



**UNIVERSITY OF TRENTO - Italy**  
**School of International Studies**

**Seeking Protection in Europe:  
Refugees, Human Rights, and  
Bilateral Agreements Linked to  
Readmission**

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## **Dedication and Acknowledgments**

*To my mum and to my dad, with infinite love*

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## **Abstract**

This thesis lies at the junction of migration control and refugee protection. As asylum is a migration-related matter, it can be difficult for States to dissociate it from the fight against irregular immigration. Asylum, as a measure for protecting refugees and other persons in need of international protection, may thus easily come into conflict with policies and practices derived from strict border control considerations. This thesis concentrates upon this tension and aims, primarily, to investigate - with a specific focus on the European Union (EU) geographical context - whether the implementation of bilateral agreements linked to the readmission of irregular migrants can hamper refugees' access to *protection*, understood here as the combination of the right to *non-refoulement* and an individual's right to have access to asylum procedures and effective remedies before return. The material content and the normative scope of these protection standards is thus analysed through the lens of international refugee and human rights law and in respect of the traditional rules of treaty interpretation.

The central objective of this thesis is to develop the concept of *agreements linked to readmission* by broadening – to my knowledge, for the first time - the scope of legal analysis to the multifaceted framework of bilateral cooperation arrangements connected to the readmission of irregular migrants from the EU to third countries of

origin or transit. This encompasses written accords employed to facilitate the forced return of undocumented migrants from the territory of an EU Member State (standard readmission agreements and diplomatic assurances on the fair and humane treatment of the deportee, especially if formalized within MoUs), and those agreements for technical and police cooperation that are *de facto* utilized by EU Member States to divert migrants back to the ports of departure before they arrive to the destination country.

In order to fully understand the real impact of bilateral agreements linked to readmission on refugee rights, it is necessary to acknowledge that the study of legal texts alone will not suffice in gaining a sufficiently comprehensive approach. Rather, equal attention has also to be accorded to the implementation of the law, and, as a result, a number of case studies have been incorporated as an integral element of the methodological framework. This thesis concludes that the *text* of agreements linked to readmission does not seem to raise *per se* issues of incompatibility with core refugee rights. However, in situations of informal border controls, massive arrivals, public emergency, and pre-arrival maritime interceptions, the enforcement of these bilateral agreements can *de facto* hamper refugees' access to protection. Therefore, this thesis will make a number of recommendations as a platform for further discussion among legal scholars and policy-makers.



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## List of Abbreviations

American Journal of International Law	AJIL
Amnesty International	AI
Anti-Terrorism, Crime and Security Act 2001	ATCSA
Area of Freedom, Security and Justice	AFSJ
Associazione per gli Studi Giuridici sull'Immigrazione	ASGI
British Yearbook of International Law	BYIL
Bundesverfassungsgericht	BVerfGE
Centre for European Policy Studies	CEPS
Common European Asylum System	CEAS
Common Market Law Review	CMLR
Convention against Torture	CAT
Convention Governing the Specific Aspects of Refugee Problems in Africa	OUA Convention
Council of Europe	CoE
Court of First Instance	CIF
Diritti Umani e Diritto Internazionale	DUDI
England and Wales Court of Appeal	EWCA
England and Wales High Court	EWHC
EU Charter of Fundamental Rights	CFR
European Community	EC
European Convention on Human Rights and Fundamental Freedoms	ECHR
European Council on Refugees and Exiles	ECRE
European Court of Justice	ECJ
European Court Reports	ECR
European Human Rights Reports	EHR
European Journal of International Law	EJIL
European Journal of Migration Law	EJML
European Migration Network	EMN

EU Schengen Border Code	SBC
European Union	EU
Executive Committee of the High Commissioner's Programme	EXCOM
Federal Court of Australia	FCA
Fordham International Law Journal	Fordham Int'l LJ
Foreign and Commonwealth Office	FCO
George Town Immigration Law Journal	Geo.Immigr. L.J
Harvard Human Rights Journal	HHRJ
Harvard International Law Journal	HILJ
Human Rights Committee	HRC
Human Rights Law Review	HRLR
Human Rights Watch	HRW
ILC Articles on the Responsibility of States for Internationally Wrongful Acts	ILC Articles
Immigration Law Practitioners' Association	ILPA
Inter-American Court of Human Rights	IACtHR
International Comparative Law Quarterly	ICLQ
International Convention on the Elimination of All Forms of Racial Discrimination	ICERD
International Court of Justice	ICJ
International Covenant on Political and Civil Rights	ICCPR
International Covenant on Economic and Social Rights	ICESR
International Criminal Law Review	ICLR
International Human Rights Law Review	IHRLR
International Journal of Refugee Law	IJRL
International Law Commission	ILC
International Maritime Organization	IMO
Italian Yearbook of International Law	IYIL
Journal of Refugee Studies	JRS



Justice and Home Affairs	JHA
Libyan National Transitional Council	NTC
Max Planck United Nations Yearbook	UNYB Max Planck
Melbourne Journal of International Law	MJIL
Memorandum of Understanding	MOU
Netherlands International Law Review	NILR
Netherlands Quarterly of Human Rights	NQHR
Nordic Journal of International Law	NJIL
Office of the United Nations High Commissioner for Refugees	UNHCR
Official Journal	OJ
Permanent Court of International Justice	PCIJ
Refugee Study Centre	RSC
Refugee Survey Quarterly	RSQ
The International Law Commission's Articles on State	ILC Commentary
Treaty on the European Union	TEU
Treaty on the Functioning of the European Union	TFEU
UK Special Immigration Appeals Commission	SIAC
United Kingdom	UK
United Kingdom House of Lords	UKHL
United Nations	UN
United Nations Convention on the Law of the Sea	UNCLOS
United Nations General Assembly	UNGA
United Nations Treaty Series	UNTS
Vienna Convention on the Law of Treaties	VCLT
Virginia Journal of International Law	Virginia J. Int'l
Washington University Global Studies Law Review	Wash.U.Global Stud.L.Rev

Yearbook of the International  
Law Commission

YBILC

## Chapter 1. Introduction

### 1.1. Encountering the refugee and the State

This thesis lies at the junction of migration control and refugee protection. As asylum is a migration-related matter, it can be difficult for States to dissociate it from the fight against irregular immigration. Asylum, as a measure for protecting refugees and other persons in need of international protection, may thus easily come into conflict with policies and practices derived from strict border control considerations.<sup>1</sup> This thesis concentrates upon this tension and aims, primarily, to investigate – with a specific focus on the European Union (EU) geographical context - whether the implementation of *bilateral agreements linked to the readmission* of irregular migrants can hamper refugees’ access to protection, understood here as the combination of the right to *non-refoulement* and an individual’s right to access asylum procedures and effective remedies before return.

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<sup>1</sup>See, e.g., Jens Vedsted-Hansen, ‘Europe’s Response to the Arrival of Asylum Seekers: Refugee Protection and Immigration Control’ (UNHCR Working Paper n 6, 1999); Jens Vedsted-Hansen and Gregor Noll, ‘Non-communitarians: Refugee and Asylum Policies’ in Philp Alston (ed), *The EU and Human Rights* (Oxford University Press 1999) 359-410; Jerzy Sztucki, ‘Who is a Refugee?’ in F Nicholson and P Twomey (eds), *Refugee Rights and Realities* (Cambridge University Press 1999) 69. Areti Sianni, ‘Interception Practices in Europe and their Implications’ *Refugee* (2003) 25-34; Agnese Hurwitz, *The Collective Responsibility of States to Protect Refugees*, (Oxford University Press 2009) c 1; Thomas Gammeltoft-Hansen, *Access to Asylum* (Cambridge University Press 2011) c 2.

Fleeing persecution and gross human rights violations in their home country, refugees stand as the most vulnerable category of people crossing an international border during the phases of both entry into and removal from the destination country. They frequently travel alongside economic migrants and are often unable to obtain identity and travel documents. As such, they are at a particularly high risk of being assimilated with common undocumented migrants violating formal immigration control requirements.

In 1951, Hannah Arendt, referring to the experience of Jews in Nazi Germany, defined refugees as ‘the most symptomatic group in contemporary politics.’<sup>2</sup> She argued that refugees are not only forced to abandon their homeland because of national or ethnic persecution but they also lose any reasonable prospects of obtaining a new citizenship elsewhere,<sup>3</sup> thus being deprived of any possibility of having a community able and willing to guarantee their rights.<sup>4</sup> As a result, ‘[t]he desperate confusion of these Ulysses-wanderers who, unlike their great prototype, do not know who they are’, inexorably follows.<sup>5</sup>

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<sup>2</sup>Hannah Arendt, *The Origins of Totalitarianism* (Andre Deutsch 1973, first published 1951) 277.

<sup>3</sup> *ibid* 293-4.

<sup>4</sup> *ibid* 297.

<sup>5</sup> Hannah Arendt, ‘We Refugees’ (1943) *Menorah Journal* 69, 76.

As uninvited aliens, refugees are *in principio* ‘outside the field of loyalty.’<sup>6</sup> Perceived as a menace to the peace and internal security of the host State, they have no community protecting them, no linkage with the home country; and as such, they are treated as outsiders whose claims must first be carefully assessed in order to decide whether they are legitimate. States’ endeavours to impose even more robust barriers to those who seek to enter their national territory continue to accentuate, and therefore lead to a ‘tension between generosity towards those at home and wariness of those from abroad.’<sup>7</sup>

Between 1950 and 1970, European States began to assume increased responsibilities with respect to the huge number of post-war refugees. What is more, since the early 1990s, a sharp increase in asylum applications has been recorded across Western countries, in particular Western Europe.<sup>8</sup> Shifting our attention to the present-day situation, in 2011, an estimated 4.3 million people were displaced due

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<sup>6</sup> Elspeth Guild, ‘International Terrorism and EU Immigration, Asylum, and Borders Policy: the Unexpected Victims of 11 September 2011’, in Carr, Fergus and Massey, Andrew (eds), *Public Policy And the New European Agendas* (Edward Elgar Publishing 2006) 234.

<sup>7</sup> Maryellen Fullerton, ‘The International and National Protection of Refugees’, in Hurst Hannum (ed.) *Guide to International Human Rights Practice* (Inc. 4th ed., Transnational Publishers 2004) 246.

<sup>8</sup> Between the early 1970s and the late 1990s, the annual number of asylum applications in the countries of the European Union has grown from 15,000 to more than 300,000. See, Hatton Timothy J, ‘Seeking Asylum in Europe’ (April 2004) 19 *Economic Policy* 7.

to conflict or persecution.<sup>9</sup> Additionally, in 2012 alone, there was an 8% increase in the number of asylum applications submitted in the 44 industrialized countries.<sup>10</sup> Therefore, the question of ‘who is responsible for refugees’ springs up yet again for debate, this time all the more pressing.

While EU Member States have attempted to elaborate harmonized solutions to face this challenge, such as the progressive creation of the Common European Asylum System (CEAS),<sup>11</sup> they have, however, also employed a new approach of reinforcing their territorial and

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<sup>9</sup> Whilst, in 2011, more than 800,000 people were newly displaced as refugees across international borders, another 3.5 million were internally displaced. If added to previous figures, the number of forcibly displaced people worldwide exceeded 42 million. See, UNHCR, *A Year of Crises: Global Trends 2011* (2012) 2-3 <<http://www.unhcr.org/4fd6f87f9.html>> accessed 28 March 2013. The Office of the United Nations High Commissioner for Refugees (UNHCR) was established on 14 December 1950 by the United Nations General Assembly. Its mandate includes the leading and coordination of State action to protect refugees as well as safeguard their rights and well-being worldwide. More detailed information on the activity of the UNHCR can be found at its official website <<http://www.unhcr.org/pages/49c3646c2.html>>.

<sup>10</sup> While an estimated 479,300 asylum applications were registered in the 44 industrialized countries in 2012, the 27 EU Member States registered 296,700 new asylum claims in 2012. See, UNHCR, *Asylum and Trends in 2012: Levels and Trends in Industrialized Countries*, 21 March 2013 <<http://www.unhcr.org/5149b81e9.html>> accessed 28 March 2013.

<sup>11</sup> The aim of the CEAS is to establish common asylum procedures and equivalent conditions for persons in need of international protection valid throughout the EU. The four most important legislative measures adopted between 1999 and 2005 were: The Council Directive 2003/9/EC, [2003] on minimum standards for the reception of asylum seekers; the Council Directive 2004/83/EC, [2004] on minimum standards for the qualification and status of third country nationals as refugees or as persons who otherwise need international protection (Qualification Directive); the Council Directive 2005/85/EC [2005] on minimum standards on procedures in Member States for granting and withdrawing refugee status (Procedures Directive); Council Regulation 343/2003, 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

For an overview of the historical development of asylum law, see, Rosemary Byrne, Gregor Noll and Jens Vedsted-Hansen, ‘Understanding Refugee Law in an Enlarged European Union’ (2004) 15 EJIL 355, 358-367.

maritime border controls, criminalizing of migrants,<sup>12</sup> and accelerating the procedures for returning unauthorized migrants to the countries they originated from or transited through. Such a proactive management of irregular migratory flows - especially by both seeking readmission of unwanted foreigners and intercepting them on the high seas, faraway from territorial borders<sup>13</sup> - has been both criticized and disparaged at national, regional, and international levels, alerting, *inter alia*, legal scholars and human rights organizations.

In view of fighting irregular migration - both by preventing the arrival of unauthorized flows of migrants and returning those individuals who do not have the status to stay in the territory of the host country – the cooperation with third countries outside the EU is vital. Within such a ‘globalization of migration control’,<sup>14</sup> the opportunity to conduct research on the international human rights and refugee law obligations binding States in territorial and extraterritorial

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<sup>12</sup> Bigo Didier, ‘Criminalization of “Migrants”’: The Side Effect of the Will to Control the Frontiers and the Sovereign Illusion’, in Barbara Bogusz, Ryszard Cholewinski, Adam Cygan and Erika Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European, and International Perspectives* (Martinus Nijhoff Publishers 2004) 61.

<sup>13</sup> Following the collapse of the regimes in Tunisia and Libya, the frequency of boat arrivals increased in early 2011. Frontex Risk Analysis Report 2012 records nearly 141,000 detected irregular entries to the EU (approximately 55,000 via the Eastern Mediterranean route, approximately 64,000 via the Central Mediterranean route, and approximately 8,500 via the Western Mediterranean route. See, <[www.frontex.europa.eu/assets/Attachment\\_Featured/Annual\\_Risk\\_Analysis\\_2012.pdf](http://www.frontex.europa.eu/assets/Attachment_Featured/Annual_Risk_Analysis_2012.pdf)> accessed 28 March 2013. Since 1988, at least 18,567 people have died along the European borders while attempting to cross the Mediterranean. See, Fortress Europe, <[http://fortresseurope.blogspot.co.uk/2006/02/immigrants-dead-at-frontiers-of-europe\\_16.html](http://fortresseurope.blogspot.co.uk/2006/02/immigrants-dead-at-frontiers-of-europe_16.html)> accessed 28 March 2013.

<sup>14</sup>See, Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalization of Migration Control* (Cambridge University Press 2011).

operative contexts becomes even more imperative. As Louis Henkin explains, ‘how [a State] behaves even in its own territory, [is] no longer [...] its own business: it has become a matter of international concern, of international politics, and of international law.’<sup>15</sup>

Likewise, readmission - whether performed before or after arrival at the border of the host, or would-be host country – lies at the intersection of distinct disciplines, such as international law and international relations. In this respect, it has been argued that

The readmission system is not only built on obligations which would be defined in international customary law. Nor is it only a system based on incentives, costs, and benefits. It is also a system contingent on predominant schemes of understanding, paradigms and a hegemonic lexicon shaping policy perceptions and hierarchies of priorities.<sup>16</sup>

This work, however, does not delve into international relations theory. Rather, it aims to provide a legal analysis of the implications of readmission schemes for the rights and safety of those seeking protection in Europe. Examining State practices of migration control against the backdrop of refugee rights assumes increasing relevance

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<sup>15</sup> Luis Henkin Lecture: The Robert L Levine Distinguished Lecture Series, ‘That “S” Word: Sovereignty and Globalization, and Human Rights, Et Cetera’ (1999) 68 *Fordham Law Review* 1, 4.

<sup>16</sup>Jean-Pierre Cassarino, ‘Inventory of the Agreements Linked to Readmission’, available at: <<http://rsc.eui.eu/RDP/research/analyses/ra/>> accessed 28 March 2013.



after 11 September 2001, when the new ‘war on terror’ increased the tendency of perceiving refugees as a threat to international peace and security.<sup>17</sup> By investigating the broad subject of bilateral *agreements linked to readmission* through the lens of international refugee and human rights law,<sup>18</sup> this thesis focuses on the principle of *non-refoulement*, and the right to access asylum procedures and effective remedies before return. In this interplay between human rights and State prerogatives, the refugee ends up occupying

A legal space characterized, on the one hand, by the principle of State sovereignty and the related principles of territorial supremacy and self-preservation;

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<sup>17</sup>For example, in late September 2001, the UN Security Council, acting under its binding Chapter VII powers, adopted Resolution 1373, which requires all States to take financial, penal, and other regulatory measures against individuals and organizations involved in terrorist activities. In particular, paragraph 3(f) calls on States to ‘take appropriate measures [...]before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts.’Moreover, pursuant to paragraph 3(g), the Security Council requires States to ‘ensure [...] that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of *political* motivation are not recognized as grounds for refusing requests for the extradition of the alleged terrorists.’ See, UN SC Resolution 1373, 28 September 2001, UN doc S/RES/1373 (2001). Addressing the issue of the relationship between terrorism and refugee law would be beyond the scope of this thesis. For literature in the field refer, *inter alia*, to: Joan Fitzpatrick, ‘Speaking Law to Power: The War Against Terrorism and Human Rights’ (2003) 14(2) EJIL 241; Guild 2006a; René Bruin and Kees Wouters, ‘Terrorism and the Non-derogability of *Non-refoulement*’ (2003)15(1) IJRL 5; William Schabas, *Non-refoulement, Human Rights and International Cooperation in Counter-terrorism* (Liechtenstein 2006).

<sup>18</sup>As far as I am aware, the expression ‘agreements linked to readmission’ was first coined by Cassarino in Jean-Pierre Cassarino, ‘Informalizing Readmission Agreements in the EU Neighbourhood’ (2007)42(2) *The International Spectator* 179.

and, on the other hand, by competing humanitarian principles deriving from general international law [...] and from treaty.<sup>19</sup>

Thus, the debate on agreements linked to readmission and refugee rights reflects a political debate involving national identity and security concerns, which is further confirmed by the European trend of seeking to deflect responsibility for migrants and refugees as far as possible from European borders. This would unduly emphasize, however, uncertain and flexible national security interests to the detriment of the protection of migrants and the fundamental rights of refugees.<sup>20</sup>

In navigating this landscape, this introduction explains the structure, objective, scope, and contribution of the research, as well as its methodology and related terminology. This section also describes the main sources used in the drafting of the thesis, pinpoints the aim and the content of *agreements linked to readmission*, and illustrates the real world implications of this study. It reflects the overall relevant law and practice, to the best of my knowledge, as it stood on 8 January 2013. However, this does not preclude occasional reference to

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<sup>19</sup> Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed, Oxford University Press 2007)91. See also, Ingo Venzke, *How Interpretation Makes International Law: on Semantic Changes and Normative Twists* (Oxford University Press 2012) 1.

<sup>20</sup>Part II of this work will be dedicated to study the impact of bilateral migration policies - aimed to facilitate the return and the readmission of unwanted/unauthorized third country nationals - on the rights of people seeking protection in Europe.

later case law. It is also important to note that on 12 June 2013, the European Parliament voted for the final adoption of the recast of the EU directives and regulations on asylum.<sup>21</sup> Due to the fact that States will need to transpose the new provisions into their respective national legal frameworks within two years, this thesis will continue referring to both the original text of the asylum directives as well as the revised versions.

## **1.2. Object of research and structure**

This study primarily aims to investigate whether the implementation of bilateral agreements linked to readmission can hamper refugees' access to protection, meant as the combination of the right to *non-refoulement* and the right to access asylum procedures and effective remedies before return.

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<sup>21</sup>The EU legislative instruments on asylum that have undergone a recast process are the following ones: i) Recast Qualification Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (Recast), OJ L 337/9, 20 December 2011 (Recast Qualification Directive); ii) Directive 8260/2/13 of 7 June 2013 on common procedures for granting and withdrawing international protection status (Recast) (Recast Procedures Directive); iii) Directive 14654/2/12 of 7 June 2013 on minimum standards for the reception of asylum seekers (Recast) (Recast Reception Directive); iv) Regulation of the European Parliament and of the Council 15605/3/12 of 7 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast Dublin Regulation). The Recast Procedures Directive, the Recast Reception Directive, and the Recast Dublin Regulation have been adopted by European Parliament legislative resolution of 12 June 2013.

For an extensive analysis of the recasting process, see, Francesca Ippolito and Samantha Velluti, 'The Recast Process of the EU Asylum System: A Balancing Act between Efficiency and Fairness' (2011) 30(3) RSQ24.

Methodologically, this main research question boils down to the three following sub-questions:

i) What is the content and scope of the right to *non-refoulement*, as well as the right to access asylum procedures and effective remedies before return?

ii) What is the relationship between agreements linked to the readmission of unauthorized migrants and the decision to return refugees to countries of origin or transit?

iii) To what extent is the text of bilateral agreements linked to readmission compatible with core refugee protection standards, as enshrined in the main international refugee and human rights law treaties?

For purposes of expository clarity, this work is divided into two main Parts. Part I explores the content and scope of the relevant international refugee and human rights protection standards, which are binding on the EU Member States when dealing with questions relating to the admission or readmission of refugees. Therefore, the legal content of the principle of *non-refoulement*, as well as an individual's right to have access to asylum procedures and effective remedies before return will be examined in Chapters 2, 3, and 4 by means of a thorough analysis of the text of the main international refugee and human rights treaties, *in primis* the 1951 Convention

relating to the Status of Refugees (Geneva Convention),<sup>22</sup> the UN Convention against Torture (CAT),<sup>23</sup> the International Covenant on Civil and Political Rights (ICCPR), and the 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR).<sup>24</sup> These Chapters will also provide the most comprehensive review possible of the jurisprudence of the relevant international human rights bodies. Part I is thus principally designed to provide a backdrop of the relevant legal norms – as interpreted by national and (mainly) international human rights courts and committees - against which the compatibility of bilateral agreements linked to readmission with refugee rights will be assessed in Part II.

Part II is, indeed, the core of this thesis. It intends to separately peruse in Chapters 5, 6, and 7 the main categories of agreements linked to readmission that have been identified as instruments of bilateral cooperation between EU Member States and third countries outside the EU. The expression ‘agreements linked to readmission’ is herein used as an overarching term encompassing the various patterns of bilateral cooperation designed to facilitate the return and the readmission of unauthorized foreigners. This expression therefore includes: i) standard readmission agreements;<sup>25</sup> ii) diplomatic

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<sup>22</sup> Geneva Convention, 28 July 1951, in force 22 April 1954, 189 UNTS 150.

<sup>23</sup> CAT, New York, 10 December 1984, in force 26 June 1987, 1465 UNTS 85.

<sup>24</sup> ICCPR, New York, 16 December 1966, in force 23 March 1976, 993 UNTS 171.

<sup>25</sup> See, e.g., the Agreement between Italy and Albania for the Readmission of People at the Frontier, Tirana, 18 November 1997; Agreement between the UK and Albania

assurances on the fair and human treatment of the deportees, with a focus on assurances contained within Memoranda of Understanding (MOUs);<sup>26</sup> and iii) agreements providing for technical and police cooperation used to patrol maritime borders and intercept undocumented migrants at sea.<sup>27</sup>

A detailed reading of the text of these agreements along with the scrutiny of the return practices rising from their implementation will demonstrate how their underlying object and purpose, even where not openly stated, is to facilitate the return and readmission of unauthorized/unwanted foreigners. As we will better see in the following Chapters, the element of ‘effective control’ over migrants

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on the Readmission of Persons, Tirana, 14 October 2003. These agreements are taken as units of analysis in Chapter 5.

<sup>26</sup>See, e.g., Memorandum of Understanding Concerning the Provision of Assurances in Respect of Persons Subject to Deportation, Ethiopia – UK, 12 December 2008 (Ethiopia-UK MOU); Memorandum of Understanding regulating the provision of undertakings in respect of specified persons prior to deportation, Jordan – UK, 10 August 2005 (Jordan-UK MOU); Memorandum of Understanding Concerning the Provision of Assurances in Respect of Persons Subject to Deportation, Libya – UK, 18 October 2005 (Libya-UK MOU); Memorandum of Understanding Concerning the Provision of Assurances in Respect of Persons Subject to Deportation, Lebanon – UK, 23 December 2005 (Lebanon-UK MOU). An extensive account of these MoUs is offered in Chapter 6.

<sup>27</sup>The agreements for technical and police cooperation signed by Italy with Libya to patrol Libyan territorial waters and international waters are the following: *Protocollo tra la Repubblica Italiana e la Gran Giamahiria Araba Libica Popolare Socialista* (Tripoli, 29 December 2007) (Protocol); *Protocollo Aggiuntivo Tecnico-Operativo al Protocollo di Cooperazione tra la Repubblica Italiana e la Gran Giamahiria Araba Libica Popolare Socialista, per fronteggiare il fenomeno dell’immigrazione clandestina* (Tripoli, 29 December 2007) (Additional Protocol); *Protocollo Aggiuntivo Tecnico-Operativo concernente l’aggiunta di un articolo al Protocollo firmato a Tripoli il 29/12/2007 tra la Repubblica Italiana e la Gran Giamahiria Araba Libica Popolare Socialista, per fronteggiare il fenomeno dell’immigrazione clandestina* (Tripoli, 4 February 2009) (Executive Protocol). See, Chapter 7 for a more thorough discussion of their content.

and refugees suffices to trigger responsibility for a human rights violation, regardless of whether there is a legal basis for the action of the State. However, such a study intends to highlight the relationship between agreements linked to readmission and the return order, thus revealing to what extent the latter is influenced by the former, and which role a certain agreement may play in the actual decision of a State to jeopardize refugees' access to protection through formal or informal practices of containing migration and securing its borders.

In this context, the hypothesis of this thesis is that the actual enforcement of agreements linked to readmission might end up having a pernicious impact on those who seek protection in Europe, thus affecting core refugee rights. Therefore, by highlighting a specific case study for each category of agreements as unit of analysis, this thesis must take into account certain crucial elements, such as State practice, case law, and the technical and legal content of the bilateral agreements at hand.

### **1.3. Instances of readmission and refugee protection**

This Section provides information on three incidents occurring within and beyond the territorial borders of EU Member States. In so doing, it illustrates how closely related the practices reflected in the typologies of accords falling under the shorthand term 'agreements linked to readmission' are.

i) Between February and April 2011, masses of undocumented migrants and refugees, following the upheavals in North Africa, begin landing in Italy in disarray after crossing the Mediterranean by boat. As denounced by several NGOs, a significant number of these individuals, especially Tunisians and Egyptians, are denied access to Eurodac and to the informative mechanisms offered by UNHCR. They are confined for long periods of time in either overcrowded detention centres or on board ships,<sup>28</sup> subjected to summary identification procedures by their consular officials, or rapidly expelled to their countries of origin, all in the name of the efficiency required by the implementation of the *readmission agreements* between Italy and the two North-African countries.<sup>29</sup> As a result, such

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<sup>28</sup> See, Associazione per gli Studi Giuridici sull'Immigrazione (ASGI), 'Grave preoccupazione per le continue violazioni del diritto nei riguardi degli stranieri respinti, espulsi, o trattenuti nei CIE, dei richiedenti asilo e dei lavoratori stranieri' (12 August 2011) <[http://www.asgi.it/public/parser\\_download/save/1\\_asgicomunicati.12811.pdf](http://www.asgi.it/public/parser_download/save/1_asgicomunicati.12811.pdf)> accessed 22 March 2013; Migrants at Sea, 'Italy Continues Shipboard Detention of Hundreds of Tunisians' (28 September 2011) <<http://migrantsatsea.wordpress.com/2011/09/28/italy-continues-shipboard-detention-of-hundreds-of-tunisians/?>> accessed 22 March 2013; Fortress Europe, 'Espulsi 3,592 tunisini, nei Cie tornerà la calma?' (1 November 2011) <<http://fortresseurope.blogspot.com/2011/11/espulsi-3592-tunisini-nei-cie-tornera.html>> accessed 22 March 2013.

See also, Cooperation Agreement in the field of readmission between Italy and Egypt, Rome, 9 January 2007. An agreement to accelerate readmission of unwanted migrants was signed on 5 April 2011 by Italy and Tunisia. This agreement is unpublished, but information on its content can be retrieved from: Martina Tazzioli, 'Cronologia degli Accordi Italia-Tunisia' *Storie Migranti* (December 2011) <<http://www.storiemigranti.org/spip.php?article1004>> accessed 22 March 2013.

<sup>29</sup> See, Yasha Maccanico, 'The EU's Self-Interested Response to Unrest in North Africa: the Meaning of Treaties and Readmission Agreements between Italy and North African States' *Statewatch* (January 2012) 6 <<http://www.statewatch.org/analyses/no-165-eu-north-africa.pdf>> accessed 22 March 2013. A more extended account of readmission agreements and informal practices of border control will be provided in Chapter 5.



actions beg the question of whether a readmission agreement may boost the use of swift and accelerated identification and return procedures in dissonance with international human rights and refugee law, especially in situations of emergency and mass influxes.

ii) Since 2005, UK governments have unsuccessfully attempted to deport Mr Omar Othman (Abu Qatada) - a radical Muslim cleric who was granted refugee status in the UK in 1994 - by seeking diplomatic assurances from Jordan on his fair and human treatment upon removal. Given that Article 3 of the ECHR precludes the transfer of suspect terrorists to countries where torture is systematic,<sup>30</sup> the British Foreign Secretary realized that formalizing bilateral diplomatic assurances for national security-related deportations in the structure of standardized blanket MoUs would smooth future deportations from the UK. Therefore, the British Embassy in Amman was instructed to engage the Jordanian government in discussions concerning the possibility of creating a framework MoU, which was finally signed on 10 August 2005. Abu Qatada is the first person to challenge, before the ECtHR, a deportation order issued on the basis of a MoU - a framework agreement that can be used in every case of removal of an individual deemed to be inconducive to the public good. Despite the January 2012 decision of the Court to block Abu Qatada's deportation to Jordan, the saga has ignited intense debate on the legal status of

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<sup>30</sup> ECHR, Rome, 4 November 1950, in force 3 September 1950, 213 UNTS 221.

assurances and their reliability in the *ex ante* assessment of the risk for the deportee.<sup>31</sup>

iii) On 6 May 2009, 471 migrants and refugees crossing the Mediterranean aboard three boats are intercepted by Italian authorities on the high seas. The migrants and refugees are transferred onto the vessels of the Italian authorities and immediately redirected to Libya on the basis of bilateral *agreements for technical and police cooperation* establishing joint naval patrols to prevent irregular immigration to Europe. Following this first incident, Italy has since embarked on a forcible and indiscriminate ‘push-back’ policy, deflecting hundreds of migrants and refugees to North Africa before they are able to enter the territorial waters of an EU Member State. No onshore access to asylum procedures is ensured. Intercepted migrants and refugees are collectively returned to Libya, reports evidencing that they are detained, tortured, raped, abused, or ultimately repatriated to their countries of origin, where they may return to a war-torn country and or face persecution.<sup>32</sup>

As empirical grounds for legal analysis, the above examples will be substantively explored in Part II of this thesis. Nevertheless, it is worth highlighting the red thread that runs through these cases and

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<sup>31</sup>See, Chapter 6 for a description of the case and the legal issues stemming from the use of MoUs setting diplomatic assurances on the fair and human treatment of the deportees.

<sup>32</sup> See, Chapter 7 for a narrative of facts and an extensive legal discussion on the Italy-Libya push-back policy.

how they fit into the argument of this thesis. It is the thread of *return*, of the layered distance placed between the refugee and the State, of the border built and reinforced to sever, at the earliest point in time, the jurisdictional bridge between who-seeks-protection and who-gives-protection. It is within this logic that, in the wake of the proactive management of European borders before and after the migratory waves triggered by the Arab Spring, diverse bilateral cooperative strategies have been devised to keep migrants and refugees away from the doors of the EU.

#### **1.4. Contribution of the thesis and policy relevance**

Readmission agreements are bilateral or multilateral treaties setting standards and procedures indicating how return of irregular migrants is to be conducted. However, this study is not limited to readmission agreements *strictu sensu*. Rather it contributes to the existing literature by broadening – to my knowledge, for the first time - the range of legal analysis applied to a multifaceted framework of bilateral cooperation arrangements connected to the readmission of irregular migrants from the EU to third countries of origin or transit. It encompasses written agreements aimed at facilitating the *forced return* of undocumented migrants from the territory of an EU Member State (standard readmission agreements and diplomatic assurances on the fair and humane treatment of the deportee, especially if written

within MoUs), and those agreements for technical and police cooperation that are *de facto* utilized by EU Member States to divert migrants back to the ports of departure before their physical arrival to the destination country. In this process of *diversification* (rather than ‘informalization’) of cooperative tools, the term *agreements linked to readmission* is better-suited for understanding the plethora of bilateral agreements made by EU Member States with non-EU third countries to both ease the forced return of irregular migrants with no status or right to stay any longer within their territory, and for preventing arrivals by outsourcing migration controls and, indirectly, responsibilities relating to refugees.

The word ‘informalization’ can give rise to different interpretations in the field of law and international relations. Cassarino uses the expression ‘informalization’ to refer to alternative patterns of cooperation beyond standard readmission agreements to return unauthorized migrants. Indeed, today, readmission is a network composed of different institutional instruments, ranging from development aid to visa facilitation, and from technical cooperation for the externalization of migration controls to labour exchanges.<sup>33</sup>

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<sup>33</sup> Cassarino identifies various types of arrangements beyond standard readmission agreements: i) Police cooperation agreements including a clause on readmission/removal of unauthorized persons; ii) Memoranda of Understanding; iii) Administrative arrangements; iv) Exchanges of letters. See, Cassarino 2007, 185-7. For an overview of these agreements linked to readmission, see the inventory drafted by the Robert Schuman Centre for Advanced Studies of the EUI, available at: <http://rsc.eui.eu/RDP/research/analyses/ra/>.

In order to avoid misunderstandings related to terminology, the legal analysis carried out in this thesis will opt for the term ‘diversification’ of agreements designed to return and readmit unauthorized migrants. In legal terms, so-called ‘informal agreements’ are international arrangements, which are primarily deemed to be ‘outside the realm of law’, and whose binding character in international law is generally up for debate.<sup>34</sup> As will be observed throughout this thesis, some of the selected agreements linked to readmission are formal while others are not. However, focusing on such distinctions is not the goal of this thesis. Rather, what I aim to emphasize in this work is the underlying objective of all these arrangements, namely facilitating the return and the readmission of unauthorized and unwanted third country nationals, regardless of their designation or their legal status under international law.

One of the main ambitions of this thesis is to contribute to the ongoing academic debate by adding legal coherence to a subject that has often been fraught with a certain level of confusion and partiality from both a terminological and substantive point of view. A frequent item of misunderstanding is the widespread use in literature and popular press of the ‘readmission agreement’ concept to interchangeably refer to diverse and non-overlapping legislative and

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<sup>34</sup> Moreover, so-called ‘informal agreements’ might be recorded without all the formalities required for the conclusion of treaties, and might be signed by officials whose treaty-making powers are doubted. See, Jan Klabbers, *Developments in International Law: the Concept of Treaty in International Law* (Kluwer 1996) 19.

administrative instruments. What is important to underline is that ‘agreements linked to readmission’ are employed to carry out different return and readmission practices as post-arrival removals and pre-arrival interceptions.<sup>35</sup> Thus, taking a first step toward the acceptance of a specific vocabulary, this thesis seeks to establish a conceptual coherence that is so manifestly lacking. If, at face value, this issue has a purely terminological connotation, it attains import for a number of reasons.

First, it draws a clear picture of the various cooperative patterns of migration control used by States to facilitate the return and readmission of unwanted foreigners. Second, it goes beyond a mere informative value by interpreting State practice on return and readmission through a three-dimensional systematization of bilateral agreements linked to readmission in the light of their underlying *purpose*. Third, identifying different types of agreements permits a better understanding of their content, aims, and main functions, thereby allowing for an assessment of the role such agreements play in the decision to return migrants and asylum seekers to countries of

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<sup>35</sup> To give an example, the agreements for technical and police cooperation negotiated by Italy with Libya to prevent the arrival of unauthorized migratory flows at the EU border – through interceptions at sea – have frequently been labelled as ‘readmission agreements.’ See, *inter alia*, Parliamentary Assembly of the Council of Europe (CoE), *Report on Readmission Agreements: A Mechanism for Returning Irregular Migrants*, Doc. 12168 (16 March 2010) (Parliamentary Assembly CoE Report); Maccanico 2012, 6; Sabrina Tucci, ‘Libyan cooperation on migration within the context of Fortress Europe’ *Amnesty International, International Secretariat* (London, 2012) <<http://www.inter-disciplinary.net/wp-content/uploads/2012/02/tuccipaper.pdf>> accessed 22 March 2013; Marion Panizzon, ‘Readmission Agreements of EU Member States: A Case for EU Subsidiarity or Dualism?’ (2012) 31(4) RSQ 101.

origin or transit – or to what extent they influence such decisions. Fourth, a careful analysis of diverse agreements linked to readmission reveals how findings regarding their impact on refugees’ rights vary according to the different classes of agreements under examination.

Therefore, studying all these agreements as part of the overarching ‘agreements linked to readmission’ concept does not only allow us to analyse their similarities and common purpose, but to also explore the ways in which they differ. Indeed, the implementation of diverse typologies of agreements linked to readmission raises a manifold of diverse legal issues. By influencing the return decision to different extents, the impact of such agreements on access to protection is subject to change, and as a consequence, the follow up to the analysis varies from agreement to agreement. This is how a research journey that began with the intent to find uniformity, or at least commonalities between accords, ends up mapping out agreements linked to readmission just like a constellation of planets all orbiting around the same sun, but at different speeds and in different directions.

By specifically focusing on the standard readmission agreements concluded by Italy and the UK with non-EU third countries on a bilateral basis, this research differs from other recent contributions, which have mainly addressed readmission policy from the perspective of the EU. For instance, Coleman concludes that EU readmission agreements are not detrimental to refugee protection, although he

concedes that more quantitative and qualitative studies in relation to informal border practices would be required.<sup>36</sup> In joining the debate, Chapter 5 of this thesis aims to assess whether the existence of readmission agreements could *de facto* stimulate informal practices relating to border control and return of irregular migrants, including refugees. Moreover, as readmission agreements do not generally include separate provisions on refugees, a real risk exists of removing asylum seekers, as unauthorized migrants, to allegedly ‘safe third countries.’ The Chapter hails, therefore, as an added value, the insertion of both non-affection clauses and procedural human rights clauses creating extra safeguards for removable asylum seekers. To this end, this thesis makes a number of concrete proposals of draft provisions as a platform for further discussion among legal scholars and policy-makers.

Chapter 6 challenges one of the most cutting-edge strategies European States are testing out to remove unwanted foreigners seen as a threat to the safety of the host country. MoUs have been established with the intent of formalizing, within a written standardized agreement, the human rights commitments of a third country with a dismal human rights track record. It is herein argued that the format of

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<sup>36</sup> Nils Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights* (Martinus Nijhoff 2009) 325.



a MoU cannot be used as a ‘legal nicety’<sup>37</sup> to remove a person to a country that is notorious for its dubious interrogation techniques. As a consequence, I suggest that States should refrain from relying on diplomatic assurances – whether or not framed within standardized MoUs - with countries that continue to employ torture tactics.

Chapter 7 deals with agreements concerning technical and police cooperation, and that are designed to intercept boat migrants and refugees at sea before arriving at the gates of Europe. Joint offshore migration controls operated through bilateral agreements between an EU Member State and a third country have become increasingly fashionable because of the presumption that States can be divested of their refugee and human rights law obligations when moving beyond their territorial borders. Therefore, this study also hopes to contribute to a more general understanding of the current trend toward externalization of migration controls through bilateral agreements with migrants’ countries of origin or transit—the rationale of which lies at the brink of law and politics.

Moreover, this work combines areas of law and policy that are generally considered neatly distinct, even in a temporal sense. Return and readmission are thus studied in relation to refugees’ access to territory and to protection, in search of a link that at face value

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<sup>37</sup>No claim is made here with respect to the legal status of MoUs and diplomatic assurances. This subject continues to be a divisive issue in scholarship and will be addressed in Chapter 6.

appears overly remote. However, a more attentive scrutiny of practice reveals how, in certain operative scenarios, especially in situations of extraterritorial migration controls, admission/non-admission and readmission overlap.

It is worth adding that there is a need for a legal analysis that comprises the synoptic review of widely disputed case studies that have sparked the interest of scholars and practitioners. While there have been separate studies on standard readmission agreements, agreements for technical and police cooperation, as well as diplomatic assurances, such three clusters of bilateral arrangements have not been conceptualized as falling within a broader category of *agreements linked to readmission* in light of their object and purpose—as this thesis intends to do. Moreover, it is to be noted that the only studies tackling agreements linked to readmission have so far addressed this topic from a non-legal perspective.<sup>38</sup>

The description of both legal texts and State practice is a stepping stone to ascertaining the relationship between bilateral agreements linked to readmission and the decision to return refugees to countries of origin or transit, thereby handing them over to authorities of countries where their life and liberty may be put at risk. Where the implementation of these bilateral arrangements hampers refugees'

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<sup>38</sup> See, e.g., Cassarino 2007; Jean-Pierre Cassarino, 'Dealing with Unbalanced Reciprocities: Cooperation on Readmission and Implications', in Cassarino (ed) *Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean Area* (Middle East Institute 2010).

access to protection, individuals are entitled to seek a remedy before the treaty monitoring bodies of the main international and European human rights conventions, which implicitly or explicitly embody the principle of *non-refoulement* and the right to access asylum procedures and effective remedies before removal.

It is also my hope that this thesis might contribute to clarify the nebulous boundaries of States jurisdiction, particularly in extraterritorial contexts, and, consequently, the geographical reach of refugee and human rights obligations. Indeed, the activity of human rights courts and committees is, by and large, openly or tacitly constrained by jurisdictional filters, which have traditionally been territorially limited. It follows that not all cases of alleged violations of rights can be considered admissible. Whereas States seem to be committed to alter geographies and move borders, an added value of this thesis would consist in exploring which avenues general international law offers to determine State responsibility in situation of joint migration control. In this context, agreements for technical and police cooperation seem to be designed to sever the jurisdictional link by distancing the territorial border and (potentially) overall responsibility from the European States.

The rationale behind the decision to focus this research on primary human rights obligations rather than on the general international rules on the responsibility of states for internationally wrongful acts rests

on the urgency to determine, at the outset, the content of human rights obligations and their normative potential. State responsibility for an internationally wrongful act can, indeed, be established only when two conditions are met: the conduct at issue is attributable to the State, and such conduct constitutes a violation of an international legal obligation.<sup>39</sup> Tracing the contours of ordinary obligations is, therefore, the foundation stone of any thorough analysis on State responsibility, in particular when EU Member States displace migration controls beyond borders to the high seas or the territorial waters of a third country, where the grounds for both exercising jurisdiction and engaging extraterritorial human rights obligations are arguably more tenuous.<sup>40</sup> However, if the analysis of inter-state responsibility enforcement mechanisms would be any more broad or exhaustive, it would simply be beyond the overall objective of this thesis.

In determining whether a given State conduct constitutes a breach of its international obligations, the principal focus will be on the primary obligation concerned. It is this primary obligation which must be interpreted and applied to the situation, thereby determining the substance of the required conduct, the standard to be observed, the

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<sup>39</sup> Article 2 ILC of the ‘Articles on the Responsibility of States for Internationally Wrongful Acts’ (2001), UNGA A/56/10, corrected by A/56/49 vol I/Corr.4 (ILC Articles).

<sup>40</sup> Cassese discusses the distinction between ‘primary’ and ‘secondary’ norms in: Antonio Cassese, *International Law* (2<sup>nd</sup> edn, Oxford University Press 2005) 244. See also, Ulf Linderfalk, ‘State Responsibility and the Primary-Secondary Rules Terminology’ (2009) 78(1) NJIL 53.

result to be achieved, and so forth.<sup>41</sup> Moreover, delving into the substance of human rights will also let us establish the efficacy of the legal guarantees to which every individual seeking protection in Europe is entitled, thereby serving to assist future research in the area of migration control and refugee rights.

Although this thesis does not focus exclusively on State responsibility only, outlining the primary types of liability, under general international law, that may arise from the *joint commitment* of two States in the area of migration control, is also important, given that clauses on common commitments are frequently inscribed within agreements linked to readmission with the objective of diluting or “washing down” the responsibilities of States. It must also be noted, however, that once it is established that responsibility can be engaged under human rights law and general international law (including indirect liability) by a State involved in joint migration controls with a third country, governments are called upon to forsake impermissible practices by adjusting their bilateral agreements and harmonizing the activities they carry out relating to the interception and return of unauthorized migrants to international and European human rights standards.

Whilst this thesis is oriented principally towards the field of refugee law, it also speaks directly to broader questions of public

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<sup>41</sup> ILC Articles Commentary, 54.

international law - especially treaty law and treaty interpretation, international human rights law, and EU law. The readership of this study may range from postgraduate students, scholars, and professional researchers in the aforementioned areas to human rights judges and lawyers, involved in cases of post-arrival expulsion or in cases of an extraterritorial nature. Such readers might benefit from the conceptual coherence and systematization of a complex subject, and rely on the extensive review of case law by the main international human rights bodies. The descriptive and normative analysis of international and European protection standards can also be useful in defining the content and scope of primary human rights obligations, especially when States are involved in migration control activities beyond their territorial borders. This work will also be of primary interest for government officers, policy-makers and intergovernmental and non-governmental organizations (NGOs) concerned with refugee law. Such groups and individuals might focus on the description and assessment of State practice in the field of post-arrival and pre-arrival readmission, on the impact of these practices on the rights of those seeking protection, or on the concrete proposals I make with respect to amending the text of readmission agreements.

## 1.5. Defining key concepts

### *1.5.1. Refugees, asylum, and protection*

Before scrutinizing the implications bilateral agreements linked to readmission have for human rights of protection seekers, some terminological clarifications are needed in view of agreeing - for the purpose of this thesis - on concepts whose meaning is always open to debate and interpretation. However, no exhaustive analysis of such concepts can be reasonably carried out in the ambit of the following two sections. In the area of refugee law, definitions are herein provided of terms such as, ‘refugee’, ‘asylum seeker’, ‘asylum’ (in its two facets, ‘right of asylum’ and ‘right to access asylum procedures’), ‘subsidiary protection’, and more broadly ‘access to protection.’ In the field of migration control, attention is focused on terms such as, ‘migrant’, ‘readmission’, ‘return’, ‘expulsion’, ‘removal’, ‘deportation’, ‘extradition’, and ‘safe third country.’

Pursuant to Article 1(a)(2) of the 1951 Geneva Convention, as amended by Article 1(2) of the 1967 Protocol,<sup>42</sup> a *refugee* is a person who

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<sup>42</sup> Protocol relating to the Status of Refugees, January 31 1967, 606 UNTS 8791.

Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

The term ‘*asylum seeker*’ does not exist in international refugee and human rights law treaties. It is, however, used by States to refer to a person seeking protection in a country other than one’s own. The latter may be based on refugeehood according to the elements of the 1951 Convention, or on the need for *complementary protection* – including subsidiary protection under EU law. In international law,

The term ‘complementary protection’ describes States’ protection obligations arising from international legal instruments and customs that complement - or supplement - the 1951 Refugee Convention. It is, in effect, a shorthand term for the widened scope of *non-refoulement* under international law.<sup>43</sup>

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<sup>43</sup> Goodwin-Gill and McAdam 2007, 285. For a comprehensive analysis of the concept of protection and complementary protection, see, Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press 2007). See also, Ruma Mandal, ‘Protection Mechanisms Outside of the 1951 Convention (“Complementary Protection”)', *UNHCR Legal and Protection Policy Research Series* (PPLA/2005/02, June 2005).

In the African context, the Convention governing the Specific Aspects of Refugee Problems in Africa adds new grounds for protection. Indeed, under Article 1(2), ‘the term “refugee” shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his



At the EU level, the Qualification Directive, adopted in 2004 by the EU Council and amended by the 2011 Recast Qualification Directive, is especially noteworthy. While the definition of refugee is entirely shaped on Article 1(a)(2) of the Geneva Convention, the definition of *subsidiary protection* employed in the Directive is based largely on international human rights instruments and embraces all those situations faced by asylum seekers that fall outside of the five grounds of persecution of the international refugee protection regime.<sup>44</sup>

It is also worth clarifying that ‘migrant is a wide-ranging term that covers people who move to a foreign country for a certain length of time.’<sup>45</sup> Although migrants and refugees often travel together,

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country of origin or nationality.’ See, 1969 OAU Convention, in force 20 June 1974, 1001 UNTS 45.

In the context of Latin America, the third conclusion of the Cartagena Declaration states that ‘the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.’ See, Cartagena Declaration on Refugees, 22 November 1984. For an overview of the regional systems of protection, see, David A Martin, Thomas Alexander Aleinkoff, Hiroshi Motomura and Maryellen Fullerton, *Forced Migration: Law and Policy* (2<sup>nd</sup> ed, West 2013) 57-63.

<sup>44</sup>See, Article 2(e) and (g) of the 2011 Recast Qualification Directive. Under Article 15 of the same Directive, an individual can obtain subsidiary protection if in her home country she would face a ‘serious harm’, defined as a ‘serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.’

<sup>45</sup>See, UNHCR, *Refugee Protection and Mixed Migration* <<http://www.unhcr.org/pages/4a16aac66.html>> accessed 28 March 2013 (UNHCR Mixed Migration).

migrants choose to move in order to improve their lives, while ‘refugees are forced to flee to save their lives or preserve their freedom.’<sup>46</sup> Since the recognition of a person as a refugee is of a declaratory (and not constitutive) nature, asylum seekers may enjoy a *prima facie* refugee status until a determination of their status on the part of the States discredit their claims.<sup>47</sup> Therefore, this thesis often uses the term ‘refugee’ to also refer to people seeking protection, although they have not been recognized as refugees yet.

Whilst individuals have a right to *seek asylum*,<sup>48</sup> they may not be able to claim a right to asylum, in the sense of ‘admission to residence and lasting protection against the jurisdiction of another State.’<sup>49</sup> According to the open definition adopted by the *Institut du Droit International* at its Bath Conference in 1950, ‘the term *asylum* means the *protection* offered by a State on its territory or elsewhere to an individual who came to seek it (emphasis added).’ More specifically, asylum has been defined as an institution ‘based on the principle of

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<sup>46</sup>ibid.

<sup>47</sup>See, *inter alia*, UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status (1979, reedited 1992) para 28; UNHCR, *Note on International Protection*, UN doc A/AC.96/914, 7 July 1999, para 16 (UNHCR Note on International Protection); James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005); Andreas Zimmermann and Claudia Mahler, ‘Article 1A, para 2’, in A Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) 73-4. The declaratory values of refugee status recognition was also approved in *R (Hoxha) v Secretary of State for the Home Department*, [2002] EWCA Civ 1403 (14 October 2002).

<sup>48</sup>See, e.g., Article 14 of the Universal Declaration on Human Rights (UDHR).

<sup>49</sup> Goodwin-Gill and McAdam 2007, 358.

*non-refoulement* and internationally or nationally recognized refugee rights.<sup>50</sup> It is offered only to foreigners who seek protection outside their country of origin from some threat or danger, and can be granted either on the State territory or elsewhere, including at the border or abroad. A further definition concerns *the right of asylum*, which refers to '[t]he right of the State, by virtue of its territorial sovereignty and in the exercise of its discretion, to allow a non-national to enter and reside, and to resist the exercise of jurisdiction by any State over that individual.'<sup>51</sup> Chapter 3 is, however, dedicated to examining the content and scope of an individual's *right to access asylum procedures*, which, when mentioned here, is meant to refer to the right of an asylum seeker to obtain access to all those procedures for the assessment of both refugee status under the Geneva Convention, and other forms of complementary protection - including subsidiary protection.

One of this thesis' main goals is to investigate whether the implementation of bilateral agreements linked to readmission can hamper refugees' *access to protection*, and, as such, further clarifications are necessary. In the absence of a uniform definition of

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<sup>50</sup> See, EMN Glossary, 'Asylum', <<http://emn.intrasoft-intl.com/Glossary/viewTerm.do?startingWith=A&id=13>> accessed 22 March 2013. The reason behind the choice to use the EMN's Glossary is twofold: i) it relies on authoritative sources, such as the UNHCR and the EU Commission; ii) it aims, *inter alia*, to improve comparability between EU Member States through the use and common understanding of the terms and definitions relating to asylum and migration.

<sup>51</sup> EMN Glossary, 'Right of Asylum' <<http://emn.intrasoft-intl.com/Glossary/viewTerm.do?startingWith=A&id=15>> accessed 22 March 2013.

‘protection’,<sup>52</sup> this work depicts this term as an overarching concept shaped by the combination of *non-refoulement* and the right to access asylum procedures and effective remedies before return to the country where refugees originate from or have transited through before seeking asylum. There is, however, a need to pinpoint what the notion(s) of ‘protection’ stand for in international law.

Under paragraph 1 of its Statute, the UNHCR ‘shall assume the function of providing international protection [...] to refugees which fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees.’ However, the notion of ‘protection’ has undergone notable interpretative changes over time, ranging from pure diplomatic assistance to more procedural and material aid in the light of the various challenges created by new refugee situations. The shift in the meaning of the notion of ‘international protection’ can be summarized as follows:

It has evolved from a surrogate for consular and diplomatic protection of refugees who can no longer enjoy such protection by their country of origin into a broader concept that includes protection not only of rights provided for by the 1951

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<sup>52</sup> Despite protection being the *raison d'être* of refugee policy, there is a neat definitional uncertainty. On this point, see, Guy S Goodwin-Gill, ‘The Language of Protection’ (1989) 1(1) *IJRL* 6; and Dallal Stevens, ‘What do We Mean by Protection?’ (2013) 20(1) *International Journal on Minority and Group Rights* 233.

Convention and the 1967 Protocol but also of refugees' human rights in general.<sup>53</sup>

While recognizing that the meaning of 'protection' remains somewhat elusive because of the difficulty in determining the fundamental obligation at the core of protection,<sup>54</sup> the refugee rights regime seems to comprise not only the 1951 Geneva Convention but also the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>55</sup> In Stevens' words:

The assurance of non-return facilitates the opportunity to access further rights, whether contained in the Refugee Convention or elsewhere. Though dependent on the approach of the asylum State, such access to rights is often deemed a form of protection that extends beyond pure territorial protection, and which might be described as 'rights protection.'<sup>56</sup>

At the EU level, the notion of 'international protection' has assumed its own legal significance referring to 'refugee status and

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<sup>53</sup>UNHCR, *Address by Ms Erika Feller, Director, Department of International Protection, UNHCR, to the XXVIII Round Table on Current Problems of International Humanitarian Law* (San Remo, 3 September 2004) <<http://www.unhcr.org/refworld/docid/42b7e2b92.html>> accessed 28 March 2013.

<sup>54</sup> Stevens 2013, 259.

<sup>55</sup> James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 8.

<sup>56</sup> *ibid*, 237.

subsidiary protection status.’<sup>57</sup> What emerges from the foregoing is how the concept of ‘*protection*’ has elicited several mutually reinforcing meanings from refugee law, human rights law, humanitarian law, and EU law by encompassing all those ‘activities aimed at obtaining full respect for the rights of the individual.’<sup>58</sup> In this regard, Chapter VII of the Qualification Directive identifies as part of the content of ‘international protection’ many other rights, which go beyond *non-refoulement* as the standard criterion of protection.<sup>59</sup>

This thesis embraces all the abovementioned facets of the notion of ‘protection’ outside the country of origin of the refugee. However, for the sake of this work’s clarity, ‘protection’ here is understood as an all-encompassing term that harmonically embodies the principle of *non-refoulement* and the right to access asylum procedures and effective remedies before return. The reasons for this can be easily understood. The principle of *non-refoulement* is paramount to the protection regime and remains the cornerstone of international refugee law. It is the primary obligation that States have to fulfil when dealing with a refugee, both at the border and beyond. Without it, protection

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<sup>57</sup> Article 2(a) of the Recast Qualification Directive.

<sup>58</sup> EMN Glossary, ‘Protection’ <<http://emn.intrasoft-intl.com/Glossary/viewTermByName.do?name=Protection>> accessed 22 March 2013.

<sup>59</sup> These rights include freedom of movement, the maintenance of family unity, the issue of residence permits and travel documents; the right to employment and education, as well the right to have access to social welfare, health care, accommodation, and integration facilities.

would become meaningless. However, in order for *non-refoulement* to be satisfied, individuals need to be able to express their fear of return to their home country and have their claims fairly and thoroughly assessed on their merits. Therefore, the right to access asylum procedures and the right to an effective remedy against an unfavourable asylum decision or expulsion order amount to procedural entitlements and essential preconditions to *non-refoulement*. As such, these three rights, despite their differences, are studied together as part of the notion of ‘protection’ in the host or would-be host EU Member State.

### ***1.5.2. Terms linked to readmission***

In the Annex of a 2002 EU Commission Communication, operational definitions are proposed in order to clarify the use of partially overlapping terms in the field of irregular migration.<sup>60</sup> The notion of *readmission* refers to ‘the act by a State accepting the re-entry of an individual (own national, third country national, or stateless person) who has been found irregularly entering to, being present in, or residing in another State.’<sup>61</sup>

*Return* ‘comprises comprehensively the preparation or

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<sup>60</sup> COM(2002) 175 final, Annex I ‘Proposed Definitions’ <[http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002\\_0175en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0175en01.pdf)> accessed 28 March 2013.

<sup>61</sup> *ibid.*

implementation aiming at the way back to the country of origin or transit, irrespective of the question whether the return takes place voluntarily or forced.’<sup>62</sup> *Expulsion* concerns an ‘administrative or judicial act, which terminates the legality of a previous lawful residence.’<sup>63</sup> *Removal* is an ‘act of enforcement, which means the physical transportation out of the country.’<sup>64</sup> Similarly, *deportation* refers to ‘the act of a State in the exercise of its sovereignty in removing an alien from its territory to a certain place after refusal of admission or termination of permission to remain.’<sup>65</sup> For the sake of clarity of this thesis, the above terms are herein used, by and large, interchangeably.

*Extradition* is, instead, a formal process concerning the surrender by the requested State to the requesting State of a person for the purpose of criminal prosecution or for the enforcement of a judgment.<sup>66</sup> Extradition will be excluded from the ambit of this thesis

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<sup>62</sup> *ibid.*

<sup>63</sup> *ibid.* Pursuant to Article 2(a) of the ILC Draft Articles on the Expulsion of Aliens, expulsion is ‘a formal act, or conduct consisting of an action or omission, attributable to a State by which an alien is compelled to leave the territory of that State [...]’. See, Draft Articles on the Expulsion of Aliens, in Report of the International Law Commission on the Work of Its Sixty-Fourth Session, UN GAOR, 64th Sess., Supp. No. 10, at 1-2, UN Doc. A/67/10 (2006).

<sup>64</sup> *ibid.*

<sup>65</sup> EMN Glossary, ‘Deportation’ <<http://emn.intrasoft-intl.com/Glossary/viewTerm.do?startingWith=D&id=66>> accessed 28 March 2013. In the Annex of the 2002 EU Commission Communication on ‘Proposed Definitions’, the term ‘deportation’ is used in the same context of ‘removal.’ See, COM(2002) 175 final, Annex I ‘Proposed Definitions.’

<sup>66</sup> UNHCR, *Note on Extradition and International Refugee Protection* (April 2008) 4 para 1.



for two reasons: first, it is not an instrument intended to combat or prevent irregular migration; second, there is an inverted relationship between the two involved parties. Indeed, the State requesting extradition is also the same that will receive the surrender, while the requested State is the one that sends back the addressee.<sup>67</sup>

Contrarily, in bilateral activities of migration control, the two actors involved in the ‘readmission’ process are the State that requests readmission and removes the unwanted migrant (*requesting State*) and the State that is requested to readmit (*requested State*). The third actor is represented by the person to be readmitted, who is, in theory, either an irregular migrant or a rejected asylum seeker deemed as a person who is not in need of international protection. However, as we will note throughout the course of this thesis, at times, refugees are also involved in either formal or informal return procedures. For the purpose of this study, the terms *irregular* (with no regular/legal status in the host country) and *undocumented/unauthorized* (without the required papers) migrant are accepted as synonyms and expanded to include also persons who cross an international border without valid documents.<sup>68</sup>

To facilitate secondary movements from the host, or would-be

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<sup>67</sup> Case law on extradition will be, however, referred to when appropriate to clarify the content of refugees’ fundamental rights.

<sup>68</sup> To read more on the concept of illegal immigration, see, Elspeth Guild, ‘Who is an Irregular Migrant?’, in Barbara Bogusz, Ryszard Cholewinski, Adam Cygan and Erika Szyszczak (eds) *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Martinus Nijhoff 2004).

host, country to another State, the notion of '*safe third country*' has been introduced. This concept - which will be discussed more in detail in Section 2.7 and 3.6 of this thesis - has been described as:

A procedural mechanism for shuttling asylum seekers to other States said to have primary responsibility for them, thereby avoiding the necessity to make a decision on the merits because another country is deemed or imagined to be secure.<sup>69</sup>

As removal of refugees whose status has not yet been determined can also take place to a third country, at least three actors are involved in such transfers: the country of origin ('first' country), the EU Member State where the asylum seeker makes, or is willing to make, her application ('second' country), and the country to which the individual is transferred (the 'third' country). This work moves across these States, following refugees on their way to Europe and their eventual move away from Europe. Emphasis is, however, on the 'second country' whenever and wherever it encounters the refugee.

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<sup>69</sup> Goodwin-Gill and McAdam 2007, 392.

## 1.6. Methodological framework and research design

### 1.6.1. Geographical scope

Agreements linked to readmission are not a new phenomenon and have been adopted by several States worldwide. Although developing countries are home to four-fifths of the world's refugees,<sup>70</sup> wealthy States have concluded a great number of readmission agreements, bilateral accords to carry out pre-emptive migration controls at sea, and, to a lesser extent, MoUs providing diplomatic assurances to facilitate the deportation of addressees. These wealthy States can use their political and economic clout to gain collaboration from third countries, which often lack both the necessary resources and interest to tightly guard their land and sea borders.<sup>71</sup> Within this general picture, EU Member States are those most involved in bilateral readmission cooperation with countries of origin and transit of immigrants, and rely upon bilateral agreements as a systematic and strategic tool to fight unauthorized entries.

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<sup>70</sup> According to the UNHCR, around four-fifths of the world's refugees flee to their neighbouring countries. See, UNHCR, *Global Trends 2011* (18 June 2012) <<http://www.unhcr.org/4fd9e6266.html>> accessed 28 March 2013.

<sup>71</sup> Paolo Cuttitta, 'Readmission and Forcibly Return in the Relations between Italy and North African Mediterranean Countries' (Ninth Mediterranean Research Meeting, Florence, Montecatini Terme, 12-15 March 2008) 8 <<http://www.altrodiritto.unifi.it/frontier/storia/cuttitta.pdf>> accessed 28 March 2013.

With regard to the geographical scope of this work, Italy and the UK have been chosen as case studies for two interwoven reasons. Italy is one of the most involved EU Member States in bilateral cooperation linked to readmission. The UK, instead, has historically been less prone to conclude agreements with third countries of origin or transit of migrants, and has only begun cooperation on migration issues in the last decade. Nevertheless, these two States are experiencing a new process of *diversification* of bilateral cooperation agreements designed to facilitate the return and readmission of undesired immigrants and asylum seekers. Italy and the UK provide, indeed, some of the best examples of the typologies of arrangements falling under the ‘agreements linked to readmission’ definition.

Whilst the UK has historically been regarded as an immigration country, Italy has traditionally been an emigration country. However, since the 1990s, Italy has started to face the challenge of massive regular and irregular immigration, with a significant impact of flows from Africa. Given its position in the Mediterranean, Italy has served as an important transit point for migrants moving toward Northern Europe.<sup>72</sup> These non-legal factors may help explain Italy’s proclivity

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<sup>72</sup> To read more on the patterns of emigration from Italy and to Italy, refer to, Robert Franz Foerster, *From Labour Emigration to Labour Recruitment: the Case of Italy* (Harvard University Press 1919); Jonathan Chaloff, ‘From Labour Emigration to Labour Recruitment: the Case of Italy’ in *Migration for Employment: Bilateral Agreements at a Crossroads* (OECD 2004); Asher Colombo and Giuseppe Sciortino, ‘Italian immigration: the Origins, Nature and Evolution of Italy’s Migratory Systems’ 9(1) 2004 *Journal of Modern Italian Studies* 49; Frank J Cavaoli, ‘Patterns of Italian Immigration to the United States’ (2008) 13 *The Catholic Social Science Review* 213.

in concluding agreements seeking to combat irregular entries and facilitate the return of undesired/unauthorized third country nationals.

At the same time, the dearth of readmission agreements concluded by the UK shows that identical or similar challenges do not always result in the same outcomes, and can instead differ significantly. For instance, in the UK, as a consequence of the stark increase of asylum applications in the 1990s, new pieces of legislation were issued, which substantially increased the penalties of ‘illegal entry.’<sup>73</sup> Thus, while Italy has opted for new compromises and agreements with countries of origin or transit of irregular immigrants, the policy of the UK has been more oriented toward ‘reinforcing traditional control structures shifting from external to internal logics of control.’<sup>74</sup>

It also bears pointing out that this research by no means aims to conduct a comparative analysis of the return policies and national laws on migration in both Italy and the UK. Instead, this thesis seeks to analyse different case studies through a practical framework within the research’s subject matter. The results drawn from this study’s selective exercise are also relevant with regard to the same typologies

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<sup>73</sup> See e.g., The Asylum and Immigration Act 1999 and the Nationality, Immigration, and Asylum Act 2002.

<sup>74</sup> Vollmer Bastian, ‘Country Report UK: Undocumented Migration Counting the Uncountable. Data and Trends across Europe’, *Clandestino Project* 51 (July 2009) <[http://clandestino.eliamep.gr/wp-content/uploads/2009/11/clandestino\\_report\\_united-kingdom\\_final\\_2.pdf](http://clandestino.eliamep.gr/wp-content/uploads/2009/11/clandestino_report_united-kingdom_final_2.pdf)> accessed 28 March 2013.

of arrangements concluded by other countries in the world with the intent of removing or preventing the arrival of unwanted foreigners.

### ***1.6.2. Third countries' selection***

The third countries selected for this thesis' analysis are those with which Italy and the UK are cooperating on readmission of irregular migrants. Moreover, in view of increased coherence, clarity, and efficient time-management, I have reduced the scope of application of this research to those same countries that have also been identified as a priority by the EU. The EU has employed the following criteria in selecting which countries it should enter into readmission agreements with:

Migration pressure from a third country concerned on a particular Member State or on the European Union as a whole, the cooperation on return by the third country concerned, as well as the geographical position of the third country concerned situated at a migration route towards Europe.<sup>75</sup>

The EU and its Member States continue to simultaneously pursue their return policies. Given the system of shared competence in the

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<sup>75</sup>Draft Council Conclusions defining the European Union strategy on readmission, 27 May 2011, para 4.

field of readmission,<sup>76</sup> a better understanding of how national systems carry out matters relating to readmission matters becomes considerably important, as States remain the primary actors in the issuance and implementation of return decisions.<sup>77</sup> It should also be observed that third target countries are selected with the intent of creating both a ‘buffer zone’ of States taking responsibility for transit migration around the EU and establishing relations with States producing higher migration pressure.<sup>78</sup>

In placing agreements linked to readmission within the complex international and European human rights law landscape, the selection of specific countries may facilitate an understanding of the functions of these arrangements and shed light on critical issues for the protection of refugees subjected to formal or informal return decisions. A more in-depth study would certainly have been instructive. However, this was not feasible given the particular

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<sup>76</sup> Since Article 4(2)(j) of the Treaty on the Functioning of the EU (TFEU) incorporates ‘Freedom, Security and Justice’ - which clearly encompasses also readmission - in the field of shared competence, the Union does not have the exclusive power to negotiate readmission agreements. The relationship between the EU and Member States is grounded on the principle of ‘sincere cooperation’ enshrined in Article 4(3) of the Treaty on the EU (TEU).

<sup>77</sup> To date, only the EU readmission agreements concluded with Sri Lanka, Albania, Hong Kong, Macao, Russia, Bosnia and Herzegovina, Macedonia, Moldova, Montenegro, Pakistan, Serbia, and Ukraine have entered into force. However, Algeria, China, Morocco, and Turkey have been invited to conclude a readmission agreement with the Union. On 21 June 2012, the negotiators of the EU Commission and of Turkey initialled a Readmission Agreement, which indicates the EU and Turkey shared interest in a more effective migration and border management.

<sup>78</sup> The only exceptions are Hong Kong and Macao, which do not present any strategic interest for the EU and its Member States. Readmission agreements with these two countries were concluded only in conjunction with the lifting of visa requirements.

circumstances of this thesis. Therefore, countries, such as Albania, Algeria, and Libya, have been incorporated into the analysis in the light of the fact they have concluded either readmission agreements (object of Chapter 5) or agreements for technical and police cooperation (object of Chapter 7) with Italy and the UK, respectively.

The readmission agreements with Albania are among the most sophisticated and detailed pieces of legislation within the well-assorted category of existing standard readmission agreements. Migration pressure and geographical position are the main reasons driving the EU Council to intensify relations on migration control issues with Libya standing as a key player in the Mediterranean region.<sup>79</sup> On 20 January 2011, the European Parliament adopted a recommendation where it welcomes the opening of negotiations between the EU and Libya in respect of the EU-Libya Framework Agreement,<sup>80</sup> and urges the Council and the Commission to conclude a readmission agreement with this key North-African partner.<sup>81</sup>

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<sup>79</sup> See, JHA Council, 'Conclusions on Cooperation with Libya on Migration Issues', adopted by the Justice and Home Affairs Council on 2-3 June 2005 <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/85255.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/85255.pdf)> accessed 28 March 2013. See also, Steve Peers, 'Readmission Agreements and EC External Migration Law', *Statewatch Analysis* no 17 <<http://www.statewatch.org/analyses/no-17-readmission.pdf>> accessed 28 March 2013. Following the uprising in Libya in February 2011, the EU has started running a € 30 million programme in Libya to address some of the most pressing needs, including security and migration control. See, European Union External Action, 'Libya', <[http://eeas.europa.eu/libya/index\\_en.htm](http://eeas.europa.eu/libya/index_en.htm)> accessed 28 March 2013.

<sup>80</sup> European Parliament recommendation of 20 January 2011 to the Council on the negotiations on the EU-Libya Framework Agreement(2010/2268(INI))para 1(b).

<sup>81</sup> *ibid*, para 1(f).



It should also be noted that, by relying on its Italian proxy on the Southern front, the EU has strengthened its bilateral relations with Libya and indisputably supported a practice aimed at keeping migrants and refugees away from the EU's borders by off-shoring or outsourcing migration controls to third countries. Diverse agreements for technical and police cooperation – among the main focuses of this analysis - have thus been concluded between Italy and Libya with the ultimate goal of intercepting migrants and asylum seekers at sea before they arrive to the gates of the EU.

In the framework of the post 9/11 'War on Terror' and the strengthening of migration policies, the European Commission has highlighted the gaps in the asylum system that could potentially be exploited by refugee seekers who are considered a threat for the security of the destination State, and urged EU Member States to adopt more restrictive border control policies to prevent refugees from exploiting such loopholes. It also underlined how the constraints posed by human rights law on the expulsion of suspected terrorists fostered a system where 'the policy options for dealing with excludable but not-removable persons are a very unsatisfactory one.'<sup>82</sup> In this sense, the UK has responded unusually to the security dilemma by formalizing diplomatic assurances for individuals to be deported

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<sup>82</sup>Commission Response to Conclusion 29 of the Extraordinary Justice and Home Affairs Council Meeting of 20 September 2001, para 2.4 <<http://eur-lex.europa.eu/Notice.do?mode=dbl&lang=en&ihmlang=en&lng1=en.en&lng2=da.d e.el.en.es.fi.fr.it.nl.pt.sv.&val=256736:cs>> accessed 28 March 2013.

pursuant to MoUs. The assurances exchanged between the UK with Ethiopia, Lebanon, Jordan, and Libya are examples of such written agreements through which an EU Member State mediates and negotiates with third countries on issues related to how foreigners viewed as a threat to the safety of the sending State should be treated. UK's MoUs are therefore part and parcel of this research (Chapter 6). Further details surrounding the rationale behind these case selections will be provided in the single Chapters in Part II.

### ***1.6.3. A study of law and practice***

In grasping divergences between legal and practical aspects of the same institution, attention should be focused on the way in which rules (*in casu* bilateral agreements linked to readmission) are applied in practice. The acquisition of knowledge cannot be limited to the study of legal texts. Rather, it is necessary to separately scrutinize how legal rules are operationalized, especially when the content of bilateral arrangements of migration control is kept secret or when a 'safe' return is based only on diplomatic assurances, such as in the case of MoUs.

Readmission discourse has been generally accompanied by a sense of bewilderment and fragmentation because of the plethora of instruments used by EU Member States both in removing undocumented migrants from their territory and in keeping them away

from the EU's borders. Cooperation with third countries on migration control is today conceivable as a network composed of different institutional instruments, ranging from development aid and labour exchanges to technical and police cooperation, and from standard readmission agreements to carrier sanctions, visa-policy, and liaison officers to monitor migration at distance as well as directly in the countries of origin.<sup>83</sup>

Despite this multifaceted apparatus of formal and informal measures of migration control, surveillance, and prevention, the scope of this thesis is limited to the main categories of bilateral agreements linked to readmission, which are analysed from an international law perspective. In so doing, attention is drawn to those instruments that address, more thoroughly, the issue of return of unauthorized migrants (including refugees whose claims have not yet been examined) to countries they originate from or transit through. These accords are standard readmission agreements, diplomatic assurances – whether or

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<sup>83</sup> For an overview, see, James Hathaway, 'The Emerging Politics of Non-Entré' (1992) *Refugee* 40-41; Ferruccio Pastore, 'Visas, Borders, Immigration: Formation, Structure, and Current Evolution of the EU Entry Control System' in N Walker (ed), *Europe's Area of Freedom, Security and Justice* (Oxford University Press 2004) 89-142; Annalisa Meloni, 'The Development of a Common Visa Policy under the Treaty of Amsterdam' (2005) *CMLRev* (2005) 1357; Didier Bigo and Elspeth Guild, 'Policing at a Distance: Schengen Visa Policies' in Didier Bigo and Elspeth Guild (eds) *Controlling Frontiers* (Ashgate 2005) 233-263; Steve Peers, *EU Justice and Home Affairs Law* (2nd ed, Oxford University Press 2006) 93-18; Steve Peers and Nicholas Rogers, *EU Immigration and Asylum Law* (Martinus Nijhoff Publishers 2006) 167-218; Violeta Moreno-Lax, 'Carrier Sanctions' in S Peers S, E Guild E, D Acosta, K Groenendijk and V Moreno-Lax (eds) *EU Immigration and Asylum Law* (2nd Ed., Vol. 2. Martinus Nijhoff Publishers 2012).

not inscribed within MoUs, and agreements for technical and police cooperation underlying pre-arrival interceptions.

The purpose of this study is to investigate whether refugees' access to protection can be hampered by the implementation of these bilateral accords. Therefore, a number of case studies have been incorporated as an integral element of the methodological framework, and, in particular, the accords entered into between Italy and the UK and non-EU third countries are studied against the backdrop of international refugee and human rights legal sources. As a first step, the terms of the selected agreements linked to readmission are described both comprehensively and separately, by means of an analytical approach. As a second step, State practice - through a narrative of the facts concerning the implementation of the accords in specific situations and emblematic cases - is brought into the picture in order to give more substance and shape to the theoretical discussion. Inevitably any enquiry into State practice is fraught with an unavoidable degree of uncertainty due to inaccessibility of relevant information, in particular with regard to communication between governments in the actual context of a maritime operation. Moreover, as States are not required to make public their use of diplomatic

assurances in the field, for example, of suspected terrorists' removal, State practice has commonly gone undocumented.<sup>84</sup>

In order to fully understand the real impact of bilateral agreements linked to readmission on refugee rights, it is necessary to acknowledge that the study of legal texts alone would not suffice in gaining a sufficiently comprehensive approach. Rather, equal attention has also to be given to the implementation of the law. It is as when at theatre, actors, both protagonists and walkers-on, stand on the stage performing their drama. They all hold the same plot. But, then, what makes the show either captivating or unpleasant is not simply a good or bad storyline, but how that storyline is acted out; how much verve actors imprint in the words of their plot; how far they improvise the lines of their scripts and seize the scene. Within this framing, drama critics sit in the obscure stalls silently and attentively beholding the moves of the actors, their dialogues, how they interpret and play their roles. Similarly, legal scholars, as conscious spectators, observe and comprehend law in its theoretical and practical application. And in their critique, the *pars destruens*, which draws State practice and existing law into question, thus destabilizing the status quo, is

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<sup>84</sup>Such a lack of information has led HRW to recommend governments 'to include in periodic reports to the Committee against Torture, the Human Rights Committee, and other relevant international and regional monitoring bodies detailed information about all cases in which requests for diplomatic assurances against the risk of torture [...] have been sought or secured in respect of a person subject to transfer.' See HRW, *Still at Risk, Diplomatic Assurances, No Safeguard against Torture* (April 2005) Vol 17 no 4(d) 80.

balanced by a *pars construens* that gives way to moments of the productivity and creativity.

In this general landscape, there are not only texts, storylines, and scripts, but also scenes, (inter)actions, digressions, and detours. A theatrical show is usually the fruit of the intertwining between a given storyline - which aims to create a frame of certainty, a guideline for actors - and the actual performance, which is influenced by human inclination, sensibility, hitches, and contingencies. That is why a theatre artwork is fundamentally irreproducible. Accordingly, the impact of bilateral agreements linked to readmission on refugees' access to protection is not only the upshot of a good or bad legal text, but also the result of the mutable embrace between a standardized written accord and the implementation by State authorities of the terms of that accord in single and therefore ever-diverse instances.

#### ***1.6.4. An overview of treaty law and methods of interpretation***

This study involves research in the field of treaty interpretation. The different actors involved in the process of interpretation - States parties, specified bodies and courts, or international bureaucracies - have the role of establishing the meaning of treaty texts and to apply said interpretations in different situations.<sup>85</sup> Pursuant to Article

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<sup>85</sup> This list is not meant to be exhaustive. On actors engaged in the process of interpretation, see, Venzke 2012, 64-66.

2(1)(a) of the Vienna Convention on the Law of Treaties (VCLT), treaties may be defined as ‘international agreement[s] concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.’<sup>86</sup> The VCLT is the starting point for any study on the practice of treaties, as it establishes all of the procedures for making, bringing into force, amending, and terminating an international agreement (law of treaties). The International Law Commission (ILC), appointed by the UN General Assembly in 1947, was entrusted with the task of promoting a progressive development of international law and its codification. Thus, on the basis of a final set of draft Articles agreed to by the Commission in 1966, the UN Conference on the Law of Treaties adopted the Convention on 22 May 1969.

The Convention applies both to multilateral and bilateral treaties - the latter meant as agreements between two States - and does not cover agreements falling under domestic jurisdiction and governed by national law.<sup>87</sup> Furthermore, international agreements that have been concluded in a simplified manner or that are contained in a more

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<sup>86</sup> Although the VCLT refers only to international agreements in a written form, the legal force of oral agreements - which are, however, very rare - is not affected. See, VCLT, 23 May 1969, in force 27 January 1988, 1155 UNTS 331, 8 ILM 679.

<sup>87</sup> Reference is to agreements between individuals or between private actors among themselves or with the State. See Gros in the ILC, YBILC 1962, I, 215, para 42; Oscar Schachter, ‘The Twilight Existence of Non-binding International Agreements’ (1997) 71(2) AJIL 296.

informal instrument, such as a Memorandum or an Exchange of Letters have the same legal effect of formal treaties, provided they meet all the criteria required by the definition of Article 2 of the VCLT.<sup>88</sup> Article 102 of the UN Charter requires the registration of ‘every treaty and every international agreement.’ However, since the concept of ‘international agreements’ is broader than the notion of ‘treaties’, ‘all treaties are international agreements but not all international agreements are treaties.’<sup>89</sup> This is to say that if an agreement satisfies all the criteria of Article 2(a), the specific designation of an international instrument as an act, agreement, charter, covenant, convention, declaration, exchange of notes, memorandum of understanding, pact, or protocol, has no particular legal meaning and does not automatically indicate its status as legally binding or not.<sup>90</sup> Indeed, as the International Court of Justice (ICJ) held in the *South West Africa (Preliminary Objections)* case, ‘there are many different types of acts to which the character of treaty stipulations has been attached.’<sup>91</sup>

Furthermore, even though Article 2 does not restrict the freedom of

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<sup>88</sup> See, Commentary on Draft Article 2 in (1996) YBILC, II, 173,188-9.

<sup>89</sup> Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 77.

<sup>90</sup> See, Villiger 2009, 80-81. In the *Customs Regime between Austria and Germany* Advisory Opinion (PCIJ, 1931, Series A/B no 41, 47) the Court affirmed that ‘from the standpoint of the obligatory character of international engagements, it is well known that such engagements may be taken in the form of treaties, conventions, declarations, agreements, protocols, or exchange of notes.’

<sup>91</sup> *South West Africa (Preliminary Objections) Cases*, ICJ Reports 1962, 331.



the parties to enter into a non-binding arrangement, the requirement that an agreement is governed by international law encompasses the *intention of the parties to create international legal obligations*.<sup>92</sup> The intention to create obligations under international law is a *conditio sine qua non* of treaties and it must be inferred from the terms of the agreement and the context of its conclusion, rather than from subsequent statements of the parties that solely concern their purpose.<sup>93</sup> The intent to create obligations under international law also distinguishes treaties from agreements governed by domestic law where the law of the contract is that of one of the Contracting States.<sup>94</sup>

The VCLT does not require a treaty to be in a particular form or to use special wording, and it is up to the negotiating State to decide whether it will conclude a treaty, or something less.<sup>95</sup> Since international law places the principal emphasis on the intentions of the parties, ‘the law prescribes no particular form [and] parties are free to choose what form they please provided their intention clearly results from it.’<sup>96</sup>

Treaties can be concluded between States and other subjects of

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<sup>92</sup> ILC Report 1966, YBILC 1966 II 189, para 6. See also, Villiger 2009, 81.

<sup>93</sup> *Qatar v Bahrain* (Jurisdiction and Admissibility) ICJ Reports (1994) 121-22, paras 26-27.

<sup>94</sup> See Francis A Mann, ‘Another Agreement between States under National Law?’ (1974) AJIL 490-496.

<sup>95</sup> This issue will be addressed more in depth in Part II of Chapter 6, which deals with the legal value under international law of diplomatic assurances for a ‘safe’ expulsion.

<sup>96</sup> *Temple of Preah Vihear* (Preliminary Objections) ICJ Reports 1961, 31.

international law as well as between international organizations. The fact that an agreement is ‘concluded’ implies that from that point in time the instrument binds the parties under international law. Indeed, the purpose of treaties is to create legally binding relations between the parties giving rise to rights and obligations, which may be invoked or enforced before national and international courts of law.<sup>97</sup> The conclusion of an agreement indicates that the treaty starts to produce legal effects and that the Parties consent to be bound by it as provided for in Articles 11–17 of the Vienna Convention. A bilateral treaty is considered as having been concluded once both Parties sign it. However, ‘conclusion’ and ‘entry into force’ are two distinct phases and a treaty will become legally binding only once it has entered into force for that State.<sup>98</sup> Indeed, pursuant to Article 18,

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

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<sup>97</sup> Villiger 2009, 78.

<sup>98</sup> *ibid* 79.

The consent to be bound by a treaty may be expressed not only by heads of State but also by governments, ministries, and other State organs, provided they represent the State and are duly authorized to act on its behalf. In other words, other public bodies that have a legal personality separate from that of the State cannot express consent. Furthermore, for a treaty to enter into force in a certain country, it is necessary that it becomes part of its domestic law.<sup>99</sup> The process of internalization of international norms assumes relevance in particular with regard to those treaties which confer rights to individuals, such as human rights treaties, or create obligations for States with regard to the rights of own nationals or third country nationals. Treaties that accord rights and obligations to individuals can be given effect only if they become part of national law and if they are provided with enforcement mechanisms. It is, then, up to the State to decide how to implement domestically international obligations.<sup>100</sup>

With the aim to give concrete meaning to individual refugee rights and State obligations, Chapters 2, 3, and 4 will examine the principle

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<sup>99</sup> Pursuant to the monist doctrine, treaties are internalized within the domestic legal order as soon as they have been concluded, in accordance with constitutional law, and have entered into force. Hence, there is no need to transform international law into national law since they are both part of one legal system. While the general rule is that they are self-executing, in some cases, legislation, in particular an act of Parliament is required for them to have full effect into domestic law. According to the dualist school, instead, legislation is always necessary to give effect to international treaties and to incorporate into domestic law rights and duties they create. Therefore, an international accord takes the status of the national legal source employed to transform it into national law and can be modified or repealed by succeeding legislation.

<sup>100</sup> Amendments as well as enactment of new legislation are possible and are preferably to be made before the State gives its consent to be bound.

of *non-refoulement* and the individual's right to have access to asylum procedures and effective remedies, as enshrined in international refugee and human rights treaties. Chapters 5, 6, and 7, instead, will analyse the text of the different typologies of agreements linked to readmission and their impact on core refugee rights.

This thesis relies on the general rules of treaty interpretation as enshrined in Articles 31-33 of the VCLT.<sup>101</sup> According to Article 31 of the VCLT, 'a treaty shall be interpreted in *good faith* in accordance with the *ordinary meaning* to be given to the terms of the treaty in their *context* and in light of its *object and purpose*.'<sup>102</sup> Thus, a literal reading of the text taking into account the meaning that would be attributed to the treaty at the time of its conclusion shall be privileged. As inferred from the reading of a great number of decisions of

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<sup>101</sup> Article 33 of the VCLT is about interpretation of treaties authenticated in two or more languages.

<sup>102</sup> Under Article 31(2) of the VCLT, 'The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.'

international courts and tribunals, the ‘ordinary meaning’ of a treaty is determined by reference to both everyday and technical language.<sup>103</sup>

At the same time, the reference to ‘the object and purpose’ of the agreement also implies a teleological argumentation. ‘The object and purpose’ of an agreement – meant as a single lexical unit<sup>104</sup> - refers to the reasons for which the treaty exists, to the *raison d’être* of a treaty,<sup>105</sup> as presumably conferred by the original lawmaker. The intentions held by the parties are the crucial element to determine the ‘object and purpose’ of a treaty, which is always used in relation to the ‘ordinary meaning’, as a supplementary second step in the process of interpretation.<sup>106</sup> As ‘object and purpose’ can vary according to the circumstances, it has been proposed that:

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<sup>103</sup>See, e.g., *Bankovic and Others v Belgium and Others*(2007) 44 EHRR 86 (*Bankovic*) paras 59-62; Case Concerning the Application of the Convention for the Prevention and Punishment of the Crime of Genocide (Merits), ICJ, 26 February 2006 (*Bosnia Genocide case*) para 160-2; Dispute Concerning Filletting within the Gulf of St Lawrence (*Canada v France*), Arbitral Tribunal established by Agreement of 23 October 1985, Award of 17 July 1986, *ILR* 82, 613 (*La Bretagne Arbitration*); *James and Others v UK* (1986) Series A no 98, para 61; *Schiesser v Switzerland* (1979) Series A no 34, para 28. See also, Ulf Lindefalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007).

<sup>104</sup>Linderfalk 2007, 207-9.

<sup>105</sup>Pessou, ILC’s sixteenth session, 765th meeting, *ILC Yearbook*1964 Vol 1, 278 para 45; Villiger 2009, 321.

<sup>106</sup> This can be inferred from the *travaux préparatoires* of the VCLT. See, Draft Articles with Commentaries (1966) *ILC Yearbook* 1966, Vol 2, 221 para 12. Relevant case law include: *Hirsi Jamaa and Others v Italy* App no 27765/09 (23 February 2012) paras 171-7; *Case Concerning the Application of the Convention for the Prevention and Punishment of the Crime of Genocide* (Merits) ICJ, 26 February 2006, paras 167-9 (*Bosnia Genocide case*); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004), Advisory Opinion, 9 July 2004, para 109; *Loizidou v Turkey* (preliminary objections) (1995) 20 EHRR 99, para 62; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (West Africa) Notwithstanding Security Council Resolution*

If it can be shown that the thing interpreted is a generic referring expression with a referent assumed by the parties to be alterable, then the *telos* of a treaty shall be determined based on the intentions held by the parties at the time when the treaty is interpreted. In all other cases, the *telos* shall be determined based on the intentions held at the time when the treaty was concluded.<sup>107</sup>

Pursuant to Article 32 of the VCLT,

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

These interpretative rules apply to all treaties. And each treaty has its own *telos*. Thus, whilst, for example, the purpose of a readmission agreement is to facilitate the arrangements for persons' movement and

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276 (1970) (Advisory Opinion) ICJ, 21 June 1971, paras 66-7 (*Namibia case*). See also, Ian Brownlie, *Principles of Public International Law* (4<sup>th</sup> edn Clarendon 1990) 627; Robert Jennings and Arthur Watts, *Oppenheim's International Law*, (Vol 1, 9<sup>th</sup> ed Oxford University Press 1992) 1267; Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 287; Linderfalk 2007, 203.

<sup>107</sup>Linderfalk 2007, 211.

their readmission between both countries,<sup>108</sup> a different treaty, such as the Genocide Convention, ‘was manifestly adopted for a purely humanitarian and civilizing purpose.’<sup>109</sup>

Furthermore, subject to a dynamic and evolutive interpretation, a treaty should be conceived of as a living instrument in the light of the socio-political changes of each era.<sup>110</sup> In support of this view, the ICJ, in its Advisory Opinion in the *Namibia* case, held that ‘an international instrument has to be interpreted and applied within the entire legal system prevailing at the time of the interpretation.’<sup>111</sup> In conclusion, while the intentions of the parties are supplementary means of interpretation, the main methods remain textual, contextual, and teleological.

### ***1.7. The interrelation between international refugee law and human rights law***

This study rests on a premise. It is no longer possible to interpret and apply international refugee law, and more specifically, the 1951 Geneva Convention in isolation from the text of international human

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<sup>108</sup>See, e.g., the Preambles to the readmission agreements concluded by the UK with Albania and Algeria.

<sup>109</sup>*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) 28 May 1951, ICJ reports 1951, 23.

<sup>110</sup> Rudolf Bernhardt, ‘Evolutive Treaty Interpretation, especially of the European Convention on Human Rights’ (1999) 42 *German Yearbook of International Law* 12, 21.

<sup>111</sup>*Namibia case*, para 53.

rights treaties and the relevant case law.<sup>112</sup> And, as some authors argue, the protection of refugees is a cornerstone of international human rights law.<sup>113</sup> In this vein, the material and normative scope of the right to *non-refoulement*, the right to access asylum procedures, and the right to an effective remedy will be reconstructed by investigating the text of the relevant provisions of the Geneva Convention, the international human rights treaties, and the case law of their monitoring bodies (ECtHR, Committee against Torture, and Human Rights Committee (HRC)), as well as academic literature.

In explaining why human rights law is herein handled alongside refugee law (without overlapping these two areas), it should be kept in mind that the rights enshrined in the Geneva Convention are subjected to a complex ‘structure of entitlement’, depending on their relationship with the State in which they are present.<sup>114</sup> Thus, while all refugees falling under the *de jure* or *de facto* jurisdiction of a State party benefit from a number of core rights, additional and different entitlements accrue: i) as soon as they enter a State party’s territory; ii) as soon as they are lawfully within that State’s territory; iii) when

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<sup>112</sup> See, e.g., Tom Clark and Francois Crépeau, ‘Mainstreaming Refugee Rights. The 1951 Refugee Convention and International Human Rights Law’ (1999) 17(4) NQHR389, 389. Also the EXCOM Conclusion No. 95 (LIV) on International Protection (10 October 2003) which underlines the ‘complementary nature of international refugee and human rights law.’

<sup>113</sup> Cathryne Costello, ‘The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?’ (2005) 7(1) EJML 35.

<sup>114</sup> Hathaway 2005,154. See also Goodwin-Gill and McAdam 2007, 154-92.



they are lawfully staying within that State's territory: or iv) when they are permanently residing there.<sup>115</sup> Moreover, under Article 3, the Geneva Convention applies without discrimination only as to 'race, religion, or country of origin.' In contrast, international human rights law is not grounded in the concept of nationality or territory, but in the concept of jurisdiction, and as such it pertains to any individuals, without discrimination, by virtue of their humanity.<sup>116</sup>

It should also be observed that international human rights conventions have judicial or quasi-judicial treaty monitoring bodies, which can be used as redress mechanisms by both States and individuals whose rights have been violated. No such devices exist under the Geneva Convention on the basis of which alleged victims may only lodge a complaint to the UNHCR or seeking protection under domestic law. Human rights law would also embrace a wider number of potential victims of human rights abuses, since it applies to all persons in need of protection, regardless of their refugee status under Article 1(a)(2) of the Geneva Convention.

The concept of '*non-refoulement*' embodied in Article 33 of the Geneva Convention is less broad than the one found in the human rights treaties, which, therefore, stand as a bulwark against the reliance on the regime of exceptions set forth in Article 33(2) of the

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<sup>115</sup> Hathaway 2005, 154-5.

<sup>116</sup> Alice Edwards, 'Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders' (2009) 30(3) MJIL763, 793.

Geneva Convention.<sup>117</sup> For those States parties to the Geneva Convention that have also ratified more expansive international human rights treaties, exclusion from refugee status - even when an individual is considered a threat to national security of the destination State - shall always be applied restrictively bearing in mind that Article 33(2) exceptions can never be invoked when primary non-derogable human rights are concerned.<sup>118</sup>

Limitations of the 1951 Geneva Convention persuaded international human rights bodies to rely on relevant treaties to establish complementary forms of protection to be accorded to individuals falling outside the scope of the international refugee protection regime. By extending the basis of protection well beyond persecution to multiple situations in which serious harm is likely to be suffered, human rights law contributes to filling in the gaps created by the Geneva Convention, thus strengthening and reinforcing the overall safeguards afforded to individuals in need of protection outside their country of origin or habitual residence.<sup>119</sup>

The comprehensive approach of the international human rights bodies - especially the ECtHR - to the recognition of refugee rights

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<sup>117</sup> Under Article 33(2) of the Geneva Convention, the principle of *non-refoulement* ‘may not [. . .] 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.’

<sup>118</sup> See, Chapter 2 on the relevant jurisprudence of international human rights bodies. See also, *Hirsi v Italy*, Concurring Opinion 42.

<sup>119</sup> Edwards 2009, 795.

and State obligations contributes to painting the content of ‘*protection*’ as a mosaic composed of diverse but matching pieces. In order to be effective, protection must comprise not only guarantees of *non-refoulement*, but also the two procedural rights to access asylum procedures and effective remedies before return.

