

EXTRATERRITORIAL APPLICATION OF NON- REFOULEMENT AND EXTRATERRITORIAL JURISDICTION

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Introduction

Purpose and research question

In the context of refugee law, the purpose of the principle of *non-refoulement* is to protect refugees from being returned to a place where their lives could be endangered; allowing States to turn refugees away at the borders would completely undermine this purpose.

There are wide debates on the extraterritorial application of the principle of *non-refoulement* in the field of human rights law and refugee law. For instance, some scholars argue that the interception on the high seas violates the international legal principle of *non-refoulement* while the others claim that the principle does not apply extraterritorially. The latter center their argument on the right of States to their territory¹ and delimit the applicability of the *ratione loci* of the Article 33 of the Refugee Convention, while the former insists on the universality of human rights.²

Moreover, The issue of migrants being intercepted and asylum seekers in distress on the external borders or territorial waters of the third States is not a traditional image of the migrants arriving at the territory of a State claiming refugee status. In other words, there is a legal uncertainty and in bodies of international refugee law, international human rights law and the Law of the Sea on one hand and for the States, on their domestic national laws on the other hand. States have extended their Migration Control Laws from the territorial borders of States to the high seas, external borders and the territory of transit and origin countries. Furthermore, States intend to intercept the vessels of the asylum seekers beyond their territory and on the high seas while the migrants being intercepted or in sorrow on the high seas fear persecution if sent back to the country of

¹ European Commission, ‘Communication from the Commission to the Council - Reinforcing the management of the European Union’s Southern Maritime Borders’, 2006; ‘Sale v. Haitian Centers Council, Inc.’, Supreme Court 509; Guy Goodwin-Gill, ‘The Haitian Refoulement Case: A Comment’ (1994) 6 International Journal of Refugee Law 103–109; *Minister for Immigration and Multicultural Affairs v. Haji Ibrahim*, [2000] HCA 55, Australia: High Court, 26 October 2000, available at: <http://www.unhcr.org/refworld/docid/3deb73f7.html>

² Andreas Fischer-Lescano, Tillmann Löhrl & Timo Tohidipur, ‘Border Controls at Sea: Requirements under International Human Rights and Refugee Law’ [2009] Oxford University Press; Elihu Lauterpacht and Daniel Bethlehem, ‘The Scope and Content of the Principle of Non-Refoulement (Opinion)’ [2001] UN High Commissioner for Refugees; James C. Hathaway, *The Rights Of Refugees Under International Law* (Cambridge University Press 2005)

origin or the transit country.³ There is no consensus with respect to extraterritorial application of the *non-refoulement* and States, in some instances, make ad hoc decisions for their migration control laws. Furthermore, although, the Law of the Sea and bilateral agreements between states may provide states with the competence to intercept and seize migrant vessels in different maritime zones, there is no doubt that the human rights treaties and the 1951 Refugee Convention constitute a proved proposition that interception can seriously jeopardize the ability of persons at risk of persecution to gain access to safety and asylum.⁴

Firstly, the purpose of the thesis is to examine whether and under which conditions the principle of *non-refoulement* applies to the borders of the States extraterritorially or beyond territorial boundaries of States. The answer to the first research question is only possible through a systematic analysis of the gaps and limits of international refugee law when migration control is carried out extraterritorially. The thesis would like to take an interpretive legal theory and a legal synthesis approach by analyzing the existing law, soft law, State practice and in a wider normative discipline. Therefore, the research would like to include a new interpretation of the provisions of the principle of *non-refoulement* with respect to court decisions, State practice and legal instruments and thus, the research will take an interpretive legal theory approach.⁵

To begin with the problem of legal uncertainty of the application of the principle of *non-refoulement* extraterritorially, it has been asserted in the literature that the legal principle of *non-refoulement* is the cornerstone of the international refugee law and a principle in international customary law.⁶ There is no treaty or legal instrument or no State practice that denies the significance of the principle of *non-refoulement*. However, the wording of the relevant articles in international human rights law and international

³ For instance: The US interception program regarding Haitian boat refugees; Australian Pacific Solution, Italy in the Adriatic and Mediterranean Sea; FRONTEX's missions; The Case of Hirsi Jamaa and others v. Italy

⁴ Executive Committee of the High Commissioner's programme, 18th Meeting of the Standing Committee (EC/50/SC/CPR.17), 9 June 2000. <http://www.unhcr.org/excom/EXCOM/3ae68d144.pdf>.

⁵ Allan Beaver and Charles Rickett, 'Interpretive Legal Theory and the Academic Lawyer' (2005) 68 The Modern Law Review 320–337

⁶ UN High Commissioner for Refugees, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol', 26 January 2007; Alice Farmer, 'Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures that Threaten Refugee Protection' [2008] New York University School of Law

refugee law treaties are not clear regarding its application extraterritorially.⁷ The 1951 refugee convention fails to address the application of the principle on the external borders of the States. Furthermore, there is no consensus in the literature or State practice on the application of the principle of *non-refoulement* extraterritorially. The case of migrants in distress on the high seas and the asylum seekers being intercepted on the external borders of the States and on the high seas constitutes a number of criticisms, in particular on recent literature. In case of refugees, asylum seekers do not intend to go back to the country of their origin since they fear persecution while no other State is obliged to accept them in its territory.⁸ States intercept the migrant vessels before they can reach to territorial waters of the destination. Therefore, the question is whether the principle of *non-refoulement* applies extraterritorially and whether States are bound by international refugee and human rights obligations when carrying out extraterritorial migration control with respect to *ratione loci* of the principle of *non-refoulement*.

Secondly, the thesis would like to evaluate and critically assess how the States behave and react with respect to the legal uncertainty given the fact that while a number of scholars have debated intensely the geographical application of the *non-refoulement* principle, few have undertaken a systematic analysis of the extraterritorial jurisdiction. In this regard, the hypothesis is that these areas of legal uncertainty afford States a legal vacuum to avoid their responsibilities to protect refugees in one hand and on the other hand, the asylum seekers in distress and the migrants being intercepted on the external border of States do not enjoy their rights to be protected. The very recent instance of the aforementioned would be the importance of Hirsi judgment for the purpose of this research where the Court highlights a framework for protecting asylum seekers and refugees found at sea; in addition, the Court ascertains no difference between interception on the high seas for the purpose of preventing unauthorized migrants arrivals and humanitarian operations. In order not to avoid the appreciation of the norms and values in other areas of law, extraterritorial jurisdiction has to be analyzed in different areas of law

⁷ United Nations, 'The 1951 Convention relating to the Status of Refugees', 1951; Article 33(1) of the 1951 Refugee Convention States that: '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 or political opinion'.

⁸ Ernst Willheim, 'MV Tampa: The Australian Response' (2003) 15 International Journal of Refugee Law 159, 166

under the relevant bodies of law and case law.⁹ The reason is that some principles and rules in international law may be developed differently in other fields or subfields.¹⁰ For instance, the concept of jurisdiction under United Nations Convention on the Law of the Sea norms are not “self-executing” and are concerned with the competence of States.¹¹ The thesis would like to explore what jurisdiction is and what level of diligence can be reasonably expected of a State in complying with international norms and in particular with respect to extraterritorial application of the principle of *non-refoulement*. Therefore, the core question addressed in the paper is then, whether any extraterritorial migration policies or migration control, whether inside, at a border or beyond the border necessarily entails an exercise of jurisdiction and how international law, and in particular human rights law, respond to State activity affecting the enjoyment of rights of persons outside the State’s territory.

Methods:

In order to clarify the ambits and parameters of the geographical scope of principle of *non-refoulement* the interpretation will consist of the legal analysis of the existing legal instrument and will analyze and interpret the provisions of article 33 of the 1951 Convention Relating to the Status of Refugees with respect to its *ratione loci*. The first stage of the interpretation will consist of the positivist reading of the interpretation by analyzing the historical context (drafting history) of the article 33, language, text and purpose of the article. The secondary stage of the interpretation will analyze the informal sources and the soft law (non-binding resolutions) and the State practice¹². The third stage is to describe the provisions of the international legal principle of *non-refoulement* in a normative discipline. The normative framework of the principle will be described through theoretical and normative concepts and a comparative appraisal of the existing international and regional human rights conventions, refugee law conventions and

⁹ See the methods section for the matter of extraterritorial jurisdiction under relevant legal documents and case law and how they will be incorporated in the study.

¹⁰ Bernhard Ryan and Valsamis Mitsilegas, *Extraterritorial Immigration Control: Legal Challenges* (BRILL 2010) 105

¹¹ *Ibid.* 108

¹² For instance: The US interception program regarding Haitian boat refugees; Australian Pacific Solution, Italy in the Adriatic and Mediterranean Sea; FRONTEX’s missions; The case of *Hirsi and others v. Italy*

customary law (The interplay between the treaties and customary law by looking at similarities and differences.)

The core question addressed in the paper is whether the extraterritorial migration policies or migration control, whether inside, at a border or beyond the border necessarily entails an exercise of jurisdiction. In order to discuss the aforementioned arguments and answer the research question, the chapter will examine the notion and the concept of extraterritorial jurisdiction under international public law and human rights law and State jurisdiction under human rights context, public international law (in particular the law of the sea (UNCLOS) has to be analyzed. The thesis explores the general theory, case law and legal doctrine on the extraterritorial applicability of human rights. By focusing on the manner how the notions of “territory” and “jurisdiction” have been incorporated and applied in human rights law, the thesis will present a general outline for delineating the scope of a State’s extraterritorial human rights obligations with a focus on the principle of *non-refoulement*. From a theoretical standpoint, these areas of legal uncertainty afford States legal space to avoid their responsibilities to protect refugees. It should be noted that the legal assessment of the judicial rights to States granted by UNCLOS is required. For that reason, the research will examine the provisions of the UNCLOS with respect to States’ *de jure* and *de facto* jurisdiction in three zones (territorial, contiguous zone and on the high seas) and will examine the case law under public international law and human right context, respectively.¹³ Therefore, the normative sources will include the relevant international human rights law, international refugee law and Law of the Sea legal documents. As for the authoritative sources, the research will illuminate the arguments of the States and courts.¹⁴ The decisions of courts are prominent as they lie in their placement of practice of extraterritorial interception of migrants squarely within the ambit of human rights laws. As an illustration, the ECtHR in *Hirsi v. Italy* not only highlights the importance of *non-refoulement*, but also illustrates the manner of States

¹³‘The 2001 Case of *Banković and Others v. Belgium*’, no. 52207/99, The European Court of Human Rights; ‘The 1927 Case of the S.S. “*Lotus*” (*France v. Turkey*)’, Permanent Court of International Justice; ‘The 1989 Case of *Soering v. The United Kingdom*’, no. 14038/88, The European Court of Human Rights

¹⁴ German General Federal Ministry of the Interior, Bundesministerium des Innern (BMI); *Sale v. Haitian Centers Council, Inc.*; *Ibrahim v Minister for Immigration & Multicultural Affairs* [1999], Australia: Federal Court FCA 374; *Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, United Kingdom House of Lord [2004] UKHL 55

operating in a maritime context.

