtHR, Chahal v United Kingdom; ECtHR, Nsona v Netherlands; ECtHR, Ahmed v Austria; ECtHR, H.L.R. v France; ECtHR, D. v United Kingdom; ECtHR, Jabari v Turkey; ECtHR, Bensaid v United Kingdom; ECtHR, Hilal v United Kingdom; ECtHR, Thampibillai v Netherlands; ECtHR, Venkadajalasarma v Netherlands; ECtHR, Said v Netherlands; ECtHR, N. v Finland; ECtHR, Bader and Others v Sweden; ECtHR, D and Others v Turkey; ECtHR, Salah Sheekh v Netherlands.
Human Rights Committee: General Comment No. 20, General Comment No. 31, Concluding Observations of the Human Rights Committee: United States of America

though extradition is not explicitly mentioned as one of the prohibited acts of removal laid down in Article 33.1 of the Refugee Convention, it is certainly covered by that Article as the phrase "in any manner whatsoever" formulated in Article 33.1 leaves again no room for doubt that every possible form of expulsion or return, including extradition, is included[136]. Extradition is frequently covered by bilateral or multilateral extradition treaties. This may give rise to a conflict of treaty obligations. The Executive Committee has explicitly recognised: 'that refugees should be protected in regard to extradition to a country where they have well-founded reasons to fear persecution on the grounds enumerated in Article 1.A.2 of the 1951 United Nations Convention relating to the Status of Refugees"[137]. Some extradition treaties have stipulated mandatory grounds for refusing extradition based on Article 33.1. According to Article 3.b of the United Nations Model Treaty on Extradition[138] "…extradition shall not be granted…, if the requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status, or that person's position may be prejudiced for any of those reasons" and Article 3.f stipulates that extradition shall not be granted "…if the person whose extradition is requested has been or would be subjected in the requesting State to torture or cruel, inhuman or degrading treatment or punishment". Moreover, a conflict will arise if an extradition treaty, which has no conflict clause, is more recent than the Refugee Convention. Human rights treaties are treated no differently from other treaties as regards priority, except where jus cogens norms are concerned. The importance of the consideration of the principle of non refoulement as jus cogens was examined above and as it was stated Article 3 of ECHR prevents a person from being subjected to torture or other forms of proscribed ill-treatment. But up until now the ECtHR has avoided discussion on a conflict of treaty obligations between Article 3 of the Convention and an obligation under an extradition treaty. This notion is also contemplated by Articles 6 and 7 of the ICCPR. Also, extradition is explicitly prohibited by Article 3 of the Convention

[136] Supra Note 80, Goodwin-Gill and Jane Mc Adam (2005). p. 257; Supra Note 17, Lauterpacht and Bethlehem (2003), p. 112-113.

[137] EXCOM Conclusion No. 17.

[138] UNGA, **Model Treaty on Extradition**: Resolution adopted by the General Assembly, 14 December 1990, A/RES/45/116, available at: *http://www.refworld.org/docid/3b00f18618.html*, last accessed 7 August 2014

against Torture if there are substantial grounds for believing that the extradited person would be in danger of being subjected to torture after extradition. It goes beyond the scope of this thesis to further investigate the issue of extradition, but it is worth mentioning that extradition and especially practices of extraordinary rendition[139] are relevant in the current struggle against terrorism[140].

Furthermore, States may rely on diplomatic assurances as a legitimate tool provided under extradition treaties to guarantee that an extradited criminal will not be subjected to proscribed ill-treatment. Although, according to UNHCR[141], diplomatic assurances regarding the treatment of the asylum-seeker or refugee in case of return do not affect the host State's obligation under international refugee law and international human rights law. In Hirsi Jamaa, the ECtHR recommended that the Italian government should take "all possible steps to obtain assurances from the Libyan authorities that the applicants will not be subjected to treatment incompatible with Article 3 of the Convention or arbitrarily repatriated"[142]. Judge Pinto de Alburquerque, in his descending opinion suggested instead that the Italian authorities should "provide the applicants with practical and effective access to an asylum procedure in Italy, as this is the only effective way for Italy to comply with its international obligations"[143]. However, the Court was not prepared to follow his proposal.

Rejection at the Borders / Pushbacks

Except of the cases of expel or return, still lays the issue of what happens if an individual finds himself at the border of a State, seeking protection, and is not allowed

[139] European Commission for Democracy Through Law (Venice Commission), **Extraordinary renditions: a European Perspective**, Council of Europe, 11 October 2006, Opinion 363/2005, CDL(2006)077, available at: *http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2006)077-e*, last accessed 4 August 2014

[140] See further the cases of Al Nashiri v. Poland and Husayn (Abu Zubaydah) v. Poland, concerning the extraordinary rendition by the CIA of two terrorism suspects to secret detention sites in Poland, in which the Court found a number of violations of the Convention.

Al Nashiri V. Poland, 28761/11, Council of Europe: European Court of Human Rights, available at: *http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-112302*, last accessed 4 August 2014 and

Husayn (Abu Zubaydah) V. Poland, 7511/13, Council of Europe: European Court of Human Rights, 22 April 1997, available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146047, last accessed 4 August 2014

[141]

[142] Supra Note 119

[143] Ibid.

to enter the territory of the State. All the treaties prohibit rejection at the frontier if as a consequence the individual is forced to return to an area of risk. As a result, States will have to refrain from closing their borders and taking measures which prevent the individual from entering a State. The logical consequence would then be for States to have positive obligations, such as to allow the individual to enter and to provide access to a procedure[144]. States may also be responsible for ensuring protection from refoulement for individuals who are at sea and have come under the actual control of a potential host State, for example, because a State's vessel has boarded the individual's boat or controls its course. In such situations a State may not renounce its responsibility to provide protection from refoulement. Such responsibility will then most likely include positive obligations too, for example to allow the individuals to disembark and to assess their claim for protection[145]. Equally, a person who is further away from a State's territory but is within its effective control may have a right to be protected from refoulement by that State. The type and content of the State's obligations in that regard depend on the situation in which the person finds himself.

As it was mentioned above, all the treaties under examination prohibit rejection at the frontier. Article 33.1 of the Refugee Convention is applicable at the frontier of a potential host State[146]. The EXCOM in Conclusion No.6[147] reaffirms "the fundamental importance of the observance of the principle of non-refoulement – both at the border and within the territory of a State". Moreover in a number of other conclusions the EXCOM[148] clarifies that it is prohibited to close borders, to take measures to push refugees back, reject them at the frontier and not allow them access to the host country and its procedures for the determination of refugee status. In fact, some EXCOM Conclusions[149] explicitly state that rejection at the frontier without the individual having access to a procedure for the determination of refugee status is prohibited under Article 33.1 of the Convention.

Also, the Human Rights Committee has acknowledged that although the ICCPR does not recognize the right of aliens to enter or reside in the territory of a State party

[144] Supra note 26 Wouters (2009).
[145] Supra note 26 Wouters (2009).
[146] Supra Note 80, Goodwin-Gill and Jane Mc Adam (2005) p.208; Supra Note 17, Lauterpacht and Bethlehem (2003), p.113-115; Supra Note 78 Hathaway (2005), p.315
[147] Supra note 97
[148] EXCOM Conclusion No. 14 (XXX), EXCOM Conclusion No. 15 (XXX), EXCOM Conclusion No. 53 (XXXIX), EXCOM Conclusion No. 85 (XLIX), etc.
[149] Conclusion No. 6 (XXVIII), EXCOM Conclusion No. 22 (XXXII), EXCOM Conclusion No. 81 (XLVIII), EXCOM Conclusion No. 82 (XLVIII), EXCOM Conclusion No. 85 (XLIX) etc.

and it is in principle a matter for the State to decide who it will admit to its territory, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise[150]. Arguably, when rejection at the frontier results in the individual being exposed to a risk of proscribed ill-treatment his rejection is prohibited. In its Concluding Observations on Lithuania[151] and on Italy[152] the Committee stated that "the State party should take measures to secure access for all asylum-seekers … to the domestic asylum procedure, in particular when applications for asylum are made at the border". Consequence of a State being responsible for refugees who are at its borders and being prohibited from rejecting them is that the refugees must then be allowed to enter and perhaps remain in the territory.

Respectively, the Committee against Torture in its Concluding Observations has touched upon this issue. For example, in its Concluding Observation on Norway[153] members of the Committee, with reference to Article 3, requested "information on how the Immigration Act actually worked and asked, in particular, whether foreigners, especially refugees, could be denied entry to Norway by the border police and turned back and what recourse procedure was available to them". And in its Concluding Observations on France the Committee recommended that "that any appeal relating to an asylum application submitted at the border be subject to a hearing at which the applicant threatened with removal can present his case effectively, and that the appeal be subject to all basic procedural guarantees, including the right to an interpreter and counsel"[154].

Until the case of Hirsi Jamaa, no international court had held a case concerned with the prohibition on refoulement with a person claiming protection at the border of a State or even further away from the State's territory. Only ECtHR, in Gebremedhin

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[150] Human Rights Committee, **General Comment No. 15**, The Position of Aliens Under the Covenant, 11 April 1986, available at: *http://www.refworld.org/docid/45139acfc.html*, last accessed 9 August 2014

[151] Human Rights Committee, **UN Human Rights Committee: Concluding Observations: Lithuania**, 01 April 2004, available at: http://tinyurl.com/mlcyzq6, last accessed 14 July 2014

[152] Human Rights Committee, **UN Human Rights Committee: Concluding Observations, Italy**, 24 April 2006, CCPR/C/ITA/CO/5, available at: http://www.refworld.org/docid/453777852.html, last accessed 9 August 2014

[153] Committee Against Torture, **Conclusions and recommendations of the Committee against Torture: Norway**, 5 February 2008, CAT/C/NOR/CO/5, available at: *http://www.refworld.org/docid/47b158142.html*, last accessed 9 August 2014

[154] PIO panw conclusion on france

v. France[155] acknowledged the responsibility of France for the protection of an alien who had presented himself at Charles de Gaulle aiport and in Xhavara and 12 Others v. Italy and Albania[156], which involved a group of Albanians who were trying to reach Italy by sea, but failed to reach the Italian border or even its territorial waters after their ship was struck by an Italian naval vessel. The Court made it clear that Italy had responsibility for the Albanians in this case, but unfortunately, the Albanians had not claimed protection from refoulement. Thus, the Court did not need to address the issue of what particular obligations Italy would have to ensure effective protection from refoulement. A similar case[157] with Hirsi Jamaa, was that of the victims of a previous pushback operation, which were initially accepted as admissible by the Court but was struck out of the list of cases on 2010 due to the impossibility of retracing the victims and to the uncertain powers of representation given to their lawyers to pursue the case on their behalf. A comparable case of immediate returns to Greece, Sharifi and Others v Italy and Greece, is currently pending before the Court.

The long awaited judgment of the European Court of Human Rights has confirmed that the individuals involved in the Hirsi case were sent back to Libya during one of the pushback operations in breach of Articles 3, and 13, and Article 4 of Protocol 4 to the European Convention on Human Rights. They were returned to a real risk of ill-treatment before being given the opportunity to lodge an asylum application or to contest their interception. Their rights to protection against refoulement and collective expulsion as well as their entitlement to an effective remedy had been violated. The Court's findings were unanimous on all counts. The pushback policy ensuing from the bilateral agreements concluded with Libya, as the Italian Minister of Interior himself declared at various points at a press conference held on 7 May 2009, first, and in a speech delivered at the Italian Senate on 25 May 2009, thereafter[158].

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[155] **Gebremedhin c. France**, 25389/05, Council of Europe: European Court of Human Rights, 10 October 2006, available at: *http://www.refworld.org/docid/45d5c3642.html*, accessed 9 August 2014

[156] **Xhavara and 12 Others v. Italy and Albania**, 39473/98, Council of Europe: European Court of Human Rights, available at: *http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-31884*, last accessed 9 August 2014

[157] **Hussun and Others v Italy**, 10171/05, 10601/05, 11593/05 and 17165/05, Council of Europe: European Court of Human Rights, available at: *http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=003-2996767-3302961*, last accessed 9 August 2014

[158] Supra Note 119 par. 13

The nine operations carried out in the course of 2009 were portrayed as an example of successful inter-State cooperation in the combat against irregular immigration. Regardless of repeated critiques from human rights organisations, the pushback policy was also said to have the effect of deterring human smuggling and trafficking, of helping save lives at sea, and of reducing the number of unwanted arrivals on Italian territory. Other European governments, mainly of the Mediterranean region, have held a similar position. An example is the common statements between the Prime Ministers of Greece, Malta and Italy, on October 2013, a few days after the incidents in Lampedusa where it was states that although "…there is a humanitarian element, there is also a security element, which cannot be overlooked and I am very glad that we've managed to discuss a number of concrete measures which we believe must be addressed together through a European dimension be it with regards to security, be it with regards to burden responsibility, be it with regards to returns policy… The threats of the actual waves of illegal migration are common to all Europeans. We are basically talking about an appalling human trafficking procedure, knocking everyday on our door, which destabilizes our societies and becomes a threat to be spread up further in the North. This is why it's about time to do something about it and we cannot stay indifferent watching those human tragedies. We cannot allow direct threats to our societies…"[159]

b. Indirect forms of Refoulement

It is not just deliberate actions which may infringe the prohibition on refoulement. Indirect refoulement may have two different meanings, the more common concept of chain refoulement through a safe third country[160] and the deterrence practices. The policy of deterrence could in turn be expressed in two ways, the adoption of measures such as fences and patrols in the Mediterranean to combat

[159] Γραφείο του Πρωθυπουργού, **Δηλώσεις του Πρωθυπουργού κ. Αντώνη Σαμαρά και του Πρωθυπουργού της Μάλτας κ. Joseph Muscat, κατά τη διάρκεια κοινής συνέντευξης Τύπου**, 21-10-2013, available at: *http://www.primeminister.gov.gr/2013/10/21/12433*, last accessed 09 August 2014 and

Γραφείο του Πρωθυπουργού, **Δηλώσεις του Πρωθυπουργού κ. Αντώνη Σαμαρά και του Ιταλού Πρωθυπουργού κ. Enrico Letta, κατά τη διάρκεια κοινής συνέντευξης Τύπου**, 21-10-2013, available at: *http://www.primeminister.gov.gr/2013/10/21/12435*, last accessed 09 August 2014

Those statements held a special symbolism as they were attempting to prepare a new common approach of issues of asylum and migration in Europe before the Greek and Italian presidency in the European Council in 2014.

[160] See next chapter

irregular immigration, disregarding the State's obligations under Human Rights Treaties and the measures taken in order to prevent the departure from the countries of origin. Also, the prohibition on refoulement may be affected by a wide range of actions or inactions. In this respect a variety of practices can be mentioned, such as practices whereby refugees are coerced into accepting voluntary repatriation without any real options but to leave, and practices such as withholding food, water and other essentials from refugees in order to induce their repatriation[161]. No international jurisprudence exists in this regard, however, according to ECtHR[162], so long as the State does not intend to proceed effectively with expulsion and there is no realistic prospect of removal, the individual cannot claim to be a victim within the meaning of Article 34 of the Convention as regards to his complaint that expulsion will be in breach of his rights under Article 3.

Indirect measures which prevent people from leaving their countries of origin / third states

Related to the prohibition on rejection at the frontier, and in particular taking measures pushing refugees back to their country of origin, is the issue of measures taken by States aimed at preventing potential refugees from leaving their country of origin and reaching a potential host State's frontier and territory. As Goodwin – Gill indicated[163], "…the response of European states to new arrivals from non-European countries has been to try to contain or regionalize refugee problems, that is, to keep those in need of protection and solutions within their regions of origin". This objective is pursued by the imposition of visa and transit visa requirements; sanctions against airlines; socioeconomic measures of deterrence; accelerating refugee status procedures, even to the point of determining applications prior to disembarkation; and by procedural devices designed to avoid the necessity for decisions on the merits in favour of rapid removal to some other country deemed to be responsible or secure.

[161] Supra Note 78 Hathaway (2005).

[162] **Bonger v. The Netherlands**, 10154/04, Council of Europe: European Court of Human Rights, 15 September 2005, available at: *http://www.refworld.org/docid/4406cb034.html*, last accessed 10 August 2014

[163] Goodwin-Gill Guy S, **"International Law and Human Rights: Trends Concerning International Migrants and Refugees"**, International Migration Review, Vol. 23, No. 3, available at: http://www.jstor.org/stable/2546427, last accessed 13 March 2014

In the strict sense of the Refugee Convention States parties have the freedom to impose such interdiction or interception measures. Protection from refoulement in accordance with Article 33.1 of the Convention can be granted only when the person concerned is outside his country of origin. Neither Article 33 nor the Convention as a whole provides for a right to seek asylum in the sense that a State party to the Convention should provide protection or assistance to those who are trying to escape persecution in their own country. Consequently, Article 33 does not apply to people remaining within their country of origin because of interdiction or interception measures such as visa requirements or the imposition of carrier sanctions, even though they may have a well-founded fear of persecution. On the basis of the wording of the Refugee Convention States are not prohibited from introducing or continuing a system of immigration control, whether by way of a requirement for visas or the operation of a preclearance system[164].

According to Hathaway, "Article 33 is similarly incapable of invalidating the classic tool of non-entrée: visa controls imposed on the nationals of refugee-producing States, enforced by carrier sanctions"[165]. One may however question the intentions of such measures, their potential discriminatory enforcement and whether or not they are in accordance with the object and purpose of the Refugee Convention, in particular when such measures concern active in-country interdiction or interception and people are put at risk of being persecuted. It is not a coincidence that a number of EU Member States have posted immigration and airline liaison officers at major international airports of countries that are major refugee-producing States whose citizens figure high on the list of recognised refugees in the various EU Member States[166]. In the case involving UK Immigration Officials at Prague Airport, the House of Lords unequivocally stated that this operation was inherently and systematically discriminatory against Roma on racial grounds[167]. The application of the prohibition on refoulement depends upon the ability to leave one's country or to remain outside it in order to avoid the risk of persecution[168]. The UNHCR has pointed out that measures aiming at combating irregular migration, although legitimate, can

[164] Supra note 26 Wouters (2009).
[165] Supra Note 78 Hathaway (2005).
[166] UNHCR, **Communication from the European Commission on A Common Policy on Illegal Immigration**, (COM(2001) 672 final), UNHCR's Observations, 1 July 2002, available at: *http://www.refworld.org/docid/3d57e5c34.html*, last accessed 10 August 2014
[167] Regina Case
[168] UNHCR

seriously jeopardise the ability of people at risk of persecution to gain access to safety and asylum. Without such measures being balanced by adequate means to identify genuine cases, they are an infringement of the prohibition on refoulement.