### ***1.8. The protection of human rights in EU Law***

The European paradigm of human rights protection constitutes a system where the coexistence of a plurality of domestic, international, and supranational regimes are engaged in promoting and safeguarding human rights and fundamental freedoms.<sup>120</sup> Over the past decades, we have witnessed more and more national courts seeking guidance from the judgments of international and supranational courts when ruling on substantive legal issues concerning human rights. At the same time, international and supranational courts have also, even more frequently, relied on national courts’ jurisprudence through a dialogic and interactive process.

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<sup>120</sup> For example, under Article 6(1) and (3) of the Treaty of the European Union (TEU), '[t]he Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union [...] which shall have the same legal value as the Treaties.

[...] Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

Although EU law is not the focus of this thesis, some considerations are nonetheless noteworthy. After the numerous attempts of national constitutional courts to question the primacy of EC law *vis-à-vis* constitutional constraints,<sup>121</sup> the European Court of Justice (ECJ) felt the urgency to claim its title as the guardian of human rights in Europe, thus enhancing its new vitality within the European paradigm of human rights protection. The acknowledgement of the ECJ as a court able to deal with the protection of human rights occurred for the first time in the *Stauder v City of Ulm* case in 1969.<sup>122</sup> A year later, in the *Handelsgesellschaft* case, the ECJ recognized human rights as fundamental principles derived by the constitutional traditions of Member States.<sup>123</sup> In the *Nold II* case, the ECJ stated that in addition to the constitutional traditions common to Member States, international human rights treaties should be used as guidelines for the interpretation of

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<sup>121</sup> See e.g., *Frontini* case and *Solange I*. In the latter judgment the Court stated that: ‘...As long as the integration process has not progressed so far that Community law receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law, a reference to the Federal Constitutional Court [...] is admissible and necessary [...] in so far as [EC law] conflicts with one of the fundamental rights of the Basic Law.’ BVerfGE 37, 271: [1974] 2 CMLR 5. While in *Solange I*, the Court manifested its scepticism with regard to the capacity of the ECJ to provide an adequate protection for fundamental freedoms,<sup>121</sup> in *Solange II*, the German Constitutional Court gave up its reservation. See, *Solange I*, 29 May 1974, BVerfGE 37, 271 [1974] 2 CMLR 540; *Solange II* case, BVerfGE 73, 339 [1987] 3 CMLR 225.

<sup>122</sup> The Court affirmed that ‘interpreted this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court.’ Case 29/69 *Stauder* [1969] ECR 419.

<sup>123</sup> Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1146.

Community law by the ECJ, thus underscoring the deference toward the ECHR as a source of inspiration within the Community legal order.<sup>124</sup>

While the relationship between the ECJ/CJEU (Court of Justice of the EU) and the ECtHR has not always been coherent, it seems to be governed by mutual cooperative interactions. On different occasions, the ECJ has tackled the same human rights set out in the ECHR. For instance, in the judgment *European Parliament v Council*, the Court held that the right to family life must be applied ‘in a manner consistent with the requirements flowing from the protection of fundamental rights.’<sup>125</sup> It is also to be noted that, on 1 June 2010, the EU acceded to the ECHR following the entry into force of Protocol 14 to the ECHR. The accession became a legal obligation under Article 6 of the Treaty of the European Union (TEU), which provides that the EU will accede to the ECHR, recognizes the rights and principles set out in the EU Charter of Fundamental Rights (CFR), and affirms that:

Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the

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<sup>124</sup> Case 4/73 *Nold II* [1974] ECR 507.

<sup>125</sup> Case C–540/03 *Parliament v Council* [2006] ECR I—5769, para 104. Moreover, in dealing with the Family Reunification Directive in the field of migration law, the ECJ considered the right to family life (Article 8 of the ECHR) to be a key element, which should be taken into account by national authorities when determining the lawfulness of the refuted measure. See, Case C–60/00 *Carpenter* [2002] ECR I–6279; Case C–109/01 *Akrich* [2003] ECR I–9607; and Joined Cases C–482 and 493/01 *Orfanopoulos* [2004] ECR I–5257.

constitutional traditions common to the Member States, shall constitute general principles of the Union's law.<sup>126</sup>

A few words should also be spent on the EU CFR, which sets out a whole range of civil, juridical, economic, and social rights and has become legally binding with the entry into force of the Lisbon Treaty on 1 December 2009.<sup>127</sup> The incorporation of the CFR in the Treaty of Lisbon expands the power of the CJEU to interpret whether both the EU institutions and Member States follow human rights standards in making and implementing EU law, respectively.<sup>128</sup> Indeed, while the Charter will certainly apply to EU institutions, it only applies to the Member States when they implement EU law.

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<sup>126</sup> Pursuant to Article 2 of the TEU, '[the] Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.' Additionally, Article 21(1) of the TEU reads that: '[the] Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.'

<sup>127</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, entered into force, 1 December 2009.

<sup>128</sup> See, Migration Watch UK, *The Lisbon European Reform Treaty Impact on Asylum and Immigration Policy*, <<http://www.migrationwatchuk.org/briefingPaper/document/82>> accessed 28 March 2013. The Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom states that 'nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom, except in so far as Poland or the United Kingdom has provided for such rights in its national law' (Article 1(2)).

Additionally, the Lisbon Treaty also extends the CJEU's jurisdiction over asylum and immigration policy,<sup>129</sup> provides for the gradual introduction of an integrated management system for external borders,<sup>130</sup> and empowers the EU to develop common policies for asylum and immigration.<sup>131</sup> With regard to the legal effect of the Charter, it ranks now as primary Union Law and compliance with it has become a requirement for the validity and legality of the EU's secondary legislation in the field of asylum. As established in Article 51 of the Charter, its scope of application is limited to the areas in which Member States are implementing Union Law and it 'does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.'<sup>132</sup>

Although the TEU, as amended by the Lisbon Treaty, provides that the Charter will have 'the same legal value as the treaties', it does not constitute, properly speaking, a treaty as a matter of international law, since it is not an agreement between States in the meaning of

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<sup>129</sup> ECJ's jurisdiction in immigration, asylum and civil law applies equally to all Member States, including the UK and Ireland, but only in so far as they have opted into the legislation. See, Steve Peers 'UK and Irish Opt-outs from EU Justice and Home Affairs (JHA) Law' *Statewatch Analysis* No 4, *EU Lisbon Treaty* (26 June 2009) 12 <<http://www.statewatch.org/news/2009/jun/uk-ireland-analysis-no-4-lisbon-opt-outs.pdf>> accessed 28 March 2013.

<sup>130</sup> See, Article 62(1)(c), Chapter 2 under Title IV of the Lisbon Treaty.

<sup>131</sup> *ibid*, Article 63. The Lisbon Treaty brings Visas, Asylum and Immigration together with all matters on police cooperation and on civil and criminal law into a shared competence, now entitled 'Area of Freedom, Security and Justice' which constitutes the Title IV of Part III of the Lisbon Treaty.

<sup>132</sup> Article 6(1) TEU as amended by the Lisbon Treaty also states that the Charter 'does not extend in any way the competences of the Union as defined in the Treaties.'

Article 2(a) of the VCLT. Indeed, the CFR has not been signed and ratified by the Member States, and has yet to have its provisions included in the Lisbon Treaty.<sup>133</sup>

Pursuant to Article 52(4) of the Charter,

Insofar as this Charter contains rights, which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law from providing more extensive protection.<sup>134</sup>

Therefore, the provisions of the Charter shall be interpreted and applied in accordance with the ECHR principles as determined by the jurisprudence of the Courts of Strasbourg and Luxembourg. Other international human rights instruments can be considered sources of inspiration for provisions of the Charter. According to Article 53,

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<sup>133</sup> The CFR was signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission on behalf of their institutions at the European Council meeting in Nice on 7 December 2000.

<sup>134</sup> According to the 'Explanations' to Article 52, '[t]he reference to the ECHR covers both the Convention and the Protocols to it. The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case law of the European Court of Human Rights and by the Court of Justice of the European Union. The last sentence of the paragraph is designed to allow the Union to guarantee more extensive protection. In any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR.' See, 'Explanations relating to the Charter of Fundamental Rights' (2007/C 303/02).



Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

The reading of Article 53 indicates how the Charter tends to expand rather than restrict human rights protection in the Union by also recognizing the relevance of international agreements to which Member States are a party for interpreting and enhancing human rights principles as enshrined in the Charter itself. Moreover, human rights protection within the EU area is also enhanced by the EU's approach to jurisdiction. Being it functional rather than territorial, Article 51 requires Member States to adhere to their EU fundamental rights obligations whenever they act within the scope of EU law,<sup>135</sup> therefore even in extraterritorial contexts.<sup>136</sup>

I mostly rely on EU law only when providing a background of the description of the legal instruments that apply to the rights of refugees in the European context. Although the reader would expect a more thorough analysis of the EU legal framework, this thesis is primarily

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<sup>135</sup> See, Explanations to Article 51 EU CFR. 'Explanations relating to the Charter of Fundamental Rights' (2007/C 303/02) OJ C/303/17.

<sup>136</sup> Cathryne Costello, 'Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored' (2012) 12(2) HRLR 307.

about the standards of protection offered by international refugee and human rights law, in particular the ECHR. Nevertheless, EU law human rights principles are, in many cases, part and parcel of those standards and are discussed when appropriate. Despite the fact that EU law constitutes an additional regime of refugee protection engaged in dialogue and interaction with international refugee and human rights law, attention is herein shifted away from the CJEU and is instead focused on international refugee and human rights treaties and the case law of the relevant monitoring bodies.

## Part I

### Refugees' Admission and Readmission: International and European Protection Obligations

*Human rights law is important for asylum seekers because the focus on humanity transcends nationality in the construction of protection. The discourse of human rights envisages a community of entitlement based on notions of personhood rather than status.*<sup>137</sup>

Colin Harvey, 'Seeking Asylum in the UK, Problems and Prospects'

In certain operative scenarios, especially in situations of extraterritorial migration controls, the practices of admission and readmission overlap. Through the lens of international human rights and refugee law, Part I of this thesis explores the scope of the relevant international refugee and human rights protection standards binding EU Member States each time they deal with the admission or readmission of refugees. The relevant international human rights and refugee law instruments - sought at two different levels concurrently in force in every EU Member State - encompass: i) at United Nations level, the 1951 Convention relating to the Status of Refugees (Geneva

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<sup>137</sup> Colin Harvey, *Seeking Asylum in the UK, Problems and Prospects* (Butterworths 2000) 35.

Convention) and its 1967 Protocol, the UN Convention against Torture (CAT), and the International Covenant on Civil and Political Rights (ICCPR); and, ii) at the Council of Europe level, the 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR).

The main question this thesis grapples with is whether the implementation of bilateral agreements linked to readmission may hamper refugees' access to protection, which is understood here as the combination of the foundational principle of *non-refoulement* (either direct or indirect) and two correlated procedural entitlements: the right to access asylum procedures and the right to an effective remedy before return. Part I will investigate whether these core international and European legal norms apply to individuals transferred (or about to be transferred) to countries of origin or transit while seeking protection within the territory of an EU Member State, at its borders, or even on the high seas. Despite the fact that the abovementioned spectrum of rights is not meant to be exhaustive, these legal principles can, however, be regarded as the primary international obligations applying to refugees (regardless of whether their status has been recognized or not) in the phase of arrival at, and expulsion from, the State of destination (or even at sea) to third countries.

A comprehensive analysis of the different interpretative approaches used to reconstruct the meaning, scope, and legal content

of these international human rights principles would exceed the reach of this research. Rather, the following three Chapters aim to draw a general overview of the main international and European human rights law principles asylum seekers may invoke to enjoy protection from *refoulement*, and access to asylum procedures and effective remedies before return. The existence of a clear legal framework is particularly important when decisions are taken at the border, in transit zones, or beyond territorial borders with regard to an asylum seeker who is seeking to enter or has entered irregularly into an EU Member State's territory.

It is to be clarified that the international jurisprudence on *non-refoulement* and the right to an effective remedy herein examined also draws on cases of expulsion/extradition where the applicant is not an asylum seeker—as long as they are functional for defining the content of these rights. Moreover, although space and time preclude the inclusion of the entirety of the EU legal regime of refugee protection, this thesis recognizes the salience of EU law in the protection of fundamental rights, and does not refrain from occasionally referring to the EU asylum directives and the CFR, as well as select cases without, however, delving much into the thriving jurisprudence of the ECJ and the CJEU.

## Chapter 2. The Right to *Non-refoulement*

### 2.1 Introduction

This Chapter will examine the obligation of *non-refoulement* in light of international refugee and human rights law instruments. Whereas the Geneva Convention constitutes the necessary entry point, the ICCPR, the CAT, and the ECHR contribute, as mutually reinforcing instruments, to the description of the content of *non-refoulement*. The EU CFR is also ultimately brought into the picture. Bearing in mind that scholars have not yet agreed upon a common definition of the legal content of *non-refoulement*, this issue will be explored with respect to international refugee and human rights law, being aware that protection obligations towards refugees and asylum seekers generally flow from implicit or explicit prohibitions of *refoulement*. Therefore, this thesis will question whether the aforementioned international instruments can be complementary in the construction of a regime of refugee protection, and whether they should be read consistently with one another. According to Article 33(1) of the 1951 Geneva Convention:

No contracting State shall expel or return 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.

This thesis presents the principle of *non-refoulement* as an overarching term, which does not exhaust its meaning only in the Geneva Convention. Rather, this principle is constructed and understood also by means of diverse international human rights treaties, which either explicitly or implicitly prohibit the return of a person to a territory where she can suffer torture and other inhuman and degrading treatment, and where her life and liberty can be seriously threatened beyond the five grounds of persecution set in Article 33(1) of the Geneva Convention.

The UN General Assembly has equipped the UNHCR with the power to supervise the application of the Geneva Convention and its Protocol by providing international protection to refugees, including shelter from *refoulement*, seeking durable solutions for the problem of refugees, and by promoting the ‘implementation of any measures calculated to improve the situation of refugees.’<sup>138</sup> If the perimeter of its original mandate was limited to individuals with a well-founded fear of being persecuted for reasons of race, religion, nationality, or political opinion, over time the UNHCR’s competence was expanded to also encompass ‘persons who have fled their home country due to

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<sup>138</sup> Statute of the Office of the United Nations High Commissioner for Refugees, adopted by United Nations General Assembly, 14 December 1950.

armed conflicts, internal turmoil, and situations involving gross and systematic violations of human rights.<sup>139</sup>

Whilst Section 2.2 discusses *non-refoulement* as a norm of customary international law, Sections 2.3 and 2.4 reconstruct the legal content of *non-refoulement* in international refugee law and human rights law. Section 2.5 aims to examine whether the prohibition of *refoulement* applies beyond the territory of the signatory States to the Geneva Convention, the ECHR, the CAT, the ICCPR, and the CFR in relation to persons who claim protection at the border of a State party, or who are intercepted at sea. Section 2.6 provides an overview of the EU legal framework protecting the principle of *non-refoulement*. Section 2.7, separately, discusses the concept of ‘safe third country’ in international and EU law and its legality under international law. It also explores the procedural safeguards that must be in place in the readmitting country for a sending State that decides to transfer an asylum seeker.

## **2.2. *Non-refoulement* as a norm of customary international law**

Whilst the arguments supporting the peremptory nature of *non-refoulement* are less than compelling, State practice, since the adoption of the 1951 Geneva Convention, has provided persuasive

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<sup>139</sup> See, UNHCR Note on International Protection, Thirty-sixth Session of the Executive Committee of the High Commissioner’s Programme, para 6, UN Doc. A/AC.96/660.



evidence that the principle has achieved the status of customary international law.<sup>140</sup> Nevertheless, the customary status of this norm has been fiercely contested by part of the scholarship stressing how the fact that most countries have accepted some kind of *non-refoulement* obligation does not imply that there is a universally applicable duty of *non-refoulement* that exists today. According to these critics, attention should be paid, to those States in Asia and the Near East that have decided not to be formally bound by the *non-refoulement* obligation, and to all those countries that have opted not to accede to either the Geneva Convention or the 1967 Protocol.<sup>141</sup>

If the prohibition of *refoulement*, embodied in treaty law, is binding upon all EU Member States, it needs to be verified if, as a matter of customary law, this principle is also binding on those few countries that have not ratified relevant international instruments on the protection of refugees. Indeed, all EU Member States are parties to

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<sup>140</sup> The customary status of *non-refoulement* has also been endorsed by several scholars, including: Sir Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of *Non-refoulement*: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003); William Schabas, *Non-refoulement, Human Rights and International Cooperation in Counter-terrorism* (Liechtenstein 2006) 7; Aoife Duffy, 'Expulsion to Face Torture? *Non Refoulement* in International Law' (2008) 20(3) IJRL 389; Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press 2007); Seline Trevisanut, 'The Principle of *Non-Refoulement* at Sea', (2008) 12 *Max Planck UNYB* 218. See also the following cases: *Hirsi v Italy*; Inter-American Commission on Human Rights, *Haitian Centre for Human Rights et al. v United States of America*, Decision of the Commission as to the merits of Case 10.675 United States, 13 March 1997.

<sup>141</sup> Kay Hailbronner, 'Non-refoulement and 'Humanitarian' Refugees: Customary International Law or Wishful Legal Thinking?' in D Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s* (Martinus Nijhoff Publishers 1988) 128-9; Hathaway 2005, 363-70.

the Geneva Convention and its Protocol, which are now regarded as part of the *acquis communautaire*.

Outside the European framework, the 1969 Organization for African Unity Convention on Refugee Problems in Africa (OAU Convention) and the Cartagena Declaration on Refugees have contributed to enlarge the core meaning of the 'refugee' notion as a matter of customary international law.<sup>142</sup> The OAU Convention, for instance expands the traditional refugee definition to include those people who are obliged to leave their home country on account of external aggression, occupation, foreign domination, or events seriously disturbing public order.<sup>143</sup> Similarly, the Cartagena Declaration on Refugees extends its mandate to

Persons who have fled their country because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights, or other circumstances which have seriously disturbed public order.<sup>144</sup>

The existence of *non-refoulement* as a conventional principle enshrined in different legal instruments does not only not preclude

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<sup>142</sup> Guy S Goodwin-Gill, 'Non-refoulement and the New Asylum Seekers' (1986) *Virginia Journal of International Law* 902.

<sup>143</sup> Article 1(2) of the OAU Convention.

<sup>144</sup> Article 3(3) of the Cartagena Declaration on Refugees, 22 November 1984.

the creation of a custom of similar content, but can also contribute to the formulation of such a customary principle. In the *North Sea Continental Shelf* case,<sup>145</sup> the ICJ identified three elements describing such a process of crystallization of customary rules into the general *corpus* of international law.<sup>146</sup> Moreover, in the *Nicaragua* case, the ICJ held that ‘it is not to be expected that in the practice of States, the application of the [rule] in question should have been perfect [...]’<sup>147</sup> The Court has not considered that, for a principle to be established as customary, the corresponding practice must be in absolute rigorous conformity with the rule. In order to deduce the existence of customary norms, the Court deems it sufficient that the conduct of States is generally consistent with such norms, and treats instances of State conduct inconsistent with a given rule as breaches of the existing principle, not as indication of the recognition of a new rule.<sup>148</sup>

With regard to the requirement of State support to the norm of *non-refoulement*, it should be observed that there exists, as

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<sup>145</sup>*North Sea Continental Shelf* Case, ICJ Reports (1969).

<sup>146</sup> Firstly, the conventional norm ‘should be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law’; secondly, ‘a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests are specially affected’; thirdly, ‘State practice, including that of States whose interests are specially affected, should be both extensive and virtually uniform in the sense of the provision invoked—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved’ (paras 72-74). For the purpose of this thesis, specially affected States are those nations which are most engaged in refugee-related issues, being either the States of refugee or the countries of origin or transit of migration fluxes.

<sup>147</sup>*Military and Paramilitary Activities against Nicaragua* Case (ICJ), Reports 1986, para 186.

<sup>148</sup> *ibid.*

aforementioned, a near universal acceptance of the principle, which goes further than a simple ‘widespread and representative’ participation in international conventions embodying the putative customary rule. At present, the major part of the 192 Members of the UN have ratified one or more binding international documents implicitly or explicitly incorporating the principle of *non-refoulement*.<sup>149</sup> Since these figures encompass those States whose interests are specially affected by refugee-related issues, and *no State*, including the remaining UN members, has objected to the principle of *non-refoulement*, it can be concluded that around 90 percent of UN membership has consented to the existence of such a norm.<sup>150</sup> Looking more specifically at the European context, all EU Member States are party to the Geneva Convention, the 1967 Protocol, the ICCPR, the CAT, the ECHR, and the CFR, which either directly or indirectly proscribe *refoulement*.

Over the last sixty years, no State has formally or informally opposed the principle, and even non-signatory States, such as Bangladesh, India, Pakistan and Thailand, have hosted large numbers

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<sup>149</sup> Reference is made only to conventions of a universal character: the 1951 Convention, the 1967 Protocol, the CAT, and the ICCPR.

<sup>150</sup> These figures do not include States such as Switzerland and Holy See, which are not members of the UN. However, while Switzerland has ratified the 1951 Geneva Convention, the 1967 Protocol, the ECHR and the ICCPR and the CAT, Holy See is party to the 1951 Convention and the 1967 Protocol.

of refugees, often in mass influx situations.<sup>151</sup> Furthermore, in numerous cases, the UNHCR, in the exercise of its supervisory function, has been required to make representations to States, which were parties neither to the Convention nor to the Protocol. In these circumstances, the Office has made reference to the principle of *non-refoulement* irrespective of any treaty obligation. It is interesting to note how approached governments have generally reacted by indicating national acceptance of the principle of *non-refoulement* as a guide for their action. These States have frequently sought to provide additional explanations or justifications of their practices that have been inconsistent with the norm, by challenging, for instance, the refugee status of the individual concerned or by invoking issues of national security and public order. As held by the UNHCR itself, ‘the fact that States have found it necessary to provide such explanations or justifications can reasonably be regarded as an implicit confirmation of their acceptance of the principle.’<sup>152</sup>

Bearing in mind that at the international law level, the practice of States on *non-refoulement* is fairly uniform, in a few cases, however, governments have shown their inability to manage mass influxes of

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<sup>151</sup> See, UNHCR, ‘Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol’ (26 January 2007) 7 <<http://www.refworld.org/docid/45f17a1a4.html>>.

<sup>152</sup> UNHCR, *The Principle of Non-refoulement as a Norm of Customary International Law* <<http://www.unhcr.org/refworld/type.POSITION.,DEU.437b6db64.0.html>> accessed 28 March 2013.

refugees, or have adopted restrictive measures toward asylum seekers.<sup>153</sup> Yet, in none of these cases have States publicly expressed unwillingness to respect the principle or to abide by such a duty. On the contrary, they have only referred to their inability to shelter refugees for a number of domestic reasons. The fact that governments offered justifications demonstrates that they recognized that the *non-refoulement* obligation exists, and that their actions were in breach of humanitarian law and international law more generally.

Recognizing the customary status of *non-refoulement* is essential for acknowledging how even those States which are not formally bound by any specific convention, are not free, yet, of customary international legal obligations toward refugees. In other words, such States are obliged not to return or extradite any person to a territory where her life or freedom would be seriously threatened. Furthermore, customary international law can be useful either to complement or supplement national legislation on *non-refoulement*, and to enable national courts to apply norms of general international law on the treatment of refugees when there is no national legislation on the matter. All in all, the extensive participation of States in international human rights and refugee law instruments confirm the wide

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<sup>153</sup> For instance, in 1995 the government of Tanzania closed its borders to a group of more 50,000 Rwandan refugees, justifying such a measure on grounds of regional tensions, national security, and serious risks to the environment. The same fate was up to Liberian refugees who, fleeing in 1996 a brutal civil war, were denied access by numerous West African ports, including Ghana, Ivory Coast, and Togo.

acceptance of *non-refoulement* as a customary international law principle, which has, therefore gradually moved beyond treaty law.

### **2.3. The legal content of *non-refoulement* in international refugee law.**

*Non-refoulement* has developed in the two distinct contexts of international refugee law and human rights law, and it is the intersection of these two contexts that shapes the content of this principle. In relation to refugee law, the content of *non-refoulement* concerns the interpretation of Article 33 of the 1951 Convention whereby, ‘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 [...]’ It should be noted that:

The practice known as *refoulement* in French did not exist in English language. In Belgium and France, however, there was a definite distinction between expulsion, which could only be carried out in pursuance of a decision of a judicial authority, and *refoulement*, which meant either deportation as a police measure or non-admittance at the frontier.<sup>154</sup>

The drafters of the Convention decided therefore to retain this

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<sup>154</sup>Paul Weiss, *The Refugee Convention 1951 – The Travaux Préparatoires Analyzed with a Commentary* (Cambridge University Press 1995) 289-290.

wider French interpretation of *refoulement* and keep it in brackets in the English version of Article 33(1) of the Convention. State practice and international jurisprudence have both endorsed this meaning of *non-refoulement* as prohibiting expulsion and non-admittance at the border<sup>155</sup> resulting in the risk of persecution, threat to life, physical integrity, or liberty, and to a real risk of torture, cruel, inhuman, and degrading treatment or punishment.

The prohibition of *refoulement* is valid even in those cases in which refugees are sent back to a territory where they are exposed to the peril of being subsequently returned to another territory in which they would face serious risks to their own life.<sup>156</sup> Given that the application of the principle of direct or indirect *non-refoulement* is made independently of any determination of refugee status, any decisions to transfer refugees to territories where their life or liberty might be put at risk would shift to the returning State the burden of proof with respect to the situation in the country of origin.<sup>157</sup>

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<sup>155</sup> For example, the OAU Convention expressly excludes rejection at the frontier in Article 2(3). Pursuant to the UN Declaration on Territorial Asylum, no refugee 'shall be subjected to measures such as rejection at the frontier [...].' See, UN Declaration on Territorial Asylum (1967), GA Resolution 2312 (XXII); EXCOM Conclusion no. 6 (XXVIII) on *Non-Refoulement* (12 October 1977) and EXCOM Conclusion no 85 (XLIX) on International Protection (9 October 1998). For a deeper analysis, see, Goodwin-Gill 1986, 901.

<sup>156</sup> On the prohibition of indirect refoulement, see, *R v Secretary of State for the Home Department, ex parte Bugdaycay*, [1987] AC 514, para 532 D, confirmed by *R v Secretary of State for the Home Department, ex parte Yogathas*, [2002] UKHL 36.

<sup>157</sup> Goodwin-Gill 1986, 902.



At this point, questions arise as to whether the words ‘where his life or freedom would be threatened’ are in fact broader than simply the risk of persecution, which is yet a very vague concept.<sup>158</sup> In this respect, one is able to observe how the UN General Assembly has extended UNHCR’s competence over the past sixty years to include those fleeing from more generalized situations of violence. Consequently, several Conclusions of the UNHCR Executive Committee have included within the scope of *non-refoulement*, ‘measures to ensure the physical safety of refugees and asylum seekers,’ and protection from ‘a danger of being subject to torture.’<sup>159</sup>

Although global State practice is not homogenous in that respect, in some circumstances, States have offered protection beyond the five grounds of persecution recognized by Article 1(a) of the Geneva Convention. Guarantees of *non-refoulement* have been granted, for instance, to persons who have a well-founded fear of facing serious threats to their life or freedom as a result of an armed conflict or generalized violence if they were returned to their home country.<sup>160</sup> It

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<sup>158</sup> For a detailed discussion on the definition of ‘persecution’, see, Jari Pirjola, ‘Shadows in Paradise - Exploring *Non-Refoulement* as an Open Concept’ (2008) IJRL 639.

<sup>159</sup> See e.g., EXCOM General Conclusion no 29 (XXXIV) on International Protection (1983) para (b); EXCOM General Conclusion on International Protection nos 79 (XLVII) 1996 and 81 (XLVIII) 1997, para (j) and (i).

<sup>160</sup> James C Hathaway and Colin J Harvey, ‘Framing Refugee Protection in the New World Disorder’ (2001) 34 *Cornell Journal of International Law* 289. For more recent literature, see, Jean-François Durieux ‘Of War, Flows, Laws and Flaws: A Reply to Hugo Storey’ RSQ 2012; Satvinder Juss, ‘Problematizing the Protection of “War Refugees”’: A Rejoinder to Hugo Storey and Jean-François Durieux’ (2013) 32(1) RSQ 122.

has therefore been argued that ‘in keeping with the humanitarian objective of the Convention, the protective regime of Article 33(1) must be construed liberally in a manner that favours the widest possible scope of protection consistent with its terms.’<sup>161</sup>

Nevertheless, the 1951 Convention provides a set of exceptions on grounds of overriding reasons of national security and public safety.<sup>162</sup> On the contrary, developments in the field of human rights law delineate a tendency to prohibit any derogation from the principle *non-refoulement* when it results in the transfer of a person to a country where she would risk being tortured or may suffer from other forms of degrading and inhuman treatment. Article 33(2) of the 1951 Convention does not affect, indeed, the obligation of the host State to respect the principle of *non-refoulement* in conformity with international human rights law, which permits no exceptions. All in

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Helene Lambert discusses how Article 15(c) of the EU Recast Qualification Directive provides scope for broadening protection of a 'third country national or stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin [...] would face a real risk of suffering serious harm as defined in Article 15 [...].’ Under Article 15, 'serious harm' includes any 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.' See, Helene Lambert, 'The Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Indiscriminate Violence' IJRL (advance access 5 June 2013). Of the same view also Maryellen Fullerton, 'A Tale of Two Decades: War Refugees and Asylum Policies in the European Union' (2011) 10 Wash.U.Global Stud.L.Rev 87, 121-31.

<sup>161</sup> Lauterpacht and Bethlehem 2001, 125.

<sup>162</sup> For example, pursuant to Article 33(2), the benefits of *non-refoulement* ‘may not [...] 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.’

all, whether or not a State is a party to the 1951 Convention, it is bound by *non-refoulement* as a principle of general international law.<sup>163</sup>

When the return of an individual would result in the threat of torture, the absolute prohibition of *refoulement* can also be read as part of the ban on torture which has achieved the status of a *jus cogens* norm under international law.<sup>164</sup> It means that all States, including those that have not ratified the relevant human rights and refugee law instruments, are bound to prohibit any acts or omissions having the effect of turning a refugee back to territories where the risk of persecution equates to, or may be regarded as being on a par with a danger of torture and cruel, inhuman and degrading treatment or punishment, and when it comes within the scope of other non-derogable customary principles of human rights. In this case, an absolute prohibition on *refoulement* now exists.<sup>165</sup>

The following sections will scrutinize to what extent human rights instruments - in particular the CAT, the ICCPR, and the ECHR - offer

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<sup>163</sup> Goodwin-Gill and McAdam 2007.

<sup>164</sup> Andrea Saccucci, 'Espulsione, terrorismo e natura assoluta dell'obbligo di non-refoulement' (2008) 2 *I diritti dell'uomo, cronache e battaglie* 36.

<sup>165</sup> See, e.g., *Juridical Condition and Rights of Undocumented Migrants* (Advisory Opinion OC 18/03) IACtHR Series A No 18 (17 September 2003), Concurring Opinion of Judge AA Cancado Trindad, paras 41-2, 69, 72. See also, *inter alia*, Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Finnish Lawyers' Publishing Co 1988) c. 10, s. G; Alice Farmer, 'Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures that Threaten Refugee Protection' (2008) *Expresso* 32 <[http://works.bepress.com/alice\\_farmer/1](http://works.bepress.com/alice_farmer/1)> accessed 28 March 2013.

a broader protection from *refoulement* in comparison with the 1951 Convention.

## **2.4. The legal content of *non-refoulement* in international human rights law**

### ***2.4.1. The CAT and the ICCPR***

International human rights law provides further protection beyond that one offered by international refugee law. Indeed, States are bound not to transfer any individual to another country where there is a risk of being subjected to serious human rights violations, particularly arbitrary deprivation of life,<sup>166</sup> or torture or other cruel, inhuman or degrading treatment or punishment.<sup>167</sup> For the purpose of this thesis, attention is mainly drawn on the prohibition of torture as a bar to *refoulement*.

Article 3(1) of the CAT contains an explicit provision on *non-refoulement*:

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<sup>166</sup> The right to life is enshrined in Article 6 of the ICCPR and, for example, Article 2 of the ECHR.

<sup>167</sup> The right to be free from torture is guaranteed under Article 1 of the CAT, which, in Article 16, also prohibits other cruel, inhuman or degrading treatment or punishment. A prohibition of torture and other cruel, inhuman or degrading treatment or punishment is provided by Article 7 of the ICCPR and Article 3 of the ECHR.

No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

This Convention applies *non-refoulement* safeguards to anyone, and not only to those asylum seekers who have 'clean hands' as long as there are substantial grounds to believe that the person will suffer torture upon removal. However, the present risk does not have to meet the test of being highly probable, but it must be 'foreseeable, real, and personal.'<sup>168</sup> According to the Committee, the prohibition of *refoulement* is non-derogable and applies in all circumstances,<sup>169</sup> including cases concerning terrorism.<sup>170</sup> Moreover, the Committee has asserted that the phrase 'another State' in Article 3 implies the

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<sup>168</sup> In the following cases concerning asylum seekers challenging a deportation order, the Committee concluded that the existence of a 'foreseeable, real, and personal risk' could not be established. See e.g. *EA v Switzerland* Comm no 28/1995 (10 November 1997) UN Doc Cat/c/19/d/28/1995, para 11.5; *X, Y, and Z v Sweden* Comm no 61/1996 (6 May 1998) UN Doc Cat/c/20/Das 1/1996, para 11.5; *IAO v Sweden* Comm no 65/1997 (6 May 1998) UN Doc Cat/ C/20/d/65/1997, para 14.5; *KN v Switzerland* Comm no 94/1997 (19 May 1998) UN Doc Cat/c/20/d/94/1997, para 10.5; *ALN v Switzerland* Comm no 90/1997 (19 May 1998) UN Doc Cat/c/20/d/90/1997, para 8.7; *JUA v Switzerland* Comm no 100/1997 (10 November 1998) UN Doc Cat/c/21/d/100/1997, para 6.5; *SMR and MMR v Sweden* Comm no 103/1998 (5 May 1999) UN DocCat/c/22/d/103/1998, para 9.7; *MBB v Sweden* Comm no 104/1998 (5 May 1999) UN DocCat/c/22/d/104/1998, para 6.8; *KT v Switzerland* Comm no 118/1998 (19 November 1999) UN Doc Cat/c/23/d/118/1998, para 6.5; *NM v Switzerland* Comm no 116/1998 (9 May 2000) UN DocCat/c/24/d/116/1998, para 6.7; *SC v Denmark* Comm no 143/1999 (10 May 2000) UN Doc Cat/c/24/d/143/1999, para 6.6; *HAD v Switzerland* Comm no 126/1999 (10 May 2000) UN DocCat/c/ 24/d/126/1999, para 4.10; *US v Finland* Comm no 197/2002 (1 May 2003) UN Doc Cat/C/30/d/197/2002, para 7.8; *MSH v Sweden* Comm no 235/2003 (14 December 2005) UN Doc Cat/c/35/d/235/2003, para 6.4.

<sup>169</sup> See, e.g., *Gorki Ernesto Tapia Paez v Sweden*, UN Doc CAT/C/18/D/39/1996, 28 April 1997, para. 14.5.

<sup>170</sup> See, e.g., *Agiza v Sweden* Comm no 233/2003, UN Doc CAT/C/34/D/233/2003 (2005).

extension of protection from expulsion of a person to any country where the individual may subsequently be expelled, returned, or extradited to another dangerous State.<sup>171</sup>

Under Article 22 of the CAT, States Parties can make an optional declaration recognizing ‘the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention.’ So far, the Committee against Torture has received a huge number of communications by asylum seekers falling outside the scope of the Geneva Convention’s persecution grounds. And, in many of these cases, it found that the forcible removal of the applicants would breach the prohibition of *refoulement*, inscribed in Article 3 of the Convention.<sup>172</sup>

For instance, Ms. Muzonzo, a Zairian citizen asylum seeker, lodged a complaint with the Committee against Torture after the Swedish Board of Immigration rejected her asylum application and

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<sup>171</sup> Committee against Torture, General Comment 1, CAT/C/3/Rev.2, 21 November 1997, para 2. This principle was first recognized in the *Mutombo v Switzerland* Comm no 13/1993 (27 April 1994) UN Doc CAT/C/12/D/13/1993. See also, *A v The Netherlands*, Comm no 91/1997 (13 November 1998) UN Doc CAT/C/21/D/91/1997.

<sup>172</sup> See, e.g., *Pauline Muzonzo Paku Kisoki v Sweden* Comm no 41/1996 (8 May 1996) UN Doc CAT/C/16/D/41/1996 (*Kisoki v Sweden*); *Ismail Alan v Switzerland* Comm no 21/1995 (8 May 1996) UN Doc CAT/C/16/D/21/1995; *CT and KM v Sweden* Comm 279/2005 (17 November 2006) CAT/C/37/D/279/2005; *Kaveh Yaragh Tala v Sweden* Comm no 43/1996 (15 November 1996) UN Doc CAT/C/17/D/43/1996 (*Tala v Sweden*); *Harminder Singh Khalsa et al. v Switzerland* Comm no 336/2008 (7 July 2011) UN Doc CAT/C/46/D/336/2008, para 11.8; *Mondal v Sweden* Comm 338/2008 (7 July 2011) UN Doc CAT/C/46/D/338/2008; *Nirmal Singh v Canada* Comm no 319/2007 (8 July 2011) UN Doc CAT/C/46/D/319/2007, para 9.

returned her to Zaire where she had been imprisoned, raped, and tortured because of her membership in the UDPS, the opposition party to the Government party MPR. As confirmed by the Swedish Aliens Appeal Board, the political situation in Zaire had improved and Ms. Muzonzo was no longer at risk of being persecuted by the governmental authorities. The Committee against Torture concluded, instead, that the return to Zaire would constitute a violation of Article 3 of the Convention as substantial grounds still existed for believing that the applicant would be in danger of being subjected to torture.<sup>173</sup> In this context, the Committee relied on the position of the UN High Commissioner for Refugees, according to whom:

Deportees who are discovered to have sought asylum abroad undergo interrogation upon arrival at Kinshasa airport, following which those who are believed to have a political profile are at risk of detention and consequently ill-treatment. The Committee also notes that, according to the information available, members of the UDPS continue to be targeted for political persecution in Zaire.<sup>174</sup>

The Committee against Torture reached the same conclusion with regard to Ismail Alan, a Turkish citizen from Kurdish background, who applied for asylum in Switzerland. He claimed that because of his membership in an outlawed Kurdish marxist-leninist organisation,

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<sup>173</sup> *Kisoki v Sweden*, paras 9.6-9.7.

<sup>174</sup> *ibid*, para 6.5.

he had been arrested several times, tortured, and interrogated about his organizational activities. According to the Committee, returning the applicant to Turkey would amount to *refoulement* in breach of Article 3 of the Convention. In the Committee's view:

The existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a person would be in danger of being subjected to torture upon his return to that country; specific grounds must exist that indicate that the individual concerned would be *personally at risk*.<sup>175</sup>

The Committee continued by affirming that, in the instant case,

The author's ethnic background, his alleged political affiliation, his history of detention, and his internal exile should all be taken into account when determining whether he would be in danger of being subjected to torture upon his return. The State party has pointed to contradictions and inconsistencies in the author's story, but the Committee considers that complete accuracy is seldom to be expected by victims of torture and that such inconsistencies as may exist in the author's presentation of the facts are not material and do not raise doubts about the general veracity of the author's claims.<sup>176</sup>

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<sup>175</sup> *ibid*, para 11.2. See also, *CT and KM v Sweden*, para 7.2; *Tala v Sweden*, para 10.1.

<sup>176</sup> *Ismail Alan v Switzerland*, para 11.3. See also, *CT and KM v Sweden*, para 7.6; *Tala v Sweden*, para 10.3.



As regards the State party's argument that the complainant could find a safe area elsewhere in Turkey, the Committee held:

That the author already had to leave his native area, that Izmir did not prove secure for him either, and that, since there are indications that the police are looking for him, it is not likely that a 'safe' area for him exists in Turkey. In the circumstances, the Committee finds that the author has sufficiently substantiated that he personally is at risk of being subjected to torture if returned to Turkey.<sup>177</sup>

Turning now to the ICCPR, Article 7 provides that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment [...].' Firstly, the Covenant encompasses in the list of proscribed acts, also cruel, inhuman and degrading treatment, and broadens the net of protection to include guarantees without distinction of any kind, against arbitrary arrest or detention, equal standing, and fair hearing. In its interpretation of Article 7, the HRC has explained that 'States parties must not expose individuals to the danger of torture and cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*.'<sup>178</sup> Like the Committee against

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<sup>177</sup>*Ismail Alan v Switzerland*, para 11.4.

<sup>178</sup> HRC, *General Comment no 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, 10 March 1992, UN Doc HRI/GEN/1/Rev.7, para 9. See also, *General Comment no 31 on the Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 12.

Torture, the HRC also considers that the prohibition of *refoulement* under the ICCPR applies in all circumstances,<sup>179</sup> with regard either to the country to which removal is sought or any other country to which the person may subsequently be transferred.<sup>180</sup> The enjoyment of the Covenant rights extends to all individuals, ‘regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers, and other persons who may find themselves in the territory or subject to the jurisdiction of the State Party.’<sup>181</sup>

Mr Mansour Ahani was an Iranian citizen who was granted refugee status by Canada in 1992. However, he was then designated as a suspected terrorist and assassin by Canadian authorities, who put him in detention pending his deportation to Iran, where Mr Ahani alleged he would be tortured and executed. The Committee found that the process leading to Ahani’s deportation was procedurally deficient, and thus decided not to determine the extent of the risk of torture to Ahani prior to his deportation, and whether he suffered torture or other ill-treatment subsequent to his return. It is nevertheless important to stress that the Committee disagreed with the Supreme Court’s decision in *Suresh* that deportation to torture could be justified in exceptional circumstances. It stated, indeed, that ‘the prohibition on

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<sup>179</sup> See, e.g., HRC, *General Comment no 29 on States of Emergency (Article 4)* UN Doc CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11; *Concluding Observations/Comments on Canada*, UN Doc CCPR/C/CAN/CO/5, 20 April 2006, para. 15. See also, *Alzery v Sweden* CCPR/C/88/D/1416/2005 (2006).

<sup>180</sup> HRC, General Comment 31, para 12.

<sup>181</sup> HRC, General Comment 31, para 10.

torture, including as expressed in Article 7 of the Covenant, is an absolute one that is not subject to countervailing considerations.’<sup>182</sup>

On 23 July 1992, Mr. C. filed an application for refugee status in Australia, on the basis of a well-founded fear of religious persecution in Iran as an Assyrian Christian.<sup>183</sup> However, his application was refused both at first instance and in appeal. In June 1993, Mr. C. applied to the Minister for Immigration for interim release from detention pending the decision of the Federal Court on his refugee application. Indeed, his psychological conditions had seriously deteriorated following a lengthy incarceration. On 10 August 1994, he was released from detention on the basis of special (mental) health needs, and applied again for refugee status. In deciding Mr. C’s case, the HRC took into account his experiences in Iran as an Assyrian Christian, along with the worsening of the situation of that religious minority in his country of origin, and the ‘marked deterioration in his psychiatric status.’<sup>184</sup> Hence, attaching particular weight to the fact that the Mr. C. was originally granted refugee status, the HRC stated that deporting him to Iran, where it is unlikely that he would receive

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<sup>182</sup>*Mansour Ahani v Canada* Comm no 1051/2002 (15 June 2004) CCPR/C/80/D/1051/2002, para 10.10.

<sup>183</sup>*C v Australia* Comm no 900/1999 (13 November 2002) CCPR/C/76/D/900/1999.

<sup>184</sup> *ibid*, para 2.6.

the treatment necessary for his mental illness, would amount to a violation of Article 7 of the Covenant.<sup>185</sup>

Mr Alzery was an asylum seeker claiming protection in Sweden.<sup>186</sup> However, for reasons of national security, he was deported to Egypt where he was seriously tortured, as acknowledged by the HRC in November 2006. According to the Committee, the diplomatic assurances given by Egypt on the fair treatment of the returnee were insufficient to reduce the risk of torture upon removal, and, that Article 7 of the Covenant had therefore been violated..<sup>187</sup> As a further example, the *Zhakhongir Maksudov and Adil Rakhimov, Yakub Tashbaev and Rasuldzhon Pirmatov v Kyrgyzstan* case concerned the extradition to Uzbekistan of four rejected refugees charged *in absentia* of terrorism. In its final views, the HRC held that extradition would amount to a breach of Article 7 because of the risk of torture in the country of origin.<sup>188</sup>

#### **2.4.2. The ECHR**

There is an increasing consensus among human rights scholars that

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<sup>185</sup> *ibid*, para 8.5.

<sup>186</sup> *Alzery v Sweden* Comm 1416/2005 (3 November 2006) UN Doc CCPR/C/88/D/1416/2005. This case will be more thoroughly discussed in Section 6.4 of this thesis.

<sup>187</sup> *Alzery v Sweden*, para 11.5.

<sup>188</sup> *Zhakhongir Maksudov and Adil Rakhimov, Yakub Tashbaev and Rasuldzhon Pirmatov v Kyrgyzstan* Comm nos 1461,1462,1476 & 1477/2006 (31 July 2008) UN Doc CCPR/C/93/D/1461,1462,1476 & 1477/2006 para 12.6.

Article 3 of the ECHR offers more protection from *refoulement* than other international refugee and human rights instruments for two main reasons: first, its ruling out in absolute terms of torture and inhuman or degrading treatment;<sup>189</sup> second, the recognition that any kind of ill-treatment - regardless of the reasons behind it - is forbidden. In addition, the judgments of the Court of Strasbourg can also influence other jurisdictions and not only the regional area represented by the Council of Europe States. Without excluding that other provisions of the ECHR can also afford protection against *refoulement*, the Strasbourg jurisprudence on this point has so far been primarily based on Article 3.<sup>190</sup> Hence, for the purpose of this thesis, focus is placed

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<sup>189</sup> See e.g., H el ene Lambert, 'Protection Against *Refoulement* from Europe: Human Rights Law Comes to the Rescue' (1999) 48 ICLQ 515.

<sup>190</sup> Although space precludes a broader discussion, it should be observed that the ECHR provides tremendous opportunity for development of the second category of rights in cases concerning expulsion. See, e.g., *D v UK*, where the Court concluded that an HIV patient could not be returned to a State of origin where medical treatment was inadequate. See, *D v United Kingdom* (1997) 24 EHRR 423. Likewise, in *Nasri v France*, the Court found a violation of Article 8 if the expulsion of an Algerian deaf-mute was to be carried out. See, *Nasri v France* (1996) 21 EHRR 458. In another case of expulsion, *Bader v Sweden*, the Court inferred *non-refoulement* from Article 2 ECHR in combination with Article 3. See, *Bader v Sweden* App no 13284/04 (ECtHR, 8 November 2005). In *Abu Qatada v UK* and *El Haski v Belgium*, the ECtHR held that deportation would breach one of the qualified, derogable rights of the Convention, Article 6 (right to a fair trial). See, *Othman (Abu Qatada) v UK* App no 8139/09 (ECtHR, 17 January 2012); *El Haski v Belgium* App no 649/08 (ECtHR, 25 September 2012).

For an overview on literature, refer to H el ene Lambert, 'The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities' (2005) 24(2) RSQ 39; Kees Wouters, *International Legal Standards for the Protection from Refoulement: a Legal Analysis of the Prohibitions on Refoulement Contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture* (Intersentia 2009). See also; Maarten Den Heijer, 'Whose Rights and Which Rights? The Continuing Story of *Non-Refoulement* under the European Convention on Human Rights' (2008) *European Journal of Migration and Law* 277-314; Christopher Michaelsen, 'The Reinassance of *Refoulement*? The *Othman (Abu Qatada)* Decision of the European Court of Human Rights' (2012) 61(3) ICLQ 750.

on Article 3 of the Convention.

As a general premise, a State is responsible under the ECHR if it commits a violation with regard to a person who is on its territory, and clearly within its jurisdiction.<sup>191</sup> Indeed, pursuant to Article 1 of the ECHR, ‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.’

The starting point for any analysis of breaches of Article 3 resulting from extradition/expulsion is the *Soering v UK* case concerning a West German national who, after murdering his girlfriend’s parents in Virginia, fled to the United Kingdom.<sup>192</sup> Since the UK Government decided to accept the request of extradition issued by the United States, Mr. Soering lodged a complaint with the European Commission of Human Rights which referred the case to the European Court. The latter held that:

It would hardly be compatible with the underlying values of the Convention, that ‘common heritage of political traditions, ideals, freedom and the rule of law’ to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he

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<sup>191</sup>*Bankovic and Others v Belgium and Others*(2007) 44 EHRR 86, para 68.

<sup>192</sup>*Soering v UK* (1989) 11 EHRR 439.

would be in danger of being subjected to torture, however heinous the crime allegedly committed.<sup>193</sup>

A State is responsible under the Convention if it renders a person to a country where there are substantial grounds for believing that she will face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment. However, as a mere possibility of inhuman treatment is not sufficient for a violation of Article 3 to be established,<sup>194</sup> the applicants must show that they would be exposed to a real risk of being subjected to inhuman or degrading treatment upon return.<sup>195</sup> According to the Court, ‘Article 3 does not refer exclusively to the infliction of physical pain but also of mental suffering, which is caused by creating a state of anguish and stress by means other than bodily assault.’<sup>196</sup> Moreover, once the applicant has adduced evidence proving that there are substantial grounds for believing that deportation would expose her to a real risk of torture and inhuman treatment, it is then for the respondent State to dispel any doubt about it.<sup>197</sup>

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<sup>193</sup>*Soering v UK*, para 91.

<sup>194</sup>*Vilvarajah and Others v the United Kingdom* (1991) 14 EHRR 248, para 111; *Viajayanathan and Pusparajah v France*, 27 August 1992, Ser A No 241-B.

<sup>195</sup>*Vilvarajah and Others v the United Kingdom*, para 114.

<sup>196</sup>*El-Masri v Former Republic of Macedonia* App no 39630/69 (ECtHR, 13 December 2012) para 198 (*El-Masri v FROM*).

<sup>197</sup>*Saadi v Italy*, para 129. On this point, see, *inter alia*, Silvia Borelli, ‘Estradizione, espulsione e tutela dei diritti fondamentali’, in Pineschi Laura (ed) *La tutela internazionale dei diritti umani* (Giuffr  2006) 736-737.

A few years later, the European Court drew on the *Soering* principle in the *Chahal v UK* case by asserting that:

The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases [...]. In these circumstances, the activities of the individual in question, however undesirable or dangerous cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees.<sup>198</sup>

*Saadi v Italy* is a landmark ruling grounded on the same principles established by the ECtHR in both *Soering* and *Chahal*.<sup>199</sup> *Saadi v Italy* contributes to the reaffirmation of *non-refoulement*, in cases dealing with expulsions to unsafe third countries, as a principle having an absolute value, particularly in an international climate calling on States to strike a balance between fundamental individual rights and the collective right for security threatened by terrorist violence.<sup>200</sup> On the basis of detailed reports surrounding the precarious situation of human rights in Tunisia, the Court concluded that the decision to

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<sup>198</sup>*Chahal v UK* (1997) 23 EHRR 413. The same principle has been extended also to other cases before the ECtHR concerning deportation, expulsion, and removal of asylum-seekers: *Cruz Varas v Sweden*, 20 March 1991, Ser A No 201; *Vilvarajah and Others v UK*; and *Ahmed v Austria*, 17 December 1996 (1996-VI).

<sup>199</sup>*Saadi v Italy* (2008) 47 EHRR 17.

<sup>200</sup>See, for example, the British Prime Minister's press conference, 5 August 2005, <<http://webarchive.nationalarchives.gov.uk/20040105034004/number10.gov.uk/page8041>> accessed 28 March 2013.



deport the applicant to Tunisia would breach Article 3 of the Convention if it were enforced.<sup>201</sup>

On 11 August 2006, Mr Saadi requested political asylum in Italy. He alleged that he had been sentenced *in absentia* in Tunisia for political reasons and that he had a real risk of being subjected to torture and ‘political and religious reprisals’ in his home country. However, his request was declared inadmissible on the ground that the applicant was a danger to national security.<sup>202</sup>

According to the ECtHR,

Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation. [...] The nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3.<sup>203</sup>

The ECtHR thus rejected the argument advanced by the Italian Government, by asserting that diplomatic assurances did not provide secure and effective long-term protection against the risk of ill-

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<sup>201</sup> *Saadi v Italy*, para 149.

<sup>202</sup> *Saadi v Italy*, para 35.

<sup>203</sup> *ibid*, para 127.

treatment, and as a result, these assurances did not eliminate the risk of *refoulement*.<sup>204</sup>

Judge Zupancic asserted that the increased terrorist threat cannot call into question the absolute value of Article 3 even if:

From the policy point of view it is clear that the expelling State will in such situations be more eager to expel. The interest of a party, however, is no proof of its entitlement. The spirit of the ECHR is precisely the opposite. The Convention is conceived to block such short circuit logic, and protect the individual from the unbridled ‘interest’ of the executive branch or sometimes even of the legislative branch of the State.<sup>205</sup>

The implicit prohibition of *refoulement* under Article 3 of the ECHR was extended from the context of extradition in the *Soering* case to the context of asylum with the *Cruz Varas* judgment concerning Sweden’s expulsion of a Chilean protection seeker back to Chile. In the 2011 joint case of *Sufi and Elmi v UK*, the ECtHR, following *NA v the United Kingdom*,<sup>206</sup> argued that the sole question to consider in the case of expulsion of an asylum seeker is:

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<sup>204</sup> Chapter 6 will provide a more substantive review of the case law concerning deportation with assurances as addressed by the ECtHR, the Committee against Torture, and the HRC.

<sup>205</sup> *Saadi v Italy*, Concurring Opinion Judge Zupancic, para 2.

<sup>206</sup> *NA v The United Kingdom* App no 25904/07 (ECtHR, 17 July 2008).

Whether, in all the circumstances of the case before it, substantial grounds have been shown for believing that the person concerned, if returned, would face a *real risk* of being subjected to treatment contrary to Article 3 of the Convention. If the existence of such a risk is established, the applicant's removal would necessarily breach Article 3, *regardless of whether the risk emanates from a general situation of violence, a personal characteristic of the applicant, or a combination of the two* (emphasis added).<sup>207</sup>

Therefore, in the case at issue, it ruled that the removal of Mr. Sufi and Mr. Elmi to Somalia would put them at risk of ill-treatments prohibited by Article 3.<sup>208</sup> Indeed, the current situation of generalized violence in Mogadishu was of sufficient intensity to create such a risk.<sup>209</sup>

Moreover, the ECtHR offers remarkable opportunity in terms of protection of refugee rights because of the protection it ensures, *in exceptional circumstances*, against expulsion to countries where the applicants do not have adequate medical treatment or an adequate standard of living.<sup>210</sup> For example, in the *MSS v Belgium and Greece* case, the Court held that the conditions in which the asylum seeker was living in Greece reached the Article 3 threshold. The lack of food,

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<sup>207</sup> *Sufi and Elmi v UK* Apps nos 8319/07 and 11449/07 (ECtHR, 28 June 2011) para 218.

<sup>208</sup> *ibid*, paras 304, 312.

<sup>209</sup> *ibid*, para 218.

<sup>210</sup> See, Lambert, 2005, 39. For a critique of the ECtHR as a new European Asylum Court, see, Marc Bossuyt, 'The Court of Strasbourg Acting as an Asylum Court' (2012) 8(2) *European Constitutional Law Review* 203.

hygiene, and shelter made his state of serious deprivation and want wholly incompatible with human dignity.<sup>211</sup>

Article 3 of the Convention also forbids indirect *refoulement* to the country of origin via another State. In the *TI v United Kingdom* case, the ECtHR elaborated this principle in respect to a Contracting Party to the Convention.<sup>212</sup> The case concerned a Sri Lankan asylum seeker - persecuted by a Tamil terrorist organization - who challenged the decision of the UK government to transfer him to Germany under the Dublin Convention. The Court determined that the UK would be responsible if the return to Germany had put into motion a chain of events resulting, then, in an indirect removal to the country of origin where the applicant could be subjected to torture or inhumane and degrading treatment.<sup>213</sup> Nevertheless, it declared the case inadmissible, since there was no real risk that Germany would expel the applicant to Sri Lanka without the opportunity to apply for asylum. Because Germany did not consider persecution by non-state actors as a ground for granting refuge, Mr. TI did not feel safe, and after the Court's decision disappeared once for all.<sup>214</sup>

By referring to its previous case law in the context of expulsions,

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<sup>211</sup> *MSS v Belgium and Greece* (2011) 53 EHRR 2, para 253.

<sup>212</sup> *TI v UK* App no 43844/98 (ECtHR, 7 March 2000).

<sup>213</sup> *ibid*, para 16.

<sup>214</sup> Gretchen Borchelt, 'The Safe Third Country Practice in the European Union: A Misguided Approach to Asylum Law and a Violation of International Human Rights Standards' (2001-2002) 33 *Columbia HRLR* 520.

in *Hirsi v Italy*, the Court confirmed that the prohibition of torture implies an obligation not to remove the individual in question where substantial grounds have been shown for believing that the returned person would face a real risk of treatments banned by Article 3.<sup>215</sup> Thus, the fact that Italian authorities pushed intercepted refugees back to Libya without assessing their protection claims indeed exposed those persons to direct and indirect *refoulement*, because of the risk of inhumane and degrading treatment in Libya and in their countries of origin, Eritrea and Somalia. In line with *Hirsi v Italy*, the ECtHR issued an interim measure against Malta to halt the deportation to Libya of 102 Somali refugees who were intercepted on 9 July 2013 by Maltese Armed Forces and brought to an onshore detention centre.<sup>216</sup>

In *Hirsi v Italy*, the Court reaffirmed the absolute nature of the prohibition of indirect *refoulement* by imposing upon the transferring State the obligation of verifying - before the actual transfer - whether the intermediary country ensures adequate guarantees against the removal of the persons concerned to their countries of origin. This duty becomes even more compelling when the receiving country is not a party to the ECHR.<sup>217</sup> With regard to the *Hirsi v Italy* case, the UNHCR and several reports of human rights NGOs had clearly

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<sup>215</sup>*Hirsi v Italy*, para 114. The Court cites *Soering v UK*, paras 90–1; *Vilvarajah v UK*, para 103; *Jabari v Turkey* App no 40035/ 98 (ECtHR, 1 July 2000), para 38; *Ahmed v Austria* (1997) 24 EHRR 278, para 39; *HLR v France* (1997) 26 EHRR 29, para 34; and *Salah Sheekh v The Netherlands* (2007) 45 EHRR 50, para 135.

<sup>216</sup>*X and Others v Malta* App no 43985/13 (ECtHR, 31 July 2013).

<sup>217</sup>*Hirsi v Italy*, para 147.

depicted the risks for migrants and refugees returned to Somalia and Eritrea after irregularly leaving their home countries. The Court tried to establish whether Italian authorities could reasonably expect that Libya was able to offer safeguards against arbitrary repatriation. As this question was answered in the negative, it therefore concluded that the applicants were exposed to the risk of arbitrary repatriation, and that Italian authorities knew or should have known that Libya did not provide any guarantees against such a risk.<sup>218</sup>

Another important issue to consider concerns whether procedural requirements exist fleeing from the ECHR that could prevent onward expulsions from one State to another without substantive examination of the asylum claim anywhere. Analyzing the jurisprudence of the Court would serve to assess whether the continuous shuttling of migrants between different States may result in a violation of Article 3 of the ECHR. Onward expulsions of an asylum seeker to a third country inevitably carry with them a certain degree of uncertainty regarding the level of protection offered by the third States involved. Even if the latter are considered safe countries providing guarantees against *refoulement*, insecurity still remains and the perspective of a certain dreaded event along with the ‘ever present and amounting anguish of anticipating’ could bring the treatment within the scope of Article 3 of the ECHR. This issue will be better discussed below in

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<sup>218</sup> *ibid* paras 146–58.

the section on the right to access asylum procedures.

In sum, the cases examined so far do not only demonstrate how individuals can challenge expulsion to countries where their life may be threatened or where they risk undergoing indirect *refoulement*, but also how international human rights bodies serve to counterbalance the leeway given to governments to unduly emphasize uncertain and flexible national security interests to the detriment of the protection of refugees' fundamental rights.

## **2.5. Extraterritorial applicability of the principle of *non-refoulement***

The ensuing Sections are aimed at examining whether the prohibition of *refoulement* applies beyond the territory of the signatory States to the Geneva Convention, the ECHR, the CAT, the ICCPR, and the CFR in relation to persons who claim protection at the border of a State party, or who are intercepted at sea.<sup>219</sup>

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<sup>219</sup> Although no well-established definition of 'interception' exists, it is generally accepted that this notion concerns 'measures applied by States outside their national boundaries which prevent, interrupt, or stop the movement of people without the necessary immigration documentation for crossing their borders by land, sea, or air.' See, Goodwin-Gill and McAdam 2007, 371-372.

### 2.5.1. (...) *Under international refugee law*

What is certain is that there is no consensus on the geographical scope of Article 33 of the Geneva Convention. The *travaux préparatoires*, despite their supplementary character as means of interpretation, can be of some utility in understanding the disagreement concerning the applicability *ratione loci* of the Convention. What has emerged from the discussions taking place within the *ad hoc* Committee composed of thirteen government representatives entrusted with the writing of a draft text, is that whilst the decision to leave out a provision on admission was amply shared,<sup>220</sup> the majority of the drafters supported an inclusive reading of non-rejection at the border.<sup>221</sup> The French term ‘*refoulement*’ was thus meant to include not only return from the territory but also non-admittance at the border.<sup>222</sup>

In particular, the participants emphasized that the principal aim of the provision is to prohibit the refugee’s return ‘in any manner whatsoever’ ‘to the frontiers of territories’ where her life or freedom would be endangered,<sup>223</sup> thus leaving room also for an interpretation

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<sup>220</sup> Atle Grahl-Madsen, *The Status of Refugees in International Law* (Vol 2, AW Sijthoff 1972) 100.

<sup>221</sup> See, Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff Publishers 2000) 428.

<sup>222</sup> See, UN Doc E/AC.32/SR.21, paras 13-26.

<sup>223</sup> Weis 1995, 341.



encompassing ‘rejection at the border.’<sup>224</sup> Indeed, as long as a refugee has approached a border guard at the border of the country of refuge, she has already left the country of persecution, which, therefore, will no longer be able to place the refugee under its control without violating the sovereignty of the State where the refugee expects to find safety. The same reasoning also applies to cases where a refugee arrives by plane and is held in the transit zone of international airports.<sup>225</sup>

By contrast, at the Conference of Plenipotentiaries in July 1951, any extraterritorial applicability of the Convention under Article 33 was rejected. Such a restrictive approach found validation in the oft-quoted *Sale v Haitian Centres Council* case - grounded in a textual interpretation of the Treaty - where the US Supreme Court refused the extraterritorial relevance of Article 33(1). It construed Article 33(1) of the Geneva Convention as having no extraterritorial applicability and conclusively established that refugees claiming asylum outside the US borders were not entitled to alleged procedural protection, or to escape repatriation, even in the face of persecution at the hands of their governments.<sup>226</sup> This judgement, however, has been sharply criticized,

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<sup>224</sup> Walter Kälin, Martina Caroni and Lukas Heim, ‘Article 33 para 1 (Prohibition of Expulsion and Return (*Refoulement*))’ in Andreas Zimmermann (ed) *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) 1367.

<sup>225</sup> *ibid.*

<sup>226</sup> US Supreme Court, *Sale, Acting Commissioner, INS v Haitian Centres Council* [1993] 113 S. Ct 2549 (*Sale v Haitian Centres Council* case).

*inter alia*, by the dissenting opinion of Justice Blackmun,<sup>227</sup> several scholars,<sup>228</sup> the Inter-American Commission,<sup>229</sup> as well as the UNHCR according to which Article 33(1) does not have any geographical limitation.<sup>230</sup> While, indeed, specific territorial limitations have been set forth in other Articles of the Treaty, no such restriction is embodied in paragraph 1 of Article 33.<sup>231</sup>

A case raising similar issues, but in a different context, is the *Prague Airport* case, considering the applicability of the Geneva Convention to a pre-clearance procedure carried out by the British immigration authorities in the Czech Republic, with the purpose of intercepting Czech nationals of Roma origin who attempted to leave the country to claim asylum abroad.<sup>232</sup> The English Court of Appeal convened that *Sale* was ‘wrongly decided’ as it shall be ‘impermissible to return refugees from the high seas to their country

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<sup>227</sup>Dissenting Opinion of Mr Justice Blackmun in *Sale v Haitian Centres Council*, 509 US 155, 162 (1993).

<sup>228</sup>Guy S Goodwin-Gill, ‘The Haitian *Refoulement* Case: A Comment’ (1994) 6 IJRL 103-10; Harold H Koh, ‘Reflections on *Refoulement* and Haitian Centres Council’ (1994) 35(1) HILJ3; Steven H Legomsky, ‘The USA and the Caribbean Interdiction Program’ (2006) 18 IJRL 677, 679-83; Jean-Yves Carlier, *Droit d’asile et des réfugiés: de la protection aux droits*, *Collected Courses of The Hague Academy of International Law*, Vol. 332 (2007) 107.

<sup>229</sup> Inter-American Commission on Human Rights, *Haitian Centre for Human Rights et al. v United States of America*, Decision of the Commission as to the merits of Case 10.675 United States 13 March 1997, para 157.

<sup>230</sup> UNHCR, *Gene McNary, Commissioner, Immigration and Naturalization Service, et al (Petitioners) v Haitian Centres Council, Inc et al (Respondents)*. *Brief Amicus Curiae of the Office of the High Commissioner for Refugees in Support of Respondents*, October 1992, 85-102.

<sup>231</sup> See, Roland Bank, ‘Refugees at Sea; Introduction to Art. 11 of the 1951 Convention’, in Zimmermann 2011, 815, 833, 835.

<sup>232</sup>*Regina (European Roma Rights Centre) and Others v Immigration Officer at Prague Airport* [2003] EWCA Civ 666.

of origin.<sup>233</sup> Even if no Convention provision absolved States from controlling the movements of third country nationals outside their borders, the same reasoning was upheld by the majority of Lords in the 2004 judgement.<sup>234</sup>

Beyond the drafting history of the Geneva Convention, it is notable how the issue of the applicability *ratione loci* of the prohibition of *refoulement* has fueled a vivid doctrinal legal debate. State authorities have tried to temper the claim for extraterritorial application of Article 33 of the Geneva Convention by picking those arguments that would not bind them to respect *non-refoulement* wherever a refugee is found.<sup>235</sup> It follows, therefore, that extensive or restrictive readings of the Convention will depend on the interpretative methods used.

One of the main points of discussion concerns the expression ‘in any manner whatsoever’ contained in Article 33(1). From the drafting history and the *travaux préparatoires*, it emerges that this reference was not inserted to extend the geographical application of the Convention. Rather, it was included with the idea of covering any

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<sup>233</sup> *ibid* paras 34-35.

<sup>234</sup> *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55. For a dissenting view, see Lord Hope, para 68.

<sup>235</sup> For example, some suggest that the principle of *non-refoulement* does not apply to asylum-seekers intercepted on the high sea. See, Vincenzo Delicato, ‘I traffici di migranti nel Mediterraneo e gli accordi internazionali per la cooperazione di polizia’ (2010) *Gli Stranieri*.

kind of *refoulement* (e.g., expulsion, refusal of admittance, removal, extradition) by judicial or administrative authorities.<sup>236</sup>

Although the *language* of Article 33(1) does not concede any explicit indication of its extraterritorial applicability, scholars have not refrained from expanding the reach of this provision beyond situations at the border—for example, in situations of interception on the high seas or in the case of pre-screening measures undertaken by a State’s immigration officials at the airport of another State.<sup>237</sup> They have argued, for instance, that ‘the ordinary meaning of *refouler* is to drive back, repel, or re-conduct, which does not presuppose a presence in-country’, thereby encouraging the view that Article 33(1) would encompass rejection at the border, in transit zones, and on the high seas.<sup>238</sup>

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<sup>236</sup> Lauterpacht and Bethlehem 2001, 122; Robinson, *Convention relating to the Status of Refugees: its History, Contents, and Interpretation: a Commentary* (Institute of Jewish Affairs 1953) 162.

<sup>237</sup> For the purpose of this thesis, attention is drawn on measures of migration control carried out on the high seas, rather than on the territory of a third country. See below in this section for relevant literature. On pre-clearance procedures and the extraterritorial applicability of Article 33(1) of the Geneva Convention, see, Violeta Moreno-Lax, ‘(Extraterritorial) Entry Controls and (Extraterritorial) Non-refoulement’ in Philippe De Bruycker, Dirk Vanheule, Marie-Claire Foblets, Jan Wouters and Marleen Maes (eds), *The External Dimension(s) of EU Asylum and Immigration Policy* (Bruylant 2011) 411-20

<sup>238</sup> See, e.g., Lauterpacht and Bethlehem 2001, 87, 110; Coleman 2009, 253; Walter Kälin, Martina Caroni and Lukas Heim, ‘Article 33 para 1 (Prohibition of Expulsion and Return (*Refoulement*))’ in Andreas Zimmermann (ed) *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) 1361, 1367; UNHCR, Advisory Opinion on the Extraterritorial Application of *Non-refoulement*, 12 para 24. See also, Goodwin-Gill and McAdam 2007, 246; Hathaway 2005, 339; Andreas Fischer Lescano and Tillman Lohr, *Border Control at Sea: Requirements under International Human Rights and Refugee Law* (European Centre for Constitutional and Human Rights 2007) 14; Moreno-Lax 2011b, 411-20.

Some commentators have put the accent on where the refugee is sent *to* rather than where she is sent *from*. This reading would be supported by the inclusive wording of Article 33(1) whereby '[n]o Contracting State shall expel *or* return ("*refouler*") a refugee *in any manner whatsoever to the frontiers of territories* where his life or freedom would be threatened (emphasis added).'<sup>239</sup> One would expect that any action of migration control (wherever undertaken) resulting in *refoulement* to the borders of such territories would amount to a breach of Article 33(1).<sup>240</sup> In this regard, it has been noted that:

The word used is 'territories' as opposed to 'countries' or 'States.' The implication of this is that the legal status of the place to which the individual may be sent is not material. The relevant issue will be whether it is a place where the person concerned will be at risk.<sup>241</sup>

Also the context of the treaty and 'the social and humanitarian character of the problem of refugees'<sup>242</sup> - as stated in the Preamble - would speak for a wider interpretation of the Geneva Convention and

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<sup>239</sup> Weis 1995, 341; Hathaway 2005, 338; Stephen H Legomsky, 'The USA and the Caribbean Interdiction Program' (2006) 18(3-4) IJRL 677; Goodwin-Gill and McAdam 2007, 246.

<sup>240</sup> Gammeltoft-Hansen 2011, 57-8.

<sup>241</sup> Lauterpacht and Bethlehem 2001, 122.

<sup>242</sup> See, Lauterpacht and Bethlehem 2001, 106 ff.

the widest possible exercise of the rights therein enshrined.<sup>243</sup> It has also been argued that the lack of emphasis on the extraterritorial scope of Article 33 can be due to the absence of any historical precedents, since the Convention was drafted mainly as a response to the plight of Jewish refugees in Europe during the Second World War.<sup>244</sup>

As we will better explore in the next Chapter, refusing to grant an asylum seeker access to the territory of the intercepting State for the purpose of examining protection claims can never be automatic. Therefore, regardless of whether interception takes place at the border or on the high seas, it is always necessary to assess the safety of the place to which the refugee is to be sent. By stressing that the decisive criterion is whether a person is subject to that State's effective control and authority, the UNHCR itself is of the view that:

The purpose, intent, and meaning of Article 33(1) are unambiguous and establish an obligation not to return a refugee or asylum seeker to a country where he or she would be at risk of persecution or other serious harm, which applies *wherever a State exercises jurisdiction*, including at the frontier, on the high seas, or on the territory of another State (emphasis added).<sup>245</sup>

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<sup>243</sup> Andreas Fischer Lescano and Tillman Lohr, *Border Control at Sea: Requirements under International Human Rights and Refugee Law* (European Centre for Constitutional and Human Rights 2007) 14.

<sup>244</sup> Hathaway 2005, 337. See also, Justice Blackmun in *Sale*, 7.

<sup>245</sup> UNHCR, Advisory Opinion on the Extraterritorial Application of *Non-refoulement*, 12 para 24.

This extraterritorial reading of Article 33(1) of the Geneva Convention would also be in line with the developments within human rights law, which have placed particular emphasis on where the refugee is sent to, rather than where the action is initiated.<sup>246</sup> The complementarity between international refugee law and human rights law can be grounded in Article 31(3)(c) of the VCLT whereby, in interpreting a treaty, ‘any relevant rules of international law applicable in the relations between the parties’ shall be taken into account together with the context. According to the ILC,

Article 31(3)(c) also requires the interpreter to consider other treaty-based rules so as to arrive at a consistent meaning. Such other rules are of particular relevance where parties to the treaty under interpretation are also parties to the other treaty, where the treaty rule has passed into or expresses customary international law or where they provide evidence of the common understanding of the parties as to the object and purpose of the treaty under interpretation or as to the meaning of a particular term.<sup>247</sup>

Therefore, with regard to *non-refoulement* what matters is whether a certain conduct giving rise to a breach of a primary obligation is attributable to the State, and not whether it takes place within or beyond its borders. A State will therefore be responsible for

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<sup>246</sup> Goodwin-Gill and McAdam 2007, 250.

<sup>247</sup> ILC, Report of the 58th Session (2006), UN Doc A/61/10, 414-415.

complying with the obligation of *non-refoulement* each time a person is subject to or is within its jurisdiction—that is to say that that individual is within the territory of the State concerned, under its effective control, or affected by organs acting on behalf of that State.<sup>248</sup> Accordingly, the duty to respect Article 33(1) ‘inheres wherever a State exercises effective or *de facto* jurisdiction outside its own territory.’<sup>249</sup>

Additionally, given the lack of a clause explicitly restricting the geographical scope of Article 33 to the territory of the Contracting Parties, no reason exists to exclude its applicability anytime a State exercises jurisdiction over a refugee, even in extraterritorial contexts.<sup>250</sup> Jurisdiction is triggered ‘wherever a person is under the effective control of, or is directly affected by those acting on behalf of, the State in question.’<sup>251</sup> Therefore, upholding a broader understanding of Article 33 would not only be in line with evolving State practice to carry out migration controls beyond territorial borders,<sup>252</sup> but would also prevent the establishment of a double system where refugees who are able to elude migration controls, thus claiming asylum within borders, would obtain greater protection than

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<sup>248</sup>Lauterpacht and Bethlehem 2001, 87, 110. See also, Goodwin-Gill and McAdam 2007, 246. For a broader explanation of the concept of jurisdiction as either legal competence or effective control, see Chapter 7, Section 7.7.1.

<sup>249</sup> Hathaway 2005, 339.

<sup>250</sup> Kälin, Caroni and Heim 2011, 1361.

<sup>251</sup> *ibid.*

<sup>252</sup> Hathaway 2005, 67.



those intercepted before reaching the territory of the destination State where they expect to find refuge.<sup>253</sup>

### 2.5.2. (...) *Under the ICCPR and the CAT*

The extraterritorial relevance of the prohibition of *refoulement* has been endorsed, in several instances, by the UN human rights treaty monitoring bodies in relation to Article 7(1) of the ICCPR and Article 3(1) of the CAT.

Pursuant to Article 2(1) of the ICCPR, ‘[e]ach 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.’ A restrictive and cumulative interpretation whereby the ICCPR only applies to people who are at the same time physically in the territory *and* under the jurisdiction of the country is supported neither by doctrine nor by the HRC jurisprudence,<sup>254</sup> and would significantly curb human rights protection. In this regard,

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<sup>253</sup> Fischer Lescano and Lohr 2007, 15.

<sup>254</sup> See, e.g., *Delia Saldias de Lopez Burgos v Uruguay* Comm no 52/1979, 29 July 1981, paras 12.1-12.3 and *Lilian Celiberti de Casariego v Uruguay* Comm no 56/1979, 29 July 1981, para 10.3. See also, Thomas Buergenthal, ‘To Respect and to Ensure: State Obligations and Permissible Derogations’ in Louis Henkin (ed.) *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1981) 74; Manfred Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary*, (2<sup>nd</sup> revised edn, Kehl, N.P. Engel Publisher, 2005) 44; Kees Wouters, *International Legal Standards for the Protection from Refoulement: a Legal Analysis of the Prohibitions on Refoulement Contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture* (Intersentia 2009) 370-371.

Tomuschat's opinion, attached to the *Lopez Burgos v Uruguay* and *Celiberti de Casariego v Uruguay* cases, can be instructive in order to better understand the intentions of the drafters of the Covenant:

To construe the words 'within its territory' pursuant to their strict literal meaning as excluding any responsibility for conduct occurring beyond the national boundaries would, however, lead to utterly absurd results. The formula was intended to take care of objective difficulties which might impede the implementation of the Covenant in specific situations. [...] It was the intention of the drafters, whose sovereign decision cannot be challenged, to restrict the territorial scope of the Covenant in view of such situations where enforcing the Covenant would be likely to encounter exceptional obstacles. Never was it envisaged, however, to grant States parties unfettered discretionary power to carry out willful and deliberate attacks against the freedom and personal integrity of their citizens living abroad. Consequently, despite the wording of Article 2(1), the events, which took place outside Uruguay, come within the purview of the Covenant.<sup>255</sup>

Therefore, a State party to the ICCPR is responsible for guaranteeing the rights of the Covenant to all individuals who are present either within or outside its territory provided they fall within its jurisdiction.<sup>256</sup> From the case law of the HRC and its General

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<sup>255</sup>Individual Opinion by Tomuschat appended to *Lopez Burgos* and *Celiberti de Casariego* cases.

<sup>256</sup>A strictly territorial construction of the scope of application of the ICCPR is rejected by several scholars. See, e.g., Antonio Cassese, 'Are International Human Rights Treaties and Customary Rules on Torture Binding upon US Troops in Iraq?' (2004) *Journal of International Criminal Justice* 874; Luigi Condorelli and Pasquale De Sena, 'The Relevance of the Obligations Flowing from the UN

Comment 31, it emerges that what is decisive in establishing State responsibility is the *relationship* between the individual and the State - whether then, a person is under the jurisdiction or the effective control of the Contracting State, regardless of her location, and in relation to a violation of any of the rights set forth in the Covenant.<sup>257</sup>

In the *Lopez Burgos v Uruguay* case, the Committee explains how the reference to ‘individuals subject to its jurisdiction’ under Article 2(1) of the Covenant, ‘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.’<sup>258</sup> It should also be observed that for protection under the Covenant to be invoked, it is not necessary that the individual be a national of the responsible State: indeed, in the case against Uruguay, the applicant was affected by the conduct of Uruguayan agents acting on foreign territory. Furthermore, in a number of Concluding Observations, the Committee has upheld the dogma that a State party is responsible toward anyone within the

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Covenant on Civil and Political Rights to US Courts Dealing with Guantanamo Detainees’ (2004) *Journal of International Criminal Justice* 111-2. See also, HRC, *Concluding Observation on Israel* UN Doc CCPR/C/79/Add.93 (1998) para 10.

<sup>257</sup> HRC, General Comment no 31, para 10. See also, *General Comment no 23: The Rights of Minorities* UN Doc CCPR/C/21/Rev.1/Add.5 (4 August 1994) para 4.

<sup>258</sup> HRC, *De Lopez v Uruguay* Comm no 52/1979 (1981) UN Doc A/36/40 (Supp) (13th session) (29 July 1981) paras 12.1-12.3.

effective control and power of the State in question, regardless of the place where the violation occurred.<sup>259</sup>

The jurisprudence of the Committee seems to confirm the extraterritorial scope of the Covenant to the *non-refoulement* obligation where individuals are under the power or actual control of the State itself. This also implies a prohibition on returning a person where reliable grounds exist to believe that she will suffer irreparable harm either in the readmitting country or in any other country to which she could subsequently be removed.<sup>260</sup> Indeed, in its Concluding Observations on the United States, the HRC argues that:

The State party should take all necessary measures to ensure that individuals, including those it detains outside its own territory, are not returned to another country by way of, *inter alia*, their transfer, rendition, extradition, expulsion, or *refoulement* if there are substantial reasons for believing that they would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment.<sup>261</sup>

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<sup>259</sup> HRC, *Concluding Observations on Israel*, 21 August 2003, UN Doc CCPR/CO/78/ISR, para 11; *Concluding Observations on Croatia*, 28 December 1992, UN Doc CCPR/C/79/Add.15, para 9; *Concluding Observations on Belgium*, 19 November 1998, UN Doc CCPR/C/79/Add.99, para 14; *Concluding Observations on Belgium*, 12 August 2004, UN Doc CCPR/CO/81/BEL, para 6; *Concluding Observations on the United States of America*, 18 December 2006, UN Doc CCPR/C/USA/CO/3Rev. 1, para 10.

<sup>260</sup> HRC, General Comment 31, para 12.

<sup>261</sup> HRC, *Concluding Observations on the United States of America*, 18 December 2006, UN Doc CCPR/C/USA/CO/3Rev. 1, para 16.

The HRC confirms the extraterritorial applicability of the prohibition of *refoulement* in the more recent case of *Munaf v Romania*, where it found no breach of the Covenant's articles with regard to the handover of an Iraqi-American dual national criminal suspect from the Romanian Embassy in Baghdad to the custody of the multinational forces in Iraq.<sup>262</sup> Nonetheless, the Committee took the opportunity to recall 'its jurisprudence that a State party may be responsible for extraterritorial violations of the Covenant, if it is a link in the causal chain that would make possible violations in another jurisdiction.'<sup>263</sup>

The extraterritorial applicability of the ICCPR has also been upheld by the ICJ in the case on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* where the Court observed 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 [ICCPR], it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.<sup>264</sup>

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<sup>262</sup> HRC, *Mohammad Munaf v Romania* Comm no 1539/2006, UN doc CCPR/C/96/D/1539/2006 (21 August 2009) para 15.

<sup>263</sup> *ibid* para 14.2.

<sup>264</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004), Advisory Opinion, 9 July 2004, para 109.

Similarly, the Committee against Torture maintains that the *non-refoulement* obligation inscribed in Article 3 of the CAT applies in any territory under a State party's jurisdiction—that is to say 'all areas under the *de facto* effective control of the State party, by whichever military or civil authorities such control is exercised.'<sup>265</sup> For example, in the context of Guantánamo Bay, the Committee expressed its concern 'that the State party considers that the *non-refoulement* obligation, under Article 3 of the Convention, does not extend to a person detained outside its territory [...].'<sup>266</sup> Indeed, the provisions of the CAT that have an extraterritorial scope 'apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world.'<sup>267</sup>

The CAT offers a vast range of guarantees to people subjected to a removal decision: no restriction, indeed, is made on the personal scope of Article 3 according to which no State party can extradite, return, or expel a person to *another State* where she would be in danger of being subjected to torture. Scholars such as Nowak and McArthur have clarified that the refrain 'another State' does not encompass only the country of origin but shall be broadly interpreted

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<sup>265</sup> *Conclusions and Recommendations of the Committee against Torture concerning the second report of the United States of America*, UN Doc CAT/C/USA/CO/2, 25 July 2006, para 15.

<sup>266</sup> *ibid*, para 20.

<sup>267</sup> *ibid* para 15.

as referring ‘to any transfer of a person from one State jurisdiction to another.’<sup>268</sup>

Although this Convention does not contain any general provision on the territorial scope of Article 3, the textual meaning of the terms ‘expel’ and ‘return’ implicates both a territorial and extraterritorial application of the principle of *non-refoulement*. A different and more restrictive interpretation, as previously explained in the case of Article 33(1) of the Geneva Convention would justify the decision of States parties to send back to the risk of persecution any individual who has not managed to reach or to enter their territory.<sup>269</sup> Therefore, the decisive factor is the *de facto* causal relationship between the State and the individual and the capacity of the former to affect or protect the rights of the latter.

As formulated by the Committee in the Concluding Observations on the United States,

The State party should recognize and ensure that the provisions of the Convention expressed as applicable to ‘territory under the State party’s jurisdiction’ apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world.<sup>270</sup>

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<sup>268</sup> Manfred Nowak and Elizabeth McArthur, *The United Nation Convention Against Torture: A Commentary* (Oxford University Press Oxford 2008) 199.

<sup>269</sup> Wouters 2009, 436.

<sup>270</sup> *Conclusions and Recommendations on the United States of America*, UN Doc CAT/C/USA/C/2 (2006) para 15.

It can thus be inferred that Article 3 of the CAT is pertinent also in all those situations in which the denial of access to the territory at the border has as a direct consequence the return of a person to a territory where she risks being subjected to torture.<sup>271</sup>

The Committee against Torture has specifically addressed the issue of the applicability of Article 3(1) of the Convention in situations of *non-refoulement* at sea. In the 2008 *JHA v Spain (Marine I)* case, the Committee against Torture found that the responsibility of the respondent State with regard to *non-refoulement* was a consequence of both Spain's interdiction programme and the extraterritorial examination of asylum claims.<sup>272</sup> The case was declared inadmissible because the complainant was not properly authorized to represent the alleged victims. Nonetheless, the Committee emphasized the responsibility of Spain as it exercised control over the intercepted people from the outset - by providing assistance in the context of search and rescue after receiving the distress call from the vessel - and throughout their detention in Mauritania and the process of repatriation. In issuing its final views, the Committee against Torture:

Recalls its General Comment No 2, in which it states that the jurisdiction of a

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<sup>271</sup> Walter Suntinger, 'The Principle of *Non-Refoulement*: Looking rather to Geneva than to Strasbourg?' (1995) *Austrian Journal of Public and International Law* 210.

<sup>272</sup> *JHA v Spain* Comm no 323/2007 UN Doc CAT/C/41/D/323/2007 (21 November 2008).



State party refers to any territory in which it exercises, *directly or indirectly, in whole or in part, de jure or de facto effective control*, in accordance with international law. [. . .] It considers that such jurisdiction must also include situations where a State party exercises, directly or indirectly, *de facto or de jure control over persons in detention* [. . .]. 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 [. . .] (emphasis added).<sup>273</sup>

A similar reasoning was followed by the Committee against Torture in the *Sonko v Spain* case<sup>274</sup> concerning the death of a migrant intercepted by the Spanish Civil Guard while swimming in an effort to enter the Autonomous City of Ceuta. Mr. Sonko was pulled out of the water along with other migrants while still alive and brought into Moroccan territorial waters, where he was thrown into the sea after the Civil Guard officers had punctured his dinghies.<sup>275</sup> Although one of the officers jumped into the water to help him and save him from drowning, Mr. Sonko died shortly thereafter. The Committee held that the concept of jurisdiction as ‘effective control and authority’ is applicable in respect of all the provisions of the CAT. It concluded that the Civil Guard officers were exercising effective control over the

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<sup>273</sup> *ibid* para 8.2.

<sup>274</sup> *Sonko v Spain* UN Doc CAT/C/47/D/368/2008 (20 February 2012).

<sup>275</sup> *ibid*, paras 2.1-2.2

persons on board – even if the vessel was in Moroccan territorial waters – and were therefore responsible for the safety of the intercepted migrants.<sup>276</sup>

### 2.5.3. (...) *Under the ECHR*

As a preliminary note, the emphasis of this thesis will primarily lie on State responsibilities regarding the treatment of refugees arriving by sea. Nonetheless, conclusions drawn from this analysis are also pertinent for other forms of extraterritorial immigration controls. It is also worth adding that the above-discussed cases of extradition and expulsion resulting in *refoulement* should not be confused with the issue of extraterritorial application of human rights treaties,<sup>277</sup> since they do not concern the actual exercise of a State's jurisdiction abroad.

In human rights treaties, 'jurisdiction' refers to an 'actual exercise of control and authority' by a State over persons or territory.<sup>278</sup> Every time a State exercises this power, it must protect and ensure the rights of people under its control. Whilst in *Hirsi v Italy*, the ECtHR dealt

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<sup>276</sup> *ibid*, para 10.3

<sup>277</sup> Marko Milanovic, *The Extraterritorial Application of Human Rights Treaties* (Oxford University Press 2011) 8.

<sup>278</sup>Theodor Meron, 'Extraterritoriality of Human Rights Treaties' (1995) AJIL78-83; Pasquale De Sena, *La nozione di Giurisdizione Statale nei Trattati sui Diritti dell'Uomo* (Giappichelli 2002); George Ress, 'Problems of Extraterritorial Human Rights Violations. The Jurisdiction of the European Court of Human Rights' (2002) IYIL51-67; Milanovic 2011, 8.

with the question of the extraterritorial interpretation of ‘jurisdiction’ somewhat briefly, it did develop its previous jurisprudence by affirming that the *ratione loci* scope of the Convention extends also to the high seas, provided that the State exercises effective control and authority through its organs over the individuals concerned. And in the instant case, the Court held the respondent State exercised jurisdiction.<sup>279</sup>

Pursuant to Article 1 of the ECHR, ‘The High Contracting Parties shall secure to everyone [therefore even refugees, stateless persons, and undocumented migrants] within their jurisdiction the rights and freedoms defined in Section I of this Convention.’ Since the phrase of Article 1 ‘under its jurisdiction’ is not geographically limited, it could be interpreted as exceeding the territorial borders of the State in question. However, it is beyond doubt that the concept of ‘jurisdiction as a threshold criterion of responsibility’ for human rights breaches is awkward, especially when complaints stem from extraterritorial acts or omissions.<sup>280</sup>

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<sup>279</sup> *Hirsi v Italy*, paras 76-82.

<sup>280</sup> Guy S Goodwin-Gill, ‘The Extraterritorial Reach of Human Rights Obligations: a Brief Perspective on the Link to Jurisdiction’ in L Boisson de Chazournes and M C Kohen (eds), *International Law and the Quest for its Implementation/Le Droit International et la Quête de sa Mise en Oeuvre: Liber Amicorum Vera Gowlland-Debbas* (Brill 2010) 306. To read more on the concept of jurisdiction under Article 1 of the ECHR, see, Raffaella Nigro, ‘Giurisdizione e Obblighi Positivi degli Stati Parti della Convenzione Europea dei Diritti dell’Uomo: il Caso *Ilascu*’ (2005) *Rivista di Diritto Internazionale* 413-40; Michal Gondek, ‘Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization’ (2005) *NILR* 349-87; Irini Papanicolopulu, ‘La Nozione di Giurisdizione ai Sensi dell’Articolo 1 della Convenzione Europea dei Diritti Umani

The jurisprudence of the European Commission on Human Rights and the Court has contributed to clarifying the terms of an enduring debate on the geographical scope of the Convention by enhancing an understanding of jurisdiction as applicable also outside the territory covered by the Council of Europe Member States.<sup>281</sup> A heated debate on the extraterritorial applicability of the ECHR has unfolded in the wake of the *Bankovic v Belgium* case where the Court rejected the responsibility of the respondent States with regard to the NATO bombing of Serbia, a country that was considered as not falling within the legal space of the ECHR Contracting Parties.<sup>282</sup>

However, the Court has accepted the extraterritorial jurisdiction and, therefore, the consequent responsibility of governments for actions performed by their authorities outside their borders in several

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nella Recente Giurisprudenza della Corte Europea dei Diritti Umani' in Tullio Scovazzi, Irini Papanicolopulu and Sabrina Urbinati (eds.) *I Diritti Umani di fronte al Giudice Internazionale. Atti della Giornata di Studio in Memoria di Carlo Russo* (Giuffr  2009) 83-130; Pasquale De Sena, 'The Notion of 'Contracting Parties' Jurisdiction' under Article 1 of the ECHR: some Marginal Remarks on Nigro's Paper' ('La nozione di 'giurisdizione degli Stati contraenti' nell'articolo 1 della Convenzione europea dei diritti dell'uomo: alcune osservazioni critiche in margine all'intervento di R. Nigro') (2011) 19 IYIL 75-83.

<sup>281</sup>The European Commission of Human Rights has clarified that the extraterritorial applicability of the Convention shall not be blurred with the territories of the Contracting Parties in respect of which the Convention enters into force pursuant to Article 63. Indeed, 'Article 63 of the Convention, providing for the extension of the Convention to other than metropolitan territories of High Contracting Parties, [cannot] be interpreted as limiting the scope of the term 'jurisdiction' in Article 1 to such metropolitan territories.' See, *Cyprus v Turkey* App no 6780/74 and 6950/75 (EComHR, 26 May 1975) 136-7.

<sup>282</sup>*Bankovic v Belgium*. For an extended critical analysis of the *Bankovic* case, see, Richard Lawson, 'Life after Bankovic—On the Extraterritorial Application of the European Convention on Human Rights' in Fons Coomans and Menno Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 104; K Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia 2009) 205–6.

other cases concerning three different circumstances:<sup>283</sup> i) cases ‘where the acts of State authorities produced effects or were performed outside their own territory’;<sup>284</sup> ii) cases in which a contracting party ‘exercised effective control of an area outside its national territory’ as a consequence of military action,<sup>285</sup> iii) cases involving the activities of a contracting party’s ‘diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State.’<sup>286</sup>

In several other instances where States acted outside of ECHR space, the Court found violations of Convention rights.<sup>287</sup> Although, in *Hirsi v Italy*, the Court reaffirmed that the jurisdiction of a State is essentially territorial,<sup>288</sup> it upholds legal precedents by endorsing the view that for extraterritorial jurisdiction to be triggered, ‘a direct and

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<sup>283</sup> The first three categories of exceptions were first set out by the ECtHR in *Loizidou v Turkey*, para 62.

<sup>284</sup> *ibid* para 69; See *Drozdz and Janousek v France and Spain* (1992) 14 EHRR 745, para 91.

<sup>285</sup> *Bankovic v Belgium*, para 70. See also, *Cyprus v Turkey* (1982) 4 EHRR 482 (Commission Decision) para 8.

<sup>286</sup> *Bankovic v Belgium*, para 73. In this regard, the Court in *Hirsi v Italy* also cites the *Al Saadoon and Mufdhi v United Kingdom* (2010) 51 EHRR 9, para 85 .

<sup>287</sup> With regard to State security forces acting abroad, see e.g., *Öcalan v Turkey* App no 46221/99 (ECHR, 12 May 2005); and *Ilich Sanchez Ramirez v France* App no 59450/00 (ECtHR, 4 July 2006). On cases of military presence abroad, see, *Al-Saadoon*; *Al-Skeini v UK* (2011) 53 EHRR 18; *Al-Jedda v UK* App no 27021/08 (ECtHR, 7 July 2011); and a pending case (*Pritchard v the United Kingdom* App no 1573/11) where the applicant alleges breaches of Articles 2 and 13. With regard to military intervention exercising effective control, see, *Markovic and Others v Italy* App no 1398/03 (ECtHR, 14 December 2006); *Mansur PAD and Others v Turkey* App no 60167/00 (ECtHR, 28 June 2007) admissibility decision; *Medvedyev and Others v France* (2010) 51 EHRR 39.