The analysis will examine different situations where the human rights bodies have found that States have exercised jurisdiction in extraterritorial context where their human rights obligations has been triggered. Thus, the first section of chapter two concerns the concept of the extraterritorial jurisdiction under public international law. The second section will examine the notion of extraterritorial jurisdiction under human rights law. In this regard, the international human rights jurisprudence will be discussed in two approaches. The first approach will analyze the extraterritorial jurisdiction in two spheres in which is in line with and similar to public international law. The second approach is about to examine the case law as regards the extraterritorial jurisdiction in four areas in the situations of denial of territorial jurisdiction, on the high seas, search and rescue operations at sea and migration policies undertaken within a third State's territorial jurisdiction. The focus will be on recent case law e.g., *Hirsi v. Italy*, case of *Al Skeini*, *Marine I* case and etc., where the courts deal with rescue operations, migrant interceptions at sea and direct and indirect *refoulement* of migrants.

I. Ratione Loci of the non-refoulement principle as the cornerstone of the international refugee law

The non-refoulement principle as enshrined in Article 33 of the Convention Relating to the Status of Refugees reads as follows:

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 wording and meaning of the article are unambiguous particularly with respect to geographical scope and application of the *non-refoulement* principle. With regard to parameters and ambits of the extraterritorial application of the international legal principle of *non-refoulement* and its interpretations there are two contrary streams: those who claim that the principle of *non-refoulement* applies extraterritorially and those who argue against.¹⁵

Some States as well as a number of scholars argue that the principle does not apply extraterritorially and they center their debates on two arguments: 1. The United States Supreme Court in *Sale v. Haitian Centers Council*¹⁶ case Stated that Article 33(1) of the 1951 Refugee Convention does not have an extraterritorial effect. Australian case law, and some parts of British case law, subsequently upheld this interpretation. 2. A number of authors believe that the principle does not apply extraterritorially since it is “beyond the rule of law” and a “legal black hole”¹⁷ and territorially limited, hence, the rights of refugees under the provisions of the 1951 refugee are not guaranteed beyond territorial boundaries. On the other hand, other scholars argue that the subsequent expulsion of migrant vessels on the high seas is fundamentally in violation of human rights law treaties and international refugee law and they argue that the judgments of

¹⁵ See notes 2 and 3 above.

¹⁶ *Sale v. Haitian Ctrs. Council*, 113 S. Ct. 2549, 113 S. Ct. 2549, 125 L. (92-344), 509 U.S. 155 (1993)

¹⁷ Johan Steyn, ‘Guantanamo Bay: The Legal Black Hole’ (2004) 53 *International & Comparative Law Quarterly* 1–15; Bjarte Vandvik, ‘Extraterritorial Border Controls and Responsibility to Protect: A View From ECRE’ (2008) 1 *Amsterdam Law Forum*

domestic courts cannot claim to be binding under international law¹⁸ and that international human rights norms are “absolute” in nature.¹⁹ At first glance, the predominance of the concepts of the principle of State sovereignty, jurisdiction and territorial effect would highlight the fact that a State cannot exercise its enforcement jurisdiction on the territory of another State unless the latter consents.²⁰ However, it is increasingly recognized that States have the power to affect human rights beyond their territory and that the universal nature of human rights is not confined to the border of States.

Drafting history of Article 33

With respect to the drafting history of the Convention Relating to the Status of Refugees, the Convention was firstly discussed by a UN Ad Hoc Committee in 1950 and then discussed and adopted in the following two conferences in July 1951. Moving towards the drafting history, it could be argued that there was a duality between supporting a more universal and territorial conceptualization of the *ratione loci* of the non-refoulement principle.

On one hand, the first draft of the *non-refoulement* principle (discussed by the ad hoc committee) referred to “expulsion” and to “non-admittance at the frontier”.²¹ With respect to the French term “refoulement”, the French representatives supported the absolute nature of the refoulement stating that the term “refoulement” includes both expulsions and non-admittance at the frontier.²² On the Other hand, more restrictive interpretations proposed by the Dutch and Swiss delegates, were put forward as a result of mass influx situation.²³

¹⁸ Andreas Fischer-Lescano, Tillmann Löhner & Timo Tohidipur, ‘Border Controls at Sea: Requirements under International Human Rights and Refugee Law’ (2009), n3 266

¹⁹ Júlia Mink, ‘EU Asylum Law and Human Rights Protection: Revisiting the Principle of Non-refoulement and the Prohibition of Torture and Other Forms of Ill-treatment’ (2012) 14 European Journal of Migration and Law 119, 134

²⁰ M. Shaw, *International Law*, Cambridge University Press, 6th ed., 2008, pp. 422-423

²¹ UN Ad Hoc Committee on Refugees and Stateless Persons, Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Twentieth Meeting Held at Lake Success, New York, on Wednesday, 1 February 1950, 10 February 1950, E/AC.32/SR.20, available at: <http://www.refworld.org/docid/3ae68c1c0.html>

²² *ibid*

²³ UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Sixteenth Meeting, 23 November 1951, A/CONF.2/SR.16, available at: <http://www.refworld.org/docid/3ae68cdc14.html>

Linguistic Interpretation

With respect to the geographical scope of the *non-refoulement* principle, some scholars have argued that “in any manner whatsoever” would suggest a wider application of the non-refoulement regardless of the territory of a State.²⁴ The second argument would suggest that “in any manner whatsoever”, was rather to ensure that all forms of return and expulsion would be covered by the Article 33.²⁵

The US Supreme Court in the *Sale* case argued that a physical presence in the territory of the State is necessary and Stated that “the coverage of the 33(2) was limited to those already in the country”.²⁶ Therefore, according to the argument made by the US Supreme Court, the exception to the article 33 (Article 33(2)) entails a territorial limitation of the *non-refoulement* principle. However, Justice Blackmun in his dissenting opinion argued that Article 33(2) as an exception to Article 33(1) does not limit the scope of the Article 33.²⁷

With respect to the word “refouler”, as discussed earlier, there were two interpretations based on the drafting history, interpretations made by the ad hoc committee and made by conference representatives, none of which concludes an authentic interpretation of the application of the *non-refoulement*.

Telos of Article 33

Some scholars believe that the purpose and object of Article 33 is the drafting history of the Convention given the fact that the purpose and object of Article 33 is to extend the application of the *non-refoulement* principle to extraterritorial application in order not to be in contrary to the spirit of the Convention.²⁸ Further, the drafting history of the Convention in other Articles than Article 33 were intended to have a broader universalist extraterritorial application, such as Article 29 (the right to tax equity) and Article 13 (the right to property).

²⁴ Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press, USA 2007) 246; Hathaway, *The Rights Of Refugees Under International Law* (n 2) 338

²⁵ Elihu Lauterpacht and Daniel Bethlehem, ‘The Scope and Content of the Principle of Non-Refoulement (Opinion)’ (n 2) 122

²⁶ ‘*Sale v. Haitian Centers Council, Inc.*’ (n 14)

²⁷ Dissenting opinion by Justice Blackmun, available at: <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=509+&page=155>

²⁸ UNHR, *The State of The World's Refugees 1995: In Search of Solutions*, State of the World's Refugees, 1 January 1995, available at: <http://www.unhcr.org/4a4c70859.html>

Moreover, Hersch Lauterpacht argues that the purpose of international law treaties are not to strengthen the national sovereignty but is to “limit the sovereignty of States”, otherwise treaties would have no meaning.²⁹ Furthermore, Elihu Lauterpacht and Daniel Bethlehem cite an Advisory Opinion of the ICJ on Reservation to the Genocide Convention by which Stated that:

In such a Convention, the contracting States do not have any interests on their own; they merely have, one and all, a common interest, namely, the accomplishment of those higher purposes which are the *raison d'etre* of the convention.³⁰

Therefore, they argue that the object and purpose of the Refugee Convention as well as the other treaties follow a “humanitarian character”.

State Practice

With respect to the extraterritorial application of the *non-refoulement* principle, a limited number of States, limited to coastal States, are likely to deal with the these situations. While a great number of States have established the obligation to respect the *non-refoulement* principle in their territories, some States challenge the extraterritorial application of the principle. A closer look at the practice of a number of States in Europe, Australia and the United States shows the fact that maritime interdiction has become a frequent instrument for immigration deterrence.

When arguing the Sale case, the US government held that Article 33 of the Refugee Convention did not apply to actions carried out by the US Guard in the high seas and that the extraterritorial application of the *non-refoulement* principle on the high seas for the US is a matter of national policy and not an international obligation.³¹ It should be borne in mind that this interpretation of the US government have not been supported by the other States and that the US itself has not been consistent in carrying out action under this interpretation. For instance, the United States enacted an agreement in 1981 with the Haitian government and promised not to return any refugee found on the high seas.³²

Secondly, in the Tampa incident in 2001, the Australian government interdicted

²⁹ H. Lauterpacht, ‘Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties’ (1949) 26 British Year Book of International Law 48

³⁰ Elihu Lauterpacht and Daniel Bethlehem, ‘The Scope and Content of the Principle of Non-Refoulement (Opinion)’ (n 2) 104

³¹ U.S. observations on UNCHR Advisory Opinion on Extraterritorial Application of Non-Refoulement Obligations (Dec. 28, 2007), available at: <http://2001-2009.State.gov/s/l/2007/112631.htm>

³² Goodwin-Gill and McAdam, *The Refugee in International Law* (n 24) 224

the Norwegian ship carrying asylum seekers with health problems to enter Australian waters. However, the government did not actually return the asylum seekers to their countries of origin and instead, made a number of negotiations with third countries (New Guinea and Nauru) to host the asylum seekers. Therefore, in this situation, it may not be argued that a State practice has been constituted to restrict the application of the principle.

However, the recent case of Italy's diversions in 2009, is another instance of the direct *refoulement* to Libya and indirect *refoulement* to Somalia and Eritrea.³³ The conformity with international and human rights standards of such practices have received plentiful critical opinions in a number of journals and cases that will be discussed in this paper, respectively.

Soft Law and Non-Binding Resolutions

With respect to *ratione loci* of the *non-refoulement* principle, a number of resolutions and declarations have appeared to extend the application of the principle to the jurisdiction of acting States. UNHR Executive Committee Conclusions have stressed the importance of the application of the non-refoulement principle at the border and within the territory of States.³⁴

Moreover, 1967 Declaration on Territorial Asylum in Article 3 explicitly clarified the scope of Article 33 of the Convention in favor of extending the application of the principle.³⁵ Furthermore, the UNHR based its argument on *effective control theory* and expressed that “since the purpose of the principle of *non-refoulement* is to ensure that refugees are protected against forcible return to situations of danger it applies both within a State's territory and to rejection at its borders. It also applies outside the territory of States. In essence, it is applicable wherever States act.”³⁶

Needless to say that, regarding the interdiction issues and refugees rescued at sea, the UNHR's Advisory opinion asserts that “[i]t is the humanitarian obligation of all

³³ The practice of Italy and the court decision of the *Hirsi Jamaa v. Italy* will be discussed in more details in this paper.

³⁴ Conclusion No.15 (XXX) 1979; Conclusion No. 6 (XXVII) 1977.