The conclusion that Article 33 of the Refugee Convention does not protect potential refugees inside the country of origin, points to a serious gap in international protection, which is again filled by the development of prohibitions on refoulement under other instruments, as Article 3 of the ECHR, Article 3 of the CAT and Article 7 of the ICCPR. Hathaway also points to Article 12.2 of the ICCPR to fill this protection gap[169]. According to Article 12.2[170] "everyone shall be free to leave any country, including his own". As Hathaway argues, where the prohibition on leaving the country of origin in order to seek protection is unlikely be deemed a legitimate reason for denying the right to leave, and/or where that prohibition is implemented in a discriminatory manner, the country of origin will be in breach of Article 12 of the ICCPR. With reference to Article 12, the Human Rights Committee has stated that States parties to the Covenant should abolish the requirement of an exit visa for their nationals as a general rule but a foreign State may also be in breach of Article 12 if it effectively controls the right to depart. However, this is not an adequate alternative for protection from refoulement.

Deterrence as an act of indirect refoulement

Over the last three decades, even as states have repeatedly affirmed their commitment to refugee law, they have designed and implemented deterrence policies that seek to keep most refugees from accessing their jurisdiction, and thus being entitled to the rights of refugee law. For many years, visa controls and carrier sanctions have been instituted to prevent even persons fleeing clearly refugee producing countries from reaching the West. States are resorting to maritime interception on the high seas in a desperate effort to take deterrent action in a place thought not to attract legal liability. The appeal of such deterrence policies is the

[169] Supra Note 78 Hathaway (2005).
[170] ICCPR

promise of absolving states from de facto compliance with the duty of non-refoulement even as they leave the duty itself intact[171].

For many years, EU member states have imposed strict controls on asylum and have often failed to respect their commitment to provide protection to persons fleeing persecution. Many of the controversial EU policies of deterrence have been developed by different member states and implemented on an EU level. Some of those policies have been copied and brought negative changes to the refugee law system in other countries, such as Canada. Under the minimal standards imposed by the EU legislation, the states are adopting and putting in place policies and practices whose compliance with the international human rights obligations is questionable and criticized by the UNHCR and NGOs.

Two kinds of argument are made by states in support of deterrent measures. The first is that since in any flow towards Europe today refugees are outnumbered by economic migrants, it is argued that governments must be free to respond effectively to the dominant character of the arrivals. As a matter of law, though, nonselective deterrent measures cannot be justified where genuine refugees are part of a mixed flow[172]. There is no exception to the duty of non refoulement for situations in which the cost or inconvenience of processing claims is great, or where only a small number of entrants are actually refugees. Nor can states lawfully avoid refugee protection obligations by deciding simply not to assess claims made to them. Measures which deter refugee claimants from arriving in an asylum state are therefore no less in breach of refugee law than is the removal of a recognised refugee already present in a state's territory.[173]

A second argument for deterrence is sometimes made on humanitarian grounds. Particularly where refugees and others arrive by sea, often in rickety or grossly overcrowded vessels, it has been said that departures must be stopped in order to avoid risk to life or limb. There is, however, a critical legal distinction between efforts to provide information and to make it difficult for traffickers to exploit people and more aggressive efforts actually to stop departures. Whatever the risks, every person

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[171] Hathaway James C. and Thomas Gammeltoft-Hansen, **"Non-Refoulement in a World of Cooperative Deterrence"**, Law & Economics Working Papers, Paper 106, 2014, available at: *http://repository.law.umich.edu/law_econ_current/106*, last accessed 10 August 2014

[172] Ibid.

[173] Hathaway James C., **"The false panacea of offshore deterrence"**, August 2006, Forced Migration Review, available at: http://www.fmreview.org/FMRpdfs/FMR26/FMR2632.pdf, last accessed 10 March 2014

has the legal right to make the decision about departure for him or herself. The relevant rule in such cases is not rooted in refugee law but in the requirement in the International Covenant on Civil and Political Rights that all persons be allowed to leave any country, including their own. Allegedly humanitarian steps taken to shut down escape routes, such as the formal agreement between the US and Cuba in 1994 requiring Cuba to "... take effective measures in every way it possibly can to prevent unsafe departures using mainly persuasive methods", are unlawful and paternalistic. It is the refugee's right to decide when the risks of staying put are greater than the risks of setting sail. Until and unless the abuse that causes refugees to flee in the first place is ended, the only real answer is to provide safe alternatives to unsafe routes of escape. Today the creation of such safe pathways is extremely important especially under the Syrian refugee crisis and the other refugee producing instabilities around the area of the Mediterranean Sea, as according to UNHCR until the end of May 2014, 104.960 new asylum applications were filled in the European Union from Syrians refugees[174].

While blunt deterrence of refugee or mixed flows is unlawful, states are perfectly free to conceive creative protection alternatives.With the viability of traditional forms of non-entrée compromised by international law; states have embraced a new generation of deterrence regimes. These new generation deterrence practices are based on the degree of involvement and collaboration with transit states and states of origin through reliance on diplomatic relations, the offering of financial incentives, the provision of equipment, machinery, or training, the deployment of officials of the sponsoring state, joint or shared enforcement missions and the establishment or assignment of international agencies to effect interception. The logic of this new generation of non-entrée policies is to insulate European countries from liability by engaging the sovereignty of another country as sponsoring states believe that they can be immune from legal responsibility for the deterrence since the actions that prevent refugees and other persons entitled to international protection are undertaken by the authorities of other countries. Contemporary understandings of jurisdiction and shared responsibility can be invoked in dismantling the new deterrence regime. Such legal action will in turn force a more honest political

[174] UNHCR, **"Syrian Refugees in Europe: What Europe can do to ensure protection and solidarity"**, July 2014, available at: *http://www.unhcr.ch/fileadmin/user_upload/dokumente/06_service/zahlen_und_statistik/UNHCR_Report_on_Syrian_Refugees_in_Europe.pdf* , last accessed 13 August 2014

conversation about how best to reconceive international refugee protection as a substantively international responsibility. The evolution of the notion of shared jurisdiction allowing more than one state to be held liable for a given breach of human rights as a function of its own actions, whatever the liability of other states, is an important bulwark against cooperation-based forms of deterrence that threatens to leave mostly the transit states holding the main responsibility for the refoulement of refugees[175].

c. The incidents in the Mediterranean Sea

The two case studies fall broadly into the above mentioned categories of practices of refoulement. The case of the vessel in Farmakonisi which carried refugees from Afghanistan and Syria is a clear pushback incident, as the Greek authorities tried to remove the vessel from Greek territorial waters and return it to Turkey. The line of responsibility could be tracked relatively easily as it falls in the same category as the Hirsi case examined by ECtHR. On the other hand, the two Lampedusa shipwrecks generally falls into the last category of the new generations deterrence practices, as they are neither an immediate return or a rejection at the border. Furthermore, the investigation carried out by the Italian authorities indicated towards the responsibility of the smugglers guiding the vessels and only.

Although there have been plenty of instances in the past, the 'institutionalisation' and widespread use as a matter of policy of the practice of interception and pushback in the Mediterranean Sea, in which vessels carrying migrants are forced to return to the State from which they departed or from which they are presumed to have departed has increased rapidly the last five years A number of tragic events over the years have occurred, in which women, children and men attempting to traverse the Mediterranean in order to reach European shores have lost their lives. The aim of the new interception practices is principally that of avoiding that, once they reach the shores of a European State, undocumented migrants may disappear and proceed to other European countries. The treatment reserved to those who attempt the desperate voyage is a combination of pushbacks and deterrence

[175] Hathaway James C. and Thomas Gammeltoft-Hansen, **"Non-Refoulement in a World of Cooperative Deterrence"**, Law & Economics Working Papers, Paper 106, 2014, available at: *http://repository.law.umich.edu/law_econ_current/106*, last accessed 10 August 2014

policies carried out by both European states and European institutions like Frontex. The lowest point was the Lampedusa incident in October 2013 which resulted in the deaths of over 360 persons.

From May 2009, the Italian Government announced a zero tolerance approach to irregular immigration When some 10,000 persons managed to reach the Italian island of Lampedusa in 2014 until now, Italy responded by discontinuing its traditional practice of sending them to Sicily for processing of protection claims. Instead, the asylum seekers were despatched back handcuffed from Lampedusa direct to Libya. No questions asked. Similar tactics have been used in relation to vessels originating from Tunisia. Individuals on board the vessels were indiscriminately returned to the State of departure, without any form of screening or assessment whatsoever of their individual situation or the validity of their claims to asylum or other forms of international protection. As regards vessels originating in Libya, the legal basis for the interdiction programme was a bilateral agreement concluded between Italy and Libya dealing with the fight against terrorism, organised crime and clandestine immigration, subsequently supplemented by a series of technical agreements relating to operational matters.

The same as Italy equally apply for Malta. The prime minister of Malta made a number of statements between 4 and 9 July 2013 indicating that Malta could resort to push backs of boats of foreign nationals and collective expulsions of individuals already within Maltese jurisdiction. On 9 July 2013 the government of Malta stated that it was considering all options to deal with the large number of foreign nationals who had recently arrived on the island.

While the attention for several years has focussed almost exclusively on Italy, since 2012 Greece has also faced increasingly vocal criticism for conducting push back operations of migrants and asylum seekers who seek to reach its coasts from Turkey. This new development appears to result directly from the sealing of the Turkish-Greek land border, which has forced migrants and asylum seekers, particularly from Syria, to seek alternative routes both by sea and via the land border with Bulgaria. The response of the Greek authorities to this shift in migration patterns has been to set up a programme of interceptions in the Aegean Sea which allegedly involves the irregular detention and deportation to Turkey of migrants and, on some occasions, push-backs at sea. In none of these cases does it appear that any screening of the individual circumstances of the individuals in question carried out.

In Spain, those who successfully scaled the barriers were often summarily sent back to Morocco, which is reported simply to have dumped them in desert border zones. The success of this deterrent programme put renewed pressure on the Spanish Canary Islands, a favoured destination where radar and sea patrols were instituted to deter travel from Morocco to the Canarian islands. The most recent flows have thus been forced to take a much longer and more perilous route from northern Mauritania to Tenerife. The Spanish government has responded to the upsurge in arrivals by offering Mauritania patrol boats to stop departures and to set up refugee camps in Mauritania.

All of the above are supported by numerous reports of various NGOs, which condemn those practices of EU and States. Human Rights Watch with the report "Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers"[176] reviled Italy's practices and was referred by ECtHR in the important Hirsi Jamaa Judgment. Also People for Change referred the Maltese pushbacks policies in the report "Access to Protection: A Human Right"[177]. Amnesty International in the report "Greece: Frontier of hope and fear: Migrants and refugees pushed back at Europe's border"[178] documents that Greek officials are routinely and illegally "pushing back" refugees and migrants into Turkey, in breach of Greek and international law. Victims describe how some Greek law enforcement officials ill-treated them, stole their belongings and put their very lives at risk. Given mounting evidence that Greece is violating human rights standards enshrined in EU law, the European Commission has an obligation to act. Only a year ago, another report[179] of Amnesty International criticized Greece for collective expulsions and pushbacks practices. Furthermore, Pro Asyl published the

[176] Human Rights Watch, **"Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers"**, 21 September 2009, 1-56432-537-7, available at: *http://www.refworld.org/docid/4ab87f022.html*, last accessed 22 April 2014

[177] People for Change Foundation, **"Access to Protection: A Human Right"**, December 2013, available at: *http://www.pfcmalta.org/uploads/1/2/1/7/12174934/hirsi_report_final_1-12.pdf*, last accessed 22 April 2014

[178] Amnesty International, **"Greece: Frontier of hope and fear: Migrants and refugees pushed back at Europe's border"**, 29 April 2014, available at: *http://www.amnesty.org/en/library/info/EUR25/004/2014/en*, last accessed 15 August 2014

[179] Amnesty International, **"Greece: Frontier Europe: Human rights abuses on Greece's border with Turkey"**, 9 July 2013, EUR 25/008/2013, available at: *http://www.refworld.org/docid/51dffc304.html*, last accessed 22 April 2014

report "Pushed Back: Systematic Human Rights Violations against Refugees in the Aegean Sea and at the Greek-Turkish Land Border"[180].

In July 2014, UNHCR[181] condemned Boulgaria, Greece, Spain and Cyprus for pushbacks on the borders of groups that included Syrians as well as Palestinians. In some of those cases the measures resulted in family separation, mistreatment and even death.

Under this light, it would appear that the practice of push-backs in the Mediterranean is far from rare, and instead remains a cause for significant concern in the on-going struggle to monitor the frontiers of southern Europe. Indeed, allegations against States continue to surface in a daily basis, with numerous appalling incidents being attributable directly to the policy of push-backs, or indirectly through organisational uncertainty and jurisdictional issues.

1.2.2. Chain refoulement and the notion of the Safe Third Country

The approach to non-refoulement should also involve a series of mechanisms used by states, reinforced by multilateral and bilateral agreements, to relocate refugees from one state to another[182]. The refugee redistribution follows two main procedures: the first country of arrival rule and the safe third country rule. The various incidents in the Mediterranean Sea have brought to light once again the issue of indirect refoulement through a considered safe third country or else chain refoulement. But in reality, the concept of the safe country, either it is the previous country of asylum or the country of origin it may be the other end of any act of refoulement examined in the previous chapter.

The extension of the prohibition to indirect or chain refoulement has been acknowledged in human rights law and in international refugee law. Already from the

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[180] Pro Asyl, **"Pushed Back: Systematic Human Rights Violations against Refugees in the Aegean Sea and at the Greek-Turkish Land Border"**, 7th November 2013, available at: *http://www.proasyl.de/fileadmin/fm-dam/l_EU_Fluechtlingspolitik/proasyl_pushed_back_24.01.14_a4.pdf*, last accessed 22 April 2014

[181] UNHCR, **"Syrian Refugees in Europe: What Europe can do to ensure protection and solidarity"**, July 2014, available at: *http://www.unhcr.ch/fileadmin/user_upload/dokumente/06_service/zahlen_und_statistik/UNHCR_Report_on_Syrian_Refugees_in_Europe.pdf* , last accessed 13 August 2014

[182] D'Angelo Ellen F, **"Non-Refoulement: The Search for a Consistent Interpretation of Article 33"**, Vanderbilt Journal of Transnational Law, 2009, available at: *http://www.vanderbilt.edu/jotl/2012/07/non-refoulement-the-search-for-a-consistent-interpretation-of-article-33/*, last accessed 13 August 2014

drafting of the 1951 Refugee Convention the intent to extent refoulement to other countries apart from the country of origin was clear. The Ad Hoc committee on Refugees and Stateless Persons reported[183] that article 33 referred "not only to the country of origin but also to other countries where the life or freedom of the refugee would be threatened". Also, UNHCR in 1977 clarified that the words "where his life or freedom would be threatened" of article 33 were not intended to lay down a stricter criterion than the words "well-founded fear of persecution" figuring in the definition of the term "refugee" in Article 1 and that "the, different wording was introduced for another reason namely to make it clear that the principle of non-refoulement applies not only in respect of the country of origin but to any country where a person has reason to fear persecution"[184].

UNHCR acknowledges that "there is no obligation under international law for a person to seek international protection at the first effective opportunity". However, it also acknowledges that "asylum-seekers and refugees do not have an unfettered right to choose the country that will determine their asylum claim in substance and provide asylum. Their intentions, however, ought to be taken into account"[185]. UNHCR seems to have a sense of reality when it embraces the concept of safe third countries, by encouraging States "to ensure that the safe third country notion is applied with clear safeguards". It has stated that "under certain circumstances and with appropriate guarantees in the individual case, the transfer of responsibility for assessing an asylum claim to another country may be an appropriate measure"[186].

a. Safe Third Country

The third country can be either the first country of asylum, meaning the country where the refugee first arrived after having left his country of origin and where he has already found some form of protection, or any other country which is not the refugee's country of nationality, as long as it is willing to accept the refugee and there

[183] UN Ad Hoc Committee on Refugees and Stateless Persons, **Report of the Ad Hoc Committee on Refugees and Stateless Persons**, Second Session, Geneva, 14 August to 25 August 1950, 25 August 1950, E/AC.32/8;E/1850, available at: *http://www.refworld.org/docid/3ae68c248.html*, last accessed 13 August 2014

[184] UNHCR, **Note on Non-Refoulement** (Submitted by the High Commissioner), 23 August 1977, EC/SCP/2, available at: *http://www.refworld.org/docid/3ae68ccd10.html*, last accessed 13 August 2014

[185] EXCOM Conclusion No. 15 (XXX) 1979, para. (h) (iii).

[186] EXCOM, Note on International Protection, UN doc. EC/53/SC/CRP.9, 3 June 2003, para. 12.

is a sufficient connection between the individual and that country[187]. According to UNHCR[188], a refugee claimant should not be removed to a country with which he lacks a sufficient connection. Mere transit is not sufficient for this purpose. Facts as the object and duration of the previous stay in the third country, as well as more general facts such as family connections, cultural ties and knowledge of the language, are relevant.

It is clear that article 33 precludes the removal of a refugee or asylum seeker to a third State in circumstances in which there is a risk that he or she might be sent from there to a territory where he or she would be at risk[189]. Although there is the view that article 33 cannot be read as precluding removal to a safe third country, one in which there is no danger and that the prohibition on refoulement applies only in respect of territories where the refugee or asylum seeker would be at risk, not more generally. But, it requires that a State willing to remove a refugee or asylum seeker should undertake a proper assessment as to whether the third country concerned is indeed safe[190]. This view is also stated in Conclusion No. 58 of the Executive Committee which, addressing refugees and asylum seekers who move in an irregular manner from a country where they have already found protection, provides that they may be returned to that country "if they are effectively protected there against refoulement"[191].

Article 3 of the ECHR also prohibits indirect refoulement[192]. However, it was not until the Court's admissibility decision in T.I. v the United Kingdom[193], on 2000 that the prohibition on indirect refoulement was explicitly acknowledged by the Court. In this case the Court adopted a relatively low standard of protection

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[187] Supra note 26 Wouters (2009).

[188] EXCOM Conclusion No. 15 (XXX), 1979, para. (h) (iv)

[189] Supra Note 17, Lauterpacht and Bethlehem (2003).

[190] Supra Note 17, Lauterpacht and Bethlehem (2003).

[191] EXCOM Conclusion

[192] **Salah Sheekh v. The Netherlands**, Application no. 1948/04, Council of Europe: European Court of Human Rights, 11 January 2007, available at: *http://www.refworld.org/docid/45cb3dfd2.html*, accessed 4 August 2014

K.R.S. v. United Kingdom, Application no. 32733/08, Council of Europe: European Court of Human Rights, 2 December 2008, available at: *http://www.refworld.org/docid/49476fd72.html*, last accessed 15 August 2014

Abdolkhani and Karimnia v. Turkey, Appl. No. 30471/08, Council of Europe: European Court of Human Rights, 22 September 2009, available at: *http://www.refworld.org/docid/4ab8a1a42.html*, last accessed 15 August 2014

[193] **T.I. v. United Kingdom**, Application No. 43844/98, Council of Europe: European Court of Human Rights, 7 March 2000, available at: *http://www.refworld.org/docid/3ae6b6dfc.html*, last accessed 15 August 2014

concerning removal by the third country to the country of origin. The Court emphasised that all States parties to the European Convention have an individual responsibility to ensure the rights and freedoms of the Convention. States parties may not automatically rely on the responsibility of other States parties. But the Court did not actually address the concept of safe third countries as such. Hirsi Jamaa is the first judgment in which the European Court of Human Rights exhaustively deals with possible indirect refoulement through a state that is not a party to the European Convention, widening up the debate on safe third country practices and protection elsewhere. In Hirsi the Court's examination of the treatment of irregular migrants in Libya is not only relevant to various types of safe third country arrangements as practiced within asylum law, but also to readmission practices involving the return of illegally staying migrants who do not have the nationality of the receiving country. The Court bases its conclusion that there is insufficient protection against arbitrary repatriation on four elements: 1) Libya had not ratified the Refugee Convention, 2) Libya did not provide for refugee status determination or an equivalent asylum procedure, 3) UNHCR's marginal role in Libya, and 4) evidence of actual forced returns of asylum seekers and refugees[194].