<sup>288</sup> *Hirsi v Italy*, para 71.

immediate link'<sup>289</sup> bringing the rights and freedoms recognized by the Convention under the actual power of the State itself, is sufficient.<sup>290</sup> Therefore, where exceptional circumstances exist justifying a finding by the Court that the State extraterritorial jurisdiction is indeed triggered, it has to be determined with reference to the full and exclusive control exercised by the State over a prison or ship.<sup>291</sup>

To translate this debate into the issue of the protection owed to people intercepted on the high seas while striving to touch European soil, the Court in *Hirsi v Italy* was eager to show that its decision was consistent with its previous jurisprudence. For instance, in *Al-Skeini v UK*, it recognized that full and exclusive control over individuals was sufficient for triggering the extraterritorial jurisdiction of the acting State.<sup>292</sup> The six individuals killed in Iraq in the course of security operations fell under the jurisdiction of British authorities who had responsibility for maintaining security in South East Iraq. Indeed, from the removal of the Ba'ath regime and until the accession of the Interim Government, the UK and the USA - by virtue of the relevant UN Security Council Resolution and Regulations of the Coalition

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<sup>289</sup>Lawson 2004, 104.

<sup>290</sup>*Hirsi v Italy*, para 74.

<sup>291</sup> *ibid* para 73. The Court refers here to *Al-Skeini v UK*, paras 132 and 136; and to *Medvedyev v France*, para 67. For an analysis of the *Al-Skeini* case, see Conall Mallory, 'European Court of Human Rights *Al-Skeini and Others v United Kingdom* (App no 55721/07) Judgment of 7 July 2011' (2012) 61 ICLQ 301.

<sup>292</sup>*Al-Skeini v UK*, para 149.

Provisional Authority in Iraq<sup>293</sup> - took on the exercise of some *public powers* normally to be exercised by a sovereign government.<sup>294</sup>

Similarly, in the *Al Saadoon and Mufdhi v UK* case, the ECtHR held that the UK exercised jurisdiction when it handed over the applicants in its custody in Iraq to the authorities of the host country. The Court held that ‘given the total and exclusive *de facto*, and subsequently also *de jure*, control exercised by the British authorities over the premises in question, the individuals detained there, including the applicants, were within the UK’s jurisdiction’,<sup>295</sup> despite the existence of a bilateral agreement with Iraq obliging the British authorities to hand over the detainees.<sup>296</sup> Considering the lack of a binding assurance that the death penalty would not be executed, the Court stated that:

The referral of the applicant’s cases to the Iraqi courts and their physical transfer to the custody of the Iraqi authorities failed to take proper account of the United Kingdom’s obligations under [the Convention] since, throughout the period in question, there were substantial grounds for believing that the applicants would face a real risk of being sentenced to death and executed.<sup>297</sup>

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<sup>293</sup> *ibid* paras 143-8.

<sup>294</sup> *ibid* para 149.

<sup>295</sup> *Al-Saadoon v UK*, para 88.

<sup>296</sup> *ibid* paras 126-8, 140-5.

<sup>297</sup> *ibid* para 143.

Therefore, the Court concluded that:

Whatever the eventual result, [...] it is the case that through the actions and inaction of the United Kingdom authorities the applicants have been subjected [...] to the fear of execution by the Iraqi authorities. [As] causing the applicants psychological suffering of this nature and degree constituted inhuman treatment, [...] there has been a violation of Article 3 of the Convention.<sup>298</sup>

The European Commission on Human Rights has also dealt with cases concerning extraterritorial *non-refoulement* from an embassy in the territory of a non-Contracting Party to the ECHR. For example, the *WM v Denmark* case concerned 18 citizens from the German Democratic Republic (GDR) whose permission to emigrate to the West was denied.<sup>299</sup> They therefore decided to enter the Danish embassy to request the Danish Ambassador to assist them in negotiations with the GDR. The Ambassador decided, instead, to hand the applicants over German authorities at the hands of whom the applicants complained to have suffered treatments that violated Article 5. Although the Commission found that ‘what happened to the applicant at the hands of the [GDR] authorities [could] not in the circumstances be considered to be so exceptional to engage the

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<sup>298</sup> *ibid* para 144.

<sup>299</sup> *WM v Denmark* App no. 17392/90 (ECommHR, 14 October 1992).



responsibility of Denmark’,<sup>300</sup> in its admissibility decision, it held that:

An act or omission of a Party to the Convention may exceptionally engage the responsibility of that State for acts of a State not party to the Convention where the person in question had suffered or risks suffering a flagrant denial of the guarantees and rights secured to him under the Convention.<sup>301</sup>

The *Al-Jedda v UK* case concerned an Iraqi national that - for imperative reasons of security in Iraq - in October 2004 was arrested on suspicion of involvement in terrorism and subsequently detained for over three years at a detention facility in Basra (Iraq) run by British forces. When major military operations in Iraq were declared complete in May 2003, a United Nations Assistance Mission for Iraq (UNAMI) was established and the UK became an occupying power. According to the ECtHR, although the UN Resolution 1511, adopted on 16 October 2003, authorized ‘a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq’, the acts of soldiers within the Multi-National Force continued to be attributable to the troop-contributing nations, and not to the UN.<sup>302</sup> Moreover, the US

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<sup>300</sup> *ibid* para 1.

<sup>301</sup> *ibid*.

<sup>302</sup> *Al-Jedda v UK*, para 80.

and the UK, through the establishment of the Coalition Provisional Authority, ‘continued to exercise the powers of government in Iraq.’<sup>303</sup> Therefore, because the UK exercised continuous authority and control over Mr. Al-Jedda throughout his internment, which took place within a detention facility controlled exclusively by British forces, the applicant clearly fell under the jurisdiction of the UK for the purpose of Article 1 of the Convention.<sup>304</sup>

Whilst *de jure* jurisdiction refers to the lawful exercise of authority extraterritorially,

*De facto* jurisdiction can arise in at least three ways. The first is a territorial conception based on the occupying power-type scenario. The second scenario is personal and involves individuals subject to the State’s physical power or control. The third reflects a combination of the territorial and personal elements of the first two, with an emphasis on the background exercise of governmental authority.<sup>305</sup>

To recapitulate, the extraterritorial applicability of the Convention can be established only on a casuistic basis every time either *de jure* or *de facto* jurisdiction arises. The inclusion of ‘*de facto* jurisdiction’ implies that accountability under human rights law can be established also when there is no entitlement to act under general international

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<sup>303</sup> *ibid* para 80.

<sup>304</sup> *ibid* paras 85-6.

<sup>305</sup> Costello 2012, 298.

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### **2.5.3.1. (...) In migration control activities beyond borders**

The arguments made above in favor of the extraterritorial applicability of the Convention on territories outside the geographic area of the Council of Europe imply that even protection claims made at the border of the destination State fall under its jurisdiction. Therefore, under the Convention, a State shall be responsible for any act or omission concerning the protection claimant and the entry request.<sup>306</sup> In these circumstances, no difference exists between removal and denial of entry, given that both situations would potentially expose the individual to proscribed ill-treatment.<sup>307</sup> Hence, the prohibition of *refoulement* implicit in Article 3 shall be applied to people claiming protection within the territory of a State party to the Convention, as well as to those intercepted at the border, without distinction.<sup>308</sup>

Whereas the applicability of the principle of *non-refoulement* to protection seekers claiming asylum at the border is quite evident, the applicability of this principle to people intercepted at sea during offshore migration controls is less conclusive. To shed light on this

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<sup>306</sup> Noll 2000, 441-2.

<sup>307</sup> *ibid*, 442.

<sup>308</sup> *ibid* 441-5.

issue, it may help to go back to the views adopted by the Court in previous cases. In *Xhavara and Others v Italy and Albania*, the Court held that Italy had a responsibility toward intercepted individuals during the performance of border surveillance measures on the high seas - and *a fortiori* for the protection of the principle of *non-refoulement*.<sup>309</sup> The case was declared inadmissible due to failure to exhaust domestic remedies. Nonetheless, the Court clarified that the sinking of a boat carrying Albanian migrants following a collision with an Italian warship - deployed in the framework of an agreement authorizing the Italian Navy to board and search Albanian vessels - could not exclude the international responsibility of Italy.<sup>310</sup>

*Hirsi* extends the decision in *Xhavara* in so far it is the first case in which the Court was called on to deal with persons claiming refuge against *refoulement* on the high seas, further away from the territory of a Contracting Party. In *Xhavara*, Albanians did not seek such protection, and as a consequence, the Court did not investigate what obligations Italy may have had in this respect. But, as recognized by the ECtHR, in the 2009 push-backs, individuals in distress on the high seas were entitled to protection and to have their protection claims assessed. Indeed, they were, *de facto*, under the actual control of Italian authorities, which were therefore in the position to either

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<sup>309</sup> App no 39473/98, Admissibility Decision (ECtHR, 11 January 2001) (*Xhavara v Italy*).

<sup>310</sup> See Ruth Weinzierl and Urszula Lisson, *Border Management and Human Rights* (German Institute for Human Rights 2007) 63, 70.

protect or violate their rights.

The *Hirsi* reasoning on jurisdiction is grounded on the ECtHR's jurisprudence concerning interdiction of vessels on the high seas. In the 2010 *Medvedyev and Others v France* decision, the Grand Chamber considered whether the jurisdiction of France could be entertained in the case concerning crew members on a Cambodian ship intercepted by the French Navy near Cape Verde after obtaining the assent of the Cambodian government through a diplomatic note.<sup>311</sup> It concluded that the respondent State violated the Convention. Since France had continuously exercised full and exclusive control over both the Cambodian ship and its crew, even ordering the rerouting of the boat, the crew remained *de facto*, from the time of its interception, under the control of French authorities, falling within France's jurisdiction for the purposes of Article 1.<sup>312</sup> In its reasoning, the Court also added that:

The special nature of the maritime environment [ . . . ] cannot justify an area outside the law where ships' crews are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction, any more than it can provide offenders with a 'safe haven.'<sup>313</sup>

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<sup>311</sup> *Medvedyev v France*.

<sup>312</sup> *ibid*.

<sup>313</sup> *ibid* para 81. See, Efthymios (Akis) Papastavridis, 'European Court of Human

In the *Women on Waves and Others v Portugal* case, the ECtHR found a violation of Article 10 of the Convention (freedom of expression) as the three applicant associations were not allowed by the Portuguese government to campaign in favor of the decriminalization of abortion.<sup>314</sup> What is interesting is that activities, such as informative meetings on the prevention of sexually transmitted diseases or family planning were scheduled to take place on board the ship, which was chartered by the three NGOs for the purpose of holding their sessions at sea. On 27 August 2004, their vessel was banned from entering Portuguese territorial waters through the intervention of a Portuguese warship. The Court found a breach of the Convention as the interference by the authorities had been disproportionate to the informative aims pursued by the applicants.<sup>315</sup>

In the *Hirsi v Italy* case, in spite of the fact that the interception occurred in international waters, the Italian government had never disputed the jurisdiction of the Court under Article 1 of the Convention. The applicants were, indeed, put onboard ships whose crews were composed of Italian military personnel who exercised a ‘continuous and exclusive *de jure* and *de facto* control’ over the

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Rights: *Medvedyev et al v France*’ (2010) 59(3) ICLQ 867–82.

<sup>314</sup>*Women on Waves and Others v Portugal* App no 31276/05 (ECtHR, 3 May 2009).

<sup>315</sup> *ibid* para 44.

intercepted people.<sup>316</sup> And, in line with the *Medvedyev* principle, this deduction would be valid even in circumstances in which the passengers were simply escorted to Tripoli.

By stressing that the issue of extraterritorial jurisdiction must be resolved with reference to the particular facts,<sup>317</sup> the Grand Chamber held that intercepted individuals were under the complete, effective, and exclusive control of Italian organs. Therefore, it rejected the Italian government's argument that it 'was not responsible for the fate of the applicants on account of the allegedly minimal control exercised by the authorities over the parties concerned at the material time.'<sup>318</sup> As the Court put it:

The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it, which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.<sup>319</sup>

Thus, it concluded that *Hirsi* constituted 'a case of extra-territorial exercise of jurisdiction by Italy capable of engaging that State's

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<sup>316</sup>*Hirsi v Italy*, para 81.

<sup>317</sup>*ibid* para 73.

<sup>318</sup>*ibid* para 79.

<sup>319</sup>*ibid* para 70.

responsibility under the Convention.’<sup>320</sup> Despite the fact that the Court’s reasoning is not exhaustive on this point, the *Hirsi* case gives room to contend that also a *minimal control* would be sufficient to trigger the jurisdiction of the State exercising migration controls. Indeed,

The Court cannot subscribe to the Government’s argument that Italy was not responsible for the fate of the applicants on account of the allegedly minimal control exercised by the authorities over the parties concerned at the material time.<sup>321</sup>

A possible interpretation of the ‘effective control’ element would link it to the establishment of physical contact between intercepting authorities and intercepted people.<sup>322</sup> However, shifting emphasis from State action *per se* to the *consequences* of such action, it seems fitting to argue that jurisdiction (and potentially responsibility) under international human rights law can also be engaged in those operations of looser-control at sea - such as intimidating a boat to modify its course by screaming or steaming nearby until it leaves the territorial waters or the contiguous zone; as well as conducting or

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<sup>320</sup> *ibid* para 78.

<sup>321</sup> *ibid* para 79.

<sup>322</sup> *Mutatis Mutandis*, this approach would be in line with the ECtHR’s decision in *Bankovic v Belgium and Others*, or the House of Lord’s judgment in *Al-Skeini and Others (Respondents) v Secretary of State for Defence (Appellant); Al-Skeini and Others (Appellants) v Secretary of State for Defence (Respondent) (Consolidated Appeals)*, [2007] UKHL 26, House of Lords (Judicial Committee), 13 June 2007.



escorting the ship to a third country - which result in the return of migrants and refugees to countries where their life and liberty can be seriously threatened.<sup>323</sup>

The ‘minimal control threshold’ was also applied in the *Al-Skeini* case in respect of one of the six persons killed in Iraq by British authorities. According to the applicant, he and his family were sitting around the dinner table when there was a sudden burst of machine-gunfire from outside the building and bullets struck his wife in the head.<sup>324</sup> The Court here held that:

The third applicant's wife was killed during an exchange of fire between a patrol of British soldiers and unidentified gunmen and *it is not known which side fired the fatal bullet*. The Court considers that, since the death occurred in the course of a United Kingdom security operation, when British soldiers carried out a patrol in the vicinity of the applicant's home and joined in the fatal exchange of fire, there was a jurisdictional link between the United Kingdom and this deceased also (emphasis added).<sup>325</sup>

From the joint reading of these cases, it emerges that the concept of ‘effective control’ also involves State actions that fall short of

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<sup>323</sup> For a thorough review of the case law of international human rights bodies on State extraterritorial obligations, see, Section 2.5.

<sup>324</sup> *Al-Skeini v UK*, para 44.

<sup>325</sup> *ibid* para 149.

arresting or detaining the individuals concerned.<sup>326</sup> ‘Effective control’ indeed implies any coercive conduct imposed on a person through the use of direct force (i.e., by shooting or bombing), ‘but also less intrusive measures like forcing a boat off of its course’,<sup>327</sup> or killing someone in an exchange of fire where it is not known which side fired the fatal bullet.<sup>328</sup>

Turning back to the context of migration controls at sea, if preventing entry into territorial waters does not automatically amount to *refoulement*, violations of this principle arise if refugees are returned to the borders of a dangerous and unsafe country. Therefore, interdicting authorities shall always determine whether a specific third States is ‘safe, accessible, and reachable for the boat in question.’<sup>329</sup> By referring to its previous case law in the context of expulsions, in *Hirsi*, the Court confirmed that the prohibition of torture implies an obligation not to remove the individual in question where substantial grounds have been shown for believing that the returned person would face a real risk of treatments banned by Article 3.<sup>330</sup>

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<sup>326</sup> Roland Bank, ‘Refugees at Sea; Introduction to Article 11 of the 1951 Convention’ in Zimmermann Andreas (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol – A Commentary* (Oxford University Press 2011) 841.

<sup>327</sup> *ibid.*

<sup>328</sup> See, e.g., *Al-Saadoon v UK*.

<sup>329</sup> Bank 2011, 849.

<sup>330</sup> *Hirsi v Italy* para 114. The Court cites *Soering v UK*, paras 90–1; *Vilvarajah v UK*, para 103; *Jabari v Turkey* App no 40035/98 (ECtHR, 1 July 2000), para 38; *Ahmed v Austria* (1997) 24 EHRR 278, para 39; *HLR v France* (1997) 26 EHRR 29, para 34; and *Salah Sheekh v The Netherlands* (2007) 45 EHRR 50, para 135.

Additionally, in *Hirsi*, the Court had the possibility of commenting on positive human rights obligations incumbent upon States during and after naval interdiction. By stating that the return by Italy of interdicted migrants and refugees to Libya, in the absence of any procedural safeguards, was impermissible, the Court built on an emerging trend in international human right law. As we will see in the next Chapters, the salience of *Hirsi* is not limited to the contribution it gave to the refinement of the concepts of jurisdiction and *non-refoulement* in extraterritorial contexts, but extends also to the discussion on the right to access asylum procedures and effective remedies even when migrants and refugees are intercepted on the high seas.

## **2.6. EU law and *non-refoulement***

Before starting this Section, the reader should be reminded that this thesis will not substantively engage with the study of EU law. However, a general overview of the main provisions concerning the principle of *non-refoulement* (as well as the later-assessed right to access asylum procedures and effective remedies) is offered as a background in the description of the legal instruments applying to the rights of refugees in the European context.

Pursuant to Article 78(1) of the Treaty on the Functioning of the EU (TFEU),

The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

While Article 4 of the EU CFR provides that ‘no one shall be subjected to torture or to inhuman or degrading treatment or punishment’, the prohibition of *refoulement* is explicitly recognized by Article 19(2) of the EU CFR whereby ‘no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to death penalty, torture or other inhuman or degrading treatment or punishment.’<sup>331</sup> The ‘Explanations’ to the CFR – which applies as long as States are implementing EU law, whether or not their actions take place within, at, or beyond the territorial borders - affirm that Article 19 incorporates the case law of the ECtHR regarding Article 3 of the relevant Convention.<sup>332</sup>

The EU Schengen Border Code (SBC) refers, in its Preamble, to

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<sup>331</sup> See *Hirsi*, paras 28, 135.

<sup>332</sup> According to the Presidium of the Convention that drafted the Charter, the Explanations ‘have no legal value and are simply intended to clarify the provisions of the Charter.’

the rights and principles recognized by the EU CFR.<sup>333</sup> Whilst Article 3 sets forth that the Code is to be applied without prejudice to ‘the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*’, Article 5(4)(c) allows for derogation from normal entry criteria on account of humanitarian grounds or other international obligations. The Schengen Border Code is an EU migration law instrument of special significance by virtue of its application in extraterritorial immigration control scenarios.<sup>334</sup> It describes the border in geographical terms (Article 2(2)) and defines ‘border guards’ as public officials performing their surveillance functions ‘along the border or the immediate vicinity of that border.’ At the same time, when outlining the different control devices, the *ratione loci* of the Code exceeds the territorial perimeter of EU Member States, since extraterritorial controls, either in airports, which do not hold the status of international airports, or in the territory of a third country are envisioned as possible solutions.<sup>335</sup>

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<sup>333</sup> Regulation of the European Parliament and of the Council (EC) 562/2006 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders [2006] OJ L105/1 (SBC).

<sup>334</sup> *Hirsi v Italy*, para 31.

<sup>335</sup> SBC, paras 2.1.3. and 2.2.1, Annex VI. While at sea, controls can be performed ‘in the territory of a third country’(para 3.1.1, Annex VI), checks can be carried out also ‘in [rail] stations in a third country where persons board the train’ (para 1.2.2, Annex VI). For an analysis of the scope of application of the SBC, see, Violeta Moreno-Lax, ‘Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers’ Sanctions with EU Member States’ Obligations to Provide International Protection to Refugees (2008) 10 EJML 315; Maarten Den Heijer, ‘Europe Beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control’ in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff 2010) 176–80; Moreno-Lax 2011b, 444-7.

In the *Hirsi* case, the ECtHR attached particular weight to the content of a letter written on 15 May 2009 by Mr Jacques Barrot, Vice-President of the European Commission, called to elaborate on the material scope of application of the Schengen Border Code.<sup>336</sup> He argued that Italy-Libya push-backs amounted to border surveillance operations falling within the purview of the Code by virtue of Article 12 whereby border surveillance measures are aimed at preventing unauthorized border crossings. Therefore, in the wake of the Commission's reasoning, where engaging in interception activities, Italy, as an EU Member State, shall always comply with its international obligation of *non-refoulement* as required by the ECHR and the Schengen Border Code, whether such activities are conducted in its territorial waters or on the high seas.<sup>337</sup>

It is also worth adding that Article 21(1) of the Recast Qualification Directive clearly confirms the extraterritorial scope of *non-refoulement*, since it obliges Member States to respect this principle 'in accordance with their international obligations.' Contrarily, Recital 21 and Article 3(1) of the Recast Procedures Directive limit its scope to territory, border, territorial waters, and transit zones.

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<sup>336</sup> Letter from ex-Commissioner Barrot to the President of the LIBE Committee, 15 July 2009, as cited by the ECtHR in *Hirsi v Italy*, paras 34, 135.

<sup>337</sup> *ibid.* See also Bruno Nascimbene, 'Il Respingimento degli Immigrati e i Rapporti tra Italia e Unione Europea' (2009) *Affari Internazionali* 4; Violeta Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23 *IJRL* 174..

## 2.7. Defining the concept of ‘safe third country’

Over the last two decades, EU Member States have elaborated various mechanisms to shift responsibility for asylum seekers to other countries either within or outside the EU. Whilst internal transfers of responsibility within the EU are governed by the Dublin Regulation,<sup>338</sup> external transfers to non-EU third countries are performed through the concepts of ‘safe third country’ - primary focus of this Section - and ‘first country of asylum.’<sup>339</sup> Yet, most of the time, no formal agreement on attribution of State responsibility for refugees exists between an EU Member State and a third country, thus

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<sup>338</sup> The Dublin Regulation 343/2003 establishes the principle that only one EU Member State is responsible for examining an asylum application. The objective is to prevent asylum shopping – several applications submitted by one person – and to avoid asylum seekers from being sent from one country to another. A number of hierarchical criteria are therefore elaborated in order to identify the Member State responsible for each asylum application. The 2003 Dublin Regulation has now been replaced by the 2013 Recast Dublin Regulation. To read more on these two Regulations, see, *inter alia*, Ulrike Brandl, ‘Distribution of Asylum Seekers in Europe?: Dublin II Regulation Determining the Responsibility for Examining an Asylum Application’ in Constança Dias Urbano De Sousa and Philippe De Bruycker (eds) *The Emergence of a European Asylum Policy/L’émergence d’une politique européenne d’asile* (Bruylant 2004); Ralf Roßkopf, ‘Dublin III Beyond MSS and NS: Amending the Recast Proposal for the Dublin II Regulation No 343/2003’ (2012) 50(2) *AWR Bulletin* 60-79; Evelien Brouwer, ‘Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof’ (2013) 9(1) *Utrecht Law Review* 135-147.

<sup>339</sup> Outside the scope of this thesis is an analysis of the ‘internal protection alternative (IPA).’ Although a well-established definition does not exist, the IPA follows the logic that a person who is present abroad cannot qualify as a refugee under the 1951 Geneva Convention if she is able to seek adequate protection from persecution within a particular region of that very same country she fled from to seek asylum abroad. See, e.g., James Hathaway and Michelle Foster, ‘Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination’ in Erika Feller *et al* (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press 2003) 353, 365-81; Zimmermann and Mahler 2011, 281, 341; Jessica Schultz, ‘The European Court of Human Rights and Internal Relocation: an Unduly Harsh Standard?’ in Gauci JP, Giuffré M and Tsourdi L, *Forced Migration(s): Critical Perspectives on Refugee Law* (Martinus Nijhoff Publishers 2014).

conceding ample margin of discretion to governments to discern when a State is safe enough to assume responsibility for refugees. Readmission agreements, agreements for technical and police cooperation, and diplomatic assurances for removing people who are considered inconducive to the public good, are some of the bilateral arrangements EU Member States have traditionally relied upon to implement ‘safe third country’ policies.

The concept of ‘safe country’ has been described as:

A procedural mechanism for shuttling asylum seekers to other States said to have primary responsibility for them, thereby avoiding the necessity to make a decision on the merits because another country is deemed or imagined to be secure.<sup>340</sup>

Article 31(1) of the Geneva Convention has been frequently adduced as a possible legal basis for ‘safe third country’ practices. It reads as follows:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees, who, coming directly from a territory where their life or freedom was threatened, enter or are present in the territory without authorization [...].

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<sup>340</sup> Goodwin-Gill and McAdam 2007, 392.



As the next Section will discuss, Article 31(1) solely aims to regulate the benefit of non-penalization, without creating any rule obligating the asylum seeker to file a protection claim in ‘first countries of asylum’ or ‘safe third countries.’<sup>341</sup>

The notion of ‘safe third country’, now integrated into the EU Recast Procedures Directive and the asylum legislation of almost all EU Member States,<sup>342</sup> continues to be very controversial.<sup>343</sup> In delimiting the contours of the term ‘safe’, Article 38 of the Recast Procedures Directive allows Member States to apply the ‘safe third country’ concept only where the competent authorities are satisfied that a person seeking asylum will be treated in accordance with the following principles in the third country concerned:

a) Life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; b) there is no risk of serious harm as defined in Directive 2011/95/EU; c) the principle of *non-*

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<sup>341</sup> Gregor Noll, ‘Article 31 1951 Convention’ in Zimmermann 2011, 1254.

<sup>342</sup> Sabine Waidlich, ‘First Instance Asylum Proceedings in Europe: Do Bona Fide Refugees Find Protection?’ (2000) 14 *Georgetown Immigration Law Journal* 643. On this practice, see also, Kay Hailbronner, ‘The Concept of “Safe Third Country” and Expeditious Asylum Procedures: A Western European Perspective’ (1993) 5 *IJRL* 36-48; Rosemary Byrne and Andrew Shacknove, ‘The “Safe Third Country” Notion in European Asylum Law’ (1996) *HHRJ* 185.

<sup>343</sup> See generally, Giulio Bartolini, ‘Osservazioni in Margine alla “Direttiva Procedure” 2005/85/EC’ in Paolo Benvenuti (ed), *Flussi Migratori e Fruizione dei Diritti Fondamentali* (Il Sirente 2008); Karin Zwaan (ed), *The Procedures Directive. Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publishers 2008).

*refoulement* in accordance with the Geneva Convention is respected; (c) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and d) the possibility exists to request refugee status and if found to be a refugee, to receive protection in accordance with the Geneva Convention.<sup>344</sup>

Article 38(2)(a) requires the existence of a reasonable connection with the third country that could justify transfer to that State. However, it fails to specify what exactly a ‘reasonable’ connection means, thereby leaving it to Member States to determine whether even mere transit could *per se* be a sufficient reason for that person to be returned to that country.<sup>345</sup> Moreover, under Article 38(2)(b), Member States may decide either to adopt a case-by-case method to determine the safety of a country or to apply a more perfunctory approach based on national designation of countries generally considered to be safe.<sup>346</sup>

With regard to the concept of ‘effective protection’, Article 7(2) of the 2011 Recast Qualification Directive provides that:

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<sup>344</sup> The same criteria are endorsed also by Article 38 of the Recast Procedures Directive which adds in paragraph (b) that the ‘safe third country’ concept applies also when, in the third country concerned there is no risk of serious harm as defined in the Recast Qualification Directive.

<sup>345</sup> Article 38 of the Recast Procedures Directive replaces Article 27 of the 2005 Procedures Directive.

<sup>346</sup> The same phrasing was adopted by Article 27(2)(b) of the 2005 Procedures Directive.

Protection against persecution or serious harm must be effective and of a non-temporary nature. Such protection is generally provided when the actors mentioned under points (a) and (b) of paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, *inter alia*, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to such protection.<sup>347</sup>

Doctrine and jurisprudence widely endorse the legality of the ‘safe third country’ notion as long as a refugee can be returned to a third country that guarantees either ‘comparable’ or ‘equivalent’ protection to that granted in the sending State.<sup>348</sup> It has also been argued that an adequate country of first asylum has to provide refugee protection of a *quality, and at a level, in conformity with* the protection scheme laid down in the [Geneva] Convention (emphasis added).<sup>349</sup> However, the

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<sup>347</sup> *Mutatis Mutandis*, in the *Abdulla* case, the CJEU argues that the verification of whether a third country ensures effective protection ‘means that the competent authorities must assess, in particular, the conditions of operation of, on the one hand, the institutions, authorities and security forces and, on the other, all groups or bodies of the third country which may, by their action or inaction, be responsible for acts of persecution against the recipient of refugee status if he returns to that country.’ See, *Alahadin Abdulla and Others v Bundesrepublik Deutschland*, C-175/08; C-176/08; C-178/08 & C-179/08, CJEU, 2 March 2010.

<sup>348</sup> Australian case law on ‘effective protection’ is particularly profuse. See, e.g., the Opinion of Judge Lee in *WAGH v Minister for Immigration and Multicultural and Indigenous Affairs (MIMA)* [2003] FCAFC 194, 27 August 2003, para 34. In his dissenting Opinion in the *Al-Rahal v MIMA* case, Judge Lee affirms that ‘as far as the operation of the Treaty is concerned under international law, *equivalent protection to that required of a contracting State* under the Treaty must be secured to an applicant in a third country before it can be said that person is not a refugee requiring consideration under the Treaty’ (*Al-Rahal v. Minister for Immigration and Multicultural Affairs* [2001] FCA 1141, Australia: Federal Court, 20 August 2001, para 50). See, Hathaway 2005, 332-333.

<sup>349</sup> Jens Vedsted-Hansen, ‘Non-admission Policies and the Right to Protection: Refugees’ Choice versus State’s Exclusion’ in Frances Nicholson and Patrick M

principle of *non-refoulement* as enshrined in Article 33 of the Geneva Convention ‘is a necessary, but not in and of itself a sufficient, criterion to establish a State as a genuine country of first asylum.’<sup>350</sup>

Destination States do not examine the substance of the protection claim, if an asylum seeker has transited – either with or without authorization - through a ‘safe third country’ that is willing to readmit her. Applying a sort of admissibility criterion, a State can remove an asylum seeker without an examination in the merits as long as the foreigner is treated - before return - as she was entitled to protection from *refoulement*. Accordingly, the readmitting country can be considered safe only if the individual will have access to effective protection, ‘will be treated in accordance with international standards’,<sup>351</sup> and will have the possibility to seek and enjoy asylum.<sup>352</sup> Thus, the literature has so far focused on the following questions: i) whether it is *de facto* possible for the second State to determine the safety of the third country without carrying out a particularized assessment of the claim; and ii) whether the mere ratification of international refugee and human rights instruments is sufficient to infer safety.

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Twomey (eds), *Refugee Rights and Realities – Evolving International Concepts and Regimes* (Cambridge University Press 1999) 279.

<sup>350</sup> *ibid.*

<sup>351</sup> UNHCR EXCOM, UN Doc A/AC.96/914 (1999) para 19.

<sup>352</sup> *ibid.* See also, Goodwin-Gill and McAdam 2007, 394; Hemme Battjes, *European Asylum and International Law* (Martinus Nijhoff Publishers 2006) 398.

Burgeoning literature has addressed the shortcomings of ‘safe third country’ policies. For instance, it has been pointed out how its implementation ‘is a misguided approach to asylum which creates new problems and avoidable instances of *refoulement*.’<sup>353</sup> Moreover, the transfer to ‘safe third countries’ is time-consuming and implies a waste of resources for both the States and asylum seekers involved.<sup>354</sup> For example, in most instances, third countries make clear that they are only able to grant temporary stays to refugees without expectations of permanent integration.<sup>355</sup> As a consequence, asylum seekers may be shunted from one State to another, each of which must somehow examine individuals’ protection claims before returning them to another ‘responsible’ third country. The inevitable risk is to increase the number of refugees ‘in orbit’ repeatedly sent from country to country without receiving a determination on the merits of their claims.<sup>356</sup>

Other pitfalls of the ‘safe third country’ policy, as outlined by doctrine, derive from both the difficulty in determining the ‘safety’ of a third State and in finding a remedy for the problem of chain

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<sup>353</sup> Gretchen Borchelt, ‘The Safe Third Country Practice in the European Union: a Misguided Approach to Asylum Law and a Violation of International Human Rights Standards’ (2002) 33 *Columbia Human Rights Law Review* 522.

<sup>354</sup> *ibid*, 500.

<sup>355</sup> Steven H Legomsky, ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection’ (2003) *IJRL* 15(4) 567, 597.

<sup>356</sup> European Council on Refugees and Exiles (ECRE), ‘Safe Third Countries: Myths and Realities’ (1995) paras 27-33.

deportations, which can result in *refoulement*. This policy falls within States' efforts, for reasons of 'procedural economy',<sup>357</sup> to expeditiously transfer asylum seekers on the basis of general assessments of 'safety.' Such a risk increases as long as EU Member States enforce return by means of bilateral readmission agreements without examining the merits of asylum applications. If requested States have concluded readmission arrangements with other countries lying earlier in the transit chain, then, conditions would be created to send asylum seekers back to the region of origin with serious risks to their life or liberty.<sup>358</sup>

Without rebuffing their protection obligations toward refugees, second States argue they fulfil their protection duties by transferring asylum seekers to a responsible third country.<sup>359</sup> Oblivious of the consequences, this approach could entail the refusal of asylum seekers' access to the second country's legal system for both a determination of their protection claims and a review of any negative decision on their status. Therefore, the assessment of a third country's safety is a *conditio sine qua non* for EU Member States to avoid

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<sup>357</sup> Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Kluwer International Law 2000) 200.

<sup>358</sup> Matthew J Gibney, *Immigration and Asylum: from 1900 to the Present* (ABC-CLIO 2005) 495.

<sup>359</sup> See, Michelle Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in another State' (2006-2007) 28 *Michigan Journal of International Law* 223, 234.

triggering international responsibility for violations of the fundamental rights of the returnees.

The jurisprudence of the ECtHR has recognized, on several occasions, that ‘safe third country’ transfers must always comply with *non-refoulement*.<sup>360</sup> However, the risk of infringements of fundamental rights cannot *a priori* be excluded when they are transferred to countries where torture of detainees and migrants is a systematic practice or where a national regulatory framework for asylum is either totally absent or unduly rudimentary. In addition, if these States have concluded readmission agreements with notoriously unsafe countries, refugees would run the risk being divested of their entitlement to remain in the territory because of the possibility to be returned right to the borders of those countries from which they were originally fleeing.

Some have emphasized how the rights acquired by refugees through their presence in the territory of the second State cannot be ‘removed’ by means of ‘safe third country’ transfers.<sup>361</sup> In the *Amuur v France* case concerning a group of Somalis applying for asylum in France and forced to stay at the Paris airport waiting for their deportation to Syria, the ECtHR held that:

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<sup>360</sup> See, e.g., *TI v UK*; *KRS v UK*; *Adbolkhani and Karimnia v Turkey*; *MSS v Belgium and Greece*.

<sup>361</sup> Foster 2006-2007.

[The] possibility [for asylum seekers to leave voluntarily the country] becomes theoretical if no other country offering *protection comparable* to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in.<sup>362</sup>

The assessment of whether the readmitting third country is actually safe does not include only the verification of whether efficient asylum procedures are in place, or whether international human rights and refugee law instruments have been ratified, but also the ascertainment of whether no peril exists for people in need of international protection to be onwards sent back into the arms of their persecutors.<sup>363</sup> For example, in the *Hirsi v Italy case*, the ECtHR held that Italy had a duty to verify, before return, that in the receiving country, the returned refugees would be able to find protection from direct and indirect *refoulement*.<sup>364</sup>

‘Protection elsewhere’ policies become particularly problematical when EU Member States decide to engage in the negotiation of agreements linked to readmission with countries that have a doubtful track record in human rights or are not bound by the same international human rights instruments. Some of these countries are, indeed, either among the largest ‘producers’ of refugees and

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<sup>362</sup> *Amuur v France* (1996) 22 EHRR 533, para 48.

<sup>363</sup> This principle has been confirmed by the ECtHR in *Hirsi v Italy*, paras 128, 157.

<sup>364</sup> *ibid*, paras 131, 152.



protection claims, or do not have adequate facilities to process applications and grant asylum.<sup>365</sup> For example, although North African countries, such as Algeria, Morocco, Libya, and Tunisia - with which either Italy, and to a lesser extent the EU have plunged into bilateral cooperation on readmission - are part of the main international and regional instruments of refugee protection, they have not yet adopted national refugee legislation or established comprehensive asylum procedures that conform to international standards. However, even if a State is considered generally safe because of the presence of adequate asylum procedures and judicial oversight, every individual is entitled to rebut the presumption of safety of that country for him or her in the particular case.<sup>366</sup>

### **2.7.1 Rebutting presumption of safety and legality?**

Despite widespread criticism, the ‘safe third country’ principle continues to be inscribed within both the Dublin Regulation and the Recast Procedures Directive,<sup>367</sup> and EU Member States regularly

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<sup>365</sup> Richard Dunstan, ‘Playing Human Pinball, The Amnesty International United Kingdom Section Report on UK Home Office “*Safe Third Country*” Practice’ (1995) 7(4) IJRL 606, 611.

<sup>366</sup> See, e.g., *MSS v Belgium and Greece*; *Hirsi v Italy*. See also, Thomas Spijkerboer, ‘Stretching the Limits. European Maritime Border Control Policies and International Law’ in MC Foblets et al. (eds), *The External Dimension of the Immigration & Asylum Policy of the EU* (Bruylant 20011).

<sup>367</sup> Article 3(3) of the Recast Dublin Regulation (Dublin III) retains the ‘safe third country’ principle. However, following the jurisprudence of the ECJ in *NS*, Article 3(2) of the Regulation will explicitly oblige Member States to take responsibility for asylum seekers in two new situations: when there is no State which can be identified

transfer asylum seekers to countries that are presumably safe. Scholars have generally criticized an absolute presumption of safety, not open to rebuttal, thereby requiring not only *de jure*, but also *de facto* compliance with international refugee and human rights law in the readmitting country for a safe transfer of responsibility to take place.<sup>368</sup> However, in practice, presumption of safety might not always be rebuttable, especially with regard to those States that have created lists of countries considered irrefutably safe.<sup>369</sup>

National and international jurisprudence shows how presumption of safety must be rebuttable. Accordingly, the safety of EU Member States, such as France, Germany, and Greece has been challenged more than one time. For instance, in the cases *Adan*, *Subaskaran* and *Aitseguer*, the Court of Appeal of the UK deemed unlawful the decision of the Home Secretary to remove two asylum seekers to France and Germany, both of which had already rejected their applications on the ground that persecution was perpetrated by non-State actors.<sup>370</sup> In these cases, therefore, France and Germany were

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as responsible according to the hierarchy of criteria; and where the transfer would risk to expose the asylum seeker to inhuman or degrading treatment, within the meaning of Article 4 of the EU CFR, in the readmitting country that is primarily responsible. See, CJEU, Joined Cases C-411/10 and C-493/10 *NS and ME* judgment of 21 December 2011.

<sup>368</sup> Gregor Noll, 'Formalism v Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law' (2001) 70 NJIL 161-82.

<sup>369</sup> Article 16 of the German Constitution has institutionalized a system of lists of countries considered safe by law.

<sup>370</sup> Court of Appeal, Civil Division, *R v Secretary for the Home Department, ex parte Adan*; *R. v Secretary for the Home Department, ex parte Subaskaran*; *R v*

regarded as ‘non-safe third countries’ since they adopted a more restrictive interpretation of the grounds for protection as compared to the Geneva Convention, which extended protection also to cases of non-State actors persecution.<sup>371</sup> But Italy has also been labelled as unsafe by German administrative tribunals because of the risk that asylum seekers would not be able to properly lodge their applications once sent back to Italy.<sup>372</sup>

In a number of cases, the ECtHR issued interim measures to halt the return of individuals to other European countries. For instance, in the landmark *MSS v Belgium and Greece* case, the Court of Strasbourg held that the transferring State must always assure that the asylum system in the readmitting country of transit affords sufficient guarantees to avoid that an asylum seeker is returned to her country of

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*Secretary for the Home Department, ex parte Aitseguer* [1999] INLR 362, 382-3 (CA). Persecution by non-state actors was not covered in the domestic interpretation of the term ‘refugee’ in Germany and France. See also, *TI v UK*.

<sup>371</sup> Furthermore, in its judgment of 19 May 2010, the *Conseil d’État*, the highest administrative court in France, for the first time overrode a decision to expel a Palestinian family to Greece under the Dublin Regulation on the ground that Greek authorities currently do not adequately safeguard the right to asylum. See, *Conseil d’État*, Ordennance no 339478.

<sup>372</sup> See e.g., VG Köln, Beschluss vom 10.01.2011 - 20 L 1920/10.A - (6~S., M18053

<[http://www.asyl.net/index.php?id=185&tx\\_ttnews\[tt\\_news\]=41626&cHash=6843dd2173](http://www.asyl.net/index.php?id=185&tx_ttnews[tt_news]=41626&cHash=6843dd2173)>; Verwaltungsgericht Minden, Beschluss vom 22.6.2010 (12 L 284/10.A),

<[http://www.asyl.net/index.php?id=185&tx\\_ttnews\[tt\\_news\]=39703&cHash=c1c307812e](http://www.asyl.net/index.php?id=185&tx_ttnews[tt_news]=39703&cHash=c1c307812e)>; VG Köln, Beschluss vom 11.01.2011 - 16 L 1913/10.A - (8~S., M18052),

<[http://www.asyl.net/index.php?id=185&tx\\_ttnews\[tt\\_news\]=41624&cHash=95aee7956](http://www.asyl.net/index.php?id=185&tx_ttnews[tt_news]=41624&cHash=95aee7956)>; VG Darmstadt, Beschluss vom 11.01.2011 - 4 L 1889/10.DA.A - (5~S., M18057),

<[http://www.asyl.net/index.php?id=185&tx\\_ttnews\[tt\\_news\]=41633&cHash=af5fb2319e](http://www.asyl.net/index.php?id=185&tx_ttnews[tt_news]=41633&cHash=af5fb2319e)>. Details on these cases have been retrieved from: Fulvio Vassallo Paleologo,

‘Respingimento ed Accordi di Riammissione – Sotto Accusa l’Italia che non è un Paese Sicuro per Richiedenti Asilo’ (Meltingpot, 31 January 2011)

<<http://www.meltingpot.org/articolo16259.html>> accessed 20 August 2013.

origin without a substantive assessment of her protection claim under Article 3.<sup>373</sup> Accordingly, by exposing the applicant to the risks of deficient asylum procedures and appalling reception conditions in Greece, the Court found that both the sending country (Belgium) and the receiving country (Greece) violated Article 3 of the ECHR.<sup>374</sup>

The Court held the view that Belgian authorities should not have automatically relied on the presumption of safety inscribed in the Dublin Regulation, and that it was for them ‘not merely to assume that the applicant would be treated in conformity with the Convention standards but [...] to first verify how the Greek authorities applied their legislation on asylum *in practice*.’<sup>375</sup> The mere ‘existence of domestic laws and accession to international treaties [...] are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment [...]’.<sup>376</sup> Most importantly, the Court argued that sending States should take into consideration not only the deficiencies of the asylum system in the readmitting country, but also ill-treatments that might result from poor detention and living conditions in Greece.<sup>377</sup>

When the reality in the readmitting country is well-known, the

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<sup>373</sup> *MSS v Belgium and Greece*, para 342.

<sup>374</sup> *ibid*, 88. See, also the *SD v Greece* case where the Court of Strasbourg concluded that Greece violated the ECHR since SD, while an asylum seeker, had experienced conditions of detention that amounted to degrading treatments in violation of Article 3. See, *SD v Greece* App no 53541/07 (ECtHR, 20 June 2009) para 41.

<sup>375</sup> *MSS v Belgium and Greece*, para 359.

<sup>376</sup> *ibid* 353.

<sup>377</sup> *ibid* 367.

sending State has an obligation to take positive measures to avoid infringements of Article 3 and to disprove the risk of an Article 3 violation. Indeed, according to the Court, if Belgian authorities had verified how the Greek authorities applied their legislation on asylum in practice, ‘they would have seen that the risks the applicant faced were real and individual enough to fall within the scope of Article 3.’<sup>378</sup>

On 21 December 2011, the ECJ delivered its judgement in the joint cases of *NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner* under the preliminary ruling procedure.<sup>379</sup> It held that in transferring an asylum seeker to another EU Member State under the Dublin Regulation, national courts must always follow the rebuttable presumption that in the readmitting country that individual will be treated in consonance with fundamental rights, and will not be exposed to the risk of onward expulsions to a persecuting State, in line with the Geneva Convention, the ECHR, and the CFR.<sup>380</sup> It means that asylum seekers should always be given the procedural possibility to rebut that presumption.<sup>381</sup> However, unlike the ECtHR, the EU Court

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<sup>378</sup> *ibid* para 358.

<sup>379</sup> ECJ, *NS v Secretary of State for the Home Department and ME and others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, C-411/10 and C-493/10, 21 December 2011.

<sup>380</sup> *ibid* para 80.

<sup>381</sup> *ibid* para 103-104.

particularly relied on the principles of ‘mutual confidence’ among Member States and ‘presumption of compliance’ with fundamental rights.<sup>382</sup> It also asserted that ‘minor infringements’ of EU asylum law and violations of rights other than the prohibition of torture do not suffice to suspend a transfer under the Dublin Regulation.<sup>383</sup>

Whilst only few academics have dealt with the lawfulness of the ‘safe third country’ notion from an international refugee and human rights law perspective<sup>384</sup> - but without reaching any conclusive answer - Moreno-Lax has soundly pushed her criticism to the point of rejecting the legality of this concept because of its inherent incompatibility with international refugee law in light of universal rules of treaty interpretation.<sup>385</sup> In this view, the implementation of ‘safe third country’ policies - whether carried out through readmission agreements, push-backs, bilateral or regional

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<sup>382</sup> *ibid* paras 78-80, 83.

<sup>383</sup> *ibid* paras 82, 86, 94, 106.

<sup>384</sup> See, e.g., James Crawford and Patricia Hyndman, ‘Three Heresies in the Application of the Refugee Convention’ (1989) 1 *IJRL* 155; Eva Kjaergaard, ‘The Concept of “Safe Third Country” in Contemporary European Refugee Law’ (1994) 6 *IJRL* 649; Rosemary Byrne and Andrew Shacknove, ‘The Safe Country Notion in European Asylum Law’ (1996) 9 *HHRJ* 185; Jens Vedsted-Hansen, ‘Non-Admission Policies and the Right to Protection: Refugees’ Choice versus States’ Exclusion?’ in F Nicholson and P Twomey (eds.), *Refugee Rights and Realities* (Cambridge University Press 1999) 269; Savitry Taylor, ‘Protection Elsewhere/Nowhere’ (2006) 18 *IJRL* 283; Maria-Teresa Gil-Bazo, ‘The Practice of Mediterranean States in the Context of the European Union’s Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited’ (2006) 18 *IJRL* 571; Goodwin-Gill and McAdam 2007, 390.

<sup>385</sup> Violeta Moreno-Lax, ‘The “Safe Third Country” Notion Revisited: An Appraisal in light of General International Rules on the Law of Treaties’, in Goodwin-Gill GS (ed) *International Migrations, 2010 Centre for Studies and Research in International Law and International Relations of The Hague Academy of International Law* (Martinus Nijhoff 2013).

arrangements on the distribution of refugees – would be inconsistent with the obligations owed by the destination State to refugees who are present in its territory or who fall under its jurisdiction.

To better grasp this argument, a number of points need to be highlighted. First, none of the Geneva Convention provisions provide a solid legal basis for the ‘safe third country’ principle. Article 1(e) of the Geneva Convention has been invoked as a basis to buttress the decision of a State to reject protection of those refugees who have already found asylum in one country and that can, therefore, be returned there.<sup>386</sup> It provides that ‘this Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.’ Therefore, exclusion from the protection of the Convention is justified only if the person concerned has taken residence somewhere else and enjoys the rights and obligations attached to citizenship. The question is thus whether the protection granted to refugees is less than that provided to nationals. To answer this question, it can be observed, for example, that whilst citizens and persons assimilated to nationals cannot be expelled,<sup>387</sup> refugees can be

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<sup>386</sup> Under Article 1(e), ‘This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.’

<sup>387</sup> See, e.g., Article 3 of Protocol 4 to the ECHR whereby ‘No one shall be expelled, by means either of an individual or of a collective measure, from the

deported under certain circumstances, such as those listed in Article 32 of the Geneva Convention.<sup>388</sup> Therefore, invoking Article 1(e) of the Geneva Convention as the legal basis for the removal of an asylum seeker to an allegedly ‘safe third country’ where she does not have residence and does not enjoy the spectrum of rights attached to nationality would amount to an extensive interpretation, which goes far beyond the ordinary meaning of that provision.<sup>389</sup>

With regard to Article 31(1) of the Geneva Convention, although the term ‘coming directly’ is not sufficiently clear,<sup>390</sup> a contextual interpretation implies that even a refugee falling outside the scope of protection of this provision shall benefit from the prohibition of *non-refoulement* under Article 33(1).<sup>391</sup> The benefits of this provision shall

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territory of the State of which he is a national.’ Article 22(5) of the American Convention on Human Rights (ACHR) provides that ‘No one can be expelled from the territory of the State of which he is a national or be deprived of the right to enter it.’ According to Nowak, the prohibition to expel nationals is implicit in Article 11(4) of the ICCPR, stating that ‘No one shall be arbitrarily deprived of the right to enter his own country.’ See, Manfred Nowak, *UN Covenant on Civil and Political Rights – CCPR Commentary* (Kehl Engel 1993) 218-221.

<sup>388</sup> Pursuant to Article 32(1), ‘The Contracting States shall not expel a refugee lawfully in their territory, save on grounds of national security or public order.’

<sup>389</sup> Moreno-Lax 2013, 19.

<sup>390</sup> The *travaux préparatoires* show that the wording ‘coming directly’ in Article 31 of the Geneva Convention should not be interpreted too rigidly, as the drafters were in agreement on the fact that this requirement could be met also by refugees transiting through or spending short periods of time in other countries, as well as by those who had to leave a country of first asylum because of a threat to their life. Therefore, according to Grahl-Madsen, the adverb ‘directly’ should be interpreted as meaning ‘without delay.’ See, Grahl-Madsen 1972, 206; Hathaway 2005, 393-99. As the UK House of Lords has asserted, ‘[t]he single most important point that emerges from a consideration of the *travaux préparatoires* is that there was universal acceptance that the mere fact that refugees stopped while in transit ought not to deprive them of the benefit of the Article.’ See, *R v Asfaw* [2008] UKHL 31, 56.

<sup>391</sup> Noll 2011, 1256.



therefore be accorded to any refugee, with the only exception of those who have obtained refugee status and lawful residence in a ‘safe third country’ of transit.<sup>392</sup> In this view, ‘the real question is whether effective protection is available for that individual in that country.’<sup>393</sup> Relying on Article 31(1) to justify pre-procedures removal to a ‘safe third country’ would also shift attention to the travel route, rather on the reasons motivating the refugee to flee her country and seek protection abroad.<sup>394</sup>

Moreover, the Preamble to the Geneva Convention exhorts Contracting Parties to ‘international cooperation’ to alleviate the ‘unduly heavy burdens’ on certain States that receive the highest number of asylum applications.<sup>395</sup> Therefore, in the light of the humanitarian and cooperative purpose of the Geneva Convention, penalization of those who might potentially find protection in a transit country would shift the reception burden to certain countries geographically closer to States of origin, thus bolstering tensions and practices contrary to the Convention.<sup>396</sup>

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<sup>392</sup> *ibid* 1257.

<sup>393</sup> Guy S Goodwin-Gill, ‘Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention, and Protection’, in Erika Feller, Volker Turk and F Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (2003) 185, 218.

<sup>394</sup> Moreno-Lax 2013, 17.

<sup>395</sup> Noll 2011, 1256.

<sup>396</sup> *ibid*. For a comprehensive analysis of the reasons behind the rejection of Articles 1(e) and 31(1) as the legal foundation of the ‘safe third country’ notion, see, Moreno-Lax 2013, 16-28. Space precludes any broader review of these Articles within this thesis.

The second point adduced to underline the problematic nature of the ‘safe third country’ notion as a legal concept argues that the failure of the Geneva Convention to include an explicit right to choose the country of refuge cannot automatically displace Convention obligations accruing at ‘simple presence’ level.<sup>397</sup> None of the Convention’s provisions require refugees to seek asylum at any particular location or in the first safe country possible.<sup>398</sup> It cannot therefore be excluded that a certain ‘element of choice is indeed open to refugees as to where they may properly claim asylum.’<sup>399</sup> Third, presumed transit countries, especially developing countries, have often denied responsibility for asylum seekers on the basis of transit through their territory and have required a stronger link with the refugee in order to assume responsibility.<sup>400</sup> Fourth, even the EU does not offer a uniform definition of the notion of ‘transit’. Whereas some Member States insist that months’ long residence in a third country is

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<sup>397</sup> For example, Article 31 (exemption from penalties on account of illegal entry) or Article 4 (freedom of religion). On the scale of entitlements accruing progressively according to the level of attachment to the country of refuge, see, Hathaway 2005, 154 ff; Goodwin-Gill and McAdam 2007, 524 ff.

<sup>398</sup> Pursuant to Article 14 of the UDHR: ‘Everyone has the right to seek and enjoy in other *countries* asylum from persecution’ (emphasis added). See also, Gil-Bazo 2006, 598.

<sup>399</sup> See, Simon Brown LJ in *R v Uxbridge Magistrates Court and Another, Ex parte Adimi* [1999] EWHC Admin 765 [2001] QB 667.

<sup>400</sup> *Report of the Sub-Committee of the Whole, A/AC.96/781*. Compare, e.g., the following Statements: Statement by the UK on behalf of the European Community and Member States, A/AC.96/SR.472, para 78; Statement by Brazil, A/AC.96/SR.485, para 2; Statement by Bulgaria, A/AC.96/SR.485, para 47; Statement by Poland, A/AC.96/SR.475, para 37; Statement by Sudan, A/AC.96/SR.427, para 69; Statement by China, A/AC.96/SR.427, para 10. See also EXCOM Conclusion no 58 (XL) of 1989, Report of the 40th Session, A/AC.96/737.

necessary, others consider even a mere passage, or disembarkation into a transit zone sufficient to trigger the responsibility of the third country. Fifth, using the EU cooperative framework as a reference point, it can be observed that ‘safe third country’ procedures are installed by EU Member States pursuant to the Procedures Directive through a *renvoi* to domestic law and national lists of safe countries.<sup>401</sup> Hence, no bilateral agreement exists between the sending and the receiving country through which the latter expressly gives its consent to readmit an asylum seeker and to enforce the same obligations the sending country should have fulfilled as a consequence of its direct contact with the asylum seeker.

Considering that the ‘safe third country’ principle cannot be inferred from the Geneva Convention, and that States involved in ‘safe third country’ transfers have never informed the other Contracting Parties to the Geneva Convention of their decision to modify their obligations *inter se*, these practices can also be deemed inconsistent with Article 41 of the VCLT.<sup>402</sup> As ‘safe third country’

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<sup>401</sup> See, Article 27(2) of the Procedures Directive and Article 38(2) of the recast version.

<sup>402</sup> Under Article 41 of the VCLT, 1, ‘Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: (a) the possibility of such a modification is provided for by the treaty; or (b) the modification in question is not prohibited by the treaty and: (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

agreements can facilitate the risk of *refoulement* based on an absolute presumption of safety of the readmitting country, ‘the *erga omnes* character of protection obligations under the Refugee Convention pre-empt the conclusion of subsequent *inter se* agreements which are incompatible with them.’<sup>403</sup>

Moreover, the crucial issue is not whether the individual has a right to choose the country of asylum, but whether the State under whose jurisdiction the asylum seeker stands has any international obligations in her regard.<sup>404</sup> As with other international human right treaties, the fact that refugees have transited through other countries before reaching the State where they claim asylum is immaterial from the perspective of the responsibility of that State.<sup>405</sup> A State cannot be absolved from its obligations *ex nunc* toward refugees who are under its jurisdiction on the ground that a transit country in the past may have become responsible and has failed to act.<sup>406</sup> The fact that an

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2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.’

<sup>403</sup> Moreno Lax 2013, 34. See, in this regard, *Barcelona Traction (Second phase)*, [1970] ICJ Rep. 3, 32.

<sup>404</sup> Jean-Francois Durieux, ‘Protection Where? Or When?’ (2009) 21 IJRL75, 76.

<sup>405</sup> See, e.g., *MSS v Belgium and Greece*, para 218; *Chahal v UK*, para. 79; and *Saadi v Italy*, paras 127 and 138-139.

<sup>406</sup> See, *NAGV and NAGW of 2002 v Minister of Immigration and Multicultural and Indigenous Affairs* [2005] HCA 6, para 84. *Contra: Bugdaycay v Secretary of State for the Home Department* [1987] 1 AC 514. In this decision, Bridge of Harwich LJ, by relying on ‘the assumption that all countries which adhere to the [Geneva] Convention may be trusted to respect their obligations under it’, affirmed that: ‘if a person arrives in the United Kingdom from country A claiming to be a refugee from country B, where country A is itself a party to the Convention, there can in the ordinary case be no obligation on the immigration authorities here to investigate the

asylum seeker has illegally crossed the borders of the destination State or has transited through another safe country, does not satisfy the *prima facie* conditions related to protection needs as described within Article 1(a) of the Geneva Convention.<sup>407</sup>

## 2.8. Conclusion

Chapter 2 described the principle of *non-refoulement* as an overarching term whose full meaning can be reconstructed only through the use of different international refugee and human rights instruments. For the purpose of this thesis, the relevant provisions are Article 33(1) of the Geneva Convention, Article 3 of the CAT, Article 7 of the ICCPR, Article 3 of the ECHR, and Article 19(2) of the CFR, which either explicitly or implicitly endorse the prohibition of *refoulement*. This principle entails that expulsion, removal, or extradition to a country where an individual can be subjected to death penalty, torture or other inhuman or degrading treatment or punishment should be outlawed. The jurisprudence of the HRC, the Committee against Torture and the ECtHR have also upheld the application beyond borders of the relevant treaties when States deal

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matter ... he will be returned to country A, whose responsibility it will be to investigate his claim to refugee status and, if it is established, to respect it.’

<sup>407</sup>Moreno-Lax 2013, 26. Further discussion on the ‘safe third country’ principle will be conducted in Section 3.6 of this thesis, in particular with regard to refugees’ access to asylum procedures in the third country as a safety condition.

with individuals who risk being subjected to torture or ill-treatment if sent back to their home country.

Scholars of international law are not ready to agree on a common qualification of the legal nature of the principle of *non-refoulement*. Notwithstanding, State practice, since the adoption of the 1951 Geneva Convention, has provided persuasive evidence that this norm has achieved the status of customary international law. Indeed, its enclosure in fundamental international instruments of both refugee and human rights law, as well as into national legislation testifies consistent practice and strong *opinio juris*.

In examining whether the ECHR provides for procedural requirements preventing onward expulsions from one State to another without substantive examination of the protection claim anywhere, this Chapter has shown how Article 3 of the ECHR has been interpreted as also forbidding indirect *refoulement* via another contracting State.<sup>408</sup> Onward expulsions of a refugee to a third country inevitably carry with them a certain degree of uncertainty regarding the level of protection offered by the third States involved. Even if the latter are considered safe countries providing guarantees against *refoulement*, insecurity remains and the perspective of a certain dreaded event could bring the treatment within the scope of Article 3 of the ECHR.

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<sup>408</sup> See, e.g., *TI v UK* and *Hirsi v Italy*.

Chapter 2 also analyzed the concept of ‘safe third country’ as EU Member States are not required to examine the substance of the protection claim, if a ‘safe third country’ exception applies. A State can expel an asylum seeker without an examination on the merits as long as it both establishes that the third country will ensure effective protection, and that the foreigner is treated - before return - as if she were entitled to protection from *refoulement*. Doctrine and jurisprudence widely endorse the view that a refugee may be returned to a third country only if the latter guarantees either ‘comparable’ or ‘equivalent’ protection to that granted in the sending State. It is argued here that the principle of *non-refoulement* is a necessary, but not in and of itself a sufficient, criterion to establish the safety of a third country. Moreover, whilst the presumption of safety should always be open to rebuttal, *de jure* and *de facto* compliance with international refugee and human rights law in the readmitting country is always required for a safe transfer of responsibility to take place.<sup>409</sup> However, regardless of the procedural safeguards in place in the readmitting States, this Chapter takes into consideration the reasons why the legality of the ‘safe third country’ principle has to be challenged under international law.

Another issue analyzed throughout the course of this Chapter is whether the prohibition of *refoulement* applies beyond the territory of

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<sup>409</sup> Noll 2001, 161-182.

the States that are signatories of the Geneva Convention, the CAT, the ICCPR, the ECHR, and the CFR in relation to persons who claim protection at the border of a State party, or who are intercepted at sea. With regard to the Geneva Convention, since it is silent on the issue of its extraterritorial application, room for contestation is ample.

The extraterritorial applicability of the principle of *non-refoulement* – including in contexts of interception on the high seas – is increasingly gaining recognition in the case law of the Committee against Torture, the HRC, and the ECtHR. As stated in *Hirsi v Italy*, jurisdiction under Article 1 of the ECHR is mainly, but not exclusively, territorial. States' extraterritorial human rights obligations are triggered, therefore, wherever they exercise jurisdiction (effective control and authority), which includes the high seas. The ECtHR has indeed found violations of direct and indirect *refoulement*.

The logic of cross-fertilization between human rights and refugee law has led the UNHCR and an even greater number of scholars and domestic courts to uphold that the principle of *non-refoulement* as enshrined in Article 33(1) of the Geneva Convention applies in extraterritorial contexts as well. From the text of this provision it emerges that the 'essential purpose' of *non-refoulement* is to ban refugees' removal, extradition, or expulsion, *in any manner whatsoever*, to countries where their life and liberty may be endangered. Hence, Article 33(1) can be interpreted as to include non-



rejection at the border or at sea on the ground that ‘the ordinary meaning of *refouler* is to drive back, repel, or re-direct, which does not presuppose a presence in-country.’<sup>410</sup> A wider interpretation of Article 33(1) attempting to ensure the widest possible exercise of the rights therein enshrined and also keeping abreast of the evolution of both migratory phenomena and border control techniques would also find cogency in the Preamble of the Geneva Convention recognizing ‘the social and humanitarian character of the problem of refugees.’

To sum up, through the reading of the Geneva Convention and the ‘case law’ of the Strasbourg organs and UN Human Rights Committees, this Chapter reconstructed the material and normative scope of the principle of non-*refoulement* by establishing its territorial and extraterritorial applicability.

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<sup>410</sup> Coleman 2009, 253.

## Chapter 3. The Right to Access Asylum Procedures before Return

### 3.1 Introduction

The Executive Committee of the UNHCR has often emphasized ‘the need to admit refugees into the territories of States, which includes no rejection at frontiers without fair and effective procedures for determining status and protection needs.’<sup>411</sup> Pursuant to Article 14 of the Universal Declaration of Human Rights (UDHR), ‘Everyone has the right to seek and enjoy asylum.’<sup>412</sup> Whilst at the EU level, Article 18 of the CFR provides for ‘the right to asylum’, Article 22(7) of the American Convention on Human Rights recognizes ‘the right to seek and be granted asylum’, and Article 12(3) of the African Charter guarantees the right of every individual ‘to seek and obtain asylum.’ It has therefore been argued that ‘the right to asylum becomes a right of individuals, which coexists with the already established right of States to grant it.’<sup>413</sup>

This Chapter analyzes the *right to access asylum procedures* as a principle corollary to that of *non-refoulement*, which can only be

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<sup>411</sup> EXCOM Conclusions No 82 *Safeguarding Asylum* (1997) para d(3).

<sup>412</sup> UNGA Resolution 217 A (III), 10 December 1948.

<sup>413</sup> Maria-Teresa Gil-Bazo, ‘The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union’s Law’ (2008) 27(3) RSQ 33, 39.

ensured if an individual has access to a fair procedure that thoroughly assesses her protection claims. Hence, States shall grant individuals invoking international protection access to the territory and to asylum procedures, since preventing a refugee from accessing such procedures can have the equivalent effect of *refoulement*.<sup>414</sup> As Costello argues, ‘access to asylum depends practically on access to a place of refuge. And securing *access to territory* means overcoming both physical and legal barriers (emphasis added).’<sup>415</sup>

It is worth clarifying that, in examining the right to access asylum procedures as a pre-removal procedural entitlement, I refer to the assessment of refugee status under the Geneva Convention, but also to other forms of complementary protection - including subsidiary protection - accorded by international human rights law and EU law to persons falling outside of the five grounds of persecution of the international refugee protection regime.

The right to access asylum procedures before removal, as a precondition to *non-refoulement*, is still subject to debate. Because undertaking status determination is not an express obligation of the Geneva Convention, some claim ‘expulsion may take place without a prior substantive examination of the protection claims.’<sup>416</sup> Indeed, the

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<sup>414</sup> Geoff Gilbert, ‘Is Europe Living Up to Its Obligations to Refugees?’ (2004) 15 EJIL 963, 966.

<sup>415</sup> Costello 2012, 338.

<sup>416</sup> Coleman 2009, 238.

drafting history of the Convention reveals a deliberate omission of any duty of States to undertake status determination.<sup>417</sup> Nonetheless, as the following sections illustrate, access to asylum procedures is a necessary procedural pre-requisite to the principle of *non-refoulement*. The 1951 Geneva Convention, the ICCPR, the CAT, the ECHR, and the EU CFR will assist us in the reconstruction of this right's normative content.

### **3.2. Access to asylum procedures under international refugee law**

Owing to the declaratory (and not constitutive) nature of refugee status, the principle of *non-refoulement* – enshrined in Article 33(1) of the Geneva Convention and examined in Chapter 2 – does not only cover recognized refugees but also asylum seekers whose status as refugees has not been determined yet. It means they enjoy a *prima facie* refugee status, pursuant to Article 1(a) of the Geneva Convention, until a full examination of their status by the State discredits their claims.<sup>418</sup> Including asylum claimants within the personal scope of Article 33(1) is the only way to ensure that the principle of *non-refoulement* is respected in practice.

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<sup>417</sup> Zwaan 2003, 15-16.

<sup>418</sup> Thus, once an individual fulfils the requirements of Article 1 of the Geneva Convention, she is entitled to some Convention benefits, regardless of her status having been determined or not. Battjes 2006, 465.

The Geneva Convention sets up no procedural rule concerning how the examination of asylum claims should take place. However, as the UNHCR states in its intervention in the *IM v France* case before the ECtHR,

While [the Geneva Convention] does not specifically regulate the asylum procedure, the enjoyment of the rights it provides for requires that the States Parties establish *fair and efficient asylum procedures*, which allow them to identify the persons in need of international protection (emphasis added).<sup>419</sup>

UNHCR's Handbook, which it published pursuant to its mandate under Article 35 of the Geneva Convention, is evidence itself of the key role that asylum procedures play to secure compliance with the treaty as a whole. Issued in 1979, reprinted several times, and last reedited in December 2011, the Handbook is a key reference for refugee status determination around the world. Indeed, it assists government officials, judges, practitioners, and UNHCR staff in applying a uniform interpretation of the refugee definition.<sup>420</sup>

To avoid unfair asylum procedures that cause an unjustifiably

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<sup>419</sup> UNHCR's oral intervention at the ECtHR Hearing of the case of *IM v France* App no 9152/09 (ECtHR, 17 May 2011) (English translation of the French version as delivered), 1 <<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain/opendocpdf.pdf?reldoc=y&docid=4dde1a882>> accessed 31 October 2013.

<sup>420</sup> UNHCR, *Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV. 3, <<http://www.unhcr.org/refworld/pdfid/4f33c8d92.pdf>> (UNHCR Handbook on RSD) accessed 31 October 2013.

high number of refugees to be returned to their persecutors, in breach of Article 33(1), the Geneva Convention ‘shall be interpreted in *good faith* in accordance with the *ordinary meaning* to be given to the terms of the treaty in their *context* and in light of its *object and purpose*’, as provided by Article 31 of the VCLT. At the national level, domestic courts have confirmed the same principle. For example, the Appeals Court of The Hague (the Netherlands) in its judgement on the compatibility of the Dutch fast track procedure with Article 33(1) of the Geneva Convention affirmed that:

The Refugee Convention itself contains no provisions on the procedure that the Contracting States should follow in order to determine who is a refugee in the sense of the Convention. But the prohibition on *refoulement* of Article 33 Refugee Convention does entail that a Contracting State must not establish this procedure in such a way that an asylum seeker has insufficient opportunity to show that he or she is a Convention refugee, with the result that refugees in the sense of the Convention run a disproportionate risk of *refoulement*.<sup>421</sup>

Thus, in the absence of procedures established by international law for the granting of protection, States may apply domestic procedural rules giving, however, ‘full effect’ to international asylum law in both

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<sup>421</sup> Appeals Court The Hague 31 October 2002, RV 2002, 22 (*VAJN and NJCM v The Netherlands*), para 5.2. Translation made by Hemme Battjes.

at first instance and appeal procedures.<sup>422</sup> The duty to disembark refugees in a place of safety and examine their protection claims shall also apply, as an obligation implicit in the principle of *non-refoulement*, in cases of extraterritorial migration controls and rescue operations on the high seas. In three experts Roundtables convened by the UNHCR since 2002, the participants agreed that ‘refugee protection issues [...] must be addressed as part of the broader response to irregular maritime migration, and *asylum must effectively be made available* in such situations for those requiring it (emphasis added).’<sup>423</sup> Accordingly, they concluded that:

Persons claiming asylum should be allowed to enter the national asylum procedure without delay; in countries where no asylum procedure exists, they should be referred to UNHCR. The State providing for disembarkation will generally be the State whose refugee protection responsibilities are first engaged.<sup>424</sup>

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<sup>422</sup> Battjes 2006, 293.

<sup>423</sup> UNHCR, *The treatment of persons rescued at sea: conclusions and recommendations from recent meetings and expert round tables convened by the Office of the United Nations High Commissioner for Refugees: Report of the Office of the United Nations High Commissioner for Refugees*, 11 April 2008, A/AC.259/17, para 6 <<http://www.unhcr.org/refworld/docid/49997aeb27.html>> accessed 31 October 2013. For a wider debate on the State responsible for disembarkation in a place of safety, see Chapter 7.

<sup>424</sup> UNHCR, *The treatment of persons rescued at sea*, 11 April 2008. See also, Kees Wouters and Marteen Den Heijer (2010) 22(1) IJRL 1, 7-8.

Although the UDHR does not provide for a right ‘to enter any country’,<sup>425</sup> the right to leave any country and the right to seek asylum are complementary in the refugee context.<sup>426</sup> If the Geneva Convention does not expressly require States to guarantee access to status determination procedures, it is also true that depriving refugees of an individual examination of their condition would be tantamount to accepting the risk that these persons could be erroneously *refouled*.<sup>427</sup> Providing refugees with fair and effective procedures for determining status without rejection at the border has also been recognized by the UNHCR as a pivotal element of international protection,<sup>428</sup> thus reinforcing the view that Article 14 of the UDHR is ‘a necessary adjunct to *non refoulement*.’<sup>429</sup>

In particular, a fair refugee determination procedure is based on two underlying aspects: the first is privacy, and the second concerns safeguards toward refugees with special vulnerabilities. Keeping information on the personal condition of the asylum seeker

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<sup>425</sup> Louis Henkin, ‘An Agenda for the Next Century: The Myth and Mantra of State Sovereignty’ (1994) *Virginia J. Int’l L.* 115, 117.

<sup>426</sup> In Edward’s view, for instance, ‘it would make nonsense of the 1951 Convention if this was not intended, at least for the purposes of refugee status determination, especially where an individual has reached a country’s territory, such as its territorial seas or a waiting zone in an international airport.’ See, Edwards 2005, 302.

<sup>427</sup> See, Stephen H Legomsky, ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection’ (2003) 15 *IJRL* 567, 654.

<sup>428</sup> Excom *Conclusions No 82Safeguarding Asylum* (1997) para d(3) <<http://www.unhcr.org/refworld/type.EXCONC,,,3ae68c958.0.html>> accessed 31 October 2013.

<sup>429</sup> Gilbert 2004, 966.



confidential is meant to avoid exposure of the applicant and her family to the risk of recrimination by the country of origin, to permit a frank testimony, and to shield the applicant from humiliation stemming from revelations of torture or other inhuman and degrading treatments. With regard to refugees' vulnerabilities, in guaranteeing the fairness of the determination, it is important to bear in mind that certain subgroups of refugees (women, children, elderly, stateless persons, and physically or mentally disabled persons) have additional special protection needs.<sup>430</sup>

The application of the term 'refugee' in a declaratory sense is made clear by the fact that the prohibition of *refoulement* enshrined in Article 33(1) also pertains to asylum seekers (whose refugee status has not been determined yet) applying at the borders of the Contracting States. It has also been argued that the Geneva Convention may implicitly require States to carry out status determinations. In particular, this obligation may flow from the duty of States to perform treaty obligations 'in good faith' in light of the object and purpose of the Convention, as laid down in the Preamble.<sup>431</sup> For it to be effective, *non-refoulement* must also involve an obligation of assessing whether the return of a person would

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<sup>430</sup> See, UNHCR Global Consultations in Budapest Conclusions, para 15 <<http://www.unhcr.org/3b83b7314.html>> accessed 3 February 2013.

<sup>431</sup> H Meijers, 'Refugees in Western Europe, "Schengen" Affects the Entire Refugee Law' (1990) 2(3) IJRL 428, 433.

endanger her life and freedom.<sup>432</sup> It follows that States have to put in place appropriate procedural safeguards - according to their constitutional and administrative structures - to ensure that a refugee is not sent to an unsafe country.<sup>433</sup>

As suggested by the UNHCR Handbook, the principle of *non-refoulement* would entail a positive obligation to grant refugees a right to enter the territory of the State, at least on a temporary basis, in order to submit the protection claim to a competent authority in charge of ascertaining whether any risk upon return can be excluded.<sup>434</sup> Refugees should, moreover, be informed that their irregular position will not affect the outcome of their protection claims.<sup>435</sup> Although Article 33(1) does not confer any right to be granted asylum, States are required ‘to adopt a course that does not amount to *refoulement*. This may amount to removal to a “safe third country” [quite a questionable alternative, in my view] or some other solution, such as temporary protection of refugees.’<sup>436</sup>

In order to avoid the risk of *refoulement*, refugees cannot be

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<sup>432</sup> Wouters 2009, 164.

<sup>433</sup> Ibid 571. See also, Kalin, Caroni, Heim 2011, 1375; UNHCR, *Handbook on Procedures*, para 189. *Non-refoulement* is respected automatically when States confer refugee status or temporary protection on the basis of *prima facie* recognition in situations of mass influxes.

<sup>434</sup> UNHCR, *Refugees without an Asylum Country*, 16 October 1979, Conclusion No.15 (1979), para c; Lauterpacht and Bethlehem 2001, 114; Moreno-Lax 2011a, 218.

<sup>435</sup> Sylvie Da Lomba, *The Right to Seek Refugee Status in the European Union* (Intersentia 2004) 110.

<sup>436</sup> Lauterpacht and Bethlehem 2001, 87, 113.

returned to their country of origin without ascertaining that their claim to protection is well-founded.<sup>437</sup> Whether, however, they are entitled to choose the country in which they will claim refugee status is still a debated issue. Although some scholars advocate such an option on the ground of the existence of family ties, language, or cultural linkages, no claim is made that they reflect binding principles of international law.<sup>438</sup> An exception might be represented, in the EU context, by the principle of family unity whose salience is emphasized by Article 9 of the 2013 Recast Dublin Regulation. It provides that:

Where the applicant has a family member, regardless of whether the family was previously formed in the country of origin, who has been allowed to reside as a beneficiary of international protection in a Member State, that Member State shall be responsible for examining the application for international protection, provided that the persons concerned expressed their desire in writing.<sup>439</sup>

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<sup>437</sup> Kälin, Caroni, and Heim 2011, 1369.

<sup>438</sup> On the issue of whether the intentions of the asylum seeker should be taken into consideration in determining the responsible country, see generally, Edward W Vierdag, 'The Country of First Asylum: Some European Aspects' in David Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s*, (Martinus Nijhoff Publishers 1988) 80-81; James Hathaway, *The Law of Refugee Status* (Butterworths 1991)46-50; UNHCR Position on Readmission Agreements, 'Protection Elsewhere and Asylum Policy' (1 August 1994), para 5 <<http://www.unhcr.org/refworld/publisher,UNHCR,POSITION,,3ae6b31cb8,0.html>> accessed 31 October 2013.

<sup>439</sup> For a definition of 'family member', see, Article 2(g) of the Recast Dublin Regulation. The essential right of family unity for refugees was also confirmed by the Final Act of the Conference of Plenipotentiaries that adopted the 1951 Refugee Convention. See also, Kate Jastram and Kathleen Newland, 'Family Unity and Refugee Protection' in Erika Feller, Frances Nicholson, and Volker Turk (eds), *UNHCR Refugee Protection in International Law* (Cambridge University Press 2003).

None of the provisions of the Geneva Convention requires individuals to seek asylum in any particular State or lodge an application at any specific place.<sup>440</sup> Therefore, even in the absence of an explicit right to pick out the country of asylum, it cannot be excluded that a certain ‘element of choice is indeed open to refugees as to where they may properly claim asylum.’<sup>441</sup>

The fact that States can return asylum seekers without a prior examination on the substance of the protection claim, both within and outside the Dublin system, shows how *de facto* the Geneva Convention does not prevent States from putting into place chain transfers of refugees from one country to another, as long as the principle of direct and indirect *refoulement* is respected. However, the practice of onward expulsions is a nerve-racking and time-consuming experience that implies an increasing uncertainty for both the governments and the refugees involved.<sup>442</sup> The latter may thus be shunted from one State to another, each of which must somehow examine their individual protection claims before returning them to another third country that is considered safe. The inevitable risk is to increase the number of refugees ‘in orbit’ repeatedly sent from

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<sup>440</sup>Moreno-Lax 2013, 20. See also, Gil-Bazo 2006, 598.

<sup>441</sup>*R v Uxbridge Magistrates Court and Another, Ex parte Adimi* [1999] EWHC Admin 765; [2001] QB 667 (per S Brown LJ). On this point, see, Section 2.7.1 of this thesis.

<sup>442</sup>Gretchen Borchelt 2001-2002, 500.

country to country without receiving a determination on the merits of their claims.

The innumerable and conflicting arguments put forward by scholars and government authorities over the last sixty years distance the reaching of a unequivocal and clear interpretative position, and offer room for contestation. However, in the light of the text and the object and purpose of Article 33(1) of the Convention - examined more in detail in Chapter 2 - it emerges how the right to *non-refoulement* and the right to seek asylum are closely connected with the right to have a protection claim examined, regardless of the place where the refugee is first found. It can thus be sustained that the principle of *non-refoulement*:

Provides a basis for procedural rights to refugee status determination insofar as it obliges States to determine whether a person they want to send back to the country of origin is a refugee. However, as such procedural rights are not provided for by the wording of the 1951 Convention, their precise scope and content remains unclear, meaning that Article 33 compensates for the lack of provisions on refugee status determination procedures in the 1951 Convention to a limited extent only.<sup>443</sup>

The gaps in the Geneva Convention with regard to the existence of an express right to access refugee status determination procedures can

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<sup>443</sup> Kälin, Caroni and Heim 2011, 1395.

be compellingly filled by the synergic contribution of human rights law to the refinement of the meaning and scope of the *non-refoulement* obligation. To be more clear, despite the lack of an explicit right to access asylum procedures under the Geneva Convention, an implied entitlement to have access to a substantive determination of protection claim can be considered a procedural corollary to the prohibition of *non-refoulement* enshrined in Article 33(1). As we will observe in the ensuing sections, the case law of international human rights bodies has confirmed the existence of such a right with respect to *non-refoulement* obligations under the relevant treaties.

### **3.3 Access to asylum procedures under the ICCPR and the CAT**

Neither the ICCPR nor the CAT contains stand-alone obligations on the right to asylum. However, the views expressed in some cases by their monitoring bodies seem to contain an implied positive obligation to ensure access to asylum procedures, if it is functional to effective protection from *refoulement*.

The HRC has pointed out that States parties to the ICCPR must always ensure that each claim for protection is subjected to a particularized assessment, irrespective of individual's country of origin. In the *XHL v The Netherlands* case, concerning a 12 year-old

Chinese minor seeking asylum in the Netherlands, the HRC concluded that:

By deciding to return the author to China without a *thorough examination* of the potential treatment that the author may have been subjected to as a child with no identified relatives and no confirmed registration, the State party failed to provide him with the necessary measures of protection as a minor at that time (emphasis added).<sup>444</sup>

Concerns about the real possibility for a refugee to substantiate her claim in the context of speedy asylum procedures have been expressed also by the Committee against Torture in its Concluding Observations on the Netherlands.<sup>445</sup> In *X v Spain*, the Committee held that its authority ‘does not extend to a determination of whether or not the claimant is entitled to asylum under national laws of a country, or can invoke the protection of the Geneva Convention [...]’.<sup>446</sup> Despite the lack of such a right in the text of the CAT, investigating a need for protection assumes special relevance in the context of alleged violations of Article 3 upon removal, including situations of mass

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<sup>444</sup>*XHL v The Netherlands* Comm no 1564/2007 (22 July 2011) para 10.3.

<sup>445</sup>*Concluding Observations on the Netherlands* UN Doc CAT/C/NET/CO/4(3 August 2007) para 7(a) and (b).

<sup>446</sup>*X v Spain* Comm no 23/1995 UN Doc CAT/C/15/D/23/ (15 November 1995) para 7.3. See also, *Aemei v Switzerland*, 29 May 1997, para 11.

influxes.<sup>447</sup>

The CAT does not indicate any specific procedural safeguards concerning the determination procedure, but the Committee has frequently urged States parties to adopt such safeguards in their national legislation allowing, for instance, the individual to have a formal hearing, due process, and transparent and impartial proceedings.<sup>448</sup> In its Recommendations to Italy, the Committee was concerned that some asylum seekers might have been denied the right to apply for asylum and to have their asylum claims assessed individually by means of a fair and satisfactory procedure. It held, accordingly, that:

The State party should adopt appropriate measures to *ensure that all asylum seekers have access to a fair and prompt asylum procedure*. In this respect, the Committee recalls the obligation of the State party to ensure that the situation of each migrant is processed individually, and the Committee further recommends that the State party proceeds with the adoption of a comprehensive legislation on political asylum (emphasis added).<sup>449</sup>

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<sup>447</sup> *Concluding Observations on the Former Yugoslav Republic of Macedonia* UN Doc A/54/44 (1999) para 116; *Concluding Observations on France* UN Doc CAT/C/FRA/CO/3 (2006) para 6.

<sup>448</sup> *Concluding Observations on Venezuela* UN Doc A/54/44 (1999) para 147; *Concluding Observations on Canada* UN Doc A/56/44 (2000) paras 54-59; *Concluding Observations on Bolivia* UN Doc A/56/44 (2001) paras 89-98.

<sup>449</sup> *Conclusions and Recommendations of the Committee against Torture, Italy*, UN Doc CAT/C/ITA/CO/4 (16 July 2007).



Noting that Hungary's asylum legislation does not require that foreigners wishing to enter (or already present in the country) be personally interviewed, in its Recommendations to Hungary in 2006, the Committee against Torture recommended the following:

The State party should ensure that it complies fully with Article 3 of the Convention and that individuals under the State party's jurisdiction *receive appropriate consideration by its competent authorities and guaranteed fair treatment at all stages of the proceedings*, including an opportunity for effective, independent and impartial review of decisions on expulsion, return or extradition (emphasis added).<sup>450</sup>

In its Observation to Greece in June 2012, the Committee expressed its concern regarding the widespread reluctance by asylum seekers to lodge applications because of an 'absence of a safe complaints mechanism, insufficient number of interpreters, and a lack of trust in authorities.'<sup>451</sup> In addition, it criticized that:

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<sup>450</sup>*Conclusions and Recommendations of the Committee against Torture, Hungary*, UN Doc CAT/C/HUN/CO/4, para 10 (6 February 2007).

<sup>451</sup>*Concluding Observations of the Committee against Torture, Greece*, UN Doc CAT/C/GRC/CO/5-6 (2012), para 12.

*Asylum seekers face serious obstacles in accessing the asylum procedure* due to structural deficiencies and non-functioning screening mechanisms at the Greek border areas and at the Attika Aliens' Police Directorate.<sup>452</sup>

Therefore, this lack of access to effective procedural guarantees, legal remedies, and asylum procedures has been seen as a concrete risk of *refoulement*.<sup>453</sup>

### **3.4 ECHR: Access to asylum procedures before expulsion**

Does Article 3 of the ECHR require States to undertake asylum procedures before expelling an asylum seeker to his or her country of origin? If so, what are the requirements for the examination of a protection claim that flow from this provision? Although the ECHR does not contain a general obligation to provide a substantive examination of asylum applications, the analysis of the jurisprudence of the Court proves the insistence of the latter on a positive obligation to status determination in order to assess the consequences of the expulsion of an individual to the country of origin. More specifically, Article 3 *per se* has been used to support a right of access to asylum procedures in order to prevent applicants' return to territories where they can suffer torture and other inhuman and degrading treatment.

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<sup>452</sup> *ibid* para 18.

<sup>453</sup> *ibid* para 19.

The fact that the status of protection seekers under the ECHR is of a declaratory nature enables States parties to the ECHR to freely decide whether to grant residence or a temporary stay, regardless of a formal procedure for status determination. This Section will also show how the Court has interpreted Article 3 as requiring a ‘rigorous scrutiny’ of a protection claim,<sup>454</sup> and how such scrutiny would not be possible without a determination of the claim itself.

In the *Jabary v Turkey*, the ECtHR found that:

Having regard to the fact that Article 3 enshrines one of the most fundamental values of the democratic society and prohibits in absolute terms torture or inhuman or degrading treatment or punishment, a *rigorous scrutiny* must necessarily be conducted of an individual’s claim that his or her deportation to a [...] country will expose that individual to treatment prohibited by Article 3.<sup>455</sup>

The Court considered that the automatic application of a short time limit for submitting an asylum application (five days of the arrival in Turkey) without the possibility of undertaking a substantive examination of the claim would be at variance with the protection of the fundamental value of democratic societies embodied in Article 3

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<sup>454</sup>*TI v UK* App no 43844/98 Admissibility Decision (ECtHR, 7 March 2000).

<sup>455</sup>*Jabari v Turkey*, para 39.

of the Convention.<sup>456</sup> Indeed, in the Court's view, the applicant risked being subjected to treatment contrary to Article 3 if returned to Iran where national authorities still may decide punish adultery by stoning the individual found guilty of such a crime.

Although the ECHR does not contain a general obligation to provide a substantive examination of asylum applications, the analysis of the jurisprudence of the Court proves the insistence of the latter on a positive obligation to status determination in order to assess the consequences of the expulsion of an individual to the country of origin. Furthermore, the fact that the status of protection seekers under the ECHR is of a declaratory nature makes States parties to the ECHR able to freely decide whether granting residence or temporary stay, regardless of a formal procedure for status determination.

The Court has also insisted on a careful factual assessment of the asylum application. For instance, in *D and Others v Turkey*, the Court stated that the UNHCR erred in its refugee status determination of a woman sentenced by an Iranian Islamic court to 100 lashes.<sup>457</sup> UNHCR's Ankara office denied her application for refugee status by assuming that she would only receive a symbolic punishment. Notwithstanding, the Court found that expulsion would breach Article

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<sup>456</sup> *ibid* para 40.

<sup>457</sup> *D and Others v Turkey* App no 24245/03 (ECtHR, 22 June 2006).

3 of the ECHR as there was no evidence that the Iranian authorities intended to reduce the 100 lashes punishment.<sup>458</sup>

A host of cases need to be mentioned here. First, *Diallo v Czech Republic* concerns a complaint lodged by two Guinean asylum seekers who alleged that their applications had been denied by the Czech authorities without first examining them on the merits. In concluding that Czech Republic should not have expelled the two asylum seekers to their home country, the Court held that ‘none of the domestic authorities examined the merits of the applicants’ arguable claim under Article 3 of the Convention.’<sup>459</sup> It thus found a violation of the right to an effective remedy in conjunction with Article 3 as:

The applicants’ claims that there was a real risk of ill-treatment in their country of origin were not subjected to close and rigorous scrutiny by the Ministry of the Interior as required by the Convention, or in fact to any scrutiny at all.<sup>460</sup>

The second case in question is *ZNS v Turkey* where the Court was not persuaded that the national authorities had conducted a meaningful assessment of the applicant’s asylum claim. The Court, therefore found, in the light of the UNHCR’s assessment of the risk

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<sup>458</sup> *ibid* para 51.

<sup>459</sup> *Diallo v the Czech Republic* App no 20493/07 (ECtHR, 23 June 2011) para 85.

<sup>460</sup> *ibid* para 77.

for the life of the applicant in the country of origin, that Article 3 had been violated.<sup>461</sup> Third, in *Abdolkhani*, the Court held that:

By failing to consider the applicants' requests for temporary asylum, to notify them of the reasons for not taking their asylum requests into consideration and to authorize them to have access to legal assistance [. . .], the national authorities prevented the applicants from raising their allegations under Article 3 [. . .].<sup>462</sup>

In *Gebremedhin v France*, the Court criticized French legislation whereby administrative authorities could refuse to grant leave to enter the country if an asylum application is considered 'manifestly unfounded.'<sup>463</sup> In its reasoning, the Court highlighted the importance of having access to asylum procedures as a means toward *non-refoulement*. It noted, indeed, that 'a decision to refuse leave to enter the country acts as a bar to lodging an asylum application',<sup>464</sup> and results in having the person immediately removed to the country from

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<sup>461</sup> *ZNS v Turkey* App no 21896/08 (ECtHR, 19 January 2010) paras 47–9. Further cases remain pending on the issue of access to asylum determination procedures. See e.g., *Sharifi and Others v Italy and Greece* App no 16643/09, communicated 13 July 2009 (pending). For an extended analysis of the right to asylum in relation to the ECHR, see, Nuala Mole and Catherine Meredith, *Asylum and the European Convention of Human Rights* (Council of Europe Publishing 2010) 103–7.

<sup>462</sup> According to the Court, since no national authority examined their allegation of a risk of ill-treatment if returned to Iran or Iraq, the applicants were not afforded an effective remedy in relation to their complaints under Article 3. See, *Abdolkhani and Karimnia v Turkey* App no 30471/08 (ECtHR, 22 September 2009) paras 113, 115.

<sup>463</sup> *Gebremedhin v France* App no 25389/05 (ECtHR, 26 April 2007) para 60.

<sup>464</sup> *ibid*, para 54.

which she claims to have fled.<sup>465</sup>

From the cases examined above it emerges how ‘a *rigorous scrutiny* must necessarily be conducted of an individual’s claim that his or her deportation will expose that individual to treatment prohibited by Article 3 (emphasis added).’<sup>466</sup> Already in *TI v UK*, the Court took the opportunity to clarify that claims of violations of Article 3 must always be considered on their merits before carrying out expulsions and, as a consequence, all the circumstances surrounding an Article 3 claim must be subjected to a ‘*rigorous scrutiny*.’<sup>467</sup>

The *TI v UK* judgment concerns a Sri Lanka national claiming international protection in Germany for suffering persecution by non-state agents in his home country. Since Germany did not recognize actions or omissions by non-state actors as grounds for receiving international protection, the applicant fled to the UK, but the Secretary of State refused to examine the substance of the new asylum claim and removed the applicant back to Germany. Germany was deemed by the UK as the State responsible for processing the asylum application at issue on the basis of the attribution of responsibility

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<sup>465</sup> *ibid.*

<sup>466</sup> *Jabari v Turkey*, para 39.

<sup>467</sup> *TI v UK*, App no 43844/98 Admissibility Decision (ECtHR, 7 March 2000) 14. The reasoning of the Court implies a duty to examine the substance of an asylum application before expelling a person to an intermediary country if the situation in the country of origin ‘gives rise to concerns.’ See Elspeth Guild, ‘The Europeanisation of Europe’s Asylum Policy’(2006) 18 IJRL 649.

established by the Dublin Convention. The Court considered that Germany would have not expelled the applicant to Sri Lanka in breach of Article 3 of the Convention, and consequently, the United Kingdom had not violated this provision by deciding to remove the applicant to Germany.<sup>468</sup> Nevertheless, the Court clarified that claims of violations of Article 3 always require a substantive examination before carrying out any type of expulsion.

The *TI v UK* case - delivered four months before the *Jabary v Turkey* judgment - also raises the issue of the relationship between the Dublin Convention and the ECHR. The automatic removal of an asylum seeker either to another EU Member State in accordance with the Dublin Convention, or to a country outside the Dublin area risks undermining international protection, especially when there is a high presumption of safety.<sup>469</sup> Indeed,

The Court notes [...] that, while the Dublin Convention may pursue laudable objectives, its effectiveness may be undermined in practice by the differing approaches adopted by Contracting States to the scope of protection offered.<sup>470</sup>

Furthermore, the Court noted that:

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<sup>468</sup>*TI v UK*, 16.

<sup>469</sup>On the approach of the ECtHR with regard to the presumption of safety in the Dublin context, see, Section 3.6.

<sup>470</sup> *ibid* 15.



It has not heard substantial arguments from either the United Kingdom or German governments as to the merits of the asylum claim. Nevertheless, it considers that the materials presented by the applicant at this stage give rise to concerns as to the risks faced by the applicant, should he be returned to Sri Lanka [...].<sup>471</sup>

Although the Court does not clearly establish that a pre-removal full examination of the merits be carried out, this passage can be interpreted as implying a duty to examine the substance of an asylum application before expelling a person to a third country, if the situation in the country of origin ‘gives rise to concerns.’<sup>472</sup>

### **3.4.1. The extraterritorial applicability of the right to access asylum procedures under the ECHR**

As recent as 2000, the ECHR was identified as providing ‘a rather impressive inherent right to access.’<sup>473</sup> Over the last 13 years, the ECtHR has tackled several cases concerning extra-territorial State activities, thus letting the Convention stand out as a reliable instrument for securing access to protection in Europe.<sup>474</sup> This Section will indulge in the jurisprudence of the Court, which has generally

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<sup>471</sup> *ibid* 16.

<sup>472</sup> Zwaan 2003, 49-50.

<sup>473</sup> Noll 2000, 454.

<sup>474</sup> Costello 2012, 306.

interpreted the prohibition of *refoulement* as requiring access to an effective and rigorous examination of protection claims, even beyond borders. In the *Amuur v France* decision, the ECtHR asserted that effective access to asylum procedures must also be ensured with respect to asylum seekers retained in the international zone of an airport.<sup>475</sup> However, it also clarified that, despite its name, the ‘international zone’ of an airport does not have extraterritorial status.<sup>476</sup>

*Hirsi v Italy* is the first case where the ECtHR ruled on the possibility of guaranteeing access to status determination when refugees are intercepted on the high seas. Greater attention will be, therefore, placed on this decision, where the Court was keen to stress that preventing people from lodging their protection claims would both heighten the risk of *refoulement* and indirectly lead to a violation of Article 3 of the Convention. Thus, by delivering its views on asylum, the impression is that the Grand Chamber intended to contribute to strengthening and refining the content of extraterritorial States’ obligations toward protection seekers.<sup>477</sup>

In 2009, migrants and refugees were pre-emptively pushed back after interception in international waters and handed over to Libya without having the possibility of being transported to safe European

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<sup>475</sup> *Amuur v France*, para 43.