³⁵ UN General Assembly, *Declaration on Territorial Asylum*, 14 December 1967, A/RES/2312(XXII), available at: <http://www.refworld.org/docid/3b00f05a2c.html>

³⁶ UN High Commissioner for Refugees, *UNHCR Note on the Principle of Non-Refoulement*, November 1997, available at: <http://www.refworld.org/docid/438c6d972.html>

coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum.”³⁷ In a more clear and recent manner a Conclusion on Protection Safeguards in Interception Measures recommends that:

Interception measures should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a Convention ground, or where the person has other grounds for protection based on international law. Intercepted persons found to be in need of international protection should have access to durable solutions.³⁸

More importantly, a report from the Inter-American Commission on Human Rights rejected the decision taken by the US Supreme Court on Sale case by stating that Article 33 applies to refugees intercepted on the high seas.³⁹

International Instruments and Normative Context

When interpreting the geographical scope of the *non-refoulement* principle, the normative framework of the principle will be described through theoretical and normative concepts. Therefore, a comparative appraisal of the existing international and regional human rights conventions, refugee law conventions and customary law would be necessary.

According to Article 7 of the ICCPR the prohibition of refoulement is applied as a component of the prohibition of torture or inhuman treatment.⁴⁰ Moreover, Article 2(1) of the ICCPR stipulates that “ each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant...”⁴¹. With respect to this article, some scholars and the United States have rejected the extraterritorial application of the ICCPR basing their

³⁷ UN High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, available at: <http://www.refworld.org/docid/45f17a1a4.html>

³⁸ UN High Commissioner for Refugees, *Conclusion on Protection Safeguards in Interception Measures*, 10 October 2003, No. 97 (LIV) - 2003, available at: <http://www.refworld.org/docid/3f93b2894.html>

³⁹ Report n° 51/96, Decision of the Inter-American Commission as to the merits of case 10.675, United States, March 13, 1997, available at: <http://www.cidh.oas.org/annualrep/96eng/USA10675.htm>

⁴⁰ Article 7 of the International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49.

⁴¹ *Ibid*, Article 2 (1)

arguments on a cumulative interpretation.⁴²

However, a disjunctive interpretation of the article would lead to a more meaningful reading of the article since the strict reading of the article would have no purpose or reason if the people could not claim it from beyond the territories of their country of origin.⁴³ The ICJ also confirmed this reading in Wall Case by stating that:

The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.⁴⁴

With respect to the Convention against Torture⁴⁵, a number of articles allow for extraterritorial application⁴⁶ while other articles contain a lack of geographical limitation.⁴⁷ However, the Committee against Torture affirmed that the *ratione loci* of the Article 3 of the Convention against Torture extends to all situations in which the State exercise effective control over individuals or over territory.⁴⁸

Moreover, Article 37 of the Convention on the Rights of the Child prohibits the return or the refoulement of children to places where they would be at risk of being tortured.⁴⁹ Furthermore, Article 22(1) States that the States are obliged to “take measures to ensure” that refugees or asylum seekers “receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the [convention]”.⁵⁰

At the regional level, the Article 3 of the European Convention on Human Rights has been interpreted to include the *non-refoulement* principle.⁵¹ Article 1 of the

⁴² Gregor Noll, ‘Seeking Asylum at Embassies: A Right to Entry under International Law?’ (2005) 17 Int J Refugee Law 542–573; U.S. observations on UNCHR Advisory Opinion on Extraterritorial Application of Non-Refoulement Obligations (Dec. 28, 2007), available at: <http://2001-2009.State.gov/s/l/2007/112631.htm>

⁴³ Hathaway, *The Rights Of Refugees Under International Law* (n 2) 165

⁴⁴ International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, July 9, 2004, para. 109, available at: <http://www.icj-cij.org/docket/files/131/1671.pdf>

⁴⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987.

⁴⁶ Articles 2, 5, 7, 12, 13, 16.

⁴⁷ Article 3

⁴⁸ Committee Against Torture Thirty-sixth session, May 1-19, 2006, CAT/C/USA/CO/2 July 25, 2006, para. 14, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/432/25/PDF/G0643225.pdf?OpenElement>

⁴⁹ Convention on the Rights of the Child, 1989, Article 37.

⁵⁰ Ibid, Article 22(1).

⁵¹ The Convention for the Protection of Human Rights and Fundamental Freedoms (*The European Convention on Human Rights* (ECHR)), 1953

Convention States “the high contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”⁵² According to advisory opinions of the European Court of Human Rights, the term “jurisdiction” may extend beyond the territory whether or not a State exercises *effective control*.⁵³ The meaning of jurisdiction and effective control will be taken up later in the next chapter.

Lastly, the OAU Convention on Refugees and the American Convention on Human Rights both embrace border applicability of the *non-refoulement* principle.⁵⁴

Customary International law

As many scholars put it, the principle is enshrined in a great number of international instruments and thus can be suggested that the *non-refoulement* is part of customary international law.⁵⁵ Furthermore, the State parties to the Refugee Convention formally acknowledged that the applicability of the principle of *non-refoulement* “is embedded in customary international law”.⁵⁶ Lauterpacht and Bethlehem base their argument concerning the support for the customary status of the principle on the fact that the number of instruments where the principle is enshrined and the fact that 90 percent of the United Nations (UN) Member States are party to one or more conventions that include the *non-refoulement* principle as an essential component.⁵⁷

Another argument put forward by Lauterpacht and Bethlehem is “that the responsibility of a State will be engaged in circumstances in which acts or omissions are attributable to that State wherever these may occur”, thus *non-refoulement* is a customary international law.⁵⁸ With the arguments above, one could argue that the prohibition of *refoulement* has evolved at the universal level beyond the scope of Article 33 of the Refugee Convention, thus, it is shown to be a principle of customary international law binding on all States, even those not parties to the UN Refugee Convention or any other

⁵² Ibid, Article 1

⁵³ UN High Commissioner for Refugees, ‘Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol’ (n 37)

⁵⁴ Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969, Article II(3); The American Convention on Human Rights (Pact of San José), 1989, Article 22(8).

⁵⁵ Mink, ‘EU Asylum Law and Human Rights Protection’ (n 19)

⁵⁶ Hathaway, *The Rights Of Refugees Under International Law* (n 2) 364

⁵⁷ Elihu Lauterpacht and Daniel Bethlehem, ‘The Scope and Content of the Principle of Non-Refoulement (Opinion)’ (n 2) 149

⁵⁸ Ibid. 160

treaty for the protection of refugees.

Moreover, in his concurring opinion in *Hirsi Jamaa v. Italy*, Judge Pinto de Albuquerque claims that:

“ The prohibition of *refoulement* is a principle of customary international law, binding on all States, even those not parties to the United Nations Convention relating to the Status of Refugees 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 to it are admitted.”⁵⁹

However, the geographical scope of such a custom remains different from the customary status and widespread adherence of the *non-refoulement* principle. The *ratione loci* of the principle of *non-refoulement* have to be justified by *opinion juris* and State practice. To wit, the *ratione loci* of the customary international law of *non-refoulement* principle would require further broader elaborations.

Eventually, an analysis of the binding human rights and international law instruments regarding the *non-refoulement* principle shows that States parties to these international instruments are bound beyond their territory.

A Summary of the chapter and conclusion:

The first stage of interpretation of the Article 33 of the Refugee Convention regarding the application *ratione loci* of the principle involved the drafting history, ordinary meaning of the text and the purpose and object of the article. The first stage of the interpretation regarding the extraterritorial application of the *non-refoulement* principle shows a conflict and disagreement between the universal and restrictive interpretation of the Article 33. While the arguments around the language fall back on arguments proposed in the drafting history, the arguments regarding the object and purpose support a broader scope of geographical application of the *non-refoulement* principle. However, the first stage of the interpretation does not lead one to narrow or conflate the ambiguities in the interpretation since there is no conclusive regarding the wording and purpose and object of Article 33 of the Refugee Convention. Thus, the issue could not be resolved by looking into the *travaux préparatoires*. In order to resolve the issue, two arguments may be recourse to.

⁵⁹ The separate opinion of Judge Pinto de Albuquerque, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231>

The first one is the “good faith” enshrined in the Vienna Convention⁶⁰ and the second argument can be based on “the doctrine of effectiveness”.⁶¹ According to Hersch Lauterpacht:

For the principle *ut res magis valeat quam pereat* does not mean that the maximum of effectiveness must be given to an instrument purporting to create an international obligation; it means that the maximum of effectiveness must be given to it consistently with the intention - the common intention - of the parties.⁶²

Lauterpacht argues that the interpretation of the intention of the parties must be read and combined with its current usage and it must not be read alone in order to ensure that the instrument remains effective. We may then conclude that the wording of the Article 33 of the Refugee Convention and the intention of its drafters if read at that time, fails to consider the current context of the article and its current practice.

Following the arguments above, it can be argued that there is a *priori* reason not to limit the obligation of *non-refoulement* to a State’s territory since the object and purpose of the Article 33 is to prevent so. Thus, the fact that the drafters of the Convention at the time of the drafting did not look thoughtfully is not a reason to fail to consider the applicability of a broader interpretation in the current practice. Thus, in order to be effective, the principle must be interpreted according to its current context (under other human right treaties) and also in accordance with its current practice.

With respect to State practice, at first glance, the majority of developed countries have tended to accept a restrictive reading of the Article 33, however, in operating the actual practice in rejecting extraterritorial application of the *non-refoulement* principle, they have not returned the refugees found on the high seas to their country of origin.

Moreover, the soft law as discussed above has supported the extension of the *non-refoulement* principle to State jurisdiction as well as the binding legal instruments and human rights treaties. Human right treaties both in international and regional context have strengthened the geographical application of the *non-refoulement* principle to where a State exercises jurisdiction.

Subsequently, having in mind a dynamic development in the application of *non-*

⁶⁰ The Vienna Convention on the Law of Treaties (VCLT), Article 26

⁶¹ Hersch Lauterpacht, *The Development of International Law by the International Court* (Cambridge University Press 1982)

⁶² *Ibid.* 229

refoulement principle as well as the systematic analysis of the early stage interpretations of the Article 33 (the wording and the object and purpose) and the second stage analysis including the soft law and hard law, the researcher would like to conclude that it remains effective that the application *ratione loci* of the principle of non-refoulement extends to the jurisdiction of the States. The reason for this claim is the fact that there is no convincing answer that appears from the wording of the article 33 or the drafting history. Nonetheless, a jurisdictional interpretation of the article 33, as opposed to territorial reading of the article would be favored based on the analysis of subsidiary sources and subsequent developments. Therefore, as soon as refugees find themselves within a State's jurisdiction, can claim to be protected under the *non-refoulement* obligation. What exactly constitutes jurisdiction require a systematic analysis of what jurisdiction and extraterritorial jurisdiction entail. For that reason, the thesis in the next chapter would like to analyze under what circumstance external migration control may bring about jurisdiction.

II. Extraterritorial Jurisdiction

The previous chapter concluded that the applicability *ratione loci* of the principle of *non-refoulement* in Article 33 of the Refugee Convention is in line with the scope of a large number of human rights instruments.