Moreover, the prohibition on indirect refoulement was acknowledged by the Human Rights Committee in its General Comment Number 31[195], in which it stated that "the prohibition on refoulement applies both in situations where there is a real risk in the country to which the removal is to be effected or in any country to which the person may subsequently be removed" The Human Rights Committee has provided no guidelines on the interpretation and application of the prohibition on indirect refoulement. In Bakhtiyari v Australia[196] the authors claimed that when deported by Australia to Pakistan they would be returned from Pakistan to Afghanistan, but the Committee did not address this issue as the claim was found to be unsubstantiated and was declared inadmissible.

Furthermore, the Committee against Torture has raised concerns about the application of the concept of safe countries of origin and safe third countries. Under

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[194] Den Heijer Maarten, **"Reflections on Refoulement and Collective Expulsion in the Hirsi Case"**, International Journal of Refugee Law Vol. 25 No. 2 pp. 265–290, available at: *http://ijrl.oxfordjournals.org/content/25/2/265.abstract*, last accessed 13 August 2014

[195] Supra Note 45

[196] **Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari v. Australia**, CCPR/C/79/D/1069/2002, UN Human Rights Committee (HRC), 6 November 2003, available at: *http://www.refworld.org/docid/404887ed0.html*, last accessed 15 August 2014

Article 3 no one shall be expelled, returned or extradited to another State. According to the Committee against Torture[197] the words another State refer to: 'the State to which the individual concerned is being expelled, returned or extradited, as well as to any State to which the author may subsequently be expelled, returned or extradited'. The prohibition on indirect refoulement was confirmed by the Committee in several individual cases[198]. In Korban v Sweden[199] the complainant was threatened with expulsion to Jordan from which he feared he would subsequently be expelled to Iraq, where he claimed he would run the risk of being tortured. The Committee noted that the State party, Sweden, had not made an assessment of the risk of expulsion from Jordan to Iraq and considered that "it appeared from the parties' submissions that the complainant was not entirely protected from being deported by Jordan to Iraq". In this regard information from the UNHCR was considered to be relevant, indicating that in the previous year two cases of forced expulsion of refugees had taken place and that Jordan should not be considered a safe country as Iraqis were not protected from expulsion to Iraq. The Committee then concluded that Sweden had an obligation not to return the author to Jordan and ended with noting that, although Jordan was a party to the Convention against Torture, it had not made a declaration under Article 22 of the Convention as a result of which the author would not have the possibility of submitting a new communication to the Committee if he was threatened with

[197] Committee Against Torture, **General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications)**, 21 November 1997, A/53/44, annex IX, available at: *http://www.refworld.org/docid/453882365.html*, last accessed 14 August 2014

[198] **Balabou Mutombo v. Switzerland**, CAT/C/12/D/013/1993, UN Committee Against Torture (CAT), 27 April 1994, available at: *http://www.refworld.org/docid/3ae6b6784.html*, last accessed 14 August 2014

Kaveh Yaragh Tala v. Sweden, CAT/C/17/D/43/1996, UN Committee Against Torture (CAT), 15 November 1996, available at: *http://www.refworld.org/docid/3ae6b65c34.html*, last accessed 14 August 2014

Seid Mortesa Aemei v. Switzerland, CAT/C/18/D/34/1995, UN Committee against Torture (CAT), 29 May 1997, available at: *http://www.refworld.org/docid/3ae6b69420.html*, last accessed 15 July 2014

Orhan Ayas v. Sweden, CAT/C/21/D/097/1997, UN Committee Against Torture (CAT), 12 November 1997, available at: *http://www.refworld.org/docid/3f588edfa.html*, last accessed 14 August 2014

A.S. v. Sweden, CAT/C/25/D/149/1999, UN Committee Against Torture (CAT), 15 February 2001, available at: *http://www.refworld.org/docid/3f588ecc7.html*, accessed 14 August 2014

[199] **Avedes Hamayak Korban v. Sweden**, CAT/C/21/D/088/1997, UN Committee Against Torture (CAT), 16 November 1998, available at: *http://www.refworld.org/docid/3f588edea.html*, last accessed 15 August 2014

expulsion from Jordan to Iraq. Also, in Z.T. v Australia[200] the individual complained that he would be subjected to torture upon his return to Algeria. From Algeria he had travelled to Saudi Arabia, where he had stayed for seven months; he then went to South Africa from where he travelled to Australia and requested asylum. The claim was denied and the individual was removed to South Africa where he was detained. Unlike in the Korban case however, the Committee considered that no substantial grounds existed so the Committee concluded that the expulsion of the individual from Australia to South Africa was not in breach of Article 3. The Committee did not address the risk of subsequent removal by South Africa to Algeria.

Caution should be exercised when it is not assessed whether or not there is a foreseeable risk of returning the refugee to his country of origin, but the transfer is implemented in a "mechanical way"[201], based simply in an agreement of collective responsibility, or a list of countries deemed to be safe. In this regard the use of a list of safe third countries is in breach of refugee and human rights law if no individual assessment is made regarding the safety of that country[202]. According to UNHCR "the question whether a country is safe is not a generic one which can be answered for any asylum-seeker in any circumstances, i.e. on the basis of a safe third country list. A country may be safe for asylum-seekers of a certain origin and unsafe for others of a different origin"[203]. The State which is first confronted with the protection claim has and retains the immediate and primary responsibility to protect the refugee against refoulement. While the third country remains primarily responsible for a direct act of refoulement, the first country, through its act of removal to the third country, is jointly liable for violating the prohibition on refoulement[204]. In relation to that, Legomsky[205] introduced the complicity principle, according to which no country may return a refugee to a third country knowing that the third country will do anything to that person that the sending country would not have been permitted to do itself, regardless

[200] **Z.T. v. Australia**, CAT/C/31/D/142/2000, UN Committee Against Torture (CAT), 19 November 2003, available at: *http://www.refworld.org/docid/404887eb3.html*, last accessed 15 August 2014

[201] Supra Note 78 Hathaway (2005), p. 325

[202] EXCOM, Note on International Protection, UN doc. A/AC.96/914, 7 July 1999, para. 20.

[203] UNGA, EXCOM, **Note on International Protection**, UN doc. A/AC.96/914, 7 July 1999, available at: *http://www.unhcr.org/4cb2d8749.html*, last accessed 14 August 2014

[204] Supra Note 80, Goodwin-Gill and Jane Mc Adam (2005).

[205] Stephen H. Legomsky, **"Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection"**, Int J Refugee Law (2003) 15 (4): 567-677, available at: *http://ijrl.oxfordjournals.org/content/15/4/567.full.pdf+html*, last accessed 29 June 2014

of whether the third country is a party to the Refugee Convention. In practice, States often apply the concept of safe third country strictly, not allowing the refugee claimant sufficient space to rebut the presumption of safety and treat the existence of a third country as evidence of a weak substantive protection claim. The strictest practices are currently applied by Australia[206] and EU countries.

The condition of safety of the third country concerns not just the sole risk of being returned to the frontiers of territories where there is a threat to a person's life or freedom, but also the availability of further effective protection in the third country[207]. Wouters has laid down four preconditions for a transfer to a third country to be considered lawful[208]: First, the absence of a direct threat to the refugee's life or freedom. If not, the removal would be a direct violation of the prohibition of refoulement. Second, the refugee must have a clear and real ability lawfully to enter and remain in the third country, and as such the third country must expressly agree to admit the refugee to its territory and to consider his claim for protection substantively in fair proceedings. In this regard, situations of refugees in orbit must be avoided. Thirdly, the refugee must be treated in accordance with basic human rights standards, including basic economic, social and cultural rights. Fourthly, an assessment of the safety of the third country and the availability of effective protection must be individual and based on the factual situation. The concept of safety should neither be assessed on formal criteria nor automatically applied". These four preconditions if applied to the cases of Lampedusa and Farmakonisi prove how these incidents don't fulfil the criteria. In particular in the Farmakonisi incident the lives of refugees were directly threatened, while the third country, Turkey, towards which the vessel was pushed back, was neither informed nor consented. Also, whether Turkey is considered as a safe country for refugees and asylum seekers is seriously doubted. And of course lastly, no individual examination was undertaken for any of the persons aboard.

[206] Since 2001 Australia has introduced the so-called Pacific Solution involving the interception of asylum seekers outside Australian territorial waters by Australian naval vessels. The asylum seekers were not allowed to land on Australian territory and, in the context of extra-territorial processing, they were to be transferred to other – neighbouring – countries, such as Indonesia, Papua New Guinea or Nauru, for further screening.

[207] Supra Note 80, Goodwin-Gill and Jane Mc Adam (2005), pp. 393 and 395.

[208] Supra note 26 Wouters (2009).

b. The Safe Third Country and the Safe Country of Origin Concepts in the Common European Asylum System

A basic ingredient of European asylum law and policy is the safe country notion, which is best exemplified through the Dublin System. The Dublin System consists of the Dublin Regulation and the EURODAC Regulation[209], which establishes a Europe wide fingerprinting database for unauthorised entrants to the EU. The Dublin Regulation aims to determine rapidly the Member State responsible for an asylum claim and provides for the transfer of an asylum seeker to that Member State. Usually, the responsible Member State will be the state through which the asylum seeker first entered the EU. The Dublin Regulation was adopted in 2003, replacing the Dublin Convention[210]. As of the 19th of July 2013 the Dublin III Regulation[211] came into force. It is based on the same principle as the previous two, that the first Member State where finger prints are stored or an asylum claim is lodged is responsible for a person's asylum claim.

The implementation of EU migration and asylum policy, to date, does not correspond to the enhancement of a harmonized system of protection, as exemplified by the adoption of the principle of Safe Third Country, enabling the removal of asylum seekers to EU countries at times incapable of guaranteeing adequate protection, on the grounds that this can be sought everywhere within the EU[212]. Since

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[209] Council Regulation (EC) No 603/2013 of 26 June 2013 on the **establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 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 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice**, 29 June 2013, OJ L. 180/1-180/30; 29.6.2013, (EU)2003/86, available at: *http://www.refworld.org/docid/51d296724.html*, last accessed 15 August 2014

[210] **Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities**, 15 June 1990, Dublin Convention, Official Journal C 254 , 19/08/1997, available at: *http://www.refworld.org/docid/3ae6b38714.html*, last accessed 15 August 2014

[211] Council Regulation (EC) No 604/2013 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**, (Dublin III Regulation), available at: *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:EN:PDF*, last accessed 15 August 2014

[212] Tucci Sabrina, **"Libyan cooperation on migration within the context of Fortress Europe"**, Amnesty International, International Secretariat, London, available at: *http://www.inter-disciplinary.net/wp-content/uploads/2012/02/tuccipaper.pdf*, last accessed 19 April 2014

the harmonization process all EU member states are considered safe and able to offer protection and as such additional movements across these are deemed to be motivated by reasons other than the need for protection[213]. International law establishes that the country where an asylum claim is filed is the one responsible for its processing as opposed to requiring asylum claimants to seek protection in the country of first arrival. EU member states, however, through the Dublin system, often abuse the principle of Safe Third Country and invert the concept of responsibility sharing by expecting the country of first entrance to take responsibility for processing claims of asylum seekers entered in an irregular fashion, even when the country does not provide sufficient guarantee for protection - as may be supported for Greece, Malta and Bulgaria, through various reports of international non-governmental organisations - and regardless of where the claim has been lodged[214]. The harmonization of national legislation does not necessarily correspond to the reasonable distribution of asylum seekers across EU member states. Although, increasing the number of states where asylum seekers can in theory be returned and granted protection, when combined with the principle of Safe Third Country, harmonization permits the redistribution of asylum seekers to transit countries and to those countries proximate to producing migration areas[215].

So, a violation of indirect refoulement can be envisaged under the Dublin Regulation, when the State denies Dublin's application and returns the asylum seekers to another Member State under the different basis of a Readmission Agreement as is the case between Italy and Greece in Sharifi and others v Italy and Greece. The authorities argued that the Italian practice was inter alia based on a translation error in the Italian version of the Regulation and that the practice of sending asylum seekers directly to Greece was permitted under Article 3.3 which states that "Any Member State shall retain the right, pursuant to its national laws, to send an asylum seeker to a third country, in compliance with the provisions of the Geneva Convention". However, while the authoritative English text refers to a "third country", i.e. to a country not bound by the Dublin Regulation, the Italian version omits the word "third" and Italy maintains a right to send people without formalities to other Dublin participating States. Also, in T.I. v the United Kingdom, mentioned above, unlike the

[213] Ibid.
[214] Ibid.
[215] Ibid.

United Kingdom, Germany did not accept a well-founded fear of persecution emanating from non-State actors, whom in this case the asylum seeker feared.

The concept of safe third country has been further codified in Europe, in the EU Procedures Directive[216]. In Article 27.1 of the Directive it is stated that the concept may be applied provided there is no threat to life or freedom on account of race, religion, nationality, membership of a particular social group or political opinion, no risk of indirect refoulement, no risk of being subjected to torture or other forms of proscribed ill-treatment and there is a possibility of asking for refugee status in accordance with the Refugee Convention. Furthermore, if the third State does not allow the person to enter its territory, the Member States are obliged to guarantee him access to proceedings for the determination of refugee status which is in accordance with the EU. However, the generic framing of the concept of safe third countries in the Directive is somewhat worrying in spite of the individual assessment implied by Articles 25 and 27. Though the criteria referred to in Article 27.1 acknowledge the prohibition on direct and indirect refoulement, as well as the right to be protected against subjection to torture and other forms of internationally proscribed ill-treatment, the criteria disregard the right to be treated in accordance with basic human rights standards, including basic economic, social and cultural rights, and do not take into account the fact that the safety of the third country, in terms of effective protection, must be individual and based on the factual situation.

Without mentioning the Union by name, the Executive Committee[217] noted, as early as 1999, that policies such as those initiated by the EU, based on "notions such as safe country of origin, internal flight alternative and safe third country, should be appropriately applied so as not to result in improper denial of access to asylum procedures, or to violations of the principle of non-refoulement". According to Allain, the introduction of such elements into the asylum system of the EU opened the door for individuals to be returned to a State where their lives would be threatened in clear violation of Article 33 of the 1951 Convention[218].

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[216] Council Directive 2005/85/EC of 1 December 2005 **on minimum standards on procedures in Member States for granting and withdrawing refugee status** (Procedures Directive), available at: *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF*, last accessed 15 August 2014

[217] Supra note 97

[218] Supra Note 108, Allain (2002)

The Committee of Ministers of the Council of Europe in 1997 adopted guidelines in order to assess whether or not a country might be regarded as a safe third country[219]. The Committee stated that all the criteria should be met in each individual case, like the Court calling for a case-by-case assessment. The guidelines include observance by the third country of international human rights standards relevant to asylum as established in universal and regional instruments, including compliance with the prohibition on torture, inhuman or degrading treatment or punishment and international principles relating to the protection of refugees as embodied in the Refugee Convention, with special regard for the principle of non refoulement. Furthermore, the third country will have to provide effective protection from refoulement and the opportunity to seek and enjoy asylum, and the asylum-seeker has already been granted effective protection in the third country or has had the opportunity, at the border or within the territory of the third country, to make contact with that country's authorities in order to seek protection there before moving on to the member State in which the aylum request was lodged, or that as a result of the personal circumstances of the asylum-seeker, including his or her prior relations with the third country, there was clear evidence of his admissibility to the third country.

EU countries, by virtue of specific bilateral readmission agreements, can also devolve their responsibilities by refouling asylum seekers to third countries on the grounds of the alleged protection provided there to those expelled but without guarantee for its effective provision, this is in stark violation of article 33 of the Refugee Convention. Except from the readmission agreements EU member states has also been made use of list with countries considered as safe. However, on 2008 the European Court of Justice annulled[220] Articles 29.1, 29.2 and 36.3 of the EU Procedures Directive. These Articles concerned the procedure for adopting and amending a minimum common list of third countries, and European countries, regarded as safe countries of origin. A side effect of the usage of lists with safe third countries is the adoption of accelerated procedures which creates a gap between the UNHCR guidelines and the EU standards. The CJEU[221] has recently corroborated

[219] Council of Europe, Committee of Ministers, Rec(97)22E, 27 November 1997 containing guidelines on the application of the safe third country concept.

[220] **European Parliament v. Council of the European Union, C-133/06**, European Union: Court of Justice of the European Union, 6 May 2008, available at: *http://www.refworld.org/docid/4832ddb92.html*, last accessed 15 August 2014

[221] **N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner**, Minister for Justice, Equality and Law Reform , C-

Strasbourg case law rejecting non-rebuttable presumptions of safety and removals to third countries without a prior comprehensive individual review.

The notion of safe third country has its supporters as it is supposed to be seen as a limit on the use of the national security exception, especially in mass influx situations[222]. However, the principle of first asylum could be implemented, in a different way than the current practices, with the aid of resettlement guarantees and substantial financial contributions from distant states to the border states, in order to relieve some of the border states' concerns. A low scale implementation of this theory can be found currently in the European Asylum System, through the family reunification mechanism incorporated in the Dublin Regulation. But a wider implementation would actually offer relief in the States of the South, who are facing a largest influx of people.

1.2.3. Mass influx and Non Refoulement

Although refoulement in situation of mass influx is not an act by itself, it is features here because it is promoted as an excellent situation under which states may adhere the prohibition of refoulement.

Although, there is no legal definition of the term mass influx[223], the Executive Committee in its Conclusion No.100[224] is referring to it as: "1. Considerable numbers of people arriving over an international border 2. A rapid rate of arrival. 3. Inadequate absorption or response capacity in host States, particularly during emergency 4. Individual asylum procedures, where they exist which are unable to deal with such large numbers".