<sup>476</sup> *ibid* para 52.

<sup>477</sup> See *Hirsi v Italy*, paras 185, 201-205.

ports for identification and examination of asylum claims. Any attempt to claim protection or to receive information was thus rendered nugatory. The *Hirsi* case could set a critical precedent for those European States that try to shift the burden of responsibility for examining asylum applications to third countries, also with the help of bilateral agreements for technical and police cooperation used to intercept migrants and refugees before their physical arrival at Europe's borders.

Confusingly, in *Hirsi*, the Court seems to suggest the possibility of accessing asylum procedures on the high seas.<sup>478</sup> However, for a number of reasons, this reading is problematic. First of all, it is unrealistic that lawyers and translators may be made readily available for all the different nationalities of migrants and refugees on the high seas. But even if it were the case, does the lack of an explicit recognition by the Court of a free standing obligation to disembarkation imply that asylum procedures can be effectively performed at sea?

Despite the lack of an explicit hint by the Grand Chamber with regard to the possibility of applying for asylum either on the vessels or on the mainland, boats should not be considered an appropriate environment for processing asylum claims. Refugees cannot be fairly interviewed in the intimidating atmosphere of a warship after an

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<sup>478</sup>*Hirsi v Italy*, para 202.

exhausting journey.<sup>479</sup> They should have time to recover, collect evidence, and be ready to disclose the reasons of their getaway and the possible ill-treatment they suffered in their country of origin. However, a question springs up spontaneously. If, hypothetically, intercepting vessels (not necessarily military crafts) were fully-equipped with all the facilities necessary for carrying out assessment of asylum applications, would they become appropriate places for a rigorous scrutiny of protection claims?

It would not be hard to imagine that passengers would be detained for long periods of time far away from any courts where challenging a negative decision on asylum or an expulsion order. Despite video recording or other types of communication could be entertained between at-sea and in-shore State authorities, ‘the personnel, temporal and infrastructure preconditions to carry out proceedings [would not be] fulfilled in a way that would be possible for domestic official proceedings.’<sup>480</sup> Since refugees would end up being retained against their will on board of floating detention camps,<sup>481</sup> ships should be unreservedly dismissed as suitable *loci* for examining individual

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<sup>479</sup> Of the same opinion, also J Schneider, ‘Comment to Hirsi (part II): Another Side to the Judgment’ (Strasbourg Observers, 5 March 2012) <<http://strasbourgoobservers.com/2012/03/02/hirsi-part-ii-another-side-to-the-judgment/>> accessed 31 October 2013.

<sup>480</sup> Andreas Fischer-Lescano, Tillmann Lohr and Timo Tohidipur, ‘Border Controls at Sea: Requirements under International Human Rights and Refugee Law’ (2009) 21 *IJRL* 256, 285.

<sup>481</sup> In the *Medvedyev v France* case, the ECtHR held that detention on the high seas amounted to a violation of Article 5 of the Convention.

situations and assessing protection claims. Such a solution would engender a further question. If massive capitals were employed to endow vessels with all the necessary facilities to guarantee access to asylum procedures and effective remedies, I would expect executing governments to provide more than a reasonable explanation - in terms of real economy and policy efficiency - to justify their choice to preserve two parallel systems duplicating roles, personnel, resources, and functions in order to accomplish identical objectives.

Advising refugees on their legal position and on the procedures to be followed to claim asylum is necessary if a State wishes to identify those genuinely in need of protection among interdicted persons. Refugees intercepted at sea, for instance, normally do not possess any knowledge of either local legislation or language, thus making access to an interpreter or to independent legal assistance a fundamental requirement for obtaining effective protection.<sup>482</sup>

It has been suggested that people intercepted at sea should always be asked to explain both why they fear their return to the country from which they embarked and whether they want to apply for asylum.<sup>483</sup> States should do this driven by their awareness that both the life of intercepted migrants and refugees could be in danger, and that, as

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<sup>482</sup>See, International Law Association, 'Resolution 6/2002 on Refugee Procedures (Declaration on International Minimum Standards for Refugee Protection)' (2002) para 8. See also, Inter-American Commission on Human Rights, *Haitian Centre for Human Rights et al. v US*, Case 10.675, para 163.

<sup>483</sup> Spijkerboer 2009, 13.

States, they possess a capacity to save people from harm.<sup>484</sup> *Mutatis mutandis*, such a contention would be in line with the doctrine of ‘positive obligations’ adopted by the Court in *Osman v UK*. Although the *Osman* case dealt with very different issues, and no asylum seeker was involved, the Court ruled that Article 2(1) of the ECHR embodies both the duty of States to refrain from the intentional and unlawful taking of life, and the duty to *take measures* to protect the life of people under their jurisdiction if State authorities knew or ought to have known, at the time, of the existence of a real and immediate risk to the life of an identified individual or individuals.<sup>485</sup> More recently, in the *Al Saadoon v UK* case, the Court stressed 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.<sup>486</sup>

In light of the foregoing, must States ensure, under the ECHR, access to asylum procedures with regard to those refugees who have

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<sup>484</sup> Thomas Spijkerboer, ‘The Human Costs of Border Control’ (2007) 9 EJML 138.

<sup>485</sup> *Osman v UK* (2000) 29 EHRR 245, para 116.

<sup>486</sup> *Al-Saadoon v UK*, para 128.

not managed to enter their territory, but are considered to be within their ‘jurisdiction’? This critical question seems to be answered in the affirmative.

It is important to note that, in *Hirsi*, the respondent State did not actually challenge the existence of a right to seek asylum on the high seas and the duty of Italian authorities to handle asylum applications. But, as claimed by the Italian government, since no migrant, once on the intercepting ships, expressed her intention to apply for asylum,<sup>487</sup> there existed no need to detect, during search and rescue operations, the identity and nationality of returned passengers. Had migrants manifested their willingness to apply for asylum, they would have been taken to the mainland to examine their protection claims.<sup>488</sup>

On this point, the ECtHR replied that Italy could not circumvent ‘jurisdiction’ and human rights obligations under the Convention by labelling activities at sea as search and rescue operations.<sup>489</sup> Such a distinction is immaterial under international human rights law. Additionally, a ‘rescue’ mission can be considered fully accomplished only when the stowaways are disembarked in a ‘place of safety’, meant also as a place where the lives and freedoms of those alleging a

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<sup>487</sup> Response of the Italian Government to the Committee on the Prevention of Torture (CPT) Report, Appendix I, para d <<http://www.cpt.coe.int/documents/ita/2010-inf-15-eng.htm>> accessed 31 October 2013.

<sup>488</sup> *ibid.*

<sup>489</sup> *Hirsi v Italy*, para 79.

well-founded fear of persecution, torture, and ill-treatment would not be threatened.<sup>490</sup>

In this regard, the intercepted refugees clearly expressed their fear of returning to Libya, a country that cannot be considered, in any manner whatsoever, a safe haven because of the well-documented inadequacy of its response to flows of migrants and asylum seekers. Moreover, according to the respondent State, the possibility of bringing migrants to Europe to identify them and examine their individual situation and asylum claims within a reception centre is only an option—not the only option. Accordingly, the fact that intercepted migrants explicitly voiced their desire not to be returned to the Libyan guardianship was not considered by Italian authorities as an international protection request. In this regard, it could be argued - as the Court does in *Hirsi* - that European States have a duty to verify, before return, that the receiving country is actually safe for the returned refugees.

Considering the significant amount of information provided by human rights organizations, Italy knew or should have known that, as irregular migrants and refugees, the applicants would be exposed to

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<sup>490</sup> On the definition of the expression ‘place of safety’, see, *Guidelines on the treatment of persons rescued at sea of the International Maritime Organization* (IMO), Resolution MSC.167(78), 20 May 2004, para 6.17, subsequently endorsed by the UN General Assembly in UN Doc A/RES/61/222, 16 March 2007. A broader discussion on search and rescue, interception, and disembarkation in a place of safety, will be carried out in Chapter 7.



treatments contrary to the ECHR in Libya,<sup>491</sup> and would not be given any form of protection against arbitrary repatriation to Somalia and Eritrea.<sup>492</sup> In this regard, the existence in Libya of domestic law or the ratification of international human rights instruments would not be sufficient, *per se*, to justify a presumption of safety.<sup>493</sup> It is exactly on this point that the radical nature of the Court's ruling on the asylum policies of EU Member States becomes most striking. The Grand Chamber affirmed that:

Italy is not exempt from complying with its obligations under Article 3 of the Convention because the applicants failed to ask for asylum or to describe the risks faced as a result of the lack of an asylum system in Libya. It reiterates that the Italian authorities should have ascertained how the Libyan authorities fulfilled their international obligations in relation to the protection of refugees.<sup>494</sup>

A virtual distinction between people actively *seeking* international protection and people *in need of* international protection would be in line with the Court's contention that no automatic negative conclusion should be drawn from the absence of either an explicit asylum claim

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<sup>491</sup> *Hirsi v Italy*, para 131.

<sup>492</sup> *ibid* para 152.

<sup>493</sup> *Ibid* para 128.

<sup>494</sup> *ibid* para 157.

or the substantiation of an asylum application.<sup>495</sup> It could be the case that individuals fleeing generalized violence or persecution in their home country are traumatized and have no knowledge of their own rights or the procedures that need to be fulfilled to claim asylum abroad. The positive obligation to act proactively by informing refugees of the possibility to claim asylum overtly emerges from the jurisprudence of the ECtHR.<sup>496</sup> States shall also take all necessary measures to ensure *de facto* compliance with the principle of *non-refoulement* - the overarching goal of the asylum regime - thereby avoiding the delivery of refugees back to their persecutors as a consequence of States' omissions.<sup>497</sup> In demonstrating the intimate link between *non-refoulement* and the procedural right to access fair status determination mechanisms, in 2010, the UNHCR stated that:

A fair refugee status determination procedure, *wherever undertaken*, requires submission of international protection claims to a specialized and professional first instance body, and an individual interview in the early stages of the procedure. Recognized international standards further include providing a reasoned decision in writing to all applicants, and ensuring that they have the opportunity to seek an

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<sup>495</sup> *ibid* Concurring Opinion 41.

<sup>496</sup> *Hirsi v Italy*, para 204

<sup>497</sup> This position finds ample support under international human rights and refugee law. See e.g., UNHCR Handbook on RSD, para 192. According to Goodwin-Gill, intercepted people should always be given an opportunity to set out reasons why they might be at risk if returned. See, Guy S Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-refoulement' (2011) 23 IJRL 449.

independent review of any negative decision, with any appeal in principle having a suspensive effect (emphasis added).<sup>498</sup>

According to the ECtHR, the *non-refoulement* obligation attaches to any persons in need of international protection who suffers a real risk of exposure to ill-treatment if returned (therefore regardless of whether they have sought asylum or are yet to have expressed their desire to be protected).<sup>499</sup> More specifically, ‘compliance with *non-refoulement* is only ensured if its prerequisite, refugee status [...] is adequately examined.’<sup>500</sup> The positive duty of States to provide information and to investigate the risks for the individuals subjected to a return decision is even more compelling when the level of danger in a certain receiving country is ascertainable from a wide number of sources.

As stated in *MSS*, the lack of information was considered by the Court as one of the major obstacles in accessing fair and effective asylum procedures. Considering the irreversible consequences of an unsafe removal, in *Hirsi* the Court stated that ‘anyone should be entitled to obtain sufficient information enabling them to gain

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<sup>498</sup> UNHCR Report 2010, 6.

<sup>499</sup> While Article 1A(2) of the Refugee Convention only provides five grounds of persecution (‘race, religion, nationality, membership of a particular social group or political opinion’) to attract the protection of the Convention, no similar qualification applies to Article 3 of the ECHR. For a review of case law, see, Mole and Meredith 2010, 25–6.

<sup>500</sup> Fischer-Lescano, Löhr and Tohidipur 2009, 285.

effective access to the relevant procedures and to substantiate their complaints.<sup>501</sup> Thus, the Court's decision that the summary return of interdicted refugees, on 6 May 2009, without access to a proper determination procedure and without granting them a hearing both to ascertain their status and challenge their removal, amounted to a violation of Articles 3 and 13 of the Convention and Article 4 of Protocol 4 was wholly consistent with the purpose of the ECHR.<sup>502</sup>

### **3.5. EU law and the right to access asylum procedures**

An instrument of great significance for the rights of people seeking protection in Europe is the CFR, whose Preamble reads as follows:

The Charter reaffirms [...] the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case law of the Court of Justice of the European Union and of the European Court of Human Rights.

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<sup>501</sup>*Hirsi v Italy*, para 204.

<sup>502</sup> Following the same logic, the UNHCR declares that 'claims for international protection made by intercepted persons are in principle to be processed in procedures within the territory of the intercepting State.' See, UNHCR Protection Policy Paper, *Maritime Interception Operations and the Processing of International Protection Claims: Legal Standards and Policy Considerations with Respect to Extraterritorial Processing* (November 2010) 2 <<http://www.unhcr.org/refworld/pdfid/4cd12d3a2.pdf>> accessed 3 February 2013.

It is clear that the Charter is mainly concerned with fundamental rights of individuals and that to this effect there is no provision that makes an explicit reference to the rights of States. In addition, the right to asylum is to be conceived of as a right belonging to individuals, rather than one belonging to States.<sup>503</sup> In this regard, Article 18 of the CFR establishes that:

*The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the Status of Refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (emphasis added).*

Thus, for the first time, a European supranational instrument recognizes not only the right to seek asylum, but also the right *to be granted asylum*, which becomes legally binding primary law in the Union. This interpretation emerges also from the *travaux préparatoires* where the drafters of the Charter expressly avoided limiting the scope of Article 18 to the right *to seek* asylum. Since the

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<sup>503</sup> The right of individuals to be granted asylum is enshrined only in regional treaties, such as Article 22 of the American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 114 UNTS 123; Article 12(3) of the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986), OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982).

right to asylum has not been recognized in any international treaty to which EU Member States are parties, its content must be inferred from the constitutional traditions common to the Member States, which inspired the drafting of the Charter. Many of these countries, for instance, have interpreted the right to asylum as an entitlement both to seek and receive protection.<sup>504</sup>

In this regard, Article 13 of the 2011 Recast Qualification Directive, by reasserting its compliance with the CFR, establishes that ‘Member States shall grant refugee status to a third country national or stateless person who qualifies as a refugee.’ In addition, Article 18 of the same Directive provides that ‘Member States shall grant subsidiary protection status to a third country national or a stateless person eligible for subsidiary protection.’<sup>505</sup> It has therefore been argued that the Qualification Directive confers ‘a subjective right to be granted asylum’,<sup>506</sup> as recognized also by Advocate General Maduro in *Elgafaji*.<sup>507</sup>

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<sup>504</sup> Examples are the constitutional traditions of France, Germany, Italy, Bulgaria, Hungary, and Spain. See Gil-Bazo 2008, 47.

<sup>505</sup> For an analysis of the Qualification Directive 2004/83/EC and the right to asylum, see, Gil-Bazo, ‘Refugee Status and Subsidiary Protection under EC Law: The Qualification Directive and the Right to be Granted Asylum’ in H Toner, E Guild and A Baldaccini (eds), *Whose Freedom, Security And Justice?: EU Immigration and Asylum Law And Policy* (Hart Publishing 2007) 237.

<sup>506</sup> Gil-Bazo 2008, 48.

<sup>507</sup> C-465/07, *Elgafaji v Saatssecreteris van Justitie* [2009] ECR I-0000, Opinion, para 30.

The ‘Explanations’ to Article 18 of the CFR affirm that the text of the Article has been based on Article 78 of the TFEU according to which the Union must respect, *inter alia*, the Geneva Convention on Refugees. The reference to Article 78 assumes relevance in so far as it states that:

The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the Status of Refugees, and other relevant treaties.

This provision seems to recognize the right to be granted asylum to all those refugees who meet the criteria for refugee status embodied in Article 1(a) of the Geneva Convention or entitled to subsidiary protection. The question is, however, whether this is the only category of individuals to whom Article 18 of the CFR applies or whether other categories of people might be entitled to the protection offered by Article 18. In this regard, Gil Bazo notes that:

Asylum in the Charter is to be construed as the protection to which all individuals with an international protection need are entitled, provided that their protection grounds are established by international law, irrespective of whether they are found in the Refugee Convention or in any other international human rights instrument.<sup>508</sup>

With the entry into force of the Lisbon Treaty, the right to asylum has become a ‘subjective and enforceable right of individuals under the Union's legal order’<sup>509</sup> and will be directly applicable in national legal orders without further incorporation and transposition.<sup>510</sup> Moreover, since Article 51 of the CFR does not expressly provide for any territorial limitation, Member States shall comply with it every time they are implementing Union law, regardless of the place where the activity is carried out.<sup>511</sup>

This Chapter focuses on the assessment of whether a right to access asylum procedures can be inferred from international human

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<sup>508</sup> Gil-Bazo 2008, 50.

<sup>509</sup> *ibid*, 33.

<sup>510</sup> The right to asylum under the CFR can be invoked directly before national courts of all EU Member States with the only exception of Poland and the UK. Article 1(2) of the Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom states that ‘nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom, except in so far as Poland or the United Kingdom has provided for such rights in its national law.’

<sup>511</sup> See, Explanations to Article 51 of the CFR in: *Explanations relating to the Charter of Fundamental Rights* (2007/C 303/02). See also, Directorate General for Internal Policies, *Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies: Frontex, Europol and the European Asylum Support Office* (European Parliament 2011) 48-9.



rights and refugee law treaties, thus casting aside a more detailed and comprehensive analysis of EU asylum procedures. Nevertheless, at this juncture, it is worth noting that procedural safeguards inscribed within the EU Recast Qualification and Procedures Directives are considered determinative for fair and effective asylum procedures in line with international human rights and refugee law standards.<sup>512</sup> For instance, asylum applications must be submitted to competent authorities bearing in mind that the authorities that receive the claims and those in charge of examining the application should not be the same. Lamentably, asylum applications are often submitted to immigration or border police officers who do not have an adequate training in human rights and asylum procedures, and who are not competent to examine the merits of an asylum claim. Article 4(4) of the Recast Procedures Directive provides that ‘Member States shall ensure that the personnel of that authority have the appropriate knowledge or receive the necessary training to fulfil their obligations when implementing this Directive.’<sup>513</sup> Also, first-instance decision-makers should be fully trained with respect to relevant standards applicable in the field of asylum and refugee law, should be independent from the Member States governments, and clearly

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<sup>512</sup> This Section aims to provide only a general overview of the standards Member States should comply with when dealing with asylum applications. For a detailed analysis of the minimum requirements Member States’ asylum procedures must satisfy to respect international and European standards, see, *inter alia*, Da Lomba 2004, c V; Battjes 2006; Costello 2012.

<sup>513</sup> This Article replaces Article 4(3) of the 2005 Procedures Directive.

identified to ensure that decisions are taken individually, objectively, and impartially.

Another example could regard language. Since communication is a critical aspect of a fair and effective access to international protection, refugees shall always be entitled to the services of a competent interpreter in all the phases of the asylum procedure and not only when the initial interview takes place.<sup>514</sup> Furthermore, applicants shall receive informed advice from lawyers specialized in immigration and asylum issues as well as from other sources, such as refugee councils. Nonetheless, while the right to free legal assistance to appeal procedures against an unfavourable decision is guaranteed by Article 20(1) of the Recast Procedures Directive, effective access to legal advice is often hampered by financial problems and cuts in public funding.<sup>515</sup>

Moreover, applicants should be informed as early as possible of their right to submit their protection claim. They also need guidance on the procedure to be followed before the proceedings are initiated. It is also paramount that first instance proceedings have suspensive effect to avoid a violation of the principle of *non-refoulement* as a consequence of the removal of asylum seekers to third countries while

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<sup>514</sup> On this issue see, UNHCR Handbook on RSD, para 192 (IV). See also, Article 12(1)(b) of the Recast Procedures Directive replacing Article 10(1)(b) of the 2005 Procedures Directive.

<sup>515</sup> See also, Article 22(1) of the Recast Procedures Directive replacing Article 15(2) of the 2005 Procedures Directive.

their claim is being examined. Under the Recast Procedures Directive, applicants are allowed to remain in the Member State only pending a decision in the first instance, and only few exceptions in respect of cases of subsequent applications are possible.<sup>516</sup> The right to appeal against unfavourable decisions with a suspensive effect is central to fair and effective asylum procedures, but it is frequently put into question by the application of accelerated mechanisms of identification, examination of asylum claims, and expulsion.<sup>517</sup>

### **3.6. Access to asylum procedures in the third country as a safety condition**

Despite the soundness of the arguments against the legality of the ‘safe third country’ concept in international law, it is unlikely that this practice will disappear anytime soon from the migration containment policies of Western States, and EU Member States, in particular. For this reason and in view of eliminating the baleful impact of ‘safe third country’ mechanisms on refugee rights, removing States must take a number of concrete measures. As already highlighted in Sections 2.7 and 2.7.1, sending States have a duty to both verify that the asylum seeker will have access to effective protection in the readmitting

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<sup>516</sup>Article 9(1) of the Recast Procedures Directive replacing Article 7(1) of the 2005 Procedures Directive. Exceptions are laid down in Article 9(2).

<sup>517</sup>The right to an effective remedy will be discussed in Chapter 4.

country, and to guarantee that, in any case, this presumption of safety is rebuttable.

Pragmatically speaking, sending States must assure, before removal, that readmitting countries offer effective protection from indirect *refoulement* either by granting permission to stay, or access to an examination procedure.<sup>518</sup> The first option would satisfy the prohibition of indirect *refoulement* without requiring access to asylum procedures. According to Goodwin-Gill and McAdam, ‘substantive evidence of admissibility’ in the readmitting State is a key requirement for permitting return under international refugee law.<sup>519</sup> If then, a residence permit is not provided in the third country, the sending State should ascertain that the transferred person will be granted access to examination procedures upon removal.

If there is no prospect of a durable solution in the third country because of the foreseeable risk of expulsion to a fourth State, the second State would fail to provide effective protection from *refoulement*.<sup>520</sup> As reckoned by the UNHCR EXCOM Conclusion from 1998, the third State should offer the refugee the possibility ‘to

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<sup>518</sup> Battjes 2006, 398.

<sup>519</sup> Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press 2010) 395; see also Hélène Lambert (2012), ‘Safe Third Country’ in the European Union: An Evolving Concept in International Law and Implications for the UK’ 26(4) *Journal of Immigration, Asylum and Nationality Law* 318.

<sup>520</sup> Battjes 2006, 400.

seek and enjoy asylum.’<sup>521</sup> This entitlement to a durable solution would not amount to a right to asylum by itself, but would be, rather, a side effect of the principle of *non-refoulement*, as applicable also to refugees who fall under the jurisdiction of an EU Member State, whether they apply at the border or beyond the border.<sup>522</sup>

With regard to pre-removal procedures, although the ECHR does not recognize a right to asylum, the Court holds the view that access to status determination is a fundamental element to avoid ‘immediate or summary removal’ to an unsafe country. An individual determination of the safety of a readmitting country for the asylum seeker concerned is deemed necessary to minimize the risk of irremediable damages to the person subject to a removal order. For example, in *TI v the UK*, the Court of Strasbourg, led by the concern to evaluate whether Germany did indeed provide effective procedural safeguards shielding the applicant from being removed to Sri Lanka, eventually found that Germany was ‘safe’ for Mr. TI to return to. Indeed, as Germany ensured a re-examination of the asylum claim, the Court stated:

While it may be that on any re-examination of the applicant’s case the German authorities might still reject it, this [was] largely a matter of speculation and

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<sup>521</sup> EXCOM Conclusion no 85 (XLIX), under (f).

<sup>522</sup> Battjes 2006, 401.

conjecture.<sup>523</sup> The procedural safeguards provided by Germany explain why the responsibility of the UK was excluded.

While according to the Court, ‘there [was] considerable doubt that the the applicant would either be granted a follow up asylum hearing or that his second claim would be granted’,<sup>524</sup> it was satisfied by Germany’s assurances that the claim would be examined before issuing a new deportation order. Thus, ‘the apparent gap in protection resulting from the German approach to non-State agent risk [was] met, *to at least some extent*, by the application [...] of section 53(6) [of the German Aliens Act] (emphasis added).’<sup>525</sup> With regard to the right to an effective remedy, since in *TI v UK*, the assessment of the procedural safeguards of the third country did not expressly involve Article 13, it could be argued that an effective application of Article 3 of the Convention would entail both a ‘meaningful assessment’ of the claim for protection and the offer of an effective remedy against a unfavourable decision.<sup>526</sup> While, therefore, the *TI v UK* confirms that the presumption of safety among the States of the Dublin system is

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<sup>523</sup>*TI v the UK*, 17.

<sup>524</sup> *ibid* 17.

<sup>525</sup> *ibid*.

<sup>526</sup> Battjes 2006, 402.

not absolute, Mr. TI's claims were rejected as manifestly unfounded and the application was found to be inadmissible.<sup>527</sup>

By contrast, in *KRS v UK*, by disregarding substantive evidence adduced by the UNHCR of the risks of ill-treatment for the applicant upon removal to Greece, the Court relied on an absolute presumption of safety. It actually stated that:

Where States establish [...] international agreements, to pursue co-operation in certain fields of activities, there could be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.<sup>528</sup>

However, it then gave excessive credit to Greece's formal obligations under both the ECHR and EU law, and argued that '[i]n the absence of any proof to the contrary' it had to be presumed that Greece would act consistently with its obligations under the Convention.<sup>529</sup>

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<sup>527</sup>*TI v UK*, 20.

<sup>528</sup>*KRS v UK* App no 32733/08 (ECtHR, 2 December 2008) 16 citing *Waite and Kennedy v Germany* App no 26083/94, para 67, ECHR 1999-I.

<sup>529</sup>*KRS v UK*, 18. For a comprehensive analysis of *TI v UK* and *KRS v UK* in relation also to *MSS v Belgium and Greece*, see, Violeta Moreno-Lax, 'Dismantling the Dublin System: *MSS v Belgium and Greece*' (2012) 14(1) *European Journal of Migration and Law* 1.

The refutability of the presumption of safety was reaffirmed *in concreto* by the ECtHR in *MSS v Belgium and Greece* where the ECtHR found that:

There has been a violation of Article 13 of the Convention taken in conjunction with Article 3 because of the deficiencies in the Greek authorities' examination of the applicant's asylum request and the risk he faces of being returned directly or indirectly to his country of origin without any serious *examination of the merits of his asylum application* and without having access to an effective remedy (emphasis added).<sup>530</sup>

The elements the UNHCR has focused upon to infer safety before removal are the express consent of the third State to readmit, protection against direct and indirect *refoulement*, respect for fundamental human rights, and access to a fair refugee status determination procedure.<sup>531</sup> Therefore, sending States must verify, on an individual basis, whether the readmitting country effectively respects safety criteria. Moreover, sending States must also receive formal assurance in advance that the third country expressly consents to the transfer by accepting both to admit the asylum seeker into its territory and to examine her protection claim.<sup>532</sup> It is thus not enough

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<sup>530</sup> *MSS v Belgium and Greece*, para 321.

<sup>531</sup> See, UNHCR Global Consultations in Budapest Conclusions, para 15 <<http://www.unhcr.org/3b83b7314.html>> accessed 3 February 2013.

<sup>532</sup> *ibid*



that EU Member States provide the claimant with a notification informing the third country that the application of the individual they are being asked to take back has not been examined on its merits. The readmitting State should also expressly consent to assess the merits of the protection claim made by the individual.<sup>533</sup> In order to reduce the risk of irremediable mistakes in the overall procedure, the asylum seeker should also be entitled to challenge, with a suspensive effect, the transfer decision by contesting the safety of the readmitting country. Although these safeguards can be inferred from the EU Recast Procedures Directive and the jurisprudence of the ECtHR, they do not always find application in practice.

The analysis of the readmission practices of Italy and the UK with third countries - carried out in Part II of this thesis - will aim to observe whether sending States ensure both access to protection before removal, and scrupulously assess whether readmitting countries are required to effectively guarantee safety criteria and procedural safeguards to returned asylum seekers.

### **3.7. Conclusion**

Although the Geneva Convention does not expressly require States to guarantee access to a fair refugee status determination procedures,

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<sup>533</sup>On the issue of express consent by the readmitting State, see, Section 5.10.1 on the procedural safeguards that should be inserted in the text of readmission agreements.

it is also true that depriving refugees of an individual examination of their claims would be tantamount to accepting the risk that these individuals could be erroneously *refouled* either directly or indirectly through onward expulsions that could jeopardize their fundamental rights.

There is no uniformity in literature on whether undertaking status determination is an implied obligation under the Geneva Convention. According to some, this obligation can be implicitly derived from the duty of States to perform treaty commitments in good faith in compliance with the object and purpose of the treaty itself. Such an obligation can also be implicitly inferred from the principle of *non-refoulement* (Article 33(1)), whose content and scope needs to be shaped through the accrual of international human rights law instruments. Therefore, not only should refugees be entitled to substantiate their protection claims before competent authorities at the border, but they should also be permitted to disembark in a safe place and receive access to fair and effective asylum procedures.<sup>534</sup>

The ECHR does not contain a general obligation to provide access to a substantive examination of asylum applications. However, the analysis of the jurisprudence of the Court of Strasbourg proves that ‘a rigorous scrutiny must necessarily be conducted of an individual’s claim to exclude the risk that this person could be subjected to

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<sup>534</sup> Da Lomba 2004, 10.

treatments contrary to Article 3 of the ECHR once returned in his home country.<sup>535</sup> This implies also a duty to scrutinize the substance of an asylum application before expelling a person to a third State different from the country of origin, if the situation in the home country gives rise to concerns for her life and liberty.<sup>536</sup> Therefore, from the case law of the ECtHR, it emerges that access to asylum mechanisms is considered a fundamental element to avoid both ‘immediate or summary removal’ to the country of origin, and to determine the safety of the third country.

At the EU level, Article 18 of the CFR - enshrining the right to asylum - has been interpreted as involving both a right to *seek* and a right *to be granted asylum*, which has become legally binding primary law in the Union. Accordingly, the 2011 Recast Qualification Directive - by reasserting its compliance with the CFR and Article 18 in particular - establishes that Member States shall grant either refugee status or subsidiary protection to a third country national or stateless person who qualifies as a refugee or as a person eligible for subsidiary protection, respectively. Furthermore, with the entry into force of the Lisbon Treaty, the right to asylum embodied in Article 18 of the CFR has become a ‘subjective and enforceable right of individuals under the Union's legal order’,<sup>537</sup> directly applicable

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<sup>535</sup> See, *Jabari v Turkey*, para 39; *D and Others v Turkey*.

<sup>536</sup> See e.g., *D and Others v Turkey*; *TI v UK*; *Hirsi v Italy*.

<sup>537</sup> Gil-Bazo 2008, 33.

within domestic legal systems without further incorporation and transposition.

This Chapter also discussed the procedures EU Member States shall put into place to reduce the baleful impact of ‘safe third country’ mechanisms – whose legality under international law is here questioned - on refugee rights. Sending States, for instance, have a duty to both verify that the asylum seeker will have access to effective protection in the readmitting country, and to guarantee that, in any case, this presumption of safety is rebuttable. They must, thus, assure, before removal, that readmitting countries offer effective protection from indirect *refoulement* either by granting permission to stay, or access to an examination procedure.<sup>538</sup>

In a process of cross-fertilization between different legal regimes, there is an increasing consensus among human rights scholars that international human rights law can provide a wider and more generous protection to asylum seekers than international refugee law, even when the violation is likely to occur outside European territory.<sup>539</sup> The *Hirsi* ruling confirms this trend by imposing upon States the duty to inform refugees about their rights, ensure access to asylum procedures, and assess the safety of the third country. The elaboration of an adequate system of access to asylum procedures in

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<sup>538</sup> Battjes 2006, 398.

<sup>539</sup> See e.g. Lambert 1999.

line with international standards of refugee and human rights law becomes even more compelling in light of the trend aimed to delocalize migration controls and asylum models outside the Union far from the procedural and substantive protection standards guaranteed within the European borders.

## **Chapter 4. The Right to an Effective Remedy before Return**

### **4.1. Introduction**

This Chapter will investigate how the right to an effective remedy is governed by international refugee and human rights treaties, such as the Geneva Convention, the ICCPR, the CAT, and the ECHR, and how the relevant monitoring bodies ensure its availability and accessibility. As already explained in relation to the right to access asylum procedures, the right to an effective remedy here is understood as a procedural entitlement, a pre-condition to *non-refoulement*, that remains the cornerstone of refugee law. An effective remedy can imply the right to appeal against a decision to refuse asylum in the first instance, as well as the right to challenge an expulsion order in view of either repealing the decision to expel or suspend the return if there is a serious risk of ill-treatment for the person concerned.

Whilst Section 4.2 introduces the right to an effective remedy under international refugee law, Section 4.3 reconstructs its substance and meaning through the analysis of international human rights treaties, such as the ICCPR and the CAT. Section 4.4 elaborates further on the right to an effective remedy under the ECHR and discusses the extraterritorial applicability of Article 13 of the

Convention, which therefore applies also in the context of maritime interception of migrants and refugees. Finally, Section 4.5 briefly outlines the main EU law norms regulating the access to legal remedies for asylum seekers claiming protection in one of the EU Member States.

#### **4.2. The Right to an effective remedy under refugee law**

The Geneva Convention does not contain an express provision on the right to an effective remedy against breaches of the rights provided therein. However, pursuant to Article 16(1) ‘[a] refugee shall have *free access to the courts of law* on the territory of all Contracting States’ (emphasis added). Whilst paragraph 1 contains a general guarantee of access to courts regardless of the refugee’s presence on the territory of the State, paragraph 2 provides for specific guarantees aimed at rendering this right effective for all refugees with habitual residence: ‘[a] refugee shall enjoy in the Contracting State in which he has habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi*.’

This right – which applies to any type of legal proceedings, as confirmed by the lack of any restriction in the text<sup>540</sup> - does not seem

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<sup>540</sup>*Contra*: Cour d’Appeal de Paris, *Colafic and Others*, 29 November 1961 *JDI* 90 (1963) 723 according to which the Geneva Convention ‘merely intended that the

to have raised much debate since its entry into force. Additionally, part of the doctrine has rejected the applicability of Article 16 to the determination of refugee status under first instance procedures as the Geneva Convention generally leaves procedural issues to the States.<sup>541</sup> Nevertheless, it can impact the right of a refugee to access fair status determination procedures by providing a remedy, in principle, against an unfavourable decision, thereby preventing States from excluding refugees from their territories.<sup>542</sup> This subjective right – as testified by the wording ‘shall have’ in Article 16(1) – does not require physical presence in the country the refugee intends to access and no reference to recognized refugees is made in its text. As Elberling explains,

This interpretation relies on the wording ‘territory of all Contracting States’— obviously a refugee would not be able to be present on the territory of all contracting States at the same time. [...] The reference to territory in Article 16(1) thus can only be understood as a standard territorial clause, limiting the right to access to courts in keeping with the territorial application of the 1951 Convention to the State in question in general. Thus, where the 1951 Convention is not applicable to certain overseas territories of a State, Article 16 does not guarantee access to

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refugee should have the opportunity of bringing or defending civil proceedings’ as cited in Björn Elberling, ‘Article 16. Access to Courts’ in Zimmermann 2011, 939.

<sup>541</sup>For some examples, see Pieter Boeles, ‘Effective Legal Remedies for Asylum Seekers according to the Convention of Geneva of 1951’ (1996) 43 NILR 291, 302. See also, UNHCR, *Handbook on Procedures*, para 12 (ii).

<sup>542</sup> Thomas Spijkerboer, ‘Higher Judicial Remedies’ in Geoffrey Care and Hugo Storey (eds), *Asylum Law: First International Judicial Conference on Asylum Law* (1995) 217 ff; Boeles 1996, 302.



courts in those territories.<sup>543</sup>

As there is no requirement that the asylum seeker be physically on the territory of one of the Contracting Parties to trigger the right to have free access to court, this right can be enjoyed even if the refugee is kept in ‘international’ or ‘transit’ zones or is brought to a third country.<sup>544</sup> Article 16(1) requires States to ensure ‘free access’ to courts, thus precluding any limitation based on refugee status, as recognition is purely declaratory and not constitutive of refugee status.<sup>545</sup> As ‘free access’ is also meant to be effective, any measures, such as both excessively strict time frames and formal requirements, would defy the substance of this right.<sup>546</sup> An asylum seeker shall have time to prepare her claim, collect evidence, appeal against a negative decision, and if detained, to challenge that detention in court. ‘Free access’ does not, mean, however, free of payment, and States can ask refugees to pay court fees as any other national in the same

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<sup>543</sup>Elberling 2011, 938. On the territorial applicability of the Convention in general, see, Maria-Teresa Gil-Bazo, ‘Article 40. Territorial Application Clause’ in Zimmermann (ed), 1567 ff. Pursuant to Article 40 of the Geneva Convention: ‘1) Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned. 3) With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories [...]’

<sup>544</sup> Angus Francis, ‘Bringing Protection Home: Healing the Schism between International Obligations and National Safeguards Created by Extraterritorial Processing’ (2008) 20 IJRL 273; Elberling 2011, 945.

<sup>545</sup> In relation to Article 16, see, *R v Secretary of State for the Home Department, ex parte Jahangeer et al.* [1993] Imm AR 564 (UK).

<sup>546</sup>See on this point, Elberling 939; Boeles (1996) NILR 43, 291, 301.

circumstances.

Although the Convention does not specify how access to courts can be ensured in practical terms, it seems, however, that the right to *access* a court of law, even before admission to a status determination procedure, shall not be undermined by acts or omissions of the host State, such as the failure to provide legal aid services to refugees, as provided by Article 16(2).<sup>547</sup> This obligation belongs to Contracting Parties. The UNHCR cannot offer legal aid services, but can use its good offices to ensure that States comply with their obligations toward refugees, or assist refugees to pay their lawyers' bills.<sup>548</sup> Moreover, as Hathaway observes, 'to the extent that the State is willing, UNHCR may, of course, provide direct assistance to refugees to enforce their rights in the asylum country.'<sup>549</sup>

Article 16(2) requires habitual residence, which is less stringent than domicile and does not create any requirement of legality or acceptance. Rather it implies a factual element, which 'simply allows States to base the choice of legal system to which the standard of treatment should attach on the individual refugee's situation.'<sup>550</sup> Refugees do not need to have a permanent stay or a plan to make their

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<sup>547</sup>Hathaway 2005, 906.

<sup>548</sup>ibid 906-7.

<sup>549</sup> ibid 992.

<sup>550</sup> Elberling 2011, 941. See also, Boeles 1996, 301.

stay permanent,<sup>551</sup> but there is a need for some form of ‘willed connection’ between the refugee and the State,<sup>552</sup> which can also be based on State’s decision to grant the refugee access to the territory. As discussed in respect to Article 16, paragraph 1, recognition of refugee status is thus not required for the guarantees of paragraph 2 come into force, namely legal assistance and exclusion from payment of *cautio judicatum solvi*, which shall be available under the same conditions as those applied to nationals.<sup>553</sup> Therefore, to act in compliance with Article 16(2), States must grant access to legal aid even to people involved in the refugee status determination process. With regard to ‘refugees in orbit’, in order to make the rights protected by Article 16 effective rather than illusory in nature, the State of habitual residence should be considered that one where the refugee is present at the material time in which access to court is sought.<sup>554</sup>

It is also to be observed that the wording of Article 16(1) regards only ‘courts of law’ as opposed to administrative agencies,<sup>555</sup> which,

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<sup>551</sup> See, Robinson 1953, 107; Weis 1995, 135..

<sup>552</sup> Christine Amman, *Die Rechte des Flüchtlings: die materiellen Rechte im Lichte der travaux préparatoires zur Genfer Flüchtlingskonvention und die Asylgewährung* (Nomos-Verl.-Ges 1994) as cited in Elberling 2011.

<sup>553</sup> See, e.g., Raad van State, Afdeling Bestuursrechtspraak (Council of State, Administrative Law Division) *DG and DD v State Secretary for Justice*, 15 January 1996, NYIL 28 (1997) 334. See also, Elberling 2011, 940.

<sup>554</sup> See Boeles 1996, 302. A refugee who has habitual residence in more than one country is entitled to access courts in each of these countries and to be treated as nationals. See, Robinson 1953, 107; Weis 1995, 123.

<sup>555</sup> Distinction between courts of law and administrative authorities is drawn by the

instead, are included in Article 32(2), which provides for access to a competent authority, and regulates access to remedies for refugees subjected to an *expulsion* decision. Article 32(2) requires that the decision to expel a refugee on grounds of national security or public order be taken ‘in accordance with due process of law’ and that:

Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before a competent authority or person or persons specially designated by the competent authorities.<sup>556</sup>

Any reader would notice the margin of both overlapping and divergence between Article 33 on *non-refoulement* and Article 32 on expulsion. First, whereas Article 32 applies only to refugees who are lawfully on the territory of one of the Contracting Party, Article 33 encompasses all refugees within the jurisdiction of this State, regardless of their regular or irregular status. Second, Article 32 refers to expulsion enforced on the basis of an order to leave the country, while Article 33 pertains to a factual removal of refugees to the

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UNHCR EXCOM Conclusion no 8 (1977) which recommends that an applicant for refugee status ‘should be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending.’ UNHCR EXCOM Conclusion no 22 (1981) emphasizes that asylum seekers ‘are to be considered as persons before the law, enjoying free access to courts and other competent administrative authorities.’ See also, Grahl-Madsen Atle, ‘Article 16’ in UNHCR (ed), *Commentary on the Refugee Convention (Article 2-11, 13-37)* (UNHCR 1963, republished 1997); Weis 1995, 134.

<sup>556</sup> Article 32(2) of the Geneva Convention.

frontiers of territories where their life or freedom would be threatened on one of the five grounds of Article 1(a). Third, State authorities have to comply with both Articles 32 and 33 when expelling a refugee. In other words, they have to issue an expulsion order only for reasons of national security and public order (as required by Article 32(1)), act in accordance with the procedural guarantees of Article 32(2) on due process and also ensure that the actual removal does not result in *refoulement*, prohibited by Article 33. Finally, Article 32 does not pertain to those refugees falling under the cessation clause in Article 1(c) of the Geneva Convention, or those persons deemed unworthy of refugee status and excluded from the benefits of the Convention under Article 1(f).<sup>557</sup> However, the fact that Article 32 applies to refugees who are lawfully in the territory of one of the Contracting Parties does not have to lead States to assume that it is confined only to refugees with a permanent residence. Rather, its scope of application extends also to ‘refugees whose stay is, at the material time, perceived as temporary and precarious’,<sup>558</sup> and potentially also to asylum seekers who are scheduled to be removed to ‘safe third countries.’<sup>559</sup>

The first element of the procedural safeguards contained in Article

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<sup>557</sup> On the intertwining between Articles 32 and 33, see, Ulrike Davy, ‘Article 32: Expulsion’ in Zimmermann (ed) 1294-5.

<sup>558</sup> Davy 2011, 1324.

<sup>559</sup> *ibid*, 1324.

32(2) is ‘due process of law,’ which implies a number of constraints on the liberty of States when deciding matters relating to deportation and removal. The notion of ‘due process’ has been articulated in a number of deportation cases. It has been defined as a standard for national legislation, which must always be accessible and foreseeable and able to protect against arbitrary actions, as required by international human rights law.<sup>560</sup> Moreover, deportation ‘must be reasonable, not arbitrary and must rest upon some ground [...] having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’<sup>561</sup>

As the ‘due process’ standard varies according to the nature of the endangered individual right, the rights listed in the second sentence of paragraph 2 – right to submit evidence to clear oneself, right to appeal and to be represented before competent authority - is not meant to be exhaustive.<sup>562</sup> While collecting and submitting evidence pertains to the decision-making procedure at first instance, the other two rights apply to an appeal procedure before an administrative authority. The

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<sup>560</sup>*Lupsa v Romania* App no 10337/04 (ECtHR, 8 June 2006) para 55. This case concerns the expulsion of a Yugoslavian citizen from Romania on the ground that there was ‘sufficient and serious intelligence that he was engaged in activities capable of endangering national security’ (para 10). See also, Hathaway 2005, 673.

<sup>561</sup>*Francis v Immigration and Naturalization Service* 532 F.2d 268 (US) 272.

<sup>562</sup>For example, in the *Ahani v Canada* case, the HRC argued that when ‘the right to be free from torture is at stake the closest scrutiny should be applied to the fairness of the procedure applied to determine whether an individual is at substantial risk of torture.’ *Mansour Ahani v Canada*, Comm no 1051/2002, UN Doc CCPR/C/80/D/1051/2002 (2004) para 10.6. Mr Ahani was an Iranian citizen who obtained refugee status in Canada based on his political opinion and membership in a particular social group. On the procedural guarantees of Article 16(2), see, Davy 2011, 1316.

right to submit evidence also implies the possibility to access competent translation services, but not the right to free legal assistance, the right to a hearing in person or a right to cross-examine witnesses.<sup>563</sup>

It is worth clarifying that, according to the drafting history of the right ‘to appeal’, the expulsion decision was not meant to entitle refugees to access a judicial body in charge of examining all questions of law and of fact anew, but rather access to a less specific proper authority.<sup>564</sup> However, in light of the development of human rights law and refugee law as two interrelated disciplines, the scope of Article 32(2) cannot today be limited to a mere opportunity ‘à présenter un recours’ before a court of law,<sup>565</sup> which conducts a mere formal examination of the case. The requirement of due process of law is satisfied only if an individual is informed of the possibility of lodging an appeal and her complaint is examined by an independent and impartial body that can determine both questions of law and fact.<sup>566</sup> Moreover, the refugee has the benefit of adversarial proceedings, that is to say the possibility to present her point of view and contest the arguments put forward by the State authorities that

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<sup>563</sup>These rights apply, under human rights law, to individuals subject to criminal charges. See, Article 6(3) of the ECHR and Article 14 of the ICCPR.

<sup>564</sup> See, Ad Hoc Committee on Statelessness and related Problems, UN Doc. E/AC.32/SR.19 (1950). See also, Conference of Plenipotentiaries, UN Doc. A/CONF.2/SR.15 (1951) 13-14.

<sup>565</sup>Hathaway 2005, 672.

<sup>566</sup>*Lupsa v Romania*, para 38; *Al-Nashif v Bulgaria* (2002) 36 EHRR 37, paras 123-4.

have ordered her expulsion.<sup>567</sup> Finally, once domestic remedies have been exhausted and the expulsion order is issued – the refugee is entitled to have her deportation order delayed for a ‘reasonable period’ in order to seek admission into another country (paragraph 3).

Another aspect that cannot be neglected is that the rights of Article 32(2) can be withdrawn on ‘compelling reasons of national security.’ This introductory clause was inserted to deal with situations where disclosure of information in case concerning national security could impair State interests, as national courts would find them obliged to reveal sensitive or classified information.<sup>568</sup> As we will analyze in detail in Chapter 6, national courts, in Western States engaged in the war on terrorism, frequently rely on evidence that is under seal (closed evidence) when dealing with refugees who are to be deported on national security grounds, thus raising continuous concerns on the risk to curtail the procedural rights of foreigners pending deportation.

Next Sections will review the guarantees international human rights treaties put at the disposal of refugees to allow them to challenge an unfavourable decision on their status or an expulsion decision.

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<sup>567</sup>ibid. See also, Davy 2011, 1318.

<sup>568</sup>ibid, 1319-20.



#### **4.3. The right to an effective remedy under the ICCPR and the CAT**

The right to an effective remedy is explicitly recognized by Article 2(3) of the ICCPR whereby:

Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an *effective remedy*, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted (emphasis added).

Pursuant to Article 7 of the ICCPR, ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’ In its interpretation of Article 7, the HRC has explained that

States parties must not expose individuals to the danger of torture and cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*.<sup>569</sup>

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<sup>569</sup> HRC, General Comment no 20 HRI/HEN/1/rev.1, 28 July 1994.

The HRC has also added that the prohibition of *refoulement* entails the right to have a review or appeal of a negative decision that is available in law and practice, and imposes upon competent national authorities the duty to assess the substance of a claim and grant appropriate relief.<sup>570</sup> A remedy can be ‘effectively assured by the judiciary, administrative mechanisms, and national human rights institutions.’<sup>571</sup> However, the HRC maintains that priority shall be placed on judicial remedies, as ‘decisions made solely by political or subordinate administrative organs do not constitute an effective remedy within the meaning of paragraph 3(b).’<sup>572</sup>

In the *Alzery v Sweden* case, the HRC stressed that Article 7, read in conjunction with Article 2 of the Covenant, requires an effective review prior to expulsion in order to avoid both irremediable damages to the individual returned to the territories of a third State where she might be subjected to torture, and the risk of rendering ‘the review otiose and devoid of meaning.’<sup>573</sup>

In the *Judge v Canada* case, the Committee stated that:

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<sup>570</sup> HRC, General Comment no 31 (2004) para. 12.

<sup>571</sup> *ibid* para. 15.

<sup>572</sup> See, e.g., *RT v France* Comm no 262/87 (30 March 1989) para 74. See also, *Vicente and Others v Colombia* where the HRC stated that ‘in case of violations of basic human rights, in particular, the right to life, purely administrative and disciplinary measures cannot be considered adequate and effective.’ *Vicente and Others v Colombia* Comm 612/1995 (14 March 1996) UN Doc CCPR/C/60/D/612/1995 (29 July 1997) para 5.2.

<sup>573</sup> *Alzery v Sweden*, para 11.8.

By preventing the author from exercising an appeal available to him under domestic law, the State party failed to demonstrate that the author's contention that his deportation to a country where he faces execution would violate his right to life, was sufficiently considered. The State party makes available an appellate system designed to safeguard any petitioner's, including the author's rights and in particular the most fundamental of rights - the right to life. [...] The decision to deport the author to a State where he is under sentence of death without affording him the *opportunity to avail himself of an available appeal*, was taken arbitrarily and in violation of Article 6, together with Article 2, paragraph 3, of the Covenant (emphasis added).<sup>574</sup>

If we read the *Judge v Canada* case in light of the case law of the HRC on the right to an effective remedy, it can be argued that the right to appeal under domestic law shall be guaranteed by the sending State to any applicants whose rights risk to be violated upon deportation. The HRC requires, indeed, that 'the State party makes available an appellate system designed to safeguard any petitioner's (including the author's) *rights and in particular* - the right to life. Therefore, the language used by the HRC is not exclusive with regard to the right to life, but it is implicitly open to a broader protection, including torture or instances of persecution.

In the *XHL v The Netherlands* case, concerning a 12 year-old Chinese minor seeking asylum in the Netherlands, the HRC

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<sup>574</sup>*Judge v Canada* Comm no 829/1998 (20 October 2003) UN Doc CCPR/C/78/D/829/1998, para 10.9. Article 6 enshrines the right to life.

considered that:

The State party is under an obligation to provide the author with an effective remedy by reconsidering his claim in light of the evolution of the circumstances of the case, including the possibility of granting him a residence permit. The State party is also under an obligation to take steps to prevent similar violations occurring in the future.<sup>575</sup>

In another case regarding two asylum seekers who risked deportation to Sri Lanka, the HRC concluded that further analysis of the protection claims of the applicants should have been carried out. Indeed, the ‘removal order issued against the authors would constitute a violation of Article 7 of the Covenant if it were enforced.’<sup>576</sup>

Therefore, it stressed that:

The State party is under an obligation to provide the authors with an effective remedy, including a *full reconsideration of the authors’ claim* regarding the risk of torture, should they be returned to Sri Lanka, taking into account the State party’s obligations under the Covenant (emphasis added).<sup>577</sup>

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<sup>575</sup> *XHL v Netherlands*, para 12.

<sup>576</sup> *Pillai et al. v Canada* Comm no 1763/2008 (25 March 2011) UN Doc CCPR/C/101/D/1763/2008, para 11.4.

<sup>577</sup> *ibid* para 13.

With regard to the CAT, the right to an effective remedy can also be implicitly derived from Article 3 on the prohibition of *refoulement*. The requirements of effective, independent and impartial administrative or judicial review must always be respected even if national security concerns entail no possibility for review of the decision to expel.<sup>578</sup> In the *Agiza v Sweden* case, the Committee against Torture affirmed that:

The right to an effective remedy for a breach of the Convention underpins the entire Convention, for otherwise the protection afforded by the Convention would be rendered largely illusory. [...] In the Committee's view, in order to reinforce the protection of the norm in question and understanding the Convention consistently, *the prohibition on refoulement contained in Article 3 should be interpreted the same way to encompass a remedy for its breach*, even though it may not contain on its face such a right to remedy for a breach thereof. [...] The nature of *refoulement* is such, however, that an allegation of breach of that Article relates to a future expulsion or removal; accordingly, the right to an effective remedy contained in Article 3 requires, in this context, an opportunity for *effective, independent and impartial review of the decision to expel or remove*, once that decision is made, when there is a plausible allegation that Article 3 issues arise (emphasis added).<sup>579</sup>

A remedy that is effective in law and practice also warrants the State to ensure adequate time to appeal. For instance, in the *Iratxe*

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<sup>578</sup> *Agiza v Sweden*, para. 13.8.

<sup>579</sup> *Ibid* para 13.6.

*Sorzábal Díaz v France* case, the time between the serving of the ministerial order and the enforcement of the expulsion was so short that it made it impossible for the applicant to obtain an effective remedy. In these circumstances, also an appeal against the ministerial decision ‘would not have been effective or even possible.’<sup>580</sup>

The *Josu Arkauz Arana v France* case concerned a claim lodged by an individual who alleged that France violated his rights under Article 3(1) by deporting him to Spain. The Committee against Torture first declared the communication admissible because the applicant was not granted sufficient time to appeal against a deportation order, which was enforced immediately after the notification thereof.<sup>581</sup> In its decision, it then held that:

There had also been suspicions, expressed in particular by some non-governmental organizations, that other persons in the same circumstances as the author had been subjected to torture on being returned to Spain and during their incommunicado detention. *The deportation was effected under an administrative procedure, which the Administrative Court of Pau had later found to be illegal, entailing a direct handover from police to police, without the intervention of a judicial authority and without any possibility for the author to contact his family or his lawyer.* That meant that a detainee's rights had not been respected and had

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<sup>580</sup>*Iratxe Sorzábal Díaz v France* Comm no 194/2001 (3 May 2005) UN Doc CAT/C/34/D/194/2001 (2005) para. 6.1.

<sup>581</sup>*Josu Arkauz Arana v France* Comm no 63/1997 (5 June 2000) UN Doc CAT/C/23/D/63/1997 (2000) para. 6.1.

placed the author in a situation where he was particularly vulnerable to possible abuse (emphasis added).<sup>582</sup>

In the light of these considerations, the Court finally found a violation of Article 3 of the Convention.

#### **4.4. The right to an effective remedy under the ECHR**

Pursuant to Article 13 of the ECHR,

Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

As Article 6 (Right to a Fair Trial) is inapplicable in migration cases, Article 13 is the relevant provision for the right of appeal of asylum seekers. An ‘effective remedy’ is meant as a tool ‘available and sufficient to afford redress in respect of the breaches alleged’,<sup>583</sup> and apt to allow the competent authority ‘both to deal with the substance of the relevant Convention complaint and to grant appropriate relief.’<sup>584</sup> It must be able to quash the decision to expel

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<sup>582</sup> *ibid* para 11(4).

<sup>583</sup> *Akdivar and Others v Turkey* [1996] 23 EHRR 143, para 66.

<sup>584</sup> *Jabari v Turkey*, para 48.

and to suspend the enforcement of the deportation order.<sup>585</sup> To be effective, it is not necessary that the authority offering the remedy is a judicial authority in the strict sense, but its independence and impartiality are necessary for the remedy to be effective.<sup>586</sup> Furthermore, the ECtHR's surveillance of State compliance with the Convention must always be subsidiary to the surveillance carried out by domestic courts.<sup>587</sup> As stated in *Gebremedhin v France*,

Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an 'arguable complaint' under the Convention and to grant appropriate relief.<sup>588</sup>

The relevant moment in time for the Court's own assessment of the risk is at the material time of deportation. If the foreigner has already been deported, this assessment must be made primarily with reference to those facts that were known or ought to have been known to the

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<sup>585</sup> See e.g., *Soering v UK*, para 121; *Vilvarajah v UK*, para 123. See also, *Jabari v Turkey*, para 50; *Conka v Belgium* (2002) 32 EHRR 54, para 79.

<sup>586</sup> *Gebremedhin v France*, para 53. See also, Pieter Van Dijk, Fried Van Hoof, Arjen Van Rijn, Leo Zwaak, *Theory and Practice of the European Convention on Human Rights* (Intersentia 2006) 1006.

<sup>587</sup> Marc Verdussen, *L'Europe de la subsidiarité* (Bruxelles, Bruylant 2000) 45-50; Battjes, 2006, 321.

<sup>588</sup> *Gebremedhin v France*, para 53.



deporting State at the moment of deportation.<sup>589</sup> In considering the case, the ECtHR can also collect information on its own initiative,<sup>590</sup> including material that was unknown to the respondent State at the moment it decided to deport the foreigner.<sup>591</sup>

The ECtHR has spoken up for the need to extend the requirement of rigorous examination to legal remedies at the national level against expulsion in violation of Article 3 in order to ensure a more thorough assessment of the claim made by the applicant and the reasons of her fear to return.<sup>592</sup> It emerges, therefore, that the procedural guarantees offered by Articles 13 are functional to protection under Article 3, given that the principle of *non-refoulement* and the right to an effective remedy are tightly interdependent. The latter is not, indeed, a freestanding right, but rather an accessory right to be read in conjunction with Article 3 of the ECHR.<sup>593</sup> In *Jabari v Turkey*, the Court held that:

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<sup>589</sup> *Chahal v UK*, para 86; *Ahmed*, para 43; *HLR v France*, para 37; *D v UK*, para 50; *Bensaid v United Kingdom*, para 35; *Salah Sheekh*, para 136; *Hirsi v Italy*, para 121.

<sup>590</sup> *Cruz Varas v Sweden*, para 75; *Salah Sheekh v The Netherlands*, para 136.

<sup>591</sup> *Hilal v United Kingdom* App no 45276/99 (ECtHR, 6 March 2001) para 60; *Vilvarajah and Others v the UK*, para 107; *HLR v France*, para 37. *Chamaiev and Others v Georgia and Russia* App 36378/02 (ECtHR, 12 April 2005) paras 361, 367.

<sup>592</sup> *ibid* para 58; *Jabari v Turkey*, para 39; *Shamayev and others v Georgia and Russia* App no 36378/02 (ECtHR, 12 April 2005) para 448.

<sup>593</sup> Lambert 2005, 47; Fischer-Lescano, Lohr and Tohidipur 2009, 286. The same claim could be made also with regard to Article 33(1) of the Geneva Convention, which has been argued to contain an implicit right to an effective remedy. See e.g., UNHCR, *Provisional Comments on Article 38(3)*, 53; Gregor Noll, 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones' (2003) 5 EJML 303, 332; Alice Edwards, 'Tampering with Refugee Protection: The Case of Australia' 15 IJRL 19(2) (2003) 210; Hathaway

Given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialized and the importance which it attaches to Article 3, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned.<sup>594</sup>

Therefore, the Court found a violation of Article 13 as the judicial review proceedings relied on by the Government did not provide any of the aforementioned safeguards.

A ‘rigorous scrutiny’ implies a thorough examination of the merits and the substance of the protection claim in order to verify real risks of torture or inhuman and degrading treatment or punishment. The term ‘independent’ is used in relation to the scrutiny by a decision maker,<sup>595</sup> which becomes essential when considering the irreversible nature of the harm that might occur if the asylum seeker is physically sent back to a country where she risks ill-treatment. While attaching experience to national authorities in examining asylum claims in a thorough manner,<sup>596</sup> the ECtHR has also explicitly indicated that its role is to provide a rigorous examination of a risk of ill-treatment in

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2005, 279; Weinzierl and Lisson 2007, 50.

<sup>594</sup> *Jabari v Turkey*, para 50.

<sup>595</sup> *Chahal v UK*, para 151.

<sup>596</sup> *Cruz Varas v Sweden*, para 81; *Vilvarajah v the UK*, para 114.

breach of Article 3.<sup>597</sup> Such an evaluation implies the possibility to assess the credibility of an asylum seeker whose claims seem implausible.<sup>598</sup>

Beyond Article 3 claims, the ECtHR has recognized violations of the right to an effective remedy also in many cases where State's failure to allow an individual to challenge a refusal of entry or an order of expulsion jeopardized the applicant's right to respect for family life.<sup>599</sup> For instance, in the *Al-Nashif v Bulgaria* case, the ECtHR found a violation of Article 8 because Mr. Al-Nashif's deportation in 1999 interfered with his family life. The ECtHR also added that, in cases where the government invokes national security grounds, domestic authorities or courts should be able properly to balance the interests of the individuals with the general interest of governments.<sup>600</sup> That said,

Even where an allegation of a threat to national security is made, the guarantee of an effective remedy requires as a minimum that the competent independent appeals authority be informed of the reasons for the decision, even if such reasons were not publicly available. The authority had to be competent to reject the

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<sup>597</sup> See, e.g., *Vilvarajah v the UK*, para 108; *Chahal v the UK*, para 96; *TI v. UK*, 14.

<sup>598</sup> *Said v The Netherlands* App 2345/02 (ECtHR, 5 July 2005) para 50; *N v Finland*, para 152; *Nasimi v Sweden* App no 38865/02, 7.

<sup>599</sup> *Abdulaziz, Cabales and Balkandali v UK* Apps nos 9214/80, 9473/81, and 9474/81 (1995) Series A no 94. See also, *Al-Nashif v Bulgaria*.

<sup>600</sup> *Al-Nashif v Bulgaria*, para 137.

executive's assertion that there was a threat to national security where it found it arbitrary or unreasonable.<sup>601</sup>

This case concerns, however, an Article 8 claim. No balancing between national interests and the fundamental rights of the individual is possible in cases regarding the risk of violation of Article 3.<sup>602</sup>

In the *Conka v Belgium* case concerning the detention and deportation of a Roma family that requested political asylum in Belgium, the Court singled out certain elements, which significantly affected the accessibility of remedies. The factors considered by the Court included the lack of proper communication of the reasons for detention, the absence of an interpreter, and the lack of understandable information on the available remedies.<sup>603</sup> Although the Court declared that no violation existed of Article 13 in connection with Article 3, it found a violation of the right to an effective remedy in conjunction with Article 4 of Protocol 4 (prohibition of collective expulsions). The relevance of this judgement with respect to the rights of asylum seekers subjected to a decision of expulsion can be deduced, *inter alia*, from the following passage:

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<sup>601</sup> *ibid* para 137.

<sup>602</sup> See, e.g, the *Saadi v Italy* case and the jurisprudence thereafter. See, Section 2.4.2.

<sup>603</sup> Evelien Brouwer, Effective Remedies in Immigration and Asylum Law Procedures: a Matter of General Principles of EU Law, in Toner, Guild and Baldaccini 2007, 73.

The notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible. Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision.<sup>604</sup>

This means that national courts or authorities shall be able to suspend measures that might produce irremediable results entailing egregious infringements of Article 3. In the *Conka* judgement, the Court also significantly expanded the right to an effective remedy to include the duty to provide an appeal with suspensive effect for a minimum reasonable period. If in the *Jabari* case, the Court cautiously considered the suspension of the physical expulsion as a possibility rather than as an obligation of governments,<sup>605</sup> in *Gebremedhin v France*, the Court stressed State obligation to provide for suspensive effect ‘de plein droit’ for a remedy to be effective.<sup>606</sup>

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<sup>604</sup>*Conka v Belgium*, para 79.

<sup>605</sup> Achilles Skordas, ‘Human Rights and Effective Migration Policies: an Uneasy Coexistence. The *Conka* Judgment of the European Court of Human Rights’ in C Dias Urbano de Sousa and P de Bruycker (eds), *The Emergence of a European Asylum Policy* (Bruylant 2004).

<sup>606</sup>*Gebremedhin v France*, paras 66-7.

Mr. Gebremedhin was an Eritrean asylum seeker who arrived, on 29 June 2005, without any identity documents, at Charles de Gaulle airport in Paris. He applied for leave to enter France on grounds of asylum but his application was dismissed by the Ministry of the Interior which gave directions for his removal to ‘Eritrea, or if need be to any country where he may be legally admissible.’ Mr. Gebremedhin therefore lodged an appeal, which was dismissed on 8 July 2005 by the urgent applications judge of the Cergy-Pontoise Administrative Court. As a last resort, the claimant filed an application with the ECtHR, which indicated to the French government an interim measure under Rule 39 aimed at staying execution of the removal to Eritrea pending a decision by the Court. On 20 July 2005, the French authorities granted Mr. Gebremedhin leave to enter France and then issued him with a temporary residence permit. A few months later, OFPRA granted him refugee status.<sup>607</sup> The applicant alleged a violation of Article 13 of the Convention in conjunction with Article 3, as under French law there was no remedy with suspensive effect against decisions refusing leave to enter or ordering removal. On 26 April 2007, the ECtHR held that:

The requirements of Article 13, and of the other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical

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<sup>607</sup> *Gebremedhin v France*, paras 7-21.

arrangement. That is one of the consequences of the rule of law, one of the fundamental principles of a democratic society, which is inherent in all the Articles of the Convention. [...] In view of the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, this finding obviously applies also to cases in which a State Party decides to remove an alien to a country where there are substantial grounds for believing that he or she faces a risk of that nature: Article 13 requires that the person concerned should have access to a remedy with automatic suspensive effect. The Court therefore concludes in the instant case that, as the applicant did not have access in the ‘waiting zone’ to a remedy with automatic suspensive effect, he did not have an ‘effective remedy’ in respect of his complaint under Article 3 of the Convention. There has therefore been a violation of Article 13 of the Convention taken in conjunction with Article 3.<sup>608</sup>

From the case law of the ECtHR, it emerges how the right to an effective remedy can be invoked not only when a serious violation has taken place, but also when the asylum seeker makes an ‘arguable’ claim of such a violation. A claim is ‘arguable’ when it is ‘sufficiently credible for the Court to consider that it raised an issue of substance under Article 3. It follows that [...] the applicant is entitled in principle to rely on that provision in conjunction with Article 13.’<sup>609</sup> If an asylum seeker has an arguable claim, she has a *prima facie* case,

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<sup>608</sup> *ibid* paras 66-7.

<sup>609</sup> *ibid* para 55. See also, *Rotaru v Romania* App no 28341/95 (ECtHR, 4 May 2000) para 67; *Čonka v Belgium*, paras 75-6; *Shamayev and Others v. Georgia and Russia*, paras 444-45.

meaning that her application cannot be dismissed on formal grounds, even if the author made procedural errors.<sup>610</sup> An infringement of Article 13 can, therefore, be invoked not only when a serious violation has already taken place, but also when an individual (including an asylum seeker), makes an ‘arguable’ claim that such a violation may occur upon return to a third country. The Court also added that Article 13 of the ECHR requires an effective remedy before expulsion – even when removal takes place at the border after refusal of leave to enter – unless the claim is ‘manifestly unfounded’ with no *prima facie* risk that the expulsion would imply a breach of Article 3.<sup>611</sup>

In *Diallo v Czech Republic*, already discussed in Chapter 3, the Court held that:

None of the domestic authorities examined the merits of the applicants’ arguable claim under Article 3 of the Convention and there were no remedies with automatic suspensive effect available to the applicants regarding the authorities’ decision not

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<sup>610</sup> See, e.g., *Bahaddar v The Netherlands*, para 44; *Jabari v Turkey*, para 40. On the meaning of ‘arguability’, see, Spijkerboer 2009, 73, 74.

<sup>611</sup> As indicated by the French government in *Gebremedhin v France*, an application for asylum is ‘manifestly unfounded’ in the following cases: ‘the grounds of the application are not asylum-related (economic grounds, pure personal convenience, etc.); the application is based on deliberate fraud (the applicant makes manifestly false claims as to his nationality, makes false statements, etc.); the applicant’s statements are devoid of any substance, do not contain any personal information or provide insufficient detail; the applicant refers to a general situation of unrest or insecurity, without providing evidence relating to his personal situation; his statements are fundamentally inconsistent or improbable or contain major contradictions, depriving his account of any credibility.’ These criteria are based on the Resolution on manifestly unfounded applications for asylum, adopted in London on 30 November 1992 by the ministers responsible for immigration of the Member States of the European Communities. See, *Gebremedhin v France*, para 61.



to grant them asylum and to expel them. In view of the foregoing, the Court finds that there has been a violation of Article 13 [...] taken in conjunction with Article 3 of the Convention.<sup>612</sup>

In *Conka*, the Court explained what exactly it considered to be an ‘effective’ remedy. After asserting that a remedy ‘must be *effective* in practice as well as in law,’ it clarified that such a factor:

Does not depend on the certainty of a favourable outcome for the applicant. Nor does the ‘authority’ referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so.<sup>613</sup>

According to the Court, the effectiveness of a remedy can be assessed also in light of the obligation to exhaust domestic remedies as set forth in Article 35 of the ECHR. Indeed, Article 13 guarantees:

The availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision

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<sup>612</sup> *Diallo v the Czech Republic*, para 85.

<sup>613</sup> *Conka v Belgium*, para. 75. See also, *Kudła v Poland* (2002) 35 EHRR 11.

of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief [...].<sup>614</sup>

National authorities must also be able to afford applicants ‘a realistic possibility of using the remedy’, as stated by the Court in the *Conka* decision.<sup>615</sup> In the *Bahaddar v The Netherlands*, case, the Court reasoned that short time limits for lodging asylum claims can hamper the access to an effective remedy if they are too short or applied too inflexibly to keep the applicant from supplying evidence proving her claim.<sup>616</sup> In this case, however, the Court found that domestic remedies were not exhausted before applying to the Commission, and no reason existed absolving the applicant from complying with the four-month time limit for lodging an appeal. For this reason, it declared the case inadmissible.

In its *Jabari v Turkey* judgment, the ECtHR found a violation of Article 13 caused by the lack of assessment of the asylum claim. In criticizing the absolute requirement that an asylum application be submitted within five days after the applicant's arrival in the country, it held that:

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<sup>614</sup>*Jabari v Turkey*, para 48.

<sup>615</sup>*Conka v Belgium*, para. 46.

<sup>616</sup>*Bahaddar v The Netherlands* (1998) 26 EHRR 278.

The automatic and mechanical application of such a short time-limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Article 3 of the Convention'.<sup>617</sup>

Rejecting an asylum application (including repeat applications) on formal grounds might lead to a violation of Article 3 if deportation is enforced to the borders of territory where the life or freedom of the claimant can be put at risk. Asylum seekers, as anybody else, must comply with procedural rules. Judicial scrutiny of an arguable claim under Article 3 must always be ensured, and procedural mistakes should not automatically prevent applicants from obtaining access to an effective remedy. The Court does not disapprove, for instance, a time frame requiring that an asylum application be submitted within five days. Rather, the Court's reasoning suggests that:

The problem is not primarily in the rules themselves (procedural rules are formal by their very nature), but in their application. [...] Making the application of procedural rules in some way conditional on the merits of the case itself is the only way to reach a compromise between the procedural autonomy of States parties on the one hand, and the subsidiary role of the Court in examining applications based on Article 3 on the other.'<sup>618</sup>

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<sup>617</sup> *Jabari v Turkey*, para 40.

<sup>618</sup> Thomas Spijkerboer, 'Subsidiarity and 'Arguability': the European Court of Human Rights' Case Law on Judicial Review in Asylum Cases' (2009) 21(1) *IJRL* 48, 57-58. In *Bahaddar v The Netherlands*, the Court did not examine the case in the merits as domestic remedies had not been exhausted. However, it emphasized how procedural rules must make due allowance for the fact that they are applied 'in the

In several other cases, the ECtHR ruled that the fact that an applicant did not have the chance to appeal the decision of expulsion or extradition led to a violation of Article 13. In the *Shamayev and Others v Georgia and Russia* case, for instance, the applicants did not have access to the files submitted by the Russian authorities and were not informed of the decision to expel them. The Strasbourg Court's reasoning underlined that the fact that applicants' lawyers were not granted sufficient information in time prevented them from challenging the extradition order. It therefore found a violation of Article 13 as national authorities unjustifiably hindered the exercise of the right to appeal. In sum, the Court maintained that:

Where the authorities of a State hasten to hand over an individual to another State two days after the date on which the order was issued, they have a duty to act with all the more promptness and expedition to enable the person concerned to have his or her complaint under Articles 2 and 3 submitted to independent and rigorous scrutiny and to have enforcement of the impugned measure suspended. The Court finds it unacceptable for a person to learn that he is to be extradited only moments before being taken to the airport, when his reason for fleeing the receiving country has been his fear of treatment contrary to Article 2 or Article 3 of the Convention.<sup>619</sup>

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context of machinery for the protection of human rights.' Therefore, procedural rules 'must be applied with some degree of flexibility and without excessive formalism [...]' (para 44).

<sup>619</sup>*Shamayev and Others v Georgia and Russia*, para 460.

Similarly, in *Gorabayev v Russia*, the Court held that:

The notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible. Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision.<sup>620</sup>

The same line of reasoning was followed by the Court in the *Baysakov and Others v Ukraine* case, which confirmed how Article 13 embodies both the requirement of an independent and rigorous scrutiny of the claim that expulsion could result in ill-treatment contrary to Article 3, and the need for a remedy with automatic suspensive effect.<sup>621</sup> However, in the present case, the Court found that the national procedure of consideration of extradition requests by the prosecutor was inconsistent with the right to an effective remedy under Article 13. Indeed, the prosecutor's regulations did not provide for a

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<sup>620</sup>*Garabayev v Russia* (2009) 49 EHRR 12, para 105.

<sup>621</sup>*Baysakov and Others v Ukraine* App no 54131/08 (ECtHR, 18 February 2010) para 71. See also, *Muminov v Russia* App no 42502/06 (ECtHR, 11 December 2008) para 101.

Thorough and independent assessment of any complaints of a risk of ill-treatment in case of extradition, [and did] not provide for a time limit by which the person concerned is to be notified of an extradition decision or a possibility of suspending extradition pending a court's consideration of a complaint against such a decision.<sup>622</sup>

Therefore, a remedy will be effective in preventing removal from the country only if it has an automatic suspensive effect.<sup>623</sup> In the case *Olaechea Chuas v Spain*, the applicant's transfer was scheduled for the day after the decision of the ECtHR to issue an interim measure pursuant to Rule 39.<sup>624</sup> The Court considered as unacceptable the justification that the Spanish government had not had enough time to suspend the extradition after receiving the notification of the decision to apply interim measures, since this behaviour would risk hindering the effective exercise of the right of individual application.<sup>625</sup>

Two other judgments deserve to be mentioned with regard to the right of refugees to access asylum procedures and effective remedies against expulsion before removal: the *IM v France* and the *Singh and Others v Belgium*. The *IM v France* case concerns a Sudanese asylum seeker arrested for 'unlawful entry' and for 'using forged documents' in France. After the denial of his asylum claim, and despite his appeal

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<sup>622</sup>*Baysakov v Ukraine*, para 74.

<sup>623</sup> *ibid* para 75.

<sup>624</sup> *Olaechea Chuas v Spain* App no 24668/03 (ECtHR, 10 August 2006).

<sup>625</sup> *ibid* para 81.

to the *Cour nationale du droit d'asile* (CNDA), Mr. IM was taken by French police officers to the Consulate of Sudan to obtain travel documents for deportation. Mr. IM then filed an application with the ECtHR on the ground that his removal to Sudan would violate Article 3 and Article 13 of the Convention. The same day, the president of the 5th Section issued a Rule 39 order requesting France to suspend the deportation of the applicant pending a decision of the Court. Finally on 12 February 2012, the ECtHR found that Articles 13 and 3 of the Convention had been violated because of France's failure to provide satisfactory legal assistance from the lawyer in charge of the case, as well as adequate language interpretation by the NGO Cimade, an association usually entrusted with the assistance of foreigners in detention.<sup>626</sup> The Court added that for a detained asylum seeker, the use of accelerated procedures (5 days to claim asylum and 48 hours to appeal the deportation order), the lack of suspensive effect of the return decision,<sup>627</sup> and the difficulty to gather evidence,<sup>628</sup> severely hindered his access to domestic effective remedies.<sup>629</sup>

The *Singh and Others v Belgium* case regards an Afghan family arriving in Belgium on a flight from Moscow. As they did not have the legally required documents, they were refused entry and an

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<sup>626</sup>*IM v France*, paras 155, 145.

<sup>627</sup> *ibid* para 156.

<sup>628</sup> *ibid* para 154.

<sup>629</sup> *ibid* paras 159-60.

expulsion order was issued against them. The applicants, at the same time, applied for asylum. But since they were unable to provide evidence of their Afghan nationality at both the first instance and appellate phases, their applications were rejected and the removal decision became enforceable. On 30 May 2011 the applicants applied to the ECtHR for an interim measure, under Rule 39, to have their removal to Russia suspended. The Court found a violation of Article 13 in connection with Article 3 as the applicants were not granted the possibility to both explain their fears of indirect *refoulement* through Russia, and to defend their allegations of ill-treatment they would face in Afghanistan as members of the Sikh minority.

Neither the Office of the Commissioner General for Refugees and Stateless Persons (CGRA) nor the Aliens Disputes Board (CCE) had sought to ascertain, even incidentally, whether the applicants faced the proscribed risks in Afghanistan. Additionally, no measures were taken to authenticate the identity documents submitted by the applicants, and no weight was given to the statements from the UNHCR certifying that the applicants had been registered as refugees under the supervision of the UNHCR.<sup>630</sup> Considering the irreversible nature of the potential harm if the risk of ill-treatment materialized, the fact that Belgian authorities refused to carry out an examination of the applicants' fears led the ECtHR to hold Belgium in violation of

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<sup>630</sup>*Singh and Others v Belgium*, para 101.



Article 13 in relation to Article 3.<sup>631</sup> Depriving applicants' documents of any probative value without verifying their authenticity was inconsistent with the obligation to guarantee a rigorous scrutiny of the merits of the applicants' arguable complaints under Article 3, thereby violating their right to an effective remedy.<sup>632</sup>

#### **4.4.1. The extraterritorial applicability of the right to an effective remedy under the ECHR**

In the *Hirsi* judgment, the ECtHR found the Italian Government in breach of Article 13 in combination with Article 3 of the Convention and Article 4 of Protocol 4 (prohibition of collective expulsion). Given the particular circumstances of the case, it was clear that the applicants, intercepted on the high seas, did not have the slightest chance of lodging a claim before a national court to challenge the decision to divert them to Libya. Thus, the question before the Grand Chamber was whether foreigners, including undocumented migrants and refugees who had not managed to enter the territory of the destination country, were entitled to have access to an effective remedy against the (informal) return decision, taken by the Military Navy officials outside the procedural framework provided by domestic law.

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<sup>631</sup> *ibid* para 103.

<sup>632</sup> *ibid* para 104.

Over the years, the Court has developed the requirement of effective remedies at the national level against the potential effects of a decision of expulsion in the light of Article 3. In the *Abdolkhani and Karimnia v Turkey* decision, the Court established a violation of Article 13 as a consequence of the lack of a formal return decision, which consequently deprived applicants of their right to seek a procedural review of the expulsion order, to receive an individual examination of their claims, and to obtain legal assistance.<sup>633</sup> Similarly, in *Hirsi*, the applicants were not channelled into procedures of identification and assessment of their personal circumstances; no interpreters and legal advisors were put at the disposal of intercepted persons on board the ships; no information was provided by the Italian military personnel about their final destination; and no advice on how to challenge their diversion to Libya was supplied.<sup>634</sup>

Strengthening its previous stance in *MSS v Belgium and Greece*, the Court in *Hirsi* reiterates the importance of providing anyone subjected to a removal decision with adequate information to enable her both to gain access to asylum procedures and to substantiate her complaints under Article 3 of the Convention and Article 4 of Protocol 4.<sup>635</sup> Moreover, for the first time since *Conka*, the Court acknowledges a violation of Article 13 taken together with Article 4

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<sup>633</sup>*Abdolkhani and Karimnia v Turkey*, paras 111-4.

<sup>634</sup>*Hirsi v Italy*, paras 202-3.

<sup>635</sup>*ibid* para 204. See also *MSS v Belgium and Greece*, para 304.

of Protocol 4.<sup>636</sup> No effective remedy with a suspensive effect of the deportation order was in fact provided to prevent collective expulsions. National authorities must always afford applicants ‘a realistic possibility of using the remedy.’<sup>637</sup> A remedy that is ‘effective’ in practice and in law does not need to bring about a favourable outcome for the claimants, nor does the ‘national authority’ referred to in Article 13 necessarily have to be a judicial one.<sup>638</sup>

In *Hirsi*, the Grand Chamber did not review its previous case law on the issue. However, its decision complements and supplements established jurisprudence, which is analyzed earlier in this Chapter. If the Court recognizes that States enjoy a certain leeway with respect to the manner in which they comply with the obligations stemming from Article 13, it also upholds the principle that obstacles to the right to an effective remedy, because of accelerated procedures of expulsion or denial of effective status determination measures (including appeal), are unjustifiable. However, Chapter 3 of this thesis shows how the right to seek asylum on the high seas and the prohibition of torture and ill-treatment imply the obligation for State authorities to detect the identity or the nationality of intercepted persons, and guarantee

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<sup>636</sup>*Hirsi v Italy*, para 207.

<sup>637</sup>*Conka v Belgium*, para 46.

<sup>638</sup>*Hirsi v Italy*, para 198.

them access to the mainland to examine their protection claims.<sup>639</sup> If refugees are entitled to an in-country right to access asylum procedures, it follows that they also have a right to judicial review of an unfavourable decision with suspensive effect of the return order, and within reasonable time limits.

The violation of Article 13 in the case of interception on the high seas and diversion to the country of embarkation results from the lack of mechanisms through which intercepted migrants can seek review, before an independent national authority, of the ‘expulsion’ decision, and through which they can substantiate their claims on the risk of torture and inhuman treatments if diverted to Libya. The infringement of Article 13 in *Hirsi* is the consequence of the lack of an accessible remedy granted to boat-migrants, who were not allowed to seek review of the push-back order informally issued by the Italian authorities on the high seas. Since such a remedy belongs to any third country nationals subjected to a decision of expulsion *from* the territory of the host country, a double system of protection would be created, which differentiates between those who have crossed the borders and those who are intercepted before entering the territorial jurisdiction of a European State.

As examined above, in *Gebremedhin v France* and *Abdolkhani and Karimnia v Turkey*, the Court held that Article 13 requires access to

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<sup>639</sup> *ibid.*

appeals ‘with automatic suspensive effect’, especially considering the irreversible nature of the damage if the risk of torture or inhumane treatments materializes in the receiving country.<sup>640</sup> Appeals submitted from abroad make the system of protection overly complex, first, because the possibility for the asylum seeker to lodge her recourse from the third country is not secured, and second, because a successful appeal would render otiose the attempts of the government to remove the applicant to a third country. As Legomsky posits,

To meet its obligations under the 1951 Convention, a destination State may not return an asylum seeker to a third country until the entire determination process, including appeal, has been completed. Only then, can there be adequate assurances that the person’s convention rights, including the right to *non-refoulement*, will be observed.<sup>641</sup>

The same reasoning can also be applied to remedies under the ECHR.

In the *Al-Saadoon v UK* case, the ECtHR considered that ‘any appeal to the House of Lords was unjustifiably nullified as a result of the Government’s transfer of the applicants to the Iraqi authorities [in Iraq].’<sup>642</sup> By transferring the detainees out of the UK’s jurisdiction,

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<sup>640</sup>*Gebremedhin v France*, para 66; *Abdolkhani and Karimnia v Turkey*, para 58.

<sup>641</sup> Legomsky 2003, 672.

<sup>642</sup> *Al-Saadoon v UK*, para 166.

the applicants were exposed to a serious risk of irreparable harm, even for the lack of a binding assurance against the use of the death penalty. Therefore, in the Court's view, the UK did not take all steps that could reasonably have been taken in order to comply with the interim measure issued by the Court, thereby breaching Articles 13 and 34 of the Convention.<sup>643</sup>

In line with its previous jurisprudence, the decision in *Hirsi* corroborates the view that States can be held responsible under the Convention even for actions carried out by or on their behalf outside the space of the Convention.<sup>644</sup> Therefore, if States set in motion offshore mechanisms of either non-admission or removal after interdiction at sea, which limit the possibility of individuals to challenge State decisions, a violation of the right to an effective remedy under Article 13 of the ECHR could take place. The Court also asserted that the possibility for the applicants to apply to the Italian criminal courts upon their arrival in Libya was not feasible. Indeed, even if such a remedy was accessible in practice, criminal

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<sup>643</sup> *ibid*, paras 164-6. See also, *Pritchard v UK*. In this pending case, communicated by the ECtHR to the British government in September 2011, the applicant alleges breaches of Articles 2 and 13 because of the UK's failure to conduct a full and independent investigation into the death of his son, a British soldier killed in Iraq while the vehicle he was driving came under fire.

<sup>644</sup> Although only *Al-Saadoon v UK* addresses Article 13 in context of State actions taking place in a territory outside of Convention space, in many other cases, which did not deal with Article 13, the ECtHR found that jurisdiction under Article 1 of the Convention was engaged and fundamental rights violated even if State actions were carried out in a territory outside of Convention space. See, e.g., *Medvedyev v France*, *Al-Skeini v UK*, *Al-Jedda v UK*, *Al-Saadoon v UK*, *Markovic and Others v Italy*; *Mansur PAD and Others v Turkey*.

proceedings against military personnel who were onboard the warship would not meet the criterion of suspensive effect of the deportation order, which has a primary, and not subsidiary, nature.<sup>645</sup>

Moreover, once returned to third countries, it would be overly complex for the applicants to claim asylum, bring proceedings against an offending State, or collect sufficient evidence and adequate information to support any such legal challenge. In a poignant illustration of the difficulties of bringing proceedings from third countries, the *Hussun v Italy* case - concerning the expulsion of a group of migrants, in 2005, from the Italian territory to Libya - is illuminating.<sup>646</sup> The applicants complained, before the Court of Strasbourg, of the risk to which expulsion to Libya exposed them, the lack of an effective remedy against the deportation orders, their collective expulsion as foreigners, and also of having been deprived of their right to apply to the Court. In any event, the Court struck the case from the list because of the lack of authentic powers of attorney. What is relevant for this Chapter is that the legal representatives had lost contact with all of the applicants, so it was unable to know exactly where in Libya the group concerned had been expelled to, or what kind of reception the Libyan authorities had given them.

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<sup>645</sup> The Court refers here to *Conka v Belgium* and to *MSS v Belgium and Greece*, para 388.

<sup>646</sup> *Hussun and Others v Italy* App nos 10171/05, 10601/05, 11593/05 and 17165/05 (ECtHR, 19 January 2010).

#### **4.5. Legal remedies in EU immigration and asylum law**

The Tampere Conclusions adopted in October 1999 by the Heads of EU governments stated that common policies on asylum and immigration ‘must be based on principles which are both clear to our own citizens and also offer guarantees to those who seek protection in, or access to, the European Union.’<sup>647</sup> This means procedural guarantees shall be provided not only to those lawfully residing in the EU but also to those third country nationals seeking protection in one of the EU Member States. A number of EU instruments on immigration and asylum law, adopted on the basis of former Title IV of the TEC, tackle the issue of the effective remedy at the disposal of asylum seekers subjected to a decision of expulsion or removal.

An important instrument of immigration law - which needs to be mentioned before going into the details of specific bodies of legislation on asylum - is the Schengen Borders Code adopted by a decision of the European Council in 2006 and replacing the Schengen Common Manual on Border Controls.<sup>648</sup> Article 13(2) of the final text of the Regulation sets up that States may refuse entry to a third country national only with a substantiated decision indicating the procedures for appeal. Hence, the person refused entry shall have a

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<sup>647</sup> Presidency Conclusions, Tampere European Council, 15–16 October 1999, para 3.

<sup>648</sup> Schengen Border Code, Regulation 562/2006 of 15 March 2006 OJ L 105/1, which came into force on 13 October 2006.



right to appeal in accordance with national law. However, ‘lodging such an appeal shall not have suspensive effect on a decision to refuse entry.’<sup>649</sup>

In particular, the Schengen Border Code - which applies extraterritorially, as explained in Section 2.6 of this thesis - contains a standard refusal form that assumes relevance for third country nationals denied entry at the borders. Indeed, border guards must provide such individuals with a refusal form that, on the one hand, explicitly states that the third country national ‘may appeal against the refusal of entry as provided for in national law,’<sup>650</sup> and on the other hand, requires that Member States motivate the decision of refusal and indicate which national legal remedies individuals may rely upon.<sup>651</sup> The standard refusal form also draws an exhaustive list of all the grounds for prohibiting access to the EU territory so that people involved are able to know the reasons for refusal as well as to appeal against a refusal of entry.

Of relevance is also Article 46(1) of the Recast Procedures Directive, which embodies an explicit right to access an effective

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<sup>649</sup>ibid, Article 13(3) second indent.

<sup>650</sup>Detailed rules governing refusal of entry are now given in Part A of Annex V to the SBC.

<sup>651</sup> A standard refusal form was included in the former Common Manual on Border Control by a Council Decision of 2004, Council Dec 2004/574/EC [2004] OJ L261/36.

remedy before a court or tribunal.<sup>652</sup> It also provides that the guarantees it offers shall be claimed before the national courts of EU Member States. As indicated in Section 2.6, although the Recast Procedures Directive does not have an extraterritorial reach, it can nonetheless be applied at the border, including the territorial sea of the Member States. This right may be exercised not only against decisions to consider an application inadmissible or unfounded, but also with regard to decisions to withdraw international protection status, or against refusals to reopen an examination. The Directive contains a number of procedural guarantees for the asylum seeker, such as the right to be informed of the procedure, the right to a personal interview, and the right to an interpreter and legal aid.<sup>653</sup> It leaves, however, the issue of suspensive effect unsatisfactorily resolved as it does not strictly require States to allow applicants to remain in the territory pending the outcome of their remedy.<sup>654</sup> Under Article 46(4)(5),

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<sup>652</sup> Ex Article 39(1) of the 2005 Procedures Directive.

<sup>653</sup> For a critique of the Procedures Directive, see, Marcelle Renneman, 'Access to an Effective Remedy before a Court or Tribunal in Asylum Cases' in Elspeth Guild and Paul Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Martinus Nijhoff 2011) 402-3. For an overview of literature on the Recast Procedures Directive, see, Section 3.5 of this thesis.

<sup>654</sup> For a critique of the Recast Procedures Directive, see European Council on Refugees and Exiles (ECRE), *Comments from the European Council on Refugees and Exiles on the Amended Commission Proposal to Recast the Asylum Procedures Directive*, COM (2011) 319 final, September 2011; ILPA, *Comments on the Revised Commission Proposal of 1 June 2011 on Common Procedures for Granting and Withdrawing International Protection Status (Recast)* COM(2011) 319 final, 5 December 2011; and Steve Peers, *Revised EU Asylum Proposals, Lipstick on a Pig* (Statewatch 2011) <<http://www.statewatch.org/analyses/no-132-asylum.pdf>> accessed 2 May 2013; Cathryne Costello, 'Courting Access to Asylum in Europe:

Member States shall provide for reasonable time limits and other necessary rules for the applicant to exercise his/her right to an effective remedy pursuant to paragraph 1. The time-limits shall not render such exercise impossible or excessively difficult.<sup>655</sup>

[...] Member States shall allow applicants to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired or, when this right has been exercised within the time limit, pending the outcome of the remedy.<sup>656</sup>

Pursuant to Article 47 of the CFR, which is primary Union law,

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an

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Recent Supranational Jurisprudence Explored' (2012) 12(2) HRLR 287, 337; UNHCR, *Comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on Common Procedures for Granting and Withdrawing International Protection Status (Recast)* COM (2011) 319 final, Geneva, January 2012.

<sup>655</sup> Ex Article 39(3) of the 2005 Procedures Directive.

<sup>656</sup> As already explained for the right to *non-refoulement* and the right to access asylum procedures, this Section only aims to provide a general overview of the legal background underpinning the right to an effective remedy under EU law. A more detailed discussion on the limits of the Recast Procedures Directive with regard to the right to an effective remedy will be provided in Section 5.10.1 of this thesis. Although I have not been able to read Renneman's PhD thesis on 'EU Asylum Procedures and the Right to an Effective Remedy' – which will be published online on 15 January 2014 – that text is recommended to have an overview of the legal remedies available to refugees under the law of the EU. See, Anne Marcelle Renneman, 'EU Asylum Procedures and the Right to an Effective Remedy' (PhD Thesis, University of Leiden 2014).

independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

According to the ‘Updated Explanations’ to Article 47, the interpretation of the right to an effective remedy under the Charter departs from the interpretation of the ECtHR according to which the right to a fair trial (Article 6 of the Convention) is not applicable to asylum cases.<sup>657</sup> Indeed, as the Explanations read:

In Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Union is a community based on the rule of law. Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union.<sup>658</sup>

Therefore, Article 47 of the CFR expands the procedural guarantees applicable to asylum seekers under the ECHR. Indeed, the right to access to a court will apply to any claim concerning a Union

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<sup>657</sup> *Maaouia v France* App 39652/98 (ECtHR 10 October 2000).

<sup>658</sup> See, case C-294/83 *Les Verts v European Parliament* [1986].

right,<sup>659</sup> including administrative proceedings, such as asylum procedures.<sup>660</sup>

The ‘Explanations’ to Article 47 confirm that the right to an effective remedy shall be interpreted in accordance with the criteria developed by the jurisprudence of the ECtHR with regard to Article 13. The need to comply with the ECHR has also been stated by the CJEU and the EU amended treaties according to which the Union is based on the rule of law and the respect of human rights as moulded in the ECHR.<sup>661</sup> Additionally, the criteria developed by the ECtHR on the basis of Article 13 and incorporated in Article 47 of the CFR, can be equally invoked in national procedures in which domestic authorities apply EU law.

To sum up, the recognition of the right to an effective remedy entails the right of every person to be defended, represented, and advised. For these reasons, it assumes notable relevance in the case of refugees whose applications have been refused, subjected to an

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<sup>659</sup> See e.g., *Bentham v The Netherlands* (1985) Series A no 97 para 32.

<sup>660</sup> On Article 6 of the ECHR as part of Article 47 CFR, see, Opinion A-G Alber, 24 October 2002, C-63/01 (*Samuel Sidney Evans v The Secretary of State for the Environment, Transport and the Regions and The Motor Insurers’ Bureau*) para 85.

<sup>661</sup> The Court of First Instance (CFI) referred to the right to an effective remedy as a general principle of Community law, based on the constitutional traditions common to the Member States, on Articles 6 and 13 of the ECHR, and on Article 47 of the CFR. See, the CFI in Case T-177/01 *Jégo-Quéré v Commission* (2002) ECR II-236, paras 41–42. According to the ECJ, in order to ensure effective judicial protection, the appeal body must be a court or tribunal as defined by Community law. The appellate body shall satisfy the following criteria: being established by law, being permanent, independent, and impartial, exercising a compulsory jurisdiction, and holding an *inter partes* procedure. See, Case C-506/04, *Graham Wilson* [2006] paras 47-8.

exclusion order, or who have received a return decision at the border (or beyond the border) without the possibility of seeking international protection.