Before answering the question whether States are obliged to respect the principle of *non-refoulement* when acting extraterritorially, this chapter shall examine the concept of jurisdiction in human rights context and its evolution expressing the difference with the concept of jurisdiction in general international law. Jurisdiction in general international law involves three categories of State powers which are largely territorial: legislative jurisdiction, executive jurisdiction and judicial jurisdiction (the latter can be an aspect of the first two types of jurisdiction). Jurisdiction, as general international law would define it, requires a State to extend the enforcement of its domestic law (previously prescribed by the State) to regulate the conduct of persons outside of its territory. Under the same circumstances human rights law is generally State-centric and as a body of international law is primarily designed to have territorial effect. However, States have the power to affect human rights beyond their territory and extraterritorially.

Some refugee scholars have argued that State jurisdiction in human rights context is the basis and the standard for the extraterritorial application of human rights treaties and therefore, States are responsible under human rights treaties for the people subject to or within their jurisdiction.⁶³ However, one could argue that a comparative study of the human rights treaties undermines the fact that by looking to international law and human rights law treaties as a general principle, States are responsible for anyone within their jurisdiction. This argument can be based on the fact that not all international human rights treaties contain any geographical restrictions.⁶⁴

The core question addressed in this chapter is then, whether the extraterritorial migration policies or migration control, whether inside, at a border or beyond the border necessarily entails an exercise of jurisdiction. In order to discuss the aforementioned

⁶³ Goodwin-Gill and McAdam, *The Refugee in International Law* (n 24) 244; Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement (Opinion)' (n 2) 111

⁶⁴ The Convention on the Prevention and Punishment of the Crime of Genocide, 1949; Convention on the Elimination of Discrimination against Women, 1979; Convention on the Elimination of All Forms of Racial Discrimination, 1965

arguments and answer the research question, the chapter will examine the notion and the concept of extraterritorial jurisdiction under international public law and human rights law in more details. The analysis will examine different situations where the human rights bodies have found that States have exercised jurisdiction in extraterritorial context where their human rights obligations has been triggered. Thus, the first section concerns the concept of the extraterritorial jurisdiction under public international law. The second section will examine the notion of extraterritorial jurisdiction under human rights law. In this regard, the international human rights jurisprudence will be discussed in two approaches. The first approach will analyze the extraterritorial jurisdiction in two spheres in which is in line with and similar to public international law. The second approach is about to examine the case law as regards the extraterritorial jurisdiction in three areas in the situations of interception on the high seas, rescue at sea, and lastly denial of territorial jurisdiction.

The concept of jurisdiction in international law

The notion of jurisdiction is closely connected to the concept of sovereignty since it can be considered as an aspect of sovereignty as the sovereignty of the State that puts the laws into force.⁶⁵ In other words, the jurisdiction (legal authority) is described as the competence or capacity of State to exercise its power.⁶⁶ A State may exercise jurisdiction within the limits of its sovereignty, and is not entitled to intrude on the sovereignty of other States.

The analysis of the extraterritorial jurisdiction may discern two types of jurisdiction: legislative jurisdiction and executive jurisdiction.⁶⁷

As regards the legislative jurisdiction, the Permanent Court of International Justice (PCIJ) in its *S.S Lotus* case judgment reads:

Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to person, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is

⁶⁵ Malcolm N. Shaw, *International Law* (Cambridge University Press 2008) 576; Ian Brownlie, *Principles of public international law* (Oxford University Press 2008) 106

⁶⁶ Shaw, *International Law* 572

⁶⁷ Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011) 22–23

only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.⁶⁸

With respect to legislative jurisdiction, this jurisdiction grants power to States to legislate for individuals inside their own territory which makes this type of jurisdiction territorial. In most of the case, States regulate in State's own territory but there are also situations when States exercise legislative jurisdiction outside their territory without the consent of other States. In these situations, there must be some clear connecting factor between the legislating State and the conduct to which States regulate. "Claims of one State to prescribe rules for persons in another State encroach upon the right of the State where those persons are based to exercise jurisdiction itself over those persons within its territory."⁶⁹

There are a number of principles as exceptions to territorial jurisdiction that allow States to legislate extraterritorially outside their borders. The first one is nationality (or active personality) according to which a State may legislate for its nationals even though they are not present within the State's territory.⁷⁰ The second one is the principle of passive personality, according to which States may prohibit conduct that can directly harm its nationals. In the recent years, the extraterritorial legislative jurisdiction, particularly in the spheres of security and international crime have been extended. The principles are the protective principle according to which a State may exercise jurisdiction on its vital interests and to persons for acts done abroad which affect the security of the State such as currency, immigration and economic offences; and the principle of universality according to which every State can exercise jurisdiction and prosecute persons regardless of their nationality for acts or conduct if that conduct harms the international community as a whole, such as piracy and crimes against international law such as genocide.⁷¹

In addition to the aforementioned legislative jurisdiction, certain States have also asserted more controversial bases such as the "effects" doctrine of jurisdiction developed

⁶⁸ *ibid.* p.19

⁶⁹ Vaughan Lowe, 'Jurisdiction' in *International law* (2nd edn, Oxford University Press 2006) 319

⁷⁰ Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, 24

⁷¹ Vaughan Lowe, 'Jurisdiction', 318,340; Brownlie, *Principles of public international law* 300-305; Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press 2003)

first in the US antitrust law to which dictates that “a State has jurisdiction even when an act has only economic effects in its territory, although it is performed by non-nationals outside the territory of the State”.⁷²

There is one general rule with respect to the exercise of executive (enforcement) jurisdiction given that States cannot exercise this type of jurisdiction in the territory of any other State without the consent of that State.⁷³ This general rule was established by the PCIJ in Lotus Case and reads as follows:

“[F]ailing the existence of a permissive rule to the contrary – [a State] may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.”⁷⁴

It should be noted that the executive jurisdiction is limited to the consent of the territorial State.⁷⁵ However, there are some lawful examples for the exercise of this type of jurisdiction within a foreign territorial jurisdiction⁷⁶, such as the consular activities of States over their nationals abroad, deployment of military personnel abroad or the “ship-rider”⁷⁷ or “hot pursuit”⁷⁸ agreements made between States, all of which are grounded in the consent of the territorial State.

Subsequently, while the legal basis for extraterritorial jurisdiction in situations of extraterritorial legislative jurisdiction is highly developed in the practice of States, the extraterritorial executive jurisdiction seems to be exceptional. In other words, as Milanovic puts it, the law of jurisdiction basically relates to the principle of territoriality.⁷⁹

The concept of jurisdiction in human rights law

The function and notion of the concept of jurisdiction in human rights law differs from the concept of jurisdiction in international law. The function of the concept of jurisdiction in human rights context does not serve to determine the legality of the exercise of State

⁷² Vaughan Lowe, ‘Jurisdiction’ 322

⁷³ Brownlie, *Principles of public international law* 306

⁷⁴ Permanent Court Of International Justice, The Case of the S.S. Lotus France v. Turkey, 1927, p.18, available at: http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm

⁷⁵ Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* 24

⁷⁶ Ibid.

⁷⁷ US vessels access to territorial waters

⁷⁸ Under the Schengen framework

⁷⁹ Marko Milanovic, ‘From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties’ (2008) 8 Human Rights Law Review 411, 421

power, in other words, whether a State's claim is lawful, but rather, to determine whether in a certain situation, a particular State is bound to respect its human rights obligations to which a State ought to secure human rights.⁸⁰ The fact that the jurisdiction in human right law is about the *de facto* power exercised by the State over territory or individuals and not about the legal entitlement of States to exercise authority, has also been asserted by the International Court of Justice in Namibia Case and reads as follows:

“The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.”⁸¹

The international case law on the extraterritorial application of human rights is embodied in the relevant views and decisions of international courts and international case law appears to distinguish between two types of situations. The first situation is the control over foreign territory as a result of occupation. The second criterion is control over persons which will be taken up later.

Jurisdiction control over territory

Regarding the territorial control, the *de facto* power or control over territory establishes the State's jurisdiction in human rights context. Since activities of the controlling State may have a notable impact on those resident there, in situations where a State, by invitation or force, assumes control over a foreign territory, a State's human rights obligations would extend to the persons resident in the occupied territory. Article 43 of the 1907 Hague Convention supports the fact that by intruding on the territorial sovereignty of another country, a State should assume the international obligations of the territorial sovereign as well as the including international treaties and the laws in force,

⁸⁰ Michal Gondek, 'The Reach of Human Rights in a Globalizing World: Extraterritorial Application of Human Rights Treaties' [2009] Intersentia Uitgevers, 52

⁸¹ Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ, para. 113.

previously applicable to that territory.⁸² Furthermore, ICJ, in *Congo v. Uganda* case, asserted the duty of the State to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence.⁸³

The question of applicability of human rights treaties to occupied foreign territory is more often addressed by reference to specific human rights obligations which was explicitly made by the ICJ in its advisory opinion on the Wall Opinion where it considered that “the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated regime, are contrary to international law” and that Israel was responsible not only under the international humanitarian law, but also under the international human rights law (the ICCPR, CRC and ICESR).⁸⁴

The question of the protection of human rights in a foreign territory has been considered by the ECtHR and the former European Commission under the European Convention on Human Rights. In the early Cyprus cases, the former European Commission, Stated that persons or property in Cyprus could be brought within the jurisdiction of Turkey, but only if Turkish armed forces, being agents of the Turkish State, “exercised control over such persons or property” and if “by their acts and omissions, affect such persons; rights and freedoms under the Convention”.⁸⁵

Furthermore, in the case of *Loizidou v. Turkey*, the ECtHR referred to effective territorial control over an area outside its national territory and asserted that:

“In conformity with the relevant principles of international law governing State responsibility, that the responsibility of a Contracting Party could also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective

⁸² Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

⁸³ ‘Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005’, p. 178, International Court of Justice

⁸⁴ ‘Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004’, p. 109, International Court of Justice

⁸⁵ EComHR , *Cyprus v Turkey*, application no 6780/74 and 6950/75 in Orna Ben-Naftali, *International Humanitarian Law and International Human Rights Law* (Oxford University Press 2011) 243

control of an area outside its national territory.”⁸⁶ Moreover, at the regional level, the Inter American Court of Human Rights, in the case of *Coard et al. v. United States* held that military occupation establishes jurisdiction in human rights context and respectively concluded that the forces of the US in Grenada in October 1983, had violated the US’s human rights obligations under the American Declaration on the Rights and Duties of Man.⁸⁷

In sum, it should be noted the *de facto* control over territory in a situation of occupation establishes jurisdiction of the occupying power and triggers the applicability of human rights in an extraterritorial context. However, the decisions made by the ECtHR cases above shows that the determination of the level of effective control is required for the applicability of the human rights extraterritorially and not the existence of occupation.

Jurisdiction resulting from control over persons

Jurisdiction over persons may also establish State jurisdiction and trigger its human rights obligations. It should be noted that the ICJ is excluded from the analysis below because there is no decision on this issue to date. However in its Wall opinion, the ICJ refers to the two respondent cases from the jurisprudence of Human Rights Committee (which will be discussed below) that could be interpreted as support for this view.⁸⁸ The jurisprudence of the human rights case law concerns arrest, detention or abduction committed by State agents in the territory of a foreign State, where the abducting State does not have effective control over that territory.