411/10 and C-493/10, European Union: Court of Justice of the European Union, 21 December 2011, available at: *http://www.refworld.org/docid/4ef1ed702.html*, last accessed 15 August 2014

[222] Farmer Alice, **"Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures That Threaten Refugee Protection"**, Georgetown Immigration Law Journal, Volume 23, Number 1, Fall 2008, available at: *http://works.bepress.com/alice_farmer/1/*, last accessed 10 March 2014

[223] Durieux Jean-François and McAdam Jane, **" Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies"**, Int J Refugee Law (2004) 16 (1): 4-24., available at: *http://ijrl.oxfordjournals.org/content/16/1/4.abstract*, last accessed 15 August 2014

[224] Supra note 97

The definition of a refugee refers to an individual person[225], in the sense that the person concerned must have a well-founded fear. But this does not mean that the Refugee Convention is not applicable in situations of mass influx as a result of entire groups being displaced. However, the Convention itself contains nothing to suggest its inapplicability in cases of mass influx and even in such situations the individual members of the displaced group may still be refugees[226]. In paragraph 44 of the Handbook the UNHCR stated[227] that "while refugee status must normally be determined on an individual basis, situations have also arisen in which entire groups have been displaced under circumstances indicating that members of the group could be considered individually as refugees…in such situations the need to provide assistance is often extremely urgent and it may not be possible for purely practical reasons to carry out individual determination of refugee status for each member of the group." Recourse has therefore been had to so-called group determination of refugee status, whereby each member of the group is regarded prima facie as a refugee[228] or is provided temporary protection. Providing temporary protection basically puts a refugee status determination 'on hold', creating a status-quo whereby the people protected are not returned to their country of origin. In that sense, temporary protection is in accordance with the prohibition on refoulement contained in Article 33 of the Refugee Convention[229]. Although temporary protection does not provide as much long-term security for refugees as resettlement, it may be easier to implement for political reasons, and it serves the aim of getting refugees to a place of safety as well as the aims of solidarity and responsibility sharing[230]. In the current Syrian's Refugee Crisis, some European countries, like Germany, pledged admission to 20,000 refugees from Syria via its Temporary Humanitarian Admission Programme, through which approximately 6000 refugees had arrived in Germany by mid-2014[231], but, but UNHCR has called for more resettlement or humanitarian admission for Syrian refugees.

[225] Supra note 26 Wouters (2009).
[226] Supra Note 223
[227] Supra Note 15, para. 44.
[228] Supra note 26 Wouters (2009).
[229] Supra note 26 Wouters (2009).
[230] Cynthia Orchard and Andrew Miller, **"Protection in Europe for refugees from Syria"**, RSC Forced Migration Policy Briefing 10, 2014, available at: *www.rsc.ox.ac.uk/publications/protection-refugees-syria*, last accessed 15 August 2014
[231] Ibid.

Although, the 1967 Declaration on Territorial Asylum[232] formally recognizes the possibility of reservations to the non-refoulement principle "for overriding reasons of national security … as in the case of a mass influx of persons.", the Refugee Convention was introduced in 1951 to deal with the mass influx of refugees in the Europe post World War II, thus it should have intended that the whole exodus of refugees should not be rejected or returned and the same rule or principle should apply today[233]. Furthermore, the importance of observing the rule of non- refoulement at all times is also clearly articulated by the UNHCR Executive Committee in a number of its Conclusions[234].

As Goodwin-Gill[235] observes mass influxes or large scale population movements have repeatedly triggered the national security exception to non-refoulement, particularly among states that share borders with historically unstable states, such as Thailand, Turkey etc. In mass influx situations, states deliberately closed their borders to asylum seekers, with security and economic shortages as the two most widespread explanations for their negative action. But, even potential mix of irregular migrants and refugees, as are the most current flows in the Mediterranean, does not change the responsibility of States to provide international protection to refugees, even if for example a vessel containing 500 migrants contains only one refugee. In a way such a situation of mixed movements can be compared to a situation of mass influx, whereby a State is obliged to provide at least temporary protection until a determination of the person's refugee status has been made[236]. In a situation of large-scale or mass influx of refugees it will not, for logistical reasons, be easy for States to provide protection and meet their obligations under Article 33(1) of the Refugee Convention in a similar way to when confronted with individual refugees. However, States remain prohibited from removing refugees, even in large numbers, to the frontiers of territories where they have a risk and may also have the obligation to

[232] UNGA, **Declaration on Territorial Asylum**, 14 December 1967, A/RES/2312(XXII), available at: *http://www.refworld.org/docid/3b00f05a2c.html*, last accessed 21 July 2014

[233] Supra Note 89

[234] UNHCR EXCOM Conclusion No. 15 (XXX) "Refugees without an Asylum Country"; UNHCR EXCOM Conclusion No. 19 (XXXI) "Temporary Refuge"; UNHCR EXCOM General Conclusion No. 21 (XXXII) "International Protection"; UNHCR EXCOM Conclusion No. 22 (XXXII) "Protection of Asylum-Seekers in Situations of Large-Scale Influx"; UNHCR EXCOM Conclusion No. 23 (XXXII) "Problems Relating to the Rescue of Asylum-Seekers in Distress at Sea"; UNHCR EXCOM Conclusion No. 35 (XXXV) "Identity Documents for Refugees"; UNHCR EXCOM Conclusion No. 44 (XXXVII) "Detention of Refugees and Asylum-Seekers", UNHCR EXCOM General Conclusion No. 65 (XLII) "International Protection" et. al.

[235] Supra Note 80, Goodwin-Gill and Jane Mc Adam (2005).

[236] Supra note 26 Wouters (2009).

allow them to enter. In these situations the burden falls upon other countries in the region that should also be responsible for providing protection to the refugees and assist with practical means, as technical and financial support, to ensure that countries provide good reception conditions, registration facilities, etc.

2nd Part

2.1 Obligations on refugees at sea

All vessels, including state vessels, are bound by the law of the sea. The law of sea stipulates that states can only interdict and assert control over foreign vessels in specific circumstances. These specific circumstances vary across the different maritime zones. When these specific circumstances are not met states often characterise their conduct as a search and rescue operation.

The first time that large numbers of asylum emigrated in often crudely made or ill-equipped boats, was in the aftermath of the communist victory in Vietnam and the subsequent mass exodus from Indo-China in the mid to late 1970s. Then the phrase “boat people” was used to refer to those people. Earlier, during the Second World War, some Jewish refugees fled in this manner. Since then incidents of tragedy at sea involving asylum seekers remain constant. For a long time, the notion of asylum-seekers attempting to immigrate by boat was not considered a European problem. This can no longer be said to be the case. Several states might be concerned by the arrival of asylum-seekers by sea, as the coastal state or state of destination, the national state of the individuals or their state of origin, the flag state of the vessel carrying the asylum-seekers and eventually the state of transit or first port of asylum.

States have increasingly resorted to interception or interdiction measures to prevent refugees at sea from reaching their territory, inter alia to control irregular migration flows rather than to assist them. When performing interception activities at sea, European Member States have to take their obligations into account. Determining these obligations can be complex and difficult, as it both involves human rights law and international maritime law. The high seas are open to all States making it difficult to determine which State is responsible for the protection from refoulement. The discussion of State responsibility for refugees at sea is further complicated by the fact that often overcrowded and unseaworthy vessels are used, and that the people on board are therefore in need of rescue irrespective of whether or not they are seeking or are in need of refugee protection. Furthermore, attempts to quantify the scale of the issue are problematic as it is particularly difficult to estimate the number of persons who fail to arrive safely. The estimates provided by humanitarian NGOs such as

Fortress Europe suggest that since 1993 until 2014 more than 17.306 people[237] have lost their lives in an attempt to reach European shores by boat.

2.1.1 Naval Interdictions Programs and Obligations arising from the Law of the Sea

In maritime areas, the state must tailor its activities to fit within an already regulated and structured regime, one that places high value on freedom of navigation, recognizes the primary responsibility and interests of flag states, and allows coastal nations to exercise certain powers within territorial waters and the contiguous zone[238]. The term interdiction has been defined differently under varying branches of international law. The first step of interdictions involves the stopping and boarding of a vessel at sea and the second step the arresting of the vessel, passengers and cargo on board the vessel, if necessary. Interdiction may also involve states exercising a right of enquiry over foreign vessels. In practice, interdiction and returns occur when a vessel approaches a foreign vessel and after enquiring of the nationality of the vessel, proceeds to board it in order to tow or escort it to another location[239]. Discussion surrounding interdiction implies that the act of carrying migrants across the sea is a criminalised activity. In fact it is the right of all individuals to freely move through the high seas. It is only upon entering the territorial waters of a state that unlawful migration may occur[240]. The practice of naval interdiction consists of the action of one state or more, undertaken on the basis of an international agreement, aimed at exercising the right of visit in relation to criminal activities not listed in article 110 of UNCLOS[241], performed by ships without nationality or by vessels sailing the flag of a

[237] UNITED for Intercultural Action, **List of documented refugee deaths through Fortress Europe**, available at: *http://www.unitedagainstracism.org/pdfs/listofdeaths.pdf*, last accessed 15 August 2014

[238] Trevisanut Seline, "The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection", Max Planck Yearbook of United Nations Law, Vol. 12, pp. 205-246, 2008, available at: http://ssrn.com/abstract=1798756, last accessed 19 April 2014

[239] Roden Sophie, **"Turning Their Back On The Law?: The Legality of the Coalition's Maritime Interdiction and Return Policy"**, Centre for Military & Security Law, 2013, available at: *https://law.anu.edu.au/sites/all/files/acmlj/turning_their_back_on_the_law_v2.pdf*, last accessed 15 March 2014

[240] Supra Note 238

[241] Article 110: Right of visit 1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that: (a) the ship is engaged in piracy; (b) the ship is engaged in the slave trade; (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has

state or a group of states. Several interdiction programs, especially in the EU, have been created to prevent and obstruct irregular migration flows[242].

Article 2.1 of the United Nations Convention on the Law of the Sea provides that, "the sovereignty of a coastal State extends, beyond its land territorial and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea". This maritime zone cannot exceed the 12 nautical miles. The only general exception to the exclusive powers of the coastal state in its territorial sea consists of the right of innocent passage as stated in article 17 of UNCLOS. The coastal state shall not hamper the innocent passage of foreign ships through the territorial sea but it can regulate the conditions of the passage in the fields listed in article 21, inter alia "the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State". The coastal state can also prevent a passage which it considers not innocent and suspend the related right in specific areas of its territorial sea when this is essential for the protection of its security. Moreover, the coastal state shall not exercise its criminal jurisdiction on foreign vessels crossing its territorial sea except if the consequences of the offence extend into its territory or if the offence is of a kind to disturb the peace or the security or the good order of the territorial sea.[243].

A fundamental distinction can be drawn, however, between a vessel merely exercising its right of innocent passage in the territorial waters of a foreign state without being directed to its coasts, and the situation of a vessel crossing the territorial sea of the coastal state to reach its territory[244]. In the first situation the coastal state has no jurisdiction on the passing vessel unless it considers the presence of unlawful passengers, the undocumented refugees, as a breach of the conditions for enjoying the

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jurisdiction under article 109; (d) the ship is without nationality; or (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship. 2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration. 3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained. 4. These provisions apply mutatis mutandis to military aircraft. 5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service

Convention on the Law of the Sea, UN General Assembly, 10 December 1982, available at: *http://www.refworld.org/docid/3dd8fd1b4.html*, last accessed 15 July 2014

[242] A.M. Syrigos, "**Developments on the Interdiction of Vessels on the High Seas**", in: Strati A., Gavouneli M., N. Skourtos, **Unresolved Issues and New Challenges to the Law of the Sea**, 2006

[243] Supra Note 80, Goodwin-Gill and Jane Mc Adam (2005).

[244] Supra Note 238

right of innocent passage. Consequently, the state could refuse the entry of the vessel into its territorial waters. Such refusal can have consequences for individuals' enjoyment of the right of seeking asylum and the right of non-refoulement. It is very important to distinguish the kinds of operations carried out by the authorities of the coastal state in the territorial waters. If the operation is aimed at the expulsion of the vessel, the coastal state exercises its power to expel those vessels or persons it considers to have unlawfully entered its territory, namely its territorial sea. It recognizes implicitly that the vessel entered its territory and therefore becomes subject to its jurisdiction[245]. In line with this, the passengers of the vessel enjoy the rights guaranteed by the international obligations binding the interested state in respect to the persons submitted to its jurisdiction; among them are the principle of non-refoulement and fundamental human rights. On the contrary, if the intervention of the coastal state authorities is only aimed at refusing the entry, this implies the movement of the frontier to the area where the operation takes place[246]. The individuals concerned are not yet under its jurisdiction but state authorities are still limited by the principle of non-refoulement in its meaning of non-rejection at the frontier. The deterrence policy as was analysed aims at denying access to the territory through the non-authorization of entry or through the creation of international zones in which neither domestic nor international law apply. As far as the territorial sea is concerned, two behaviours can particularly violate the obligations deriving from the principle in its meaning of non-rejection at the frontier: the refusal of entry into the territorial sea and the denial of access into the port or of disembarkation[247].

The contiguous zone extends beyond the territorial sea to a limit of 24 nm. The zone is conterminous with the Exclusive Economic Zone and the continental shelf. As a result, the enshrined freedom of navigation of the high seas also applies within the contiguous zone. Under an exception to the freedom of navigation principle, in this zone, coastal states are entitled to exercise rights over the outward and inward bound movement of ships. Agents of states acting in the contiguous zone have limited powers to conduct interdiction operations as the freedom of navigation principle is applicable. The coastal state can exercise the control necessary in the contiguous zone to prevent and punish infringements of its customs, fiscal, immigration or sanitary

[245] Ibid.
[246] Ibid.
[247] Ibid

laws within its territorial sea[248]. The control asserted over asylum vessels is likely to be limited to the prevention of infringements, as punishment is only available upon breach of a domestic law. As such, a coastal state is only permitted to assert control to prevent the infringement, most likely by removing the asylum vessel to the edge of the contiguous zone[249]. However, in asserting this extraterritorial control the coastal state becomes bound by its international obligations, including the norm of non refoulement and the duty to rescue those in distress[250].

High seas are defined negatively by article 86 UNCLOS as "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State". The high seas are free of state sovereignty and are governed by the principle of freedom of the seas, within which freedom of navigation operates. High seas are characterized by the prohibition of appropriation and the freedom of the high seas, but this does not imply the absence of rules but rather indicates that freedoms are granted equally to all states. Article 87 UNCLOS[251] gives a non-exhaustive list of freedoms. The freedom of navigation encompasses two principles: the vessel sailing under the flag of any state has the right to navigate[252]; the navigation of a vessel sailing under the flag of one state should not be hampered by other states. A vessel may sail under the flag of only one state which exercises its exclusive jurisdiction, except in the cases explicitly provided by the Convention or in accordance with another agreement stating expressly the exception. Vessels on the high seas are subject to their flag state jurisdiction and other rules of international law.

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[248] **Convention on the Law of the Sea**, UN General Assembly, 10 December 1982, available at: http://www.refworld.org/docid/3dd8fd1b4.html, last accessed 15 July 2014

[249] Supra Note 80, Goodwin-Gill and Jane Mc Adam (2005).

[250] Supra Note 239

[251] Article 87: 1. The high seas are open to all States, whether coastal or landlocked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States: (a) freedom of navigation;(b) freedom of overflight;(c) freedom to lay submarine cables and pipelines, subject to Part VI;(d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;(e) freedom of fishing, subject to the conditions laid down in section 2;(f) freedom of scientific research, subject to Parts VI and XIII. 2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

Convention on the Law of the Sea, UN General Assembly, 10 December 1982, available at: *http://www.refworld.org/docid/3dd8fd1b4.html*, last accessed 15 July 2014

[252] Article 90: Right of Navigation: Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.

Convention on the Law of the Sea, UN General Assembly, 10 December 1982, available at: *http://www.refworld.org/docid/3dd8fd1b4.html*, last accessed 15 July 2014

The freedom of navigation enshrined within the high seas is not absolute as vessels can be subject to interference under permissive rules of international law. However, a vessel registered with its flag state is afforded protection by the flag state's enforcement of its jurisdiction over all activities on the vessel. States cannot interdict a foreign vessel which has flag state protection and is acting in compliance with international law requirements, except if consent is given by the captain or flag state. Asylum vessels often fall into the exceptions to these rules as they travel without state protection. The vessels used by asylum seekers are predominately small fishing boats. Due to their small size and expected use only within coastal waters these fishing boats are not registered with the state from which they originate. A vessel that is not registered is assumed to be assimilated to a ship without nationality[253]. As such, they are subject to the vulnerabilities inherent in travelling as a stateless vessel. Stateless vessels have no protection on the high seas as they are not directly bestowed any rights and have no jurisdiction to rely on to assert their sovereignty. The law of the sea is silent on the rights of stateless vessels, but has accepted that statelessness itself is not repugnant to the law of the sea. Recent state practice in the area of Mediterranean Sea on that account is quiet interesting, as there have been several cases where although vessels packed with asylum seekers were spotted by the Greek[254] and Maltese Coastguard in international waters, and while they were already in short of resources as water, food and fuel, the individuals on board refused to be transferred in a safe port and remained in the sea demanding to be rescued by the Italian coastguard. In both cases the asylum seekers were transferred in a Greek and Maltese safe port, respectively.

In relation with those incidents the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the Convention against Transnational Organised Crime[255] is also relevant. Article 8.7 of the Protocol give states powers to board and search stateless vessels if there is a reasonable suspicion that the vessel is engaged in the smuggling of migrants. These same powers are available over flagged ships engaged in the smuggling of migrants; however the flag state must give

[253] Supra Note 80, Goodwin-Gill and Jane Mc Adam (2005).

[254] Παπασταθοπούλου Χριστίνα, "**Αρνούνται να έλθουν στην Ελλάδα 65 μετανάστες**", Η Εφημερίδα των Συντακτών, 28 Ιουλίου 2014, available at: *http://www.efsyn.gr/?p=220965*, last accessed 30 July 2014

[255] **Protocol against the Smuggling of Migrants by Land, Sea and Air**, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, available at: *http://www.refworld.org/docid/479dee062.html*, last accessed 10 March 2014

permission for powers to be exercised over the vessel[256]. Smuggling of migrants is defined as "the procurement… of the illegal entry of a person into a state… of which the person is not a national or permanent resident in order to obtain a financial benefit"[257]. Individuals attempting to move asylum seekers through maritime zones are likely to be liable under such a definition. States may utilise these provisions to establish the jurisdictional nexus required to assert jurisdiction over stateless vessels. Under the Protocol, if evidence of smuggling is found, states may take "appropriate measures in accordance with relevant domestic and international law"[258]. Logically, it can be assumed that appropriate measures include bringing the vessel to the domestic port and initiating criminal procedures under domestic legislation, as it already being done in numerous cases by the Italian and Greek authorities, who are arresting the individuals in an asylum vessel who are suspected to be smugglers. This protocol does not permit states to remove the vessel to a foreign port and by asserting control the interdicting state is also required to respect its international law obligations, including the norm of non-refoulement[259].