#### **4.6. Conclusion**

The right to an effective remedy is guaranteed by international treaties relevant to asylum cases, such as the ICCPR, the CAT, and the ECHR. However, with the development of the Common European Asylum System, asylum procedures are also partly governed by Union law, including Article 47 of the CFR of the EU. Of particular relevance are the 2005 Procedures Directive and the Recast Procedures Directive, which enshrine an explicit right to an effective remedy before a court or tribunal and provide that the guarantees they offer shall be claimed before the national courts of EU Member States.

With regard to human rights law, Article 2(3) of the ICCPR explicitly recognizes the right to an effective remedy. From the wording of the HRC, it emerges that States shall always allow an individual to challenge an expulsion order, in particular if appeal proceedings are available under domestic law. Moreover, according to the Committee, States parties shall establish judicial and administrative mechanisms for addressing alleged breaches of rights and guarantee full reconsideration of a protection claim. The lack of

such remedies would imply a violation of the prohibition of torture (Article 7) because the applicants could be directly or indirectly removed to their country of origin, where they risk being subjected to ill-treatment.<sup>662</sup>

Whilst the CAT does not contain a specific provision on the right to an effective remedy, it can be implicitly derived from Article 3 on the prohibition of *refoulement*. The Committee against Torture has indeed made clear that the right to an effective remedy underpins the entire Convention. Therefore, the requirements of effective, independent, and impartial administrative or judicial review must always be respected before expulsion or removal, when there is a plausible allegation that Article 3 issues arise.

The right to an effective remedy enshrined in Article 13 of the ECHR requires independent and rigorous scrutiny of the applicant's claim that a real risk exists of ill-treatment exists contrary to Article 3 in the readmitting country. This right has also been interpreted as requiring a right to challenge a decision of expulsion before an independent and impartial authority. Such an appeal must have automatic suspensive effect of the enforcement of the deportation, in order to prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible.<sup>663</sup> The

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<sup>662</sup> *Alzery v Sweden*, para 11.8.

<sup>663</sup> See, e.g., *Gebremedhin v France*, para 66-7; *Garabayev v Russia*; *Baysakov and Others v Ukraine*, para 71; *Muminov v Russia*, para 101.

ECtHR has emphasized how the right to have a review of an unfavourable decision on refugee status or an expulsion order should not be hindered by national procedural rules, such as short notice or short time limits for lodging an appeal. The recognition of an effective remedy as a human right implies the right of every person to be defended, represented, and advised. It follows that time limits for bringing proceedings shall not be too short, so that the asylum seeker may have sufficient time to appeal an expulsion measure before the order is enforced.

The lonely Opinion of Judge de Albuquerque in the extraterritorial context of the *Hirsi* case would tell States that the enforcement of *non-refoulement* has two procedural consequences: the duty of the State to advise the individual in question about her entitlement to obtain international protection, and the duty to provide access to individualized and fair asylum procedures and effective remedies. *Non-refoulement* and access to fair and effective procedures are ‘so intertwined that one could say they are two sides of the same coin.’<sup>664</sup> As explained in Chapter 2, for these procedural guarantees being effective, they need to be ensured onshore in respect of every asylum seeker, regardless of whether she is able to claim protection within the borders of the destination State, at a State border, on the high seas

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<sup>664</sup>*Hirsi v Italy*, Concurring Opinion 44.



after being rescued, or intercepted by the authorities of an EU Member State.<sup>665</sup>

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<sup>665</sup> See on this point also, *Hirsi v Italy*, Concurring Opinion 45; Parliamentary Assembly of the Council of Europe, ‘Resolution 1821 (2011) on the Interception and Rescue at Sea of Asylum Seekers, Refugees, and Irregular Migrants’, paras 9.3–9.6.

## **Part II**

### **Agreements Linked to Readmission and Refugee**

#### **Rights: A Story in Three Parts**

Part II is the core of this thesis. It intends to review, in three different Chapters, the main categories of *agreements linked to readmission* that have been identified as instruments of bilateral cooperation between EU Member States and third countries: standard readmission agreements, diplomatic assurances – especially those inscribed within MoUs - and agreements for technical and police cooperation to preventively intercept undocumented migrants at sea.

Readmission agreements and agreements for technical and police cooperation can be questionably used to remove asylum seekers before their asylum procedures are initiated. Instead, diplomatic assurances aim to create a legally sustainable way for the deportation of both individuals who have been excluded from refugee status under Article 1(f) of the Geneva Convention and refugees who can be removed on national security grounds under Article 33(2) of the same Convention. A further item of divergence needs to be pointed out. Whereas standard readmission agreements and diplomatic assurances are designed to smooth the return process from the territory of an EU Member State to a third country - thereby when the concerned

individuals are clearly under the territorial jurisdiction of the sending State - agreements for technical and police cooperation lie at the margins of jurisdiction. They apply, indeed, to migrants and refugees intercepted and pushed-back before entering the territorial jurisdiction of an EU Member State. The existence of different *loci* in which all these bilateral arrangements encounter the refugee explains the sequence of Chapters 5, 6, and 7 in Part II of this thesis.

As explained in Chapter 1, this work intends to contribute to the current academic debate by adding legal coherence to a subject that has often been fraught with a certain level of confusion and partiality from both a terminological and substantive point of view. Hence, it aims to convey conceptual coherence of the subject of readmission by systematizing the three different classes of bilateral arrangements in light of their underlying purpose. Agreements linked to readmission are thus attentively perused to assess whether their implementation can hamper refugee access to protection, which is understood here as the combination of the foundational principle of *non-refoulement* and two procedural entitlements: the right to access asylum procedures and the right to an effective remedy before return. This serves to join Parts I and II of this thesis.

## **Chapter 5. Readmission Agreements and Refugee Rights**

### **5.1. Introduction**

In the framework of the bilateral cooperation on migration control between EU Member States and third countries, readmission agreements stand as key tools in the removal of unauthorized migrants and asylum seekers supposed to undergo asylum procedures elsewhere. Therefore, this Chapter examines the intersection between migration control and core refugee rights by investigating whether the implementation of standard readmission agreements may hamper access to protection for asylum seekers subject to a return procedure.

A preliminary question, which permeates the ensuing analysis is whether general international law generates upon States an obligation to readmit their own and foreign nationals, and, if so, how this obligation relates to readmission agreements (Section 5.2). After an overview of readmission agreements (Section 5.3), Section 5.4 attempts to reach an as precise and complete understanding as possible of the technical content of these treaties in order both to increase knowledge about the substance of these instruments and assess their relationship with the decision to return irregular migrants and asylum seekers to countries of origin or transit. The accords

concluded by Albania with Italy and the UK, respectively, are taken as units of analysis. They are, indeed, among the most sophisticated and detailed pieces of legislation within the well-assorted category of standard readmission agreements.

Since competence in the ‘Area of Freedom, Security and Justice’ remains shared and the EU and Member States continue to pursue their readmission procedures in a parallel manner, this study focuses on the bilateral arrangements of individual *Member States* with third countries, which constitute the bulk of the instruments in this field. Whilst Section 5.5 describes the relationship between the readmission policies of the EU and individual Member States, Section 5.6 draws an overview of the EU Return Directive<sup>666</sup> and the Asylum Recast Procedures Directive,<sup>667</sup> which regulate, respectively, the transfer of unauthorized migrants and asylum seekers to ‘safe third countries.’

As readmission agreements do not generally include separate provisions on refugees, a real risk exists of removing asylum seekers, as unauthorized migrants, to allegedly ‘safe third countries.’ This work will accordingly examine whether the mild reference to human rights in the body of the agreements is enough to guarantee the

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<sup>666</sup> Council Directive 2008/115/EC, [2008] on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive).

<sup>667</sup> Directive 8260/2/13 of 7 June 2013 on common procedures for granting and withdrawing international protection status (Recast) (Recast Procedures Directive). Reference is also made to the previous Council Directive 2005/85/EC [2005] on minimum standards on procedures in Member States for granting and withdrawing refugee status (Procedures Directive).

observance of the applicable safeguards. In this regard, the insertion of non-affectation provisions is described as an instructive technique to resolve normative conflicts in practice (Section 5.7).

In the first comprehensive manuscript on EU readmission agreements, Coleman concludes that a formal application of these treaties follows a decision of national law, in compliance with EU law, on the return of a protection-seeker either on ‘safe third country’ grounds or after the denial of/exclusion from, refugee status.<sup>668</sup> Thus, readmission agreements do not provide the legal basis for returning asylum seekers,<sup>669</sup> and are not ‘safe third country’ agreements.<sup>670</sup> Rather, they are administrative arrangements designed only to facilitate the execution of an expulsion decision, which must always be taken in consonance with international and European refugee obligations.<sup>671</sup>

This Chapter agrees with Coleman’s conclusion that no issue of incompatibility with refugee and human rights law seems to stem

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<sup>668</sup> Nils Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights* (Martinus Nijhoff 2009) 314.

<sup>669</sup>This Chapter refers to the term ‘legal basis’ as used by Coleman to explain the relationship between readmission agreements and the return decision. See, Coleman 2009,305, 315.

<sup>670</sup> An example of a bilateral ‘safe third country’ agreement is the *Agreement between the Government of Canada and the Government of the United States of America for cooperation in the examination of refugee status claims from nationals of third countries*, 5 December 2002 <<http://www.cic.gc.ca/english/department/laws-policy/safe-third.asp>> accessed 2 May 2013.

<sup>671</sup> *ibid.*

from the *text* of readmission agreements<sup>672</sup>—purely administrative tools used to articulate the procedures for a smooth return of irregular migrants and rejected refugees. Nevertheless, this work adds another piece to the readmission puzzle. Instances of informal practices of border return, including situations of emergency and mass arrivals, are brought into the analysis in order to observe whether the existence of a readmission agreement, in spite of saving clauses inscribed therein, may boost the employment of cursory identification and return procedures in dissonance with human rights and refugee law (Section 5.8).

Section 5.9 explores the reasons that might drive two States concluding a readmission agreement to tie their hands with more stringent procedural human rights clauses requiring monitoring and compliance with refugee law standards. These interrogatives hint at the political costs of a drafting process aimed to supplement the content of readmission agreements with procedural human rights clauses. Finally, after examining why the incorporation of procedural human rights clauses adding extra safeguards for removable refugees is to be hailed as an added value, Section 5.10 outlines some ways

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<sup>672</sup> Coleman's research regards, however, EU readmission agreements. See, Coleman 2009.

forward for draft provisions within reformed readmission agreements.<sup>673</sup>

## **5.2 Obligation under international law to readmit persons**

### ***5.2.1. Readmitting own nationals***

A comprehensive analysis of readmission agreements implicates the primary duty to investigate on which basis the obligation to readmit a person is grounded. This Section addresses, therefore, the following question: does general international law create upon States an obligation to readmit their own and foreign nationals? If so, how does this obligation relate to readmission agreements? Four distinct categories of people must be identified when dealing with readmission obligations under international law: own nationals, third country nationals, former nationals, and stateless persons. However, for the purpose of this thesis, attention will be paid to the first two groups and, in particular, third country nationals. Despite asylum seekers cannot avail themselves of the protection of their home country,

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<sup>673</sup> Part of the analysis of this Chapter has already been published in Mariagiulia Giuffr , ‘Readmission Agreements and Refugee Rights: from a Critique to a Proposal’ (2013) 32(3) RSQ 79.



readmission agreements are nevertheless used to return the concerned persons to a ‘safe third country’ of transit.<sup>674</sup>

According to part of the doctrine, the obligation to readmit own nationals is traditionally derived from the right of every State to expel foreigners and the right of everyone to return to one’s country.<sup>675</sup> The right to return has been enshrined in several international instruments. For instance, pursuant to Article 13(2) of the UDHR, ‘Everyone has the right to leave any country, including his own, and to return to his country.’<sup>676</sup> Article 12(4) of the ICCPR provides that ‘No one shall be arbitrarily deprived of the right to enter his own country’ while Article 5(d)(ii) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) recognizes ‘The right of everyone [...] to equality before the law [...] in the enjoyment of the right to leave any country, including one’s own, and to return to one’s own country.’<sup>677</sup> Finally, pursuant to Article 3(2) of Protocol 4 of the ECHR, ‘No one shall be deprived of the right to enter the territory of the State of which he is a national.’

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<sup>674</sup>The grounds under which an asylum seeker is transferred to a ‘safe third country’ are illustrated in Sections 2.7 and 3.6 of Chapters 2 and 3, respectively.

<sup>675</sup>See, Kay Hailbronner, ‘Comments on the Right to Leave, Return and Remain’ in V Gowlland-Debbas (ed) *The Problem of Refugees in the Light of Contemporary International Law Issues* (Martinus Nijhoff Publishers 1996); Kay Hailbronner, ‘Readmission Agreements and the Obligation of States under Public International Law to Readmit their Own and Foreign Nationals’ (1997) 57 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 2-5; Coleman 2009, 28.

<sup>676</sup> UDHR, adopted 10 December 1948, UNGA Res. 217A(III).

<sup>677</sup> ICERD, adopted 4 January 1969, entered into force 7 March 1966, 660 UNTS 195.

In this view, State obligation to readmit nationals who are not allowed to remain in the territory of the host country is held toward individuals as beneficiary of the right to return by virtue of the principle of nationality.<sup>678</sup> According to Weis:

Nationality in the sense of international law is a technical term denoting the allocation of individuals, termed nationals, to a specific State - the State of nationality - as members of that State, a relationship which confers upon the State of nationality [...] rights and duties in relation to other States.<sup>679</sup>

However, the theory whereby the obligation to readmit depends on the individual right to return erroneously conflates the relationship between individuals and the State with the obligation owed by a State to another State. Hence, another line of doctrinal thought sustains that international obligations to readmit one's own nationals on one hand, and foreign nationals on the other, have to be distinguished from the right of an individual to return.<sup>680</sup> In this view, the duty to readmit would rest on the sovereign right of States to regulate access to and expulsion from their territory. Therefore, the refusal of a country to readmit its own nationals expelled from the territory of another State would entail a breach of the territorial sovereignty of the host State

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<sup>678</sup> See Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law* (Longman 1992) 857; Coleman, *EU Readmission Policy*, 29.

<sup>679</sup> Paul Weis, *Nationality and Statelessness in International Law* (Kluwer 1979) 59.

<sup>680</sup> Hailbronner 1997, 45.

and jeopardize the right of this State to expel foreigners.<sup>681</sup> The obligation of a State to reaccept its nationals also lays in the principle of responsibility of a State for the welfare of its nationals who have been expelled from the territory of the host country.<sup>682</sup>

A contrasting position is held - at the EU level - by the Legal Service of the Council of Ministers, which contests the existence of an international legal obligation to readmit involuntary returnees. In this view,

It is doubtful whether, in the absence of a specific agreement [to readmit] between the concerned States, a general principle of international law exists, whereby these States would be obliged to readmit their own nationals when the latter do not wish to return to their State of origin.<sup>683</sup>

Moreover, the right to leave - enshrined in several international instruments, such as Article 13(2) of the UDHR, Article 12(1) of the ICCPR, Article 5(d)(ii) of the ICERD, and Article 2(2) of Protocol No. 4 of the ECHR - would be frustrated *prima facie* by the application of an international norm obliging States to readmit

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<sup>681</sup> *ibid* 8, 11-12.

<sup>682</sup> *ibid* 7.

<sup>683</sup> Council Legal Service Opinion, Council Doc 6658/99, cited in Statewatch, *Lome Convention Used to Impose Repatriation on the World's Poorest Countries*, Statewatch Bulletin, 7 June 2000, para 6 <<http://www.statewatch.org/news/jul00/01lome.htm>> accessed 3 May 2013.

involuntary returnees.<sup>684</sup> Without pushing this argument further, it is, however, worth noting that the existence of norms regulating State sovereignty as well as access, residence, and expulsion of aliens seems to support the view that ‘interstate obligations to readmit nationals exist also independently of an individual’s willingness to return.’<sup>685</sup> In the *Duyn* case, the ECJ affirmed that ‘a principle of international law’ prevents States from refusing the right of entry or residence to its own nationals.<sup>686</sup>

The obligation of a State to readmit its own nationals is deemed as a firmly established norm of customary law because of the coexistence of *opinio juris* and consistent State practice.<sup>687</sup> While only in few exceptional circumstances States have refused to readmit their citizens,<sup>688</sup> home States are usually obliged to expeditiously cooperate in the readmission of their own nationals by issuing, for

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<sup>684</sup> Gregor Noll, ‘The Non-Admission and Return of Protection Seekers in Germany’ (1997) 9(3) IJRL, n 7.

<sup>685</sup> Coleman 2009, 32.

<sup>686</sup> Case 41-74 *Van Duyn v Home Office* [1974] ECR 1337, para 22.

<sup>687</sup> See, Hailbronner 1997; Coleman 2009, 32-33. Goodwin-Gill, less specifically, refers to the obligation to readmit nationals as ‘firmly fixed within the *corpus* of general international law.’ See, Goodwin-Gill, *International Law and the Movement of Persons between States* (Oxford University Press 1978) 137. Weis describes the obligation to readmit as ‘universally recognized’ and ‘generally accepted.’ Weis 1979, 47-48; David Martin, ‘The Authority and Responsibility of States’ in Alexander Aleinikoff and Vincent Chetail (eds), *Migration and International Legal Norms* (TMC Asser Press 2003) 31-45; Marion Panizzon, ‘Readmission Agreements of EU Member States: a Case for EU Subsidiarity or Dualism?’ (2012) 31(4) RSQ 107.

<sup>688</sup> Hailbronner, for instance, reports the case of the 1928 Turkish legislation that considered the readmission of an expellee to her country of origin a punishable offence. See, Hailbronner 1997, 7 n 18.

instance, any necessary papers within reasonable time.<sup>689</sup> As Coleman explains, although different factors can challenge the customary status of this norm - such as ‘practical and procedural obstacles to readmission imposed by requested States, the proliferation of readmission agreements reiterating the obligation to readmit own nationals, and the fact that readmission agreements are concluded on the basis of *quid pro quo*<sup>690</sup> - the customary value of this norm may be presumed to persist. At the same time, it is to be asked to what extent the proliferation of treaty law in the field of return of irregular migrants influences the customary status of the obligation to readmit. Does the fact that States tend to conclude the highest number of readmission agreements, deemed indispensable for executing expulsion, indicate that readmission is governed by these bilateral treaties rather than by a customary norm?

Treaties play an important role in determining the existence of customary international law because they help shed light on how States view certain rules of international law. In the *North Continental Shelf* case, the ICJ confirmed that treaties may codify pre-existing customary international law, but may also lay the foundation for the development of new customs based on the norms contained in those

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<sup>689</sup> Hailbronner 1997, 45.

<sup>690</sup> Coleman 2009, 33.

treaties.<sup>691</sup> Among the various ways in which treaties may interplay with customary law, the Court affirmed that treaty negotiating process may crystallize an emerging customary rule.

In this regard, readmission agreements can be seen as confirming and putting into concrete terms the existence of the general international law obligation to readmit.<sup>692</sup> Indeed, codification of a norm in treaty law does not put into question its customary status. A rule can continue to exist under both customary and treaty law as long as the two criteria of consistent State practice and *opinio juris* are fulfilled. At the same time, the presence of several bilateral agreements on the same subject might be considered evidence of a customary norm.<sup>693</sup>

It is thus imperative to assess whether the modalities in which readmission agreements are concluded prevent the existence of a customary norm because of the lack of an *opinio juris*. This risk can be run when States condition the conclusion of agreements concerning the readmission of own nationals to the granting of benefits. In reality, with Italy as the only exception - which tends to tie the conclusion of a readmission agreement with labour accords establishing yearly or

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<sup>691</sup>*North Sea Continental Shelf* Case, ICJ Reports (1969). See also, Ian Brownlie, *Principles of Public International Law* (4<sup>th</sup> edn, Oxford Clarendon Press 1990) 13.

<sup>692</sup>Hailbronner 1997, 8, 14; Martin Schieffer, 'The Readmission of Third Country Nationals within Bilateral and Multilateral Frameworks' in Boer M den (ed) *The Implementation of Schengen, First the Widening, Now the Deepening* (European Institute of Public Administration 1997) 100; Coleman 2009, 36.

<sup>693</sup> Hugh Thirlway, 'The Law and Procedure of the International Court of Justice' (1990) 87 *British Yearbook of International Law* 86.

seasonal immigration quotas - EU Member States do not generally offer compensatory incentives to persuade third countries to sign an arrangement, if it regards own nationals.<sup>694</sup> Readmission of a State's own nationals constitutes, indeed, a customary norm the existence of which would be endangered if States agreed to negotiate it.<sup>695</sup>

Readmission agreements are generally drafted with reciprocal language where contracting parties accept mutual and identical obligations. Nonetheless, a majority of treaties of last generation involve States with different economic backgrounds where requested States do not share the same interest in the return of migrants as compared to requesting States. In these circumstances and in the absence of explicit means of compensation, the interest countries of origin may have in collaborating in the readmission of own nationals resides in the possibility to improve their political and economic relations with the country of destination.<sup>696</sup>

The fact that the conclusion of a readmission agreement implies a *quid pro quo* does not undermine *ipso facto* the customary status of the obligation to readmit. Two States can decide, indeed, to negotiate an agreement to set up clear and explicit procedures facilitating the

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<sup>694</sup>Commission (EC), 'Study on the Links between Legal and Illegal Migration' (Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions) COM(2004) 412 final 14, 4 June 2004.

<sup>695</sup> Hailbronner 1997, 48-49.

<sup>696</sup>See, Nordic Joint Advisory Group 1999, Council doc 7707/99, 18. See also, Coleman, *European Readmission Policy* 39.

actual transfer of unauthorized migrants.<sup>697</sup> Therefore, any incentive requested States receive from requesting States in exchange of the conclusion of a readmission agreement may be read as a sort of compensation for the limitation of their sovereignty due to the fact that the agreement lays down a set of precise procedures, time limits, and administrative constraints establishing how readmission is to be implemented.<sup>698</sup> Therefore, the granting of either explicit or implicit reciprocal benefits does not *per se* preclude States from having an *opinio juris* regarding their obligation to readmit own nationals.

### ***5.2.2. Readmitting third country nationals***

If compelling arguments buttress the view that readmitting own nationals is a customary norm, it cannot be likewise safely argued that there exists a norm of customary law requiring States to readmit foreign persons. Hailbronner has attempted to derive such a norm from the principle of neighbourliness, which would lead States to control unauthorized migratory flows to impede their transit across the territories of neighbour countries.<sup>699</sup> Readmission, in this perspective, would be a sort of reparation for failing to prevent irregular migrants

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<sup>697</sup> Coleman 2009, 40.

<sup>698</sup> *ibid.*

<sup>699</sup> Pursuant to Article 74 of the UN Charter, Members of the United Nations [...] agree that their policy in respect of the territories to which this Chapter applies, no less that in respect of their metropolitan areas, must be based on the general principle of good-neighbourliness, due account be taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters.



from crossing the border. Accordingly, readmission agreements would codify the penalization of third States through which migrants have transited before reaching the destination country. Although the lack of both a well-established State practice and *opinio juris* testify to the absence of an obligation of general international law to readmit third country nationals, Hailbronner believes a customary norm in *status nascendi* would be inferred from the proliferation of readmission agreements concerning the return of both nationals and third country nationals.

However, several objections have been made to the application of the principle of neighbourliness to the control of migratory flows. In this regard, Lammers argues that:

Neighbourship law in principle involves an obligation for a State to abstain from conduct—or to take such positive action as is necessary to convince private persons or entities in its territory to *abstain* from conduct [...]. It purports to enable neighbouring States to *coexist* by setting certain limits to the exercise and enjoyment of their territorial sovereignty and it does not in principle compel them to undertake positive action for the benefit of other States or to *improve* their mutual condition through cooperation.

The present description of the concept of neighbourliness, based on ‘harmonious reciprocal relations between States, consisting of corresponding obligations and rights’, proves how this notion cannot

be used to create upon States a positive obligation to control borders since this would be an unbalanced allocation of responsibility.<sup>700</sup> Furthermore, the legal concept of neighbourliness is likely to be open to political and subjective interpretations. While, on the one hand, requesting States might interpret it as imposing upon transit countries the duty to readmit third country nationals, on the other hand, transit countries could be damaged by the new migratory burden, which causes a shrinking of national sovereignty.<sup>701</sup>

Therefore, the view that no customary rule requiring readmission of foreign persons exists is more convincing, as demonstrated by the fact that States usually agree to collaborate to fight irregular immigration - by readmitting third country nationals - under the incentive of good political and economic relations, visa facilitations, financial and technical aid, and development assistance.<sup>702</sup> States' obligation to readmit does not apply, under general international law, to citizens of third countries or stateless persons who have transited

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<sup>700</sup> Coleman 2009, 45.

<sup>701</sup> *ibid.*

<sup>702</sup> See e.g., 'Readmission and Forcibly Return in the Relations between Italy and North African Mediterranean Countries', *Paper Presented at the Ninth Mediterranean Research Meeting* (Florence and Montecatini Terme, 12-15 March, 2008), organized by the Mediterranean Program of the Robert Schumann Centre for Advanced Studies at the European University Institute 7, 9-10; Florian Trauner and Imke Kruse, 'EC Visa Facilitation and Readmission Agreements: Implementing a New EU Security Approach in the Neighbourhood' (23 April 2008), *CEPS Working Document* [t<http://www.ceps.eu/book/ec-visa-facilitation-and-readmission-agreements-implementing-new-eu-security-approach-neighbour>](http://www.ceps.eu/book/ec-visa-facilitation-and-readmission-agreements-implementing-new-eu-security-approach-neighbour) accessed 2 May 2013; Coleman 2009, 62.

through the requested State or have been granted a stay permit.<sup>703</sup> In particular, governments can refuse to accept readmission of undocumented persons whose nationality can be difficult to establish. In these circumstances, readmission agreements can turn out to be very helpful, since they generally formalize the obligation of States to readmit both their own nationals and third country nationals who are irregularly present in the territory of the other contracting party.<sup>704</sup> The decisive factor is the issue of transit, as well as the granting of a visa or other title of residence by the requested State.<sup>705</sup> All in all, while readmission of own nationals finds a legal basis in general international law, readmission of third country nationals can be grounded only in treaty law.

A further issue points to the lack in the text of readmission agreements of specific obligations concerning refugees and stateless persons, being these categories of people summarily subsumed under the same terms as ‘third country nationals.’ However, under the 1951 Geneva Convention and the 1960 Convention relating to the Status of

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<sup>703</sup> See, *inter alia*, Hailbronner 1997; Ferruccio Pastore, ‘L’Obbligo di Riammissione in Diritto Internazionale’ (1998) 4 *Rivista di Diritto Internazionale* 976; Imke Kruse, ‘EU Readmission Policy and its Effects on Transit Countries: the Case of Albania’ (2006) 8 *European Journal of Migration and Law* 2, 7. In accordance with Article 1 of the Convention Relating to the Status of Stateless Persons, ‘the term “stateless person” means a person who is not considered as a national by any State under the operation of its law.’

<sup>704</sup> Daphne Bouteillet Paquet, ‘Passing the Buck: A Critical Analysis of the Readmission Policy Implemented by the European Union and its Member States’ (2003) 5 *EJML* 361-362.

<sup>705</sup> Hailbronner 1997, 27.

Stateless Persons,<sup>706</sup> a State must readmit recognized refugees and stateless persons to whom it has issued a travel document in keeping with Article 28 of these Conventions. Indeed, a State must readmit refugees and stateless persons if they have received by the country in question travel documents ‘for the purpose of travelling outside their territory, unless compelling reasons of national security or public order otherwise require [...]’.<sup>707</sup>

### **5.3. Readmission agreements: an overview**

In the framework of the three-pronged categorization of bilateral agreements linked to readmission, this Chapter concentrates on *standard readmission agreements*, which are defined as:

Agreements between the EU and/or a Member State with a third country, on the basis of reciprocity, establishing rapid and effective procedures for the identification and safe and orderly return of persons who do not, or no longer, fulfil the conditions for entry to, presence in, or residence on the territories of the third country or one of the Member States of the European Union, and to facilitate the transit of such persons in a spirit of cooperation.<sup>708</sup>

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<sup>706</sup>Convention relating to the Status of Stateless Persons, 360 UNTS 117, entered into force 6 June 1960.

<sup>707</sup> Article 28 of the 1951 Geneva Convention and the 1960 Convention relating to the Status of Stateless Persons. See, Coleman 2009, 48-49.

<sup>708</sup>European Migration Network, *Glossary*, <<http://emn.intrasoft-intl.com/Glossary/viewTerm.do?startingWith=R&id=223>> accessed 2 May 2013.

Therefore, without impinging on the rights of those who are legitimately entitled to stay, readmission agreements aim to create a legal framework for forced returns. By providing for readmission without formalities, these bilateral arrangements allow border authorities to handle transfers of third country nationals without the involvement of diplomatic channels.<sup>709</sup>

This thesis does not aim to describe the readmission legislation and return policies of the selected countries through a comparative enquiry of the national measures of removal. Rather, it purports to investigate, from an international law perspective, whether the implementation of bilateral readmission agreements - although designed to contrast unauthorized migration - might also hamper refugees' access to protection.

Today, readmission is a network composed of different institutional instruments, ranging from development aid to visa facilitation, from technical cooperation for the externalization of migration controls to labour exchanges. However, this Chapter concentrates on standard readmission agreements seen as a fundamental component of the numerous and various national policies of expulsion, removal, and repatriation of people who have an irregular status in the destination country, or who have sought to

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<sup>709</sup> Hailbronner 1997, 9.

irregularly enter the territory of a State. The effectiveness of the whole system of expulsion/removal rests upon efficient modalities of execution of return decisions. Since readmission of irregular migrants depends on a profitable cooperation between destination States and countries of origin or transit of migrants, it is imperative to shed light on bilateral agreements, which facilitate the carrying out of all the procedures necessary for guaranteeing the readmission of own nationals and third country nationals.

Return of irregular migrants can be voluntary or forced. Voluntary return is generally recommended and consists of providing the migrant with adequate assistance and reasonable time for autonomously complying with the removal order. It is generally less costly and involves less protracted procedures. Instead, forced return, which follows a compulsory administrative or judicial act, occurs when the individual refuses to voluntarily comply with the removal order.

In 1994 and 1995, the Council of Justice and Home Affairs (JHA) of the EU adopted two recommendations concerning, respectively, a specimen bilateral readmission agreement between a Member State and a third country, and guiding principles to be followed in drafting protocols on the implementation of a readmission agreement.<sup>710</sup> More

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<sup>710</sup> See, *Recommendation concerning a specimen bilateral readmission agreement between a Member State of the European Union and a third country*, adopted on 30 November and 1 December 1994, SN 10339/94. Any provisions on the rights of

specifically, the purpose of the specimen agreement was to help EU Member States standardize their readmission procedures with third countries. While no significant differences may be detected in the text of the readmission agreements separately concluded by EU Member States with third countries, a certain degree of variation in wording and substance is, however, inevitable, as their negotiation is significantly dependent on the political relations between the two involved parties.

#### **5.4. The content of standard readmission agreements: the case of Albania**

In sketching out the different sections of standard readmission agreements, this Chapter takes as units of analysis the accords concluded by Albania with Italy and the UK, respectively. Albania constitutes a special case insofar it was the first country in Europe to execute a readmission agreement with the European Community (now the EU). At the same time, this case study reveals the salience of interstate readmission strategies. Indeed, the negotiation process between the EU and Albania took so long that Italy lost interest in the EU's initiatives and decided to boost its own cooperation with Albania, thus realizing that the activities taken at bilateral level had,

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refugees and asylum seekers contained in previous draft were abandoned in the finalized version of the text. See, Elspeth Guild and Jan Niessen, *The Developing Immigration and Asylum Policies of the European Union* (Kluwer 1996) 407.

*de facto*, significantly contributed to stem massive irregular inflows from the Balkans.<sup>711</sup> Additionally, the accords concluded separately by Albania with Italy and the UK are among the most sophisticated and detailed pieces of legislation within the well-assorted category of existing standard readmission agreements.

There are several reasons why Albania has been of great import for EU Member States: first, it had the highest migration rate in Central and Eastern Europe; second, it was a transit country for Kosovo refugees and asylum seekers who have reached the EU's borders in massive numbers; third, thousands of other third country nationals cross Albania daily *en route* to the EU; fourth, it is considered a reliable buffer State through which returning third country nationals, including asylum seekers, who have transited through Albania before getting to an EU Member State; fifth, it is in the EU's interest to control an unstable area in the heart of Europe, which has been shuttered for a long time by economic and corruption problems, as the exodus of thousands of people, provoked by the crisis in the nineties, demonstrates.<sup>712</sup> In particular with regard to Italy, Albania has always acted as one of the most reliable partners, and its active collaboration

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<sup>711</sup>See, Federico Maria Piddu, 'Le Missioni in Albania della Marina Militare' (1998) *Rivista Marittima* 49; Jonathan Chaloff, 'Lessons from the Italy-Albania Readmission Agreement', in C Mackenzie (ed) *Return and Readmission to Albania: the Experience of Selected EU Member States* (August 2006) 112 <<http://www.albania.iom.int/en/E-Library/Books/EC%20research.pdf>> accessed 2 May 2013.

<sup>712</sup>*ibid* 102.



in the fight against undocumented migration has been rewarded through development aid (including military and police cooperation),<sup>713</sup> and a system of preferential quotas for single foreign workers.

#### ***5.4.1. Readmission of nationals and third country nationals***

Readmission agreements - bilateral treaties that aim to regulate the readmission of undocumented migrants between the two involved parties – are the main points of focus of this Chapter. In keeping with Article 31 of the VCLT, a literal reading of the text taking into account the meaning that would be attributed to the treaty at the time of its conclusion should be privileged. Thus, a literal reading of the text that takes into account the terms of the agreement will suffice to understand its technical and legal content.

Notwithstanding the differences in the content of any readmission agreements, which depend on the relationship between the two involved countries, the arrangements concluded separately by Albania with Italy and the UK are rather homogeneous. Scrutiny of the text of readmission agreements is a stepping stone, not only for the acquisition of further knowledge on the content of the treaties, but also to better understand their relationship with other sources of EU

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<sup>713</sup>ibid 103.

law as well as international and European refugee and human rights law. Moreover, the description of the technical content of readmission agreements will also be instructive for the debate on the opportunity to inscribe human rights procedural clauses in the text of these bilateral accords as a further guarantee for the rights of refugees and asylum seekers. This Section outlines the main aspects of standard readmission agreements taking as units of analysis the accords concluded by Albania with Italy and the UK, respectively, and indicating differences in their wording only where relevant.

Beside a Preamble, the Italy-Albania readmission agreement is composed of five numbered and titled sections. Section I describes the readmission obligations of the two Contracting Parties; Section II lays down the readmission obligations of third country nationals; Section III indicates the readmission procedure for Contracting Parties' citizens; Section IV regulates admission in transit for the purpose of returning third party nationals to another country; Section V contains general dispositions.

The structure of the agreement between Albania and the UK is slightly different, but the substance is almost the same.<sup>714</sup> The Preamble is followed by a first Article on definitions; Section I (so-called Part) concerns the readmission of citizens and people with a

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<sup>714</sup>In the UK-Albania Readmission Agreement, 'Sections' are named 'Parts.' However, we will continue to use the terms 'Sections' to render easier their joint reading with the Sections of the Readmission Agreement between Albania and Italy.

right to abode; Section II deals with the readmission of third country nationals; Section III defines transit operations; Section IV sets out general and final provisions. Additionally, both agreements have an Executive Protocol attached to the main text of the accords.

Both the Preambles generally point out the objective of the agreements, namely the strengthening of the bilateral cooperation between the two Contracting Parties - having regard to the need to abide by human rights as recognized by international instruments - in order to combat irregular immigration and facilitate the return of persons whose residence or presence in the territory is unauthorized. The Italian accord also refers to the intent of both parties to regulate readmission on the basis of the principle of reciprocity and in a spirit of cooperation.

Article 1 of the agreement with the UK lists definitions of key terms, such as 'Residence Permit', 'Citizen' and 'Citizenship', 'Right of Abode', 'Visa', 'Third Party National', 'Working Day', 'Children', 'Requesting and Requested Parties', 'Competent Authorities', and 'Permission to Transit', which means any authorization to enable a third party national to transit through the territory of the requested State for the purpose of return to another country, or pass through the transit zone of a port or airport.

In both the Italy and UK readmission agreements, Part I determines that the requested Contracting Party shall readmit without particular

formalities any persons who do not meet, or who no longer meet the conditions for entry or residence on the territory of the requesting State, provided that the individual is properly identified and it is proven or reasonably presumed that the individual is a citizen of the requested country.<sup>715</sup> The UK's readmission agreement includes also persons with right of abode in the requested contracting party, or people who were citizens of the requested party but have subsequently relinquished their citizenship without acquiring a new one. Moreover, the requesting State shall readmit, at the request of the requested Contracting Party any person who formerly departed from its own territory, if subsequent checks reveal that at the time of departure, that person was not a citizen of the requested Contracting Party, nor had a right of abode in said country.<sup>716</sup>

Section II of both agreements sets up the obligation to readmit, without unnecessary formalities, third country nationals - persons who do not have the nationality of either of the Contracting Parties to the agreement - if they do not fulfil, or no longer fulfil, regulations of entry or residence on the territory of the requesting State. Pursuant to the UK-Albania arrangement, the obligation to readmit is conditional upon *proof*: i) that the unauthorized migrant holds, or held at the time

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<sup>715</sup> Article 2(1) of the UK's Readmission Agreement and Article 1 of Italy's Readmission Agreement.

<sup>716</sup>The latter option applies only to the the UK's readmission agreement. See, Article 2(1)(2) of the UK's Readmission Agreement and Article 1(3) of Italy's Readmission Agreement.

of her unlawful entry into the territory of the requesting party, a visa or a valid residence permit issued by the requested State; ii) that the irregular migrant meets the requirements of the requested State's national legislation for entry and residence of aliens.<sup>717</sup> Each Contracting Party shall also readmit on the territory of its State if it is *reasonably presumed* that the third party national had entered or resided on the territory of the requested State.<sup>718</sup> The accord with the UK adds that, in cases in which both Contracting Parties have issued a visa or residence permit, responsibility shall reside with the State whose visa or residence permit expires last (Article 7(2)).

The same exemptions from the obligation to readmit third country nationals are envisaged by the two arrangements in a number of situations in which the third party national: i) has been granted refugee status by the requesting party; ii) is a citizen of, or permanently reside in, a State bordering the territory of the requesting Contracting Party; iii) has been previously returned by the requested State to her country of origin or a third country; iv) has held a valid residence permit issued by the requesting Contracting Party for a period of more than six months.<sup>719</sup>

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<sup>717</sup> Article 7(1) of Section II of the UK's Readmission Agreement.

<sup>718</sup> Article 2 of Section II of Italy's Readmission Agreement requires, instead, that entry or residence in the territory of the requested State is proven.

<sup>719</sup> Article 8(2)(a)(b)(c)(g) of Section II of the UK's Readmission Agreement; Article 3(a)(c)(d)(e) of Section II of Italy's Readmission Agreement. The two selected countries also provide for different regimes of exceptions. For instance, the Italy's agreement excludes the obligation to readmit migrants who have obtained by

#### ***5.4.2. Readmission procedure***

As far as the UK-Albania readmission agreement is concerned, Part I addresses some aspects of the readmission procedure of citizens and individuals with a right of abode, while Part II lays down the readmission procedure of third country nationals. Pursuant to Article 4, any request for readmission shall be made in writing to the competent authority of the requested State, and shall contain information as set out in Article 1 of the annexed protocol. Therefore, such a request shall incorporate, *inter alia*, the name and the address of the two competent authorities, the personal data of the returnee, certified copies of original documents constituting means of proof, or means for establishing a presumption of, citizenship or right of abode of the person to be readmitted, the planned itinerary, and data relating to health and possible diseases. In cases concerning readmission of both nationals and third country nationals, the reply to the request for readmission will be given in writing within fifteen working days.<sup>720</sup>

Article 3 of the agreement lists the means of evidence for establishing identity and citizenship of persons to be readmitted, provided that they are citizens or other persons with a right of abode in the requested Contracting Party. The agreement distinguishes between two types of evidence. The first one is ‘proof’, which can

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the requesting State a valid stay permit for a period of more than three months (Article 3(b)).

<sup>720</sup> See Articles 6(2) and 10(3).

include documents with an official status, such as identity cards, passports, substitute travel documents, or service record books and military passes. The second one is ‘*prima facie* evidence’, used to ‘reasonably presume’ identity and citizenship.<sup>721</sup> Unlike ‘proof’, ‘*prima facie* evidence’ is rebuttable.

Entry or residence of the third party national in the territory of the requested State shall be *proven* by the application of border seals or other proper annotations in their travel documents by border authorities at entry or departure from the territory of the requested country (Article 9(1)). Instead, entry or residence may be *reasonably presumed* on the basis, for example, of transport documents, proof of payment for hotel, medical service, as well as reliable statements of both *bona fide* witnesses and the third country national in question (Article 9(2)).

Under Article 1 of the Albania’s agreement with Italy, citizenship may be ascertained through citizenship certificates or any other naturalization documents, identity cards, passports, seaman’s books, and children travel documents in lieu of passports. The annexed protocol sets up all the procedures for the readmission of both nationals and third country nationals by establishing the competent

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<sup>721</sup>This elaborated category may include expired documents ascribed to the person, driving licences, minute evidence duly supplied by *bona fide* witnesses or by the migrant in question, the language she speaks, seamen’s books, extracts from the Civil Status Office’s records, bargemen’s identity documents, photocopies of the above-mentioned documents, as well as any other evidence acceptable to both Contracting Parties.

authorities and the timetable to reply to a readmission request in order to avoid overly lengthy bureaucratic mechanisms. For instance, both third country nationals and individuals whose citizenship of one of the Contracting Parties is presumed may be immediately readmitted - through direct contact between the Border Police Offices of both countries - if apprehended while irregularly crossing the border of the requesting party.

However, third country nationals should possess a valid stay permit issued by the requested State, or travel documents containing proper annotations by border authorities of the requested country.<sup>722</sup> If the unauthorized presence of third country nationals is detected when they already are within the territory of the requesting State, readmission may be executed within 8 days starting from the date of receipt of the readmission application, which will take place even in the absence of a formal reply to the readmission request.<sup>723</sup> For nationals whose citizenship is presumed, the time limit is 7 days.<sup>724</sup> It should be observed that in lack of a specific provision requiring the requested State to send an acknowledgement of receipt of the application, the fate of the returned migrant might be put at risk by a transfer executed on the basis of a request that has never been received.

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<sup>722</sup> See para D(1) of the Annexed Protocol to the Italy-Albania Readmission Agreement.

<sup>723</sup> See, para D(2) of the Annexed Protocol to the Italy-Albania Agreement. If detected migrants are nationals of the requested party, the reply to the readmission request must be given within forty-eight hours (para A(2) of the Annexed Protocol).

<sup>724</sup> See, para B(3)) of the Annexed Protocol to the Italy-Albania Agreement.



### ***5.4.3 Further dispositions***

Both Section III of the readmission agreement between Albania and the UK and Section IV of the agreement between Albania and Italy regulate the issue of transit for return purposes. In other words, each Contracting Party shall, at the request of the other Contracting Party, generally permit transit through its territory, of third country nationals for the purpose of readmission to their country of origin or to a third party State.<sup>725</sup> Italy's accord explicitly lays down a safeguard for asylum seekers by establishing that transit may be refused if the readmitted person is at risk of being subjected, in the country of destination, to persecution for nationality, religious, and sexual reasons, as well as membership in a particular social and political group (Article 9). The costs of transit and the costs related to readmission shall be borne solely by the requesting Contracting Party, as provided by Article 19 of the UK's agreement and Articles 6 and 7 of the Italy's accord.

Article 13 of the readmission agreements Albania concluded with the UK and Italy, respectively, provides that any controversies surrounding the interpretation of the treaty shall be resolved through diplomatic channels. Every year, representatives of the two contracting parties meet in order to discuss problems concerning the implementation of the agreements, and to jointly formulate new

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<sup>725</sup> See, Article 13 of the UK's Agreement and Article 7 of Italy's Agreement.

proposals and amendments.<sup>726</sup> The content of standard readmission agreements is highly technical, and consensus between the two Contracting Parties on detailed procedural and evidence requirements is necessary for a smooth readmission of unauthorized migrants. It is also worth observing that:

Negotiations with Albania did not generally address how people would be returned and how their returns would be sustained over time. Rather they focused on definitions of who should be returned, on methods of verifications, on provision of documents for persons to be returned, and the time required for the return process.<sup>727</sup>

However, of greater relevance for this thesis is that both texts of the readmission agreements contain a *non-affected* clause that regulates the relation of these instruments with other treaties – including human rights treaties - and international obligations. For instance, Article 11 of the Italy's accord indicates that the agreement at issue does not affect the Contracting Parties' obligations on admission or readmission under any other international treaties, but it does not specifically refer to human rights and refugee law

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<sup>726</sup> See, Articles 14 and 15 of Italy's Agreement.

<sup>727</sup> See, Lynellyn D Long and Sanja Celebic, 'Perspectives on the EC/Albanian Readmission Agreement' in C Mackenzie (ed) *Return and Readmission to Albania* (IOM 2006) 25.

instruments.<sup>728</sup> Instead, Article 21 of the UK Agreement refers to a number of international human rights and refugee law instruments Contracting Parties shall comply with when readmitting a person.<sup>729</sup> Since both these conventions and readmission agreements are international treaties with no hierarchical relationship under general international law, potential conflicts between a readmission agreement and any other treaty obligations binding the EU Member State or the third country in question would be solved in favor of the international instruments listed in the non-affectation clause.<sup>730</sup>

### **5.5 The relationship between interstate and EU readmission agreements**

The EU's readmission policy constitutes the general framework placed above and beyond the broad cobweb of bilateral readmission agreements agreed to between EU Member States with third

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<sup>728</sup> Pursuant to Article 11 of the Italy-Albania Readmission Agreement, '*Le disposizioni del presente accordo non pregiudicano gli obblighi delle Parti Contraenti di ammissione e di riammissione di cittadini stranieri conseguenti all'applicazione di altri accordi internazionali.*' See, Sections 5.9 and 5.9.1 for a more detailed analysis of non-affectation clauses.

<sup>729</sup> Under Article 21 of the UK-Albania Readmission Agreement: 'The provisions of this Agreement *shall* not affect the Contracting Parties' rights and duties under: a) other international agreements on extradition, transfer of convicted persons, mutual legal assistance in criminal matters and readmission or transit conveyance in cases of removal of persons generally; b) *the Convention Relating to the Status of Refugees*, done at Geneva on 28 July 1951 as amended by the Protocol done at New York on 31 January 1967; c) *any international agreement on human rights*; d) *international agreements on asylum*, in particular the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, done at Dublin on 15 June 1990; e) any other international agreement.'

<sup>730</sup> Coleman 2009, 105.

countries.<sup>731</sup> The interrelatedness between national and supranational readmission policies is corroborated by the fact that Member States continue to pursue their readmission procedures in parallel with the EU strategy, as solicited by paragraph 7 of the Preamble of the Return Directive, which underlines ‘the need for Community and bilateral readmission agreements with third countries to facilitate the return process.’

Readmission has therefore turned out to be an underlying component of the EU immigration and asylum policy, which has been progressively defined and consolidated after the entry into force of both the Amsterdam and the Lisbon Treaties. In addition, the *Stockholm Programme – an Open and Secure Europe Serving and Protecting the Citizens*, adopted in December 2009, portrays readmission agreements, at both bilateral and supranational level, as a building block in EU migration management. Article 79(3) of the TFEU expressly gives authority to the EU to stipulate agreements with third States for the readmission of third country nationals who do not or who no longer fulfil the conditions for entry, presence, or residence in one of the Member States.

The issue of division of competences has stirred up a heated debate over the years, and Member States have openly contested an alleged

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<sup>731</sup> While the European Commission has received 21 mandates for negotiating readmission agreements, 13 arrangements are already in force.

exclusive competence of the EU.<sup>732</sup> In this regard, after examining the different claims to exclusive and shared competence, Panizzon concludes that ‘shared competence over readmission, and as a result, ‘agreements dualism’, should, in principle, remain unencumbered.’<sup>733</sup> Although recognizing the dual commitment of the EU and individual Member States in this area, Panizzon however suggests that shared competence may trigger a race to the bottom over human rights standards. The reasons why EU readmission agreements would be better tools in safeguarding the rights of the returnees are twofold:<sup>734</sup> i) in 2011 the EU Commission proposed that future directives negotiating readmission agreements will not cover third country nationals;<sup>735</sup> ii) according to the same proposal, EU arrangements will contain a safeguard clause requiring suspension of the treaty if the readmitting country does not respect human rights.<sup>736</sup>

Yet, as long as the EU does not provide incentives (such as labour quotas) for source countries, States of transit of migrants will inevitably prefer concluding agreements with individual EU Member States. Moreover, the Lisbon Treaty does not bestow upon the Union

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<sup>732</sup>On the division of competences between the EU and Member States, see, *inter alia*, Paul Craig and Grainne De Burca, *EU Law: Text, Cases and Materials* (Oxford University Press 2011) 73 ff.

<sup>733</sup> Panizzon 2012, 132.

<sup>734</sup> *ibid*

<sup>735</sup> Commission, ‘Evaluation of EU Readmission Agreements’ (Communication) COM (2011) 76 final, 9, 23 February 2011 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0076:FIN:EN:PDF>> (EC Evaluation of EU Readmission Agreements).

<sup>736</sup> *ibid* 12.

the exclusive power to negotiate readmission agreements. Indeed, Article 4(2)(j) of the TFEU incorporates ‘Freedom, Security and Justice’ – which clearly encompasses readmission – in the field of shared competence. Therefore, the relationship between the EU and Member States continues to be shared and grounded on the principle of ‘sincere cooperation’ enshrined in Article 4(3) of the Treaty on the EU (TEU).<sup>737</sup>

In case of coexistence of previous state-negotiated arrangements, they continue to be in force and used, but, by virtue of the ‘safeguard clause’, EU readmission agreements take precedence over state-negotiated ones in case of incompatibilities.<sup>738</sup> The JHA Council of

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<sup>737</sup> Article 4(3) of the TEU reads as follows: ‘Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.’ On the principle of ‘sincere cooperation’, refer to, *inter alia*, Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Cases and Materials* (Cambridge University Press 2010) 223 ff. For a detailed analysis of the Area of Freedom, Security and Justice (AFSJ) after Lisbon and Stockholm, see Theodora Kostakopoulou, ‘An Open and Secure Europe? Fixity and Fissures in the Area of Freedom, Security and Justice after Lisbon and Stockholm’ (2010) *European Security* 19(2) 151.

<sup>738</sup> It is often mistakenly assumed that the role of Member States is totally dismissed once the Commission and the Council independently decide to negotiate and conclude an EU readmission agreement, thereby overlooking the fact that the mandate of the Commission only consists in ‘brokering the agreement.’ As Kovanda put it in 2006, ‘EC readmission policies and agreements fall under the external dimension. They set out reciprocal obligations binding the Community on the one hand and the partner country on the other hand. But once an agreement is negotiated, the Community responsibility is over. Its day-to-day implementation, the actual decision about sending a person back and the actual operation it involves—all this is entirely within the competence of our Member States.’ See, Euroasylum, interview with Karel Kovanda, Special Representative for Readmission Policies, DG Relex (April 2006), as cited in Jean-Pierre Cassarino, *Readmission Policy in the European Union*, Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs (Brussels, European Parliament 2010) 18.

May 1999 sustained that a Member State must always notify the Council of its intention to negotiate a bilateral readmission arrangement, and can carry on with the process only if the European Community has not already stipulated a treaty with the concerned third State or ‘has not concluded a mandate for negotiating such an agreement.’<sup>739</sup> Exceptions are represented by the instance in which Member States require more detailed arrangements to compensate a EU agreement or a negotiating mandate containing only general statements. However, ‘Member States may no longer conclude agreements if they might be detrimental to existing Community agreements.’<sup>740</sup> To put it differently, they

Shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.<sup>741</sup>

Should a State contravene this obligation, the European Commission could bring an infringement procedure before the Court

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<sup>739</sup> JHA Council, ‘Conclusion on Readmission Agreements – Consequences of the Entry into Force of the Amsterdam Treaty’, 27–28 May 1999 (JHA Council 1999) <[http://europa.eu/rapid/press-release\\_PRES-99-168\\_en.htm](http://europa.eu/rapid/press-release_PRES-99-168_en.htm)> accessed 2 May 2013. For an appraisal of the EU readmission policy, see Carol Billet, ‘EC Readmission Agreements: A Prime Instrument of the External Dimension of the EU’s Fight against Irregular Immigration. An Assessment after Ten Years of Practice’ (2010) 12 EJML 45; Mariagiulia Giuffrè, ‘The European Union Readmission Policy after Lisbon’, 1 *Interdisciplinary Political Studies Journal* (2011) 7.

<sup>740</sup> JHA Council 1999.

<sup>741</sup> Article 2(2) TFEU.

of Justice of the EU under Article 258 of the TFEU.

### **5.6. What legal basis for return decisions? The *Return* and the *Recast Procedures* directives in context**

The primary question of this Chapter is whether refugees' access to protection might be impaired by the implementation of standard readmission agreements. In order to address this issue, a preliminary sub-question needs to be answered first. It asks whether these bilateral accords stand as the legal basis for 'safe third country' return decisions. In this regard, readmission follows the return stage, which refers to the actual decision, under national law and EU law, to remove an irregular migrant or an asylum seeker against her will. In this chain, readmission agreements are administrative instruments acting as a bilateral conduit between the requesting and the requested State in view of facilitating the transfer and readmission of persons who have been found irregularly entering to, being present in, or residing in the territory of the requesting State. They therefore address the horizontal relationship between two States involved in the readmission policy, and are put into action only once the return process ends.

Before proceeding with the question on the relationship between agreements linked to readmission and the return decision, attention has to be focused on Article 38 of the Recast Procedures Directive,



which allows States to return asylum seekers to ‘safe third countries’ for the purpose of examining asylum claims. The connection between readmission agreements and both ‘safe third country’ practices and accelerated procedures for returning unauthorized migrants apprehended at the EU borders has raised various doubts and concerns in the international community.<sup>742</sup> Whilst burgeoning literature has addressed the shortcomings of the ‘safe third country’ practice,<sup>743</sup> Moreno-Lax has pushed her criticism to the point of rejecting altogether the legality of the ‘safe third country’ notion because of its

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<sup>742</sup> See, e.g., Rosemary Byrne, Gregor Noll and Jens Vedsted-Hansen, ‘Western European Asylum Policies for Export: The Transfer of Protection and Deflection Formulas to Central Europe and the Baltics’ in Rosemary Byrne, Gregor Noll and Jens Vedsted-Hansen (eds), *New Asylum Countries? Migration Control and Refugee Protection in Enlarged European Union* (Kluwer 2002) 16–19; Daphne Bouteillet Paquet, ‘Passing the Buck: A Critical Analysis of the Readmission Policy Implemented by the European Union and its Member States’ (2003) 5 EJML 359; Cathryne Costello, ‘The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?’ (2005) 7(1) EJML 35; Maria-Teresa Gil-Bazo, ‘The Practice of Mediterranean States in the Context of the European Union’s Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited’ (2006) 18(3–4) IJRL 571; Goodwin-Gill and McAdam 2007, 392; Maura Marchegiani, ‘Competenze Comunitarie e Prerogative degli Stati in Materia di Immigrazione Irregolare, con Particolare Riferimento alla Questione delle Politiche di Riammissione’ in Paolo Benvenuti (ed), *Flussi Migratori e Fruizione dei Diritti Fondamentali* (Il Sirente 2008) 333; Violeta Moreno-Lax, ‘The “Safe Third Country” Notion Revisited: An Appraisal in light of General International Rules on the Law of Treaties, in Guy S Goodwin-Gill (ed) *International Migrations, 2010 Centre for Studies and Research in International Law and International Relations of The Hague Academy of International Law* (Martinus Nijhoff 2013). For further literature and commentary, see, Section 2.7 and 3.6 of this thesis.

<sup>743</sup> See, e.g., European Council on Refugees and Exiles (ECRE), ‘Safe Third Countries: Myths and Realities’ (1995) paras 27-33; Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Kluwer International Law 2000) 200; Gretchen Borchelt, ‘The Safe Third Country Practice in the European Union: A Misguided Approach to Asylum Law and a Violation of International Human Rights Standards’ (2002) 33 *Columbia Human Rights Law Review*; Steven H Legomsky, ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection’ (2003) IJRL 15(4) 567, 597; Matthew J Gibney, *Immigration and Asylum: from 1900 to the Present* (ABC-CLIO 2005) 495.

inherent incompatibility with international refugee law in light of universal rules of treaty interpretation.<sup>744</sup>

The ‘safe third country’ concept implies that access to an effective asylum procedure can be denied if individuals have transited through another ‘safe third country’ before reaching the State in which they are ultimately soliciting protection. In this view, refugees should request asylum in the first safe country they are able to reach. Since transfer of responsibility for asylum seekers to another ‘safe’ country does not find a legal basis in general international law, readmission agreements are commonly relied upon by the EU and its Member States to obtain the necessary cooperation for readmitting third-country nationals. They do not only regulate the return of irregular migrants but also that of rejected refugees and asylum seekers whose application was not examined on its merits on the basis of a ‘safe third country’ exception.

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<sup>744</sup> Moreno-Lax 2013. For a broader discussion on the legality of the ‘safe third country’ notion, see, Sections 2.7 of this thesis. Few scholars have also dealt with the lawfulness of the ‘safe third country’ notion from an international refugee law and human rights perspective, but this without reaching an ultimate answer. See, e.g., James Crawford and Patricia Hyndman, ‘Three Heresies in the Application of the Refugee Convention’ (1989) 1 *IJRL* 155; Eva Kjaergaard, ‘The Concept of “Safe Third Country” in Contemporary European Refugee Law’ (1994) 6 *IJRL* 649; Rosemary Byrne and Andrew Shacknove, ‘The Safe Country Notion in European Asylum Law’ (1996) 9 *HHRJ* 185; Jens Vedsted-Hansen, ‘Non-Admission Policies and the Right to Protection: Refugees’ Choice versus States’ Exclusion?’ in F Nicholson and P Twomey (eds.), *Refugee Rights and Realities* (Cambridge University Press 1999) 269; Savitry Taylor, ‘Protection Elsewhere/Nowhere’ (2006) 18 *IJRL* 283; Maria-Teresa Gil-Bazo, ‘The Practice of Mediterranean States in the Context of the European Union’s Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited’ (2006) 18 *IJRL* 571; Goodwin-Gill and McAdam 2007, 390.

EU Member States may also decide to engage in the negotiation of readmission agreements or in other kinds of informal cooperation on migration control with countries that have a doubtful track record in human rights. Some of these countries are either among the largest ‘producers’ of refugees and protection claims, or do not have adequate facilities to process applications and grant asylum.<sup>745</sup> Nevertheless, rebuttal of the safety of a country in individual circumstances is a protection imperative.<sup>746</sup>

As far as irregular migrants are concerned, the main EU instrument regulating the removal of unauthorized aliens is the Return Directive. This Directive sets out common rules concerning removal, return, detention standards, safeguards for returnees, and re-entry bans for people subjected to a return decision.<sup>747</sup> The Recast Procedures Directive is, instead, the instrument used by EU Member States to determine the measures for granting or withdrawing refugee status and to ascertain whether asylum seekers can be removed to a ‘safe third country’ responsible for the examination of their asylum

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<sup>745</sup> Richard Dunstan, ‘Playing Human Pinball, The Amnesty International United Kingdom Section Report on UK Home Office “Safe Third Country” Practice’ (1995) 7(4) IJRL, 611.

<sup>746</sup> See, e.g., *MSS v Belgium and Greece* (2011) 53 EHRR 2, para 253; *TI v UK* App no 43844/98 (ECtHR, 7 March 2000); Noll 2000, 200.

<sup>747</sup> The Return Directive was applied by the Court of Justice of the EU in the *El Dridi* case concerning a third country national that had to be deported on grounds of illegal entry in Italy. The Court ruled that national legislation imposing a prison sentence solely on the grounds of refusal to obey an order to leave the territory within the time limit given is contrary to the Return Directive. State authorities should, rather, pursue their efforts to enforce the return decision, which continues to produce its effects. See *El Dridi* Case C-61/11 PPU, 28 April 2011, para 58.

claims.<sup>748</sup> The legal status of asylum seekers is thus assessed during an initial phase following their arrival in the territory of one of the EU Member States.

Readmission agreements do not provide the legal basis for the return of refused/excluded refugees. They are only used to enable the transfer to the country of origin or transit of all those people whose protection claims have been denied on the grounds set in the Procedures and Qualification Directives.<sup>749</sup> It should also be underlined that, formally, the ‘safe third country’ exceptions envisaged by the Procedures Directive and its Recast version have been rarely used by Member States. Indeed, the latter have usually had difficulties in obtaining the cooperation of the readmitting country and have tended to examine individual circumstances prior to expulsion.

Nevertheless, nothing prevents EU Member States from using

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<sup>748</sup> For an overview of the Recast Procedures Directive, see, UNHCR, *Comments on the European Commission’s Amended Proposal for a Directive of the European Parliament and of the Council on Common Procedures for Granting and Withdrawing International Protection Status (Recast)* COM (2011) 319 final, Geneva, January 2012; European Council on Refugees and Exiles (ECRE), *Comments from the European Council on Refugees and Exiles on the Amended Commission Proposal to Recast the Asylum Procedures Directive*, COM (2011) 319 final, September 2011; ILPA, *Comments on the Revised Commission Proposal of 1 June 2011 on Common Procedures for Granting and Withdrawing International Protection status (Recast)* COM(2011) 319 final, 5 December 2011; and Steve Peers, *Revised EU Asylum Proposals, Lipstick on a Pig* (Statewatch 2011) <<http://www.statewatch.org/analyses/no-132-asylum.pdf>> accessed 2 May 2013; Cathryne Costello, ‘Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored’ (2012) 12(2) HRLR 287, 337.

<sup>749</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals as refugees or as persons who otherwise need international protection, OJ L 304/12, 30 September 2004 (Qualification Directive).

readmission agreements to enforce ‘safe third country’ policies. In this respect, asylum seekers can be subject to readmission procedures as third country nationals. If there is proof that a person has already been recognized as a refugee in a third country, she should be returned to that country by means of a readmission agreement. A similar reasoning pertains to asylum seekers who have transited through, or resided in, a ‘safe third country.’ Indeed, Article 33(2)(c) of the Recast Procedures Directive overtly requires that Member States consider an application for asylum inadmissible if a country, which is not a Member State, is considered to be a ‘safe third country’ for the applicant.<sup>750</sup> Whereas a protection claimant is rejected on substantive grounds, an EU Member State may request readmission to the country of origin as its own national, or to any other State as a third-country national.

A further issue giving cause for concern appertains to the potential violation of refugee rights as a consequence of accelerated procedures of expulsion, laid down in the major part of readmission agreements, including those selected for the present analysis. For instance, the Italy-Albania readmission agreement provides that both third-country nationals and individuals whose citizenship of one of the contracting parties is presumed may be immediately readmitted if apprehended

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<sup>750</sup> Ex Article 25(2)(c) of the 2005 Procedures Directive.

while irregularly crossing the border of the requesting party.<sup>751</sup> While the end of the unauthorized presence of third country nationals apprehended when they are already within the territory of the requesting State can be executed within eight days,<sup>752</sup> for nationals whose citizenship is presumed the time limit is, instead, of seven days.<sup>753</sup> In both circumstances, readmission will take place even in the absence of a formal reply to the readmission request.<sup>754</sup>

If it holds true that Member States can decide not to apply all the procedural safeguards of the Return Directive to people apprehended in the external border region,<sup>755</sup> it should also be noted that swift mechanisms of expulsion cannot be executed in all those cases in which intercepted persons claim to be refugees.<sup>756</sup> Additionally, Article 43 of the recast Procedures Directive requires that Member States shall provide for procedures, in accordance with the basic

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<sup>751</sup> See, paras D(1) and B(2) of the Annexed Protocol to the Agreement between Italy and Albania for the Readmission of People at the Frontier, Tirana, 18 November 1997. In this case, third country nationals need to have documents certifying their transit through the requested State.

<sup>752</sup> *ibid* para D(2).

<sup>753</sup> *ibid* para B(3).

<sup>754</sup> *Ibid* para D(2) and B(3).

<sup>755</sup> Return Directive, Article 2(2)(a). The procedural safeguards accorded to third-country nationals subjected to a return decision are listed in Chapter III (Articles 12–14) of the Return Directive.

<sup>756</sup> As Article 4(4) of the Return Directive reads: ‘With regard to third-country nationals excluded from the scope of this Directive in accordance with Article 2(2)(a), Member States shall: (a) ensure that their treatment and level of protection are no less favourable than as set out in Articles 8(4) and (5) (limitations on use of coercive measures), Article 9(2)(a) (postponement of removal), Article 14(1) (b) and (d) (emergency health care and taking into account needs of vulnerable persons), and Articles 16 and 17 (detention conditions) and (b) respect the principle of non-*refoulement*.’

principles and guarantees of Chapter II, in order to decide at the border or in transit zones on asylum applications made at such locations.<sup>757</sup> Such guarantees include the right to remain pending the examination of an asylum application *at first instance* (Article 9).<sup>758</sup>

From the above-mentioned provisions, it appears that, in principle, asylum seekers cannot be removed to a third country until their asylum application has been examined, and an unfavourable decision handed down. Therefore, return should not give rise to concerns as long as the safety of the readmitting country is individually established and the safeguards contained in national and EU legislation – *in primis* the Return Directive and the Recast Procedures Directive – are scrupulously and fairly observed. However, whilst a return decision can be pronounced or enforced only once the protection claim has been rejected at first instance, Member States have always shown a certain reluctance to accept as a general rule that appeals can have suspensive effect on the expulsion order (either automatic or upon request).<sup>759</sup> Within this procedural gap – which the Recast Procedures Directive has not been able to fulfil – EU Member States have a certain margin of manoeuvre in deciding to return

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<sup>757</sup> Ex Article 35 of the 2005 Procedures Directive.

<sup>758</sup> Ex Article 7 of the 2005 Procedures Directive. Furthermore, pursuant to Article 3(1) of the Recast Dublin Regulation, ‘Member States shall examine any application for international protection by a third country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones.’

<sup>759</sup> See, Annaliese Baldaccini, ‘The Return and Removal of Irregular Migrants under EU Law: an Analysis of the Return Directive’ (2009) 11(1) EJML 1, 12.

asylum seekers who have not completed the appeal phase with regard to their protection claims.

Scholarship has traditionally labelled bilateral readmission agreements as detrimental to refugee rights. Notwithstanding, in line with Coleman, this Chapter concludes that no issue of incompatibility with refugee and human rights law seems to stem from their *technical content*. Readmission agreements constitute purely administrative tools serving the purpose of smoothing the final stage of the return procedure for irregular migrants and rejected refugees. These bilateral instruments do not define criteria for the legality of a person's presence in an EU Member State. This assessment is made by national authorities in compliance with domestic administrative law and in full respect of the procedural safeguards enshrined in international and EU law. Moreover, international law offers technical tools to solve conflicts of treaties and attribute precedence to human rights instruments.

Nevertheless, readmission agreements can also be used, in practice, to smooth the return of asylum seekers whose claims will be examined elsewhere, and asylum seekers waiting for the outcome of their appeal against denial of their protection claims at first instance. As Section 5.8 will show, once we shift from law to the implementation of law, the relationship between readmission agreements and refugee rights turns out to be not as coherent and



consistent as previously imagined. And it is on this tension that I intend to build up my main contribution.

### **5.7. Conflicts of treaties and non-affected clauses: readmission agreements *versus* international human rights treaties**

Readmission agreements are designed to regulate the transfer of persons only between the two Contracting Parties. In studying the relationship between readmission agreements and international human rights treaties, it is to be emphasized that States cannot contract out their pre-existing obligations under international refugee and human rights law by concluding a subsequent agreement on the readmission of irregular migrants. Pursuant to the principle of *pacta sunt servanda*, enshrined in Article 26 of the VCLT, States must respect their agreements. Since Article 34 of the VCLT provides that ‘a treaty does not create either obligations or rights for a third State without its consent’, changes to multilateral refugee law instruments cannot be created by a new treaty binding only a few States of the international community. Therefore, the obligations of States derived from all international refugee and European human rights instruments remain unaltered, even after the conclusion of a bilateral readmission agreement. Moreover, Article 41 of the VCLT provides that:

Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if the [modification in question] is not prohibited by the treaty and does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations.

A correlated question is whether conflicts may arise between a readmission agreement and other international conventions concerning refugee and human rights protection. This treaty relation would actually not be problematic if both the national decision on the legal status of the asylum seekers and the order to return those with no title to stay in the EU territory were taken in full compliance with European and international law standards. Moreover, as provided in the EU specimen agreement, bilateral readmission arrangements sometimes contain a *non-affected clause* requiring the Contracting Parties to comply with rights and duties under other refugee and human rights conventions. It is thus unlikely that requesting States encounter a situation where they would have to choose between contrasting obligations when implementing a bilateral readmission agreement. The rationale is that Contracting Parties do not intend to affect their previous obligations under international refugee law when they agree to mutually control irregular migration.

However, first, not all readmission agreements contain non-affected clauses requiring States to comply with international human rights treaties, and, second, the implementation of bilateral

agreements of migration control – as we will better observe later in this thesis – enhances the risk of direct and indirect *refoulement* and may lead to violations of refugee rights as a consequence of asylum seekers’ transfer to third countries without examination of their protection claims. Therefore, despite the existence of non-affected clauses, their *de facto* compatibility with, for example, the object and purpose of the Geneva Convention remains doubtful. If ‘the effective execution’ of the original treaty cannot be guaranteed, and these *inter se* arrangements impair the performance of *erga omnes* protection obligations under the Geneva Convention, Article 41 VCLT would be breached.

The proliferation of treaties inevitably insinuates the possibility of norms’ conflicts and doubts as to the agreement to be applied when the same State is party to two or more treaty regimes with diverging purposes. Despite no generally accepted definition of what constitutes a conflict between treaties, it could be affirmed that a conflict in the strict sense exists when a State is not able to simultaneously comply with all the requirements of two norms.<sup>760</sup> Beyond Article 30 VCLT – which, however, sets the precedence only of successive treaties with the same subject-matter, and cannot therefore address all the problems concerning the priority of a particular treaty – all other applicable

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<sup>760</sup> Seyed-Ali Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties* (Martinus Nijhoff Publishers 2003) 5; Christopher J Borgen, ‘Resolving Treaty Conflicts’ *The George Washington International Law Review*, 37, 2005, 573, 575.

maxims hardly seem to provide a response to the resolution of normative conflicts.

For instance, whilst a certain rule, such as *lex prior*, may place focus on earlier treaties, another equally valid rule may take into account the evolving intent of the parties within a dynamic legal system by prioritizing the most recent treaty (*lex posterior derogat legi priori*). This rule is usually applicable when the parties have not expressed any indication as to the way in which conflicts should be resolved. Recent discourses have focused on the *lex specialis* doctrine whereby the more narrowly precise treaty governing a specific subject matter overrides a treaty regulating more general issue-areas.<sup>761</sup> While at times, some of these diverging principles may be used concurrently (when, for instance, the subsequent treaty is also the more specific one), in many other cases, the unclear relationship among these canons implies an inevitable conflict and uncertainty about the rule to be favoured.<sup>762</sup>

Any reader would realize that no single rule among those abovementioned could be applied satisfactorily to situations involving various partners, and the VCLT is *de facto* incapable of resolving

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<sup>761</sup> See e.g., Martti Koskenniemi, 'Study in the Function and the Scope of the *Lex Specialis* Rule and the Question of 'Self-Contained' Regimes', UN Doc. ILC(LVI)/SG/FIL/ CRD.1 and Add.1., 4 and 7 May 2004; Anja Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrines of *Lex Specialis*' (2005) 74 NJIL 27.

<sup>762</sup> Lindroos 2005, 41.

serious conflicts between treaties.<sup>763</sup> Some authors have thus endorsed the flexible ‘principle of political decision’ whereby it is up to the State concerned (in particular decision-makers) to make a political decision regarding which commitment it prefers.<sup>764</sup> Since State practice remains *de facto* ambiguous and ‘no particular principle or rule can be regarded as of absolute validity’,<sup>765</sup> I consider non-affection clauses as an instructive legal technique for resolving potential conflicts between treaties.

By intervening at the very drafting stage, the incorporation of saving (non-affection) clauses might be helpful for establishing either the priority of the treaty in question or the priority of another treaty.<sup>766</sup> These clauses should however be only used when a first attempt to reconcile concurrent norms has failed, thus obliging States to give precedence to one of the two conflicting provisions.<sup>767</sup>

In order to avoid a general scheme of substantive hierarchization of treaties, saving clauses could be used to indicate that a certain current treaty is *in casu* hierarchically superior or inferior to a previous

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<sup>763</sup> Jan Klabbbers, *Treaty Conflicts and the European Union* (Cambridge University Press 2009) 88-90.

<sup>764</sup> See Manfred Zuleeg, ‘Vertragskonkurrenz im Völkerrecht. Teil I: Verträge zwischen souveränen Staaten’ (1977) 20 *German Yearbook of International Law* 246 ff, as cited in Klabbbers 2009, 88.

<sup>765</sup> Wilfred Jenks, ‘The Conflict of Law-Making Treaties’ (1953) 30 *British Yearbook of International Law* 407.

<sup>766</sup> Hans Blix and Jirina H Emerson (eds), *The Treaty Makers’ Handbook* (Oceana 1973) 210–222.

<sup>767</sup> Sadat-Akhavi 2003, 87.

one.<sup>768</sup> By increasing coherence in the international legal system, such a solution would ensure certainty that either a specific agreement will be honoured, or mechanisms of legal recourse can be put in motion in case of infringement.<sup>769</sup> Considering treaties as agreements setting forth norms of expected behaviour, non-affected clauses would swell predictability of outcomes as to which treaty would be applicable in case of conflict.<sup>770</sup>

In point of fact, readmission agreements are not consistent in the use of non-affected clauses. According to Coleman, these clauses are not imperative and have a purely declaratory value insofar as they cement the applicability of international obligations to the extent to which such obligations already bind Contracting Parties.<sup>771</sup> In sum, they do not create obligations for the two involved States, and may be considered, at most, as an additional safeguard to avoid the application of readmission agreements after deciding to expel an asylum seeker in breach of international law.

However, when a *proviso* on the precedence of human rights treaties is formulated in a more detailed fashion, not only does it generate more stringent and definite obligations than those derived by customary international law, but it also distinctly articulates how the

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<sup>768</sup> Borgen 2005, 638, 644.

<sup>769</sup> *ibid* 644.

<sup>770</sup> *ibid* 647.

<sup>771</sup> Coleman 2009, 306.

agreement at hand can be enforced in accordance with earlier human rights treaties. The readmission agreement between the UK and Albania contains a sophisticated articulation of human rights instruments. Indeed, Article 21 prescribes that:

The provisions of this Agreement *shall* not affect the Contracting Parties' rights and duties under: a) other international agreements on extradition, transfer of convicted persons, mutual legal assistance in criminal matters and readmission or transit conveyance in cases of removal of persons generally; b) *the Convention Relating to the Status of Refugees*, done at Geneva on 28 July 1951 as amended by the Protocol done at New York on 31 January 1967; c) *any international agreement on human rights*; d) *international agreements on asylum*, in particular the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, done at Dublin on 15 June 1990; e) any other international agreement.<sup>772</sup>

The mandatory character of this provision – confirmed by the use of the word ‘shall’ – seems to indicate that respect for *all* rights and principles proclaimed in the Geneva Convention and its 1967 Protocol, as well as in any other international agreement on human rights and asylum constitute an underlying component of the agreement itself.

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<sup>772</sup> Such a provision follows the content of the non-affection clause inserted in the Council Recommendation concerning a specimen bilateral readmission agreement between a Member State and a third country, OJ C 274 (EU specimen readmission agreement).

An interpretation whereby all the norms of the abovementioned instruments are incorporated by reference is mostly significant insofar as we consider that not *all* of the norms of the Geneva Convention and relevant human rights treaties amount to customary international law.<sup>773</sup> Therefore, non-affected clauses may create obligations that are more onerous than those deriving from general international law.

Given that the international legal system is a cobweb of interrelated agreements that affect each other, thoughtful drafting of saving clauses is more likely to foresee and avoid potential conflicts among treaties.<sup>774</sup> Because of the risk of asylum seekers being affected by the application of a readmission agreement, it would be opportune to insert specific references to the duty of States to comply with international refugee and human rights treaties without altering the scope and objective of the bilateral accords, which are clearly aimed at expediting the return of irregular migrants to countries of origin or transit.

As a matter of public international law, it is also particularly important to decode the value of references to human rights and democracy in the Preamble of any bilateral readmission agreement in order to gauge whether they either constitute mere assumptions on which the accord is predicated or the real objectives of the treaty. This

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<sup>773</sup> A norm unquestionably amounting to customary law is the principle of *non-refoulement*.

<sup>774</sup> Borgen 2005, 637.



interpretative exercise is particularly salient with regard to those agreements not containing saving clauses. In this respect, the role of the Preamble can be misleading since it is often used as a location where Contracting Parties declare their common values, especially in agreements of a political character.

The text of bilateral readmission agreements generally contains preambular references to human rights, but seldom to specific international human rights instruments.<sup>775</sup> Rather than the genuine objectives of the treaty, the impression is that they constitute a statement of shared values to the effect that the parties attach importance to human rights and democratic principles. A slightly more accurate example, but still restricted in its scope, is the 1997 Agreement between Italy and Albania on the readmission of people at their borders. While in the Preamble, the Parties bear on the respect of international conventions on human rights protection and in particular on the rights of migrant workers, in Article 3(d), the Parties exclude from the personal scope of the Agreement both nationals of third countries who have been recognized as refugees under the 1951

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<sup>775</sup> To give an example, in the Preamble of the readmission agreement between Italy and Algeria, the two Contracting Parties declare to be desirous ‘to improve the arrangements for persons’ movement between both countries, within the respect of the rights and guarantees provided for by their internal legislation and international conventions which apply to both States.’ The same broad and unspecific reading can be found in the Preamble of the Readmission Agreement between the UK and Algeria on the Circulation of Persons and Readmission, London, 11 July 2006. Additionally, the UK and Albania agree on the readmission of third country nationals ‘[h]aving regard to the need to abide by basic human rights and freedoms, guaranteed by their national legislation and by international agreements in force for the Contracting Parties.’ See, Preamble (Recital 4) of the UK-Albania Readmission Agreement.

Geneva Convention, as amended by the 1967 Protocol, and stateless people pursuant to the 1954 New York Convention.

It is crucial to highlight that EU Member States remain bound by international refugee and European human rights obligations whenever they return a person to a third country. Therefore, expulsions executed by means of readmission agreements do not automatically entail an increased risk of *refoulement*, if the return decisions are taken in consonance with the whole gamut of safeguards enshrined in the Recast Procedures Directive, as well as the legally binding international human rights instruments ratified by the EU Member States as a whole. In this regard, non-affected clauses intervene to ensure legal certainty and confer precedence to human rights and refugee law treaties. However,

There [is] [...] no sufficient guarantee that the authorities would treat asylum applicants differently than any other illegal aliens, or any explicit commitment by the requested State to examine an asylum claim of a readmitted individual.<sup>776</sup>

Moreover, as the next Section will discuss, informal practices of border control can at any time be performed by State authorities, thus dismantling the spectrum of guarantees and rights owed to asylum seekers under bilateral and multilateral international treaties.

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<sup>776</sup> Hurwitz 2009, 71.

### **5.8. Informal border practices: when refugees become invisible**

Readmission agreements *per se* cannot be expected to eliminate return problems. Much will depend on the goodwill of requested States to cooperate, supply documents, reply to the application request, and assist third-country nationals readmitted in their territory, including asylum seekers who should be channelled into procedures of assessment of their protection claims. Moreover, the possibility of informal border return operations and diverging State practices creating tensions with protection obligations cannot be excluded in absolute terms. In this respect, Coleman's conclusion is that more quantitative and qualitative studies would be required in relation to informal border practices. Although such a dual-pronged analysis mapping in detail formal and informal readmission practices would be beyond the scope of this Chapter, a host of examples stretching from East to the South can be illustrative of the risks run by refugees disorderly knocking at EU doors.

Slovakia, for instance, returns migrants and asylum seekers to Ukraine on a regular basis – the two countries concluded a readmission agreement in 2004. According to Slovak officials interviewed by Human Rights Watch (HRW), people claiming protection do not know, in most cases, that they have to explicitly

utter the word ‘asylum’ when interrogated.<sup>777</sup> But even using the word ‘asylum’, summary removal from Slovakia is not automatically out of the question, given that the system of access to asylum procedures remains very defective. There is no individual assessment of each returnee’s identity and status, interpreters and lawyers are not provided to assist the returnees, and there is no way to challenge the decision to return.<sup>778</sup>

Such a practice of informal removal is mainly due to a deficiency of the domestic asylum system and of the procedural guarantees toward refugees, rather than to the existence of specific provisions within the bilateral agreement with Ukraine expressly authorizing the readmission of asylum seekers.<sup>779</sup> Similarly, Poland almost automatically implements its readmission agreement with Ukraine by sending back all migrants and asylum seekers who have irregularly crossed the Polish border, even if they have transited through other States.<sup>780</sup> But Ukraine does not possess the legal and policy

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<sup>777</sup> HRW, *Ukraine on the Margins: Background Migration Trends in Ukraine*, Research Paper, New York, 29 November 2005 <<http://www.hrw.org/en/node/11521/section/4>> accessed 2 May 2013 (HRW 2005b).

<sup>778</sup> HRW 2005b.

<sup>779</sup> On the deterioration of human rights in Ukraine, in particular with regard to refugees, see, High Representative of the EU for Foreign Affairs and Security Policy, *Implementation of the European Neighbourhood Policy in Ukraine Progress in 2011 and Recommendations for Action*, SWD(2012) 124 final, Joint Staff Working Document, 15 May 2012 <[http://ec.europa.eu/world/enp/docs/2012\\_enp\\_pack/progress\\_report\\_ukraine\\_en.pdf](http://ec.europa.eu/world/enp/docs/2012_enp_pack/progress_report_ukraine_en.pdf)> accessed 2 May 2013.

<sup>780</sup> HRW 2005b.

framework necessary for receiving a high number of migrants and ensuring access to asylum procedures. For instance, as denounced by Ukrainian lawyers, the asylum applications of six Somali asylum seekers, sent back to Ukraine from Poland (although they entered Poland from Belarus), were rejected by the Ukrainian Committee on Nationalities and Migration on the ground that they should have claimed asylum in Poland.<sup>781</sup>

By the same token, a group of nine Chinese individuals, transferred from Poland to Ukraine by means of the existing readmission agreement, were detained for months, subject to ill-treatment, sexual harassment, and seizure of their belongings by Ukrainian guards without receipt. Deprived also of their right to apply for asylum, most of them desperately asked to return home.<sup>782</sup> Thus, some argue that Ukraine, country of transit for migrants and refugees attempting to enter the EU from East, ‘runs the risk of becoming a centre for *refoulement* for Europe’s refugees [and] asylum seekers.’<sup>783</sup>

To give another example, on 26 October 2010, Italy implemented its readmission agreement with Egypt by returning 68 migrants claiming to be Palestinian refugees. They were sent back on a charter

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<sup>781</sup> HRW interview with Natalia Dulnyieva and Svitlana Marintsova, *Human Rights Have No Borders*, Lviv, Ukraine, 18 April 2005 <[http://www.hrw.org/reports/2005/ukraine1105/3.htm#\\_ftnref51](http://www.hrw.org/reports/2005/ukraine1105/3.htm#_ftnref51)> accessed 2 May 2013 (HRW 2005c).

<sup>782</sup> HRW 2005c.

<sup>783</sup> HRW 2005c.

flight to Cairo without being given the possibility of lodging an asylum application. An Egyptian consular official was even present at Catania's airport for identifying her own nationals.<sup>784</sup> The text of the 2007 agreement between Italy and Egypt does not provide for accelerated procedures of identification and readmission.<sup>785</sup> Moreover, it contains a non-affection clause requiring the two involved States to comply with international human rights treaties and the Geneva Convention.<sup>786</sup> Therefore, swift practices of identification and return resulted from an informal implementation of the agreement itself within the framework of patterns of border control in dissonance with well-established rules of international and European law.

On the basis of a MoU signed with the UNHCR in 1954, Egypt has entrusted the UN Agency with the examination of all asylum applications in the country. However, Egyptian officers often deny the UNHCR access to detention camps where migrants and people willing to apply for refugee status are confined. On several occasions – in 2008, 2009, and 2011 – Egyptian guards have also forced Eritrean

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<sup>784</sup> See details on the case, in Fulvio Vassallo Paleologo, *Eritrei – Respinti dall'Italia, Espulsi dalla Libia, Sequestrati in Egitto*, Meltingpot, 6 December 2010 <<http://www.meltingpot.org/articolo16080.html>> accessed 2 May 2013.

<sup>785</sup> *Cooperation Agreement in the field of readmission between Italy and Egypt*, Rome, 9 January 2007. Under Article 2(2), the time limits incumbent upon the requested party to reply to a readmission request range from 7 days (when nationality is ascertained) to 21 days (when nationality is presumed).

<sup>786</sup> Article 11(1) of the 2007 readmission agreement between Italy and Egypt provides that: 'The provisions of this Agreement shall not affect the Contracting Parties' rights and duties under: international law, and in particular human rights treaties; the Convention Relating to the Status of Refugees, done at Geneva on 28 July 1951 and its 1967 Protocol; any international agreement on extradition.'

refugees to sign documents for their ‘voluntary’ return to their country of origin where they would suffer persecution as deserters from the army.<sup>787</sup> In September 2013, two Syrian refugees were killed by Egyptian coastguards while trying to flee the country by boat. As denounced by international media and human rights organizations, Egypt is not a safe country for thousands of Syrian refugees who are subject to a campaign of persecution and harassment, resulting also in detention and repatriation to their country of origin devastated by a violent civil war.<sup>788</sup>

In 2011, masses of undocumented migrants and refugees, following the upheavals in North Africa, landed in Italy in disarray. As denounced by several NGOs, a large number of these individuals, especially Tunisians, were denied access to Eurodac and to the informative mechanisms offered by UNHCR.<sup>789</sup> They were confined for a long time in either overcrowded detention centres or on board of

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<sup>787</sup> For example, on 29 October 2011, 118 men, including 40 persons who had already obtained refugee status were beaten at the al-Shalal prison in Aswan to oblige them to sign the repatriation papers. See HRW, *Egypt: Don't Deport Eritreans*, 15 November 2011 <<http://www.hrw.org/news/2011/11/15/egypt-don-t-deport-eritreans>> accessed 2 May 2013.

<sup>788</sup> See, e.g., the following websites: <<http://www.aljazeera.com/news/middleeast/2013/09/201391893140911980.html>>; <[http://articles.washingtonpost.com/2013-09-07/world/41854801\\_1\\_syrian-refugees-muslim-brotherhood-bilal](http://articles.washingtonpost.com/2013-09-07/world/41854801_1_syrian-refugees-muslim-brotherhood-bilal)>; <[http://www.repubblica.it/solidarieta/2013/09/19/news/egitto\\_guardia\\_costiera\\_spar\\_a\\_su\\_barca\\_di\\_rifugiati\\_siriani\\_diretta\\_verso\\_l\\_italia-66861534/?ref=HREC2-7](http://www.repubblica.it/solidarieta/2013/09/19/news/egitto_guardia_costiera_spar_a_su_barca_di_rifugiati_siriani_diretta_verso_l_italia-66861534/?ref=HREC2-7)> accessed 19 September 2013.

<sup>789</sup> See, e.g., UNHCR, IOM and Save the Children Italy Press Release, *Le Organizzazioni Umanitarie chiedono di incontrare i migranti egiziani e tunisini che sbarcano sulle coste italiane*, 30 Aprile 2013; UNHCR, *Recommendations on Important Aspects of refugee Protection in Italy* (July 2013) 3 <<http://www.refworld.org/docid/522f0efe4.html>> accessed 4 September 2013.

ships,<sup>790</sup> subjected to summary identification procedures by their consular officials, or rapidly expelled to their countries of origin beyond any standards envisaged by the EU Asylum Directives, the Return Directive, or bilateral readmission agreements.<sup>791</sup> As denounced by *Fortress Europe*, in 2011, 3,592 individuals were repatriated to Tunisia and 965 to Egypt in the name of the efficiency required by the implementation of the readmission agreements between Italy and the two relevant North-African countries.<sup>792</sup> For example, since the start of 2011, 183 persons have been speedily repatriated to Egypt, a few hours after their arrival in Italy.<sup>793</sup> Although the Schengen Border Code (SBC) and the Return Directive

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<sup>790</sup> Nearly 600 Tunisians have been detained on board two ships in the harbour of Palermo and Porto Empedocle. See, Migrants at Sea, *Italy Continues Shipboard Detention of Hundreds of Tunisians*, 28 September 2011 <<http://migrantsatsea.wordpress.com/2011/09/28/italy-continues-shipboard-detention-of-hundreds-of-tunisians/>?> accessed 2 May 2013.

<sup>791</sup> Statement by an UNHCR official (personal communication, 1 September 2011). See also, Associazione per gli Studi Giuridici sull'Immigrazione (ASGI), *Grave preoccupazione per le continue violazioni del diritto nei riguardi degli stranieri respinti, espulsi, o trattenuti nei CIE, dei richiedenti asilo e dei lavoratori stranieri*, 12 August 2011, <[http://www.asgi.it/public/parser\\_download/save/1\\_asgicomunicati.12811.pdf](http://www.asgi.it/public/parser_download/save/1_asgicomunicati.12811.pdf)> accessed 2 May 2013.

<sup>792</sup> See, Fortress Europe, *Espulsi 3,592 tunisini, nei Cie tornerà la calma?* (1 November 2011) <<http://fortresseurope.blogspot.com/2011/11/espulsi-3592-tunisini-nei-cie-tornera.html>> accessed 2 May 2013. For an overview on the state of irregular migration in Italy, see Elisa Fornalé, 'The European Returns Policy and the Re-Shaping of the National: Reflections on the Role of Domestic Courts' (2012) 31(4) RSQ 144–6.

<sup>793</sup> Similarly, undocumented migrants (and potential asylum seekers) have been expeditiously repatriated through charter flights on 22 April from Catania (19 people), on 23 April from Trieste (20), on 26 April from Bari (54) and on 27 April from Lamezia Terme (40). See, Yasha Maccanico, *The EU's Self-Interested Response to Unrest in North Africa: the Meaning of Treaties and Readmission Agreements between Italy and North African States*, Statewatch, January 2012, 6 <<http://www.statewatch.org/analyses/no-165-eu-north-africa.pdf>> accessed 2 May 2013.



require notification of expulsion decisions, a majority of migrants are not been notified about the removal order or the location to which they are being sent. In addition, they were not given any chance to challenge the return decision and to suspend execution of the expulsion.

Cursory readmission procedures have been provided by both the 1998 Exchange of Notes between Italy and Tunisia on the entry and stay of nationals of the two countries, and their 2009 bilateral accord on the readmission of third-country nationals without a stay permit.<sup>794</sup> Nevertheless, States are still required to execute these accelerated procedures in accordance with international and European human rights law, as well as refugee law. Otherwise, there exists a deficiency in the domestic system of admission and readmission; and this constitutes the starting point for any possible reform initiatives. Readmission agreements are not the *per se* cause of informal border practices, but they are executed in a context of structural protection deficiency. The existence of a readmission agreement may therefore amplify the presumption of the requesting State that it will obtain the full cooperation of the requested country – with which it has established positive relations in many other areas related to readmission – regardless of the status of the removed person. This

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<sup>794</sup>*Exchange of Notes between Italy and Tunisia on the Readmission of Persons in Irregular Position*, Rome, 4 August 1998; Readmission Agreement between Italy and Tunisia, 28 January 2009.

becomes particularly glaring when a self-proclaimed state of emergency ‘imposes’ agile, rapid, and informal return practices to face mass arrivals of displaced people. Consequences for asylum seekers are predictable.

A pertinent example regards the new unpublished agreement signed on 5 April 2011 between Italy and Tunisia. The accord contains provisions to accelerate the readmission of unwanted migrants without formalities after the identification by a consular official, or after a cursory reconstruction of nationality (which in practice was also performed on the basis of both the westerly provenance in respect to Lampedusa, and the somatic traits of migrants).<sup>795</sup> The existence of good relations between requesting and requested States – consecrated in the negotiation of such an informal and unpublished readmission agreement – is considered sufficient to expel people, regardless of the unstable social, political, and economic situation in their home countries. Therefore, the fast-track procedures of identification provided by the agreement allow for the summary and collective expulsion of groups of the same nationality.

As asserted by the former Italian Ministry of the Interior, ‘those

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<sup>795</sup> Martina Tazzioli, ‘Cronologia degli Accordi Italia-Tunisia’ *Storie Migranti*, December 2011 <<http://www.storiemigranti.org/spip.php?article1004>> accessed 2 May 2013. From 1 to 21 August 2011, 4,637 people arrived in Lampedusa from Libya, while 497 came from Tunisia. See, Raffaella Cosentino, *Respingimenti in Atto da Mesi sulla Rotta Tunisia-Lampedusa*, Terrelibere.org, 2011 <<http://www.terrelibere.org/4318-respingimenti-in-atto-da-mesi-sulla-rotta-tunisia-lampedusa>> accessed 2 May 2013.

who come from Tunisia are economic migrants, who do not have the requirements to be considered refugees or asylum seekers.<sup>796</sup> In this vein, readmission agreements have been invoked by representatives of the Ministry of the Interiors to solicit Italian judges to validate accelerated measures of forced return in the absence of the traditional set of safeguards offered by the domestic system.<sup>797</sup>

It should also be noted that readmission agreements generally establish that their implementation shall not affect the contracting parties' duties under other readmission or transit conveyance accords on the removal of persons.<sup>798</sup> Such a clause implies the risk of Contracting Parties not being obliged to apply the standard readmission treaty. They can use further formal or informal cooperation arrangements to expel unauthorized migrants and asylum seekers, such as MoUs, Exchange of Letters, as well as *ad hoc* Exchanges of Notes between diplomatic or consular authorities. These instruments do not generally contain the same safeguards of

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<sup>796</sup> Audizione del Ministro dell'Interno, Roberto Maroni, sui recenti sviluppi degli eccezionali flussi migratori dalla Tunisia e dalla Libia e sulle iniziative che il Governo intende assumere in materia di immigrazione, 12 April 2011, <[http://www.interno.it/mininterno/export/sites/default/it/assets/files/21/0983\\_Audizione\\_Ministro\\_I\\_e\\_III\\_Com\\_Camera\\_flussi\\_migratori.pdf](http://www.interno.it/mininterno/export/sites/default/it/assets/files/21/0983_Audizione_Ministro_I_e_III_Com_Camera_flussi_migratori.pdf)> accessed 2 May 2013. See also, Maccanico 2012, 7.

<sup>797</sup> See Fulvio Vassallo Paleologo, 'Accordi di riammissione e diritto di polizia' *Il Lavoro Culturale*, 3 February 2012 <<http://www.lavoroculturale.org/asylum-1-accordi-di-riammissione-e-diritto-di-polizia/>> accessed 2 May 2013.