The Human Rights Committee have examined the “control over person” in several cases *v. Uruguay* that all concerned abduction committed by Uruguayan agents in foreign States. One of the relevant cases is the case of *Lopez Burgos v. Uruguay*⁸⁹ that concerned the abduction of a recognized UNHCR political refugee applicant in Argentina by the Uruguayan security and intelligence forces who were aided by Argentine

⁸⁶ Case Of *Loizidou V. Turkey* (Preliminary Objections), European Court Of Human Rights, (Application No. [15318/89](#))

⁸⁷ ‘*Coard et al. v. United States*’, no. Report N. 109/99 - Case 10.951 , Inter-American Commission on Human Rights

⁸⁸ ‘Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004’, para.109.

⁸⁹ ‘The 1981 Sergio Euben Lopez Burgos v. Uruguay Case’, no. R.12/52, The Human Rights Committee

paramilitary groups.⁹⁰ He was then illegally transported to Uruguay, where the special security forces at a secret prison detained him for three months. The Committee noted that the acts of the Uruguayan agents “on foreign soil” brought the applicant under the jurisdiction of Uruguay within the meaning of Article 2 (1) of the ICCPR.⁹¹ Furthermore, the Committee Stated that:

“The reference in article 1 of the Optional Protocol to “individuals subject to its jurisdiction” does not affect the above conclusion because the reference in that article is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.”⁹²

Furthermore, the Human Rights Committee in the case of *Ibrahima Gueye*, on the same line of reasoning, on the question whether retired Senegalese soldiers of the French Army residing in Senegal should be treated equally with French nationals in the enjoyment of their pension rights, considered that the authors were “not generally subject to French jurisdiction, except that they rely on French legislation in relation to the amount of pension rights”.⁹³

Moreover, the ECtHR has also dealt with the question of jurisdiction resulting from control over person in a number of cases. An instance of the cases is the case of *Öcalan v. Turkey* given the fact that, the applicant, Mr. Öcalan, was arrested and abducted by Turkish officials from Kenya, with the help of Kenyan authorities.⁹⁴ In this case the Court Stated that Turkey exercised jurisdiction over Mr. Öcalan and held that:

“It is common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the “jurisdiction” of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory.”⁹⁵

Under the Inter-American system of human rights jurisprudence, the Inter- American Commission on Human Rights and the Inter-American Court of Human Rights have both considered that the obligation to uphold the rights of any person subject to the jurisdiction

⁹⁰ Human Rights Committee, Views of the Human Rights Committee under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights, Communication no. 52/1979, jurisprudence no. CCPR/C/13/D/52/1979, available at: <http://www.unhchr.ch/tbs/doc.nsf/0/e3c603a54b129ca0c1256ab2004d70b2?Opendocument>

⁹¹ *ibid.*

⁹² *ibid.* para. 12.2.

⁹³ HRC 3 April 1989, *Ibrahima Gueye et al. v France*, no. 196/1983, para. 9.4

⁹⁴ ‘The 2005 Case of *Öcalan v. Turkey*’, no. 46221/99, European Court of Human Rights, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69022>

⁹⁵ *Ibid.*, para.91.

of each American State may refer to conduct with an extraterritorial location. In *Coard et al. v the United States*, the Inter-American Commission on Human Rights noted that “[i]n principle, the inquiry turns not on the presumed victim’s nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control”.⁹⁶ Furthermore, in *Alejandro, et al., v. Cuba*, the shooting down by the Cuban air force of two civilian aircraft in international space was sufficient to uphold that the aircrafts’ passengers were subjected to the authority of Cuba, without there being any further special relationship between Cuba and the victims.⁹⁷

Moreover, in its recent decision, *J.H.A. v. Spain*, the UN Committee Against Torture (CAT) also established the State jurisdiction resulting from control over persons in human rights context.⁹⁸ The decision concerned the detention of Indian nationals rescued at sea by Spain, after a distress call, but then detained for a period of time in Mauritania. The Committee held that the exercise of *de jure* and *de facto* control over persons constitutes jurisdiction and subsequently submitted that:

“In the present case, the Committee observes that the State party maintained control over the persons on board the *Marine I* from the time the vessel was rescued and throughout the identification and repatriation process that took place at Nouadhibou. In particular, the State party exercised, by virtue of a diplomatic agreement concluded with Mauritania, constant *de facto* control over the alleged victims during their detention in Nouadhibou. Consequently, the Committee considers that the alleged victims are subject to Spanish jurisdiction insofar as the complaint that forms the subject of the present communication is concerned.”⁹⁹

Extraterritorial jurisdiction in line with international law?

However, the extraterritorial jurisdiction in human rights law context in two cases is in line with or similar to public international law. As regards to extraterritorial jurisdiction over territory, the general principle of effective sovereignty is being followed and extends the jurisdiction to all geographical areas where States exercise *de facto* control. In this regard the most important case is the case of *Bankovic and others v.*

⁹⁶ ‘Coard et al. v. United States’, para. 37, available at: <http://www.refworld.org/docid/502a39642.html>

⁹⁷ ‘The 1999 Case of Alejandro et al. v Cuba (Brothers to the Rescue)’, no. Report No. 86/99 Case No. 11, 589, Inter-American Commission on Human Rights

⁹⁸ ‘The 2008 Case of J.H.A. v. Spain’, no. CAT/C/41/D/323/2007, UN Committee Against Torture (CAT)

⁹⁹ *Ibid.*, para.8.2.

Belgium and 16 other NATO Members States.¹⁰⁰ Although often subject to criticism, the case has a lasting impact on international public case law and human rights jurisprudence and has been referred to in a number of cases subsequently by the ECtHR concerning the extraterritorial application of human rights. The ECtHR in Bankovic case held that:

In sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.¹⁰¹

The ECtHR in Bankovic rejected the arguments of the applicants that the aerial bombing on the territory of FYR fulfilled the criteria of effective control over territory and that the NATO forces exercised jurisdiction that triggered their human rights obligations within the meaning of Article 1 of the ECHR.¹⁰² Furthermore, the Court noted that during the air strikes the NATO forces did not exercise territorial control, to such an extent as the level of effective control referring to the Cyprus v. Turkey judgment.¹⁰³ The ECtHR in Cyprus v. Turkey Stated that responsibility of the State confines not only to acts of its own soldiers but also to any act or omission leading to human rights violations where effective control is confirmed.¹⁰⁴

The second base concerning the extraterritorial jurisdiction is the effective control over individuals. The ECtHR in Issa and Others v. Turkey held that:

[A] State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully - in the latter State.¹⁰⁵

Furthermore, the decision of the ECtHR in Bankovic regarding the diplomatic and consular agents acting abroad reflect similar bases for extraterritorial jurisdiction for flag

¹⁰⁰ ‘The 2001 Case of Banković and Others v. Belgium’)

¹⁰¹ *ibid.* para.71.

¹⁰² *ibid.* paras.54-82.

¹⁰³ *ibid.* para.70.

¹⁰⁴ Case of Cyprus v. Turkey, European Court of Human Rights, 2001, Application no. [25781/94](#), para.77.

¹⁰⁵ Case Of Issa And Others V. Turkey, European Court Of Human Rights, 2004, Application no. [31821/96](#), para.71.

State activities in Lotus Case under public international law.¹⁰⁶

Extraterritorial jurisdiction

In order to recognize jurisdiction in cases of extraterritorial immigration policies, the thesis distinguishes four areas, the first of which examines the situation where States exercise their jurisdiction on the high seas. Respectively, the second section will discuss the question of jurisdiction and rescue at sea. The third section is about to analyze the situation in which the migration policies are undertaken within a third State's territorial jurisdiction. And lastly, the thesis will examine the situation where there is a denial of authority from parts of a State's territory for the purpose of immigration control.

Interception at sea

One of the most important situation in which the extraterritoriality appears is when States act in international water or on the high seas and intercept the vessels of migrants and asylums. Interception on the high seas has been increased quickly in practice, particularly with situations of mass influx.

The United Nations Convention on the Law of the Sea (UNCLOS), grants jurisdictional rights to States and can be exercised in all maritime zones. States may argue to hold a legal entitlement to exercise jurisdiction both *de jure* and *de facto* and intercept vessels at sea carrying migrants, asylum seekers or refugees which this jurisdiction would trigger their human rights obligations including the application of the *non-refoulement* principle.

The UNCLOS provisions confirm that States exercise jurisdiction in the territorial sea with an exception of the right of innocent passage as Stated by Article 17 of the UNCLOS. Taking into consideration the entitlements given to coastal States by the UNCLOS, it is undisputed that the coastal States exercise *de jure* and *de facto* jurisdiction in their territorial sea. Furthermore, Article 33 does not limit States to punishing acts committed under its jurisdiction in the territorial waters, but also allows States to punish acts of a vessel situated within the contiguous zone, if the acts produce

¹⁰⁶ Bankovic Case, para. 73: “the Court notes that other recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State.”

an infringement of a coastal State's customs, fiscal, sanitary and immigration laws within the territorial sea.

As mentioned earlier in the second chapter, States have increasingly taken advantage of the ambiguity in the law concerning the interception of vessels on the high seas to take extraterritorial measures to stop the flows of migration by sea. The Australian "pacific Solution" programs, the US intercepting Haitian boat of refugees and the recent Mediterranean interceptions and FRONTEX's missions are all the instances of interception of vessels of migrants, asylum seekers and refugees on the high seas.

United State's operation on interception of the Haitian boat concerns the territorial conception of the *non-refoulement* principle. The US Supreme Court in *Sale* upheld a restrictive territorial interpretation of Article 33 of the Refugee Convention. Not only the reasoning and decisions of the Court in *Sale* have been criticized, but also verdicts of national court decisions should not to be regarded as final conclusions. Referring instead to the jurisprudence of international human rights, the courts have affirmed the applicability of Article 33 of the Refugee Convention in situations regarding the migration measures on the high seas. Notably, the line of reasoning in Inter American Commission by rejecting the US Supreme Court's ruling and also the decision of the ECtHR in *Isaak and Others v. Turkey*¹⁰⁷, strengthens the responsibility of the States in undertaking migration control activities on the high seas.

Thus, with respect to *non-refoulement* obligation of States, it can be argued that whenever States exercise jurisdiction, the principle of *non-refoulement* should apply. Since it was affirmed that human rights apply in an extraterritorial context, when a State exercises jurisdiction towards the intercepted persons, that jurisdiction will trigger the State's human rights obligations. Hence, the principle of *non-refoulement* as a part of the human rights law applies extraterritorially. Furthermore, it is strongly accepted that international human rights jurisprudence supports a broader interpretation that if State exercises or undertakes migration operations on the high seas, that would amount to its jurisdiction. Thus, any interception measure, although not amounting to effective control, would be considered jurisdiction and under human rights law should be respected.

¹⁰⁷ *Isaak and Others v. Turkey*, ECtHR, application no. 44587/98

Rescue at sea and jurisdiction

Following the situations of interception at sea and on the high seas, the situation of distress at sea increases. According to the European Union Agency for Fundamental Rights every year thousands of people risk their lives in their attempt to reach the European shores.¹⁰⁸ In practice, States have shifted the interception operations to SAR (search and rescue) regimes since the SAR operation can be noted as an exception to the territorial jurisdiction.