Within the EU, coastal states monitor and control their borders both individually and in conjunction with the EU border management agency, Frontex. The majority of asylum seekers depart from North Africa, heading for Italy, Malta or Spain and from Turkey, heading for Greece. These states conduct interdictions of asylum vessels in all three maritime zones[260]. Bilateral agreements forged with third states regarding the repatriation of individuals on board asylum vessels form the legal basis for the EU's interdiction policy. The EU conducts joint operations with North African states in their territorial waters. These operations are aimed at preventing asylum vessels from departing the territorial sea for Europe. This operation is used by the EU in an attempt to pass off refugee protection obligations to the North African states. The EU also conducts interdictions within the high seas. Upon interdiction, the asylum vessels are forcibly returned to the country from which they embarked[261]. Generally no assessment of an individual's refugee status or the risks of returning an individual to the state of embarkation takes place[262]. Even if such an assessment is claimed to have

[256] Ibid article 8.2
[257] Ibid article 3.a
[258] Ibid article 8.2 and 8.7
[259] lbid article 9 and 16
[260] Supra Note 193
[261] Ibid.
[262] Ibid.

been conducted, there are practical difficulties that arise in regards to individual examinations which a state couldn't conduct accurately whilst at sea. States can only conduct effective and fair status examinations on land and so the obligation to individually evaluate corresponds to a temporary right to disembark[263]. Maritime interdictions are generally carried out by navy personnel on navy warships. A large number of refugees associate the military with their past persecution and are, thus, unlikely to speak freely with military personnel, particularly about their fear of persecution. Further practical concerns that arise include the requirement of interpreters on board to ensure all refugees can present their claims and the ability of personnel to scrutinise claims whilst on a ship. Indeed, the overwhelming conclusion to draw is that the conditions on naval vessels will not allow for adequate individual evaluations[264]. When this policy was implemented by Italy, it was found to be illegal by the ECtHR. The ECtHR found that the policy resulted in the collective expulsion of aliens, which is prohibited under the ECHR, and it breached Italy's non-refoulement obligations[265]. The judgement also criticised the EU's policy of classifying interdictions as search and rescue operations[266].

2.1.2 Safety of Life at Sea and Respect of the Principle of Non Refoulement in the Course of Search and Rescue Operations

Search and rescue is particularly important for asylum seekers who often find themselves lost or in distress during their trip to safe heavens. According to UNHCR, between January and 21 July 2014 over 85000 people arrived by sea to Italy[267] and have been rescued by the Italian Navy, while 308 persons arrived in Malta[268], most of them Eritreans and Syrians nationals. The same period it is estimated that over 800 people died in the Mediterranean. The data for Greece and Spain are not accessible, as

[263] O'Brien Killian, **"Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem"**, 2011, Goettingen Journal of International Law, available at: *http://www.gojil.eu/issues/32/32_article_obrien.pdf*, last accessed 22 April 2014.

[264] Supra Note 239

[265] Supra Note 119

[266] Ibid

[267] UNHCR, **EU solidarity for rescue-at-sea and protection of refugees and migrants**, 31 July 2014Central Mediterranean Sea Initiative (CMSI), available at: *http://www.unhcr.org/531990199.pdf*, last accessed 01 August 2014

[268] UNHCR, **Malta Asylum Trends 2014: Mid-Year Update**, available at: *http://www.unhcr.org.mt/news-and-views/press-releases/754-unhcr-fact-sheet-drop-in-boat-arrivals-to-malta*, last accessed 01 August 2014

the Greek Coast Guard doesn't publish total data but rather focus on individual cases, however UNHCR estimates that more people died in 2014 than in previous years in their attempt to reach Europe[269]. The duty to provide assistance to persons in distress at sea is "…one of the most ancient and fundamental features of the law of the sea" and is widely recognized as a norm of customary law[270].

The Safety of Life at Sea (SOLAS) Convention[271] and the Search and Rescue (SAR) Convention[272] are significantly relevant in this context. Article 98 of UNCLOS provides that "every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers to render assistance to any person found at sea in danger of being lost, to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him, after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call". Similarly, the SOLAS Convention provides that "the master of a ship at sea which is in a position to be able to provide assistance, on receiving a signal from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance…" The SAR Convention is designed to encourage increased cooperation between States Parties with the aim of optimizing search and rescue operations at sea. Considering that the aim of the SAR Convention is to ensure a speedy response following a maritime incident, it can be distinguished from the preventive approach adopted by the SOLAS Convention, which seeks to

[269] UNHCR, **Αυξάνονται οι νεκροί στο Αιγαίο καθώς πρόσφυγες από εμπόλεμες χώρες προσπαθούν να φτάσουν στην Ευρώπη**, 14 July 2014, available at: *http://www.unhcr.gr/nea/deltia-typoy/artikel/9392a9121ddeeffa909a90f2817695e2/ayxanontai-oi-nekro.html?L=fnywjyznrlj*, last accessed 01 August 2014

[270] International Law Commission, "Commentary on Draft Art. 12 of the United Nations Convention on the High Seas", UN doc. A/3179, 1956, available at: *http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1956_v2_e.pdf*, last accessed 10 March 2014

[271] **International Convention for the Safety of Life At Sea**, International Maritime Organization, 1 November 1974, 1184 UNTS 3, available at: *http://www.refworld.org/docid/46920bf32.html*, last accessed 10 March 2014

[272] **International Convention on Maritime Search and Rescue**, International Maritime Organization, 27 April 1979, 1403 UNTS, available at: *http://www.refworld.org/docid/469224c82.html*, last accessed 10 March 2014

establish minimum standards for the construction, equipment and operation of ships[273].

The personal scope of application of the search and rescue obligation includes any person found in distress at sea regardless of nationality or legal status. Discrimination on account of other circumstances is also prohibited. In regard to its ratione loci, the obligation is due throughout the ocean. Even though article 98 of UNCLOS is placed in the section devoted to the regulation of the high seas, the use of the generic "at sea" in article 98 of UNCLOS does not seem to allow for any geographical restrictions, as otherwise, the effectiveness of the obligation would be compromised.

Even though the current legal framework has as a goal the precise acts of rescue some argue that it leaves a gap of responsibility, as there is only a general obligation for coastal States to promote the establishment, operation and maintenance of an adequate and effective search and rescue service, either alone or in cooperation with other States, while the responsibility to rescue and provide assistance initially lies with the master of the ship that comes to the rescue, and entails the duty to deliver the people on board to a place of safety[274].

A rule designating a specific port of disembarkation is absent in the law of the sea, leaving it to the states involved in the SAR operation to provide for ad hoc arrangements every time. According to the IMO Guidelines on the treatment of persons rescued at sea[275], a place of safety is "…a location where rescue operations are considered to terminate. It is also a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Further, it is a place from which transportation arrangements can be made for the survivors' next or final destination." The delivery to a place of safety can be interpreted as disembarkation in the next port of call, but this practice has not yet evolved into a rule of customary law[276]. The absence of a

[273] O'Brien Killian, **"Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem"**, 2011, Goettingen Journal of International Law, available at: *http://www.gojil.eu/issues/32/32_article_obrien.pdf*, last accessed 22 April 2014

[274] Supra note 26 Wouters (2009).

[275] International Maritime Organization, Resolution MSC.167(78), **Guidelines on the Treatment of Persons Rescued At Sea**, 20 May 2004, available at: *http://www.refworld.org/docid/432acb464.html*, last accessed 21 July 2014

[276] Moreno Lax Violeta, **"Seeking Asylum In The Mediterranean Against A Fragmentary Reading Of EU"**, International Journal of Refugee Law, 2011, available at: *http://ijrl.oxfordjournals.org/content/23/2/174.abstract*, last accessed 10 March 2014

clear definition of a place of safety is not per se damaging since it allows for a case by case approach, which takes into account the particular circumstances of each rescue situation and the different categories of stowaways[277]. The notion of safety has no single meaning and the arrangements made in regard to some of those rescued may not be valid for others. As established by the IMO Guidelines "these circumstances may include factors such as the situation on board the assisting ship, on scene conditions, medical needs, and availability of transportation or other rescue units. Each case is unique, and selection of a place of safety may need to account for a variety of important factors. Safety bears different meanings when applied to different categories of rescues"[278].

According to the European Commission, 80 per cent of the traffic in the Mediterranean towards the EU is undertaken in small unseaworthy vessels, which put the lives of its passengers in danger. It may therefore be inferred that persons on board such crafts are per definition in distress and a priori in need of assistance[279]. EU states choose to follow a fragmentary reading of the applicable norms favouring minimum compliance with maritime rules over international protection obligations[280]. Some EU Member States, as well as Frontex, don't distinguish interdiction with search and rescue operations, as if both measures were interchangeable and produce equivalent effects. As a result, vessels that are not in distress have been "rescued", whereas vessels genuinely in distress have been ignored or diverted[281]. Search and rescue obligations are understood as operating independently from other international obligations arising from refugee law and human rights, the observance of which is rendered uncertain. Often, minimal intervention is undertaken to prevent loss of life, in these cases food, water, and fuel may be provided, but without engaging in actual

[277] Moreno Lax Violeta, **"Seeking Asylum In The Mediterranean Against A Fragmentary Reading Of EU"**, International Journal of Refugee Law, 2011, available at: *http://ijrl.oxfordjournals.org/content/23/2/174.abstract*, last accessed 10 March 2014

[278] IMO, **"Principles relating to administrative procedures for disembarking persons rescued at sea"**, Circular FAL.35/Circ.194, 14 Jan. 2009, available at: *http://www.imo.org/OurWork/Facilitation/docs/FAL%20related%20nonmandatory%20instruments/FAL.3-Circ.194.pdf*, last accessed 10 March 2014

[279] European Commision, Communication from the Commission to the Council, **"Reinforcing the Management of the European Union's Southern Maritime Borders**", COM(2006) 733, 11 Nov. 2006, para. 35, available at: *http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52006DC0733*, last accessed 10 March 2014

[280] Moreno Lax Violeta, **"Seeking Asylum In The Mediterranean Against A Fragmentary Reading Of EU"**, International Journal of Refugee Law, 2011, available at: *http://ijrl.oxfordjournals.org/content/23/2/174.abstract*, last accessed 10 March 2014

[281] Ibid.

rescue so that responsibility for the migrants concerned is considered to be avoided. For instance, during the course of the research, a lot of asylum seekers, especially in Malta reported that during their attempts to cross the Mediterranean Sea they were approached by Maltese vessels and they were provided with water and/or food but were neither transported to Europe nor sent back to Libya.

On that direction, the Council of Europe acknowledged that the guidelines have been interpreted differently by member states, but clarified and reinforced the view that in locating a place of safety, there must be a consideration of human rights norms[282]. Even if not obliged to consider the norm of non-refoulement under the law of the sea, the rescuing state is obliged to do so under international refugee law[283]. Search and rescue has often been adduced as the legal basis for both interception of shipwrecked boats and the deflection of interdicted people to ports of embarkation. Also, launching maritime operations with the objective of stopping migrants from leaving the shores and thus reducing the danger of losses of human lives constitutes a misconception of search and rescue obligations.

Whereas it may simply relate to the passengers immediate well-being, considering shipwrecked persons in general, when the notion concerns refugees and asylum seekers, in particular, their special position has to be taken into account. As underlined in the IMO Guidelines "the need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea". Therefore, "States cannot circumvent refugee law and human rights requirements by declaring border control measures to be rescue measures"[284]. In an Expert Roundtable[285] convened by UNHCR and consisting of representatives from States, shipping companies, international organisations, non-governmental

[282] Council of Europe, Parliamentary Assembly, **Recommendation 1645 (2004) Access to assistance and protection for asylum-seekers at European seaports and coastal areas**, 29 January 2004, Rec 1645 (2004), available at: *http://www.refworld.org/docid/47fdfafa0.html*, last accessed 10 March 2014 and

Council of Europe, **Resolution 1821 (2011) The interception and rescue at sea of asylum seekers, refugees and irregular migrants**, Parliamentary Assembly, 21 June 2011, available at: *http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta11/ERES1821.htm*, last accessed 10 March 2014

[283] Supra Note 239

[284] Ibid.

[285] UNHCR, Expert Roundtable, **Rescue-at- Sea: Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees**, Lisbon, 25–26 March 2002, Summary of Discussions, available at: *http://www.unhcr.org/4963237b0.pdf*, last accessed 10 March 2014

organisations and academia it was agreed that, on the completion of the rescue, following delivery to a place of safety, other aspects of the matter come to the fore, including screening for protection needs. Under international maritime law there is no provision specifically dealing with the plight of refugees. UNHCR[286] believes that "…the disembarkation of persons rescued at sea can be taken as implicit in the practice of States and in the various provisions referred to above. To permit the disembarkation of boat people in the most liberal manner would be fully in line with these provisions. By the same token, to refuse disembarkation or to permit it only under strict resettlement guarantee conditions would not be in the spirit of accepted international principles, since this might indirectly discourage rescue at sea.". In general, the duty to rescue refugees and provide them with protection is the responsibility of flag, coastal and resettlement States[287]. EXCOM in its Conclusion No. 23 states that "general responsibilities concerning rescue should be accepted as including that:…coastal States have a responsibility to facilitate rescue through ensuring that the necessary enabling arrangements are in place…flag States are responsible for ensuring that ships' masters come to the assistance of people in distress at sea…the international community as a whole must cooperate in such a way as to uphold the integrity of the search and rescue regime…in accordance with established international practice, supported by the relevant international instruments, persons rescued at sea should normally be disembarked at the next port of call. This practice should also be applied in the case of asylum-seekers rescued at sea"[288]. A circular of the IMO Facilitation Committee adopted in January 2009 also recommends that "…the Government responsible for the SAR area should accept the disembarkation of the persons rescued...into a place of safety under its control..."[289]. The content of this circular has been integrated almost entirely in the Protocol against the Smuggling of Migrants by Land, Sea and Air to the UN Convention against

[286] UNHCR, **"Problems Related to the Rescue of Asylum-Seekers in Distress at Sea"**, UN doc. EC/SCP/18, 26 Aug.1981, paras. 19-21, available at: *http://www.unhcr.org/3ae68ccc8.html*, last accessed 10 March 2014.

[287] Supra note 26 Wouters (2009).

[288] Supra note 97

[289] IMO, **"Principles relating to administrative procedures for disembarking persons rescued at sea"**, Circular FAL.35/Circ.194, 14 Jan. 2009, available at: *http://www.imo.org/OurWork/Facilitation/docs/FAL%20related%20nonmandatory%20instruments/FAL.3-Circ.194.pdf*, last accessed 10 March 2014

Transnational Organized Crime[290] and thus binds the States parties. It should be noted that Mediterranean states, especially Malta, have objected on this notion[291]. Due to its large SAR Region, Malta favours the closest safe haven rule for disembarkation over the State responsible of the SAR Region where the persons were rescued criterion, while Italy and Spain have also adapt the same position.

On that respect, according to UNHCR, in general "the State where disembarkation or landing occurs, normally the coastal state in the immediate vicinity of the case, will be responsible for admitting the refugees, at least on a temporary basis and ensuring access to proceedings for the determination of refugee status"[292]. In addition, UNHCR acknowledges that "under certain circumstances the flag State of the ship that came to the rescue may also have primary responsibility. This will be the case when it is clear that those rescued intended to request protection from the flag State, and in the event that the number of people rescued is so small it may be reasonable for them to remain on the vessel until they can be disembarked on the territory of the flag State"[293]. According to the Executive Committee, in an effort to resolve the problem of identifying the country responsible for refugee status determination and refugee protection, in Conclusion N.15 it acknowledges that "the intentions of the asylum seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account" [294]. Recently, the IMO in co-operation with the UNHCR published a document entitled "Rescue at Sea, A Guide to principles and practice as applied to migrants and refugees"[295] in which shipmasters are invited for cases in which people rescued at sea claim asylum to "alert the closest RCC (Rescue Co-ordination Centre); contact the UNHCR, to not ask for disembarkation in the country of origin or from which the individuals fled, to not

[290] **Protocol against the Smuggling of Migrants by Land, Sea and Air**, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, available at: *http://www.refworld.org/docid/479dee062.html*, last accessed 10 March 2014

[291] IMO, **"Measures to protect the safety of persons rescued at sea: comments on document FSI.17/15/1"**, FAL Committee, FSI.17/15/2, , 27 Feb. 2009, available at: *http://www.sjofartsverket.se/pages/18709/17-15-2.pdf*, last accessed 10 March 2014

[292] UNHCR, **"Background Note On The Protection Of Asylum-Seekers And Refugees Rescued At Sea"**, available at: *http://www.unhcr.org/3e5f35e94.pdf*, last accessed 10 March 2014

[293] Ibid

[294]: EXCOM Conclusion

[295] IMO, **"Rescue at Sea. A Guide to Principles and Practice as Applied to Migrants and Refugees"**, September 2006, available at: *http://www.refworld.org/docid/45b8d1e54.html*, last accessed 10 March 2014

share personal information regarding the asylum- seekers with the authorities of that country, or with others who might convey this information to those authorities".

Moreover, as provided by the IMO Guidelines, a vessel cannot be conceived of as a final place of safety. The fact that a state is bound to disembark a person to a safe haven implicates the duty to obtain a comprehensive understanding of the circumstances of the receiving country with respect to the condition of reception and treatment of rescued migrants and refugees[296]. Disembarkation in a predetermined place, as in Senegal, Mauritania or Cape Verde or in Libya, Turkey etc., disregarding the particular requirements determining the safety of the asylum seekers on board, may amount to a direct breach of the protection obligations of the EU Member States.[297], especially because of the well-documented inadequacy of those countries response to flows of migrants and asylum seekers. An example of how a selection of a "safe place" could affect the lives of people in distress is the Lampedusa case. In the first months of 2011 a new record of around 55000 boat arrivals, mainly from Tunisia, was recorded in Italy's island Lampedusa[298]. The situation on the Island quickly transformed into a humanitarian crisis, culminating in clashes between the migrants and the riot police and the reception centre was set ablaze. The Italian government responded with drastic measures, as it declared Lampedusa to be an unsafe port on 21 September 2011. The designation of Lampedusa as unsafe port might have obliged for a short period shipmasters to disembark rescued migrants elsewhere.

In Hirsi Jamaa, Italy argued that the applicants had been rescued in the high seas because they were in distress, so that they had never come under Italian jurisdiction. The Court responded that the applicants, who had indeed never reached Italian soil, had nonetheless been transferred to Italian military ships. They were thus "under the continuous and exclusive de jure and de facto control of the Italian authorities". On this issue, the Court seems to depart from its earlier decision in Xhavara v Italy and

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[296] Giuffré Mariagiulia, **"State Responsibility Beyond Borders: What Legal Basis for Italy's Push-backs to Libya?"**, International Journal of Refugee Law Volume 24, Issue 4Pp. 692-734, available at: *http://ijrl.oxfordjournals.org/content/24/4/692.abstract*, last accessed 10 March 2014

[297] Moreno Lax Violeta, **"Seeking Asylum In The Mediterranean Against A Fragmentary Reading Of EU"**, International Journal of Refugee Law, 2011, available at: *http://ijrl.oxfordjournals.org/content/23/2/174.abstract*, last accessed 10 March 2014

[298]Council of Europe, **"Lives lost in the Mediterranean Sea: Who is responsible**?", Parliamentary Assembly, Report, Committee on Migration, Refugees and Displaced Persons, Rapporteur: Ms Tineke STRIK, Netherlands, Socialist Group, Doc. 12895, 05 April 2012, available at: *http://assembly.coe.int*, last accessed 22 April 2014.