<sup>798</sup> See e.g., Article 21 of the Agreement between the UK and Albania on the Readmission of Persons, Tirana, 14 October 2003; Article 21 of the Agreement between the UK and Bulgaria on the readmission of Persons, Sofia, 21 February 2003; Article 11 of the Agreement between Italy and Albania on the readmission of people at the frontier, Tirana, 18 November 1997.

readmission agreements, and are also not subjected to public scrutiny and monitoring.<sup>799</sup>

**5.9. Protecting human rights through readmission agreements: which ‘carrots’ and ‘sticks’ for requesting and requested States?**

Whilst Section 5.7 outlined non-affected clauses as a proper and elegant legal technique to avoid treaty conflicts, conferring primacy to international human rights and refugee law instruments, Section 5.8 has thereupon dragged us back to the reality of informal practices of border control where refugees become even more invisible, even more vulnerable. Therefore, it remains to be asked whether there is a need to create, beyond non-affected clauses, more precise procedural human rights clauses within the text of readmission agreements.

The incorporation of non-affected clauses and procedural human rights safeguards within existing or future readmission agreements would impose upon sending States the duty to more attentively scrutinize whether asylum seekers can be involved in the readmission process without due guarantees, and to ascertain, through a monitoring mechanism, whether the readmitting State *de facto*

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<sup>799</sup> For a critique on the use of informal arrangements to readmit undocumented migrants, see, Paula Garcia Andrade, ‘La Dimension Externe de la Politique Migratoire de l’UE: un Bilan au travers de ses Instruments’ in M. Dony (ed), *La Dimension Externe de l’Espace de Liberté, de Sécurité et de Justice au Lendemain de Lisbonne et de Stockholm: un Bilan à Mi-parcours* (Éditions de l’Université de Bruxelles 2012).

complies with agreed standards of refugee protection.

At this point, however, the reader would ask: first, why should requesting and requested States tie their hands by agreeing to more stringent procedural human rights clauses requiring monitoring and compliance with refugee law standards? Second, what incentives might requesting States have in seeking the termination or suspension of a readmission agreement as a consequence of human rights violations? These questions hint at the political costs of a drafting process aimed to supplement the content of readmission agreements with procedural human rights clauses. Regrettably, the answers given will be nothing but the outcome of a – sometimes unbalanced – trade-off where no ‘right’ solution can be smoothly proffered that would serve to accommodate the diverging interests of two different and competing actors.

### ***5.9.1. Requested States***

Readmission amounts to a bilateral cooperation based on asymmetric costs and benefits where requesting and requested States clearly share different interests. Despite the fact that readmission agreements are in principle framed on grounds of reciprocity, they are *de facto* founded on *unbalanced reciprocities* mostly biased in favor

of the sending States' interests.<sup>800</sup> It means that their mutual obligations cannot apply equally to both parties. Indeed, the implementation of these arrangements has a different impact for the populations, the economy, the structural institutional and legal capacity of the two involved countries, in terms of enforcement of readmission decisions, reception of migrants, and compliance with human rights and refugee law, as required by non-affectation clauses. Thus, to compensate for the unbalanced reciprocities underlying the cooperation on readmission and removal, the conclusion of readmission agreements is always motivated by expected benefits that are however differently perceived by the two parties.<sup>801</sup>

Far from being an end in itself, readmission agreements are generally used to enhance cooperation in other strategic areas, such as labour quotas, development aid, special trade concessions, visa facilitations or the lifting of visa requirements, financial assistance, police cooperation, border security, or the construction of reception capacity in readmitting countries that generally lack the administrative and legal background as well as the infrastructure to receive

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<sup>800</sup>Jean-Pierre Cassarino, 'Dealing with Unbalanced Reciprocities: Cooperation on Readmission and Implications' in Jean-Pierre Cassarino (ed), *Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean Area* (Middle East Institute 2010) 4 (Cassarino 2010a).

<sup>801</sup> *ibid* 5.

immigrants and assess protection claims.<sup>802</sup> For instance, the 2007 Italy-Egypt readmission agreement was accompanied by a bilateral debt swap agreement highly beneficial for Egypt, as well as by trade concessions and temporary entry quotas for Egyptian nationals in Italy. France also conditioned the implementation of the 2005 agreements on development, science, and environment to the acceptance by Pakistan of a readmission agreement.<sup>803</sup>

A typical model of cooperation in readmission is that of Albania, which became in turn a recipient of Italian development aid and technical and military assistance. Italy and Albania signed on the same day (18 November 1997) a readmission agreement and a labour agreement setting planned quotas for Albanian workers.<sup>804</sup> Likewise, the 2006 readmission agreement between the UK and Algeria was signed in the context of tight negotiations, including such strategic issues as police cooperation, energy, and technical assistance in the war on terrorism.<sup>805</sup>

*Migration salience, geographic proximity, and incentives* have been emphasized as the three factors influencing the conclusion of

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<sup>802</sup> Coleman 2009, 68. In this regard, the Council of Europe suggests that transit countries should be assisted in organizing access to fair asylum procedures. Parliamentary Assembly CoE, para 67.

<sup>803</sup> See, Parliamentary Assembly CoE Report, para 81.

<sup>804</sup> Notwithstanding the ample pattern of bilateral exchanges, the Italian police reported a lack of cooperation from the authorities of the requested State with regard to the readmission of third country nationals that had allegedly transited through Albania before arriving in Italy. See, Chaloff 2006, 113, 115.

<sup>805</sup> Cassarino 2010a, 6–7. See also, Coleman 2009, 62–63.

standard readmission agreements.<sup>806</sup> This consideration brings contingency to the above question on why should requested States accept to bind themselves with non-affection clauses and more stringent procedural human rights clauses while performing readmission. In this respect, it could be argued that third countries tend to cooperate more efficiently when compensated. Therefore, the arsenal of expected benefits so far utilized to conclude readmission agreements might once again constitute the most powerful political and economic ‘weapons’ EU Member States have at their disposal to persuade third countries to accept the costs of readmission in compliance with human rights and refugee law standards.

### ***5.9.2. Requesting States***

After examining the *do ut des* component of readmission agreements from the readmitting country standpoint, another general question arises: what motivation the requesting State may have in endorsing the political and financial costs of more ‘individual-centred’ and ‘human rights-oriented’ treaties delineating extra reciprocal obligations for the involved States?

It should first be emphasized how the insistence on both wide-ranging priority clauses and procedural human rights clauses can

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<sup>806</sup> Cassarino 2010a, 15.



prevent (or postpone) the conclusion of further agreements with countries that possess a dismal record of human rights and democracy. In this sense, they could have an ‘anticipatory’ effect by pushing the third country to respect human rights and certain procedural safeguards toward asylum seekers before ratification is deposited. Indeed, it has been argued how ‘it is much easier to use the pending ratification of a treaty as a means of persuasion than to rely on the human rights clause after ratification [...]’<sup>807</sup>

Despite acknowledging the understandable reluctance of a requesting State to accept the burden of a drafting process that would impose additional legal ties, human rights clauses and non-affection provisions permit governments and border authorities to be confronted with ‘in law’ well-defined obligations, mostly when return decisions are taken at the border and in transit zones. As signatories of refugee and human rights law conventions, requesting States should have an obvious interest in taking all necessary measures to avoid that asylum seekers are excluded from accelerated return procedures, and, if it happens, to ensure that fundamental rights are not infringed as a consequence of a misguided removal to an unsafe third country of transit. The political costs the sending State could incur in case, for instance, of *refoulement* to a place where the asylum seeker does not have access to a fair assessment of her protection claim (thus running

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<sup>807</sup> Eibe and Will 1999, 741.

the risk, for example, of being returned to her home country) would undoubtedly be higher than the costs deriving from monitoring the readmitting State.

In this regard, Article 10(3)(b) of the Recast Procedures Directive also requires that EU Member States ensure determining authorities examining asylum applications to have access to

Precise and up-to-date information [...] obtained from various sources, such as EASO and UNHCR and relevant international human rights organisations, as to the general situation prevailing in the countries of origin of applicants and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions.<sup>808</sup>

Thus, providing for a monitoring mechanism within the framework of a readmission agreement would give substance and contextual specificity to one of the rules of the Recast Procedures Directive, thereby confirming how the supervision of the viability of safe havens in third countries has an overall beneficial impact on ‘safe third country’ policies. The cooperation of third countries is a pre-condition for the effective implementation of ‘safe third country’ exceptions,

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<sup>808</sup> Compared with Article 8(2)(b) of the 2005 Procedures Directive, Article 10(3)(b) of the Recast Procedures Directive only adds a reference to information obtained from the European Asylum Support Office.

and readmission agreements are key tools to implicitly obtain such cooperation, despite they do not usually mention asylum seekers and refugees in their text.<sup>809</sup>

From a mere State-sovereignty and migration-control perspective, the ability of a government to show that its return policy is implemented effectively can bring about a lowering in the number of irregular arrivals. Indeed, a smooth transfer of unauthorized migrants and asylum seekers to ‘safe third countries’ might send the dissuasive signal to third country nationals that obtaining permanent residence or access to asylum procedures in an EU Member State may not be that easy. At the same time, it is noteworthy that restrictive measures of border control and pre-arrival interceptions have so far hardly deterred people from migrating and fleeing their countries, even at the cost of their own life.

It should additionally be considered that making non-affected clauses and procedural human rights clauses essential elements of a readmission agreement would also be in line with Article 60(1) of the VCLT, which provides that ‘a material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.’ However, it remains to be asked what interest EU Member States – which generally play the role of sending countries – may

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<sup>809</sup> Coleman 2009, 67.

have in agreeing to suspend or terminate a treaty whose purpose is to alleviate migration pressure in their territories.

On the one hand, it can be contended that a suspension clause would turn out to be beneficial for the requested State, well aware that maintaining a situation of human rights violations in its own territory would lighten the readmission burden. On the other hand, suspending or terminating a readmission agreement *de jure* or *de facto* would strengthen the international image of the requesting State as a credible and reliable actor in the protection of human rights. It would moreover be the most perviewous alternative to obviating the damage incumbent upon both returned individuals and sending State if an unsafe removal takes place, especially when the human rights situation in the readmitting country precipitously deteriorates. In these circumstances, not only would States discredit their international standing, but they would also run the risk of engaging their international responsibility for the commission of an international wrongful act on grounds of *refoulement*.

To sum up, a handful of answers can be offered to address the question why States should accept to embark into the lengthiness of differently crafting new readmission agreements. *In primis*, in an era of treaty congestion, the insertion of non-affectation provisions stands as a bulwark against treaty conflict, and has a flywheel effect in increasing legal certainty for both governments involved in the return

process. Moreover, by making a clear manifesto of their human rights commitments within the text of readmission agreements, Contracting Parties would reinforce their image as credible players in the human rights arena, seriously committed to abiding by international obligations toward returned migrants and asylum seekers.

#### **5.10. Looking ahead: aims and functions of proposed procedural human rights clauses in readmission agreements**

The following questions are examined in this Section: beyond non-affectation clauses, is there a need to create more precise procedural human rights clauses within the text of readmission agreements? Or would this constitute a superfluous iteration by virtue of the fact that EU Member States have already agreed to be bound by human rights law? Would these *provisions* impose obligations upon States, beyond those already binding them under customary and treaty law?

The system of protection of refugee rights within the text of bilateral readmission agreements is quite rudimentary. This is essentially due to the fact that they do not discipline the legal status of migrants and asylum seekers, and do not authorize the return decision. However, some of these instruments, such as the readmission agreement between the UK and Albania contain a non-affectation clause committing the parties to respect the rights of migrants in accordance with international refugee and human rights treaties.

The existence of preambular references to human rights in the text of readmission agreements is not always sufficient to reduce the risk of grave violations. Moreover, these general principles do not form part of the operative components of bilateral treaties that are essential for the achievement of the purpose and object of the agreement.<sup>810</sup> Generic mention of human rights generates only programmatic principles rather than specific obligations that could be invoked as conditions for the implementation of the treaty and for justifying its suspension in case of material breaches of the treaty itself.

My concern does not contemplate those cases where a readmission request follows an expulsion decision regularly issued by a judicial or administrative authority, or those cases where border authorities remove a person with no title to stay in the territory of the requesting State after ascertaining that no claim for asylum has been expressed and no risk of *refoulement* exists. Rather, I have an uneasy feeling about readmission agreements in two particular circumstances: first, when asylum seekers are apprehended while irregularly crossing the border, especially in situations of emergency with massive arrivals of mixed influxes and lack of adequate monitoring by NGOs, international organizations, lawyers, and media; second, when access to asylum procedures is denied to those asylum seekers who have transited through a 'safe third country' before soliciting protection

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<sup>810</sup> Eibe Riedel and Martin Will, 'Human Right Clauses in External Agreements' in Philip Alston (ed), *The EU and Human Rights* (Oxford University Press 1999) 724.

within the borders of a EU Member State.

There is no doubt that major efforts are being made to restore the structural deficiencies of the asylum and migration control systems of EU Member States. However, whereas the protection net does result in some leaks in practice, specific *procedural human rights clauses* – intended as provisions setting State duties toward returned migrants and asylum seekers – could be encompassed in the text of readmission agreements to avert, *ad residuum*, possible human rights violations in the implementation of a readmission procedure. For the purpose of this Chapter, attention is intentionally and selectively placed on asylum seekers in need of protection.

On the one hand, it can convincingly be contended that embellishing readmission agreements with clauses framing in detail State obligations with regard to the rights of returned migrants and asylum seekers could operate as a ‘window dressing.’ It would indeed give the impression that agreements are comprehensive, well-drafted, and therefore potentially exempt from further scrutiny. On the other hand, these provisions could nonetheless be an effective tool in the hands of EU Member States to require third countries (and *vice versa*) to fulfil clear procedures ensuring compliance with international human rights and refugee law standards.

Proponents of standard readmission agreements argue that such agreements are harmless, highlighting their neutrality as one of the

reasons. If these bilateral arrangements do not formally provide a legal basis for removal, and the national decision to return an asylum seeker to a ‘safe third country’ is mainly taken pursuant to the criteria set in the Recast Procedures Directive, it is also undeniable that this Directive does not create obligations for the third, readmitting State. As Costello observes, the lack of communication between the two Contracting Parties may simply ‘shift “disorder” from one arena to another.’<sup>811</sup>

It could also be contended that laying out, as a prerequisite for readmission, that third countries respect human rights and ensure access to asylum procedures would be an incentive for readmitting States not to respect such standards in order to prevent unwanted returns. The response to this argument will state the obvious: the fact that the requested party decides not to comply with human rights and refugee law standards for receiving fewer migrants and asylum seekers should warn the requesting State that its potential partner is actually not that safe for returnees. Therefore, before negotiating an agreement, sending States should ensure that receiving countries have not only ratified, but have also correctly implemented relevant international instruments concerning refugee rights. A system of regular monitoring and reports related to both the human rights situation in readmitting countries and the legal guarantees they offer

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<sup>811</sup> Costello 2005, 49.



to refugees could be useful to complement the action of the requesting parties.

#### ***5.10.1. Proposal on specific procedural human rights clauses***

Enhancing protection of asylum seekers subjected to a readmission procedure requires a comprehensive approach involving, above all, an overhaul of the EU asylum regime.<sup>812</sup> My contribution, however, is limited to scrutinizing the role readmission agreements might play in this context and propose measures that States might agree upon in a bilateral framework. Therefore, some selective and concrete ways forward for draft provisions adding extra procedural safeguards for removable refugees are sketched out as a platform for further discussion. Although these clauses derive from my examination of the agreements' text, they are in line with similar (though not identical) proposals made by the Parliamentary Assembly of the Council of Europe and the European Commission with regard to EU readmission agreements.<sup>813</sup>

Taking note of the 2011 Communication of the Commission on the evaluation of the EU readmission agreements, the Council has

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<sup>812</sup> As explained in Section 1.1 of Chapter 1, on 12 June 2013, the European Parliament voted the final adoption of the asylum package.

<sup>813</sup> Parliamentary Assembly of the Council of Europe (CoE), *Report on Readmission Agreements: a Mechanism for Returning Irregular Migrants*, Doc. 12168, 16 March 2010, para 7.3 (Parliamentary Assembly CoE Report); EC Evaluation of EU Readmission Agreements.

reasserted the importance of EU readmission agreements in order to tackle illegal immigration.<sup>814</sup> However, it did not make any explicit reference to the human rights provisions recommended by the Commission in February 2011.<sup>815</sup> Therefore, the policy debate continues to be open, as readmission agreements are a very sensitive and novel topic in EU affairs, and negotiations with certain partners, such as Russia, can be difficult to conclude.<sup>816</sup> Although the Commission's proposals have not been operationalized at the EU level yet, there is a need to make human rights part of the ordinary discourse and bilateral readmission practices of EU Member States with third countries, especially with regard to the involvement of asylum seekers and third country nationals.

A great risk exists for individuals apprehended at the border (including airports) to be returned through fast-track procedures, as provided in the text of several readmission agreements. A clause which clearly excludes individuals in need of protection from the personal scope of these bilateral instruments would be opportune, especially in chaotic situations of mass mixed influxes, where the

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<sup>814</sup> See, Council Conclusions defining the EU strategy on readmission, JHA Council meeting Luxembourg, 9 and 10 June 2011.

<sup>815</sup> On the same line also the paper presented by Presidency of the Council of the European Union entitled 'Operationalizing the Council Conclusions of 9 – 10 June 2011 defining the European Union Strategy on Readmission (doc. 5728/12 MIGR 11)' 7 March 2012.

<sup>816</sup> See, European Policy Centre, *EU Readmission Agreements: towards a more strategic EU approach that respects human rights?*, Policy Dialogue, 21 March 2012, 2 <[http://www.kbs-frb.be/uploadedfiles/kbs-frb/files/verslag/epc\\_readmissionagreements\\_210312.pdf](http://www.kbs-frb.be/uploadedfiles/kbs-frb/files/verslag/epc_readmissionagreements_210312.pdf)> accessed 2 May 2013.

rights of newly arrived migrants are be easily prejudiced. Building on a recommendation of the EU Commission regarding, however, EU readmission agreements,<sup>817</sup> the first proposed clause would appear as follows:

1) Before the Requesting Contracting Party removes the individual apprehended at the border to the territory of the Requested Contracting Party, it shall ensure that accelerated readmission procedures are conditional on the information, collected by Border Authorities, that persons seeking protection are not involved.

Readmission agreements are to be considered international treaties, setting reciprocal obligations between Contracting Parties. They are not, therefore, the suitable *loci* for EU Member States to grant an individual right to an effective remedy against an expulsion decision or a denial of asylum at first instance. The right to appeal the removal order with a suspensive effect must be established in national legislation in accordance with the ECHR and EU law, in particular the

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<sup>817</sup> Pursuant to Recommendation 10 of the EU Commission, '[p]rovisions [...] highlighting in general the importance for border guards to identify persons seeking international protection could be included in the Practical Handbook for Border Guards. A clause making the accelerated procedure conditional on such information might be also introduced in the text of the agreements.' See, EC Evaluation of EU Readmission Agreements, 12. The right to be informed at border crossing points will be strengthened by the Recast Procedures Directive.

CFR, the Return Directive, and the Recast Procedures Directive, as far as asylum seekers are concerned. Therefore, efforts should be directed toward, first, a more stringent monitoring of national police activities during frontier operations (to avoid asylum seekers being involved in cursory readmission procedures), and second, the prompt implementation by States of the Recast Procedures Directive as adopted in June 2013. The 2005 Procedures Directive does not uphold the automatic suspension of the leaving order in case of appeal.<sup>818</sup> Therefore, the overall situation will be improved once States enforce the Recast Procedures Directive at the domestic level, which provides that:

Member States shall allow applicants to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired or, when this right has been exercised within the time limit, pending the outcome of the remedy.<sup>819</sup>

Having said that, the practices of EU Member States are characterized by accelerated procedures that make it overly difficult to

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<sup>818</sup> Article 39 of the Procedures Directive provides that: ‘Member States shall, where appropriate, provide for rules in accordance with their international obligations dealing with: a) the question of whether the remedy pursuant to paragraph 1 shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome.’ For an examination of the Procedures Directive, see Tineke Strik, ‘Procedures Directive: An Overview’, in Karin Zwaan, *The Procedure Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publisher 2008) 7.

<sup>819</sup> Article 46(5) of the Recast Procedures Directive.

access effective remedies. For example, asylum seekers detained in the UK under the ‘detained fast-track procedure’ only have two working days to challenge a negative asylum decision. In Hungary, a request for judicial review must be lodged within three days if the asylum application is declared inadmissible, as is the case when a person has transited a ‘safe third country’ before claiming asylum in the destination State.<sup>820</sup>

With regard to third-country nationals more generally, Article 13(2) of the Return Directive provides that a competent judicial or administrative authority or a competent body *can* decide to temporarily suspend the enforcement of a return decision, while Member States shall always postpone removal when it would violate the principle of *non-refoulement* (Article 9(1)(a)). No reference is however made to the suspension of the execution of return and the deferral of the request for readmission in case of pending appeals against negative decisions on asylum at first instance.

Although both the Return Directive and the Recast Procedures Directive contain, to a different extent, rules on the suspensive effect of appeals,<sup>821</sup> there might be *de facto* attempts by States to informally return a person when an appeal is still pending, thereby ‘undermining

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<sup>820</sup> ECRE, ‘Obstacle course in the EU leads to unfair treatment of asylum seekers’, *ECRE Weekly Bulletin*, 6 September 2013.

<sup>821</sup> See, Article 46(5) of the Recast Procedures Directive and Articles 9 and 13(2) of the Return Directive.

legal safeguards at both the procedural and substantive level.<sup>822</sup> Indeed, the recast Procedures Directive does not provide that appeals against unfavourable asylum decisions taken in accelerated procedures have full automatic suspensive effect.<sup>823</sup> This is at odds with the jurisprudence of the ECtHR on Article 13, which, in several cases has recognized the importance of suspensive effect of expulsion/deportation orders pending appeals.<sup>824</sup> ECRE's analysis of the amended Article 46(6) is illustrative of the main obstacles regarding the access to an effective remedy under the Procedures Directive:

Essentially, in its examination of whether an appeal in those cases would have suspensive effect, the court or tribunal would begin examining the merits of the appeal, but would only later complete the examination and rule on the appeal itself. This process creates double scrutiny of the same material, burdening the already stretched judicial systems. Moreover, if the court or tribunal decided, on the basis of the preliminary assessment, that the asylum seeker need not remain in the territory, but after a full examination of the appeal concluded that the asylum seeker is nevertheless in need of international protection, the individual may have already

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<sup>822</sup> See, Byrne, Noll and Vedsted-Hansen 2002, 12.

<sup>823</sup> See Article 46(6) in conjunction with Article 31(8) of the Recast Procedure Directive.

<sup>824</sup> See, e.g., *Conka v Belgium* (2002) 32 EHRR 54; *Olaechea Chuas v Spain* App no 24668/03 (ECtHR, 10 August 2006); *Gebremedhin v France* App no 25389/05 (ECtHR, 26 April 2007) para 66; *Muminov v Russia* App no 42502/06 (ECtHR, 11 December 2008) para 101; *Abdolkani and Karimnia v Turkey* App no 30471 (ECtHR, 22 September 2009) para 108; *Baysakov and Others v Ukraine* App no 54131/08 (ECtHR, 18 February 2010) para 71; *IM v France* App no 9152/09 (ECtHR, 17 May 2011).

been returned and subjected to irreversible harm. As a result, the appeal could be disadvantaged on the basis of a rapid, incomplete assessment of the case.<sup>825</sup>

States are not obliged to halt the readmission request and its enforcement until the entire application of the asylum seeker, including the appeal, has been completed. As the Procedures Directive gives States full *discretion* to allow the asylum seeker to stay in the territory pending an appeal against an unfavourable decision taken in accelerated procedures, readmission agreements could contribute to ensure legal certainty complementing the safeguards of the Procedures Directive. They might thus be seen as the proper *loci* to reiterate the duty of border authorities to allow migrants and asylum seekers to await the outcome of their appeals before removing them to third countries.<sup>826</sup> This would be an additional, clear-cut, and residual safeguard in case States decide to either formally or informally return a person while a judicial review of an unfavourable decision at first instance is still pending.

The main purpose of readmission agreements is to speed up the process of return of irregular migrants without formalities, and on the

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<sup>825</sup> ECRE, 'Comments from the European Council on Refugees and Exiles on the Amended Commission Proposal to Recast the Asylum Procedures Directive, COM (2011)' (September 2011) 37.

<sup>826</sup> See, Parliamentary Assembly CoE Report. The European Commission has recommended that EU readmission agreements should clearly state that they can 'be applied only to persons whose return/removal has not been suspended.' See, Evaluation of EU Readmission Agreements, 12.

basis of *prima facie* valid pieces of evidence. To obviate any risk for involved asylum seekers, the second proposal – in line with the Parliamentary Assembly of the Council of Europe – would be the following:

2) The Requesting Contracting Party shall stay the request for readmission and the enforcement of readmission until the Competent Authorities have ruled on the asylum seeker's application, including the appeal.

Readmission agreements do not discipline the treatment owed to asylum seekers, given the distinction between asylum procedures and readmission procedures. However, at times, the contours of these two spheres of action can blur, especially when asylum seekers are removed to a 'safe third country' before their admission procedures have been accomplished. So far, the Recast Procedures Directive only requires that the applicant is 'admitted to the territory' of the third country, and that she is provided with a document informing the authorities of the readmitting country that her application has not been examined in its substance.<sup>827</sup> Under Article 38(4) of the Recast Procedures Directive, EU Member States are required to channel the

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<sup>827</sup> See, Article 38(3)(b) of the Recast Procedures Directive replacing Article 27(3)(b) of the 2005 Procedures Directive.



asylum seeker into asylum procedures when the requested country refuses to let her ‘*enter* its territory.’<sup>828</sup>

However, the requesting State has no obligation to take charge of the removed asylum seeker again if it is ascertained that the requested State, despite permitting admission to its territory, has subsequently prevented the applicant from accessing asylum procedures. Therefore, return should not be undertaken without the assurance – exchanged within the communication channels set up in the framework of a bilateral treaty – that the third country has *explicitly agreed* to readmit the individual concerned as an asylum seeker whose protection claim will be examined in its merits.

Beyond informing the authorities of the requested State that the asylum application of the returnee has not been examined in its substance - as provided by Article 38(3)(b) of the Recast Procedures Directive - States shall ensure that the agreement to readmit non-nationals amounts to consenting to grant access to status determination procedures pursuant to the Geneva Convention. Silence or failing to respond to the informative note sent by the requesting State should not be considered as constituting consent as to the willingness of the requested State both to readmit and provide protection.<sup>829</sup> Claiming such a high threshold would also be in line,

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<sup>828</sup> Ex Article 27(4) of the 2005 Procedures Directive.

<sup>829</sup> According to the ICJ, silence is not sufficient to express consent. See, e.g., *Kasikili v Sedudu Island (Botswana v Namibia)* [1999] ICJ Rep. 1045 and

*mutatis mutandis*, with Article 35 of the VCLT whereby ‘[a]n obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.’<sup>830</sup> Enhanced legal certainty on the rights of removed asylum seekers can thus be obtained if the requested country expressly consent in writing to the provision of international protection for the readmitted asylum seeker. ‘Informal arrangements, in so far as they are incapable of guaranteeing *de jure* the fulfilment of obligations should be deemed inappropriate.’<sup>831</sup> For instance, in *MSS v Belgium and Greece*, the ECtHR was of the opinion that:

The diplomatic assurances given by Greece to the Belgian authorities did not amount to a sufficient guarantee. It notes first of all that the agreement to take responsibility in application of the Dublin Regulation was sent by the Greek authorities after the order to leave the country had been issued, and that the expulsion order had therefore been issued solely on the basis of a tacit agreement by the Greek authorities. Secondly, it notes that the agreement document is worded in stereotyped terms and contains no guarantee concerning the applicant in person. No more did the information document [...], provided by the Greek authorities, contain

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*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia)* [2001] ICJ Rep. 575.

<sup>830</sup> Although, during the preparatory works on Article 35, the rule of ‘implied consent’ was proposed, States unanimously voted that the obligation had to be accepted ‘in writing.’ See, OR 1969 Plenary 60, paras 8, and 158, para 49.

<sup>831</sup> *ibid* 35.

any individual guarantee; it merely referred to the applicable legislation, with no relevant information about the situation in practice.<sup>832</sup>

If access to asylum procedures is denied in the third country, a readmission agreement could be a suitable instrument for imposing upon the sending State the duty of re-admitting the applicant and to granting her access to asylum procedures. Respecting the sovereignty of the third country, a monitoring system should be created to supervise the human rights situation in the readmitting State and certify whether returned asylum seekers have been effectively channelled into mechanisms of protection claims' determination.<sup>833</sup> However, it is not clear what composition such a supervisory committee could have. Suggestions may range from diplomatic officers working at the embassies to NGOs and parliamentary delegations from international organizations.<sup>834</sup> Therefore, summarizing the points above, the third proposed clause can be formulated as follows:

3) If the person who is the subject of readmission is an asylum

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<sup>832</sup> *MSS v Belgium and Greece*, para 354.

<sup>833</sup> For example, the EU Commission recommends the setting up of a 'post-return' monitoring mechanism in the readmitting countries with a view of gathering information about the human rights situation of persons (especially third country nationals) after their readmission procedure is completed. See, EC Evaluation of EU Readmission Agreements, 13–14.

<sup>834</sup> Parliamentary Assembly CoE Report, paras 74–75.

seeker whose protection claim has not been examined on its merits before removal, the following conditions shall apply:

a) The reply to the request for readmission provided by the Competent Authorities of the Requested Contracting Party shall contain a confirmation in writing that the individual concerned is an asylum seeker, and that the substance of his/her protection claim will be thoroughly examined.

b) The Competent Authorities of the Requesting Contracting Party shall ensure that the Requested Contracting Party guarantees access to asylum procedures. If such an access is denied, the persons taken in charge shall be readmitted by the Requesting Contracting Party without formality and sent through the normal asylum channels. A monitoring Committee shall be created for this purpose.

Finally, a ‘suspension clause’ with reciprocal effects could be activated where there are persistent human rights violations and risks for the readmitted persons in the third country concerned.<sup>835</sup> While the Italy-Albania readmission agreement does not have a suspension provision, Article 25(2)(3) of the UK agreement with Albania affirms in sweeping terms that each Contracting Party shall terminate or suspend the agreement by giving notification in writing to the other

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<sup>835</sup> See, Evaluation of EU Readmission Agreements, 12. Of the same opinion, also Panizzon 2012, 132.

party *on important grounds*. Whether infringement of human rights in the readmitting country is to be conceived of as a possible precondition for treaty suspension is not clear, but such a possibility is not excluded. Therefore, in light of the foregoing, the fourth proposed clause, drafted in more specific terms, could be the following:

4) Each Contracting Party may either suspend or terminate the Agreement on important grounds, which include the deterioration of human rights in the territory of the Requested Contracting Party.

*5.10.2. Non-affected clauses and procedural human rights clauses: added value or mere reiteration of internationally recognized standards?*

EU Member States are embedded in a thick web of human rights norms binding them at universal and regional level. This might seemingly induce scholars and practitioners dealing with readmission agreements to consider any further insertion of non-affected clauses or extra legal safeguards for asylum seekers a superfluous duplication.

To address these arguments, it can first be pointed out that procedural human rights clauses and non-affected provisions create positive obligations upon both EU Member States and third countries towards individuals subjected to a removal decision, including asylum

seekers. The imposition of such safeguards for readmitted asylum seekers upon the readmitting country could arguably be inducing EU Member States to further transfer their refugee responsibilities to a ‘safe third country’ well beyond borders. However, this would overlook the fact that EU Member States are already entitled to declare an asylum application inadmissible upon a ‘safe third country’ exception by virtue of the Recast Procedures Directive.<sup>836</sup> For so doing, they have to verify the human rights situation in the readmitting country and abide to a number of safeguards when removing an asylum seeker.<sup>837</sup> Therefore, an increase of transfers is not the most likely outcome of new procedural safeguards, especially if considering that individuals might eventually be re-admitted by the sending State if the receiving country *de facto* denies access to asylum procedures.

Previously contracted refugee and human rights law obligations are a key benchmark for States cooperating in the readmission of asylum seekers. As such, States shall abide by them even when implementing a joint migration control arrangement, which somehow restricts the liberty of the individual concerned. Nonetheless, it is crucially important to highlight that both EU Member States and non-EU third countries are not always bound by the same human rights instruments,

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<sup>836</sup> Article 33(2)(c) of the Recast Procedures Directive (ex Article 25(2)(c) of the 2005 Procedures Directive).

<sup>837</sup> Article 38 of the Recast Procedures Directive (Article 27 of the 2005 Procedures Directive).

particularly with regard to the EU *acquis communautaire*. As practice shows, third countries do not always offer the same legal safeguards granted by EU Member States. Moreover, the jurisdictional reach of EU supranational judges will be limited in cases involving violations of fundamental rights that are committed far away from the EU borders. In this view, readmission agreements should instead contain a clause whereby parties commit themselves to treat third country nationals in compliance with international human rights and refugee law. If, then, the readmitting country has not ratified the key international human rights instruments, the inclusion of precise obligations for the two Contracting Parties with regard to the rights of refugees and third-country nationals is recommended. Whereas these clauses could be a replication for EU Member States (but it is not necessarily so), they might also constitute a fundamental benchmark for third countries, especially when they readmit asylum seekers who have only been transferred on a ‘safe third country’ ground.

Asylum seekers who are scheduled to be transferred pursuant to a ‘safe third country’ exception (therefore not on substantive grounds) remain ‘presumptive’ refugees. However, while *non-refoulement* obligations continue to apply to them, they are also treated as unauthorized residents with no right to freely circulate in the territory of the EU. Shifting *de facto* ‘from the status of victim (the basis of humanitarian action) to that of illegal immigrant (the basis of police

action)',<sup>838</sup> they are returned, like fully-fledged irregular migrants, to a third-transit country under the terms of a readmission agreement. The proposed obligation for the requesting State to ascertain that the readmitting country effectively ensures access to asylum procedures is thus hailed as an additional safeguard.

Elaboration (or reiteration) of State obligations regarding asylum seekers could be instructive for a host of other reasons. First, it increases legal certainty for both applicants and governments involved in the return of irregular migrants, and permits frontier authorities to be confronted with well-defined international obligations and enforcement procedures, mostly when return decisions are taken at the border and in transit zones. Since transfer treaties always involve a limitation of rights, the agreement itself should be 'in law.'<sup>839</sup> A formal and transparent treaty is the necessary platform for two States that reciprocally decide to limit rights in compliance with the international standards they have accepted.

As a second motive, reiterating procedural human rights obligations is relevant mostly for those norms that do not have a customary status or that cannot expressly be derived from the text of international human rights and refugee law treaties. For instance,

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<sup>838</sup> Michel Agier, 'Forced Migration and Asylum: Stateless Citizens Today' in Cedric Audebert and Mohamed Kamel Dorai (eds), *Migration in a Globalized World: New Research Issues and Prospects* (Amsterdam University Press 2010) 186.

<sup>839</sup> Thomas Clark and François Crépeau, 'Human Rights in Asylum Sharing and Other Human Transfer Agreements' (2004) 22(2) NQHR 232.



access to asylum procedures does not amount to widely accepted right under positive law,<sup>840</sup> and its normative content is partly construed by judges. If the 1951 Geneva Convention does not explicitly require States to guarantee fair access to refugee status determination procedures, it is also true that depriving asylum seekers of an individual examination of their personal condition would expose them to the risk of *refoulement*, thereby undermining the object and purpose of the Convention.<sup>841</sup> The jurisprudence of human rights bodies has thus recognized the existence of an implicit right to access fair and effective asylum procedures.<sup>842</sup> The content of readmission agreements and other transfer arrangements would therefore not only be in line with international human rights and refugee law, but also with the relevant corresponding standards developed by the case law

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<sup>840</sup> A different and wider regime of protection is offered by the EU CFR, which expressly confers a right to asylum (Article 18). See Maria-Teresa Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law' (2008) 27 RSQ 33.

<sup>841</sup> The correlation between the right to access asylum procedures and the principle of *non-refoulement* has been discussed in Chapter 3 of this thesis.

<sup>842</sup> In the following cases, the ECtHR requires States to ensure access to effective scrutiny of asylum applications before removing a person to a third country. See, e.g., *Jabari v Turkey* App no 40035/98 (ECtHR, 1 July 2000) para 39; *MSS v Belgium and Greece* (2011) 53 EHRR 2; *Abdolkhani and Karimnia v Turkey*, App no 30471/08 (ECtHR, 22 September 2009); *ZNS v Turkey* App no 21896/08 (ECtHR, 19 January 2010); *Amuur v France* (1996) 22 EHRR 533; *Hirsi Jamaa and Others v Italy* App no 27765/09 (23 February 2012). For a review of the jurisprudence of the ECtHR concerning the right to access asylum procedures, see, *inter alia*, Mariagiulia Giuffrè, 'Watered-Down Rights on the High Seas: *Hirsi Jamaa and Others v Italy*' (2012) 61(3) ICLQ 728; Violeta Moreno-Lax, 'Dismantling the Dublin System: *MSS v Belgium and Greece*' (2012) 14 EJML 1 (Moreno-Lax 2012b); Costello 2012. For a wider review of the right to access asylum procedures before removal, see, Chapter 3 of this thesis.

of human rights bodies and courts.<sup>843</sup>

Human rights procedural clauses will not be the panacea because of the remaining flaws associated with any return process, especially when asylum seekers are involved. Readmission agreements are flexible instruments giving a high level of discretion to governments in determining whether and how to implement removals. However, the fact that they do not reflect specific obligations on refugee rights risks either maintaining procedural national differences or lowering current protection levels below international human rights law standards. Non-affectation provisions and procedural human rights clauses – setting uniform standards – might therefore be an added value.

#### **5.11. Readmission agreements and access to protection: concluding remarks**

This Chapter carried out a broad examination of standard readmission agreements depicted as administrative instruments aiming to create a legal framework for forced return. A first finding is that general international law only provides the legal basis for a State's obligation to readmit its own nationals. Instead, treaty law, and

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<sup>843</sup> Clark and Crépeau 2004, 239.

more specifically, readmission agreements, are the instruments that establish an obligation to readmit third country nationals.

Placing interstate readmission agreements under the umbrella of the EU readmission policy, it is important to observe that the Lisbon Treaty does not bestow upon the Union the exclusive power of negotiating readmission agreements, since the ‘Area of Freedom, Security and Justice’ pertains to the field of shared competence grounded on the principle of ‘sincere cooperation.’<sup>844</sup> A Member State can carry on with the negotiation of a bilateral readmission arrangement only if the EU has not already stipulated a treaty with the concerned third State or has not concluded a mandate for negotiating such an agreement. Exceptions include cases in which Member States require more detailed arrangements to compensate a EU agreement or a negotiating mandate containing only general statements.

Human rights concerns have been expressed in respect to the connection of interstate readmission agreements with both ‘safe third country’ practices and the usage of accelerated procedures for returning unauthorized migrants apprehended at the EU borders. Nonetheless, this Chapter convened with Coleman that the text of readmission agreements is not *per se* incompatible with refugee rights. The legal status of asylum seekers is indeed regulated in an initial phase following their arrival in the territory of one of the EU

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<sup>844</sup> See, Article 4(3) of the TEU.

Member States. Bilateral readmission agreements hold only a subsidiary function aimed at enabling return to the country of origin or transit of all those people whose protection claims have already been rejected in accordance with the EU Recast Procedures and Qualification Directives.

Nonetheless, in situations of informal border controls and massive arrivals of migrants and refugees where monitoring is generally lacking, the implementation of a readmission agreement may contribute to hamper access of asylum seekers to protection. *Refoulement* can thus occur as a consequence of accelerated return mechanisms jeopardizing the right to access both asylum procedures and effective remedies. Moreover, there is a risk for asylum seekers who have transited through ‘safe third countries’ to be removed by means of a readmission agreement. This warrants the inclusion of saving clauses and reciprocal procedural obligations that add additional safeguards for refugees without altering the scope and objective of the accords, which are clearly aimed at expediting the return of irregular migrants to countries of origin or transit. Thus, without any aim to provide an exhaustive response to the refugee rights-related problems arising from the implementation of readmission agreements, some proposals of draft provisions are brought forward as a springboard for further debate among legal scholars and policy-makers.

Despite recognizing the costs, especially for the requesting State, deriving from a new drafting process that gives centrality to human rights, the alternative of incurring in international responsibility for violating the *non-refoulement* obligation following the implementation of a readmission agreement would definitively be more troubling. On the whole, the development and improvement of non-affectation clauses and itemized procedural human rights clauses within the text of bilateral readmission agreements should be positively considered if we want to see them acting as effective conditionality tools.

In view of a coherent and solid regime of readmission, foremost importance is attached to States' compliance with existing norms of international refugee and European human rights law as well as EU law asylum procedures. Nonetheless, when States fail to act within such a well-established legal framework, the procedural safeguards of readmission agreements might offer a residual and complementary protection to removed asylum seekers. Beyond enhancing legal certainty for governments and frontier authorities, they would moreover present the advantage of making fundamental rights part of ordinary business and bilateral cooperation, rather than principles merely subject to specialized human rights instruments,<sup>845</sup> thereby

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<sup>845</sup> Esa Paasivirta, 'Human Rights, Diplomacy and Sanctions: Aspects to 'Human Rights Clauses' in the External Agreements of the European Union' in Jarna Petman and Jan Klabbers (eds), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Brill Publishing 2003) 157.

emphasising the implicit acceptance by both parties, during return operations, of a 'human rights *acquis*.'

## Chapter 6. Negotiating Rights and Diplomatic Assurances under Memoranda of Understanding

### 6.1. Introduction

Over the last decade, EU Member States have repatriated a notable number of individuals, considered threats to the public safety of the host country, after receiving diplomatic assurances by the country of origin concerning the treatment of the returnees.<sup>846</sup> Particularly interesting for the purpose of this thesis is the case of the UK. Indeed, the idiosyncratic response of the UK to terrorism has resulted in the negotiation with third countries of Memoranda of Understanding (MoUs), written accords that enumerate a long list of assurances dictating standards of fair and humane treatment to be afforded to the returnees. MoUs stand, therefore, as framework agreements reflecting a mutual understanding on respect of human rights in every case of removal.

Some terminological clarifications are needed to avoid overlaps among concepts that are very similar and often interchangeably used in the literature. *Diplomatic Assurances* can take a variety of forms. In the context of the transfer of a person from one State to

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<sup>846</sup> See, Section 6.4 for an extensive review of State practice, including case law of national and international human rights bodies.

another, this shorthand term:

Refers to an undertaking by the receiving State to the effect that the person concerned will be treated in accordance with conditions set by the sending State or, more generally, in keeping with its human rights obligations under international law.<sup>847</sup>

Diplomatic assurances are generally exchanged between the sending and the readmitting States in the field of extradition or migration control, and may include, *inter alia*, MoUs, Exchanges of Letters, *Notes Verbales*, or *Aides-Mémoire*. Assurances are usually issued by the Embassy or the Ministry of Foreign Affairs of the requested State and addressed to the requesting country in charge of sending the individual back to her country of origin. In extradition cases, judicial bodies also provide additional guarantees.

*Diplomatic assurances* are herein considered the overarching category within which *MoUs* and *individualized diplomatic assurances* form sub-categories. MoUs are blanket agreements on the treatment of the deportees signed with some countries before an emergency arises. *Individualized diplomatic assurances*, instead, are case-by-case accords negotiated either independently, in relation to a

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<sup>847</sup> UNHCR, 'Note on Diplomatic Assurances and International Refugee Protection' (Geneva, August 2006) 2.



certain person to be removed, or under a MoU with regard to specific individuals after an emergency arises. In the following sections, the terms assurances and individualized assurances are at times used interchangeably.

After the September 11<sup>th</sup> attacks, MoUs have been utilized to frame migration control as a national security objective, thus stressing the commitment of governments to protect their citizens' safety from foreigners often suspected of exploiting the Geneva Convention to obtain residence abroad.<sup>848</sup> Diplomatic assurances have thus been applied to refugees who are considered a threat to the security of the host country and removed under Article 33(2) of the Geneva Convention, according to which the benefits of *non-refoulement*:

May not [...] be claimed by a refugee for 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.

Another category of individuals subject to deportation with assurances includes those individuals who are suspected of being involved in terrorist activities and *ab initio* excluded from the

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<sup>848</sup> See, Elspeth Guild, *Security and Migration in the 21<sup>st</sup> Century* (Polity Press 2009).

protection of the Geneva Convention under Article 1(f).<sup>849</sup> Failing to qualify for refugee status, but sheltered from removal under international human rights law due to the risk of undergoing inhuman treatment in their country of origin,<sup>850</sup> they end up to be trapped in a legal and ‘status’ limbo. Diplomatic assurances have, thus, been used to facilitate their transfer to third countries in a legally sustainable fashion.

This leads to an urgency to accommodate diplomatic assurances within the broader plastic body of a thesis aimed at painting as complete a picture as possible of the diverse typologies of written bilateral agreements linked to the readmission of undocumented

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<sup>849</sup> Article 1(f) of the Geneva Convention reads as follows: ‘The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.’

Burgeoning literature has been produced on exclusion from refugee status. See, *inter alia*, James C Simeon, ‘Complicity and Culpability and the Exclusion of Terrorists from Convention Refugee Status Post-9/11’ (2010) RSQ 29(4) 104; Elspeth Guild and Madeline Garlick, ‘Refugee Protection, Counter-Terrorism, and Exclusion in the European Union’ (2010) RSQ 29(4) 63; Thomas Straub, ‘The Criminal Refugee: The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law’ (2012) IJRL 24(4) 892; Jennifer Bond, ‘Excluding Justice: The Dangerous Intersection between Refugee Claims, Criminal Law, and ‘Guilty’ Asylum Seekers’ (2012) IJRL 24(1) 37; Satvinder Singh Juss, ‘Complicity, Exclusion, and the “Unworthy” in Refugee Law’ (2012) RSQ 31(3) 1; Satvinder Singh Juss ‘Terrorism and the Exclusion of Refugee Status in the UK’ (2012) *Journal of Conflict and Security Law* 17(3) 465.

<sup>850</sup> Pursuant to Article 3(1) of the CAT, ‘No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.’ The UN Human Rights Committee (HRC) and the European Court of Human Rights (ECtHR) have implicitly derived the prohibition of *refoulement* from the prohibition of torture enshrined in Article 7 and Article 3 of the relevant treaties, respectively.

migrants. In particular, the goal of this Chapter is to investigate whether the implementation of diplomatic assurances – whether negotiated independently or in the framework of a MoU - may hamper refugees’ access to protection: the combination of *non-refoulement*, and the individual’s right to access asylum procedures and effective remedies before removal.

In a climate in which migrants are perceived as external threats to national stability, the real danger is that States unduly emphasize uncertain and flexible national security interests to the detriment of the protection of individuals’ fundamental rights.<sup>851</sup> The risks are even higher for refugees and asylum seekers. For example, adopting a migration law rather than a criminal law regime, an asylum seeker may be excluded from protection when there are ‘*serious reasons* for considering’ her as a terrorist.<sup>852</sup> Contrarily, in criminal proceedings, the burden of proof is much higher than that required by the Geneva Convention, as a final conviction for terrorism can be obtained only when the burden of proof is ‘*beyond any reasonable doubt*.’<sup>853</sup>

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<sup>851</sup>Jens Vedsted-Hansen, ‘The European Convention on Human Rights, Counter-Terrorism, and Refugee Protection’ (2010) 29(4) RSQ 45, 59-62.

<sup>852</sup> See, e.g., Article 1(f) of the Geneva Convention. In the EU context, see Article 12(2) of the Recast Qualification Directive.

<sup>853</sup> The definition of terrorism has proved particularly controversial, as testified by difficulties faced by the international community to formulate a universally agreed, legally binding qualification of this crime. Maintaining vague or excessively broad conceptions of terrorism raises rights-related concerns since States, to criminalize dissent, might discretionally label opposition groups or armed rebel forces as ‘terrorist organizations.’ Since this issue falls beyond the ambit of this thesis, for a detailed discussion on the definition of terrorism, it is possible to refer, *inter alia*, to: Jean Marc Sorel, (2003) Some Questions About the Definition of Terrorism and the

Additionally, beside evidentiary issues, criminal proceedings traditionally offer more substantive and procedural guarantees, since they deal with a limitation of individuals' fundamental rights.<sup>854</sup> MoUs, as adopted in the UK, are flexible instruments to deal with such security sensitive deportations. Indeed, since only a 'reasonable belief' is sufficient,<sup>855</sup> the threshold for removal required in migration proceedings is undoubtedly lower.

Although diplomatic assurances have mainly been used in the field of extradition, their potential application is broader.<sup>856</sup> They may be utilized also in the context of deportation/expulsion and 'extraordinary rendition' to undergo interrogation elsewhere.<sup>857</sup>

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Fight against its Financing 14(2) *European Journal of International Law*; UD Acharya, 'War on Terror or Terrors Wars: The Problem in Defining Terrorism' (2009) 37(4) *Denver Journal of International Law and Policy* 653-679.

<sup>854</sup> For an exhaustive assessment of the protection of fundamental rights in criminal justice, see Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press, 2005).

<sup>855</sup> See, e.g., Terrorism Prevention and Investigation Measures Act 2011, <<http://www.legislation.gov.uk/ukpga/2011/23/section/3/enacted>> accessed 3 April 2013.

<sup>856</sup> Pursuant to Article 1 of the European Convention on Extradition, 'The Contracting Parties undertake to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order.' Often regulated through bilateral agreements, *extradition* can also be defined as 'the surrender by one nation to another of an individual accused or convicted of an offence outside of its own territory, and within the territorial jurisdiction of the other, which being competent to try and to punish him, demands the surrender.' See, *Terlindem v Adams*, 184 US 270 (1902) 289.

<sup>857</sup> *Expulsion* concerns an 'administrative or judicial act, which terminates the legality of a previous lawful residence.' See, COM(2002) 175 final, Annex I 'Proposed Definitions' <[http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002\\_0175en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0175en01.pdf)> accessed 22 June 2013. *Deportation* refers to 'the act of a State in the exercise of its sovereignty in removing an alien from its territory to a certain place after refusal of admission or termination of permission to remain.' See, EMN Glossary, 'Deportation'

Unlike extradition, which requires formal acts of two States, expulsion or deportation occur on the basis of unilateral decisions of the sending State, in principle consistently with international human rights and refugee law.<sup>858</sup> However, as Jones posits, in many cases, ‘asylum, immigration, and extradition removal proceedings overlap.’<sup>859</sup> For example, in a number of cases, persons whose extradition is requested by the country of origin are asylum seekers or individuals excluded from refugee status on grounds of terrorism. In these circumstances, the existence of diplomatic assurances is seen as part of the factual evidence in determining the *non-refoulement* test.<sup>860</sup> It is to be clarified that the type of removal of primary interest in this Chapter is removal through immigration proceedings employed to remove unwanted and undocumented aliens.

The use of bilateral diplomatic assurances raises numerous and diverse issues ranging from their legal status to their relationship with international human rights obligations and their reliability in

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<<http://emn.intrasoft-intl.com/Glossary/viewTerm.do?startingWith=D&id=66>> accessed 22 June 2013. According to the ECtHR, the term ‘extraordinary rendition’ refers to ‘an extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment.’ See, *El-Masri v Former Republic of Macedonia* App no 39630/69 (ECtHR, 13 December 2012) (*El-Masri*) para 221.

<sup>858</sup> UNHCR, *Note on Diplomatic Assurances and International Refugee Protection* (2006) 2.

<sup>859</sup> Martin Jones, ‘Lies, Damned Lies and Diplomatic Assurances: The Misuse of Diplomatic Assurances in Removal Proceedings’ (2006) 8 EJML 9, 11.

<sup>860</sup> Vasillis Pergantis, ‘Soft Law, Diplomatic Assurances and the Instrumentalisation of Normativity: Wither a Liberal Promise?’ (2009) 56(2) NILR 137, 148.

eliminating the risk of ill-treatment upon return. However, by conceptualizing diplomatic assurances as falling within the broader category of *agreements linked to the readmission* of unwanted/unauthorized migrants from EU Member States to countries of origin or transit,<sup>861</sup> this Chapter's focus is to investigate whether their implementation can undermine core refugee rights.

A number of Western countries, *in primis* the United States, Canada, the United Kingdom, Sweden, Austria, Germany, Italy, Spain, the Netherlands, and Russia have resorted to diplomatic assurances to transfer alleged terrorists to unsafe countries to undergo interrogations and trials.<sup>862</sup> For the purpose of this Chapter, a receiving country is considered 'unsafe' when it does not offer adequate guarantees that the deportee - often a suspected terrorist or a person deemed inconducive to the public good - will be treated in accordance with the conditions set by the sending State, in particular

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<sup>861</sup> Jean-Pierre Cassarino, 'Informalizing Readmission Agreements in the EU Neighbourhood' (2007), *The International Spectator* 42. The other two types of bilateral arrangements encompassed in the 'agreements linked to readmission' category are standard readmission agreements and arrangements for technical and police cooperation aimed to push migrants and refugees back before their actual arrival at the EU border.

<sup>862</sup> For a survey of developments on the use of diplomatic assurances by European governments and domestic jurisprudence, see, Amnesty International (AI), *Dangerous Deals: Diplomatic Assurances in Europe* (Report 2010) 18. On the practice of the US and Canada, see, e.g., Ashley Deeks, *Promises not to Torture: Diplomatic Assurances in US Courts* (American Society of International Law 2008) <<http://www.asil.org/files/ASIL-08-DiscussionPaper.pdf>>; John Cook (ed), 'State Department Legal Advisor Testifies regarding Diplomatic Assurance (2008) 102(4) AJIL 882-884; Aristoteles Constantinides, 'Transjudicial Dialogue and Consistency in Human Rights Jurisprudence: a Case Study on Diplomatic Assurances against Torture' in Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart 2012) 289-91.

with regard to the prohibition of torture and inhuman or degrading treatment or punishment and the right to a fair trial — as enshrined within the international human rights treaties ratified by the sending State.

The UK is the only EU Member State that has formalized bilateral diplomatic assurances for security-related deportations in the form of written MoUs. These instruments include general clauses concerning the lawful treatment of deportees. At the same time, they also ‘[allow] the government to seek more specific personal assurances depending on individual circumstances.’<sup>863</sup>

### **6.1.1. Structure of the chapter**

Section 6.2 introduces the *Abu Qatada* saga as a key case study, which epitomizes the endeavour of the UK to legitimize the removal of suspected terrorists to undergo interrogations and trials abroad.<sup>864</sup> Abu Qatada is, indeed, the first person to challenge, before the ECtHR, a deportation order to Jordan issued on the basis of a MoU enumerating a series of guarantees for the fair and human treatment of the deportee. The content of the MoUs signed by the UK with

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<sup>863</sup> Ninth Report of the Foreign Affairs Committee (House of Commons), 9 July 2008, para 65 <<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmfaff/533/53306.htm>> accessed 15 June 2013 (Ninth Report of the Foreign Affairs Committee).

<sup>864</sup>The Abu Qatada case was introduced in Section 1.3 of this thesis and will be examined more thoroughly hereunder.

Ethiopia, Jordan, Lebanon, and Libya - taken as illustrative examples and units of analysis - is therefore examined.<sup>865</sup>

Section 6.3 engages in a doctrinal debate on the legal status of diplomatic assurances under international law. It first explores whether diplomatic assurances are considered treaties, political agreements, or something in between. Section 6.3.5 investigates if and when diplomatic assurances - regardless of their legal status - can be deemed reliable instruments to eliminate the risk of torture and inhuman treatment. This entails an assessment of whether: first, the State giving the assurance can be expected to comply with the agreement; and second, how reliability can be strengthened.<sup>866</sup> A review is then conducted of the criteria under which diplomatic assurances might be considered sufficiently reliable tools in the implementation of a safe transfer to a third country. These criteria, however, are not exhaustive, and constitute only a preliminary discussion to any broader analysis on reliability. Section 6.3.6 sheds light on the nascent trend toward a ‘repoliticization of human

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<sup>865</sup> Ninth Report of the Foreign Affairs Committee, para 65.

<sup>865</sup> See, Memorandum of Understanding Concerning the Provision of Assurances in Respect of Persons Subject to Deportation, Ethiopia–UK, 12 December 2008 (Ethiopia-UK MOU); Memorandum of Understanding regulating the provision of undertakings in respect of specified persons prior to deportation, Jordan–UK, 10 August 2005 (Jordan-UK MOU); Memorandum of Understanding, Libya–UK, 18 October 2005 (Libya-UK MOU); Memorandum of Understanding Concerning the Provision of Assurances in Respect of Persons Subject to Deportation, Lebanon–UK, 23 December 2005 (Lebanon-UK MOU).

<sup>866</sup>In this Chapter, I use the word ‘compliance’ in relation to diplomatic assurances, regardless of whether they are considered as legally binding or not.



rights<sup>867</sup> and questions the utility and appropriateness of a binary system of human rights protection, which devolves upon the sphere of politics what States have already reserved to the sphere of law.

Section 6.4 is the core of this Chapter. It asks if the implementation of diplomatic assurances – whether negotiated either independently or in the framework of MoUs - can undermine refugees’ access to protection. It does so through the lens of international refugee and human rights law. It is here worth recalling that this thesis describes the wording ‘access to protection’ as the combination of *non-refoulement* as well as access to asylum procedures and effective remedies. As there is a dearth of jurisprudence of international human rights bodies involving the enforcement of MoUs, cases on the use of single diplomatic assurances under migration law proceedings are the focus of analysis. However, examples are also drawn from the numerous cases of diplomatic assurances exchanged in the framework of extradition.

It is clear that an extensive review of the legal issues relevant to the links between exclusion (mainly on grounds of terrorism) and refugee rights is worthy of a book of its own. However, the present focus is only on one of the strategies States are developing to combat the terrorist threat by removing suspected people back to their countries of origin. Indeed, this Chapter nourishes itself within the broader body

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<sup>867</sup> Vedsted-Hansen 2011, 60.

of a thesis tackling diverse categories of agreements linked to readmission. Whilst diplomatic assurances are generally negotiated to facilitate the transfer of individuals considered a threat to the public safety of the host country, they have also been used to remove asylum seekers whose claims had been rejected or who had been excluded from refugee status on national security grounds. However, as Section 6.5 illustrates, States have relied upon diplomatic assurances also to return asylum seekers whose claims had not been assessed yet. This Chapter captures this anomaly in the system and critically discusses it in view of highlighting the potential risks stemming from the extension of the use of diplomatic assurances to people whose asylum applications have not been examined in their merits before removal.

Finally, Section 6.6 summarizes the main findings and engages in a general critique of diplomatic assurances after an assessment of law (the content of the bilateral agreements at issue) and practice (the actual implementation of the agreements). It finds that the decision to return a person to an unsafe country, deny her access to effective remedies, refuse her asylum, or exclude her from refugee status and subsidiary protection are not taken on the basis of diplomatic assurances – whether formalized in MoUs or not. Nevertheless, their negotiation in individualized circumstances can influence, to a certain extent, these decisions, thereby hampering refugees' access to protection.

## **Part I**

### **6.2. Deportation at all costs? The case of the UK and diplomatic assurances**

After 10 years of repeated failed attempts by UK governments to deport Mr. Omar Othman (Abu Qatada) to Jordan, on 17 January 2012, the ECtHR determined that the removal of the applicant to his country of origin would constitute a violation of his right to a fair trial under Article 6 of the Convention.<sup>868</sup> Abu Qatada is a radical Muslim cleric who was recognized as refugee in 1994, and then stripped of such status under Article 1(f)(c) of the Geneva Convention because ‘reasonable grounds’ existed for regarding him as a danger to the security of the UK. The ECtHR was thus asked, for the first time, to appraise the reliability of diplomatic assurances, negotiated under a standardized MoU, in the assessment of the risk for the applicant upon removal to Jordan.

In its November 2012 decision, the British Special Immigration Appeal Commission (SIAC) was ultimately not satisfied that there was no risk that the impugned statements extracted with torture could still be admitted probatively against the appellant in Jordan. This provoked the furious and resentful reaction of both the British Government and the press, which principally attacked the fact that Abu Qatada’s deportation - despite the renewed efforts to obtain

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<sup>868</sup> *Othman (Abu Qatada) v UK* App no 8139/09 (ECtHR, 17 January 2012).

further guarantees after the decision of the ECtHR - once again failed the test of unfairness, ‘a question of fact which ordinarily would not be amenable to appeal.’<sup>869</sup> Finally, on 27 March 2013, the British Court of Appeal rejected the Home Secretary’s latest legal attempt to overturn SIAC’s decision to block Abu Qatada’s deportation to Jordan.<sup>870</sup>

The hysteria provoked by the judgments of the Strasbourg Court, SIAC, and the Court of Appeal has to be read in light of the attempts of British governments to combat terrorism at all costs, even cooperating on deportation with countries that notoriously violate human rights. What is certain is that this judgment has spawned such an intense debate among legal scholars, human rights practitioners, State officials, and civil society that it is unlikely to wane anytime soon. What is, for example, the legal value of diplomatic assurances? Would diplomatic assurances eradicate the risk of *refoulement* to torture and ill-treatment? Would friendly bilateral relations be sufficient elements for a national or international court to consider assurances on fundamental rights reliable? What is the impact that the ECtHR’s ruling might have on the future use of diplomatic assurances

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<sup>869</sup> Jim Duffy, ‘Abu Qatada: Preventing a Flagrant Denial of Justice’, UK Human Right Blog, 13 November 2012.

<sup>870</sup> *Othman (Abu Qatada) v SSHD* [2013] EWCA Civ 277, 27 March 2013 (*Abu Qatada 2013*). To read more on the Abu Qatada case, see, Christopher Michaelsen, ‘The Reinassance of *Refoulment*? The *Othman (Abu Qatada)* Decision of the European Court of Human Rights’ (2012) 61(3) ICLQ 750; Mariagiulia Giuffré, ‘An Appraisal of Diplomatic Assurances One Year after *Othman (Abu Qatada) v United Kingdom* (2012)’ (2013) 2(2) IHRLR.

to remove people deemed inconducive to the public good on national security grounds?

The UK government has been labelled as ‘the most influential and aggressive promoter in Europe of the use of diplomatic assurances’ to forcibly repatriate people considered threats to national security to countries where they would suffer human rights violations, including inhuman treatment and torture.<sup>871</sup> Describing how the UK has acted with respect to issues of immigration and terrorism before and after 9/11 is not in the ambit of this Chapter. However, few words need to be spent in order to illustrate why the UK has been chosen as item of study for this thesis.

The securitization of migration policy predates September 11, 2001, and originates in the long history of terrorism in the UK, especially against the Irish Republic Army. Perceiving the creation of a European geographic area without border controls as a threat to security, the UK refused to join the Schengen Border Code.<sup>872</sup> At the same time, it agreed to have access to the Schengen Information System (SIS) and the EU database collecting information and fingerprints of asylum seekers.

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<sup>871</sup> Amnesty International 2010, 28.

<sup>872</sup> Elspeth Guild, ‘International Terrorism and EU Immigration, Asylum and Borders Policy: The Unexpected Victims of 11 September 2001’ (2003) *European Foreign Affairs Review* 341.

With the enactment of the Immigration Act in 1971, immigration officials were granted the power to detain migrants, while the Home Secretary was entrusted with the deportation of non-nationals considered a threat to the public good.<sup>873</sup> Moreover, the Home Office, and not the judiciary, became responsible for determining, after an assessment of individual motivations, whether a migrant was entitled to stay in the territory.

The process of securitization of migration was accelerated after September 11 when the Parliament passed the Anti-Terrorism, Crime and Security Act 2001 (ATCSA), an emergency legislation which frames terrorism as a pure migration issue - rather than a criminal law issue - since it applies only to *foreigners* suspected of being involved in terrorist activities. Moreover, an expulsion decision can only be challenged before SIAC, created in 1997 to review decisions taken by the Home Office on suspected terrorists. SIAC has thus been placed in a position of assessing the reliability of diplomatic assurances, which, on its instruction, must be made public in the proceedings.<sup>874</sup> The cases dismissed by SIAC may then be appealed on points of law to the Appeal Court and ultimately to the House of Lords.

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<sup>873</sup>See, 1971 Immigration Act, Schedule 2.

<sup>874</sup>*Y & Othman v Secretary of State*, SIAC, SC/36/2005 and SC/15/2005 (July 2006), para 58  
<[http://www.siac.tribunals.gov.uk/Documents/C362005\\_SC152005.pdf](http://www.siac.tribunals.gov.uk/Documents/C362005_SC152005.pdf)> accessed 15 June 2013.

Terrorist crimes are generally very hard to prove, and evidence dealing with matters of public security contains classified information. The use of such evidence in criminal proceedings would necessarily imply their disclosure to the public, which is something States have difficulty doing. In this regard, what has raised more concerns, from a human rights law perspective, is that the evidence used by SIAC and the Appeal Court is based on secret material that cannot be challenged and that is too sensitive to be considered in full by an open court for such national security reasons.<sup>875</sup> Thus, migrants suspected of terrorism - who are excluded by the scope of Article 1(f) of the Geneva Convention, but who cannot be removed, under international human rights law, because of the peril of *refoulement* - risk being detained for indefinite periods of time without any formal charge, as the security-sensitive evidence incriminating them cannot be disclosed.<sup>876</sup> Since lesser measures, such as surveillance and control orders do not remove the threat of terrorism, the UK, flanked by many other governments, casts deportation as the only solution.

In December 2004, the House of Lords held indefinite detention of foreign national terrorist suspects under Part 4 of the ATCSA 2001 to

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<sup>875</sup> Rebekah Braswell, 'Protection against Torture in Western Security Frameworks: The Erosion of Non-*refoulement* in the UK-Libya MOU' (2006) RSC Working Paper 10.

<sup>876</sup> See, ATCSA, Part 4, Section 23.

be incompatible with the ECHR.<sup>877</sup> This decision forced the UK to increasingly rely on diplomatic assurances in order to allow British courts to authorize smooth deportation of unwanted foreigners in compliance with international human rights standards. MoUs were perceived as the suitable instrument to create a stable and standardized formal basis for deportation. It was thus presumed that, by obtaining international legitimacy, the UK's deportation with assurances policy would have been less exposed to the attacks of human rights circles, which have always been reproachful of any stratagem designed to displace the risk abroad through cooperation with third countries.

Even if international human rights law does not prohibit *per se* deportation on national security grounds, the UK Privy Council Review Committee in 2004 held that

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<sup>877</sup>*Y v SSHD* [2006] UKSIAC 36/2004\_2, para 222. See also, *A and Others v UK* where the ECtHR found a violation of Article 5(1) of the Convention in respect of nine of the eleven applicants who were detained as suspect international terrorists and whose presence at liberty in the UK gave rise to a threat to national security (para 171). It also held that 'one of the principal assumptions underlying the derogation notice, the 2001 Act and the decision to detain the applicants had been that they could not be removed or deported "for the time being"' (para 167). Therefore, as none of the nine applicants were persons 'against whom action [was] being taken with a view to deportation or extradition', their detention did not fall within the exception to the right to liberty set out in paragraph 5(1)(f) of the Convention (para 170). The Court also added that it 'does not accept the Government's argument that Article 5(1) permits a balance to be struck between the individual's right to liberty and the State's interest in protecting its population from terrorist threat. This argument is inconsistent not only with the Court's jurisprudence under sub-paragraph (f) but also with the principle that paragraphs (a) to (f) amount to an exhaustive list of exceptions and that only a narrow interpretation of these exceptions is compatible with the aims of Article 5' (para 171). See, *A and Others v UK* App no 3455/05 (ECtHR, 19 February 2009).



Seeking to deport terrorist suspects does not seem to us to be a satisfactory response, given the risk of exporting terrorism. If people in the UK are contributing to the terrorist effort here or abroad, they should be dealt with here. While deporting such people might free up British Police, intelligence, security and prison service resources, it would not necessarily reduce the threat to British interests abroad, or make the world a safer place more generally. Indeed, there is a risk that the suspects might even return without the authorities being aware of it.<sup>878</sup>

Placing these bilateral accords within international human rights legal framework, this Chapter will explore whether deportation policies aimed at preserving national security have been or could be executed at the expense of the rights of asylum seekers whose refugee status has either been rejected, excluded from protection on national security grounds, or removed before examination of asylum claims.

### ***6.2.1 Outlining the content of UK's MoUs***

The UK has provided quite a unique answer to the security dilemma by formalizing diplomatic assurances for deported individuals. It is for that reason that the MoUs agreed so far with Ethiopia, Jordan, Lebanon, and Libya deserve particular attention within the three-dimensional systematization of bilateral agreements linked to readmission. Despite the content of the UK's MoUs slightly

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<sup>878</sup> UK Privy Council Review Committee (2003) para 54.

varies from case to case, a cluster of common traits can be identified. Whilst sometimes they reiterate international human rights commitments, other times they are more detailed by providing for specific post-return monitoring through prompt and regular visits from the representative of an independent body, who will conduct private interviews with the returned person.<sup>879</sup> Agreements concerning further details on the monitoring have also been added to the MoUs.

Although MoUs contain diverse typologies of assurances, States still have ample discretion in their implementation and acceptance. The arrangements will apply to citizens of the requested country<sup>880</sup> - or in the case of Libya and Lebanon also to stateless persons and any third country nationals the receiving State is prepared to admit<sup>881</sup> - following a written request made under the terms of the agreement. Thus, despite lacking an obligation to pursue the assurances, it will be for the receiving State to decide whether to give further assurances, if appropriate in an individual case, as a response to the requests made, under the Memorandum, by the sending country.<sup>882</sup> This means that it is possible to shift from MoUs to individualized assurances to push

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<sup>879</sup> UK-Jordan MoU, Application and Scope, para 4.

<sup>880</sup> UK-Jordan MoU, Application and Scope, paras 1-2.

<sup>881</sup> UK-Libya MoU, Application and Scope, para 1; UK-Lebanon MoU, Application and Scope, para 1.

<sup>882</sup> UK-Libya MoU, Application and Scope, para 5; UK-Jordan MoU, Application and Scope, para 6; UK-Lebanon MoU, Application and Scope, para 5.

the protection of the person in question to a higher level of commitment.

Moreover, MoUs provide for a retrial for those convicted *in absentia*. It is also to be noted that only the agreement with Libya explicitly contains an assurance that the death penalty will not be carried out ‘if its laws allow’, and requires Libyan authorities to use ‘all the powers available to them’ [...] to ensure that, if the death penalty is imposed, it would not be executed.<sup>883</sup>

With regard to Jordan, on 10 August 2005, the UK Chargé d’Affaires in Amman and the Jordanian Ministry of the Interior signed a side letter on death penalty, due to the fact that, ‘for constitutional reasons’, Jordan was unable to make a formal declaration in the MOU itself. The side letter recorded that, if someone returned under the agreement was sentenced to death, ‘the British Government would consider asking the Jordanian Government to commute the sentence’<sup>884</sup> and the Jordanian Government would commit itself not to impose the death penalty.<sup>885</sup>

Another point to notice in the description of the content of MoUs is that they do not use the terms ‘torture’ or ‘inhuman and degrading treatment’ explicitly.<sup>886</sup> Rather, deported persons are entitled to

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<sup>883</sup> UK-Libya MoU, Assurances, para 2.

<sup>884</sup> See, *Abu Qatada v SSHD*, [2007] UKSIAC 15/2005, para 352.

<sup>885</sup> See, *Abu Qatada v UK*, para 23.

<sup>886</sup> Justice, ‘Home Office Review of Counter-Terrorism and Security Powers’,

‘adequate accommodation, nourishment, and medical treatment, and [to] be treated in a humane and proper manner, in accordance with internationally accepted standards.’<sup>887</sup> Additional safeguards include that the deportee: will be entitled to promptly consult a lawyer; will be informed of the reasons of the arrest and of any charge against her; and will receive regular visits from a representative of the monitoring body. The individual must be brought without undue delay before a civilian judge for the determination of the lawfulness of her detention and will receive a fair and public hearing before an independent and impartial civilian court. She will be allowed adequate time and facilities to prepare her defence, and to call and examine witnesses. The deportee will be allowed to defend herself in person or through legal assistance, and to freely observe her religion.. Every judgment will be then pronounced publicly. However, in specified circumstances, the press and public may be excluded.<sup>888</sup>

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*Written Submissions* (August 2010) 44.

<sup>887</sup> See, the UK-Libya and the UK-Lebanon MoUs, and the UK-Etiophia MoU, Assurances, para 1; the UK-Jordan MoU, Understanding, para 1. In this regard, Mr Layden, a retired diplomat appointed to the Foreign and Commonwealth Office (FCO) as Special Representative for Deportation with Assurances, argues that Libyan authorities are well aware of the purpose of MoUs and their international human rights obligations. The same reasoning should be applicable also to all other Memoranda. See, *DD and AS v SSHD*, SC/42 and 50/2005, 27 April 2007 (*DD and AS v SSHD*) para 218.

<sup>888</sup> All these safeguards are inscribed in the UK-Lebanon MoU, Assurances, paras 2-6; the UK-Libya MoU, Assurances, paras 4-9; and the UK-Jordan MoU, Undertakings, paras 2-8. In addition, the agreement with Jordan provides that access to consular posts of the sending State will not be limited (para 5).

## Part II

### 6.3. Legal status of diplomatic assurances: an open-ended doctrinal debate

The main purpose of diplomatic assurances is to provide guarantees against torture and ill-treatment. Scholarship and human rights circles have so far mostly associated the insufficiency of diplomatic assurances in removing the risk of human rights violations for the deportee with their alleged non-legally binding character. However, by engaging in the scholarly debate on the status of diplomatic assurances under international law, Part II of this Chapter concludes that the ‘binding or not binding’ question is not, *de facto*, the determining factor in grasping the impact these bilateral agreements (both in the form of MoUs and individualized assurances) have on refugee rights.

At times, assurances are embodied within documents called ‘MoUs’, which can be either treaties or soft-law instruments. However, this classification does not depend on their registration with the UN Secretariat as a treaty under Article 102 of the UN Charter.<sup>889</sup> Whilst failure of registration does not affect the legal status of an agreement, it may hamper the possibility to use it before a dispute

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<sup>889</sup> For instance, several bilateral treaties concluded by either the US or the UN are called MoUs (Iraq-UN 1996, 1926 UNTS 9 (No 32851); Korea-US MoU on communication security equipment 1993, 1751 UNTS 217 (No 30579).

settlement body.<sup>890</sup> It has been argued that the title of a bilateral agreement as a Memorandum is not indicative of its legal status. Rather it is only one indicator to construct - together with the language of the agreement, its object and purpose, and the preparatory works - the *intention* of the parties.<sup>891</sup>

Despite the enduring debate on the normative status of diplomatic assurances, no clear and uniform answer has been elaborated.<sup>892</sup> Taking a definitive stance on the legal value of diplomatic assurances is not in the remit of this thesis. However, the main arguments on either side are herein illustrated with the purpose of scrutinizing whether their normative quality plays any role in refugees' access to protection and in the human treatment of the deportee.

### ***6.3.1. Diplomatic assurances as treaties?***

Under Article 2(1)(a) of the Vienna Convention on the Law of Treaties (VCLT), treaties may be defined as:

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<sup>890</sup> Thomas Worster, 'Between a Treaty and Not: a Case Study of the Legal Value of Diplomatic Assurances in Expulsion Cases' (2012) 21(2) *Minnesota Journal of International Law* 253, 286-7.

<sup>891</sup> Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press 2000) 20.

<sup>892</sup> For a general and well-informed overview of the debate, see, Lena Skoglund, 'Diplomatic Assurances against Torture – An Effective Strategy? A Review of Jurisprudence and Examination of the Arguments' (2008) 77 *NJIL* 319; Worster 2012.

International agreement[s] concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

As legally binding instruments - where the parties communicate to each other the promise of certain behaviour - they are *enforceable* through the legal system adopting them. States and individuals can, therefore, lodge complaints concerning transgression of the agreement itself. Contrarily, if diplomatic assurances are conceived as non-treaties, the sending State may not rely on the UN dispute settlement in case of breach of the agreement.

An increasing number of governments resort to diplomatic assurances not to torture and to the fair treatment of the deportees as a pre-condition to the removal of unwanted foreigners. This raises two interrelated questions: first, whether diplomatic assurances are mere political commitments to act toward certain agreed ends, without any legally binding effect; second, whether such a reliance on bilateral assurances can defy the protection of fundamental rights, *in primis* the prohibition of torture, as enshrined within international human rights treaties.

The first issue will be object of closer examination. With regard to the second point, it is here sufficient to argue - as we also do in Chapter 5 - that changes to multilateral refugee and human rights law

instruments cannot be caused by a new treaty binding only few States within the international community. Indeed, pursuant to Article 34 of the VCLT, ‘a treaty does not create either obligations or rights for a third State without its consent.’ Therefore, the *erga omnes* obligations found in all international refugee and human rights instruments - for example the obligation not to ‘expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture’<sup>893</sup> – that are applicable to States, remain unaltered after the exchange of bilateral diplomatic assurances on security related deportation (either in the form of MoUs or not, regardless of their legal status). Under Article 41 of the VCLT:

Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if the [modification in question] is not prohibited by the treaty and does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations.

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<sup>893</sup> Article 3 of the CAT. On the duty of States to respect *non-refoulement* as an *erga omnes* obligation, see, Ana-Maria Salinas de Frías, ‘States’ Obligations under International Refugee Law and Counter-Terrorism Responses’ in Salinas de Frías Ana-Maria, Katja Samuel and Nigel White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press 2012) 130-2.



The VCLT recognizes that various international agreements exist that do not fall into the scope of the Convention.<sup>894</sup> Yet, it does not make any explicit reference to the status of diplomatic assurances under international law. Therefore, the scholarly debate is still open with regard to the legally binding nature of such arrangements.<sup>895</sup> Klabbers believes that the very idea that some agreements are not binding is in essentially impracticable, as it does not explain what other purpose an international agreement can have.<sup>896</sup> Thus, even if the intention of the involved States is solely to create commitments, ‘gentlemen agreements’<sup>897</sup> aim to produce a normative effect intending to influence future behaviour. However, Klabbers criticizes that, according to some scholars, the parties to a gentleman agreement desire ‘to become bound in a normative order other than law, the orders most often mentioned being “politics” and “morality”.’<sup>898</sup> Similarly, Noll perceives as ‘quite meaningless’ the existence of non-binding agreements that do not play any role in altering the risk

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<sup>894</sup> Article 3 of the VCLT, 23 May 1969, in force 27 January 1988, 1155 UNTS 331, 8 ILM 679.

<sup>895</sup> Aust poses the same question with regard to MoUs more generally. See, Aust 2000. See also, Vladimir Uro Degan, *Sources of International Law* (Martinus Nijhoff Publishers 1997) 358-362.

<sup>896</sup> Jan Klabbers, *Developments in International Law: the Concept of Treaty in International Law* (Kluwer 1996) 4, 6.

<sup>897</sup> This shorthand term encompasses all those arrangements generally known as non-legally binding agreements, soft-law instruments, political agreements, international understandings, etc. Their denomination is, however, of little importance.

<sup>898</sup> Klabbers 1996, 19.

assessment undertaken by the sending State.<sup>899</sup> The cardinal factor is whether the risk of torture and ill-treatment is in fact eliminated by the mutual understanding of the parties with regard to the removed individual.

Some suggest that when diplomatic assurances contain an undertaking intended to create new legal obligations beyond mere restatements of pre-existing obligations of international law (for example, the establishment of a monitoring mechanism), a new agreement has been reached.<sup>900</sup> And it is this new undertaking that might constitute a fact in overcoming a risk of ill-treatment.<sup>901</sup>

In criticizing the Austian distinction between the legally and non-legally binding nature of international agreements, Klabbers observes that ‘in the former case, [States] become intentionally legally bound; in the latter, they become so bound without having intended as much,

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<sup>899</sup>Gregor Noll, ‘Diplomatic Assurances and the Silence of Human Rights Law’ (2006) 7 MJIL 10.

<sup>900</sup>Worster 2012, 285. It is also to be noted that, in the case of *erga omnes* human rights obligations, the need to restate them is unclear considering that States cannot excuse themselves from compliance.

<sup>901</sup>As long as diplomatic assurances are *ad hoc* guarantees documented in writing, such as through an exchange of notes, they might satisfy the treaty requirements under Article 2(1) of the VCLT. In this case, they would be governed by the Vienna Convention treaty rules. While the ILC does not explicitly provide for non-legally binding agreements, their existence is not excluded. It states that ‘although the term “treaty” in one sense connotes only the single formal instrument, there also exist international agreements, such as the exchange of notes, which are not a single formal instrument, and yet are certainly agreements to which the law of treaties applies. Similarly, many single instruments of daily use, such as an ‘agreed minute, or a ‘memorandum of understanding’, could not appropriately be called formal instruments, but they are undoubtedly international agreements subject to the law of treaties’. See ILC, VCLT with Commentaries, II YB ILC 187 (1966) Article 2(2).

by virtue of good faith, estoppel, or reliance. But if that is the case, what can be said to justify the distinction?<sup>902</sup>

### ***6.3.2. Diplomatic assurances as binding unilateral statements?***

Diplomatic assurances can also be conceived of as legal obligations insofar as *binding unilateral statements*.<sup>903</sup> As formulated by the ICJ in the Nuclear Test case:

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific [...]. An undertaking of this kind, if given publicly, and with intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* or any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect [...].<sup>904</sup>

According to the ICJ, the intention of the parties to be bound must be obtained by interpretation of the act. Likewise, the ECtHR has acknowledged that every time a State entertains diplomatic

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<sup>902</sup> Klabbers 1996, 111.

<sup>903</sup> Worster 2012, 340-4.

<sup>904</sup> *Nuclear Test Case (Australia v France)*, Judgement, 1974 ICJ Reports 253, 20 December 1974, para 43 (*Nuclear Test Case*).

communication by taking a commitment in good faith and limiting its freedom of action, it expresses an intention to follow the statement and to be bound.<sup>905</sup> Only after the intent to be bound is uttered, then the obligation becomes legal:

When it is the intention of the State making the declaration that it should become bound according to its terms, the intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration.<sup>906</sup>

In the *Einhorn v France* case, the ECtHR defined diplomatic assurances as treaties despite conceding that they could alternatively amount to binding unilateral statements:

The diplomatic notes could also be regarded in public international law as a unilateral international undertaking requiring the United States to fulfil the obligations it had entered into, failing which its international responsibility would be engaged [...].<sup>907</sup>

I would add, however, that in the *Einhorn* case, extradition was

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<sup>905</sup> See, *Ahmad, Awat, Ahsan and Mustafa (Abu Hamza) v UK* Apps nos 24027/07, 11949/08, and 36742/08, Part. Dec. as to the Admissibility (ECtHR, 6 July 2010) para 105.

<sup>906</sup> *Nuclear Test Case*, para 43.

<sup>907</sup> *Einhorn v France* App no 71555/01, Fin. Dec. as to the Admissibility (ECtHR, 16 October 2001) para 30.

sought by the US, which, consequently, had all the interest in complying with the given assurances. What is different is a case of expulsion and removal ordered for the purpose of returning an asylum seeker whose refugee status has still to be determined, or whose status has already been refused or revoked. The receiving State simply replies to a request by the sending country without having any primary interest in readmitting the individual at issue and gives, to this end, specific assurances that she will be treating fairly.

### ***6.3.3. Diplomatic assurances as non-legally binding agreements?***

The legal status of diplomatic assurances hardly concedes a conclusive response. What cannot be neglected is that States intentionally commit themselves at different levels. The presumption of a lack of legal bounds constitutes, at times, the main reason for States to enter into more informal accords generally negotiated and signed by diplomats without parliamentary scrutiny and implementation in national legislation. The elements explaining the gradual proliferation of informal patterns of cooperation on readmission are invisibility and confidentiality, higher flexibility in changing circumstances thanks to the ease in amending their text,

adaptability to short-term security concerns, and limited costs of defection as disputes can be resolved during negotiations.<sup>908</sup>

Although the doctrine continues to be divided, one of the views is that diplomatic assurances are international commitments - political promises meant to be kept - but not necessarily legally binding.<sup>909</sup> Indeed, it is absolutely possible that non-legally binding instruments may nonetheless bring about legal consequences.<sup>910</sup> In this view, whilst a diplomatic assurance is not legally binding, it may evoke legal consequences as a matter of fairness and estoppel. It means that although the leverage added by the assurance is mainly political, if an agreement is made in good faith, States are estopped from defecting from their original commitment.<sup>911</sup> However, if, by virtue of the doctrine of estoppel, a State should abstain from acting to the detriment of an agreement that has been concluded in good faith, it is also true that the *pacta sunt servanda* rule applies only to treaties. Indeed, Article 2(1)(a) of the VCLT only applies to international

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<sup>908</sup> Cassarino 2007, 189-190. See also, Aust 2000, 39-40. According to Aust, the fact that the agreement is easy to modify and does not require implementation in domestic legislation leads governments to have a certain lack of care in drafting a MoU.

<sup>909</sup> See, e.g., UN High Commissioner for Human Rights Louise Arbour, Statement on Human Rights Day: On Terrorists and Torturers, 7 December 2005 <<http://www.unhchr.ch/hurricane/hurricane.nsf/0/3B9B202D5A6DCDBCC12570D00034CF83?opendocument>> accessed 15 June 2013. According to Manfred Nowak, former Special Rapporteur on Torture, diplomatic assurances ‘carry no legal effect and no accountability if breached; and the person whom the assurances aim to protect has no recourse if the assurances are violated.’ See, Special Rapporteur on Torture, Report submitted in accordance with General Assembly Resolution 59/182, UN Doc A/60/316, 30 August 2005, para 51; Skoglund 2008, 336.

<sup>910</sup> Aust 2000, 46.

<sup>911</sup> *ibid*, 46.

agreements ‘governed by international law’, which thus excludes instruments that do not intend to create mutually binding obligations.

#### ***6.3.4. What is the legal value of the UK’s MoUs?***

Shifting attention to the formalized assurances taken as units of analysis of this thesis, the Vienna Convention Official Record reports that the UK delegation considered that Memoranda were not international agreements subject to the law of treaties because the parties had not intended to create legal rights and obligations, or a legal relationship, between themselves.<sup>912</sup> The heated debate that animated the delegates to the Vienna Conference on the introduction of the ‘intent’ element as part of the treaty definition ended with the exclusion of intent from the VCLT. However, two points can be noted. First, titling an agreement as a MoU does not automatically exclude it from the sphere of treaties. Second, some authors suggest that the kind of intent to take into consideration when assessing the normative status of an agreement would be the ‘objective intent’, *consensus ad idem*, as stated in the text of the accord. Such an ‘objective intent’ differs from the ‘subjective intent’ of the parties, which is an aspect of the ‘agreement’ element with the designation

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<sup>912</sup>United Nations Conference on the Law of Treaties, Vienna, Austria Second Session 9 April– 22 May 1969, 228 para 35, A/CONF.39/C.1/SR.87.

traced by Article 2(1) and extremely difficult to prove.<sup>913</sup> Whilst a State is free to decide if it wishes to enter into a treaty or not, it cannot use sovereignty as an excuse once it has objectively concluded an agreement.<sup>914</sup> Indeed, ‘if a State concludes an agreement that is expressly legally binding, then the State could never succeed in arguing that it did not intend for that result. The document speaks for itself.’<sup>915</sup>

In Worster’s words, an international accord could be, in its substance, either a treaty or not, regardless of its title as a MoU.<sup>916</sup> As States are entitled to exercise or not exercise their treaty-making power, if they decide to enter into binding agreements, they generally do so through clear and explicit language. Although a thorough discussion on the legal status of diplomatic assurances (and, *in casu*, the UK’s MoUs) is beyond the scope of this Chapter, it is to be noted that, according to some, the diplomatic assurances negotiated under the MoUs in question are considered legally binding, while for others they are not.

On the one hand, Worster believes that phrasings such as ‘[the

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<sup>913</sup> For a detailed discussion on the intent element, see, Worster 2012, 273-5. See also, Kelvin Widdow, ‘What is an Agreement in International Law?’ (1979) BYIL 117, 121.

<sup>914</sup> Worster 2012, 301.

<sup>915</sup> *ibid* 304.

<sup>916</sup> *ibid*.



deportee] *will* be brought promptly before a judge’,<sup>917</sup> ‘will be informed promptly of any charge against him’,<sup>918</sup> ‘will receive a fair and public hearing’,<sup>919</sup> cannot be interpreted as mere political arrangements, but rather as assertions of State obligations under international law with application in the single case of removal.<sup>920</sup> For example, the MoU between the UK and Jordan states that ‘it is understood that the authorities of the UK and Jordan will comply with their human rights obligations under international law regarding a person returned under this arrangement.’<sup>921</sup> Similarly, under the MoUs with Libya and Lebanon, the two parties ‘will comply with their human rights obligations.’<sup>922</sup> According to Worster, these agreements use mandatory language by referring to assurances as ‘conditions’<sup>923</sup> or stating that they ‘will apply to such a person [...]’.<sup>924</sup> In his view, the monitoring mechanisms created under the MoUs with Lebanon, Libya, and Ethiopia create an additional obligation - therefore a new agreement - to those already binding those States under international human rights law.<sup>925</sup>

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<sup>917</sup> Jordan-UK MoU, Understanding 2.

<sup>918</sup> *ibid*, Understanding 3.

<sup>919</sup> *ibid*, Understanding 7.

<sup>920</sup> Worster 2012, 330.

<sup>921</sup> UK-Jordan MoU.

<sup>922</sup> UK-Lebanon and UK-Libya MOUs.

<sup>923</sup> UK-Jordan MoU.

<sup>924</sup> UK-Lebanon and UK-Libya MOUs.

<sup>925</sup> Worster 2012, 279-80.

On the other hand, the British government has clearly affirmed that MoUs are used as a means for the State - in the exercise of its free treaty-making power - to preserve a high degree of autonomy under a non-legally binding bilateral arrangement. Although the intention of the British government is a particularly important element, its statements are only an indicator of the normative quality of the assurances. Indeed, attention should be paid also to the language of the agreements. And in this regard, someone could argue that the text of the MoUs signed by the UK with Ethiopia, Jordan, Lebanon, and Libya - through the use of terms, such as 'will', 'arrangement', or 'understanding' - confirms the willingness of the parties not to be legally bound. This terminology, beyond the explicit statements of the State, would denote the lack of a clear recognition of the intention of States to enter into a legally binding agreement and to be held accountable for any breach of the accord.

States have generally embraced the ICJ finding in the *Qatar v Bahrain* case that terminology cannot alone be sufficient to determine the normative status of an agreement as a treaty or not.<sup>926</sup> However, the fact that the parties explicitly relied on a diplomatic terminology that expresses the intention not to be legally bound cannot be neglected. In rejoining to the most common criticism to diplomatic assurances used in national security deportation cases, the British

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<sup>926</sup> See, Maritime Delimitation and Territorial Quest (*Qatar v Bahrain*) ICJ Reports 112, 122 (1 July 1994).

government with all necessary clarity declared that ‘while the MoUs reflect the express political commitment of the States concerned, *they are not legally binding*.’<sup>927</sup> More specifically, in the landmark *Abu Qatada* case, the ECtHR held that it may well be that the MoU with Jordan is not legally binding.<sup>928</sup> Nevertheless, it stressed that ‘whatever the status of the MoU in Jordanian law, the assurances have been given by officials who are capable of binding the Jordanian State.’<sup>929</sup>

Despite the new cluster of diplomatic assurances, SIAC and the Court of Appeal continued to hold that Abu Qatada would face ‘a flagrant denial of justice’ if he were sent back to face terror charges based on evidence obtained by torture.<sup>930</sup> Whilst Abu Qatada has always challenged the reliability of diplomatic assurances negotiated under the MoU, he was prepared to leave the UK for Jordan once the two countries ‘enshrined in law’ their bilateral agreement through the ratification of a fair trial *treaty*.<sup>931</sup> Therefore, to overcome the

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<sup>927</sup> See, e.g., Braswell 2006, 3; Kate Jones, ‘Deportation with Assurances: Addressing Key Criticism’ (2008) 57 ICLQ 188; Simon Crowther, ‘The SIAC, Deportation, and European Law’ (2010) *Cambridge Student Law Review* 229.

<sup>928</sup> *Abu Qatada v UK*, para 201

<sup>929</sup> *ibid*, para 195

<sup>930</sup> See, *Othman (Abu Qatada) v SSHD*, SC/15/2005, 12 November 2012, para 66, 73. See also, *Abu Qatada 2013*.

<sup>931</sup> See, the Statement by Abu Qatada’s lawyer Edward Fitzgerald QC, as cited in Robert Booth and Shiv Malik, ‘Abu Qatada arrives in Jordan after eight-year deportation battle’, *The Guardian*, 7 July 2013 <<http://www.theguardian.com/world/2013/jul/07/abu-qatada-jordan-deportation-battle> accessed 15 July 2013>; Alan Travis, ‘Abu Qatada “will voluntarily go back to Jordan when new treaty is ratified”’, *The Guardian*, 10 May 2013

objections of the British Courts, the Home Secretary decided to conclude a new ‘mutual legal assistance agreement’, which entered into force in June 2013. This Treaty comprises a number of fair trial guarantees for deportees and a stringent ban on the use of torture-obtained evidence. It places the onus on the prosecution to prove beyond any doubt that the statement has been obtained out of free will and choice and has not been acquired through torture or ill-treatment.<sup>932</sup> The SIAC Judge, Mr. Justice Irwin said ratification of the mutual legal assistance agreement by Jordan was not enough. Only its entry into force would have let the treaty override any of the rulings by the Jordanian courts.<sup>933</sup> Thus, on 7 July 2013, Abu Qatada

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<<http://www.guardian.co.uk/world/2013/may/10/abu-qatada-jordan-treaty-ratified>> accessed 15 July 2013.

<sup>932</sup> Article 27 reads as follows: ‘3) Where there are serious and credible allegations that a statement from a person has been obtained by torture or ill-treatment by the authorities of the receiving State and it might be used in a criminal trial in the receiving State [...] then the statement shall not be submitted by the prosecution nor admitted by the Court in the receiving State, unless the prosecution submits evidence on the conditions in which the statement was obtained, and the Court is satisfied to a high standard that such statement has been provided out of free-will and choice and was not obtained by torture or ill-treatment by the authorities of the receiving State.

4) Where, before the date of signature of this Treaty, a Court in the sending State has found that there is a real risk that a statement from a person has been obtained by torture or ill-treatment by the authorities of the receiving State, and might be used in criminal trial in the receiving State [...] this statement shall not be submitted by the prosecution nor admitted by the Court in the receiving State, unless the prosecution in the receiving State proves beyond any doubt that the statement has been provided out of free-will and choice and was not obtained by torture or ill-treatment by the authorities of the receiving State, and the Court in the receiving State is so satisfied.’ See, Treaty on Mutual Legal Assistance in Criminal Matters between the United Kingdom of Great Britain and Northern Ireland and the Hashemite Kingdom of Jordan, London, 24 March 2013, entry into force 1 July 2013.

<sup>933</sup>Travis 2013.

finally agreed to return to Jordan following a formal approval of the Treaty by Jordan's King Abdullah.

In light of the foregoing, the doctrine continues to be divided. Whilst for some, the UK's MoUs with Ethiopia, Lebanon, Libya, and Jordan are legally-binding, others believe that they cannot automatically be regarded as treaties on the ground of being instruments embodying an agreement.<sup>934</sup> Nevertheless, this Chapter only aims to map out all these different positions to show how the question on the legal value of diplomatic assurances remains unsettled as scholarship is unable to agree on a uniform answer. Despite the fact that the UK's MoUs refer to the duty of States to comply with human rights under international law, there is room to question why States need to duplicate their human rights commitments within the frame of a diplomatic accord, which does not contain all those mechanisms of enforcement and monitoring provided by international human rights treaties—especially with regard to bodies for individual complaints.