Under the UNCLOS and SOLAS, States have certain obligations when it comes to vessels sailing on the seas. The most important obligations that exist under international maritime law are the duty to provide assistance to persons found in distress at sea, the duty to bring them to a place of safety and the duty to provide for disembarkation.¹⁰⁹ Thus, this gives an opportunity to States to exercise their jurisdiction over vessels that sail under their own flag, as well as those vessels that are flagless.

Hirsi Jamaa and other twenty three Somali or Eritrean applicants left Libya heading to Italian coasts and were intercepted on the high seas by the Italian vessels and returned to Tirpoli. Eventually, they were handed over to the Libyan authorities. However, the *refoulement* was not acknowledged by the UNHCR and NGO's. In that ground, the Italian government in *Hirsi Case* claimed that it had performed a rescue operation rather than an interception activity. However, the European Court held that the Italian government had effective control over the persons and that "Italy cannot circumvent its jurisdiction under the Convention by describing the events at issue as rescue operations on the high seas".¹¹⁰ Furthermore, the European CPT, in its report, observed that extraterritorial jurisdiction was established through Italy's exercise of effective control over the migrants pushed back and that Italy's obligations under article 3 of the ECHR, including the principle of *non-refoulement* had been violated.¹¹¹

The legal pretext for shifting the interdiction of vessels to search and rescue

¹⁰⁸ European Union Agency for Fundamental Rights, *Fundamental Rights at Europe's Southern Sea Borders*, 2013, available at <http://fra.europa.eu/en/publication/2013/fundamental-rights-europes-southern-sea-borders>

¹⁰⁹ Article 98 of UNCLOS, Articles 10 and 33 SOLAS

¹¹⁰ Case of *Hirsi Jamaa and Others v. Italy*, (Application no. [27765/09](#))

¹¹¹ Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 to 31 July 2009, CPT/Inf (2010) 14, available at: <file:///Users/shabnamhajjalimohammadi/Downloads/2010-inf-14-eng.pdf>

operations may emanate from the 2004 amendments to the 1979 SAR Convention and the SOLAS¹¹², clarifying the disembarkation responsibilities. The amended article to the SAR Convention reads as follows:

The party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring that such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization.¹¹³

The most practical solution in this regard is that States “cannot circumvent refugee law and human rights requirements by declaring border control measures – that is, the interception, turning back, redirecting etc. of refugee boats – to be rescue measures.” However, this only applies to situations where migrants are not in distress. The problem here is that transferring the responsibility to the State whose search and rescue measures occurs, does not solve the problem of the refugees with respect to the *non-refoulement* principle, given the fact that such rescue operations would involve the jurisdiction of the acting State. Furthermore, none of the Conventions provide an explicit definition of “distress” and do not deal with asylum issues, hence, security officials operate on ad hoc decisions basis.¹¹⁴ Thus, with respect to the *non-refoulement* principle, the jurisdiction of the acting State would endanger the *non-refoulement* of the refugees. This argument has also been emphasized in the Guidelines of the Maritime Safety Committee and States that:

“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.”¹¹⁵

Migration policies undertaken within a third State’s territorial jurisdiction

A wide range of policies and various roles and level of control is exercised by States where migration policies are undertaken within a third State’s territorial jurisdiction and extending the migration control to the territory of another State may complicate the reach of international refugee and human rights law when considering extraterritorial migration

¹¹² Article 1(1)

¹¹³ Amendment to the 1979 International Convention on Maritime Search and Rescue, p. 3, available at: <http://www.imo.org/OurWork/Facilitation/IllegalMigrants/Documents/Resolution%20MSC.155-%2078.pdf>

¹¹⁴ Silja Klepp, ‘A Contested Asylum System: The European Union between Refugee Protection and Border Control in the Mediterranean Sea’ (2010) 12 European Journal of Migration and Law 1, 18

¹¹⁵ Andreas Fischer-Lescano, Tillmann Löhr & Timo Tohidipur, ‘Border Controls at Sea: Requirements under International Human Rights and Refugee Law’, 290

control within foreign territorial jurisdiction. These policies would include the interception within foreign territorial waters, the deployment of immigration officers at foreign airports and the policies performed at visa consulates.

As regards the control performed at visa consulates and airport visas, the question is whether the denial of visa may amount to a violation of *non-refoulement* and other human rights obligations where the enforcement of visa requirements brings the applicant within the jurisdiction of the imposing State and where asylum seekers and refugees are specifically affected and whether the visa applicants would come under the jurisdiction of the granting or denying country. With respect to the European Common Consular Instructions on Visa, for nationals of a number of countries with a high asylum rate, a special airport transit visa (ATV) is required.¹¹⁶ Asylum seekers are often unable to provide supporting documentation where the Common Consular Instructions requires the airport officers “to be particularly vigilant when dealing with “risk categories”, unemployed persons, those with no regular income, etc.”¹¹⁷ The fact is that, although, UNHCR has accepted the visa controls as legitimate and in most of the cases visa requirements are not intended to “stop the departure of refugees” they “fail to distinguish between persons at risk of persecution and others, or between those at risk persons who can safely access protection in other countries, and those who have no options”.¹¹⁸ Unless a sufficient causal link between the rejection or a denial of a visa and any violation of *non-refoulement* principle, persecution, torture and ill treatment is provided, denying a visa even if conducted by State agents can hardly be considered *refoulement*, thus, only in exceptional conditions the denial of visa may trigger the *non-refoulement* obligation.¹¹⁹

Another question to consider is whether the acts of immigration officers at airports or at borders of third States may establish jurisdiction for the State deploying immigration liaison officers, thus, amount to a violation of *non-refoulement*. There are two types of instance of such transfer of migration control to third states’ border or airport. While in the first instance, immigration officers only carry out individual check

¹¹⁶ Common Consular Instructions on Visas, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2005.326.01.0001.01.ENG, Annex 3

¹¹⁷ *ibid*, Part V.

¹¹⁸ Hathaway p. 310-311

¹¹⁹ Seeking Asylum at Embassies: A Right to Entry under International Law?, *Int J Refugee Law* (2005) 17 (3):542-573.

and interviews¹²⁰, the second instance illustrates the fact that immigration officers may have legal authority to prevent individuals from boarding. It has been emphasized that the EU immigration liaison officers at borders and airports “do not carry out any tasks relating to the sovereignty of States but advice and support the competent border guard authorities”.¹²¹ On the contrary, the case of *Regina v Immigration Officer at Prague Airport*¹²² illustrates the fact that one could argue that immigration officers as government agents and consular officers acting abroad where have exercise authority may establish extraterritorial jurisdiction. In 2001, the UK government, following a rise in Roma asylum requests arriving from Czech Republic, signed an agreement with the Czech to send British immigration officers to Prague Airport in order to conduct interviews and grant or deny access to the UK. The negotiation gave rise to issues concerning the international human rights obligation including the *non-refoulement* and discrimination against Roma.¹²³ The Court, however, rejected the duty to respect the *non-refoulement* stating that the applicants were not outside the country of origin, thus, were not covered by the provisions of the 1951 Refugee Convention. Based on the very few existing case law on the issue of immigration officers acting on the territories of a third state, it is hard to conclude that extraterritorial jurisdiction over individuals is being established.

With respect to interception within the State’s territorial seas, Spain, following the FRONTEX interception missions, has signed bilateral agreements that permit intercepting vessels not only on the high seas but also within the territorial waters, contiguous zones and the sky above Senegal, Mauritania and Cape Verde.¹²⁴ Furthermore, in 1997, a protocol was signed by the Italian and Albanian authorities in order to interdict migrants in international and Albanian waters. In such instances, the

¹²⁰ The transfer of migration control to the United States Department of Homeland Security

¹²¹ European Union, *Comprehensive Plan to Combat Illegal Immigration and Trafficking of Human Beings in the European Union (2002/C 142/02)*, 28 February 2002, Official Journal of the European Communities C 142/23; 14.6.2002, available at: <http://www.refworld.org/docid/3f5225bd4.html>

¹²² *Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others*, [2004] UKHL 55, United Kingdom: House of Lords (Judicial Committee), 9 December 2004, available at: <http://www.refworld.org/docid/41c17ebf4.htm>

¹²³ Goodwin Gill, R (ex parte European Roma Rights Centre et al) v. Immigration Officer at Prague Airport and another (UNHCR intervening), *Int J Refugee Law* (2005) 17 (2):427-453.

¹²⁴ FRONTEX, however, has denied cooperating in the bilateral agreement signed between Spain and Senegal.

migration control carried out within the territorial waters of a third state is governed by treaty based bilateral agreements in order to tackle illegal migration. There is little case law available as the deciding factor of how such agreements establish extraterritorial jurisdiction for the acting and interdicting state, perhaps because in most cases, such agreements are not carried out formally. Therefore, the question is whether bilateral agreements would shift the extraterritorial jurisdiction of the acting state and whether the human rights obligations of the interdicting state acting extraterritorially based on an agreement would be traded at will. One of the few cases in which the case law considered the impact of bilateral arrangements when establishing extraterritorial jurisdiction was the case of *Al Saadoon and Mufdhi v United Kingdom*, where two Iraqi applicants who had been detained by UK forces, complained that their *refoulement* to Iraqi authorities would be subjected to the death penalty. The Court in its judgment accentuated the special character of the “collective enforcement of human rights” and stated that:

“It has been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party’s “jurisdiction” from scrutiny under the Convention. The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention.”¹²⁵

As the Court puts it, the agreement upon which requires that intercepted people are handed over to the territorial state, does not affect Convention liability.

As regards undertaking migration control over a territory or territorial waters of another State, the question is where and in what situation exercise of overall control would establish jurisdiction, or in other words whether “any” exercise of State authority would bring the migrants within the States’ jurisdiction. Having a closer look at the recent cases and instances, there still remains debates on what exactly constitute “effective control”. In most of the existing cases such as in *Cyprus vs. Turkey*, the jurisdiction is established where a military occupation of larger territories is present and that is not temporary given that certain duration of military presence is required,¹²⁶ even if the acts are carried out not directly by the agents of the operating State and even if they

¹²⁵ Case of *Al-Saadoon and Mufdhi v. The United Kingdom*, European Court of Human rights, 61498/08, 02/03/2010, para. 128, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97575>

¹²⁶ *Cyprus vs. Turkey*, para. 76, 80, 81

lead to human rights violations.¹²⁷ Concerning effective control over a geographical area or a territory, however, the Court in *Issa and Others v. Turkey* had a different reasoning in its judgment rejecting both requirements stating that:

“The Court does not exclude the possibility that, as a consequence of this military action, the respondent State could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq. Accordingly, if there is a sufficient factual basis for holding that, at the relevant time, the victims were within that specific area, it would follow logically that they were within the jurisdiction of Turkey (and not that of Iraq, which is not a Contracting State and clearly does not fall within the legal space (*espace juridique*) of the Contracting States (see the above-cited *Banković* decision, § 80).”¹²⁸

In other instances, following the agreements with France, the United Kingdom juxtaposed control scheme carries out exclusive migration control over the smaller parts of the territory of French ports of Calais, Boulogne and Dunkirk and enforces British immigration laws.¹²⁹ Therefore, when it comes to control over territory the instances of *Issa and Others v. Turkey* Case and the British practice highlight the likelihood of another approach where any exercise of control even over smaller territories would establish jurisdiction and thus, differ from the two requirements of effective control for establishing jurisdiction over a territory where migration control is limited to situations where *refoulement* is found to be present within the context of a pre existing military occupation.