Albania[299], where it found that an Italian warship preventing a vessel carrying migrants from Albania from landing in Italy was not a breach of article 4 Protocol 4. The Court somewhat artificially distinguishes the two cases by observing that the complaint brought under article 4 Protocol 4 in Xhavara had not concerned the actual diversion activity but was specifically targeted at Italian legislation, which had not been applied to the applicants in that case[300]. Italy after the Hirsi Jamaa Judgement and in an attempt to adapt its policies with it and of course as a direct response to the double Lampedusa tragedies, deplored the Mare Nostrum rescue Operation since 18 October 2013 in Southern Mediterranean with the participation of personnel, naval units and aircraft from the Italian Navy, the Army, Air Force, Customs Service, Coast Guard, as well as Police officers on board the Units, and other national agencies, with the aim to control migration flows. Until 15 August 2014 the total numbers of migrants saved by the Italian Coast Guard reached 101,480. However, Italy has been calling for months for an increase in efforts to deal with the crisis, in which more than 1,800 people are estimated to have died this year, despite Mare Nostrum, and for the problem to be dealt with at a European level. Indeed, it was announced by Italy that the Mare Nostrum operation is going to be terminated by November 2014 and it's going to be replaced by an extended Frontex operation with the name "Frontex Plus". UNHCR expressed its concerns for the new operation and warned that more people will die trying to cross the Mediterranean if the creation of a new EU border patrol to replace the Italian naval operation leads to a reduced search and rescue presence.

At the same time particularly interesting is the creation of the first private initiation with the aim to save lives in the Mediterranean Sea. MOAS (Migrant Offshore Aid Station)[301] is a Maltese, private funded NGO dedicated to preventing loss of life at sea by providing aid, assistance and medical help to migrants who find themselves in distress whilst crossing the Mediterranean Sea in unsafe boats. It is equipped with a 40 metre boat, two RIBS, two Remote Piloted Aircraft and a crew of rescuers and paramedics. Their area of operation is only Malta's SAR zone and they have a limitation of being no more than 60 nautical miles from land. It is the first time

[299] **Xhavara and 12 Others v. Italy and Albania**, 39473/98, Council of Europe: European Court of Human Rights, available at: *http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-31884*, last accessed 9 August 2014

[300] Giuffré Mariagiulia, **"State Responsibility Beyond Borders: What Legal Basis for Italy's Push-backs to Libya?"**, International Journal of Refugee Law Volume 24, Issue 4Pp. 692-734, available at: *http://ijrl.oxfordjournals.org/content/24/4/692.abstract*, last accessed 10 March 2014

[301] Migrant Offshore Aid Station, available at: *http://www.moas.eu/*

that such a plan is implemented and it is interesting to see how it will develop in the future and how it is going to correspond with all the other actors in the area.

2.1.3 The Extraterritorial Application of Non Refoulement

The debate on extraterritorial protection from refoulement revolves around whether, and under what conditions, persons affected by deterrence policies can be considered to come within the jurisdiction of the state authoring such policies[302]. Extraterritorial controls are some of the measures that governments implement to push back migrants before they can reach destination countries. Some scholars argue that extraterritorial controls are essentially undermining the international protection system. The rationale of many extraterritorial interdiction practices is the idea that statutory safeguards on asylum, detention and access to court allow for circumvention when the state operates outside its territory[303]. However, the use of extraterritorial deterrence policies has also reinforced the interpretation that the principle of non refoulement also has extraterritorial applicability. At its core, non refoulement is a humanitarian concept, thus it should not be treated as a threat to territorial sovereignty. In addition, according to Newmark[304] "…an extraterritorial interpretation of the non refoulement obligation creates the best policy incentives for dealing with refugee situations, by placing a burden on states capable of providing refuge as it forces disinterested states to recognize the deplorable circumstances in other states".

Uncertainty about the extraterritorial application of the non refoulement obligation existed as early as the adoption of the U.N. Convention[305]. The main view expressed in the 1951 drafting convention was that the obligation exists only when a refugee is within the territory of a contracting state, as states were concerned with the potential for a massive flow of refugees and the inability to deal effectively with a large influx of people[306]. The adoption of the 1967 Protocol Relating to the Status of Refugees had no practical effect on the interpretation of the extraterritorial reach of the non refoulement obligation. But other international legal principles also strengthen its extraterritorial applicability. The Universal Declaration of Human Rights, for

[302] Supra Note 193
[303] Ibid.
[304] Supra Note 4, Newmark (1993).
[305] Supra Note 4, Newmark (1993).
[306] Supra Note 19

example, assures everyone the right to seek asylum and the right to leave their country.

In the context of ECHR, this debate has been affected by the somewhat inconsistent stance of the Court on the issue of the Convention's extraterritorial scope[307]. But generally, according to the ECtHR, the nature of the States' responsibility under Article 3 in refoulement cases lies in the act of exposing an individual to the risk of proscribed ill treatment. A State may be responsible for protecting individuals against refoulement in accordance with Article 3 of ECHR when the individual is outside its territory, because the individual is physically present within a foreign territory over which the State has effective overall control or because the individual is affected by extraterritorial conduct which can be attributed to the State and because of which the individual can effectively be protected from refoulement in accordance with Article 3. Control entails responsibility and control determines the content of the responsibility. Within the context of protection from refoulement the actual control of the State party has to be the result of conduct, an act or an omission, by which the individual is directly exposed to a risk of treatment contrary to Article 3 of the Convention, and whereby the State party has real and effective power to protect the individual against refoulement[308]. In Medvedyev v France[309], the Court underlined the general point that "the maritime environment is not a human rights no man's land and that maritime interdictions may well bring affected persons within the interdicting state's jurisdiction". In Xhavara and Others v Italy and Albania[310], even though the applicants did not claim protection from refoulement, their ship was seriously damaged and sank outside Italy's territorial waters when it was struck by an Italian war vessel. Fifty-eight passengers drowned. The survivors claimed that the Italian war vessel had deliberately hit their boat, attempting to prevent the Albanians' entry into Italy. The complaint was declared inadmissible because domestic remedies had not been exhausted. Nevertheless, the

[307] Supra Note 193

[308] Costello Cathryn, "Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored", Human Rights Law Review 2012, available at: http://hrlr.oxfordjournals.org/content/12/2/287.full.pdf+html, last accessed 12 May 2014

[309] **Medvedyev and Others v. France**, Application no. 3394/03, Council of Europe: European Court of Human Rights, 29 March 2010, available at: *http://www.refworld.org/docid/502d45dc2.html*, last accessed 9 August 2014

[310] **Xhavara and 12 Others v. Italy and Albania**, 39473/98, Council of Europe: European Court of Human Rights, available at: *http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-31884*, last accessed 9 August 2014

Court did note that Italy as a State party to the Convention had a responsibility in this case, irrespective of where the incident had occurred, inside or outside the State's territorial waters.

In the recent Hirsi Jamaa[311] case the Court held the opinion that the Hirsi group was indeed under Italy's jurisdiction within the meaning of article 1 of ECHR. The judgment not only emphasizes the absolute character of non refoulement and its manner of operation in a maritime context, but also conveys the wider message that "any state activity encroaching on fundamental rights should be embedded in a clear framework of legal safeguards and procedural standards"[312]. For that reason, the judgment's implications for the future shaping of Europe's external migration and asylum policies cannot easily be overestimated and has indeed affected greatly the deployment of the Mare Nostrum operation of the Italian Coast Guard. Hirsi Jamaa also established a broader interpretation on collective expulsions under Article 4 of Protocol 4 as the Court, for the first time, gave effect to this provision extraterritorially. It noted that its purpose was to "prevent States being able to remove certain aliens without examining their personal circumstances"[313] and without affording them the opportunity to put forward their arguments against expulsion[314]. The legal analysis of the case could also be seen as a model for other situations in which refugees are encountered in extraterritorial settings by non EU third countries performing exit border controls in cooperation with EU member states[315] and even operations coordinated by Frontex, as will be discussed below.

Furthermore, according to the Human Rights Committee "article 2 requires States Parties to respect and ensure the Covenant rights for all persons in their territory and all persons under their control and also entails an obligation not to extradite, deport, expel or otherwise remove a person, 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

[311] Supra Note 119
[312] Ibid.
[313] Ibid.
[314] Supra Note 308
[315] Giuffré Mariagiulia, **"State Responsibility beyond Borders: What Legal Basis for Italy's Push-backs to Libya?"**, International Journal of Refugee Law Vol. 24 No. 4 pp. 692–734, 2013, available at: *http://ijrl.oxfordjournals.org/content/24/4/692.abstract*, last accessed 12 May 2014

removed"[316]. In its Concluding Observations on the United States of America[317] the HRC made it clear that "the State party should take all necessary measures to ensure that individuals, including those it detains outside its own territory, are not returned to another country by way of inter alia, their transfer, rendition, extradition, expulsion or refoulement if there are substantial reasons for believing that they would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment". Finally, the prohibition on refoulement contained in Article 3 CAT applies to people who are within the territory of the host State, at the border of the host State, in a foreign country which is under the effective control of the host State and outside their country of origin and under the effective control of the host State through conduct which can be attributed to the State and has a direct effect on the person's right to be protected from refoulement[318].

The legal framework developed by EU, both regimes pertaining to Frontex and the Common European Asylum System; leave questions of asylum and expulsions at sea largely unsettled. It describes the frontier in geographical terms and defines border guards as public officials performing their surveillance functions 'along the border or the immediate vicinity of that border'. The Schengen Borders Code[319], when outlining the different control devices and the ratione loci seems to exceed the territorial perimeter of EU Member States, since extraterritorial controls in the territory of a third country are envisioned as possible solutions. But although its extraterritorial scope has sometimes been disputed, the Code has special provisions on maritime controls that clarify that border checks and border surveillance may also be carried out on the high seas or in ports or territorial waters of third countries, pursuant to agreements with those countries[320]. Article 3.b of SBC states that the regulation is "without prejudice to…the rights of refugees and persons requesting international

[316] Supra Note 45

[317] Human Rights Committee, **UN Human Rights Committee: Concluding Observations: United States of America**, 18 December 2006, CCPR/C/USA/CO/3/Rev.1, available at: *http://www.refworld.org/docid/45c30bec9.html*, last accessed 14 July 2014

See further Mohammad Munaf v Romania, HRC General Comment No 2 The prohibition of torture and cruel treatment or punishment and Kindler v Canada

[318] Supra note 26 Wouters (2009).

[319] Council Decision of 26 April 2010 **supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union**, (2010/252/EU), available at: *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:111:0020:0026:EN:PDF*, last accessed 15 July 2014

320 Supra Note 193

protection, in particular as regards non refoulement"[321]. A letter written on 15 May 2009 by Mr Jacques Barrot[322], Vice-President of the European Commission, addressed to the Court, was attached particular weight, concerning the case of Hirsi Jamaa, as he was called to elaborate on the material scope of application of the Schengen Border Code. He argued that the pushbacks carried out by Libya and Italy amounted to border surveillance operations falling within the view of the Code, by virtue of Article 12, whereby border surveillance measures are aimed to prevent unauthorized border crossings. Therefore, in the wake of the Commission's reasoning, Italy, as an EU Member State, should always comply with its international obligation of non refoulement.

Of course it should be noted that States cannot exercise sovereign powers in the territorial sea of a third country without the latter's consent. The Hera operations have taken the bilateral arrangements entered into by Spain with Senegal and Mauritania as their legal basis, whereas the pushback campaign orchestrated by Italy was underpinned by a treaty concluded with Libya. However, neither international cooperation nor extraterritoriality releases EU Member States from their international engagements, as it will be examined in the next chapter. Therefore, border surveillance activities carried out anywhere at sea entail the obligation to respect article 3 of the Schengen Borders Code, the EU Charter of Fundamental Rights, the ECHR, the Refugee Convention and all the other relative legal binding texts.

The extraterritorial patrols and the deterrence policies of European states in general are creating complex legal questions due to the simultaneous application of the law of the sea, the international rules on search and rescue, refugee law and human rights law, combined with the lack of a common interpretation of these rules. Therefore, the attribution of responsibility for cases like the Farmakonisi incident and the two Lampedusa shipwrecks is particularly complicated and emphasis should be added in tracing the line of responsibility based on who exercised effective control over the particular incidents as well as to both the obligations and responsibilities of the engaged actors as a whole.

[321] Schengen Border Code
[322] Supra Note 119

2.2 Shared responsibility in the Mediterranean Sea

As it was examined in the previous chapter the extraterritorial refugee policies can be described as initiatives that seek to "deterritorialize" the current refugee protection system. Politicians and policy makers increasingly consider such policies as a viable response to the strains placed upon their domestic asylum systems[323]. The burden and pressure the situation in the Mediterranean places on the States concerned should definitely not be underestimated, especially in the present context of economic crisis and the difficulties related to the phenomenon of movement by sea, involving for States additional complications in controlling the borders in southern Europe.

However, having regard to the absolute character of the rights secured by Article 3, a State cannot be absolved of its obligations under the principle of non refoulement. ECtHR in two cases, in MSS v. Belgium and Greece[324] and in Hirsi Jamaa v. Italy, noted that "the States which form the external borders of the European Union are currently experiencing considerable difficulties in coping with the increasing influx of migrants and asylum seekers" and although it did not "underestimate the burden and pressure this situation places on the States concerned, which are all the greater in the present context of economic crisis", it clarified that "having regard to the absolute character of the rights secured by Article 3 it cannot absolve a State of its obligations under that provision" and rejected Greece's and Italy's arguments that the Court should take these difficult circumstances into account when examining the applicants' complaints.

Having already clarified that the aforementioned obligations are not to be absolved under any circumstance, the deterrence policies and the different scenarios of shared responsibility that may ensue from their unlawful implementation should be examined. The deterrence practices and the joint border controls carried out by European states are most likely to produce responsibilities of multiple states. The traditional view in human rights law was that shared responsibility for the breach of

[323] Swerissen Isabelle, **"Shared Responsibility in International Refugee Law"**, SHARES Expert Seminar Report, 30 May 2011, Amsterdam, published in March 2012, available at: *www.sharesproject.nl*, last accessed 19 April 2014

[324] **M.S.S. v. Belgium and Greece**, Application No. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, available at: *http://www.refworld.org/docid/4d39bc7f2.html*, last accessed 15 March 2014

human rights obligations would be implausible[325]. Modern understandings of jurisdiction under human rights law have, however, come more closely with the dominant position in public international law that two or more states responsible for the same internationally wrongful act can both be held individually liable on the basis of their own conduct and international obligations, as indicated by article 41 of the Articles on State Responsibility that "…where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act"[326]. The simplest scenario is that during the course of such controls, national border guards of one State are sometimes made available to another State. When that happens in such a way that a State exercises exclusive command and control over another State's border guards, their actions are attributable to the State at whose disposal they were placed as in Article 6 of the Articles on State Responsibility[327]. However, most border guards operate within the command structures of their own country and are therefore not at the complete disposal of another State while furthermore the deployment of joint operations under an EU framework, mainly through Frontex indicate that instead more emphasis should be placed on a broader notion of shared responsibility.

The term "shared responsibility" in the meaning of the International Law Commission articles refers to such situations of shared responsibility stricto sensu, that arise out of the acts of two or more actors that result in a single injury, and is distributed to them separately, rather than resting on them collectively[328]. Shared responsibility may also arise out of joint actions of multiple states and/or international

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[325] Hathaway James C. and Thomas Gammeltoft-Hansen, **"Non-Refoulement in a World of Cooperative Deterrence"**, Law & Economics Working Papers, Paper 106, 2014, available at: *http://repository.law.umich.edu/law_econ_current/106*, last accessed 10 August 2014

[326] International Law Commission, "**Draft Articles on Responsibility of States for Internationally Wrongful Acts"** (2001) UN GAOR Supplement No. 10 (A/56/10) chp.IV.E.1, available at: *http://www.refworld.org/docid/3ddb8f804.html*, last accessed 24 July 2014

[327] Article 6 (Conduct of organs placed at the disposal of a State by another State): The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

International Law Commission, "**Draft Articles on Responsibility of States for Internationally Wrongful Acts"** (2001) UN GAOR Supplement No. 10 (A/56/10) chp.IV.E.1, available at: *http://www.refworld.org/docid/3ddb8f804.html*, last accessed 24 July 2014

[328] Nollkaemper André and Dov Jacobs, "Shared Responsibility in International Law: A Concept Paper", ACIL Research Paper No. 2011-07 (SHARES Series) finalized 2 August 2011, available at: *http://www.sharesproject.nl/wp-content/uploads/2011/08/Nollkaemper-Jacobs-Shared-Responsibility-in-International-Law-A-Concept-Paper.pdf*, last accessed 22 April 2014

organizations, even if the distribution of responsibility between such states and/or organizations is not necessarily even[329].

1.2.1. Shared responsibility between multiple States

There is a variety of different scenarios of shared responsibility that may ensue from the violation of the obligation of non-refoulement and extraterritorial refugee policies. Firstly, although a State remains independently responsible for conduct carried out by its border guards, since those border guards were involved in joint border controls together with border guards from other States; multiple States may be responsible for the same course of action. In other words, in those cases the responsibility of several States, whose conduct has contributed to a single injury, is distributed to them separately, rather than resting on them collectively, as the ECtHR claimed in the MSS Judgement. Secondly, in addition to holding multiple States responsible for separate international wrongs, it should also be discussed the possibility of holding a State responsible for aiding and assisting another State in the commission of an internationally wrongful act, either by providing deliberately aid on the field or through the provisions of an already existing agreement, as in the case of the different agreements between Mediterranean States. This approach is very much in line with the general view of the European Court of Human Rights that international human rights law is to be interpreted taking into account the law on state responsibility[330]. The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law.

In M.S.S. v. Belgium and Greece[331] the ECtHR determined that Belgium was in breach for returning the applicant to Greece contrary to the duty of non refoulement, even as it found that Greece was itself liable for the failure to establish adequate asylum procedures and to avoid the ill treatment of those seeking its protection. In this

[329] Ibid.

[330] Hathaway James C. and Thomas Gammeltoft-Hansen, **"Non-Refoulement in a World of Cooperative Deterrence"**, Law & Economics Working Papers, Paper 106, 2014, available at: *http://repository.law.umich.edu/law_econ_current/106*, last accessed 10 August 2014

[331] **M.S.S. v. Belgium and Greece**, Application No. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, available at: *http://www.refworld.org/docid/4d39bc7f2.html*, last accessed 15 March 2014

judgment, the ECtHR revisited also its case law on the Dublin II Regulation. The case concerned the transfer of an Afghan national from Belgium to Greece, where he faced degrading detention and living conditions as well as the risk of refoulement to Afghanistan due to structural deficiencies in Greek asylum procedures. The Court held both the sending and receiving State individually responsible for violating their obligations of non refoulement. With regard to the sending State, Belgium, this covered both direct refoulement for knowingly exposing him to ill-treatment in Greece, effectively enforcing the primacy of non-refoulement over mutual trust, and indirect refoulement for exposing him to subsequent expulsion to Afghanistan. Viewing them as separate international wrongs, the Court thus made a distinction between these different forms of refoulement, something it failed to do in earlier case law. Also, particularized liability may ensue even when not all of the states exercising jurisdiction are bound by the same international legal obligations. In Al-Skeini[332], the United Kingdom was held responsible under the ECHR even though it shared its jurisdiction in Iraq with the United States and other non-party states. Under this understanding, the fact that a partner state is not a party to the Refugee Convention, as is frequently the case under cooperation-based forms of deterrence, is not a restrain in finding the sponsoring state party exercising jurisdiction to be liable.