### ***6.3.5. Is 'to bind or not to bind' the right question?***

Despite the heated debate on the legal status of assurances, *in practice* States consider this appraisal an important, but not a decisive element in the assessment of the risk for the deportee. *De facto*, since

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<sup>934</sup> Jones 2008, 188.

governments can keep faith also with their international political commitments to avoid undesirable consequences, such as disruption of their bilateral relations and (possibly) their international image, they argue that the risk of torture or inhuman treatment is not necessarily reduced or eliminated by means of a legally binding diplomatic assurance. It is to be stressed that any analysis of theories of international relations would be outside the scope of this thesis. However, it is worth noting that a neoliberal institutionalist such as Keohane, by considering the long-term reputational consequences of non-compliance, has observed that:

For reasons of reputation, as well as fear of retaliation and concerns about the effects of precedents, egoistic governments may follow the rules and principles of international regimes even when myopic self-interest counsels them not to.<sup>935</sup>

Legal scholarship remains highly divided on the normative quality of diplomatic assurances, and the different stances seem difficult to reconcile through a minimum common denominator. Likewise, the judiciary does not provide a uniform answer. Thus, I believe that, in determining the status of these highly disputed arrangements in international law, a case-by-case approach should be adopted by giving greater weight to the *intention* of the parties as inferred from

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<sup>935</sup> Robert O Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press 1984) 108.

both the phrasing of the agreement, and the positions taken by the two governments during the negotiation process.

That said, I also believe that the key question, for the purpose of assessing the impact of diplomatic assurances on refugee rights is not whether they are *binding*, but whether they are *reliable*,<sup>936</sup> or, in other words, they are meant to be kept. If this is the case, even a political commitment might affect the assessment of the risk for the removed.<sup>937</sup> In this respect, I believe that what counts most in the assessment of reliability is the human rights track record of the receiving country and its extraneousness to practice of torture and violent interrogation.

#### ***6.3.5.1. Strengthening reliability: what incentives and threats?***

The question of whether an individual (for the purpose of this Chapter an asylum seeker, or a person either excluded from refugee status or whose status has been rejected or revoked) has a real and personalized risk of being subject to ill-treatment upon return requires a determination of whether or not assurances are reliable. This entails an assessment, from a State perspective, of whether: first, the government giving the assurance can be expected to comply with the

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<sup>936</sup> It is here worth clarifying that the two concepts are not disconnected. As we will see below, a legally binding assurance can also add value to the reliability of assurances.

<sup>937</sup> Skoglund 2008, 337.

agreement; and second, how reliability may be strengthened. If the prospects of compliance are overly remote, any removal would be unlawful as the risk for the deportee cannot be eliminated.

Nonetheless, international human rights treaties' supervisory bodies have generally been more cautious in endorsing the reliability of assurances in the eradication of the risk for the deportee. The *Agiza v Sweden* case,<sup>938</sup> for example, demonstrates how the Committee against Torture did not consider the discourse on trust compelling. Indeed, despite the fact that Sweden ensured Egypt's compliance with the bilateral commitments by holding that 'failure to honour the guarantees would impact strongly on other similar European cases in the future',<sup>939</sup> allegations of torture started to circulate quite soon after deportation.

Governments generally assume that compliance depends less on the legal status of the agreement and more on the incentives the two involved States have to keep the promise. Although it is often maintained that a State flouting binding international human rights obligations cannot be trusted to respect a non-legally binding promise in a specific case, the same reasoning can be applied - in their view - also with regard to legally binding assurances. Since assurances have been supplied at the highest level of government, and lack of

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<sup>938</sup> *Agiza v Sweden* Comm no 233/2003, UN Doc CAT/C/34/D/233/2003 (2005).

<sup>939</sup> *Agiza v Sweden*, para 4.24.



compliance is likely to do serious damage to diplomatic relations and international reputation, the effects of infringement would be more detrimental than those deriving from flouting a multilateral obligation owed to several States at once. The more individualized assurances are, the more incentives a State has to comply with the exchanged guarantees. However, if negotiated during the asylum determination process, individualized assurances can undermine the principle of confidentiality, which is an essential requirement of fair asylum procedures.<sup>940</sup>

It has been argued how ‘the *de facto* function of a diplomatic assurance is to elevate the circumstances of a single person to a case of “diplomatic significance” or “personal trust” between senior State officials.’<sup>941</sup> By means of a bilateral agreement - more than through a multilateral arrangement where States seldom rely on State complaint mechanisms - the sending State should be more inclined to monitor whether the other party follows through on the accord.

The representative of the British government in the *Abu Qatada* case dwells on how MoUs work in practice, and explains what a political commitment can add, beyond a legally binding human rights obligation, as follows:

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<sup>940</sup>For a broader discussion on the principle of confidentiality and asylum procedures, see below, Section 6.4.5.1.

<sup>941</sup> Nina Larsaeus, ‘The Use of Diplomatic Assurances in the Prevention of Prohibited Treatment’ (2006) RSC Working Paper no 32, 8.

States look not only to the legal status of international documents when deciding their behaviour but to the whole political context. [...] This MoU, while imposing less than a legal obligation, was made with respect to one State only, with an exceptionally strong political commitment on the part of both governments.

The same approach has been adopted at the level of the national judiciary also by SIAC:

The answer here is precisely that [the assurance] is bilateral, and is the result of a longstanding and friendly relationship in which there are incentives on both sides to comply once the agreement was signed. The failure of those who regard these arrangements as unenforceable [...] is a failure to see them in their specific political and diplomatic context, a context which will vary from country to country.<sup>942</sup>

This approach seems to assume that, regardless of the informal format of Memoranda, the receiving country would be more committed to respecting standards mutually agreed on a bilateral level than at the multilateral level because of the ‘serious bilateral consequences if things went wrong.’<sup>943</sup> Beside the immediate interest of a State in readmitting a national, a government might also decide to regulate, in agreement with another country, the treatment of a

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<sup>942</sup> *Oman Othman v SSHD*, SC/15/2005.

<sup>943</sup> Jones, 2008, 187.

deportee for the sake of enhancing its international standing. Indeed, the long-term costs for defecting States would include attracting negative publicity, worsening their reputation, and diminishing credibility as actors able to keep faith with their commitments.<sup>944</sup>

The decision to sign the agreement is detached from the actual compliance with the accord itself. Compliance may also depend on different political calculations concerning possible benefits or sanctions in other related areas, such as trade or development aid. In the major part of security-related deportations, the receiving State has a minor interest in negotiating an assurance, which is the outcome of a request made by the sending State in view of conferring legitimacy to the removal of a person deemed not conducive to the public good. As a consequence, the receiving State needs particular motivations to meet the demands of the sending State. The lack of incentives was probably the reason leading to the failure of diplomatic assurances between the British government and Egypt in 1999 concerning the deportation of Mr Youssef.<sup>945</sup>

Generally speaking, assessing the reliability of diplomatic assurances is perhaps relatively easier when they are intended to prevent receiving States from sentencing to death a certain person.<sup>946</sup>

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<sup>944</sup> Skoglund 2008, 355. See also, Jones 2008, 188.

<sup>945</sup> *Youssef v The Home Office* [2004] EWHC 1884 (*Youssef*).

<sup>946</sup> Reliability of diplomatic assurances in cases involving death penalty cannot, however, be taken for granted. For example, in the *Venezia* judgement, the Italian Constitutional Court held that the formula 'sufficient assurances' is not

In these circumstances, the authorities of the sending State can seemingly better monitor whether the deportee is effectively channelled into a formal process that envisages capital punishment as the sanctioning solution. However, supervising compliance with assurances against torture or other inhuman and degrading treatment turns out to be very complicated, as it requires a constant vigilance by competent and independent personnel in relation to abuses committed by security forces in detention centres.<sup>947</sup>

For instance, the British SIAC, although accepting that Libyan authorities had entered the MOU with the UK in good faith, did not find diplomatic assurances reliable in the specific case of two individuals ordered to be deported to Libya on security grounds. Given that Libyan authorities had in the past unexpectedly changed course, there was a real risk that their position could vary again after the delivery of the assurances.<sup>948</sup>

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constitutionally admissible, since cases regarding the death penalty and, therefore, the right to life, require an ‘absolute guarantee’ that the capital punishment will not be executed. See, *Venezia v Ministero di Grazia e Giustizia*, Judgment no 223, Italian Constitutional Court, 27 June 1996, para 5.

<sup>947</sup> Report of the independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism to the UN Commission on Human Rights, UN Doc E/CN.4/2006/94, 16 February 2006, para 56.

<sup>948</sup> *DD and AS v SSHD*, SC/42/2005 and SC/50/2005 paras 334-71.

### **6.3.5.2. Monitoring mechanisms**

A viable manner to supervise whether diplomatic assurances are respected seems to be through the instalment of independent monitoring bodies. Taking again the UK as unit of analysis, it has identified local or national organizations to conduct post-return monitoring visits, such as the Ethiopian National Human Rights Commission, or the Adaleh Centre for Human Rights appointed by the Jordanian governments to monitor the treatments of individuals repatriated on the basis of the Memorandum agreed with the UK. The MoU with Ethiopia, signed on 12 December 2008, provides that each country will nominate an independent monitoring body, which will be in charge of overseeing the return, the detention, and trial of any deportee. The individual is entitled to contact the monitoring body within three years after her date of return, and to receive visits by a representative of the committee within 48 hours after the arrest, detention, or imprisonment.<sup>949</sup>

The MoU with Libya provides that:

The deported person will have unimpeded access to the monitoring body unless they are arrested, detained or imprisoned. If the person is arrested, detained or imprisoned, he will be entitled to contact promptly a representative of the monitoring body and to meet a representative of the monitoring body within one

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<sup>949</sup> UK-Ethiopia MoU, Assurance 5.

week of his arrest, detention or imprisonment. Thereafter he will be entitled to regular visits from a representative of the monitoring body in co-ordination with the competent legal authorities. Such visits will include the opportunity for private interviews with the person and, during any period before trial, will be permitted at least once every three weeks.<sup>950</sup>

The monitoring body can also authorize medical examinations. Since the MoU does not specify who the members of the committee would be, the UK asked the Gaddafi International Foundation for Charity to take on these functions. But the fact that the son of the then Head of State, Colonel Gaddafi, was the leader of the organization inescapably questioned its independence from the government. It is hard to imagine, indeed, that torture would have been denounced, and, even if this were the case, that legal redress would have been provided to the victims of such treatment.<sup>951</sup>

Similarly, in the Arar's case - concerning a Canadian national suspected of terrorism and rendered by the US to Syria - the Canadian consul visiting the captive, once confronted with diverging information on the detention conditions, preferred to believe the Head of the Syrian Intelligence Service rather than Mr. Arar. As Canada had an interest in the outcome of Mr. Arar's interrogation, he was not

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<sup>950</sup> UK-Libya MoU, Application and Scope, Assurance 6.

<sup>951</sup> An analysis of the Libyan monitoring framework is traced in the *SIAC case A and DD v the Secretary of State for the Home Department* [2007] UKSIAC 42/2005.

considered a reliable source of information, thus demoting the protection owed to a national and his fundamental rights.<sup>952</sup> Therefore, the Commission of Inquiry called to decide about Mr. Arar's removal to Syria, found that the applicant was tortured despite assurances, and concluded that this finding is a concrete example that assurances from totalitarian regimes which practice torture in a systematic fashion, are of no value and cannot be accepted as reliable sources for a safe transfer.<sup>953</sup>

Many other reasons can contribute to render the supervisory system ineffective. Because of the fear of retributive torture, the captive might be unable to admit to torture or violent interrogation methods when she receives visits from diplomats and members of the monitoring committee. Many detainees have expressed similar frustrations.. For instance, after two weeks of interrogation and torture, Mr. Arar started receiving diplomatic visits, which took place in the presence of the Colonel, an interpreter, and three other Syrian officials. Although those visits were his lifeline, Mr. Arar found them

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<sup>952</sup> Noll 2006.

<sup>953</sup> Commission of Inquiry into the actions of Canadian Officials in relation to Mr Arar's removal to Syria, *Report of the Events relating to Maher Arar – Factual Background* (Minister of Public Works and Government Services 2006) (Report of the Events relating to Maher Arar).

unbearably frustrating, since he was unable to denounce torture for the fear of being beaten again.<sup>954</sup>

Additionally, if the deportee is an alleged terrorist, an enemy of, or a threat for the sending country, diplomats might have no interest in a genuine disclosure of truth through an investigation of the reasons behind the accusations of torture. First, the two governments may share the common interest of acquiring intelligence information. Second, admission of ill-treatment would confirm previous criticism on the risks of deportation, and would potentially endanger good relations with the partner in other areas, such as control and prevention of irregular migration.<sup>955</sup> Third, it is not difficult to imagine that the readmitting State might decide to withdraw cooperation on counterterrorism matters in the event that a breach was discovered.<sup>956</sup> Fourth, any finding of violation of the assurances would result in the embarrassing acknowledgment that an unlawful removal in breach of the international obligation against torture has been carried out, thus tarnishing the international image of the two involved States and undermining their bilateral relationship. Indeed, the receiving State would not have any interest in denouncing lack of

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<sup>954</sup> Maher Arar, 'Statement', in Rachel Meeropol (ed), *America's Disappeared: Secret Imprisonment, Detainees, and the War on Terror* (Seven Stories Press 2004) 68-9.

<sup>955</sup> Noll 2006, 122-3.

<sup>956</sup> Justice 2010, 50.



compliance, thereby depicting itself as an unreliable actor.<sup>957</sup> Such a silencing effect of the diplomats and the captives is the inner virus of any assurances; a virus that makes them unreliable instruments as long as they are negotiated with notoriously unsafe countries.

### **6.3.5.3. Enforcement mechanisms**

Since diplomatic assurances are mainly grounded on an *ex ante* trust in a foreign country, a careful assessment of their role in eliminating the risk of *refoulement* should be carried out. To my knowledge, each time an individual has been removed in the framework of a bilateral exchange of diplomatic assurances on national security grounds, she has been excluded from the effective control of the judiciary, because of the inability of the sending State to exercise jurisdiction to act upon a finding of transgression.<sup>958</sup> A victim of torture is generally entitled to seek civil, criminal, and international legal remedies against both the sending and readmitting country. Successful civil or criminal actions can also give rise to compensatory or punitive redress, which has a more symbolic value, if compared to the irremediable physical and mental damage suffered

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<sup>957</sup>Eveline Schmid, 'The End of the Road on Diplomatic Assurances: the Removal of Suspected Terrorists under International Law' (2011) 8(1) *Essex Human Rights Review* 229.

<sup>958</sup>Noll 2006.

by the torture victim.<sup>959</sup> The question, therefore, is what guarantees, if any, are available as a consequence of violations of diplomatic assurances?<sup>960</sup>

Traditional political responses in the event of infringement of assurances include diplomatic protest as well as threat of economic and political sanctions. It should also be added that non-legally binding arrangements do not necessarily contain a mechanism for arbitration if a conflict arises between the two parties.

When the return of a person to the country of origin is susceptible of provoking irremediable violations of her fundamental rights, no sufficient reliance can be made on discretionary principles of estoppel and good faith, which might be detrimental of legal certainty. Those supporting diplomatic assurances as non-legally binding agreements would argue that, if a transgression occurs, it would not be possible to resort to a legal enforcement action, but conflicts might be solved only through diplomatic processes.<sup>961</sup> From an inter-state perspective, where no countermeasures can be invoked if a violation of a non-legally binding treaty occurs, other unfriendly actions can be

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<sup>959</sup> Jeffrey G Johnston, 'The Risk of Torture as a Basis for Refusing Extradition and the Use of Diplomatic Assurances to Protect against Torture after 9/11' (2011) 11 ICLR 1, 46.

<sup>960</sup> Jones 2006, 28.

<sup>961</sup> Aust 2000, 45.

undertaken by the parties to an international agreement, such as diplomatic protest and retorsion.<sup>962</sup>

It should also be highlighted that no special forum exists – under a bilateral political agreement - to pursue an action alleging violations of diplomatic assurances. In addition, domestic courts have been quite reluctant to attribute a legal personality to foreign States in domestic legal proceedings. Individuals are generally not able to enforce diplomatic assurances. Since they are not a party to the agreement and no mechanism of individual complaints exists, diplomatic assurances do not guarantee an individual standing to allege a breach of the accord. The MOUs agreed by the UK do not contain any provision for adjudication, enforcement, or sanction for breach of any kind. The only noteworthy provision is that either State may withdraw from the arrangement by giving six months' notice. However, the terms of the agreement will continue to apply to any person returned under the arrangement. No provision regulates the consequences in case of breach of this requirement, or in case a detainee is discovered to be a victim of torture. Since there is little prospect of detainees gaining redress from the domestic legal systems of the receiving countries,

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<sup>962</sup> Retorsion is meant as an 'unfriendly' conduct that is not inconsistent with any international law obligations, even though it may be a response to an internationally wrongful act, or an unpleasant or injurious act by another State. Being technically lawful but practically unfriendly and harmful, retorsion encompasses such acts as the interruption of diplomatic relations, embargos, and withdrawal of voluntary aid programs. Moreover, all acts of retorsion ought at once to cease when the State modifies its discourteous or unfair behaviour. See, Oppenheim and Roxburgh, *International Law: A Treatise*, Vol 1 (3<sup>rd</sup> Edn, The Lawbook Exchange Ltd 2005) 43.

‘one would think that this lack of any provision for enforcement went directly to the question of the reliability of assurances.’<sup>963</sup>

However, international bodies stand as the most suitable arenas for seeking legal redress against serious human rights violations. In particular, universal and regional human rights bodies are the most appropriate venues through which States and individuals may seek to adjudicate breaches of fundamental rights, even if they derive from breaches of diplomatic assurances. It should be observed, in this respect, that UN human rights treaty monitoring bodies, such as the Committee against Torture or the HRC, can accept individual complaints for violations of the prohibition of torture, as a consequence of the failure of the receiving State to enforce diplomatic assurances, only if the receiving State has itself accepted the jurisdiction of the Committee.<sup>964</sup>

In the process of both finding out breaches of assurances and providing the individual with effective remedies, two elements need to be borne in mind. First, the sending State is understandably very reluctant to publicly admit that an accord to prevent the future risk of mistreatments resulted – despite assurances - in the actual commission of those same mistreatments at the hand of a State overtly described

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<sup>963</sup> Eric Metcalf, ‘The False Promise of Assurances against Torture’ (2009) 6(1) *Justice Journal* 63.

<sup>964</sup> Jones 2006, 30-31.

as reliable and safe by virtue of the strong political relations linking the two governments.

Second, in its prognostic assessment of the risk, the sending State should be persuaded in good faith that there is no peril of proscribed treatments upon removal. Accordingly, the role of an international human rights body - such as the ECtHR - would be limited to ascertaining that the sending State has lived up to the obligation of *non-refoulement* in good faith by receiving a number of safeguards from the readmitting country. *Non-refoulement* - as implicitly enshrined, for example, in Article 3 of the ECHR - is a duty of prevention, and not a duty of result. The obligation is exhausted when the Court is satisfied that a State has made its best efforts to reconstruct what might happen sometime in the future, rather than when it has achieved a specific result. The appraisal of the risk is, indeed, a speculative exercise where the Court is asked to examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind all available information.<sup>965</sup> Therefore, regardless of the legal status of the assurances, it would be meaningless if a deportee, tortured upon removal, would lodge a new complaint before the same Court that had already previously given the

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<sup>965</sup> See, e.g., *Saadi v Italy* (2008) 47 EHRR 17, para 130. See, ILC Report on the Work of its Fifty-third Session (2001), N56/IO, para 14, 145, where the Commission affirms that ‘obligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable and necessary measures to prevent a given event from occurring, but without warranting that the event will not occur.’ See also, Antonio Marchesi, *Obblighi di condotta e obblighi di risultato* (Giuffr  2003).

green light to deportation following the satisfactory *ex ante* assessment of the risk made by the sending State.

#### **6.3.5.4. When assurances are reliable and when they are not.**

In light of the foregoing, this Section asks under what circumstances diplomatic assurances can be considered sufficiently reliable instruments to eliminate the risk of torture or other inhuman treatment. As we will better observe in Part III of this Chapter, international human rights bodies have generally rejected *ipso facto* assurances as a reliable basis for a safe transfer. In the *Ben Khemais v Italy* case, for example, the ECtHR held that the fact the complainant had not suffered immediate ill-treatment upon his return to Tunisia, as ensured by the authorities of this State, would not amount to a reliable prediction of the fate of that person in the future.<sup>966</sup>

The implicit importance of the Court's reasoning lies in the consideration that an assessment of the safety of the receiving country for the individual must be done also in the long run and in light of the general human rights situation in the receiving country. Although a court or any other supervisory body should consider the subsistence of stable relations between the two involved States, and gauge the personalized risk existing at the material time of the expulsion, these

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<sup>966</sup>*Ben Khemais v Italy* App no 246/07 (ECtHR, 24 February 2009) para 64.

bodies cannot neglect the possible irremediable consequences for the deportee if torture is practiced once the spotlights are off on a certain particular case and the visits from diplomats monitoring the detainee become even more rare.

Whilst assurances concerning death penalty can be more easily supervised, it has been suggested that diplomatic assurances on human treatment might suffice only in three cases: i) where exchanged with countries that do not possess patterns of torture toward prisoners and suspect terrorists; ii) where ‘a previous systemic pattern of torture has been brought under control’; iii) when ‘although isolated, non systemic acts continued, there was independent monitoring by a body with a track record of effectiveness, and criminal sanctions against transgressors.’<sup>967</sup>

More specifically, the ECtHR crafted a series of further criteria, which, in my view, are only the starting point of any discussion on reliability. If satisfied, they might create a presumption of sufficiency, but in any manner whatsoever can be considered exhaustive. These criteria include: i) whether the terms of the assurances have been disclosed to the Court; ii) whether they are specific or rather general and vague; iii) whether the agent giving the assurances is able to bind the receiving State and, additionally, local authorities; iv) whether the

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<sup>967</sup>These are the criteria developed by the applicant in his submission in the *Abu Qatada v UK* case before the ECtHR. See, para 168.

assurances concern treatments that are legal or illegal in the readmitting State; v) whether the two States have strong and durable relations; vi) whether the readmitting State has traditionally respected previous assurances of similar sort; vii) whether monitoring mechanisms exist to supervise compliance; viii) whether an effective system of protection against torture is in force in the receiving country, in terms of investigation, prosecution of torture-related crimes, and cooperation with international monitoring bodies; ix) whether the applicant has previously been ill-treated; and x) whether the reliability of assurances has already been examined by national courts of the sending State.<sup>968</sup>

Delegating monitoring responsibilities to an independent and authoritative third party, composed not necessarily of diplomats, but preferably of members of NGOs and human rights organizations, would play a crucial role on the assessment of the risk for the individual in question. Contacts with detainees should take place over time and be carried out by individuals with the necessary expertise. As the HRC suggests, a video recording of all interrogations can also be kept.<sup>969</sup> A monitoring body could exercise external pressure on the sending State not to conceal any information about human rights transgressions. It can also stand as a deterrent for the receiving

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<sup>968</sup> *Abu Qatada v UK*, para 189.

<sup>969</sup> HRC, General Comment no 20, 10 March 1992.



country by means, for example, of publication of monitoring reports of violations and the institutionalization of automatic enforcement mechanisms and venues of legal redress when illegal practices are detected. However, even if diplomats phrase assurances in very specific terms, with the activation of monitoring mechanisms coupled with a system of public reports of abuses, I believe they cannot be considered reliable in those contexts where torture is pervasive.

While most literature has delved into the legal status of diplomatic assurances, this issue does not seem to be decisive in determining whether the risk faced by the individual in the readmitting country is in fact displaced, and whether refugees' access to protection may be hampered. As governments tend to violate human rights obligations taken at a multilateral level, States are prone to justify diplomatic assurances against ill-treatment on the basis of the reliability of their partners, regardless both their human rights track record and the legally binding nature of the undertakings.

#### ***6.3.6. Diplomatic assurances: toward a 'repoliticization' of rights?***

Although the UN human rights committees and the ECtHR have acknowledged the reliability of diplomatic assurances when mechanisms of control are in place, it is not an automatic equation that more accountable and enforceable security-driven agreements

eliminate *per se* the risk of ill-treatment within the borders of a country that makes of torture a systematic practice—a practice that, *inter alia*, is often justified in the name of cooperation with Western governments in the ‘war on terror.’ Through the analysis of international human rights case law, the following sections will show how *refoulement* occurred also when diplomatic assurances had been sought.

The fact that the sending and receiving governments do not want their international reputation and diplomatic relationship damaged by lack of adherence to the accord still provides no guarantee against the perpetration of a wrongful act. Therefore, despite the existence of a friendly diplomatic relationship, a State partner with a dismal long-standing attitude to human rights obligations, which have been undertaken at a multilateral level should be considered unreliable.

With regard to the legal status of assurances, the use of the term ‘diplomatic’ does not *ipso facto* exclude their legally binding nature. Attention should be drawn on the intention of the parties, the actual object of the agreements, and the organs that have negotiated them, in order to ensure that they are able to bind the State in accordance with Article 46 of the VCLT. A case-by-case approach would, therefore, be fitting.<sup>970</sup>

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<sup>970</sup>See, Alessandra Gianelli, ‘Obbligo di *non-refoulement* e assicurazioni diplomatiche’ in *Studi in onore di Vincenzo Starace*, Vol I (Editoriale Scientifica 2008) 368.

I also believe the existence of legally binding agreements does not prevent the commission of the wrongful act, but has an impact only on the *ex post* enforcement mechanisms in case of human rights abuses. Enforcement is an element courts (and possibly States) *should* take into consideration in the *ex ante* assessment of the risk of torture. It would indicate to what extent the two States would be able to commit themselves by accepting to be subjected to mechanisms to determine their responsibility in case of departure from the assurances. In this sense, it could also have a deterrent effect.

However, *in practice*, States do not deem the legal status of diplomatic assurances - which is related to the existence of enforcement procedures - particularly relevant to the assessment of their reliability. Indeed, political motivations and friendly diplomatic relations play *de facto* a greater role in the decision of States to cooperate for a safe removal. *Ex post* enforcement is perceived as an essential component of an effective system of human rights protection, but it pursues the purpose of supplying the individual with the instruments to seek and obtain justice only *after* a violation of her rights has occurred. The combination of all these elements explains why, *de facto*, the normative quality of diplomatic assurances is not deemed by political and judicial authorities as a decisive asset to the assessment of the impact assurances have on refugee rights.

These considerations also raise two further questions, which however cannot be answered in the course of this chapter: i) why States need to frame their human rights commitments within bilateral political agreements, which replicate standards that have already been enshrined within international human rights treaties; ii) whether the proliferation of bilateral instruments precluding torture in a specific case undermine the object and purpose of multilateral human rights treaties aimed at granting protection against torture in a *general* manner.<sup>971</sup>

It is only worth pointing out here that a legally binding assurance can legitimately restate pre-existing obligations, but apply them specifically to the case of removal of a person under the bilateral agreement. Indeed, ‘an obligation might be doubly owed, due to having been made obligatory by two different sources.’<sup>972</sup> However, this does not clarify what would be the added value of repeating in generic form commitments, which States have already entered into in human rights treaties.<sup>973</sup>

Diplomatic assurances are generally sought when the sending country bears a reasonable suspicion that the receiving State is

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<sup>971</sup> For a thorough discussion on the relationship between diplomatic assurances and the multilateral framework of human rights protection, see, Schmid 2011, 230-4.

<sup>972</sup> Worster 2012, 276.

<sup>973</sup> SIAC, for example, explained in these terms Algeria’s failure to agree a MoU with the UK. See, *Y v Secretary of State for the Home Department* (SC/36/2005, 24 August 2006) para 256.

abusive. The two detrimental, but still inevitable consequences are: on the one hand, the implicit recognition of the existence and perpetuation of systematic violations of torture in the readmitting country; and, on the other hand, the creation of a two-tier system that differentiates between the individual shielded by the assurances and all other detainees who continue to be subjected to inhuman and degrading treatment or torture.

Moreover, Article 41(2) of the International Law Commission (ILC) Articles on State Responsibility (ILC Articles) provides that ‘no State shall recognize as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation.’ Pursuant to Article 40, a breach of a norm, such as the prohibition of torture, ‘is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.’ Article 41(2) does not only refer to the formal recognition of an unlawful situation, but also prohibits acts that would imply such recognition.<sup>974</sup> Article 41(2) ‘extends beyond the commission of the serious breach itself to the maintenance of the situation created by that breach, and it applies whether or not the breach itself is a continuing one.’<sup>975</sup> As to the elements of ‘aid or assistance’, it is implicit that the

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<sup>974</sup>ILC Commentary to Article 41, 114.

<sup>975</sup>ibid 115.

State has ‘knowledge of the circumstances of the internationally wrongful act’, as provided for in Article 16 of the ILC Articles.<sup>976</sup>

For the purpose of this Chapter, the typical scenario is one of bilateral cooperation for the removal of suspected terrorists to a country with questionable and violent techniques of interrogation in order to extract information that can be helpful to both the sending and receiving State. The issue of State responsibility under general international law will not be discussed here in further detail. However, it can be noted that, if it is proved that the sending country transfers unwanted aliens to a third country with knowledge of the circumstances of the internationally wrongful act (*in casu*, the use of torture), it might be engaging in a violation of Article 41 for aiding and abetting the responsible State in maintaining that situation.

Although diplomatic assurances (either in the form of an MoU or as individualized assurances) have often been considered by national authorities as trustworthy tools for removing the risk of mistreatments for the deportee, academics, human rights organizations, and international human rights bodies have repeatedly questioned their reliability. Goodwin-Gill, for example, indicates at least four reasons why diplomatic assurances lack efficacy: i) they are based on trust; ii)

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<sup>976</sup>ibid 115. Pursuant to Article 16, ‘A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act [...].’ Article 16 will be discussed more in details in Chapter 7 of this thesis.

post-return monitoring mechanisms are insufficient to prevent mistreatments, on account of the fact that torture is secretly administered and the detainees have no interest in occasionally reporting abuses that could cause reprisals; iii) non-state actors can be the potential perpetrators of torture; and iv) it is unlikely that States are held accountable in case of violations.<sup>977</sup>

According to Theo Van Boven, the former UN Special Rapporteur on Torture, even when there is not a consistent pattern of gross and flagrant human rights violations in the receiving country, the potential risk of torture or other forms of inhuman treatment in the individual case is sufficient to exclude a priori the usage of diplomatic assurances.<sup>978</sup> Post-return monitoring mechanisms have so far proven ineffective in both relieving individuals from the risk of torture, and as an instrument of accountability.<sup>979</sup> They neither have a statutory mandate allowing unimpeded and unannounced visits, nor possess that authority nor influence to ensure that an independent investigation of the allegations of torture is carried out.<sup>980</sup> The existence of such a fragile backdrop for human rights protection in

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<sup>977</sup> Guy S Goodwin-Gill, 'Diplomatic Assurances and Deportation', Presented at JUSTICE/Sweet & Maxwell Conference on Counter-terrorism and Human Rights, 28 June 2005, 2, as cited in Braswell 2006, 15.

<sup>978</sup> Special Rapporteur of the UN Commission on Human Rights on Torture and other cruel, inhuman, or degrading treatment or punishment, *Report Submitted pursuant to General Assembly Resolution 58/164*, UN Doc A/59/324, 1 September 2004, paras 34, 37-39 (Special Rapporteur on Torture 2004).

<sup>979</sup> See, Special Rapporteur on Torture, *Report submitted in accordance with General Assembly Resolution 59/182*, UN Doc A/60/316, 30 August 2005, para 46.

<sup>980</sup> Amnesty International 2010, 12.

security-related transfers ‘leads us to question whether security and migration control constitute legitimate enough interests to undermine the application of the principles of legal certainty, transparency, and democratic control to State action abroad.’<sup>981</sup>

In extradition proceedings, negotiation regarding the treatment of the person in question is carried out by the criminal justice systems of the two involved countries. Instead, when the subject matter involves deportations with assurances on security grounds, the same dialogue occurs between the countries’ respective political authorities. Such deference to bilateral diplomacy might end up being particularly dangerous when the fundamental rights of vulnerable individuals are at stake. Diplomatic assurances are predominantly negotiated with countries where torture is widespread and routine and where, consequently, the damage for the applicant would be irremediable if torture occurred *in concreto*. Moreover, if the protection of the rights of the deportees can be ensured by the pre-existent set of human rights treaties concluded at universal and regional level, I question the utility and appropriateness of a binary system of human rights protection, which devolves upon the sphere of politics what States have already reserved to the sphere of law.<sup>982</sup>

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<sup>981</sup>Garcia Andrade poses this question in the framework of migration controls at sea. See, Paula Garcia Andrade, ‘Spanish Perspective on Irregular Immigration by Sea’ in *Extraterritorial Immigration Controls*, 344.

<sup>982</sup> On this difference, see Klabbbers 1996, 19.



The emerging anomaly is a progressive ‘repoliticization of human rights by way of moving their protection and shifting power from the legal or judicial sphere to that of diplomacy and transnational security networking.’<sup>983</sup> An individual identified as an ‘object of “diplomatic significance” and “personal trust” between senior State officials’, while possibly more protected, would also run the risk of being placed at the mercy of the fluctuating exigencies of foreign relations.<sup>984</sup> Although this does not sound like the most comforting scenario, it is also true that, in many cases, the activism of the judiciary has countered the choices made by the executive branch, generally more concerned in securing migration at the expenses of the human rights of foreigners. Indeed, despite terrorism can drive the ECtHR to grant States a wider margin of appreciation in case of ‘war or other public emergency threatening the life of the nation’,<sup>985</sup> State security concerns cannot defer judicial review and trump fundamental human rights obligations.<sup>986</sup>

As Vedsted-Hansen observes, although assurances can be perceived as an attempt to translate human rights protection into an essentially political issue, they should be subjected to the judicial

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<sup>983</sup>Vedsted-Hansen 2011, 60.

<sup>984</sup>Larsaeus 2006, 2.

<sup>985</sup> Under Article 15(1) of the ECHR, ‘In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.’

<sup>986</sup> See, e.g., Vedsted-Hansen 2011, 61.

control of independent bodies.<sup>987</sup> Nevertheless, the fact that they can be disobeyed – as several cases have demonstrated - reveals how ‘the dilemmatic relationship between law and policy persists, and the shifting of power to the executive and security sphere invites for continued legal and academic attention.’<sup>988</sup>

### **Part III**

#### **6.4. Access to protection: the relationship between refugee rights and diplomatic assurances, in principle and in practice**

Before delving into the intertwining between diplomatic assurances and refugee rights, the reader might benefit of brief summary of the main points made thus far. Part II of this Chapter pointed out how doctrine continues to be divided on the legal status of diplomatic assurances. This status can be an element in assessing the existence of enforcement mechanisms and the extent to which a State would commit itself by agreeing to be subjected to mechanisms of determination of responsibility in case of infringement of the assurances. However, *in practice*, the legal status of assurances is not deemed as a primary asset by the sending State in its prognostic assessment of the risk. States tend, indeed, to pose greater reliance on

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<sup>987</sup> *ibid* 60.

<sup>988</sup> *ibid* 62.

friendly political relations and the relocation of the deportee to the sphere of ‘high diplomacy.’

This Chapter takes as units of analysis diplomatic assurances formalized within MoUs, written bilateral agreements that lay out the mutual understanding on the treatment of the deportees in a general fashion. Ample latitude is then given to States in deciding the modalities of enforcement of the assurances negotiated under the general framework of a MoU. However, because of the dearth of jurisprudence on MoUs, cases on the use of single diplomatic assurances are brought into the analysis.

International courts have repeatedly highlighted how diplomatic assurances alone are insufficient,<sup>989</sup> and how the government should conduct an independent risk-analysis to assess whether, at the practical level, the specific assurances delivered in an individual case alter the risk assessment. The next subsections combine both the study of law and implementation of the law. They examine whether the use of diplomatic assurances, in principle and in practice, can hamper refugees’ access to protection, that is to say, non-*refoulement*, as well as access to fair asylum procedures, and effective remedies before removal.<sup>990</sup>

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<sup>989</sup> See, *Ben Khemais v Italy*, para 57; *Toumi v Italy* App no 25716/09 (ECtHR, 5 April 2011) para 51.

<sup>990</sup> Part II of Chapter 6 draws on a paper I wrote for a forthcoming book. See, Mariagiulia Giuffré, ‘Access to Protection: Negotiating Rights and Diplomatic Assurances under Memoranda of Understanding’ in Gauci JP, Giuffré M and

#### ***6.4.1. Access to asylum procedures, in principle***

Diplomatic assurances assume relevance for supervisory bodies, including refugee status determination commissions, national courts, or international human rights bodies invested with the task of determining whether a particular asylum seeker is entitled to protection, and whether assurances eliminate the risk of prohibited treatments faced by an individual scheduled to be deported to her country of origin.<sup>991</sup> Although diplomatic assurances do not affect the right to access asylum procedures, they can impact the eligibility to asylum. To put it more clearly, in principle they cannot be sought from the country of origin or the country of former habitual residence (in the case of stateless asylum seekers) of an asylum seeker whose application is in course of examination. However, assurances might be given unilaterally by the country of origin or the country of former habitual residence when it is known or suspected that a national or a certain individual has sought asylum in another State. Additionally, a person may apply for asylum after the request for diplomatic assurances has been submitted in view of facilitating the return of a person whose presence is considered inconducive to the public good.

What is important to stress is that, in all these different scenarios,

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Tsourdi L, *Forced Migration(s): Critical Perspectives on Refugee Law* (Martinus Nijhoff Publishers 2014).

<sup>991</sup> See, e.g., Committee against Torture, General Comment no 1 on Article 3 of the Convention, UN Doc A/53744, Annex IX, 52 (1998) para 7.

the principle of confidentiality and the right to privacy categorically bar the host State from sharing information with the applicant's home country pending a determination of the asylum claim in order to avoid that she or her family members are exposed to a risk of persecution, and that such information is used for purposes contrary to human rights law. Pursuant to Article 12 of the UDHR and Article 17 of the ICCPR, 'no one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence. Everyone has the right to the protection of the law against such interference or attacks.'<sup>992</sup> Likewise, Article 8 of the ECHR provides that 'Everyone has the right to respect for his private and family life, his home, and his correspondence' and restrictions are allowed only in accordance with the law. As the HRC explains in its General Comment 16 on Article 17, 'the principle of confidentiality requires that effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process, and use it.'<sup>993</sup>

At the EU level, the principle of confidentiality is explicitly recognized by Article 30 of the Recast Procedures Directive whereby:

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<sup>992</sup> Under Article 16 of the UN Convention on the Rights of the Child, 'Every child has the right to privacy. The law should protect the child's private, family and home life.' Convention on the Rights of the Child 1577 UNTS 3, entry into force 2 September 1990.

<sup>993</sup> See, HRC, General Comment 16 on Article 17 of the ICCPR, UN doc HRI/GEN/1/Rev.1, 23 (1988) para 10.

For the purposes of examining individual cases, Member States shall not: (a) disclose information regarding individual applications for international protection, or the fact that an application has been made, to the alleged actor(s) of persecution or serious harm; (b) obtain any information from the alleged actor(s) of persecution or serious harm in a manner that would result in such actor(s) being directly informed of the fact that an application has been made by the applicant in question, and would jeopardise the physical integrity of the applicant or his or her dependants, or the liberty and security of his or her family members still living in the country of origin.<sup>994</sup>

Likewise, Article 45(2)(b) of the Recast Procedures Directive<sup>995</sup> requires Member States to ensure that, in considering withdrawing the international protection status of a third country national in accordance with Article 14 and 19 of the Recast Qualification Directive, they adhere to the same procedural guarantees on confidentiality.<sup>996</sup>

In line with the above-mentioned provisions, the UNHCR ‘Note on Procedural Standards for refugee status determination under the UNHCR’s Mandate’ points out that every official who provides

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<sup>994</sup> Article 30 of the Recast Procedures Directive replaces Article 22 of the 2005 Procedures Directive.

<sup>995</sup> Article 45(2)(b) of the Recast Procedures Directive replaces Article 38(1)(d) of the 2005 Procedures Directive.

<sup>996</sup> Under Article 14 of the Qualification Directive, Member States shall revoke, end, or refuse to renew the refugee status of a third-country national or a stateless person if, *inter alia*, he or she has ceased to be a refugee (Article 14(1)); if after he or she has been granted refugee status, it is established by the Member State concerned that ‘he or she should have been or is excluded from being a refugee in accordance with Article 12’ (para 14(3)(a)).

services to asylum seekers is ‘under a duty to ensure the confidentiality of information received from or about asylum seekers and refugees.’<sup>997</sup> The fact that the applicants have made such a request should also be taken into consideration.<sup>998</sup> Moreover, disclosure of information without the consent of the individual concerned shall be subjected to the approval of a Protection Staff member, and, in appropriate cases, the Department of International Protection (DIP).<sup>999</sup> Asylum seekers must always be informed of their right to confidentiality and should also be assured that the UNHCR would not contact or share information with the country of origin about their condition or refugee status, unless they have expressly authorized the host country’s authorities to do so.<sup>1000</sup>

Therefore, a status determination authority shall not provide the State of origin or other entities within the State with any information that a certain individual is seeking protection or has already obtained asylum, even if the situation in the home country has changed. Such an obligation is valid also in those cases in which a person has been

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<sup>997</sup> UNHCR, *Note on Procedural Standards for Refugee Status Determination under the UNHCR’s Mandate*, 20 November 2003, 2-1 (UNHCR Note on Procedural Standards).

<sup>998</sup> UNHCR, ‘Asylum Processes (Fair and Efficient Asylum Procedures’, *Global Consultations on International Protection*, EC/GC/01/12, 31 May 2001, para 50 (m).

<sup>999</sup> UNHCR Note on Procedural Standards, 2-1

<sup>1000</sup> *ibid.* See also, UNHCR, *Guidance Note on Extradition and International Refugee Protection* (April 2008) 24.

denied asylum.<sup>1001</sup> States shall abide by the confidentiality rule not only during the assessment of protection needs, but also during the examination of exclusion grounds. In this phase, it might be possible to share data about a particular asylum seeker for the sake of gathering intelligence information on an individual's suspected terrorist activities. Although the exclusion procedure is not the core of this study, it is important to remember that 'even in such situations, the existence of the asylum application should still remain confidential.'<sup>1002</sup>

States cannot avail themselves of diplomatic assurances in denying access to asylum procedures, but can only rely on them as part of the factual elements necessary for assessing the risk for the asylum seeker and how well-founded her fear of persecution may be if she is returned to her home country. Therefore, diplomatic assurances cannot give rise to a declaration of inadmissibility of an asylum claim or to restrictions of essential procedural safeguards, but can only be used to determine the eligibility criteria for the recognition of an individual as a refugee or as a person in need of complementary protection.<sup>1003</sup> If exchanged during the phase of assessment of her

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<sup>1001</sup> See, UNHCR Submission, *Inquiry into Asylum and Protection Visas for Consular Officials and the Deportation, Search and Discovery of Vivian Solon* (2005) para 9 (UNHCR Inquiry into Asylum and Protection Visas).

<sup>1002</sup> UNHCR, *Background Note on the Application of the Exclusion Clauses: Article IF of the 1951 Convention Relating to the Status of Refugees* (4 September 2003) 540.

<sup>1003</sup> UNHCR Note on Diplomatic Assurances, paras 41-42.



claim, assurances can involve violation of confidentiality and thus undermine the credibility of the entire process.<sup>1004</sup>

The fact that the host country has received diplomatic assurances cannot constitute a basis for rejecting an asylum application - which should always be examined in its substance - but might require, according to the circumstances, a prioritization of the treatment of such claims.<sup>1005</sup> For example, applications concerning people suspected of terrorism or giving rise to possible considerations of exclusion under Article 1(f) of the Geneva Convention should not be considered manifestly unfounded, but rather better assessed on a priority basis by specialized exclusion units with designated Eligibility Officers operating within the institution in charge of asylum determination.<sup>1006</sup>

As the UNHCR emphasizes, diplomatic assurances cannot only be limited to eradicating a specific threat - such as the risk of torture - but must 'effectively eliminate *all* reasonably possible manifestations of persecution in the individual case (emphasis added).'<sup>1007</sup> The institution responsible for asylum determination shall ascertain, in other words, that the person in question would not be exposed to any other particular form of persecution beyond torture, for example,

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<sup>1004</sup> UNHCR Inquiry into Asylum and Protection Visas, para 12.

<sup>1005</sup> UNHCR Note on Diplomatic Assurances, para 46.

<sup>1006</sup> *ibid.* See also, UNHCR Note on the Application of the Exclusion Clauses, para 101.

<sup>1007</sup> UNHCR Note on Diplomatic Assurances, para 51.

disproportionate punishment or discrimination. In conducting such an evaluation, the decision-making authority shall also verify that the entity issuing the assurance has effective control over the actions of those State or non-State actors the risk of persecution emanates from.<sup>1008</sup> An effective system of monitoring of the internal situation of the country at issue is, therefore, an essential requisite, although such a solution does not automatically provide the individual with mechanisms of enforcement against possible post-return violations of the assurances.

Moreover, the evaluation of diplomatic assurances as a reliable criterion for eliminating the risk of persecution in the home country, and, therefore, denying asylum, shall be made in accordance also with international human rights law, which provides a wider protection, especially when the applicant falls within one of the exclusion clauses of the Geneva Convention.<sup>1009</sup> For instance, the ECtHR, the HRC, and the Committee against Torture have acknowledged the right of a

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<sup>1008</sup> *ibid.* paras 51-52.

<sup>1009</sup> The exclusion provisions of the Refugee Convention are: the first paragraph of Article 1(d) whereby ‘This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance’; Article 1(e) which applies to ‘a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country’; Article 1(f) that applies to ‘any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.’

person, prior to her removal, to have legal recourse to an independent reviewing body to challenge the transfer, and gauge the reliability of assurances obtained in response to allegations of torture.<sup>1010</sup>

#### ***6.4.2 Access to effective remedies***

Asylum seekers, whose refugee status (or subsidiary protection) has been refused or who have been excluded from international protection on national security grounds, are entitled to an effective remedy, meant as the right both to appeal a negative decision within a reasonable time, and to remain in the territory waiting the outcome of the appeal.<sup>1011</sup> In addition, independent judicial scrutiny of diplomatic assurances at national and international level may prevent an unlawful removal to torture.

In general, the existence of diplomatic assurances is not one of the criteria relied upon by human rights bodies to find violations of the right to an effective remedy. For instance, in the *Abu Qatada* case, the ECtHR found that there was no violation of Article 13:

The Court does not consider that there is any support in these cases (or elsewhere in its case law) for the applicant's submission that there is an enhanced requirement for transparency and procedural fairness where assurances are being

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<sup>1010</sup> See, *Agiza v Sweden*, para 13.7.

<sup>1011</sup> UNHCR Executive Committee, Conclusion no 8, *Determination of Refugee Status*, CCVIII, 1977, paras 6-7 (UNHCR Conclusion no 8).

relied upon; as in all Article 3 cases, independent and rigorous scrutiny is what is required. Furthermore [...] Article 13 of the Convention cannot be interpreted as placing an absolute bar on domestic courts receiving closed evidence, provided that the applicant's interests are protected at all times before those courts.<sup>1012</sup>

In the great majority of cases object of the present review concerning deportation with assurances, the ECtHR has recorded no breach of Article 13, owing to the fact that the decision to expel an individual after rejection of her asylum claim or the application of an exclusion order had been reviewed by a domestic court of appeal. Therefore, the exchange of diplomatic assurances should not impair the right to an effective remedy as long as a person (including an asylum seeker who has either been rejected or excluded from refugee status/subsidiary protection) has been allowed to both challenge the expulsion decision and to remain in the territory waiting the outcome of the appeal.<sup>1013</sup>

In those few cases where the ECtHR found violations of Article 13, responsibility was not attributed to the existence of diplomatic assurances *per se*, since deportees were always entitled to challenge their return decision. Breaches of rights were rather caused by lack of automatic suspensive effect of the appeal to set aside an expulsion order that could produce potentially irreversible effects for the

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<sup>1012</sup>*Abu Qatada v UK*, para 219.

<sup>1013</sup>UNHCR Conclusion no 8, paras 6-7.

removed individual.<sup>1014</sup> In lieu of a rigorous and effective scrutiny of the claim, an extreme urgent procedure can reduce the rights of the defence and the examination of the complaint to a minimum.<sup>1015</sup>

#### ***6.4.3. Access to fair asylum procedures and effective remedies, in practice***

This Section intends to illustrate how seeking diplomatic assurances during the asylum determination process can contribute to a violation of the procedural safeguards of asylum mechanisms, such as the principle of confidentiality, thus affecting the final outcome of the proceedings.<sup>1016</sup> Although a detailed analysis of the procedural and substantive aspects of asylum determination is not at issue here, it is worth noting that diplomatic assurances have been progressively entering into the evidentiary assessment process. Many cases addressed by national courts have raised the criticism of human rights circles because of the fact that assurances against torture were sought

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<sup>1014</sup> See, e.g., *Chahal v UK* (1997) 23 EHRR 413, paras 153-4; *Soldatenko v Ukraine* App no 2440/07 (ECtHR, 23 October 2008) paras 82-83; *Muminov v Russia* App no 42502/06 (ECtHR, 11 December 2008) paras 102, 105; *Abdulazhon Isakov v Russia* App no 14049/08 (ECtHR, 8 July 2010) paras 136, 138-139.

<sup>1015</sup> See, e.g., *MSS v Belgium and Greece*, paras 386-9.

<sup>1016</sup> As explained by the UNHCR, the basis of the right to confidentiality is the right to privacy enshrined in Article 12 of the UDHR and Article 17 of the ICCPR. See, UNHCR Inquiry into asylum and protection visas.

prior to completion of asylum procedures, thus violating the principle of confidentiality.<sup>1017</sup> A review of practice is thus herein carried out.

The first case examined in this Section concerns the expulsion of Mr. Sihali from the UK to Algeria.<sup>1018</sup> In contesting the transfer of his client, the counsel of the applicant during the appeal before SIAC attacked the decision to seek and rely on diplomatic assurances. They were deemed, indeed, an integral part of the immigration decision to refuse asylum to Mr. Sihali, as witnessed by the refusal letter of 16 January 2009, which makes express reference to the *Note Verbale* 08/08 between the UK and Algeria.<sup>1019</sup>

Because assurances shall not be sought in the case of an ordinary asylum seeker who is not a national security suspect, ‘the Secretary of State has deviated from the publicly understood position he previously held, not to seek assurances in asylum cases in the absence of a threat to national security “or other major public interest.”’<sup>1020</sup> However, as the UNHCR recognizes, even if ‘in exceptional circumstances, contact with the country of origin may be justified on national security

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<sup>1017</sup> For a review of these cases, see, HRW, *Commentary on State Replies CDDH Questionnaire on Diplomatic Assurances* (March 2006) <[http://www.hrw.org/sites/default/files/related\\_material/eu0306\\_diplo.pdf](http://www.hrw.org/sites/default/files/related_material/eu0306_diplo.pdf)> accessed 22 June 2013.

<sup>1018</sup> *Sihali v SSHD*, SC/38/2005.

<sup>1019</sup> *ibid*, para 28.

<sup>1020</sup> *ibid*.

grounds [...] the existence of the asylum application should not be disclosed.<sup>1021</sup>

Between 2005 and 2006, the then Dutch Minister for Alien Affairs and Integration, Rita Verdonk came under pressure in parliament following a report by a current affairs programme (Netwerk) in June 2005. According to the programme, the Congolese Secret Service (DGM, which was also in charge of border control) had been given confidential information about its own nationals whose asylum applications in the Netherlands were unsuccessful. The fact that Minister Verdonk let Congolese authorities know that these people had applied for asylum exposed the returnees to the risk of persecution. A special commission (Commission Havermans), in charge of investigating in more detail the issue, confirmed in December 2005 that sufficient information likely to identify the persons as asylum seekers had been provided to the Congolese government.<sup>1022</sup> A string of other examples, drawn from international human rights case law and circumscribed to the phase of access and assessment of protection claims, can be of additional illustrative guidance, as the following sub-sections will demonstrate.

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<sup>1021</sup> UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1f of the 1951 Convention relating to the Status of Refugees* (2003) 501.

<sup>1022</sup> For more information on the ‘Congolese case’, see the following websites: <[http://www.pilates.ekoregion.biz.pl/?pilates=Rita\\_Verdonk](http://www.pilates.ekoregion.biz.pl/?pilates=Rita_Verdonk)>; and <[http://www.expatica.com/nl/news/local\\_news/netherlands-passed-asylum-details-to-congo-26049.html](http://www.expatica.com/nl/news/local_news/netherlands-passed-asylum-details-to-congo-26049.html)> accessed 23 November 2012.

#### **6.4.3.1 *The Committee against Torture and the HRC***

The destiny of Mr. Agiza and Mr. Alzery crossed when these two Egyptian nationals arrived in Sweden and applied for asylum. Mr. Agiza alleged he was persecuted and tortured in Egypt on account of his activities in the Islamic movement. In 1999, when he fled to Iran, the Egyptian Superior Court Martial convicted him of terrorism *in absentia*. Fearing a possible readmission to Egypt, he abandoned Iran, and on 23 September 2001, during a transit stop through Stockholm, he applied for asylum together with his family. Similarly, Mr. Alzery was subjected to harassment and arrest in Egypt for his involvement in an Islamic movement opposing the Egyptian government. After fleeing to Saudi Arabia and Syria, he eventually landed in Sweden in 1999.

The Swedish Migration Board determined that Mr. Agiza and Mr. Alzery could have a well-founded fear of persecution if they were forced to return to Egypt. Nevertheless, the case was turned over to the government based upon secret evidence provided to the Migration Board by the Swedish Security Police according to which Mr. Agiza had a leading role in the terroristic activities of an organization, while Mr. Alzery represented a threat for the security of the nation. They were excluded from refugee protection and the enforcement of the return procedures was so swift that no possibility to challenge both exclusion and the expulsion decision was in fact available for the two



asylum seekers. They were, therefore, deprived of their right to an effective remedy before removal, also on account of the fact that no possibility was given to an international court to assess the sufficiency of the diplomatic assurances obtained by Egyptian authorities.

Although the decision of exclusion from refugee status regarding Mr. Agiza and Mr. Alzery was issued on 18 December 2001, the Swedish government entered into bilateral negotiations with the Egyptian government in early December by obtaining from it assurances of ‘full respect to their personal and human rights.’<sup>1023</sup> By seeking diplomatic assurances on the treatment of the two men while their asylum applications were still under way, Swedish authorities breached the principle of confidentiality whereby no information can be given to the government of the country of origin—the source of fear for the applicant. The assurances sought from the Egyptian government were, thus, deemed sufficiently credible to secure compliance with Sweden’s human rights obligations.

In the cases of Mr. Agiza and Mr. Alzery, exclusion from refugee status, which resulted in *refoulement*, came about without a sufficiently reasoned determination of the asylum claims and without any information about the security grounds leading to rejection. On the same day, the two men were repatriated to Egypt where they

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<sup>1023</sup>*Alzery v Sweden* Comm no 1416/2005 (3 November 2006) UN Doc CCPR/C/88/D/1416/2005, paras 3-7.

alleged to have undergone torture and inhuman treatment. Swedish, USA, and Egyptian security agents were all present at the Bromma airport during the apprehension of the two men, whose bodies were searched in a very intrusive way.<sup>1024</sup>

Moreover, the Security Police file reports the following information: first, the date for the decision on the asylum application was settled for 18 December while the plane supplied by the American Central Intelligence Agency (CIA) to expel the two men was booked for 19 December; second, these decisions were taken at the highest level in the Swedish Foreign Affairs Ministry after consultation with the Security Police and Migration Board.<sup>1025</sup> In 2003 and 2005, the Committee against Torture and the HRC found that Sweden had violated the CAT and the ICCPR for both subjecting the two applicants to inhuman and degrading treatment, and for transferring them to a country where they were allegedly mistreated.<sup>1026</sup>

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<sup>1024</sup> Despite the cold of the Swedish winter, their clothes were cut off their bodies; they were handcuffed, chained to their feet, drugged per rectum with some form of tranquilliser, and placed in diapers. They were then dressed in overalls and escorted to the plane, blindfolded, hooded, and barefoot. See, *Alzery v Sweden*, para 3-11.

<sup>1025</sup> Elspeth Guild, 'Asymmetrical Sovereignty and the Refugee: Diplomatic Assurances and the Failure of Due Process. *Agiza v Sweden* and *Alzery v Sweden*' in James C Simeon, *Critical Issues in International Refugee Law. Strategies toward Interpretative Harmony* (Cambridge University Press 2010) 137-8

<sup>1026</sup> Although their family members denounced clear signs of torture and the shocking state of the prisoners, the Swedish Ambassador in Egypt, who offered them visits time by time (not in private), reported that no evidence of torture was found. And when Mr. Alzery complained about inhuman treatments in front of the diplomat and the Egyptian warden, the latter took notes and after a while Mr Alzery

Moreover, Mr. Agiza was deprived of his right to an effective remedy, since misleading information surrounding the denial of the asylum application was provided by Swedish authorities to his legal advisers. The reason for such a subtle manoeuvre was to prevent international human rights bodies, such as the Committee against Torture or the ECtHR from issuing a staying order before enforcement of the expulsion decision could take place.<sup>1027</sup>

According to the Committee against Torture, Article 3 of the CAT implies the right to an effective, independent, and impartial review of the decision to expel or remove. The Committee found, therefore, that:

The absence of any avenue of judicial or independent administrative review of the Government's decision to expel the complainant does not meet the procedural obligation to provide for effective, independent and impartial review required by Article 3 of the Convention.<sup>1028</sup>

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was transferred to another prison where he was seriously tortured. See, *Alzery v Sweden* (UNHCR submission).

<sup>1027</sup> The Parliamentary Ombudsman, *A Review of the Enforcement by Security Police of a Government Decision to Expel two Egyptian Citizens*, Adjudication no 2169-2004, 22 March 2005, Section 2.4.2. The proceedings before the Committee against Torture and the HRC concluded with a compensation of SEK 3 million to Mr. Agiza and Mr. Alzery and the establishment of an independent immigration court with power to review expulsion decisions, including security related deportations.

<sup>1028</sup> *Agiza v Sweden*, para 13.8.

Mr. Agiza was not given sufficient time to file a complaint before a Swedish Court or an international body prior to removal. Therefore, the Committee held that there was an express breach of Article 22, highlighting that all remedies (against the exclusion from refugee status and the expulsion decision) should have been exhausted before removal. Likewise, the HRC has interpreted Article 2(3) of the ICCPR as requiring States parties to provide administrative and judicial review of deportation orders to avoid violations of the principle of *non-refoulement* enshrined in Article 7 of the ICCPR.<sup>1029</sup> Under Article 2(3) of the ICCPR,

Each State Party to the present Covenant undertakes: (a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) to ensure that the competent authorities shall enforce such remedies when granted.

#### **6.4.3.2. The ECtHR**

In this analysis of State practice, the ECtHR offers a host of instructive cases. In *Khaydarov v Russia*, for example, the ECtHR

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<sup>1029</sup>ibid para 11.8.

held that, if the order to extradite the applicant to Tajikistan was to be enforced, there would be a violation of Article 3 of the Convention.<sup>1030</sup> The applicant was an ethnic Uzbek who fled Tajikistan to move to Russia where, on 17 June 2008, he applied for asylum claiming that the Tajik authorities had persecuted him on ground of his ethnic origin. However, his asylum request was denied, a decision that was confirmed on appeal. On several occasions, on 4 and 26 February 2009 and on 12 March 2009, the Moscow City Court sent requests for information to the Russian and Tajik Ministries of Foreign Affairs concerning the applicant's allegations of a risk of ill-treatment, and postponed a hearing on the appeal against the extradition order pending the examination of the asylum claim.<sup>1031</sup> As we can read in the text of the ECtHR's decision,

On 24 March 2009 the Russian Ministry of Foreign Affairs informed the Moscow City Court that it had no information concerning any political motives for the applicant's prosecution and noted that Tajikistan had ratified nearly every major international human-rights instrument, including the ICCPR and the UN Convention against Torture.

Only two days after, the Moscow City Court upheld the judgment on appeal concerning the refusal of refugee status. On 10 April and on

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<sup>1030</sup> *Khaydarov v Russia* App no 21055/09 (ECtHR, 20 May 2010) para 164.

<sup>1031</sup> *ibid* paras 26, 28.

26 May 2009, the Tajik Prosecutor General provided assurances that the applicant would not be persecuted on political or religious grounds, and that Tajikistan had ratified the main international human rights instruments. Called to re-examine the extradition order, the Moscow City Court upheld the previous judgement affirming that the applicant was a Tajikistani national with no refugee status and that he was not persecuted for political or religious reasons.<sup>1032</sup> It also argued the assurances given by the Tajik Prosecutor General's Office sufficed to exclude the risk that the applicant would suffer ill-treatment. On 30 July 2009, the Supreme Court upheld the decision and the extradition order became final.<sup>1033</sup>

Despite the fact that in cases of extradition, the requesting State is the home country of the individual in question, and it is privy to the person whereabouts, confidentiality should however be respected when commencing asylum proceedings. Despite the fact that information related to extradition may have a bearing on the eligibility of the person to asylum, the decision on asylum and the decision on the extradition request should always be conducted in parallel and constitute two separate procedures.

Whether diplomatic assurances were one of the major elements the Russian deciding authority relied upon to determine the refusal of the

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<sup>1032</sup>ibid para 37.

<sup>1033</sup> ibid paras 37-38.

asylum request is a matter of speculation. But what is certain is that diplomatic assurances were sought during the asylum determination process of Mr Khaydarov, thus violating basic rules of fairness requiring that no information on the applicant is shared with the country of origin. The outcome of the extradition proceedings was affected accordingly.

#### ***6.4.4. Non-refoulement, in principle***

In order to avoid *refoulement*, asylum seekers are entitled not to be expelled pending a final determination of their status.<sup>1034</sup> Under Article 33(1) of the Geneva Convention, States cannot transfer a person to a territory where she may face persecution on grounds of race, religion, nationality, membership of a particular social group, or political opinion, or where she may be onward removed to another State where there exists a risk of persecution for one of the five aforementioned reasons.<sup>1035</sup>

The standard of scrutiny is slightly different depending on the instrument. For example, according to the Committee against Torture,

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<sup>1034</sup> The principle of *non-refoulement* must, therefore, be respected either with regard to persons whose refugee status has been granted by the UNHCR, or by the asylum authorities of the host State, or, by the authorities of a country other than the State that wants to remove the person in question.

<sup>1035</sup> According to the UNHCR, the recognition of the refugee status should be binding for the State authorities dealing with extradition requests. Additionally, a country receiving an extradition request should always ensure that a decision on the transfer of a refugee is consistent with its obligations on *non-refoulement* under international human rights and refugee law. See, UNHCR Guidance Note on Extradition, paras 52-53.

the complainant must prove that ‘there are substantial grounds for believing that he [or she] *would be in danger* of being subjected to torture.’<sup>1036</sup> The HRC affirms, instead, that a person cannot be deported to a country where she might face a *real risk* of being subject to torture or cruel, inhuman and degrading treatment.<sup>1037</sup> ‘Substantial grounds’ shall exist that demonstrate that the risk of torture is a necessary and foreseeable consequence of the individual’s removal.<sup>1038</sup>

When dealing with a case of expulsion/removal, the ECtHR has to decide if ‘there are substantial grounds for believing that the person in question, if expelled, would face a *real risk* of being subjected to torture or to inhuman and degrading treatment or punishment in the receiving country (emphasis added).’<sup>1039</sup> On account of the difficulty expressed by Judge Zupancic, of proving ‘a future event to any degree of probability because the law of evidence is a logical rather than a prophetic exercise’,<sup>1040</sup> the applicant is not required to substantiate ‘beyond any reasonable doubt’ that she would suffer ill-treatment. If, in this context, diplomatic assurances have been provided, they could be relied upon only as factual elements for conducting such a

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<sup>1036</sup> Article 3 of the CAT.

<sup>1037</sup> HRC, General Comment no 20, para 9.

<sup>1038</sup> HRC, *ARJ v Australia* Comm no 692/1996, 28 July 1997, para 6.9; *T v Australia*, Comm 706/1996, 4 November 1997, paras. 8.1 and 8.2.

<sup>1039</sup> *Soering v UK*, Series A, No 161, App no 14038/88, para 88; *Chahal v UK*, para 74.

<sup>1040</sup> *Saadi v Italy*, para 1 (Concurring Opinion Judge Zupancic).



determination on the safety of the receiving country in the individual case. If assurances cannot mitigate the risk of persecution and ill-treatment, the *non-refoulement* obligation must be fully adhered to by the host State.

However, under Article 33(2) of the Geneva Convention, a person may be returned to her country of origin if an individualized finding is made that she constitutes a present or future serious threat to the security of, or to the community of, the host State as a consequence of her conviction of a crime of a particularly grave nature.<sup>1041</sup> In any case, *refoulement* must be necessary and proportionate, and must represent the last possible resort when the risk for the host country far outweighs the risk of harm for the returned person.<sup>1042</sup> Moreover, the decision to apply Article 33(2) shall always be taken on the basis of a set of procedural safeguards, such as the right to be heard and to appeal, as well as the right to be granted sufficient time to seek

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<sup>1041</sup> Sir Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of *Non-refoulement*: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) paras 164-66; see also, the Commentary to Article 33 by Atle Grahl-Madsen, in UNHCR (ed), *Commentary on the Refugee Convention (Article 2-11, 13-37)* (UNHCR 1963, republished 1997) para 8.

<sup>1042</sup> UNHCR Note on Diplomatic Assurances, para 13; see also, UNHCR, *Factum of the Intervenor, UNHCR, Suresh v the Minister of Citizenship and Immigration; the Attorney General of Canada*, SCC No 27790 (UNHCR Suresh Factum) in 19(1) IJRL (2002) paras 74-84.

admission to another State, thus avoiding being sent back to the same country where persecution is feared.<sup>1043</sup>

The protection afforded by human rights law is undoubtedly broader than that provided by refugee law since *non-refoulement* applies to any persons whose life and liberty can be threatened in the receiving country, beyond the five grounds of persecution set in the Geneva Convention. Diplomatic assurances may thus be accepted only if they offset the risk to the returned person, and if the sending State, in all good faith, assumes that the element of trust sufficed to consider assurances as reliable instruments. In order to be effective, the authorities of the receiving country must be in the position to ensure *de facto* compliance with the assurance itself. For example, this criterion cannot be satisfied if State authorities are not able to supervise the activity of the security forces of a prison where the deportee is kept in custody, and to ensure compliance with the given assurance.<sup>1044</sup>

#### ***6.4.5. Non-refoulement, in practice***

Diplomatic assurances are not explicitly mentioned in international human rights treaties. However, States regularly use them as a means

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<sup>1043</sup> Articles 33(2) and 33(3) list a set of safeguards. See also, UNHCR Note on Diplomatic Assurances, para 14.

<sup>1044</sup> See, *Chahal v the UK*, para 105.

to demonstrate compliance with their *non-refoulement* obligations, and as a consequence, relevant human rights treaty monitoring bodies rely on assurances in the pre-removal risk assessment. MoUs and individualized diplomatic assurances do not provide the legal basis for the return of a person to her country of origin. Nonetheless, in numerous cases, national and (mostly) international courts have found that, despite assurances, a violation of the principle of *non-refoulement* occurred or would occur upon removal to a third country. While the present review revolves around the case law of international human rights bodies, some domestic decisions regarding transfer by means of MoUs are also brought into the analysis.

In the *DD and AS v The Secretary of State for the Home Department*,<sup>1045</sup> SIAC blocked the removal of two individuals from the UK to Libya by stating that, although it was unlikely that the assurances would not be transgressed, the risk that they would be ill-treated was not ‘well-nigh unthinkable.’<sup>1046</sup> Detained under immigration powers, the appellants were deemed a threat to the national security of the host State. While Mr. DD was alleged to be a member of the Libyan Islamic Fighting Group engaging in terrorist activities,<sup>1047</sup> Mr. AS claimed asylum ‘on the basis that he and his

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<sup>1045</sup> *DD and AS v SSHD*.

<sup>1046</sup> *ibid* para 371.

<sup>1047</sup> *Ibid* para 4.

family had been persecuted and tortured by the Gaddafi regime because of their true Islamic views.’<sup>1048</sup>

Formally, Libyan domestic law prohibited torture and subjected perpetrators to criminal sanctions. Nevertheless, torture was *de facto* practiced as NGOs documented only few months before the signature of the UK-Libya MoU.<sup>1049</sup> Therefore, in reviewing the case, SIAC noted that individual diplomatic assurances negotiated under the MOU between Libya and the UK lacked efficacy in the Libyan context and, as such, could not be considered a reliable accord.<sup>1050</sup> SIAC found flawed the argument that Libya would honour the assurances in the interest of preserving amicable political relations. Moreover, the possibility to leave a violation undetected as a consequence of weak monitoring mechanisms brought contingency to the view that ‘there [was] too much scope for something to go wrong, and too little in place to deter ill-treatment or to bring breaches of the MoU to the UK’s attention.’<sup>1051</sup>

In the *Youssef v The Home Office* case,<sup>1052</sup> assurances were sought because of ‘evidence that detainees were routinely tortured by the

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<sup>1048</sup> *ibid* para 6.

<sup>1049</sup> Braswell 2006, 21-22.

<sup>1050</sup> *DD and AS*, para 371.

<sup>1051</sup> *ibid* para 428.

<sup>1052</sup> *Youssef v The Home Office* [2004] EWHC 1884 (*Youssef*).

Egyptian Security Service.’<sup>1053</sup> However, the British request for an assurance concerning prison visits was declined by the Egyptian government ‘on the ground that they would constitute interference in the scope of the Egyptian judicial system and an infringement of national sovereignty.’<sup>1054</sup> Mere suspicion of, or a conviction for a particular crime cannot as such justify exclusion from protection.<sup>1055</sup> The seriousness of the security threat must be individually assessed and be proportional to the risk for the person intended to be removed.<sup>1056</sup>

#### **6.4.5.1. *The Committee against Torture and the HRC***

The decisive issue is not whether assurances have been given, but whether they can be used as an instrument to lower the risk the individual would face, at the material time of removal.<sup>1057</sup> International bodies have often found assurances inadequate in trimming down the personalized risk to a level where there is no real risk or ‘substantial grounds’, especially where no effective monitoring mechanism has been set out, when they have been phrased in a very indeterminate and inaccurate manner, or when their strength has been

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<sup>1053</sup> *ibid* para 6.

<sup>1054</sup> *ibid* para 14.

<sup>1055</sup> Lauterpacht and Bethlehem 2003, 118.

<sup>1056</sup> Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, (3<sup>rd</sup> edn, Oxford University Press 2007) 239-41.

<sup>1057</sup> See, *Chahal v UK*, para 105; *Saadi v Italy*, para 148; *Agiza v Sweden*, para 13.4.

grounded only on the ratification of main international human rights instruments by the receiving country.<sup>1058</sup> At the same time, however, international human rights bodies have not banned the use of diplomatic assurances as a tool to enhance overall protection by either eliminating the risk of torture altogether or reducing such a risk below the threshold required to avoid *refoulement*.

In the *Agiza v Sweden* case, the Committee against Torture held that the deportation with assurances did not reduce the manifest risk of torture and ill-treatment, thus amounting to a violation of Article 3. Despite the assurances that the individual would not be ill-treated and would be granted a fair trial upon return, the Committee determined that:

It was known, or should have been known, to the [Swedish] authorities [...] that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons.<sup>1059</sup>

Even without a finding on the treatment of Mr. Agiza in his home country, where torture was widespread, the Committee against Torture argued that a violation of *non-refoulement* could be foreseen

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<sup>1058</sup>Schmid 2011, 226.

<sup>1059</sup>*Agiza v Sweden*, para 13.4.

on account of his treatment on Swedish soil where also American and Egyptian authorities participated to the apprehension, intimate body search, and forced deportation of the applicant at Bromma airport. By the same token, the HRC held that the efforts placed by Sweden to obtain diplomatic assurances from Egypt were sufficient to have warned the sending government of the risk of torture and inhuman or degrading treatment if Mr. Alzery were returned there. Violation of Article 7 was indeed recorded.

In *Alzery* and *Agiza*, the view of the Committee against Torture and the HRC that assurances were not sufficient to reduce the risk of torture upon removal,<sup>1060</sup> seemed to concede that international human rights treaty monitoring bodies would be prepared to accept assurances if differently modelled through supervision and enforcement mechanisms. For example, in the *Pelit v Azerbaijan* case concerning the issuance of diplomatic assurances by Turkey to Azerbaijan, the Committee against Torture argued that:

While a certain degree of post-expulsion monitoring of the complaint's situation took place, the State party has not supplied the assurances to the Committee in order for the Committee to perform its own independent assessment of their satisfactoriness or otherwise [...] nor did the State party detail with sufficient specificity the monitoring undertaken and the steps taken to ensure that it both was,

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<sup>1060</sup> *ibid*; *Alzery v Sweden*, paras 11.3-11.5.

in fact and in the complainant's perception, objective, impartial and sufficiently trustworthy.<sup>1061</sup>

In my view, recalcitrant countries, which notoriously practice torture, especially in respect of detained suspected terrorists, cannot, in any manner whatsoever, be trusted as safe havens, even when detailed and apparently convincing diplomatic assurances are supplied.

Another noteworthy case is *Zhakhongir Maksudov and Adil Rakhimov, Yakub Tashbaev and Rasuldzhon Pirmatov v Kyrgyzstan* concerning the extradition to Uzbekistan of four rejected refugees charged *in absentia* of terrorism. In the Committee's view, the applicants' extradition amounted, *inter alia*, to a violation of Article 7 of the Covenant. Indeed,

The procurement of assurances from the Uzbek General Prosecutor's Office, which, moreover, contained *no concrete mechanism for their enforcement*, was insufficient to protect against such risk. The Committee reiterates that at the very minimum, the assurances procured should contain such a *monitoring* mechanism and be safeguarded by *arrangements made outside the text of the assurances* themselves, which would provide for their effective implementation (emphasis

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<sup>1061</sup> *Pelit v Azerbaijan*, Comm no 281/2005 CAT/C38/D/281/2005, 5 June 2007, para 11.



added).<sup>1062</sup>

The Committee noted that the assessment of the risk of *refoulement* prohibited by Article 7 of the ICCPR should be conducted in light of the information that was known or ought to have been known at the time of extradition, and '[did] not require proof of actual torture having subsequently occurred, although information as to subsequent events is relevant to the assessment of initial risk.'<sup>1063</sup> The existence of assurances is one of the elements relevant to the overall determination of the risk. Since public reports had widely described the inhuman treatment meted out to detainees, especially those held for political and security reasons, a real risk of torture could be envisaged.

#### **6.4.5.2. The ECtHR**

The ECtHR has always attached greatest importance to the human rights record of the receiving country in order to assess the safety of removals, especially when carried out in the framework of national security decisions. Although it has reviewed cases involving diplomatic assurances against torture and ill-treatment prior to

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<sup>1062</sup>*Zhakhongir Maksudov and Adil Rakhimov, Yakub Tashbaev and Rasuldzhon Pirmatov v Kyrgyzstan*, CCPR/C/93/D/1461,1462,1476 & 1477/2006 (HRC, 31 July 2008) para 12.5.

<sup>1063</sup>*Ibid* para 12.4.

2008,<sup>1064</sup> in the well-known *Saadi v Italy* case, the Court laid out some key criteria for gauging reliability of diplomatic assurances on a case-by-case basis. The respondent government justified expulsion of Mr Saadi to Tunisia on the basis of diplomatic assurances according to which the requested State had given ‘an undertaking to apply in the present case the relevant Tunisian law [...] which provided for severe punishment of acts of torture or ill-treatment and extensive visiting rights for a prisoner’s lawyer and family.’<sup>1065</sup> The assurance was provided in the form of a *Note Verbale* by the Tunisian Ministry of Foreign Affairs the day before the Grand Chamber hearing. The ECtHR pointed out that the individual ‘real risk’ of ill-treatment for the deportee could not be obliterated by such a generic note, which was limited to observing that Tunisian laws respected the rights of prisoners, and that Tunisia had acceded to the relevant international treaties and conventions.<sup>1066</sup>

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<sup>1064</sup>See, e.g., *Shamayev and Others v Georgia and Russia* App no 36378/02 (ECtHR, 12 April 2005) para 153. In this extradition case, the Court did not find violation of Article 3, and deemed acceptable to rely on assurances against torture and ill-treatment from Russia; see also, *Burga Ortiz v Germany* App no 1101/04 (ECtHR, 16 October 2006) 9–10; *Sanchez Munte v Germany* App no 43346/05 (ECtHR, 16 October 2006) 7–8. In all these cases, the Court held that Germany did not violate Article 3 by extraditing the applicant. In their dissenting Opinion to the *Mamatkulov v Turkey* decision, Judges Bratza, Bonello and Hedigan strongly criticized the decision of the Court for the weight given to the assurances. They also stressed that ‘the weight to be attached to assurances emanating from a receiving State must in every case depend on the situation prevailing in that State at the material time.’ See, *Mamatkulov v Turkey* Apps nos 46827/99 and 46951/99 (ECtHR, 4 February 2005) 295, 303, 322 and para 10 of the dissenting Opinion.

<sup>1065</sup>*Saadi v Italy*, para 116.

<sup>1066</sup>*ibid* para 147.

The Court held that if the decision to deport the applicant to Tunisia was to be enforced, there would be a violation of Article 3 of the Convention. It also insisted on the importance of looking beyond the oath of the receiving State and examining its actions and human rights track record. In this regard,

The existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where [...] reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.<sup>1067</sup>

The Court also added that the fact that Tunisian authorities had given the diplomatic assurances requested by Italy,

Would have not absolved the Court from the obligation to examine whether such assurances provided, in their *practical application*, a sufficient guarantee that the applicant would be protected against the risk of treatments prohibited by the

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<sup>1067</sup> *ibid.* In many other cases, the Court was not persuaded that the existence of assurances could guarantee effective protection against violations of Article 3 when there was a dismal human rights situation with systematic use of torture in the readmitting country, regardless of the formal ratification of human rights instruments. See, e.g., *Khaydarov v Russia*, para 105, 111 and 115; *Ismoilov v Russia* App no 2947/06 (ECtHR, 24 April 2008) para 127; *Soldatenko v Ukraine*.

Convention [...].The weight to be given to the assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time.<sup>1068</sup>

In the *Ben Khemais v Italy* case, the ECtHR reached the same conclusion, affirming that it is up to the Court to determine, on a case-by-case basis, whether it can be firmly established that diplomatic assurances provide effective protection against ill-treatment.<sup>1069</sup> Despite Tunisian authorities issued a *Note Verbale* more detailed than in *Saadi*, Mr Ben Khemais was not allowed to receive visits from Italian diplomatic authorities or the foreign lawyer representing him before the ECtHR.<sup>1070</sup>

A crucial requirement for the effective implementation of diplomatic assurances rests on the capacity of the receiving State to exercise effective control over the whereabouts of the individual. Considering the way in which torture is secretly administered and the difficulty of obtaining information by the captive, national and

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<sup>1068</sup> *Saadi v Italy*, paras 147-8. The Courts makes reference to the *Chahal v UK* case, para 105.

<sup>1069</sup> *Ben Khemais v Italy*, para 57. In many other cases, the Court asserts its competence in reviewing assurances. See, e.g., *Ryabikin v Russia* App no 8320/04 (ECtHR, 19 June 2008) para 119; *Abdulazhon Isakov v Russia*, para 111; *Muminov v Russia*, para 97.

<sup>1070</sup> Such a custodial condition *de facto* hindered the possibility for the detainee to access international human rights bodies and courts. The lack of enforcement mechanisms can also testify to the reluctance of the requesting and requested States to commit themselves to provide the deportee with an effective remedy against violations of his fundamental rights caused by the inhuman treatments inflicted by the authorities of the readmitting country. Reference to the lack of enforcement mechanisms as an element of inadequacy of diplomatic assurances was pointed out by the Committee against Torture in the *Agiza v Sweden* case, para 13.4.

international courts have at times halted extradition and deportation when they believed it to be highly unlikely that the government giving assurances, despite its good faith, was *de facto* able to enforce its undertakings. In the *Chahal* case, the ECtHR stated it was ‘not persuaded that the [...] assurance would provide Mr Chahal with an adequate guarantee of safety.’ This lack of confidence about the condition for removal was mainly due to the lack of sufficient control over the security forces of a certain prison.<sup>1071</sup>

Instead, in *Soering v UK*, the key factor against extradition was the independence of the executive and the judiciary in the receiving State. Despite the friendly relations between the UK and the US, because of the independence of the judiciary, the Court considered the assurances issued by the Federal Government absolutely insignificant. Since Mr. Soering was charged with an offence falling under the jurisdiction of the Commonwealth of Virginia, the Federal State was not competent to issue a binding diplomatic assurance. Additionally, even informing the judges of the wishes of the UK, at the stage of sentencing, could not prevent them from imposing the death penalty.<sup>1072</sup> Since Virginia courts could not bind themselves in advance to a certain result for a

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<sup>1071</sup> For example, in the *Chahal v UK* case, the ECtHR recognized the lack of control by the Indian Federal Government over the Punjabi military forces. See, *Chahal v UK*, para 105. See also, the decision taken by a British Court in a case concerning extradition to Russia: *The Government of the Russian Federation v Akhmed Zakaev*, Bow Street Magistrates’ Court, Decision of Hon. T. Workman, 13 November 2003.

<sup>1072</sup> *ibid* para 97.

future decision, the risk of the death penalty being imposed could not be eliminated.

Therefore, of essence is whether the government issuing the assurances is able to control the territory and any public official operating within its territory. Only if the responsible entity has the power to enforce the agreements and can be trusted in this role, can the assurances be used to assess the likelihood of a State's compliance with a certain agreement. The diverse elements considered by the Court to assess the suitability of an assurance also demonstrate how the ratification of human rights instruments by the requested State or relevant domestic law is not sufficient to consider the receiving country safe for the individual in question.

For instance, in the *MSS v Belgium and Greece* case concerning the intra-EU transfer of an asylum seeker under the Dublin system, the ECtHR establishes the refutability of the 'presumption of safety' and of the semi-automatic application of mutual trust:

The Belgian government argued that in any event [the Belgian authorities] had sought sufficient assurances from the Greek authorities that the applicant faced no risk of treatment contrary to the Convention in Greece. In that connection, the Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection where [...] reliable sources have reported

practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.<sup>1073</sup>

To my knowledge, after *Saadi*, the Court ruled on thirteen cases concerning individuals (generally alleged terrorists and suspects of criminal conspiracy linked to fundamentalist Islamist groups) who faced deportation or who had already been transferred by Italy to Tunisia under the auspices of diplomatic assurances. It determined in all but one case that removal of the applicants did or would violate Article 3.<sup>1074</sup> The Court declared that no trust could be placed in a country with a dismal human rights record of monitoring and protection of detained against torture and mistreatments, especially when sources have reported unlawful practices resorted to or tolerated

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<sup>1073</sup> *MSS v Belgium and Greece*, para 353. See also, Moreno-Lax 2012b.

<sup>1074</sup> See, *Toumi v Italy*, para 85; *Trabelsi v Italy* App no 50163/08 (ECtHR, 13 April 2010) para 52; *Selam v Italy* App no 12584/08 (ECtHR, 5 March 2009) para 43–44; *Abdelhedi v Italy*, App no 2638/07 (ECtHR 24 March 2009) para 50–51; *Ben Salah v Italy* App no 38128/06 (ECtHR, 24 March 2009) paras 39–40; *Bouyahia v Italy* App no 46792/06 (ECtHR, 24 March 2009) paras 42–43; *CBZ v Italy* App no 44006/06 (ECtHR, 24 March 2009) paras 43–44; *Darraji v Italy* App no 11549/05 (ECtHR, 24 March 2009) paras 66–67; *O v Italy* App no 37257/06 (ECtHR, 24 March 2009) paras 44–45; *Soltana v Italy* App no 37336/06 (ECtHR, 24 March 2009) paras 46–47; *Hamraoui v Italy* App no 16201/07 (ECtHR, 24 March 2009) paras 45–46; *Ben Khemais v Italy*, paras 61–65. In the *Cherif* case, the Court did not address the application of Article 3 as the applicant failed to provide a power of attorney document authorizing the named party to pursue the case. See, *Cherif v Italy* App no 1860/07 (ECtHR, 7 April 2009) paras 50–51. In *Gasayev v Spain*, the Court accepted assurances as sufficient to eliminate the risk of *refoulement* under Article 3 thanks to adequate detention conditions in Russia and monitoring by Spanish diplomatic personnel. See, *Gasayev v Spain* App no 48514/06 (ECtHR, 17 February 2009). Also in *Bakoyev v Russia*, the ECtHR held the applicant's extradition to Uzbekistan - which had provided diplomatic assurances on the fair treatment of the transferee - would not give rise to a violation of Article 3 of the Convention. See, *Bakoyev v Russia* App no 30225/11 (ECtHR, 5 February 2013).

by the authorities of that State.<sup>1075</sup> A further crucial hurdle the Court noticed was down to the existence of the same formulaic assurances within a standardized document indicating the data of each single applicant, who had not yet been deported.<sup>1076</sup> Despite the fact that assurances for the two applicants who had already been removed were more specific, the Court found a violation of the principle of *non-refoulement* embodied in Article 3.<sup>1077</sup>

The *El-Masri v FYRM* case offers a clear illustration of what an ‘extraordinary rendition’ means in practice.<sup>1078</sup> Unlike the cases discussed above, no assurances against the risk of ill-treatment were sought before removal.<sup>1079</sup> However, the Court found a violation of Article 3 and held the respondent State responsible for having

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<sup>1075</sup> See, e.g., *Koktysh v Ukraine* App no 43707/07 (ECtHR, 10 December 2009) para 64; *Klein v Russia* App no 24268/08 (ECtHR, 1 April 2010). By contrast, in the *Ahmad v UK* case concerning extradition to the US, the Court argued that it ‘has even more rarely found that there would be a violation of Article 3 if an applicant were to be removed to a State which had a long history of respect of democracy, human rights and the rule of law.’ It is here worth observing how the Court tended to minimize facts that could have contributed to compromise the US human rights record. See, *Ahmad v United Kingdom* App no 24027/07 (ECtHR, 12 April 2012) para 179. See also, *Boumediene v Bosnia and Herzegovina* App no 38703/06 (ECtHR, 18 December 2008); *Al-Moayad v Germany* App no 35865/03 (ECtHR, 20 February 2007). It can be pointed out here that none of these individuals lodged an asylum application.

<sup>1076</sup> See, *Sellem v Italy*, para 18 (assurances provided 3 January 2009); *Cherif v Italy*, para 26; *Abdelhedi v Italy*, para 17; *Ben Salah v Italy*, para 14; *Bouyahia v Italy*, para 16; *CBZ v Italy*, para 17; *Darraj v Italy*, para 35; *Soltana v Italy*, para 205; *Hamraoui v Italy*, para 15; *Ben Khemais v Italy*, para 27.

<sup>1077</sup> For a comprehensive analysis of the jurisprudence of the ECtHR on diplomatic assurances, see, Alice Izumo, ‘Diplomatic Assurances against Torture and Ill-treatment: European Court of Human Rights Jurisprudence’ (2008) 42 *Columbia Human Rights Law Review* 233.

<sup>1078</sup> *El-Masri v Former Republic of Macedonia* App no 39630/69 (ECtHR, 13 December 2012) (*El-Masri v FROM*).

<sup>1079</sup> *ibid* para 219.



transferred the applicant into the custody of the US authorities<sup>1080</sup> without 'a legitimate request for his extradition or any other legal procedure recognized in international law for the transfer of a prisoner to foreign authorities [...]. Furthermore, no arrest warrant had been shown to have existed at the time authorizing the delivery of the applicant into the hands of US agents.'<sup>1081</sup> The Court also maintained that Macedonian authorities: i) had knowledge of the place where the applicant would be flown from the Skopje Airport; ii) knew or ought to have known that there was a serious risk for the applicant to be exposed to treatments contrary to Article 3. Indeed, several reports in the public domain before Mr. El-Masri's transfer described the worrying condition of detention under the 'rendition' program, and the violent interrogation methods used by the US authorities on person suspected of involvement in international terrorism.<sup>1082</sup>

As a general consideration, whilst national courts are more inclined to recognize assurances as a ground for a safe expulsion on security grounds, international human rights bodies have unquestionably struck the balance in favor of the protection of the fundamental rights of the deportees, especially with regard to the prohibition of torture. Nonetheless, diplomatic assurances have not being categorically outlawed, but rather weighed in the balance, as one factor out of

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<sup>1080</sup> *ibid*, para 215.

<sup>1081</sup> *ibid* para 216.

<sup>1082</sup> *ibid* para 218.

many, when they offer sufficient protection and guarantees to eliminate the risk for the deportee.

The salience of individualized and detailed assurances is reasserted with emphasis in the long-expected 2012 *Abu Qatada v UK* case, which represents a first opportunity for the Strasbourg judges to consider the UK's practice of negotiation of MoUs for returning suspect terrorists to countries of origin. By contending that Abu Qatada could not be safely deported to Jordan, the ECtHR moved away from its previous jurisprudence and expanded the scope of *non-refoulement*. It argued, indeed, that deportation with assurances would not be in violation of Article 3 of the Convention. Removal would rather result in a breach of Article 6 because of the real risk that evidence obtained through torture would be admitted at his retrial in Jordan, thus amounting to a 'flagrant denial of justice.' Moreover, transgression of the right to counsel, the right against arbitrary arrest and detention, or to a fair trial may aggravate the risk of torture itself.<sup>1083</sup>

In order to determine the quality of the assurances given and their reliability in light of the receiving State's practice, the Court concluded that: i) torture in Jordan remains 'widespread and routine'; ii) it continues to be practiced with impunity within a criminal justice system that 'lacks many of the standard, internationally recognized

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<sup>1083</sup> Jones 2006, 33.

safeguards to prevent torture and punish its perpetrators;’ iii) Jordan lacks a genuinely independent complaint mechanisms; iv) it denies ‘prompt access to lawyers and independent medical examinations.’<sup>1084</sup>

Nevertheless, by relying on the strong political relations between the UK and Jordan, the ECtHR reckoned diplomatic assurances negotiated in the framework of the 2005 MoU specific and comprehensive enough to remove any real risk of ill-treatment of Abu Qatada.<sup>1085</sup> It also added that the extent to which States fail to comply with international human rights obligations against torture is, at most, only one factor to be weighed in the assessment of diplomatic assurances’ reliability. States should not refrain from seeking assurances from countries that systematically violate human rights; otherwise ‘it would be paradoxical if the very fact of having to seek assurances meant one could not rely on them.’<sup>1086</sup>

Already in 1996, in the *Chahal* case, seven of the nineteen judges submitted a partly dissenting opinion upholding the position of the UK that in terrorism cases, where people are deported outside the territorial jurisdiction of the Council of Europe’s Member States, a balancing approach, between national security interests and the extent

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<sup>1084</sup> *Abu Qatada v UK* para 191.

<sup>1085</sup> *ibid* para 194.

<sup>1086</sup> *ibid* para 193.

of the potential risk of the deportee in the State of destination, should be applied.<sup>1087</sup>

Both the ECtHR and SIAC had to conclude that the Jordanian prosecutors refused to give an undertaking in advance that they would not use confessions obtained by torture. Consequently, the UK government did not receive minimum assurances on torture evidence, even though for more than 10 years Jordan had been under the pressure and spotlight of the international community. Considering, in addition, that transgression of the right to counsel, the right against arbitrary arrest and detention, and to a fair trial, more generally, may aggravate the risk of torture itself,<sup>1088</sup> I wonder how the ECtHR, which unconditionally assumed that a government ‘incapable of properly investigating allegations of torture and excluding torture evidence’<sup>1089</sup> was able to assure that a suspected terrorist would not be mistreated to extract a confession.

To conclude, it is encouraging that, in November 2012, SIAC did not open the backdoor to *refoulement* by means of new assurances from Jordan—a country where torture is ‘systematic and routine.’ Nevertheless, the general image of the ECtHR, one year after *Abu*

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<sup>1087</sup> *Chahal v UK*, Joint Partly Dissenting Opinion, para 1. On the difficult interplay between, on the one hand, national security, and on the other hand, due process and the rule of law, see, Adam Wagner, ‘Abu Qatada: in the Public Interest’, UK Human Rights Blog, 16 November 2012.

<sup>1088</sup> Jones 2006, 33.

<sup>1089</sup> *Abu Qatada v UK*, para 285.

*Qatada*, ends up to be that one of a tightrope walker. It is the image of a Court that nimbly (yet not always convincingly) keeps the equilibrium between, on one hand, the effort to protect human rights within and beyond borders, and on the other hand, the exigency to uphold States' concern to face terrorist violence by displacing as far as possible the 'foreign-born threat' and, as a consequence, any responsibility for human rights violations.

#### **6.5. Diplomatic assurances on *asylum seekers* removable to 'safe third countries'?**

Section 6.4 is the core of this Chapter and it provided the answer to the main research question. It showed how no individual should, in principle, encounter a violation of her right to access fair asylum procedures and effective remedies, and a breach of her right to *non-refoulement*, if basic procedural rules are respected. The principle of confidentiality, embodied in soft and hard law instruments, prevents the host State from sharing information (through, for example diplomatic assurances) with the applicant's home country pending a determination of the asylum claim. Moreover, as long as a rejected or excluded asylum seeker is entitled to challenge the decision on her status as well as the expulsion order - thus questioning the reliability of assurances - no violation of the right to an effective remedy and to *non-refoulement* would take place.

Nevertheless, Section 6.4 also revealed how the negotiation of diplomatic assurances can *de facto* hamper refugees' access to protection. In shifting from the study of the agreements *per se* to the their actual implementation, a string of cases show that seeking diplomatic assurances during the asylum determination phase contributes to defying the procedural safeguards of asylum mechanisms, such as the principle of confidentiality, thus affecting the final upshot of the proceedings and the fairness of the entire process. In some circumstances, asylum seekers have been rejected or excluded from refugee status/subsidiary protection after requesting diplomatic assurances from the home country. Deprived of their right to access administrative and judicial review of their exclusion/rejection decision and of the deportation order, they incurred violations of the right to an effective remedy. Finally, substantive international human rights case law, especially from the ECtHR, testifies to the risk of *refoulement* for people removed, generally on national security grounds, to countries of origin on the basis of diplomatic assurances against torture and ill-treatment.

The above-examined judgments primarily concern people whose protection claims had been rejected or who were transferred on security grounds after exclusion from refugee status/subsidiary protection. However, in a few cases, the ECtHR has assessed diplomatic assurances as one of the elements to eradicate the risk of

ill-treatment toward asylum seekers *before* asylum procedures were completed. It is important to note that removal is not to the country of origin but to a ‘safe third country’ of transit. This Section intends to separately seize and examine this dangerous and unexplored anomaly in the system of protection, thereby questioning consequences for refugee rights. Generally, the Court reserves particular attention to the plight of asylum seekers as they belong to a particular vulnerable group.<sup>1090</sup> Thus, whilst assessing the opportunity of removal with assurances, it underlines how most regard should be had 'to the fact that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country.'<sup>1091</sup>

The ECtHR heretofore has rejected the use of diplomatic assurances for refugees and asylum seekers, but it has to a certain extent endorsed them with regard to people whose protection claims had been denied or subjected to exclusion. Only time will tell whether the Court’s attitude toward asylum seekers will not be contaminated by the approach adopted with regard to people who, for different reasons, are not entitled to refugee protection. By now, it is worth observing how the ECtHR in few cases – which, therefore, do not amount to a trend *in status nascendi* - seems to have suggested to

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<sup>1090</sup> *MSS v Belgium and Greece*, para 251.