In cases of extraterritorial migration control over individuals, jurisdiction is established where a State may be held accountable for international and human rights violation of individual asylum seekers or migrants who are in the territory of another State but who are found to be under another State's authority and control through its agents operating, whether lawfully or unlawfully.¹³⁰ Jurisdiction in such cases may flow from two situations. Generally, “the activities of [State’s] diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State” have been recognized as extraterritorial exercise of jurisdiction according to “customary

¹²⁷ *ibid.* para. 77

¹²⁸ *Issa and others v. Turkey*, para 74

¹²⁹ Research Handbook on International Law and Migration, Vincent Chetail, Céline Bauloz, Edward Elgar Publishing, Mar 28, 2014, p. 121

¹³⁰ *Issa and Others v. Turkey*, para 71; *Coard et al. v. the United States*, the Inter-American Commission of Human Rights decision of 29 September 1999, Report No. [109/99](#), case No. 10.951, §§ 37, 39, 41 and 43; *Illich Sanchez Ramirez v. France*, application no. [28780/95](#), Commission decision of 24 June 1996, DR 86, p. 155; *Lopez Burgos v. Uruguay* and *Celiberti de Casariego v. Uruguay*, nos. 52/1979 and 56/1979, at §§ 12.3 and 10.3

international law and treaty provisions”.¹³¹ Therefore, the first situation concerns the establishment of jurisdiction under public international law. The ECtHR in *Hirsi v. Italy* observed that by virtue of provisions of international law and law of the seas, the “pushbacks”¹³² on the high seas notably violated the principle of *non-refoulement*¹³³ and the provisions of Article 3 of the ECHR and Article 4 of Protocol 4 stating that:

“[A] vessel sailing on the high seas is subject to the exclusive jurisdiction of the State of the flag it is flying. This principle of international law has led the Court to recognize, in cases concerning acts carried out on board vessels flying a State’s flag, in the same way as registered aircraft, cases of extraterritorial exercise of the jurisdiction of that State. Where there is control over another, this is *de jure* control exercised by the State in question over the individuals concerned.”¹³⁴

Thus, the Court concluded that the applicants were under the “continuous and exclusive *de jure* and *de facto* control” of Italian government. Therefore, Italy’s jurisdiction under the meaning of article 1 of the European Convention results in Italian governments engagement in coercive activity at sea. The Court observed that Italy exercised *de jure* control as a result of having exclusive jurisdiction over its vessels under the “flag principle”¹³⁵. But the Court also asserts that Italy had *de facto* control over the migrants between the boarding and relocating them to Libya since the migrants were within the factual power of the Italian government.

The second situation arises when individuals are in physical custody of the State acting extraterritorially or as the Court in *Al-Skeini* puts it, also involves the exercise of “physical control over the persons in question” or they are in vessels, ships or building over which States have jurisdictional control. Regarding the recent cases, the Courts in cases of *Al-Skeini* and also in *Al-Saadoon*, held that State’s jurisdiction is also established where individuals are retained at military bases where States exercise effective control. The case *Al-Skeini* concerned the death of six Iraqi civilians where five of them were shot by the British forces and the sixth civilian had been detained at a British military base until he died from his wounds due to had been beaten severely. According to the House of Lords only the last civilian fell under the jurisdiction of the

¹³¹ *Bankovic*, para. 73

¹³² UNHCR interviews asylum seekers pushed back to Libya, Briefing Notes, 14 July 2009, available at <http://unhcr.org/4a5c638b6.html>

¹³³ *Hirsi v. Italy*, para. 134

¹³⁴ *Hirsi v. Italy*, para. 77

¹³⁵ Article 5(1) of the Geneva Convention on the High Seas; Article 91 of the 1982 treaty called the United Nations Convention on the Law of the Sea

British government. The ECtHR in *Al-Skeini*, however, held that the British government retained jurisdiction over all civilians stating that:

“[T]he Court has recognized the exercise of extra-territorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government (*Banković*, § 71). Thus where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State.”¹³⁶

The Court in the case of *Al Skeini* took a wider approach than the *Bankovic* Case stating that where a State exercises control and authority over individuals even through its agents, the jurisdiction arises.¹³⁷

In situation where asylum seekers are taken into physical custody or transferred to camps located outside the territory of the State due to extraterritorial migration control the jurisdiction is likely to be established. The US interception of Haitian refugees and being sent back to Haiti violated the principle of *non-refoulement*. Similarly, in the *Marine I* case, the Committee against Torture explicitly affirmed that the alleged victims were subject to Spanish jurisdiction and that the extraterritorial detention of migrants would amount to jurisdiction.¹³⁸ In accordance with international maritime law the Spanish ship was recognized to be holding jurisdictional entitlements as of the time of boarding.

Denial of territory

There has been a growing trend for the States to adopt and exercise national policies or measures that denies their international obligations and limits access to asylum status in some parts of the territory.

The first instance is the Australian attempts to adopt and exercise “excision from migration zone” legislations, which excise a large number of island and ports from the Australian territory.¹³⁹ The asylum seekers arriving in the excised territories of Australia may apply for asylum status with the UNHCR but since 2007, the asylum seekers

¹³⁶ para. 135

¹³⁷ para. 137

¹³⁸ <http://www.refworld.org/docid/4a939d542.html> para 8.2

¹³⁹ Migration Amendment, Excision from Migration Zone, Act 2001, Australia

arriving in the excised territories have been transferred to New Guinea or Nauru.¹⁴⁰ The Federal Court of Australia in the Tampa case, had regarded the boarding of the Tampa not to require the conferral of constitution rights of *habeas corpus* and indicated that the boarding and “the actions of the Commonwealth were properly incidental to preventing the rescues from landing in Australian territory where they had no right to go. Their inability to go elsewhere derived from circumstances which did not come from any action on the part of the Commonwealth.”¹⁴¹

The second instance is the “wet-foot, dry-foot” measures undertaken by the US government against Cuban asylum seekers in order to exempt the territorial waters from Cuban asylum seekers and to return them to Cuba.¹⁴²

Furthermore, a number of States such as the UK and France have claimed that international airport zones are not parts of their territory. The question of international zones was dealt with, by the ECtHR in *Amuur v. France*, regarding the detention of Somali asylum seekers in the Paris airport. In this regard, the Court held that holding the asylum seekers “in the international zone of Paris-Orly Airport made them subject to French law” and that “the international zone does not have extraterritorial status.”¹⁴³

Such arrangements of States must be analyzed here in an international law and international human rights context. From an international law and international maritime law standpoint, arrangements of excision or denial of territory does not have merit. Furthermore, in the jurisprudence of human rights case laws, it has been affirmed that a State must exercise jurisdiction within its entire territory and that denial of territory does not leave the State to undermine its international human rights obligations.¹⁴⁴ As for the Tampa case, although, the domestic Australian court ruling deal with national constitutional rights opposed to the scope of application human rights treaties, they clearly contradicted with ECtHR’s decisions that the nature or purpose of maritime

¹⁴⁰ Goodwin-Gill and McAdam, *The Refugee in International Law*, 256

¹⁴¹ Minister for Immigration and Multicultural Affairs & Others v. Vadarlis (“Tampa Appeal”), Federal Court of Australia; Victoria District Registry, 17 September 2001, [2001] FCA 1329, para. 213, available at <http://www.refworld.org/docid/3bb1cfdc6.html>

¹⁴² Ruth Ellen Wasem, ‘Cuban Migration Policy and Issues’ [2006] UNT Libraries Government Documents Department

¹⁴³ European Court of Human Rights, *Amuur v. France*, (Application no. [19776/92](#))

¹⁴⁴ ‘Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004’; ‘The 2004 Case Of Ilaşcu And Others V. Moldova And Russia’, no. 48787/99, The Human Rights Committee

interdiction is not the criterion for the application of human rights obligations, but the exercise of *de jure* and *de facto* control is the dispositive factor. The Court in *Hirsi v. Italy* concluded that the applicants were under the “continuous and exclusive *de jure* and *de facto* control of the Italian authorities”.¹⁴⁵ In a similar vein, UNCAT in *Marine I* case observed that “the State party maintained control over the persons on board the *Marine I* from the time the vessel was rescued and throughout the identification and repatriation process that took place at Nouadhibou”.¹⁴⁶

Summary and conclusion:

The thesis started by posing a question whether any exercise of migration control extraterritorially would entail an exercise of jurisdiction and in which conditions the international human rights obligations and in particular, *non-refoulement* obligations of States where States carry out extraterritorial jurisdiction would be triggered.

The first chapter, submitted the fact that the *ratione loci* of the *non-refoulement* principle, have been the subject to a large number of debates since the obligation of *non-refoulement* does not carry out a limitation concerning the geographical scope of the principle and whether the principle is applicable extraterritorially. As the primary stage of answering the question whether the *non-refoulement* principle is applicable extraterritorially, the paper had an attempt to look at the wording, drafting history, object and purpose of the 1951 Convention as well as soft law, case law and state practice and opting for a dynamic interpretation concluded that the principle of *non-refoulement* must be interpreted to be applicable everywhere States exercise jurisdiction. Yet, the paper in order to discuss the extraterritorial application of *non-refoulement* presumed that for the purpose of the paper, it was essential to analyze the conception of jurisdiction and extraterritorial jurisdiction as conceived in international law and international human rights law given the fact that a systematic analysis of what actually constitutes jurisdiction was a crucial step.

Even though, the jurisdiction is primarily understood in terms of territory, a large number of case law over a time illustrates the fact that jurisdiction is extending to a

¹⁴⁵ *Hirsi* judgment, para. 81

¹⁴⁶ *Marine I* case, para. 8.2

number of situations where States act outside their territory. Therefore, the second chapter had an attempt to examine the notion of extraterritorial jurisdiction as employed in public international law and human rights law and analyzed the most important international human rights litigation with respect to extraterritorial jurisdiction and its application to different practices of offshore migration control. The chapter examined the extraterritorial application of human rights by emphasizing the difference between the two concepts of jurisdiction, jurisdiction in general international law and in human rights context. The latter is used as a basis for extraterritorial application of human rights and has primarily been established through an analysis of the factual situation arising in each particular case. From the analysis of the decisions it can be concluded that there were two interpretive starting points. The first one stressed that there must be some kind of factual link between the individual and the State committing the human rights violation, thus, a factual link can be established through the “control over persons” or “control over territory” tests. The second extended from the territoriality principle and emphasized the absolute nature of jurisdiction even when established extraterritorially.

Furthermore, the chapter examined how the notion of jurisdiction is applied in the case law as regards the extraterritorial jurisdiction in four areas in the situations of interception on the high seas, rescue at sea, jurisdiction within a third state territory and denial of territorial jurisdiction.

In the first sphere, on the high seas, States actions and their approach to jurisdiction has been different but the interpretation seems to apply to a broader reading of extraterritorial jurisdiction. The jurisdictional obligations of States under international and human rights law are not relieved on the high seas.