Also, the international law concept of aid and assistance, or complicity, is not without controversial elements. For example, states are clearly not exercising jurisdiction when they provide only training or material assistance to a partner state. Even when immigration officers or other officials are posted to another country as advisers, there will be no exercise of jurisdiction unless the authorities of the territorial state can be shown to act under the direction and control of the sponsoring state. Although, there is an emerging consensus that international law will hold states responsible for aiding or assisting another state's wrongful conduct. As it is most clearly set out in Article 16 of the International Law Commission's Articles on State Responsibility two requirements must be fulfilled; the assisting State must be aware of the circumstances making the conduct of the assisted State internationally wrongful and the act must be internationally wrongful if committed by the assisting State. In light of the fact that the threshold for establishing responsibility in this manner is

[332] **Al-Skeini and Others v. United Kingdom**, Application no. 55721/07, Council of Europe: European Court of Human Rights, 7 July 2011, available at: *http://www.refworld.org/docid/4e2545502.html*, last accessed 24 July 2014

considerably higher, combined with the resulting lack of practice, it is a challenging option. The Venice Commission of the Council of Europe similarly referred to Article 16 as applicable to European states contributing to instances of refoulement and other human rights abuses in the context of the US-led extraordinary rendition program. Also Judge Albuquerque in his separate opinion to the Hirsi case[333] claimed that "the presence of an agent from a Contracting Party on board a warship of a non-contracting party or a navy under the effective control of a non-Contracting Party makes the cooperating Contracting Party responsible for any breaches of the Convention standard". The commentaries[334] on article 16 notes that the assistance need not be essential to performing the illegal act, so long as it contributes significantly thereto, suggesting that action beyond mere instigation is required.

So according to the above, a state which takes steps such as providing maritime patrol vessels or border control equipment, which seconds border officials, or which shares relevant intelligence or directly funds migration control efforts that assist another country to breach its non refoulement obligation is taking action that can fairly be characterized as aiding or assisting[335]. But even when the state sponsoring the deterrence takes more direct forms of action, Article 16 provides that the assisting state must have "knowledge of the circumstances of the internationally wrongful act." Indeed, the commentary goes farther, suggesting both an intention and a consummation requirement, namely that aid or assistance must be given "with a view to facilitating the internationally wrongful act, and must actually do so". Liability should not follow where aid or assistance given in good faith is subsequently misused by another country, for example, a state providing development aid is not responsible if, unbeknownst to it, that aid is used to implement border controls that lead to the refoulement of refugees[336]. It is otherwise, however, when the sponsoring state has at least knowledge that its contributions will aid or assist another country to breach its obligations and chooses to aid or assist nevertheless. For example, in Hirsi Jamaa[337],

[333] Supra Note 119

[334] International Law Commission, "**Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries**", available at: *http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf*, last accessed 24 July 2014

[335] Hathaway James C. and Thomas Gammeltoft-Hansen, **"Non-Refoulement in a World of Cooperative Deterrence"**, Law & Economics Working Papers, Paper 106, 2014, available at: *http://repository.law.umich.edu/law_econ_current/106*, last accessed 10 August 2014

[336] Ibid.

[337] Supra Note 119

Italy argued that it reasonably considered Libya to be a "safe host country" based on its ratification of several human rights treaties and the African Union's regional refugee treaty, coupled with the express stipulation in the Italian-Libyan agreement requiring Libya to comply with international human rights law. Relying on these formal commitments, Italy argued that it "had no reason to believe that Libya would evade its commitments". This argument was, however, soundly rejected by the Court which observed "that the existence of domestic laws and the ratification of international treaties guaranteeing respect for fundamental rights are not in themselves sufficient to ensure adequate protection against the risk of ill treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities..." It therefore considers that when the applicants were removed, the Italian authorities knew or should have known that they would be exposed in Libya to treatment in breach of the Convention and that they would not be given any kind of protection in that country.

UNHCR attempted, to establish some common principles between states for shared responsibility in cases of mass influx. For that reason, part of the Global Consultations on International Protection was devoted to responsibility sharing in situations of mass influx. However, debates failed[338] to lead to the adoption of practical measure and UNHCR published some general directions towards states[339].

a. Bilateral Agreements Attempting To Allocate Responsibility

Readmission agreements are linked to the principle of Safe Third Country, already examined on chapter 1.2.2. The concept of a safe third country entails the idea of another country, than the one that an asylum seeker is currently located, that can be held responsible for providing protection. The concept of a safe third country is often applied as a procedural mechanism, used to transfer refugees to other States which are considered to be responsible for assessing their claim for refugee protection. These agreements allow states to remove third country nationals from their territory and to

[338] Phuong Catherine, "**Identifying States' Responsibilities towards Refugees and Asylum Seekers**", available at: *http://www.esil-sedi.eu/sites/default/files/Phuong.PDF*, 2008, last accessed 24 July 2014

[339] UNHCR, **Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations**, 8 October 2004, No. 100 (LV), 2004, available at: *http://www.refworld.org/docid/41751fd82.html*, last accessed 24 July 2014

return them to the country they passed through, where safe, as embedded, among others, in article 3.3 of the Dublin Regulation[340]. The collective approach to non-refoulement creates a unique set of complications in determining the proper implementation of Article 33. This collective approach makes allocating responsibility more difficult when there are violations of non refoulement. In this context, Article 33 does not contain sufficient language to ensure that states do not use the concept of safe country of asylum procedures to circumvent their obligations of non refoulement.

An interesting example of such a readmission agreement is the one between Libya and Italy, which was voided after the Hirsi Jamaa Judgement of the ECtHR, allowed Italy to intercept asylum seekers and migrants in international waters and to return them to Libya with no consideration of their right to apply for asylum. The 2008 Treaty of Friendship, Partnership and Cooperation between the Republic of Italy and Libya[341] called for the patrolling of 200 Km of the Libyan coast with boats, devises and technology provided by Italy and funded by both Italy and the EU. Libya has also been induced by Italy to approve restrictive migration policies, among others, through the provision of financial and technical incentives[342]. Most of those readmitted from Italy to Libya have been subjected to ill treatment, torture and detention, removed from Libya to neighbouring countries or left stranded in the desert[343]. As a result of Italian pressure[344], furthermore, Libya has signed readmission

[340] Article 3.3: Any Member State shall retain the right to send an applicant to a safe third country, subject to the rules and safeguards laid down in Directive 2013/32/EU.

Council Regulation (EC) No 604/2013 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**, (Dublin III Regulation)

[341] The text of the Treaty, in Italian only, can be found annexed to the law authorizing the ratification and implementation (Law no. 7 of February 6 2009).

[342] Tucci Sabrina, **"Libyan cooperation on migration within the context of Fortress Europe"**, Amnesty International, International Secretariat, London, available at: *http://www.inter-disciplinary.net/wp-content/uploads/2012/02/tuccipaper.pdf*, last accessed 19 April 2014

[343] Human Rights Watch, **"Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers"**, 21 September 2009, 1-56432-537-7, available at: *http://www.refworld.org/docid/4ab87f022.html*, last accessed 22 April 2014

Human Rights Watch, "**Libya: Whipped, Beaten, and Hung from Trees**", 22 June 2014, available at: *http://www.hrw.org/news/2014/06/22/libya-whipped-beaten-and-hung-trees*, last accessed 24 July 2014

[344] Supra Note 342

agreements on border control with Chad, Niger, Sudan and Egypt[345]. In this context it is obvious that Italy has tried to externalize its responsibilities under international refugee and human rights law to Libya, despite its ongoing violations of international standards. The Treaty itself has been the reason of several human rights abuses, given that Libya is not party to the Refugee Convention. Italy has cooperated on migration management and deterrence practices, rather than refugee protection, by preventing the arrival of people from Libya and returning migrants and asylum seekers to a country failing to ensure their protection. Based on the same principles are also numerous other readmission agreement, as the one between EU and Turkey[346], Malta and Libya, Spain and Morocco etc. In that way these agreements affects not only receiving countries but also transit ones, as many transit countries are held accountable for controlling access of migrants to Europe and receive financial support in exchange of restrictive policies finalized to hinder access through their borders. As the ECtHR noted in Xhavara Case[347], the "Italian-Albanian Agreement cannot, by itself, engage the responsibility of Albania under the Convention for any action taken by Italian authorities in the implementation of this agreement."

On the other hand, there is the opinion that the use of first country of arrival and safe third country rules could actually help allocate the burden of accommodating influxes of refugees and could be an appropriate solution to distribute the burdens of migration while maintaining heightened protection for refugees[348], if it is effectively combined with other durable solutions and relocation policies.

[345] Migration Policy Centre, "**Migration Profile: Libya**" June 2013, available at: *http://www.migrationpolicycentre.eu/docs/migration_profiles/Libya.pdf*, last accessed 24 July 2014

[346] European Union, Proposal for a Council Decision, concerning the conclusion of the Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorization, Brussels, 22.6.2012, available at: *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0239:FIN:EN:PDF*, last accessed 24 July 2014

The official version of the EU-Turkey readmission agreement is the one that is expected to be published after the ratification of the agreement by the Turkish parliament, which took place on June 2014.

[347] **Xhavara and 12 Others v. Italy and Albania**, 39473/98, Council of Europe: European Court of Human Rights, available at: *http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-31884*, last accessed 9 August 2014

[348] Supra Note 80, Goodwin-Gill and Jane Mc Adam (2005).

1.2.2. Shared responsibility between States and International Organizations

The same principles, in general terms, apply in situations where responsibility is shared between one or multiple states and an international organisation or an agency or organ of an international organisation. Under international law, no State can avoid responsibility by outsourcing or contracting out its obligations to an international organisation. As international cooperation to block passage to vessels and hand them over to the national authorities of the third country concerned does not release EU Member States from their international engagements the same goes with the transfer of competences to international bodies and vice versa.

According to one of the "general principles" expressed in the ILC articles on the responsibility of international organizations[349], the two elements of an internationally wrongful act of an international organization are, first, that conduct consisting either in action or in omission is attributable to that organization and, second, that that conduct constitutes a breach of an international obligation. According to the approach followed by the International Law Commission on the issue of attribution, the European Union would be internationally responsible when its organs or agents commit a breach of one of the obligations that the Union has under international law. Depending on the content of the international obligation, a breach could consist in the failure to comply with a rule requiring the European Union to ensure that Member States do something or in the failure to prevent them from taking certain actions[350].

While the articles on responsibility of international organizations envisage only attribution of conduct to an international organization, according to the commentaries, this does not exclude the possibility that a conduct which is attributed to an international organization may also be attributed to a State. In T.I. v. United Kingdom[351], the ECtHR determined that when States establish international organisations, or mutatis mutandis international agreements, to pursue cooperation in

[349] International Law Commission, **"Draft articles on the responsibility of international organizations"**, Yearbook of the International Law Commission, 2011, vol. II, Part Two, available at: *http://www.refworld.org/docid/4a716c6a2.html*, last accessed 24 July 2014

[350] Gaja Giorgio, **The Relations Between the European Union and its Member States from the Perspective of the ILC Articles on Responsibility of International Organizations**, SHARES Research Paper 25, 2013, available at: *http://www.sharesproject.nl/wp-content/uploads/2013/06/SHARES-RP-25-final.pdf*, last accessed 24 July 2014

[351] **T.M. v. Sweden**, CAT/C/31/D/228/2003, UN Committee against Torture (CAT), 2 December 2003, available at: *http://www.refworld.org/docid/404887e41.html*, accessed 16 July 2014

certain fields of activities, there may be implications for the protection of fundamental rights. As the Court established "absolving Contracting States completely from their...responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the ECHR, as the guarantees of the Convention could be limited or excluded at will thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards".

The ILC articles on the responsibility of international organizations also envisage that responsibility of an international organization may exist in connection with the breach of an international obligation by a member State. According to articles 14 and 15, an international organization incurs responsibility when it supports a State in committing an internationally wrongful act, either through providing aid or assistance, or by the exercise of direction and control. These concepts, which find their origin in the articles on State responsibility, are not precisely defined[352]. One question raised in the commentary[353] of article 15 on the responsibility of international organizations is whether direction and control include a binding decision addressed by an international organization to a member State. In any case a binding decision by the European Union, like the adoption of the Frontex and EUROSUR regulations, would seem to meet the required standard. For the responsibility of an international organization to arise, the same two conditions as for the responsibility of states are set out, as the breached international obligation should exist also for the international organization and also the latter should have knowledge of the circumstances of the act.

a. EU, the Role of Frontex and EUROSUR

Frontex was established in 2004[354] with the mandate to assist and coordinate operational cooperation between member states in border control issues. Frontex

[352] Gaja Giorgio, **The Relations Between the European Union and its Member States from the Perspective of the ILC Articles on Responsibility of International Organizations**, SHARES Research Paper 25, 2013, available at: *http://www.sharesproject.nl/wp-content/uploads/2013/06/SHARES-RP-25-final.pdf*, last accessed 24 July 2014

[353] UNGA, **Report of the International Law Commission**, 23 July 1999, A/54/10, available at: *http://www.refworld.org/docid/3ae6af970.html*, last accessed 24 July 2014

[354] European Union, Council Regulation (EC) No 2007/2004 of 26 October 2004 **establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union**, available at:

operations are carried in a multidimensional context of actions taken in the high seas, third country territories, and as they affect mostly third country nationals, the question about the division of responsibilities and legal certainty is always a central one. Since one of the aims of Frontex is to provide support to return operations an interesting question is how the work of Frontex is in accordance with the principle of non refoulement, which aims at protecting refugees no matter whether they are officially recognized as refugee or not.

In this context it is important to mention that even though Frontex is the coordinating authority in joint operations, the member states remain in the relevant responsible position for obligations stemming from the principle of non refoulement. In the Treaty on the Functioning of the European Union[355] under Title V "Area of Freedom, Security and Justice" article 72 states that: "This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security". Therefore, the responsibility of border controls and migration management remains with the member states and Frontex is presented as a coordinating agency. However, the fact that the responsibility of the obligations arising from the principle of non refoulement lies with the member states does not clarify the issue, since it is widely accepted that International Organisations cannot evade their responsibility by pointing to their member States and vice versa. Depending on what is agreed between Frontex and the member States in question on the issue of responsibility, which is not always known nor specified in advance, some form of shared responsibility may arise. EU, to which Frontex conduct is attributable, may be also held responsible to the extent that is shares competences with its member States.

The Treaty of Amsterdam[356] introduced the Area of Freedom Security and Justice aiming to "maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime". At the European Council meeting in

http://frontex.europa.eu/assets/About_Frontex/frontex_regulation_en.pdf, last accessed 24 July 2014

[355] European Union, **Treaty on the Functioning of the European Union**, 26 October 2012, OJ L. 326/47-326/390; 26.10.2012, available at: *http://www.refworld.org/docid/52303e8d4.html*, last accessed 15 July 2014

[356] European Union, **Treaty on European Union, Treaty of Amsterdam**, 2 October 1997, available at: *http://www.refworld.org/docid/3dec906d4.html*, last accessed 24 July 2014

Tampere[357] the member states agreed on the aim to establish a common EU asylum and migration policy. The adoption of those instruments marked the first step towards a Common European Asylum System which was further developed in the Hague program on "Strengthening Freedom, Security and Justice in the European Union"[358]. The Hague program constitutes a central part in the development of EU policy on border management, especially because the possibility of partnerships with third countries is extensively mentioned. The possibility to conclude agreements and establish partnerships with third countries is in particular relevant for the activities of Frontex, since it allows operating in third country territories and cooperation on return operations[359]. Furthermore, the establishment of the Schengen Border Code[360] marks another crucial point in the issue of border management in the EU. The Schengen Border Code was until recently the only text related to border surveillance that it referred to international obligations including the principle of non-refoulement[361].

With the adoption of the Treaty of Lisbon[362] and the abolishing of the pillar structure the Area of Freedom Security and Justice was relocated under Title V in the Treaty of the Functioning of the European Union. The divisions of the competences of the member states and the EU are set out in several articles at the beginning of Title V. Article 72 of TFEU[363] states that "this title shall not affect the exercise of the

[357] European Union: Council of the European Union, **Presidency Conclusions, Tampere European Council**, 15-16 October 1999, 16 October 1999, available at: *http://www.refworld.org/docid/3ef2d2264.html*, last accessed 15 July 2014

[358] European Union, **The Hague Programme: Strengthening Freedom, Security and Justice in the European Union**, 13 December 2004, 2005/C 53/01, available at: *http://www.refworld.org/docid/41e6a854c.html*, last accessed 15 July 2014

[359] European Union, Council Regulation (EC) No 2007/2004 of 26 October 2004 **establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union**, available at: *http://frontex.europa.eu/assets/About_Frontex/frontex_regulation_en.pdf*, last accessed 24 July 2014

[360] Council Regulation (Eu) No 610/2013 Of The European Parliament And Of The Council of 26 June 2013 amending Regulation (EC) No 562/2006 of the European Parliament and of the Council **establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), the Convention implementing the Schengen Agreement, Council Regulations (EC) No 1683/95 and (EC) No 539/2001 and Regulations (EC) No 767/2008 and (EC) No 810/2009 of the European Parliament and of the Council,** available at: *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:182:0001:0018:EN:PDF*, last accessed 15 July 2014

[361] Ibid article 559 and article 1360.

[362] European Union, **Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community**, 13 December 2007, 2007/C 306/01, available at: *http://www.refworld.org/docid/476258d32.html*, last accessed 29 June 2014

[363] European Union, **Treaty on the Functioning of the European Union**, 26 October 2012, OJ L. 326/47-326/390; 26.10.2012, available at: *http://www.refworld.org/docid/52303e8d4.html*, last accessed 15 July 2014

responsibilities incumbent upon the Member States with regard to the maintenance of law and order and the safeguarding of internal security." Clearly, the member states remain in the responsible position. However, article 68 of TFEU[364] mentions that "the European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice". So as it appears, the EU has the power to formulate the norms and guiding principles while the member states are responsible for the implementation. The same is applicable for the Frontex agency. The regulation establishing Frontex refers to article 66 TEC: "The Council, acting in accordance with the procedure referred to in Article 67, shall take measures to ensure cooperation between the relevant departments of the administrations of the Member States in the areas covered by this title, as well as between those departments and the Commission." The Council provides the opportunity for cooperation between the member states' relevant departments; however, the member states take the appropriate action. Furthermore, as mentioned above article 78 of TFEU concerns the common policy on asylum and forms of humanitarian protection. The article explicitly refers to the obligation for protection of third-country national who are in need of it, the guarantee of the non refoulement principle and the duty to respect the Geneva Convention and the Protocol of 1967. Moreover, the Lisbon Treaty provides a framework for threefold protection of human rights under article 6 of TEU, as it refers to the Charter of fundamental rights of the European Union and grants it the same legal value as the Treaties, mentions the accession of the ECHR to the EU and mentions that those fundamental rights plus the constitutional traditions stemming from the member states shall constitute general principles of the EU law. This is also valid for the coordinating activities of the EU agency Frontex; even though the member states remain in the responsible acting positions, the guidelines set out in the Treaties are relevant and must be respected.