Respectively, in the situations of rescue and search, the implications of the recent amendments to the SAR and SOLAR as regards disembarkation is disputed and a number of States continue to challenge the SAR divisions. Moreover, States argue that individuals rescued in the search operations and zones do not have a protection claim with respect to the acting State. Hence, the protection obligations are shifted in practice and rescuing States retain jurisdictional human rights obligations when operating on the high seas. The *Hirsi* judgment and its placement in practices of extraterritorial interception of migrants implicates its importance given the fact that it emphasizes on the

absolute character of *non-refoulement* and confirms that States are not free “to reach out beyond their territory to seize a refugee and to return him/her to the country from which he/she sought to escape”.¹⁴⁷ Moreover, for situations involving the denial of jurisdiction, it can be concluded that States are not free to withdraw jurisdiction from certain parts of their territory.

Based on the different readings of case law in some cases and state practice denying extraterritorial jurisdiction on the high seas and within the territory and territorial waters of third states, it is hard to conclude that the debate on extraterritorial jurisdiction is not ongoing. The paper analyzed the fact that where states carry out migration control extraterritorially or on the territory of another state, the establishment of extraterritorial jurisdiction depends on the level of control exercised over the territory or over individuals. The existing case law appears to support both narrow and wide approach toward the establishment of jurisdictional link; the Court in *Bankovic* observed a strict effective control test¹⁴⁸, explicitly denying a cause and effect approach to jurisdiction while in *Al Skeini* judgment, the Court pointed out that “whenever the State through its agents operating outside its territory exercises control and authority over an individual” jurisdiction is established.¹⁴⁹

As a final point, the doctrinal analysis and legal interpretation of the international human rights jurisprudence, as presented in the thesis, illustrates the fact that different readings of extraterritorial jurisdiction has been suggested. The case law in a number of cases has supported a more universalist approach toward the extraterritorial jurisdiction- e.g. *Al Skeini*, while in others- i.e., *Bankovic*, a more territorial arguments has been put forward. Although, *Hirsi* judgment reflects its importance on practice of extraterritorial interception of all migrants – asylum seekers as well as refugees – within the ambit of human rights law, the Court was not confronted with the issue of extraterritorial jurisdiction.¹⁵⁰ Furthermore, the State practice has shown a tendency toward denying extraterritorial jurisdiction on the high seas, as well as within territorial waters of the

¹⁴⁷ Maarten Den Heijer, Reflections on *Refoulement* and Collective Expulsion in the *Hirsi* Case, Int J Refugee Law (2013), p.290

¹⁴⁸ Jurisdiction applied only where the territory of one Contracting State was controlled by another Contracting State.

¹⁴⁹ *Al skeini*, para 137

¹⁵⁰ The interception operation was exclusively run by the Italian government.

third States. Based on the continuation of different readings of extraterritorial jurisdiction and analysis based on legal interpretation and doctrinal approach presented earlier in the thesis, the author of this paper would like to suggest a different (functionalist) approach toward the extraterritorial jurisdiction and absolute character of *non-refoulement* and support the fact that “border control measures, wherever they are carried out, have a functional territorial reference point since they are lined to the enforcement of State jurisdiction”¹⁵¹.

Thus, the author would like to conclude that the border practices and case law seem to expedite an alternative (functionalist) interpretation. A functional approach toward the extraterritorial jurisdiction must entail some elements.¹⁵² The functionalist approach focuses not on rules but on their effects and on events and its objects are understood in the light of their functional relation to society meaning its usefulness for society must be highlighted. The reason the author has opted for a functional approach and not an effective control test is not only the fact that the different readings of extraterritorial jurisdiction based on the doctrinal approach and legal interpretation does not give us a conclusive answer to extraterritorial jurisdiction for human rights purposes but also the focus of the extraterritorial jurisdiction and absolute character of *non-refoulement* should be built on observable facts rather individual ideas (the law in action vs. the law in books); the judicial decisions should be responses to real life situations. As a matter of fact the Bankovic ruling has been criticized for its strict effective control criteria for not accepting the cause and effect approach to jurisdiction; the reasoning put forward in Bankovic professing the decision that the court did not support that “jurisdiction can be divided and tailored” is the process of territorial conceptualization of jurisdiction and may not (and should not) be the preferred solution and instead the human rights obligations should be adopted to the particular circumstances when a State operates outside its territory. Furthermore, the judge of ECtHR in his academic work and in dissenting opinion have adopted the position that the jurisdiction in human rights treaties

¹⁵¹ Border control at sea, Fischer and others, p. 277

¹⁵² Ralf Micheals, The functional method of comparative law, in The oxford handbook of comparative law, Oxford University Press, 2008, p. 342

is not based on strict effective control test anymore.¹⁵³ Notably, in *Georgia Andreou v Turkey*, the court in its judgment accepted the cause and effect by holding that opening fire on the crowd even on territories over which Turkey exercised no control, was the “direct and immediate cause of those injuries” and that “the applicant must be regarded as within the jurisdiction of Turkey”.¹⁵⁴

Therefore, the researcher would like to argue that the undisputable factor under a functional approach in relation to violations set forth in human rights conventions is the relationship between the individuals and States wherever they occur and not the place where the violation occurs and that this approach is in line with the human right principle, power entails obligations. A functional approach to jurisdiction as opposed to an effective control test, may cause an issue where more than one State might exercise jurisdiction over an individual while the jurisdiction over an individual under the effective control criterion would only be established where one State exercises jurisdiction. In the refugee law context, if the case is where more than one state exercises jurisdiction i.e., - the territorial State and the State exercising migration control-, both are expected to respect the *non-refoulement* principle. In *Hirsi* judgment, the Court rejected the Libyan Government’s preliminary objection concerning the applicants’ lack of victim status and held that here had been a violation of Article 3 of the Convention on account of the fact that the applicants were exposed to the risk of being subjected to ill treatment in Libya. The importance of the above mentioned holding is the fact that Libya is not a signatory to the 1951 Refugee Convention, yet that would not relive the extraterritorial obligation of Italy with respect to asylum seekers and refugee claimants. Therefore, the thesis would like to conclude that the functionalist criteria with regard to extraterritorial jurisdiction is the desirable approach from a human rights and refugee law context.

¹⁵³ Loukis G. Loucaides, Determining the Extra-Territorial Effect of the European Convention: Facts, jurisprudence and the Bankovic Case, *European Human Rights Law Review*, 4, 2006, p. 391-2

¹⁵⁴ Case of *Andreou v. Turkey*, ECtHR, Application no. [45653/99](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-95295), 2008, para. 25, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-95295>

Bibliography

- Alice Farmer, 'Non-Refoulement and Jus Cogens: Limiting Anti- Terror Measures That Threaten Refugee Protection' [2008] New York University School of Law
- Andreas Fischer-Lescano, Tillmann Löhrr & Timo Tohidipur, 'Border Controls at Sea: Requirements Under International Human Rights and Refugee Law' [2009] Oxford University Press
- Beever A and Rickett C, 'Interpretive Legal Theory and the Academic Lawyer' (2005) 68 *The Modern Law Review* 320
<<http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.2005.00540.x/abstract>>
accessed 15 April 2013
- Ben-Naftali O, *International Humanitarian Law and International Human Rights Law* (Oxford University Press 2011)
- Bjarte Vandvik, 'Extraterritorial Border Controls and Responsibility to Protect: A View From ECRE' (2008) 1 *Amsterdam Law Forum*
- Brownlie I, *Principles of Public International Law* (Oxford University Press 2008)
- Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement (Opinion)' [2001] UN High Commissioner for Refugees
- Ernst Wilhelm, 'MV Tampa: The Australian Response' (2003) 15 *International Journal of Refugee Law* 159
- European Commission, 'Communication from the Commission to the Council - Reinforcing the Management of the European Union's Southern Maritime Borders' (2006) /* COM/2006/0733 final */
- Goodwin-Gill G and McAdam J, *The Refugee in International Law* (3rd edn, Oxford University Press, USA 2007)
- Gregor Noll, 'Seeking Asylum at Embassies: A Right to Entry Under International Law?' (2005) 17 *Int J Refugee Law* 542
- Guy Goodwin-Gill, 'The Haitian Refoulement Case: A Comment' (1994) 6 *International Journal of Refugee Law* 103
- Hathaway JC, *The Rights Of Refugees Under International Law* (Cambridge University Press 2005)
- Klepp S, 'A Contested Asylum System: The European Union Between Refugee Protection and Border Control in the Mediterranean Sea' (2010) 12 *European Journal of Migration and Law* 1

- Lauterpacht H, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 *British Year Book of International Law* 48
<<http://heinonline.org/HOL/Page?handle=hein.journals/byrint26&id=56&div=&collection=journals>>
- Lauterpacht H, *The Development of International Law by the International Court* (Cambridge University Press 1982)
- Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 *Human Rights Law Review* 411
- , *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011)
- Michal Gondek, 'The Reach of Human Rights in a Globalizing World: Extraterritorial Application of Human Rights Treaties' [2009] Intersentia Uitgevers
- Mink J, 'EU Asylum Law and Human Rights Protection: Revisiting the Principle of Non-refoulement and the Prohibition of Torture and Other Forms of Ill-treatment' (2012) 14 *European Journal of Migration and Law* 119
- Reydams L, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press 2003)
- Ruth Ellen Wasem, 'Cuban Migration Policy and Issues' [2006] UNT Libraries Government Documents Department
- Ryan B and Mitsilegas V, *Extraterritorial Immigration Control: Legal Challenges* (BRILL 2010)
- Shaw MN, *International Law* (Cambridge University Press 2008)
- Steyn J, 'Guantanamo Bay: The Legal Black Hole' (2004) 53 *International & Comparative Law Quarterly* 1
- UN High Commissioner for Refugees, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol' (2007)
- Vaughan Lowe, *Jurisdiction* (2nd edn, Oxford University Press 2006)
- Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004* (International Court of Justice)
- Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), 2005* (International Court of Justice)

Coard et al v United States [1999] Inter-American Commission on Human Rights Report N. 109/99 - Case 10.951

Sale v Haitian Centers Council, Inc (1993) 509 US 155 (Supreme Court)

The 1927 Case of the SS 'Lotus' (France v Turkey) (Permanent Court of International Justice)

The 1981 Sergio Euben Lopez Burgos v Uruguay Case [1981] The Human Rights Committee R.12/52

The 1989 Case of Soering v The United Kingdom [1989] The European Court of Human Rights 14038/88

The 1999 Case of Alejandro et al v Cuba (Brothers to the Rescue) [1999] Inter-American Commission on Human Rights Report No. 86/99 Case No. 11,589

The 2001 Case of Banković and Others v Belgium [2001] The European Court of Human Rights 52207/99

The 2004 Case Of Ilaşcu And Others V Moldova And Russia [2004] The Human Rights Committee 48787/99

The 2005 Case of Öcalan v Turkey [2005] European Court of Human Rights 46221/99

The 2008 Case of JHA v Spain [2008] UN Committee Against Torture (CAT) CAT/C/41/D/323/2007

The 1951 Convention Relating to the Status of Refugees 1951