In addition, with a regulation establishing the European Border Surveillance System[365] (EUROSUR) a common framework for the exchange of information and for the cooperation between Member States and the Frontex Agency was specified,

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[364] Ibid.

[365] European Union, **Regulation Of The European Parliament And Of The Council Establishing The European Border Surveillance System (EUROSUR**), 2011/0427 (COD) PE-CONS 56/13, available at: *http://register.consilium.europa.eu/doc/srv?l=EN&f=PE%2056%202013%20INIT*, last accessed 15 July 2014

"in order to improve situational awareness and to increase reaction capability at the external borders of the Member States of the Union for the purpose of detecting, preventing and combating illegal immigration and cross-border crime and contributing to ensuring the protection and saving the lives of migrants". EUROSUR became operational on 2 December 2013 and aims to reduce the number of irregular migrants entering the EU undetected and to help member states to react faster to incidents regarding undocumented migrants and cross-border crime[366]. Its main pillars are the national coordination centres, in which all authorities responsible for border surveillance are required to coordinate their activities. EUROSUR will be operational in a total of 30 countries. Critics have described this measure as extremely expensive, discriminatory and anti-immigrant and that it will only be justified if there is a substantial decrease in the number of deaths involving migrants attempting to get into the EU, which until now is not the case. Although, the EUROSUR regulation is referring to the principle of non refoulement and to obligations arising by international human rights law, there are no actual provisions for the incorporation of those obligations. In practice, EUROSUR is extending the operational area of Frontex and of member states further than before and is creating a broader closed bordered area, "securing" the Mediterranean Sea without the use of fences and barriers.

On the 16th of April of 2014, the European Parliament voted on the proposal for a new Regulation on the maritime surveillance by the European agency for the coordination of the cooperation at the external borders[367]. The Parliament has introduced for the first time in the regulation a definition of non-refoulement, but to assess the risk of asylum seekers, Frontex will only use governmental and European sources and will not publish its conclusions[368]. In accordance to the principle of non-refoulement, pushback operations on the high seas are explicitly forbidden, and criminal sanctions for the shipmasters and crews responsible for the sole rescue of persons in distress at sea have been excluded, in line with customary international

[366] Ibid.

[367] European Union, **Regulation Of The European Parliament And Of The Council Establishing Rules For The Surveillance Of The External Sea Borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union**, 2013/0106 (COD) PE-CONS 35/14, available at: *http://register.consilium.europa.eu/doc/srv?l=EN&f=PE%2035%202014%20INIT*, last accessed 15 July 2014

[368] MigrEurop, Regulation on the maritime surveillance by Frontex : lives in danger at the external borders of Europe, Frontexit press release, 14 April 2014, available at: *http://www.migreurop.org/article2501.html?lang=fr*, last accessed 15 July 2014

law. Still though, border guards are entitled to warn and order vessels not to enter in the territorial waters of a member state, and provisions ensuring migrant individual access to interpreters and legal advisers have not been fully contemplated[369]. The Agency will also have to take into account the existence of agreements and projects between the EU, its Members States and third countries in order to make such assessments. Furthermore, the regulation foresees the possibility to send persons intercepted at high sea or in the contiguous zone of a Member State's territorial waters back to the country from which they departed, regardless of whether there is an agreement between the EU and this country.

Moreover, in the context of Frontex the bilateral agreements with third states, as they were examined in the previous chapter, signed by EU member states involved in Frontex operations often establish respectively the cooperation in returning persons intercepted at sea. The development of relationships with third countries is always seen as the solution to all problems of so called irregular immigration and Frontex is asked to play a key role in this respect. According to Frontex's operational guide "…as an integral part of its mission, Frontex builds cooperation with countries outside the EU. A primary objective is to intensify existing bilateral cooperation with neighbouring countries and with countries of origin and transit for irregular migration. In this context Frontex constantly develops a reliable and effective network of partnerships at the operational level with the relevant authorities of non-EU states...these authorities are usually law enforcement authorities with operational responsibility for border control, as well as regional cooperation structures for border control." Since April 2013, Frontex had concluded arrangements with the authorities of countries as the Russian Federation, Ukraine, Moldova, Georgia, the Former Yugoslav Republic of Macedonia, Serbia, Albania, Bosnia and Herzegovina, the United States, Montenegro, Belarus, Canada, Cape Verde, Nigeria, Armenia, Turkey and Azerbaijan. In addition, following mandates from its Management Board to enter into negotiations, the agency is in various stages of negotiations with the authorities of seven further countries, Libya, Morocco, Senegal, Mauritania, Egypt, Brazil and Tunisia. As Papastavridis[370] sees those bilateral agreements gives an opportunity to

[369] Stefan Marco, **Putting Frontex In Perspective**, 25/04/2014, MEDEA Institute, available at: *http://www.medea.be/2014/04/putting-frontex-in-perspective-some-thoughts-at-the-margin-of-the-last-ep-plenary-vote/*, last accessed 15 July 2014

[370] Papastavridis E., **'Fortress Europe' and Frontex: Within or Without International Law?**, Nordic Journal of International Law, 79(1), 2010, available at:

violate the principle as "it is highly unlikely that European States concerned, particularly in the context of Frontex operations, pay respect to the non refoulement obligations and do not return intercepted persons."

Some of the most known joint operations that have been coordinated by Frontex are the maritime operations aiming to curb migration by sea, such as the Hera operations off the Canary Islands and the Nautilus operations in the central Mediterranean. Joint patrols on the High Seas and in the territorial waters of third countries from which irregular migrant boats depart mean that the physical surveillance of the external borders has made it increasingly difficult for people to actually reach EU territory, the Member States try to avoid the responsibility for asylum claims or the removal of irregularly present third country nationals[371]. As it was examined above those extraterritorial patrols raise a range of legal questions because of the simultaneous application of the law of the sea, the international rules on search and rescue as well as refugee law and a lack of a common interpretation of these rules.

Even though the aforementioned judgement of Hirsi Jamaa and others v Italy was not in the context of a Frontex operation, this case certainly has implications for the operations carried out by the member states under the cooperation by the agency. Currently, the most controversial practice in the framework of the agency is that of the diversion by national border guards of ships under the coordination of Frontex back to their point of departure[372]. This practice entails not only a real risk to the life and safety of the passengers on board these often unseaworthy ships, but as regards possible asylum seekers on board, it also risks violating the right to claim asylum and the prohibition of refoulement. The Greek coast guard has the reputation of regularly diverting boats back to the Turkish shores, as it was once again proved by the Farmakonisi incident. Italy has openly admitted to the interception and return of irregular migrants and asylum seekers from Libya under its 2008 Treaty on Friendship, Partnership and Cooperation. Both within and outside the Hera

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http://booksandjournals.brillonline.com/content/journals/10.1163/157181009x12581245929640;jsessionid=7njawkkp45j8.x-brill-live-03, last accessed 15 July 2014

[371] Rijpma Jorrit J, "**Frontex: Successful Blame Shifting of the Member States?**", available at: *http://www.realinstitutoelcano.org/wps/wcm/connect/391e6a00421a96f98d66ef8b6be8b54b/ARI69-2010_Rijpma_Frontex_Memeber_State_European_Union.pdf?MOD=AJPERES&CACHEID=391e6a00421a96f98d66ef8b6be8b54b*, last accessed 15 July 2014

[372] Ibid.

operations, Spain has been returning people to Senegal and Mauritania and all those interceptions are formally cast in terms of rescue operations and transfer to the nearest place of safety. As the Frontex-Libyan attempt for cooperation has shown, a certain degree of own dynamic in the development of agreements bears the risk that the principle of non refoulement is avoided and omitted, as the principle was not mentioned in the report on the technical mission of Frontex in Libya in 2007. Thereby it becomes clear that to a certain extent the correct implementation of provisions depends on all the involved actors and their specific interests.

1.2.3. Solidarity in the EU and the incidents in the Mediterranean Sea

The reality is that in European Union there is an increased need for solidarity in the area of asylum and migration, which stems from the fact that some Member States have more asylum seekers than others, more refugees than others, and more difficulties in coping with them for a number of geographic, economic and other reasons. It must also be acknowledged that the majority of refugees, even in Europe, are hosted in states that are least equipped to accommodate them and provide them access to the rights due to them under the 1951 Refugee Convention and other human rights treaties[373]. In order for states to avoid breaking their international obligations under human rights law and refugee law and finally to avoid the current death toll in the Mediterranean Sea, a range of measures could be used to support the functioning of solidarity, such as financial assistance, practical cooperation, relocation, resettlement, and joint processing.

The term solidarity among EU Member States does not have a single, uniform meaning in EU law, but can refer to a number of different legal contexts[374]. The principle of solidarity has its strongest expression in the solidarity clause which creates the legal basis for the Union and its Member States to "act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural

[373] Kris Pollet, "**Enhancing Intra-EU Solidarity Tools To Improve Quality And Fundamental Rights Protection In The Common European Asylum System**", European Council on Refugees and Exiles, January 2013, available at: *http://www.ecre.org/component/content/article/315*, last accessed 29 June 2014

[374] Goldner Lang Iris, **"Is There Solidarity On Asylum And Migration In The EU?"**, Croatian Yearbook of European Law and Policy, Vol.9 No.9 December 2013, available at: *http://hrcak.srce.hr/114177?lang=en*, last accessed 29 June 2014

or man-made disaster"[375]. Article 222, of the Treaty on the Functioning of the European Union constitutes a major innovation of the Lisbon Treaty as it extends mutual commitment beyond the traditional concept of armed attack and territorial defence, to encompass "terrorist threats" and "natural or manmade disasters". The mutual solidarity clause, however, is only one component of the Union's references to solidarity; for instance, it is strongly linked to Article 122 for support in the case of supply crisis, Article 194 aiming at ensuring the Union's energy supply, and Article 196 on the prevention and protection against natural and manmade disasters[376].

Solidarity among EU Member States is also mentioned in the Treaties in a number of instances and within different policy areas. In article 2 of the TEU[377], it is referred to as one of the values the European Union is founded on and in article 21 as one of its principles which guides the Union's action on the international scene. In the area of asylum, migration and border controls, Treaty articles explicitly rely on the principle of solidarity and responsibility-sharing. Solidarity has been referred to in a number of EU documents, some preceding the Lisbon Treaty, such as the Tampere Conclusions[378], the Hague Programme[379], the European Pact on Immigration and Asylum[380] and the Stockholm Programme[381]. Furthermore, the principle of sincere cooperation laid out in Article 4.3 TEU[382] also had important implications in the area

[375] European Union, **Treaty on the Functioning of the European Union**, 26 October 2012, OJ L. 326/47-326/390; 26.10.2012, available at: *http://www.refworld.org/docid/52303e8d4.html*, last accessed 15 July 2014

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[378] European Union: Council of the European Union, **Presidency Conclusions, Tampere European Council**, 15-16 October 1999, 16 October 1999, available at: *http://www.refworld.org/docid/3ef2d2264.html*, last accessed 15 July 2014

[379] European Union, **The Hague Programme: Strengthening Freedom, Security and Justice in the European Union**, 13 December 2004, 2005/C 53/01, available at: *http://www.refworld.org/docid/41e6a854c.html*, last accessed 15 July 2014

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[381] European Union, **The Stockholm Programme: An open and secure Europe serving and protecting citizens**, 2010, available at: *http://eur-lex.europa.eu/legal-content/EN/ALL/;ELX_SESSIONID=R1rdJG0Xxs2QTvvHYnGLKgWryf118nvszYFs46j0hS8R20nLtgmM!570924940?uri=CELEX:52010XG0504(01)*, last accessed 15 July 2014

[382] European Union, **Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community**, 13 December 2007, 2007/C 306/01, available at: *http://www.refworld.org/docid/476258d32.html*, last accessed 29 June 2014

of asylum and immigration, as it obliged EU Member States to "assist each other in carrying out tasks which flow from the Treaties".

Moreover, article 80 of TFEU is the most explicit formulation of the principle of solidarity, on the policies concerning refugee protection and asylum in European states. Article 80 TFEU, is the central and most specific call for solidarity in Title V and it stipulates that "the policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle". The explicit reference to solidarity and the fair sharing of responsibility could cover all deterrence policies already examined. Therefore, solidarity should be the guiding principle throughout all the policy areas attempting to regulate the current situation in the Mediterranean Sea. Furthermore, reference to solidarity when drafting and implementing all the policies on border checks, asylum and immigration shows the intention to apply this principle not only in emergency situations, such as a mass inflow of refugees, but also when shaping these policies[383].

Solidarity applies both to EU institutions and the Member States. However, measuring solidarity and fair sharing of responsibility is not an easy task. The Treaty provides no specification to help determine what constitutes these terms and their goals are undefined. Responsibility sharing can be seen as one of the manifestations of the principle of solidarity, implying a fair distribution of burden, regarding to EU borders, immigration and asylum policies, among EU Member States.

Until now, the most concrete form of solidarity and responsibility-sharing between EU Member States that exists today in the field of asylum is financial solidarity. The fact that Article 80 TFEU explicitly refers to the financial implications of solidarity, but does not limit itself only to this manifestation of burden-sharing, suggests the importance of financial burden-sharing, but also calls for other forms of cooperation among Member States that could lead to burden-shifting to Member States under less pressure. Also important is the monitoring of the use of this financial aid on behalf of the member states, so those funds are not directed towards the

[383] Goldner Lang Iris, **"Is There Solidarity On Asylum And Migration In The EU?"**, Croatian Yearbook of European Law and Policy, Vol.9 No.9 December 2013, available at: *http://hrcak.srce.hr/114177?lang=en*, last accessed 29 June 2014

adoption of further detention measures, but in constructing effective reception conditions for refugees and asylum seekers, which will ensure their rights and also avoid creating further problems in the receiving society.

Member States' motivation for solidarity in the area of asylum and migration might vary, as states that are geographically exposed to a disproportionate number of refugees, such as Greece, Italy and Malta, call for burden-sharing with other, less pressured Member States. Their reasons for urging for solidarity are primarily financial, social and political. On the other hand, another type of self-interest might encourage other Member States to assist and participate in the burden-sharing mechanisms. The ability of one Member State to effectively handle immigrants, refugees and asylum seekers, while preserving human rights standards, might have positive consequences for all the other Member States, as it reduces irregular migration and increases internal security[384].

[384] Ibid

Conclusion

The Other European Crisis

As Stephen Legomsky wrote[385], "we do not live in a utopian world where there are no refugees, no armed conflicts and no human rights abuses; we do not even live in a modified utopian world where refugees are welcomed with open arms. Unfortunately, we live in a world that consists of sovereign States that jealously guard their territories, their wealth, and their economic composition".

As it was already analysed, the danger for loss of life for asylum seekers crossing the Mediterranean Sea increased during the last decade. Since the early 2000s, Lampedusa became a prime transit point for illegal immigrants from Africa, the Middle East and Asia wanting to enter Europe. In 2004, the Libyan and Italian governments reached an extraterritorial bilateral agreement that obliged Libya to accept those deported from Italian territories. This resulted in the mass return of many people from Lampedusa to Libya between 2004 and 2005 without the endorsement of European Parliament. In 2009, the overcrowded conditions at the island's temporary immigrant reception centre came under criticism by UNHCR. The unit, which was originally built for a maximum capacity of 850 people, was reported to be housing nearly 2000 people. A fire which started during an inmate riot and destroyed a large portion of the holding facility on 19 February 2009 was the triggering event for refoulement policies in the Mediterranean, as Lampedusa was declared an unsafe port and the cooperation between Italy, Malta and Libya was straightened.

In 2011 many more people attempted to cross the Mediterranean during the rebellions in Tunisia and Libya and of course the Syrian war. By May 2011, more than 35,000 immigrants had arrived from the transit countries of Tunisia and Libya and since then the flaw is gradually increasing. The various reports for pushbacks and deterrence policies from behalf of Italy and Malta, in coordination with Frontex, in the area prove the significance of the issue. The Hirsi Jamaa Judgement of ECtHR and the two shipwrecks in Lampedusa were actually what lead to a shift in policy of Italy which deplored the Mare Nostrum operation, with the main goal to prevent loss of life in sea and reinforce search and rescue operations. In an attempt to ensure the humanitarian character of the operation and to prove that it complied with its

[385] Supra Note 205

international obligations Italy also took over or the individuals found in the Maltese search and rescue zone. However, currently Italy, complaining for neglect on behalf of the European Union, for lack of solidarity among European States and for the hardships caused by the economic crisis announced that the Mare Nostrum operation is to be terminated by the end of November.

On the other side of the Mediterranean, Greece has been receiving a stable flaw of people over the last two decades. In 2012, Greece completed a 10.5 km fence at its border with Turkey to prevent the wave of unregulated immigrants from flowing into the country, serving as an indirect deterrence measure. However, the sharp drop in people entering Greece through Evros has been accompanied by a renewal in the influx via the islands of the Aegean Sea, which in combination with the overall deterrence policy adopted by Greece, like interception measures, lead to various incidents, like the Pharmakonisi case, resulting in pushbacks and the death of numerous asylum seekers. In the same time Bulgaria has largely completed the construction of a 33 km barbed wire fence at the borders with Turkey resulting in more people to attempt to arrive in Europe though Aegean Sea.

However, the situation in the Greek-Turkish boarders, the Italy-Libya one and the Hirsi Jamaa Judgement revealed a central problem with deterrence mechanisms which they do not reduce the number of people who need to move and who may have valid claims for refugee status, instead they simply keep them in suspension, often in countries in which their rights may not be protected. Investment in deterrence as the preferred solution to the challenge posed to States by irregular boat arrivals is not only against international refugee law and international human right law but also doomed to failure. Investment predominantly in deterrence as the solution is doomed to failure over the longer term for it ignores what drives people to put themselves in perilous circumstances at sea. The forces that drive people onto the boats lie as much in the conditions in the countries of first asylum as they do in the circumstances in countries of origin. Those problems are complex and have such an international context which renders solving them an overambitious goal. More realistically States should be aiming at better management strategies which take more holistically and compassionately into account some central characteristics, using more effectively existing tools. The 1951 Convention is not at the root of the problem as it calls for strategies which address properly, robustly and compassionately deficiencies in national asylum systems, which protect rights and which promote better international

cooperation and burden-sharing to address what is at root a global problem. Investment in more effective and robust national asylum systems and in international cooperation and solidarity to collaboratively manage this multidimensional problem would be money and effort more properly and compassionately spent.

However the future is not expected to be brighter as after the announcement of the termination of Mare Nostrum operation, the EU also announced the deployment of a new operation, named Frontex Plus, which is alleged to be restricted inside the EU borders and disregard once again the fact that Frontex is an organisation with the main goal to protect the European states and not the people in need of a safe heaven. This development, in combination with new initiatives, as the MOAS organisation, operating inside the Maltese SAR zone - which during the first two weeks of its operation has saved more than 1500 persons, which were then transferred in Italy – introduces new actors in the area, in the form of voluntary organisations which in the future we may see playing a complementary role in the Frontex operations but also creating major legal issues with regard to legality and responsibility sharing.

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