<sup>1091</sup> *Amuur v France*, para 43.

contracting parties to negotiate assurances rather than taking responsibility for asylum seekers who are about to be removed or have already been removed.<sup>1092</sup> In the *Hirsi v Italy* judgment, for example, Judge Pinto de Albuquerque proposed 'to provide the applicants with practical and effective access to an asylum procedure in Italy.'<sup>1093</sup> By contrast, in its final recommendations, the Court unexpectedly urged the respondent State to take 'all possible steps to obtain assurances from the Libyan authorities that the applicants will not be subjected to treatments incompatible with Article 3 of the Convention or arbitrarily repatriated.'<sup>1094</sup>

In the *MSS v Belgium and Greece* case, the Court affirmed that diplomatic assurances by Greece did not amount to a sufficient guarantee because they were worded in stereotyped terms and did not address the specific situation of the asylum seeker in question.<sup>1095</sup> However, the Court appears to foreshadow that accepting well detailed and individualized assurances would by all means be plausible if they were able to counteract any risk of ill-treatment. Without outlawing diplomatic assurances *per se*, the ECtHR proposes a case-by-case approach, with a special focus on the human rights situation of the readmitting country. Even countries where torture and

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<sup>1092</sup> Violeta Moreno-Lax, '*Hirsi Jamaa and Others v Italy* or the Strasbourg Court versus Extraterritorial Migration Control?' (2012) 12(3) HRLR, 592-3.

<sup>1093</sup> *Hirsi v Italy*, Concurring Opinion 82.

<sup>1094</sup> *Hirsi v Italy*, para 211.

<sup>1095</sup> *MSS v Belgium and Greece*, para 354.



ill-treatment of detainees is known to be widespread and systematic have been considered safe, if adequate assurances are given. Moreover, as international human rights bodies and national courts have substantively recognized, in many cases, *refoulement* occurred as a consequence of expulsion of suspected terrorists under the auspices of assurances.<sup>1096</sup>

In the *Saadi v Italy* case, the ECtHR rejected the UK's argument that, in case of a threat to national security, stronger evidence has to be adduced to prove that the applicant would be at risk of torture or ill-treatment in the receiving country. In this view, the individual is not required to prove that a 'real risk' exists, but rather that such a risk is 'more likely than not.'<sup>1097</sup> Accordingly, the threshold for determining the safety and reliability of the readmitting country giving assurances is seemingly lower when dealing with people expelled on national security grounds, regardless of whether they are the object of an exclusion provision. Are we ready to exclude that this

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<sup>1096</sup> See, e.g., the Arar's case. Commission of Inquiry into the actions of Canadian Officials in relation to Mr Arar's removal to Syria, Report of the Events relating to Maher Arar.

<sup>1097</sup> *Saadi v Italy*, para 122. For a critique of the balancing test between individual protection and national security, see, *inter alia*, Pasquale De Sena, 'Lotta al terrorismo e tutela dei diritti umani: conclusioni' (The Fight against International Terrorism and the Protection of Human Rights: Concluding Remarks) in Gargiulo P and Vitucci MC (eds) *La tutela dei diritti umani nella lotta e nella guerra contro il terrorismo* (Giuffr  2009) 159-167; Andrea Saccucci, 'Diritto di Asilo e Convenzione Europea dei Diritti Umani alla Luce della Giurisprudenza della Corte di Strasburgo' in Chiara Favilli (ed) *Procedure e Garanzie del Diritto di Asilo* (Padova 2011) 171; Andrea Saccucci, 'Divieto di Tortura ed Esigenze di Sicurezza nel Contesto della War on Terror: Verso una Flessione "al Ribasso" degli Obblighi Internazionali?' (2009)1 DUDI; Antonello Tancredi, 'Assicurazioni Diplomatiche e Divieto "Assoluto" di *Refoulement* alla Luce di Alcune Recenti Pronunzie della Corte Europea dei Diritti Umani' (2010) 1 DUDI.

threshold could one day not be applied also to asylum seekers transferred to a ‘safe third country’ or repatriated after diplomatic assurances have been used in the asylum proceedings? That would certainly amount to a procedural race to the bottom—someone could argue. States seem nevertheless eager and well-equipped to run such a race.

#### **6.6. Access to protection, diplomatic assurances, and MoUs: a concluding critique**

Considering diplomatic assurances as one typology of the cooperative arrangements EU Member States have set out to facilitate the removal of unauthorized migrants to third countries, they can smoothly be encompassed within the broad category of ‘agreements linked to readmission.’ However, to grasp the actual impact of assurances on refugees’ access to protection, both their content – whether framed or not within an MoU - and their actual negotiation and implementation by State authorities in single circumstances had to be examined.

MoUs are written umbrella agreements, which set out the general framework of cooperation without specifying each and every right in detail. They lay out the mutual understanding on the treatment of the deportees in a general fashion, and inaugurate the diplomatic relations between the two involved States before an emergency arises in a

concrete case. They might stabilize relations pushing the readmitting State to improve its human rights condition in view of the agreement's application. Individualized assurances, negotiated under a certain MoU when a particular need arises, instead contain the accord that the individual in question will not in fact be subjected to prohibited treatments.<sup>1098</sup> Despite detailed assurances within MoUs can only give an initial overview of the intentions of the parties without ensuring the safety of the deportee, their further specificity in individual cases make them less likely to be mere pro forma commitments.<sup>1099</sup>

In light of the above analysis, I argue that whilst the content of diplomatic assurances – whether or not inscribed within MoUs - does not seem to raise *per se* issues of incompatibility with refugee rights, the implementation of these bilateral agreements in concrete cases through individualized assurances may be questionable. MoUs are drafted with the intent to normalize diplomatic assurances, establish a common plan of action, and make human rights authoritative sources of reciprocal commitments. Pursuing the intent of progressively stabilizing bilateral relations, MoUs can be part of international cooperation, and have the effect of exercising pressure on the readmitting State to enhance the general human rights situation within

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<sup>1098</sup> This reasoning led the ECtHR to deem diplomatic assurances inadequate to alter the individual risk assessment. See, *Soering v UK* case, para 97.

<sup>1099</sup> See, in this regard, also Jones 2006, 34.

its territory for the sake of the construction of a safe and credible deportation policy with the sending country.

Moreover, in the absence of clear guidelines on the role and use of diplomatic assurances, MoUs could serve the purpose of crafting a set of public minimum standards, which could guide States while negotiating more detailed assurances in specific cases. Indeed, no regulation of this practice exists, and international human rights organizations, as well as the Council of Europe and the Committee against Torture have opposed any proposals for the creation of guidelines pointing to best practices or setting minimum standards for the use of assurances.<sup>1100</sup> Also the criteria crafted by the ECtHR to assess the reliability of a readmitting State can only be considered as preliminary benchmarks.<sup>1101</sup>

The fact that an MoU enunciates clear-cut commitments does not bar the requesting State from seeking further specific assurances,<sup>1102</sup> and the individual in question from explaining why in that particular case, the assurances envisaged by the MoU are not enough. However,

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<sup>1100</sup> See, e.g., AI, *Reject rather than Regulate: Call on Council of Europe Member States not to establish minimum standards for the use of diplomatic assurances in transfers to risk of torture and other ill-treatment* (2 December 2005) <<http://www.amnesty.org/en/library/info/IO61/025/2005>>. See also, Human Rights Watch, *No Guidelines on Empty 'No Torture' Promises: Council of Europe Rejects Minimum Standards for Diplomatic Assurances* (3 April 2006). With regard to the Committee against Torture's proposal, see, UNCAT, *Third-Second Session, Summary of the Record of the First Part (Public) of the 617<sup>th</sup> Meeting* (2 August 2004) UN Doc CAT/C/SR.617, para 29.

<sup>1101</sup> These criteria have been outlined in Section 6.3.6.

<sup>1102</sup> See, UK-Libya MoU, Application and Scope, para 5; UK-Jordan MoU, Application and Scope, para 6; UK-Lebanon MoU, Application and Scope, para 5.

even if MoUs are blanket agreements whose content is fulfilled *in concreto* through a case-by-case negotiation of human rights safeguards for a specific person, such individualized assurances might not be sufficient to consider *ipso facto* the readmitting State reliable with regard to the treatment of the deportee. It is also worth underlying that the unique UK's diplomatic assurances programme, formalized within MoUs, which we take as units of analysis for this Chapter, could foreseeably act as a blueprint for other countries.

States do not make return decisions on the basis of diplomatic assurances (either in the form of MoUs or individualized assurances). Nevertheless, assurances are one of the main elements - at times the most important one - States weigh in the balance while deciding on the expulsion of a person. The possibility of influencing the risk assessment is not *a priori* problematic, but it can turn out to be awkward where the mere existence of diplomatic assurances is assumed as both the primary criterion for rejection or exclusion from refugee status and complementary protection, or as a pre-condition to removal. In the case law of international human rights bodies, diplomatic assurances are generally upheld as one factor amongst many in the assessment of the risk, rather than trusted at face value.<sup>1103</sup>

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<sup>1103</sup> For example, while deciding on the reliability of assurances, the ECtHR attaches considerable importance also to 'information and evidence obtained subsequent to

At this point, it is to be asked what role they play, if any, in hampering refugees' access to protection: that is to say, shelter from *refoulement*, and access to fair asylum procedures and effective remedies. In addressing this research question in the frame of Chapter 6, we can rely on the set of cases reviewed in Section 6.4, some of which have had international resonance before human rights bodies.

The key findings can be summarized as follows. First, even if assurances are considered legally permissible and able in principle to reduce the risk of *refoulement*, they are not always effective in practice in preventing torture,<sup>1104</sup> as a result, national courts and, primarily, international human rights bodies have frequently held that *refoulement* took place or would take place upon removal. Second, if the exchange of assurances does not *per se* constitute a hurdle to asylum seekers' access to asylum procedures, it might affect the fairness of the proceedings and alter the outcome of the decision-making process. Indeed, most of the reviewed cases on the use of diplomatic assurances show how they have been implemented to speed up the process at the expenses of pre-return individual guarantees, such as the right to fair asylum procedures and effective remedies against rejection/exclusion and the decision of expulsion.

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the applicants' extradition.' See, *Shamayev and Others v Georgia and Russia*, para 345.

<sup>1104</sup> Johnston 2011, 48.

This *ex ante* crisis of guarantees assumes even more salience in an *ex post* perspective, as no enforcement mechanisms to protect deported individuals from the breach of a diplomatic assurance is envisaged. Negotiation of assurances must, therefore, be case-specific and consider the entire human rights situation in the readmitting country, including its torture track record, in order to verify whether assurances suffice to protect from such a risk. For example, it is not enough that the promisor has ratified international human rights instruments to consider it safe, but its compliance with human rights *in concreto* must be gauged.

I hold the view that, in principle, the content of diplomatic assurances does not seem to raise problems of incompatibility with refugee rights. However, in practice, access of asylum seekers to protection can be hampered, especially if diplomatic assurances are assumed as one of the elements to eradicate the risk of ill-treatment toward *asylum seekers* before asylum procedures are completed, or even before asylum applications are actually submitted. Section 6.5 interestingly examines this questionable hint of State practice. I thus wonder whether the lower threshold for determining the safety and reliability of a country giving assurances on people expelled on national security grounds might one day also be applied to asylum seekers removed before an examination of their claims or after diplomatic assurances have been used in their asylum proceedings.

A dangerous employment of assurances may occur in at least five circumstances: i) when the assessment of the risk excessively relies on the assurances given by the readmitting government, primary source of the fear, without bringing into the picture the general human rights situation and the pervasiveness of torture in the receiving country; ii) when the receiving country has a history of failing both to comply with assurances and investigate the allegations of prohibited treatments against other detainees; iii) when the assurances are negotiated during the examination of the asylum claim, thus violating the principle of confidentiality and the right of an asylum seeker to access and enjoy fair asylum procedures; iv) when the existence of diplomatic assurances accelerates the rejection of the protection claim and the enforcement of the return procedures, thus preventing the individual from both challenging the decisions and having access to an effective remedy; v) when an efficient system of monitoring is lacking, and the government issuing the assurances is not able to enforce the agreement because of the lack of control of the territory or the security forces of the prison where the individual in question is detained.

If obligations regarding the treatment of the deportees are altogether a priori considered non-legal, in the meaning of creating no new obligation to protect or monitor compliance with fundamental rights of the deportee, diplomatic assurances would amount to mere



‘pieces of paper.’<sup>1105</sup> Therefore, by relying on what the parties objectively intended to agree on while negotiating and drafting the accord in a certain way, I believe that: i) rather than being wrapped in the debate on the formal classification of diplomatic assurances, a case-by-case approach on their legal status needs to be prioritized; ii) the ‘legally or not legally binding’ question is not, however, decisive for the purpose of grasping the impact diplomatic assurances have on the rights of refugees and deportees—focus of this study. Key to this question is, indeed, whether governments deem diplomatic assurances reliable in the assessment of the risk for the deportee. Reliability may be strengthened, for example, by means of monitoring mechanisms. Prospects of compliance can also depend on the willingness of a State to enhance its international standing, or on political calculations concerning possible benefits or sanctions in other related areas, such as trade or development aid. However, even if offered in good faith, an assurance is ‘not of itself a sufficient safeguard where doubts exist as to its effective implementation.’<sup>1106</sup>

I believe that the fact that MoUs are blanket agreements does not mean they are neutral. Rather they constitute the matrix of any other contact between requesting and requested State; they formalize within a written accord the human rights commitments of a State with a

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<sup>1105</sup> Worster 2012, 339.

<sup>1106</sup> *Mamatkulov v Turkey*, para 10.

dismal human rights track record. Regardless of their legal status, the format of MoUs cannot be used as a ‘legal nicety’ to make *ordinary* a human rendition that common sense would *de facto* label as ‘extraordinary.’ Using the law to veil an arrangement designed to remove a person to ‘interrogation as opposed to “justice”<sup>1107</sup> within the borders of a country notoriously known for its dubious techniques of questioning is at the very least objectionable.

State practice does not stand in a vacuum, but it is the product of a normative setting which can be more or less well thought-out. It is this normative setting that legal scholars are prone to look at first. Nevertheless, it is through the observance of practice that we get better clues on the relevant law. Despite letting law and praxis run on two parallel lines, we need to continue to keep our eyes on both of them. We therefore would realize that, if the negotiation of diplomatic assurances in individual cases raises continuous condemnation and disapproval, this is also due to flaws in the applicable legislation.

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<sup>1107</sup> See, Antenor Hallo de Wolf and James Watson, ‘Navigating the Boundaries of Prevention: the Role of OPCAT in Deportations with Diplomatic Assurances’ (2009) 27 NQHR 525, 540; see also, Craig Forcece, ‘The Capacity to Protect: Diplomatic Protection of Dual Nationals in the ‘War on Terror’ (2006) 17(2)EJIL369, 371; Tullio Scovazzi, ‘Tortura e formalismi giuridici di basso profilo’ (2006) *Rivista di Diritto Internazionale*, 905 ff. See also, *Babar Ahmad and Others v the United Kingdom*, para 113. The US has inaugurated the extraordinary rendition practice after 11 September 2001. In this regard, President Bush signed a classified order allowing the CIA to carry out renditions without the authorization of White House, Department of State, or Department of Justice. Transfers could be executed ‘solely for the purpose of detention and interrogation’ to countries where the prisoners did not face any criminal charges. See, Douglas Jehl and David Johnston, *Rule Change Lets CIA Freely Send Suspects Abroad to Jails*, NY Times, 6 March 2005, A1. See also, Katherine R Hawkins, ‘The Promises of Torturers: Diplomatic Assurances and the Legality of “Rendition,”’ (2006) 20 Geo.Immigr. L.J.213.

Such awareness could induce us to engage in the game of regulation building on the fact that MoUs fail, for example, to mention ‘torture’ or ‘inhuman and degrading treatment’, or that they lack precision and accuracy with regard to monitoring, as well as enforcement and redress mechanisms in the event of a breach. While endorsing this criticism, I believe that amendments on further human rights safeguards in the text of MoUs would do little to sort the problem out. Even with new sophisticated monitoring procedures and enforcement mechanisms, there will always be limits in detecting torture and eliminating the personal risk for the deportee.

A number of contradictions are inherent in the process of seeking assurances given that ‘even as the sending State seeks protection for one, so it acquiesces in the torture of others.’<sup>1108</sup> Moreover, it remains unanswered why States need to frame their human rights commitments within bilateral political agreements - despite being subject to judicial control - which replicate human rights standards that have already been enshrined within international human rights treaties creating clear binding obligations and mechanisms of individual complaints.

The recent proliferation of diplomatic assurances and security-related deportations symbolizes the new tendency of governments to

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<sup>1108</sup> Guy S Goodwin-Gill and Raza Husain ‘Diplomatic Assurances and Deportation’, unpublished conference paper, *JUSTICE/Sweet & Maxwell Conference on Counter-terrorism and Human Rights* (28 June 2005), as cited in Larsaeus 2006, 3. See also, Noll 2006, 104.

consider foreigners as a threat to public safety, thus strengthening the link between refugees and terrorists and jumbling the logic of protection with the logic of security.<sup>1109</sup> For instance, the hysteria provoked by the decisions of the Strasbourg Court and British courts to stay the deportation of *Abu Qatada* has to be read in light of the endeavour of British governments to clear their streets, at all costs, from foreign-born suspected terrorists.<sup>1110</sup> The same considerations can be extended to any other countries engaged in the fight against terrorism.

Generally speaking, executives have sought diplomatic assurances either in the form of MoUs or individualized assurances, and national courts have in the main upheld their use. In some circumstances, assurances against the death penalty – if issued by the judiciary – might be deemed trustworthy instruments that enhance the regime of protection owed to extradited persons. Given that the safety of return

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<sup>1109</sup>Eveline Brouwer, 'Immigration, Asylum and Terrorism: A Changing Dynamic Legal and Practical Developments in the EU Response to the Terrorist Attacks of 11.09' (2003) 4 *European Journal of Migration and Law* 399.

<sup>1110</sup> As an example of the disappointment with which SIAC's decision has been met, see, The Sun, 'Home Secretary slams Qatada decision as "unacceptable"' <<http://www.thesun.co.uk/sol/homepage/news/4114354/Home-Secretary-slams-Qatada-decision-as-unacceptable.html>> accessed 2 April 2013; see also, Douglas Murray, 'Abu Qatada's victory proves how low we have been laid', The Spectator, 13 November 2012 <<http://blogs.spectator.co.uk/douglas-murray/2012/11/abu-qatadas-victory-proves-how-low-we-have-been-laid/>> accessed 3 January 2012. To read more on the reactions to the Court of Appeal decision, see, Sky News, 'Abu Qatada Stays As Theresa May Loses Appeal' <<http://news.sky.com/story/1070407/abu-qatada-stays-as-theresa-may-loses-appeal>> accessed 2 April 2, 2013; The Guardian, 'Abu Qatada: Theresa May loses latest attempt to deport Islamist cleric', <<http://www.guardian.co.uk/world/2013/mar/27/abu-qatada-theresa-may-loses>> accessed 2 April 2 2013.

is a matter of fact,<sup>1111</sup> I deem highly problematical, from a human rights and refugee law perspective, the possibility of returning a person, with the assurance she will not be tortured, to a country where torture is a *systematic* practice. Accordingly, I believe States should refrain from relying on diplomatic assurances - whether framed or not within standardized MoUs - with countries that persist in the use of torture.

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<sup>1111</sup> Jones 2008, 183, 186.

## **Chapter 7. Pre-Arrival Interception and Agreements for Technical and Police Cooperation**

### **7.1. Introduction**

In the context of the pro-active management of European frontiers, diverse bilateral strategies have been devised to keep migrants and refugees away from the EU's territory or rapidly remove them. These strategies have been attempted through various types of agreements linked to readmission between EU Member States and non-EU third countries of origin or provenance of migrants. While both standard readmission agreements and diplomatic assurances are being used to return foreigners who have already crossed the EU borders, agreements for technical and police cooperation are being negotiated to set up joint patrols for the pre-emptive containment of unwanted arrivals in Europe.

Drawing a line of demarcation between pre-arrival and post-arrival returns, this Chapter focuses on readmission performed before individuals enter into the territory of a EU Member State, bearing in mind that during interdiction and diversion manoeuvres outside the territorial jurisdiction of the EU destination country, the phases of

arrival (or non-admission) and return virtually overlap.<sup>1112</sup> The arrangements used for preventing access to the EU territory may be deemed as an underlying component of the progressive externalization of migration controls – either in the territorial waters of a third country or on the high seas,<sup>1113</sup> with the expectation of diluting State responsibilities by letting refugees ‘fall into a gaping crack in the human rights system.’<sup>1114</sup> Since refugees often travel in mixed flows, crossing the sea by boat together with migrants, restrictive external migration controls can also end up affecting the rights of people genuinely in need of protection.<sup>1115</sup>

According to available records, in May 2009, Italy embarked on a forcible and indiscriminate return policy, deflecting hundreds of people to North Africa before they could enter the territorial waters of a EU Member State. The Italy-Libya push-back campaign will, therefore, be a key case study to explore: i) whether bilateral agreements for technical and police cooperation provide the legal

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<sup>1112</sup> This Chapter partially draws on an article I published in 2012. See, Mariagiulia Giuffrè, ‘State Responsibility beyond Borders: What Legal Basis for Italy’s Push-backs to Libya?’ (2012) 24(4) *IJRL* 692.

<sup>1113</sup> Article 86 of the UN Convention on the Law of the Sea (UNCLOS) defines negatively ‘high seas’ as ‘all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.’ UNCLOS, adopted 10 December 1982, entered into force 16 November 1994, 1833 UNTS 3.

<sup>1114</sup> Janet Dench and François Crépeau, ‘Interdiction at the Expense of Human Rights: A Long-term Containment Strategy’ (2003) 21 *Refugee* 1, 3.

<sup>1115</sup> See, Bhupinder S Chimni, ‘Aid, Relief, and Containment: The First Asylum Country and Beyond’ (2003) 40 *International Migration* 75, 76; Da Lomba 2004, 105.

framework for the forced return of intercepted refugees to countries of embarkation; ii) and whether pre-arrival interceptions and forced return can hamper refugees' access to protection in Europe.

It is worth noting that any enquiry into State practice is fraught with an unavoidable degree of uncertainty due to the inaccessibility of relevant information. For instance, in the case of interdictions on the high seas resulting in the handover of migrants and refugees to the country of embarkation, ambiguity and uncertainty are caused by the lack of transparency and absence of monitoring mechanisms, such as media, NGOs, and international organizations.<sup>1116</sup> In order to compensate such vagueness and grasp the main functions of agreements for technical and police cooperation, this Chapter has chosen to pivot the entire analysis around a single case study. The arrangements between Italy and Libya are therefore used as a reference frame to better comprehend this category of agreements, whose content can vary from country to country.

The push-back campaign is, arguably, the most controversial policy ever adopted by a European government to combat irregular immigration by sea. In February 2012, the ECtHR delivered a landmark judgment in the *Hirsi v Italy* case by holding that Italy had extraterritorial human rights obligations with regard to twenty-four

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<sup>1116</sup> Barbara Miltner, 'Human Security and Protection from *Refoulement* in the Maritime Context', in Alice Edward and Carla Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs* (CUP 2010) 195, 215.



refugees from Somalia and Eritrea handed over to Libyan authorities after being intercepted by Italian warships. Italy exercised, indeed, ‘effective control and authority’ over intercepted migrants, thus creating a ‘jurisdictional link’ between the State and the individuals concerned.

As a consequence of the events of 2011 – both the indiscriminate lethal force used by the Gaddafi government to retain power, and the Italian involvement in the humanitarian intervention against the Libyan government – their bilateral agreements have been suspended. Despite the end of the war in Libya and the death of Colonel Gaddafi, this study remains relevant for the following reasons. First, there is still a need to establish, if any, the legal framework underpinning the 2009 push-back campaign. Second, southern European States continue to face influxes of seaborne migrants and refugees from North Africa, and urgently need guidance about clear-cut extraterritorial human rights obligations,<sup>1117</sup> and possible types of responsibility they could incur according to general international law. Third, in March 2011, the Libyan rebels’ leader promised that the post-Gaddafi Libyan Government would respect all agreements concluded between Italy and the Gaddafi regime.<sup>1118</sup> As a

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<sup>1117</sup> In this regard, the *Hirsi v Italy* judgment is exemplar.

<sup>1118</sup> See, Migrants at Sea, ‘Libyan Rebel Leader Jalil Promises to Respect Immigration Agreements between Libya and Italy’ (29 March 2011) <<http://migrantsatsea.wordpress.com/2011/03/29/libyanrebel-leader-jalil-promises-to-respect-immigration-agreements-between-libya-and-italy/>> accessed 20 August 2013.

consequence, the new governments in place in both Italy and Libya are re-establishing cooperation in the field of migration control and intend to resume the agreements for technical and police cooperation signed in 2007 and 2009. Fourth, sea routes constantly change and, in their attempt to reach Europe, people continue to opt for increasingly perilous and difficult journeys. Accordingly, new bilateral agreements might be negotiated.<sup>1119</sup> Therefore, the legal analysis of the Italy–Libya case is pertinent for other situations in which refugees are encountered in extraterritorial settings by EU or non-EU third countries performing exit border controls in cooperation with EU Member States.

### **7.1.1. Structure of the chapter**

Sections 7.2 and 7.3 provide an initial overview of State practice and the content of the agreements for technical and police cooperation. This background analysis offers a thorough portrayal of

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<sup>1119</sup> For instance, Italy in 2011 made a proposal to Tunisia to establish naval patrols along the Tunisian coast to block human trafficking and illegal immigration to Europe. See, A Celletti, ‘Interview with Franco Frattini’, Italian Foreign Minister (Rome, 20 March 2011) <[http://www.esteri.it/MAE/IT/Sala\\_Stampa/ArchivioNotizie/Interviste/2011/03/20110320\\_intfr.htm?LANG=IT](http://www.esteri.it/MAE/IT/Sala_Stampa/ArchivioNotizie/Interviste/2011/03/20110320_intfr.htm?LANG=IT)> accessed 20 August 2013. French and Italian Ministers of the Interior have also announced an agreement for ‘joint air and naval patrols’ off the Tunisian coast to block departures from Tunisia. See, Migrants at Sea, ‘France and Italy Agree to Joint Naval Patrols along Tunisian Coast to Block Migrant Departures’ (8 April 2011) <<http://migrantsatsea.wordpress.com/2011/04/08/france-and-italy-agree-to-joint-naval-patrols-along-tunisian-coast-to-block-migrant-departures/>> accessed 20 August 2013.

the plethora of bilateral arrangements between Italy and Libya, some of which have not been published. Although the content of these accords and the practice of push-backs have sparked the interest of scholars and human rights practitioners, the subject has often been laden with confusion from both a terminological and substantive point of view. However, only when the main terms of the accords at issue are clarified, including their purpose, and the rules of engagement they set up, can the far more complex issues be examined, such as: the legal basis underpinning the push-back campaign; the assessment of whether access to protection is hampered by the implementation of these accords; and responsibility under general international law of a EU Member State cooperating with a third country in migration control.

Through the scrutiny of the diverging motivations advanced by Italy to justify diversion operations at sea, Section 7.4 investigates whether either the 2007 and 2009 Protocols or the 2008 Partnership Treaty (individually taken) stand *per se* as the legal basis for push-backs. Section 7.5 shows how the legal analysis of the Italy–Libya case is pertinent for other situations in which States within or outside the EU (*in primis* the US and Australia) entrust or used to entrust third countries of provenance of migrants and refugees with the duty of patrolling both their territorial and international waters to deter unauthorized immigration. Section 7.5.1 offers an overview of the

main tasks of Frontex, the EU Agency involved in both the integrated management of the external borders and in the prevention of unauthorized entries, especially by sea.

Section 7.6 illustrates how refugees' access to protection – understood here as the combination of *non-refoulement* and access to asylum procedures and effective remedies - is undermined by the enforcement of maritime pre-arrival interceptions. Section 7.7 argues that EU Member States could be held indirectly accountable, under Article 16 of the International Law Commission Articles on State Responsibility (ILC Articles)<sup>1120</sup> for an internationally wrongful act committed by a third country by means of its 'aiding and assisting' the third country in illicit operations. By depicting the main elements of the Italy–Libya cooperation, a possible reading of the State responsibility riddle in the case of violations of the principle of *non-refoulement* is offered.

As a free-standing part, Section 7.7 aims to examine whether State responsibility under general international law can be triggered in the case of joint operations of migration control. This issue emerges as a novelty if compared with previous Chapters, which confined themselves to assess whether States comply with primary obligations

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<sup>1120</sup> ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts' (2001), UNGA A/56/10, corrected by A/56/49 vol I/Corr.4.

under international human rights and refugee law treaties by ensuring access to protection to refugees and asylum seekers.

It should be finally observed that one of the main problems in pronouncing on the responsibility of EU Member States in cases of joint migration controls has been the lack of information about the relevant accords and their implementation. For example, whereas the engagement rules within the bilateral agreements normally entrust Libya with the enforcement of the patrols, the actual execution of the accords may give rise to more complex operational scenarios, where Italian authorities are also implicated to varying degrees.

## **7.2. Deflection en route to Libya: a narrative of facts**

According to available records, between 6 May and 6 November 2009, 834 persons were driven back to Libya and twenty-three to Algeria through the autonomous intervention of Italian vessels deployed in the course of nine different maritime operations run by Italian forces belonging to the *Guardia di Finanza* (Revenue Police), the *Marina Militare* (Navy) and the *Guardia Costiera* (Coast Guard) and coordinated by the Central Directorate for Immigration and Borders Police within the Department of Public Security (Ministry of the Interior).<sup>1121</sup>

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<sup>1121</sup>UNHCR, *Submission in the Case of Hirsi*, March 2010, para 2.1.3, <<http://www.unhcr.org/refworld/pdfid/4b97778d2.pdf>> accessed 20 August 2013.

On two different occasions (6 May and 30 August 2009), the people affected by the push-back activities were transported back to Libya directly by Italian authorities after being transferred from their unseaworthy boats onto Italian vessels. Italy was, thus, unilaterally responsible for running the maritime part of the operation. On these occasions, migrants and refugees - who had not been informed that the Italian ships were directed to return to Libyan ports - were compelled by force to disembark and were handed over to Libyan officials. During other operations, intercepted people were, instead, handed over by Italian authorities to Libyan patrol boats, the latter operated by joint Libyan and Italian crews.<sup>1122</sup>

If 2009 push-backs were preceded by similar cases of deflections to Libya in 2004–5, and also, in the late nineties, to Albania, the significant difference in the recent Italian interdictions is their systematic nature.<sup>1123</sup> Interdictions and joint push-backs of boat migrants continued even in 2010, albeit in different forms. After the signature of the 2009 Protocol, Libyan authorities started to show their determination by intercepting migrants on the high seas or in

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See also, CPT, *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*, 28 April 2010 <<http://www.cpt.coe.int/documents/ita/2010-inf-14-eng.pdf>> accessed 20 August 2013 (CPT Report). While these operations were generally conducted by the Coast Guard and the Revenue Police, the Italian Navy intervened only twice. The push-back issue had already been introduced in Section 2.5.3.1 of this thesis.

<sup>1122</sup>UNHCR, *Submission in the Case of Hirsi*, para 2.1.5.

<sup>1123</sup>Alfredo Terrasi, 'I Respingimenti in Mare di Migranti alla Luce della Convenzione Europea dei Diritti Umani' (2009) 3 DUDI 591.

Libyan territorial waters with vessels and technical equipment supplied by the Italian government, even entering the Search and Rescue (SAR) zone administered by Malta.<sup>1124</sup>

While Italy and Malta had initially contributed with their officials or their own vessels to interdiction operations, in 2010 they attempted to withdraw, letting Libya do the job of intercepting migrants near Malta or Lampedusa, and returning them to African ports.<sup>1125</sup> While, by 4 April in 2010, only 170 migrants appear to have landed on Sicilian shores that year, the number was 4,573 individuals in the corresponding period in 2009. If we may assume that a comparable number of migrants attempted crossings in 2010 and 2009

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<sup>1124</sup>After a summit between Italy, Malta, and Libya in early July 2009, the representatives of these three countries adhered to a new ‘Strategy for the Mediterranean’ aimed at strengthening their collaboration in the control, identification, and repatriation of migrants intercepted at sea. This enhanced, triangular relationship immediately gave rise to questionable practices, on the basis of which refugees started to be interdicted in the Search and Rescue (SAR) zone administered by Malta by those Libyan vessels offered by Italy under the framework of their bilateral cooperation. As a general note, anyone that attempts to reach Italy by sea has to pass through Maltese SAR waters. See, Italia-Malta: Vertice Intergovernativo a Roma sui Temi di Strategia Mediterranea, <[http://www.esteri.it/MAE/AR/Sala\\_Stampa/ArchivioNotizie/Approfondimenti/2010/07/20100708\\_ItaliaMalta.htm?LANG=AR](http://www.esteri.it/MAE/AR/Sala_Stampa/ArchivioNotizie/Approfondimenti/2010/07/20100708_ItaliaMalta.htm?LANG=AR)> accessed 20 August 2013.

<sup>1125</sup>For example, on 22 July 2010, twenty-seven Somali asylum seekers out of a group of fifty-five people were diverted to Libya, without setting foot in Europe, separating members of the same family. See, Sansone Kurt, ‘Somali Migrant Separated from Pregnant Wife during Rescue’ Times of Malta (22 July 2010) <<http://www.timesofmalta.com/articles/view/20100722/local/somali-migrant-separated-from-pregnant-wife-during-rescue>> accessed 20 August 2013. Irregular inflows of entrants persisted in 2010 and in 2011 through disembarkation of thousands of migrants and refugees on Sicilian shores via more perilous and difficult routes, in particular via Tunisia. See, Alessandra Ziniti, ‘Immigrati Continuano gli Sbarchi: un Flop i Respingimenti in Mare’ *Repubblica* (8 August 2010). On the Egyptian route, see, Tobias Zick, ‘Egypt Plays down Reported Eritrean Refugee Hostage Crisis in Sinai’ Global Crisis Solution Centre (19 December 2010) <[http://www.everyonegroup.com/Everyone/MainPage/Entries/2010/12/19\\_Egypt\\_Plays\\_Down\\_Reported\\_EritreanRefugeeHostageCrisisIn\\_Sinai.html](http://www.everyonegroup.com/Everyone/MainPage/Entries/2010/12/19_Egypt_Plays_Down_Reported_EritreanRefugeeHostageCrisisIn_Sinai.html)> accessed 20 August 2013.

respectively, then the suspected deflection rate is higher than 96 per cent.<sup>1126</sup> By 13 July in 2011, 50,236 migrants had reached Italy by sea that year, as a consequence of migratory waves triggered by North African revolutions.<sup>1127</sup>

Since bilateral cooperation on readmission primarily purports to confront the ‘humanitarian crisis’ deepened by the flight of thousands seeking better living conditions in Europe, regardless of the status of the asylum system in readmitting countries, the words of the Frontex deputy executive director, Gil Arias Fernández, carry particular weight:

Based on our statistics, we are able to say that the agreements [between Libya and Italy] have had a positive impact. On the humanitarian level, fewer lives have been put at risk, due to fewer departures. But our agency [Frontex] does not have the ability to confirm if the right to request asylum as well as other human rights is being respected in Libya.<sup>1128</sup>

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<sup>1126</sup> Fulvio Vassallo Paleologo, ‘Respingimento ed Accordi di Riammissione – Sotto Accusa l’Italia che non è un Paese Sicuro per Richiedenti Asilo’ (Meltingpot, 31 January 2011) <<http://www.meltingpot.org/articolo16259.html>> accessed 20 August 2013..

<sup>1127</sup> Migrantes Online, ‘Più di 50mila immigrati sbarcati da gennaio a oggi’ (13 July 2011) <[http://www.migrantesonline.it/siti\\_migrantes/migrantes\\_online/00005082\\_Piu\\_di\\_50mila\\_immigrati\\_sbarcati\\_da\\_gennaio\\_a\\_oggi\\_.html](http://www.migrantesonline.it/siti_migrantes/migrantes_online/00005082_Piu_di_50mila_immigrati_sbarcati_da_gennaio_a_oggi_.html)> accessed 20 August 2013.

<sup>1128</sup> Human Rights Watch, ‘Pushed Back, Pushed Around: Italy’s Forced Return of Boat Migrants and Asylum Seekers, Libya’s Mistreatment of Migrants and Asylum Seekers’ (21 September 2009) 37 <<http://www.hrw.org/en/node/85585>> accessed 20 August 2013.



It is important to emphasize that neither the denial of entry of a vessel into territorial waters, nor the refusal to allow disembarkation, amount per se to a breach of the principle of *non-refoulement*. For such a violation to occur, it is necessary that interdiction results in the physical return of intercepted refugees to territories (either countries of origin or transit) where their life and liberty would be threatened.<sup>1129</sup> The evaluation of a third country's safety is, therefore, a *conditio sine qua non* for EU Member States to avoid responsibility both under human rights treaties and general international law. Especially in those instances where migrants and refugees are preventively interdicted on the high sea or in the territorial waters of a third country, 'the less one may rely on the *ex post* control by [EU] courts and tribunals (which is the very idea of outsourcing), the more we need to engage in an *ex ante* control.'<sup>1130</sup>

At the same time, regardless of whether a State is considered generally safe because of the presence of adequate asylum procedures and judicial oversight, every individual should be entitled to rebut the presumption of safety of that country for him or her in their particular case.<sup>1131</sup> Even when States are faced with mounting pressure of mass

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<sup>1129</sup> Goodwin-Gill and McAdam 2007, 277–8.

<sup>1130</sup> Gregor Noll, 'Law and the Logic of Outsourcing: Offshore Processing and Diplomatic Assurances' (Refugee Protection in International Law, Contemporary Challenges Workshop, Oxford, 24 April 2006) 1.

<sup>1131</sup> Thomas Spijkerboer, 'Stretching the Limits. European Maritime Border Control Policies and International Law' in MC Foblets (ed), *The External Dimension of the Immigration & Asylum Policy of the EU* (Bruylant 2009).

flows of migrants and refugees by sea, their discretion in determining how to react is not absolute and a duty exists for contracting governments, not only under refugee and human rights law, but also under the law of the sea and, more particularly, under the UN Convention on the Law of the Sea (UNCLOS), to cooperate to assist ships' masters in delivering persons rescued at sea to a 'place of safety',<sup>1132</sup> meant, in general terms, as a location where basic human needs are met and where 'rescue operations are considered to terminate.'<sup>1133</sup>

In the case of the 2009 push-backs, the Italian government branded Libya as a safe haven for migrants and asylum seekers: although it had not ratified the Geneva Convention, it was party to the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, and had accepted, on an informal basis, the presence of the UNHCR.<sup>1134</sup> Also, several agreements had been concluded between Italy and Libya that committed them to act in compliance with the UN Charter and the Universal Declaration of Human Rights (UDHR). Nevertheless, the inadequacy of Libya's response to the flow of

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<sup>1132</sup> See, amendments to both the International Convention on Maritime Search and Rescue (SAR) and the International Convention for the Safety of Life at Sea (SOLAS) (adopted May 2004, entered into force 1 July 2006). Amendment to c V of SOLAS and to cc III and IV of the SAR. Resolutions MSC.155 (78) and MSC.153 (78), 20 May 2004.

<sup>1133</sup> IMO Resolution 167 (78), Annex 34, Guidelines on the Treatment of Persons Rescued at Sea (adopted 20 May 2004) para 6.12.

<sup>1134</sup> The OAU Convention commits Libya to guarantee protection to people undergoing persecution and fleeing from dangerous geographical zones.

migrants and refugees had been well documented. If abuses escalated further in early 2011, the Gaddafi regime's treatment of migrants had been known to undermine human rights for a long time.

### **7.3. Overview of the bilateral agreements linked to readmission between Italy and Libya**

States avail themselves of bilateral agreements for technical and police cooperation to combat irregular immigration and trans-border crimes, such as terrorism, illegal traffic of drugs, trafficking of human beings, and organized crime. For the purpose of this thesis, this wording is used to indicate arrangements between two States, Italy and Libya, which aim to establish a common action against unauthorized immigration by means of a program of joint patrols resulting in naval interdiction and deflection of intercepted boats to the ports of departure.

Trying to analyze all the informal bilateral agreements, on the basis of which Libyan authorities both authorized Italian vessels to cross Libyan territorial waters, and accepted readmission of intercepted migrants in each single operation, is a painstaking process. Moreover, the content of some of these instruments remain unpublished and detailed information is often missing. Inevitably, therefore, some comments in the following analysis can only be tentative.

On 13 December 2000, Italy and Libya initiated their bilateral cooperation on irregular migration.<sup>1135</sup> A Memorandum was signed in January 2006 concerning the common engagement in the fight against irregular immigration culminating in a Protocol<sup>1136</sup> and an Additional Operating and Technical Protocol on cooperation in the fight against irregular immigration (Protocol and Additional Protocol), signed on 29 December 2007.<sup>1137</sup> The 2007 accords assume great prominence because, for the first time, Italy and Libya concluded arrangements to ensure practical operability of the commitments made in the 2000 Agreement, which was limited to generically recommending the parties to exchange information and provide mutual assistance and cooperation.

A Treaty on Friendship, Partnership, and Cooperation (Partnership Treaty) was concluded in Tripoli on 30 August 2008.<sup>1138</sup> This

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<sup>1135</sup>The Agreement in question concerned collaboration in the fight against terrorism, organized crime, illegal traffic of drugs, and irregular immigration, on the basis of which the two countries exchanged information on irregular immigration and ensured reciprocal assistance to combat this phenomenon. See, *Accordo tra la Repubblica Italiana e la Gran Giamahiria Araba Libica Popolare Socialista per la Collaborazione nella Lotta al Terrorismo, alla Criminalità Organizzata, al Traffico Illegale di Stupefacenti e Sostanze Psicotrope e All'Immigrazione Clandestina* (Rome, 13 December 2000). Another agreement was reached in July 2003 intended to define the modalities of cooperation between respective police authorities for the purpose of preventing unauthorized flows from Africa, but its content has never been published.

<sup>1136</sup>*Protocollo tra la Repubblica Italiana e la Gran Giamahiria Araba Libica Popolare Socialista* (Tripoli, 29 December 2007) (Protocol).

<sup>1137</sup>*Protocollo Aggiuntivo Tecnico-Operativo al Protocollo di Cooperazione tra la Repubblica Italiana e la Gran Giamahiria Araba Libica Popolare Socialista, per fronteggiare il fenomeno dell'immigrazione Clandestina* (Tripoli, 29 December 2007) (Additional Protocol).

<sup>1138</sup>*Trattato di Amicizia, Partenariato, e Cooperazione* (Bengazi, 30 August 2008) ratified by Italy with Law no2009/7 (Partnership Treaty).

Partnership Treaty was followed by the negotiation of an Executive Protocol to the 2007 agreements, signed on 4 February 2009, which still remains unpublished.<sup>1139</sup> The 2008 Partnership Treaty reshaped the system of legal sources by incorporating in Article 19 the commitments previously adopted by the parties – especially the 2000 Agreement and the 2007 Protocols – to intensifying bilateral cooperation in the fight against terrorism, organized crime, traffic of drugs, and irregular immigration. For the purpose of this Chapter, the arrangements under scrutiny are the 2007 and 2009 technical Protocols, as well as the 2008 Partnership Treaty.<sup>1140</sup>

The content of the 2007 arrangements (Protocol and Additional Protocol) – which should be jointly examined – was disclosed only in 2009. Pursuant to Article 1(1) of the Additional Protocol, the parties agreed to establish joint missions whereby Libya committed to patrolling both its coastline and international waters while Italy agreed to supply its Southern-Mediterranean partner with six vessels on a temporary basis. Also, under Article 5 of the Protocol, Italy availed itself of the EU budget for the construction of a system to control Libyan territorial and maritime frontiers to combat the phenomenon of

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<sup>1139</sup> *Protocollo Aggiuntivo Tecnico-Operativo concernente l'aggiunta di un articolo al Protocollo firmato a Tripoli il 29/12/2007 tra la Repubblica Italiana e la Gran Giamahiria Araba Libica Popolare Socialista, per fronteggiare il fenomeno dell'immigrazione clandestina* (Tripoli, 4 February 2009) (Executive Protocol).

<sup>1140</sup> The Italian language is used mainly with regard to those provisions of the bilateral agreements that are particularly crucial for reconstructing both the purpose of these instruments and the legal basis of push-back operations. The texts of the accords, done only in Italian and Arabic, are equally authentic.

unauthorized migration to Europe.<sup>1141</sup> For the first ninety days operations were to be conducted by a mixed crew, as a training period, after which the Italian personnel on board were to be progressively reduced (Article 1(4)).<sup>1142</sup> A Joint Operations Command under the responsibility of a representative appointed by Libya, and a vice-commandant appointed by Italy – with advisory tasks – was created with the purpose of arranging daily enforcement patrols.

Libyan authorities were, thus, totally entrusted with the command and responsibility for any initiative taken during operational missions, as Article 1(5) of the 2007 Additional Protocol reads:

*... Il Comando delle unità navali temporaneamente cedute sarà assunto da personale individuato dalla Parte Libica, che sarà responsabile della condotta della*

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<sup>1141</sup> Under Article 5, ‘Italy commits itself to cooperate with the EU in the provision of a system of control of territorial and maritime frontiers in order to combat the phenomenon of irregular migration. The construction of this system will be entirely funded by the EU [...] (my translation). The Italian version reads as follows: *‘L’Italia si impegna a cooperare con l’Unione Europea per la fornitura, con finanziamento a carico del bilancio comunitario, di un sistema di controllo per le frontiere terrestri e marittime libiche, al fine di fronteggiare il fenomeno dell’immigrazione clandestina [...]’*

<sup>1142</sup> It is worth observing that the Italian government decided to put a stop to the presence of Italian personnel aboard Libyan vessels after an incident occurred on 12 September 2010. On this date, one of the vessels supplied by Italy to Libya and run by a mixed crew fired at a Sicilian trawler. See, Repubblica, ‘I libici mitragliano un peschereccio. Finanziari italiani sulla nave di Tripoli’ (13 September 2010) <[http://www.repubblica.it/cronaca/2010/09/13/news/i\\_libici\\_mitragliano\\_un\\_peschereccio\\_finanziari\\_italiani\\_sulla\\_nave\\_di\\_tripoli-7043116/](http://www.repubblica.it/cronaca/2010/09/13/news/i_libici_mitragliano_un_peschereccio_finanziari_italiani_sulla_nave_di_tripoli-7043116/)> accessed 20 August 2013..

*navigazione e delle iniziative assunte sia nel corso delle crociere addestrative che di quelle operative* (emphasis added).<sup>1143</sup>

Under Article 2 of the 2007 Protocol, Italian officials were employed on board vessels only to conduct training activities, to give technical assistance, and for maintenance of the vessels.<sup>1144</sup> When a Libyan vessel intercepted a boat, and either escorted or towed it back to a North African port, competence attaches to Libya itself, thus excluding Italy from the exercise of any kind of legal authority over returned migrants and refugees.<sup>1145</sup>

Neither the Protocols concluded in December 2007 nor the 2009 Executive Protocol expressly prescribed rules for the interception and deflection to Libya of seaborne migrants halted by Italian authorities in international waters or closer to the Italian territory.<sup>1146</sup> Therefore, the legality of both the naval interdiction and bilateral readmission

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<sup>1143</sup> Article 1(5) can be translated as follows: ‘The command of the temporarily given vessels will be taken by Libyan personnel, who will be responsible for navigation and any activities undertaken in the course of both training and operative missions.’

<sup>1144</sup> Under Article 2, ‘... *I mezzi imbarcheranno equipaggi misti con personale libico e con personale di polizia italiano per l’attività di addestramento, di formazione, di assistenza tecnica all’impiego, e manutenzione dei mezzi [...].*’

<sup>1145</sup> This conclusion is also backed by the words of the Italian Ambassador in Tripoli. See, Trupiano, ‘Indagine conoscitiva sulle nuove politiche Europee in materia di immigrazione’ (Audition before the Parliamentary Committee monitoring the implementation of the Schengen Code, Europol’s activity, and migration-related issues, Rome, 13 October 2009) 5 <[http://www.camera.it/470?stenog=/\\_dati/leg16/lavori/stenbic/30/2009/1013&pagina=s020](http://www.camera.it/470?stenog=/_dati/leg16/lavori/stenbic/30/2009/1013&pagina=s020)> accessed 3 January 2012.

<sup>1146</sup> See, Terrasi 2009, 1; see also, generally, Seline Trevisanut, ‘Immigrazione Clandestina via Mare e Cooperazione fra Italia e Libia dal Punto di Vista del Diritto del Mare’ (2009) 3 DUDI 609.

programs will be mainly discussed in relation to their modalities of execution. Article 19 of the 2008 Partnership Treaty provided an ‘intensification of the ongoing cooperation in the context of the fight against terrorism, organized crime, drug trafficking and clandestine migration.’<sup>1147</sup> It also committed the parties to developing bilateral and regional initiatives to collaborate to prevent the irregular departure of migrants directly in the countries of origin.

Furthermore, mixed crews patrol Libyan coasts on vessels supplied by Italy, while land borders are subjected to a satellite detection system jointly financed by Italy and the European Union. Italy and Libya strengthened their technical and financial assistance in the framework of the Friendship Treaty in 2008 and the Executive Protocol in 2009, on the basis of which Italy supplied Libya with six vessels on a permanent ground. In light of the new circumstances, a different and more collaborative patrolling practice was put in place to perform their contractual duties on irregular migration control. It is also worth observing that no delimitation *ratione personae* is made in the text of these technical agreements, and no distinction is drawn between nationals and third country nationals, or between asylum seekers and all other irregular migrants.

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<sup>1147</sup> Pursuant to Article 7(2) of the Decree of the Minister of Interior of 14 July 2003, vessels suspected of being used in the transportation of irregular migrants may be stopped, with a view to their possible deflection to the ports of departure. See, [http://www.stranieriinitalia.it/briguglio/immigrazione-easilo/2003/settembre/decreto-mininterno-14-7-03.html#\\_ftn1](http://www.stranieriinitalia.it/briguglio/immigrazione-easilo/2003/settembre/decreto-mininterno-14-7-03.html#_ftn1) accessed 3 January 2012.



#### **7.4. In search of a legal foundation for push-backs to Libya**

Studying the content of agreements for technical and police cooperation and looking for a legal basis in cases of joint migration control serves three purposes. First, it helps answer one of this thesis' research questions on the relationship between agreements linked to the readmission of unauthorized migrants and the decision to return refugees to countries of origin or transit. Second, the diverse legal bases put forward by the Italian government to justify its cooperation with Libya also show that Italy ought to know about the treatment of migrants and refugees in Libya. Sovereign discretion cannot warrant displacement of fundamental rights, first and foremost the principle of *non-refoulement*. EU Member States, *in casu* Italy, have a duty to abide by international refugee and human rights law, whether they are either engaged in the implementation of search and rescue operations, anti-smuggling activities, or the performance of migration controls in tandem with another country.

Third, identifying the framework within which controversial practices susceptible of involving State responsibility were executed help understand the actual role played by bilateral agreements for technical and police cooperation. Gaining knowledge of the rules of engagement and the subdivision of responsibilities enables an assessment of both the different legal competences of the two States, and the degree of assistance provided by Italy to Libya. It also

contributes to better assessing which State would have primary responsibility in the case of human rights violations, and to what extent the other State could be indirectly complicit in the commission of an international wrongful act. Moreover, the analysis of a topical case, such as the Italy-Libya cooperation, contributes to showing how *de-territorialized* State action can undercut the rights of refugees intercepted before entering the territorial jurisdiction of the European intercepting country.

A purposive interpretation of some critical provisions of the bilateral accords for technical and police cooperation – an interpretation that does not overstretch the literal reading of the text – reveals how return to Libyan soil is the inevitable and foreseeable outcome of a cooperation policy that expressly pursues the goal of preventing and combating unauthorized arrivals to Europe by patrolling international waters and the Libyan coasts.<sup>1148</sup> The interception of ships and their diversion to a third country, or the act of handing migrants over to the authorities of a third State are not powers expressly prescribed in the 2009 Executive Protocol or in the 2007 agreements for technical and police cooperation. Thus, the

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<sup>1148</sup> The return-related purpose of the push-back policy has been confirmed by the CPT Report, 11. See also, Article 1(1) and (3) of the Preamble to the 2007 Additional Protocol. For case law and doctrine on treaty interpretation based on the ‘ordinary meaning’ of the text and its ‘object and purpose’, refer to Section 1.6.4. of this thesis.

question where this enforcement jurisdiction can be inferred from remains open, and as such deserves further discussion.<sup>1149</sup>

Nevertheless, a *bona fide* interpretation of a number of provisions implicitly entails recognition of the underlying purpose of these accords, namely, the restriction of undocumented migration to Europe through a program of technical and police cooperation with Libya.<sup>1150</sup> This goal is also corroborated, as outlined below, by the numerous statements of representatives of the Italian and Libyan governments.<sup>1151</sup> In the framework of the intensive technical cooperation and financial support crafted by these bilateral instruments of migration control, Libya undertook to readmit migrants and refugees intercepted by either Italian or Libyan authorities after transiting through Libya on their way to Europe.

However, it is likely that further instruments, which are not readily available, have played a role in shaping the push-back campaign: for instance, *ad hoc* notes exchanged by competent border authorities, or other informal accords, where consent is given by fax or telephone, on the basis of which both Italian vessels were authorized to enter Libyan territorial waters, and Libya assented to the readmission of third

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<sup>1149</sup> See, on this point, Section 7.4.3.

<sup>1150</sup> The joint commitment to the struggle against illegal immigration is reiterated in the preambles of the 2007 Protocols and in Article 19 of the 2008 Partnership Treaty.

<sup>1151</sup> Also the ECtHR in the *Hirsi v Italy* judgment has affirmed that push-backs in May 2009 were carried out with the intention of preventing irregular migrants from disembarking on Italian soil. See, *Hirsi v Italy*, para 181.

country nationals. As far as the push-backs of 6 May 2009 are concerned, the Italian Ministry of the Interior declared that the authorization by the Libyan government for the readmission of migrants was issued during the night, after long negotiations.<sup>1152</sup> My hypothesis is that neither the 2007 and 2009 technical Protocols, nor the 2008 Partnership Treaty, stand *per se* as the legal basis of push-backs, but this series of agreements, taken as a whole, constitutes the legal and political framework within which the 2009 push-backs were performed.

In its official response to the Council of Europe Committee on the Prevention of Torture (CPT) during its July 2009 mission to Italy, the Italian government put forward diverse and incongruous legal justifications for its push-back policy.<sup>1153</sup> As discussed in the following subsections, the main explanations advanced by the Italian government to validate push-backs are: SAR measures, migration control activities in pursuance of the Protocol on the Smuggling of Migrants, and police operations carried out by Italy on behalf of Libya to return to the country of departure those who had irregularly evaded border controls. These arguments are analyzed below, bearing in mind the existence of two different legal frames authorizing, on the one

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<sup>1152</sup> See, Meltingpot, 'Migranti riaccompagnati in Libia' (7 May 2009) <<http://www.meltingpot.org/articolo14467.html>> accessed 20 August 2013.

<sup>1153</sup> Response of the Italian Government to the CPT Report, app I (Response Italian Government) <<http://www.cpt.coe.int/documents/ita/2010-inf-15-eng.pdf>> accessed 20 August 2013.

hand, interception or rescue operations on the high seas, and, on the other hand, the return of migrants and refugees to the country of embarkation.

#### ***7.4.1. Search and rescue?***

First, interventions have been labelled as ‘search and rescue’ operations, requiring EU Member States’ vessels to disembark rescued people to a ‘place of safety’, broadly defined as ‘a place where the rescue operations are considered to have been completed.’<sup>1154</sup> A ‘place of safety’, however, ‘is not necessarily the closest one to the place where people were rescued.’<sup>1155</sup> Pursuant to Article 98(1) of the UNCLOS, ‘every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew, or the passengers [...] to render assistance to any person found at sea in danger of being lost’ and ‘to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance.’ Similarly, the SOLAS Convention provides that ‘[t]he master of a ship at sea which is in a position to be able to provide assistance, on receiving a signal from any source that persons are in distress at sea, is bound to proceed with all speed to their

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<sup>1154</sup> The SAR Convention sets the duty to disembark the shipwrecked in a ‘safe place.’ See also, the IMO Resolution MCS 167/78 of 20 May 2004 and the amendments to the SAR and SOLAS Conventions.

<sup>1155</sup> See, Response Italian Government, para c.

assistance...'<sup>1156</sup> No delimitation *ratione personae* is made, and 'any person' in distress at sea can benefit from the SAR obligations falling upon States.<sup>1157</sup>

The State holding primary responsibility for the delivery of the intercepted migrants to a 'place of safety' is the State responsible for the SAR region where assistance is rendered.<sup>1158</sup> Broadly speaking, under maritime law, only the flag State has jurisdiction over a vessel on the high seas but in the case of boat refugees, the flag State could be the very State from which they are fleeing. Although disembarkation in the next port of call is not a rule of customary law,<sup>1159</sup> some scholars, and the UNHCR, maintain that the obligation on the coastal State to accept disembarkation may implicitly be inferred from the maritime Conventions.<sup>1160</sup>

The absence of a clear-cut definition of a 'place of safety' is not *per se* damaging since it allows for a case-by-case approach, which

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<sup>1156</sup> SOLAS, c V, reg 33(1).

<sup>1157</sup> SAR Annex, cc 2 and 3, para 2.1.10.

<sup>1158</sup> SAR Annex, para 3.1.9 and SOLAS, c V, reg 33 (1-1). On the latest amendments to the SAR Convention and its application in the Mediterranean, see, Seline Trevisanut, 'Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?' (2010) 25 IJMCL 526-35.

<sup>1159</sup> Richard A Barnes, 'Refugee Law at Sea' (2004) 53 ICLQ 47, 63.

<sup>1160</sup> UNHCR, *Problems Related to the Rescue of Asylum Seekers in Distress at Sea*, UN doc EC/SCP/18, 26 August 1981, paras 19–21. Similarly, a circular of the IMO Facilitation Committee recommends that '[i]f disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SAR area should accept the disembarkation of the persons rescued [...] into a place of safety under its control [...]' See, Circular FAL.35/Circ.194, 'Principles relating to administrative procedures for disembarking persons rescued at sea' (14 January 2009).

takes into account the particular circumstances of each rescue situation and the different categories of stowaways.<sup>1161</sup> In this regard, the Guidelines on the treatment of rescued persons of the International Maritime Organization (IMO) emphasize how:

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.<sup>1162</sup>

However, a number of examples show how coastal States continue to bounce responsibilities for disembarkation. And, in some circumstances, such an uncertainty has led to episodes of non-rescue, or the sinking of overcrowded boats resulting in the death of the passengers on board.<sup>1163</sup> Moreover, if rescue units or other suitable ships can temporarily be used to discharge initial succours in cases of

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<sup>1161</sup>Violeta Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23 *IJRL* 174, 198.

<sup>1162</sup> IMO Guidelines on the treatment of persons rescued at sea, Resolution MSC.167(78), 20 May 2004, para 6.17, subsequently endorsed by the UN General Assembly in UN doc A/RES/61/222, 16 Mar 2007.

<sup>1163</sup> On 3 October 2013, a boat carrying migrants and refugees to Italy sank off the Italian island of Lampedusa. While 155 people were rescued, the death toll reached 339. See also, the MV & Salamis incident on 4 August 2013. Further information can be retrieved in: Jean-Pierre Gauci and Patricia Mallia, 'Access to Protection: a Human Right' (National Report – Malta, December 2013) 36

distress, survivors must in the end be disembarked in a ‘place of safety’, which may only be on dry land.<sup>1164</sup>

As stated by the ECtHR - which broadly relied on reports of international human rights organizations - Libya could not be considered a ‘place of safety’ because of the well-documented inadequacy of its response to flows of migrants and asylum seekers.<sup>1165</sup> Moreover, as provided by the IMO Guidelines, a vessel cannot be conceived of as a final ‘place of safety.’ The fact that a State is legally bound to disembark a person rescued at sea in a safe haven implicates the duty to collect thorough information on the condition of reception and treatment of rescued migrants and refugees in the receiving country.

In accordance with the UNHCR’s proposed definition, ‘interception’ embraces all those extraterritorial activities carried out by a State to keep undocumented migrants, including refugees, away from their territory, thus preventing entry by land, sea, or air.<sup>1166</sup> At

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<sup>1164</sup> *ibid* para 6.14.

<sup>1165</sup> *Hirsi v Italy*, paras 123–6.

<sup>1166</sup> UNHCR Executive Committee, *Interception of Asylum Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, UN doc EC/50/SC/CPR.17, 9 June 2000. Interception may encompass interdiction of boats (‘active’ or ‘physical’ interception) as well as ‘passive’ measures, such as implementation of restrictive visa requirements, carrier sanctions, and the establishment of airlines liaison officers in countries of origin or transit of immigrants to identify those possessing false or inadequate documentation and to prevent their departure to the destination country. Nothing prohibits interception from also being executed in the territorial waters of a third country if the consent of the coastal State is given. On practices deterring asylum seekers, see, Brian Gorlick, ‘Refugee Protection in Troubled Times: Reflections on Institutional and Legal Developments at the Crossroads’, in Niklaus Steiner, Mark Gibney, and Gil



face value, ‘rescue’ and ‘interception’ appear to be profoundly different, but examination indicates both their similarities and ambiguities. As a general rule, ‘when vessels respond to persons in distress at sea, they are not engaged in interception.’ ‘Rescue’ can, indeed, be described as ‘an operation to retrieve persons in distress, provide for their initial medical or other immediate needs, and deliver them to a place of safety.’<sup>1167</sup> However, problems arise when, for example, a State coastguard encounters an unseaworthy boat allegedly transporting undocumented migrants.<sup>1168</sup>

Because of the incongruent responses by the Italian government and the lack of a clear legal basis encompassing its activities in 2009, it is not straightforward to categorize the push-backs to Libya as either rescue measures or external maritime border control operations. It is important to note that such a classification is immaterial for the purpose of establishing State responsibility under general international law and human rights law, as in both cases, what counts is whether primary human rights obligations have been violated as a consequence of the abovementioned practices.<sup>1169</sup> Nevertheless, this categorization matters for the purpose of EU law. Indeed, assuming that ‘search and rescue’ missions do not fall under the Schengen Border Code (SBC),

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Loescher (eds) *Problems of Protection: the UNHCR, Refugees, and Human Rights* (Routledge 2003) 86.

<sup>1167</sup> SAR Annex, para 3.1.9; and SOLAS, c V, reg 33 (1-1).

<sup>1168</sup> Miltner 2010, 220.

<sup>1169</sup> See, e.g., *Hirsi v Italy*, para 81. See also, Moreno-Lax 2012a, 9.

States generally prefer to deem their activities on the high seas as ‘rescue’ missions rather than ‘interceptions.’<sup>1170</sup>

This issue is controversial as demonstrated by the annulment of Council Decision 2010/252/EU of 26 April 2010 supplementing the SBC in a case concerning the surveillance of the external maritime borders in the context of operational cooperation coordinated by Frontex.<sup>1171</sup> Indeed, Part II (paragraph 1.1) of the Annex to the Decision – which continues to maintain its effects until its replacement - provides that ‘[t]he obligation to render assistance to the persons in distress at sea shall be carried out [by Member States]’ and that ‘[p]articipating units shall provide assistance to any vessel or person in distress at sea.’<sup>1172</sup>

That said, Article 3(b) of the SBC sets forth that it is to be applied without prejudice to ‘the rights of refugees and persons requesting

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<sup>1170</sup> Pursuant to Article 1, the SBC aims to establish rules governing the border control of persons crossing the external borders of the Member States of the European Union. As stated in recital 6 of the Code, border control is intended to ‘help to combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States’ internal security, public policy, public health and international relations.’

<sup>1171</sup> See, Case C-355/10, *European Parliament v Council of the European Union*, 5 September 2012. According to the Parliament, the provisions of the contested decision ought to have been adopted by the ordinary legislative procedure and not by the comitology procedure based on Article 12(5) of the SBC (see, para 2). The Court concluded that ‘the contested decision must be annulled in its entirety because it contains essential elements of the surveillance of the sea external borders of the Member States which go beyond the scope of the additional measures within the meaning of Article 12(5) of the SBC, and only the European Union legislature was entitled to adopt such a decision’ (para 84). See also, para 86.

<sup>1172</sup> More specifically, paragraph 2(1) of Part II of the Annex to the Decision provides that, unless otherwise specified in the operational plan, ‘priority should be given to disembarkation [of rescued people] in the third country from where the ship carrying [them] departed or through the territorial waters or search and rescue region of which that ship transited.’ See, also, para 29 of case C/355/10.

international protection, in particular as regards *non-refoulement*, while Article 5(4)(c) allows for derogation from normal entry criteria on account of humanitarian grounds or because of international obligations. Since the *ratione loci* of the Code exceeds the perimeter of EU Member States,<sup>1173</sup>

Both interdiction and search and rescue measures undertaken by EU Member States anywhere at sea with the purpose of border control, or in the course of a maritime surveillance operation, shall be considered as coming within the remit of the Schengen Border Code and subject to its provision on *non-refoulement*.<sup>1174</sup>

Thus, by rejecting a fragmentary approach to maritime obligations, States should prioritize a systemic interpretation of their duties at sea, thus harmonizing their border control measures with international human rights and refugee standards.<sup>1175</sup> Indeed, as some argue,

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<sup>1173</sup> SBC, paras 2.1.3 and 2.2.1, Annex VI. While at sea, controls can be performed ‘in the territory of a third country’ (SBC, para 3.1.1, Annex VI), checks can be carried out also ‘in [rail] stations in a third country where persons board the train’ (SBC, para 1.2.2, Annex VI). For an analysis of the extraterritorial scope of the SBC, refer to Section 2.6 of this thesis. See also, Maarten Den Heijer, ‘Europe beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control’ in B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff 2010) 176–80; Violeta Moreno-Lax, ‘(Extraterritorial) Entry Controls and (Extraterritorial) Non-refoulement’ in P De Bruycker, D Vanheule, MC Foblets, J Wouters and M Maes (eds) *The External Dimension(s) of EU Asylum and Immigration Policy* (Bruylant 2011) 444-7.

<sup>1174</sup> Moreno-Lax 2011a, 211.

<sup>1175</sup> *ibid* 220.

[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. In the case of both rescue at sea and border control measures *vis à vis* migrants who are not in distress at sea, the following procedures are required: transfer of the protection seekers and migrants to a safe place on EU territory; conduct of proceedings in order to examine the asylum application; legal review of the decision.<sup>1176</sup>

According to the EU Commission tasked to elaborate on the material scope of application of the SBC, Italy's push-backs to Libya amounted to border surveillance operations falling within the purview of the SBC by virtue of Article 12, whereby border surveillance measures are aimed to prevent unauthorized border crossings.<sup>1177</sup>

'Search and rescue' has often been adduced as the legal basis for both interception of shipwrecked flagless boats and the deflection of interdicted people to ports of embarkation.<sup>1178</sup> Nevertheless, portraying the 2009 push-backs as 'rescue activities' would not reflect Italy's obligation, as a State party to the SAR and SOLAS

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<sup>1176</sup> Andreas Fischer-Lescano, Tillmann Lohr and Timo Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21 *IJRL* 256, 291.

<sup>1177</sup> Letter from ex-Commissioner Barrot to the President of the LIBE Committee of 15 July 2009. See, *Hirsi v Italy*, para 34. See also, Bruno Nascimbene, 'Il Respingimento degli Immigrati e i Rapporti tra l'Italia e l'Unione Europea' (Istituto Affari Internazionali 2009) 1, 4.

<sup>1178</sup> See, e.g., the analysis conducted by Matteo Tondini, 'Fishers of Men? The Interception of Migrants in the Mediterranean Sea and their Forced Return to Libya' (Inex Paper 2010).

Conventions, to cooperate to assist shipmasters in delivering persons rescued at sea to a ‘place of safety.’

Moreover, even if it is agreed that Italian authorities intervened after receiving a distress call for the purpose of rescuing individuals in distress in the international waters within Maltese SAR competence, the ‘rescue’ operation can only be considered to be fully accomplished when survivors finally disembark on safe, dry land, and not when they are initially rescued. Therefore, having discarded the first explanation, we now shift our attention to the second justification.

#### ***7.4.2. An anti-smuggling operation? The role of the Palermo Protocol***

Under Article 110(1) of the UNCLOS,

Except where acts of interference derive from powers conferred by *treaty*, a warship, which encounters on the high seas a foreign ship is not justified in boarding it unless there is reasonable ground for suspecting that: (a) the ship is engaged in piracy; (b) the ship is engaged in the slave trade; (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under Article 109; (d) the ship is without nationality; or, (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

Therefore, the Italian government appeals, as a second justification, to the potential application of the Palermo Protocol on Smuggling of Migrants,<sup>1179</sup> which entrusts States to stop and search vessels without nationality (Article 8).<sup>1180</sup> In particular, paragraph 7 provides that:

A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law.

While the Protocol allows a State party to request the assistance of other States parties in suppressing the use of a vessel without nationality that is suspected of engaging in the smuggling of migrants by sea,<sup>1181</sup> it is also true that nothing in the text of the Protocol explicitly entitles Contracting States to divert or escort intercepted vessels back to the country of embarkation. The Protocol does not expressly prohibit coastal States to grant permission to receive

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<sup>1179</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) (Protocol against Smuggling).

<sup>1180</sup> App III, main text, Response Italian Government.

<sup>1181</sup> Article 8(1) of the Protocol against Smuggling.

intercepted migrants either. Nevertheless, a saving clause plainly requires States conducting enforcement operations at sea to respect humanitarian law, human rights, and refugee law, in conformity with the principles of *non-refoulement* and non-discrimination (Article 9). The obligation to comply with these fundamental international rules imposes upon the intercepting State both the responsibility to act in the full respect of the principles in question, and the duty to ascertain whether these norms are respected *de jure* and *de facto* in the third cooperating country in order to prevent the commission of an international wrongful act.

The mere fact that the Palermo Protocol does not impede the return of migrants to Libya is not sufficient to consider it as the legal foundation of the operations.<sup>1182</sup> Its text only envisages the repatriation of migrants to countries of origin or permanent residence (Article 18(1)), not to countries of transit such as Libya. Moreover, the Protocol provides that its implementation shall not affect the obligations entered into under any other applicable bilateral or multilateral treaty, or any other applicable operational arrangement regulating, in whole or in part, the return of unauthorized persons (Article 18(8)). As the Protocol on Smuggling of Migrants is an unsound legal basis for push-backs, the question remains open: on

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<sup>1182</sup> Tondini 2010, 9.

what basis were intercepted migrants, including refugees, diverted to Libya?

***7.4.3. Italy–Libya agreements: an example of ‘international cooperation principles’?***

Although interdiction and deflection activities by Italian authorities went beyond the literal meaning of the Italy–Libya agreements, and the actual scope of Italy’s maritime operations could not be foreseen, I believe the text of the bilateral Protocols is (perhaps purposely) somewhat vague. As a consequence, an ample margin of intervention is left to Italian authorities. Moreover, the push-back practice - involving a consistent sequence of acts and pronouncements - would have been impossible without the broader framework of interactions between Italy and Libya created by the 2007 and 2009 bilateral agreements for technical and police cooperation, and also by the 2008 Partnership Treaty.

In this respect, the systematic character of Italy’s return operations to Libya should not be overlooked. First, they were repeated frequently over a long interval of time, ending only when the case of twenty-four returnees from Eritrea and Somalia was brought before the ECtHR in November 2009.<sup>1183</sup> Second, Libya never protested

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<sup>1183</sup> The case in question is *Hirsi v Italy*.



against the readmission of third country nationals, or the intervention of Italian vessels in the patrolling of international waters that resulted in the deflection of intercepted migrants and refugees to the ports of departure. Third, whereas readmission of own nationals is now considered a customary obligation in international law, readmission of third country nationals is only possible on the basis of an agreement between two States.

As a final avenue, by invoking generic ‘international cooperation principles’, the Italian government has justified redirection of intercepted ships as a response to Libya’s request. Indeed, migrants and refugees in their attempt to reach Europe had infringed Libyan migration law by irregularly fleeing the country after eluding local border controls.<sup>1184</sup> Due to an absence of a precise legal framework and a standardized readmission procedure, the agreements for technical and police cooperation concluded between Italy and Libya in 2007 and 2009 seem to embody these ‘international cooperation principles.’ However, it is possible that a more direct expression of these principles is contained in other classified and informal accords, on the basis of which Libya assented to the readmission of undocumented migrants in *ad hoc* notes during the contingency of the 2009 maritime interceptions.<sup>1185</sup>

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<sup>1184</sup> Response Italian Government, para c.

<sup>1185</sup> As indicated in Section 7.4, the consent to readmission was issued by Libya in the night of 6 May after long negotiations. In order to interdict the suspect vessels

Article 2(1) of the 2007 Additional Protocol would explain Italy's participation in those activities of control of external maritime borders. It provides that the Joint Operations Command may request the intervention of Italian units, ordinarily deployed in the Italian island of Lampedusa, for conducting 'anti-immigration (*sic*) activities', *telos* of all agreements linked to readmission between Italy and Libya.<sup>1186</sup> Although nothing in the text specifies what exactly these 'anti-immigration activities' are, it is possible to infer that push-backs amount to a practice denoting the consensus of both parties to the Italian enforcement of police actions on behalf of Libya.

Push-backs would be, in other words, a procedure falling 'within specific agreements, aimed at "returning to requesting States those migrants, being intercepted in international waters, who had escaped the controls of the relevant authorities" of the countries from which shores they departed.'<sup>1187</sup> This interpretation would also be consistent with the Preamble to the 2007 Protocol, whereby Italy and Libya commit to intensifying their cooperation on irregular migration

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and then exert enforcement jurisdiction - especially in the context of counter-drug trafficking - States have generally obtained the consent of the flag State or, initially, the consent of the Master through the involvement of an administrative Agency of the boarding State. This Agency usually requests the permission by the respective agency of the flag State through informal means, such as telephone or facsimile. In *United States v Gonzalez*, a conversation by telephone was considered to be an 'arrangement' between governments. See Judge Kravitch, *United States v Gonzalez*, 776 F.2<sup>nd</sup> (11 Circuit, 1985) 936 as cited in Papastavridis 2010a, 875 fn 55.

<sup>1186</sup> In this regard, pursuant to Article 2(1), '... [I]l citato Comando ha la facoltà di richiedere l'intervento e/o l'ausilio delle unità navali italiane ordinariamente rischierate presso l'isola di Lampedusa per le attività antiimmigrazione.'

<sup>1187</sup> Response Italian Government.

control, taking due account of the difficulty Libya experienced in policing its more than 5,000 kilometres of desert and 2,200 kilometres of maritime borders. Likewise, the Preamble of the 2009 Executive Agreement, by recalling the previous accords, reaffirms the necessity to activate systems of maritime control to combat unauthorized immigration at technical and operational level.

In addition, the 2007 Protocols include provisions dealing with the common commitment for the restraint of irregular immigration to Europe through joint patrols in the Libyan territorial waters and in international waters under Libyan command and responsibility.<sup>1188</sup> Coping with unauthorized immigration also subsumes the possibility of both sighting and halting any crafts with clandestine passengers on board, as Article 2(1)(d) of the 2007 Additional Protocol sets forth. Article 2 of the 2009 Executive Agreement provides, instead, that ‘the two countries undertake to repatriate clandestine immigrants [from their territory] and to conclude agreements with the countries of origin in order to limit clandestine immigration.’<sup>1189</sup>

Since freedom of navigation reigns on the high seas, vessels are subject – save in exceptional cases – to the exclusive jurisdiction of their flag State (Article 92(1)). As indicated in the previous Section, naval interdiction on the high seas is grounded in international

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<sup>1188</sup> Article 2 of the Protocol and Article 1 of the Additional Protocol.

<sup>1189</sup> Translation supplied by the ECtHR in *Hirsi*, para 19. See also, Tondini 2010, 4.

agreements between two or more States aimed at exercising the right of visit to combat criminal activities not listed in Article 110 UNCLOS and performed by vessels without nationality or not sailing the flag of a State party to the agreement.<sup>1190</sup> In particular, Article 110 requires that, '[e]xcept where acts of interference derive from powers conferred by treaty', States may exercise a 'right of visit' with regard to ships of uncertain nationality and flagless ships to verify the vessel's right to fly its flag. If, after document inspection, suspicion remains, the interdicting vessel 'may proceed to a further examination on board the ship, which must be carried out with all possible consideration.'

It is fitting to observe how, not only treaties, but also *ad hoc* accords can constitute an international agreement granting a State the right to intercept and visit a flagless vessel on the high seas.<sup>1191</sup> This was upheld, for example, by the ECtHR (Grand Chamber) in the *Medvedyev v France* case concerning the interception of a Cambodian boat suspected of drug trafficking in international waters off Cape Verde after obtaining consent by the flag State through a diplomatic note,<sup>1192</sup> which 'officialised Cambodia's agreement to the interception

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<sup>1190</sup> See, Seline Trevisanut, 'The Principle of *Non-Refoulement* at Sea' (2008) 12 Max Planck UNYB 205, 240.

<sup>1191</sup> Efthymios (Akis) Papastavridis, 'European Court of Human Rights: *Medvedyev et al v France*' (2010) 59 ICLQ 874. For a different view, see, Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press 2012).

<sup>1192</sup> The Diplomatic Note reads as follows: 'The Ministry of Foreign Affairs and International Cooperation (. . .) has the honour formally to confirm that the Royal

of the Winner [...].'<sup>1193</sup> In addressing the distinction between treaties and other international accords, the ICJ has clearly sustained that 'where [...] the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it.'<sup>1194</sup> In this view, it can be argued that the diplomatic note of 7 June 2002 between France and Cambodia amounts to a binding agreement as it 'enumerates commitments [...] and thus create rights and obligations in international law.'<sup>1195</sup> Indeed, by authorizing the French authorities 'to intercept, inspect and take legal action against the ship Winner', the diplomatic note created a legal basis for the boarding operation, conferring a right to visit pursuant to Article 110 UNCLOS.<sup>1196</sup>

However, this right of visit on the high seas should not be conflated with the assertion of enforcement jurisdiction, which instead depends on the prior establishment of legislative jurisdiction and

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Government of Cambodia authorises the French authorities to intercept, inspect and take legal action against the ship Winner, flying the Cambodian flag [. . .] (emphasis added).'

<sup>1193</sup>*Medvedyev and Others v France* (2010) 51 EHRR 39, 97.

<sup>1194</sup>See, *Temple of Preah Vihear case, (Cambodia v Thailand)*, Preliminary Objections, Judgment of 26 May 1961, ICJ Rep (1962) 31. See also, *the Aegean Continental Shelf Case (Greece v Turkey)* ICJ Rep (1978) 38–44.

<sup>1195</sup>See, *Case Concerning Maritime Delimitation and Territorial Questions (Qatar v Bahrain)*, ICJ Rep 1994 120. See also, Klabbbers 1996, 215; Papastavridis 2010a, 874; Klabbbers 1996, 215.

<sup>1196</sup>Papastavridis 2010a, 874. Without going into the details of this case, it should however be added that detention of the applicants was prescribed only by international law but not by national law as there was no basis in the French Law for the establishment of jurisdiction over members of the crew. As a consequence, the Court found a violation of Article 5(1) of the Convention.

would enable the intercepting State to bring the vessel to the port of the boarding State, arrest, try the offenders, confiscate the vessels, etc.<sup>1197</sup> While 'legislative jurisdiction' concerns the power to prescribe rules, enforcement jurisdiction concerns 'the power to take executive action in pursuance of the making of decisions or rules.'<sup>1198</sup>

Redirection to a third country after interception either on the high seas or in the territorial waters of a coastal State is practically and legally possible only with the consent of the coastal State itself on the basis of either formal or informal accords.<sup>1199</sup> This is valid in particular when the readmitting State is different from the flag State of the intercepting vessel. In this case, diversions are executed on account of an accord between the State toward which the ship is redirected and the flag State of the interdicting vessel, which performs police actions on behalf of the former country.

On the high seas, enforcement jurisdiction can only be exercised with the consent of the flag State, which can be granted either by a pre-existing bilateral or multilateral treaty or by an *ad hoc* accord. In the context of control of irregular migration by sea, Italian authorities were potentially entitled, in keeping with Article 110(1), to exercise a right of visit of intercepted flagless boats, even outside any specific

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<sup>1197</sup> Efthymios Papastavridis, 'Enforcement Jurisdiction in the Mediterranean Sea: Illicit Activities and the Rule of Law on the High Seas' (2010) 25 IJMCL 569, 577.

<sup>1198</sup> Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 7th edn 2008) 297.

<sup>1199</sup> Trevisanut 2009, 614.

bilateral or multilateral agreement. However, the legal framework authorizing deflection of migrants and refugees is still not clarified, as uncertainty exists over whether a further power of seizure can be inferred from the right of visit. Neither general international law nor the UNCLOS explicitly confer other rights upon the intercepting State and any further assertion of jurisdiction.<sup>1200</sup> It should be noted that the right to visit an intercepted vessel ‘does not *ipso facto* entail the full extension of the jurisdictional power of the boarding States.’<sup>1201</sup> If the vessel is brought to a port for further investigation, the exercise of jurisdiction would be limited to inquiring as to the nationality of the vessel and intentions of the persons onboard.<sup>1202</sup> Therefore,

Such actions as seizing the ship and apprehending the persons on board; ordering the ship to modify its course towards a destination outside the territorial waters or the contiguous zone; escorting the vessel or steaming nearby until the ship is heading on such course; conducting the ship or the persons on board to a third country or handing them over to the authorities of a third State, do not readily follow from the terms of the [law of the sea] treaties. The fact that the *cayucos* and *pateras* used for the transport of migrants do not fly the flag of any State does not seem to allow for unlimited enforcement jurisdiction in their regard.<sup>1203</sup>

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<sup>1200</sup> Myron H Nordquist, *United Nations Convention on the Law of the Sea, A Commentary*, Vol III (Martinus Nijhoff 1985) 127.

<sup>1201</sup> Papastavridis 2010c, 583.

<sup>1202</sup> *ibid* 584.

<sup>1203</sup> Moreno-Lax 2011a, 188.

These considerations are also relevant to the interception of migrants in the contiguous zone, which extends 24 nautical miles from the baselines. In the contiguous zone, freedom of navigation applies and coastal States may exercise controls over vessels in transit only to avoid violations of their immigration, custom, fiscal, and sanitary laws (Article 33(1) UNCLOS).<sup>1204</sup> Since proportionality is always required,<sup>1205</sup> it cannot be taken for granted that powers of detention or forcible return to the country of departure are implicitly encompassed in this proviso. Therefore, even if it is accepted that interception of migrants and refugees in international waters was triggered by Article 110(1) with regard to vessels without nationality, the initial aim of a maritime operation might shift to something different—for example, in the context of the Italy–Libya push-backs, from a SAR operation to a measure of border control and *vice versa*.<sup>1206</sup>

As explained by the Italian Ambassador in Tripoli, Trupiano, the procedure of ‘accompaniment’ to Libya originates in the various accords between these two countries concluded from 13 December

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<sup>1204</sup> The territorial sea extends up to 12 nautical miles from the coastline. In territorial waters State sovereignty is limited only by the right of innocent passage.

<sup>1205</sup> See, the Award by the Permanent Arbitral Tribunal, *Guyana v Suriname*, 17 September 2007, para 445: ‘In international law force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary.’

<sup>1206</sup> The possible change in the purpose of a maritime operation was also endorsed by Seline Trevisanut, ‘*Non-refoulement at Sea*’ (Governing Migration by Sea: a Legal Perspective Workshop, Oxford, 17–18 November 2011).



2000 onwards.<sup>1207</sup> The 2007 Protocols for the first time established maritime joint patrols with six vessels temporarily rendered to Libya. Then, through the Bengasi Partnership Treaty in 2008, the two Contracting Parties renewed their common commitment in several fields of action, including the fight against unauthorized immigration.

This led to the adoption of the 2009 Executive Protocol, which defines the organization of the joint patrolling missions conducted by vessels operated by a mixed crew. The Executive Protocol, by supplying Libyans with six vessels on a permanent basis (replacing the Italian flag with a Libyan one), significantly shifts their control of unauthorized migration to Europe in a more pro-active direction. Although Italy had repeatedly solicited Libya's participation in joint patrols, Libya had always refrained from taking part in the operations. Indeed, until May 2009, Libya remained reluctant to the idea of letting a military boat flying the Italian flag across Libyan territorial waters to drive migrants back to the North African coast.<sup>1208</sup> The provision of vessels on a permanent basis and the operational definition of technical cooperation envisaged by the 2009 Executive Protocol changed the context of their collaboration, thus paving the way for the push-back practice.

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<sup>1207</sup> See, Trupiano, 5  
<[http://www.camera.it/470?stenog=/\\_dati/leg16/lavori/stenbic/30/2009/1013&pagina=s020](http://www.camera.it/470?stenog=/_dati/leg16/lavori/stenbic/30/2009/1013&pagina=s020)> accessed 20 August 2013.

<sup>1208</sup> *ibid.*

The reasons for a transit country, such as Libya, to accept the burden of thousands of returned migrants and refugees must be examined. It goes without saying that Italy and Libya, as Contracting Parties of the 2007 and 2009 bilateral agreements, did not have the same interest in the readmission of migrants, who were not Libya's nationals but foreign nationals passing through its territory on their way to Europe. Moreover, Libya did not have legal institutional capacity or adequate facilities to manage the massive presence of irregular migrants and refugees. Therefore, if it was willing to invest resources in patrolling its territorial and maritime borders, it was motivated by expected benefits. Technical cooperation and assistance in terms of training, consulting, exchange of intelligence information and supply of vessels and equipment are the most common incentives used by Italy to induce Libya to cooperate on prevention of unauthorized immigration under the 2007 and 2009 technical Protocols.

The 2008 Partnership Treaty marks the most significant step toward diplomatic normalization and the creation of a favourable climate between these two countries.<sup>1209</sup> By cooperating with Italy

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<sup>1209</sup> Italy committed itself to allocate huge resources to Libya, built a highway from Tunisia to Egypt, and invested in both the construction and education sectors through the provision of scholarships for Libyan citizens willing to study in Italy. Pursuant to Article 8(1), Italy agreed a \$5 billion compensation package to end disputes relating to Italian colonialism, in return for Libya intensifying its efforts to curb illegal immigration by sea (Article 19). Not only did Italy express its regret for the suffering that Italian colonization caused to the Libyan people, but it had also to undertake 'special initiatives', such as the grant of scholarships, rehabilitation of victims of mine explosions, and the handing over to Libyan authorities of

and the EU in the fight against irregular migration, international terrorism, and the smuggling of human beings, not only did Libya obtain political and economic benefits, such as the lifting of the European embargo and the construction of a gas pipeline to Italy, but it also improved its international standing.<sup>1210</sup> It has therefore been argued that ‘it is this whole bilateral cooperative framework which secures a minimum operability in the cooperation on readmission more than the “reciprocal” obligations contained in a standard readmission agreement.’<sup>1211</sup> Since the accords for technical and police cooperation do not constitute standard readmission agreements and are quite vague in defining the scope of migration control activities, the parties rely on having a wider margin of manoeuvre to respond to short-term security concerns and new situations fraught with uncertainties.<sup>1212</sup>

As asserted by the Italian government, in its observations in the *Hirsi* case,<sup>1213</sup> and iterated by the former Italian Minister of the

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archaeological artefacts brought to Italy during its colonial rule. For an overview of the Partnership Treaty, see, Natalino Ronzitti, ‘The Treaty on Friendship, Partnership, and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean’ (Institute of International Affairs 2009) <<http://www.iai.it/pdf/DocIAI/iai0909.pdf>> accessed 20 August 2013.

<sup>1210</sup> See, Jean-Pierre Cassarino, ‘Informalizing Readmission Agreements in the EU Neighborhood’ (2007) 42 *The International Spectator* 183; Emanuela Paoletti, ‘Relations among Unequals? Readmission between Italy and Libya’ in Cassarino 2010a, 70.

<sup>1211</sup> Jean-Pierre Cassarino, ‘Dealing with Unbalanced Reciprocities: Cooperation on Readmission and Implications’, in Cassarino 2010a, 8.

<sup>1212</sup> *ibid.*

<sup>1213</sup> See, Italian Government Submissions in *Hirsi v Italy*, para 65.

Interior, Maroni, on several official occasions, the Protocols signed in 2007 and 2009 with Libya, as well as the 2008 Partnership Treaty, may constitute both the legal foundation for push-back missions, and crucial tools in the fight against clandestine immigration.<sup>1214</sup> Accordingly, the Italian vessels deployed in international waters, together with the vessels donated to Libya, are part of a wider surveillance and ‘border control system aimed to strike migratory flows at the root.’<sup>1215</sup>

Although in the complex contingencies of patrol operations, States implement readmission through unpublished and informal exchanges of notes, they generally prefer to secure operability of bilateral cooperation on highly sensitive issues, such as readmission (quite unpopular in countries of origin or transit of migrants) through flexible but still written documents.<sup>1216</sup> These accords ensure, at least, more credibility and predictability in terms of compliance with the commitments of, and responsiveness to, the expectations of the parties

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<sup>1214</sup>Roberto Maroni, Minister of the Interior, ‘Resoconto. Sommario and Stenografico’ 5 (Oral information at Senato della Repubblica, XVI Legislatura, 25 May 2009) <<http://www.senato.it/service/PDF/PDFServer/BGT/00424000.pdf>> accessed 20 August 2013. See also, AdnKronos, ‘Immigrati, Maroni: “L’accordo con la Libia funziona. Avanti con i respingimenti.” Bruxelles: chiarimenti da Italia e Malta’ (31 August 2009) <<http://www.adnkronos.com/IGN/News/Politica/?id=3.0.3718416369>> accessed 3 January 2012.

<sup>1215</sup>See, Massimo Nesticò, ‘Immigrazione: Consegnate a Libia tre Motovedette GDF – D’Arrigo, Equipaggi Libici Addestrati da GDF’ (Associazione Finanziari Cittadini e Solidarietà, 17 May 2009) <[http://www.ficiesse.it/home-page/3065/immigrazione\\_-consegnate-a-libia-tre-motovedette-gdf---d\\_arrigo\\_-equipaggilibici-addestrati-da-gdf](http://www.ficiesse.it/home-page/3065/immigrazione_-consegnate-a-libia-tre-motovedette-gdf---d_arrigo_-equipaggilibici-addestrati-da-gdf)> accessed 20 August 2013.

<sup>1216</sup>Cassarino 2010a, 8.

on a more regular basis. As Nolte pointedly observed, ‘treaties are not just dry parchments. They are instruments providing stability to their parties and to fulfil the purposes which they embody.’<sup>1217</sup>

The foregoing analysis demonstrates that Libya’s cooperation on patrolling sea and land borders, and readmission of undocumented third country nationals intercepted by Italian authorities, builds on a solid platform of costs–benefits analysis. Although the only possible conclusion is that push-backs do not have a clear legal basis, it can be argued that the wide ranging series of accords concluded between Italy and Libya, including the 2007 and 2009 agreements for technical and police cooperation and the 2008 Partnership Treaty, as well as those unpublished notes exchanged between national authorities in the contingency of patrol operations, constitute the multifaceted legal and political scaffold supporting the practice of interdiction and deflection of undocumented migrants and refugees to the port of embarkation. Considering the high costs of readmission for Libya – in social, political, and economic terms – it is plausible that, beyond unilateral acquiescence, *ad hoc* consent is necessary for each and every maritime operation resulting in the actual disembarkation and readmission of third country nationals.

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<sup>1217</sup> ILC, *Report on the Work of its Sixtieth Session, Treaties over time in particular: Subsequent Agreements and Practice*, A/63/10, Annex A (2008) 365 <<http://untreaty.un.org/ilc/reports/2008/2008report.htm>> accessed 20 August 2013.

The salience of the Italy–Libya agreements can be condensed in two principal points. First, the technical Protocols encapsulate those ‘international cooperation principles’ that aim to curtail irregular migration to Europe. Whether forced return to the country of departure is deemed either as a police action of Italy on behalf of Libya, or as an autonomous Libyan initiative taken with Italy’s support and assistance, does not alter the ultimate goal of the bilateral arrangements. Second, the 2007 and 2009 agreements for technical and police cooperation, as well as the 2008 Partnership Treaty, encompass the arsenal of incentives utilized by Italy to persuade Libya to more proactively cooperate in both curbing irregular migration, and in accepting the readmission of third country nationals intercepted in their desperate flight to Europe. As such, I argue the aggregation of all these accords constitutes the legal and political framework within which Italy-Libya cooperation on migration control (including the push-back policy) was put into action. The research question on the relationship between agreements for technical and police cooperation and the decision to return migrants and refugees to transit countries is thus addressed.

### **7.5. Not an isolated case: outlining further agreements for technical and police cooperation**

Deflections to Libya - country of embarkation but not of origin of undocumented migrants heading to Europe - find a first precedent in the Italian interdictions at sea in response to the massive influx of migrants from Albania in 1997. Also in that case, operations were authorized by a set of agreements concluded between the two countries. While on 25 March 1997, an agreement was signed in the form of an Exchange of Letters, on 2 April 1997, the two States signed a Protocol encompassing all the technical enforcement measures Italy could adopt to hold back the masses of irregular migrants arriving by sea.<sup>1218</sup> Finally, in November 1997, a readmission agreement was signed that entered into force on 1 August 1998.

The cases briefly reviewed in this Section demonstrate that the analysis of the Italy–Libya case is pertinent for other situations in which countries within or outside the EU entrust or used to entrust third countries of provenance of migrants and refugees with the patrolling of both their territorial waters and international waters in order to prevent unauthorized immigration to Europe. In the late 1990s, new influxes of migrants from North Africa ‘threatening’ to

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<sup>1218</sup> The agreement was adopted through a simplified procedure whereby States exchanged the instruments constituting the treaties.

transgress the EU border ceased as a consequence of the enhanced bilateral cooperation in the field of readmission and police cooperation with Southern Mediterranean countries,<sup>1219</sup> such as Tunisia,<sup>1220</sup> Morocco,<sup>1221</sup> Algeria,<sup>1222</sup> and more recently Egypt and Libya.<sup>1223</sup>

Faced with the same challenge, Spain, in its endeavour to contrast irregular migration by sea set up joint patrols authorized by a host of bilateral agreements with several African countries, including Morocco in 2003, Senegal and Mauritania in 2006, Cape Verde in 2007, Gambia, Guinea Bissau, and Guinea Conakry in 2008.<sup>1224</sup> These documents would constitute the legal basis for joint sea patrols between the Spanish Guardia Civil and African security forces aimed to decrease the number of arrivals of migrants and refugees from

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<sup>1219</sup> The agreements for technical and police cooperation with these countries provided for the transfer of equipment and training courses to assist them in the control of irregular immigration. Police officers were also sent to diplomatic and consular representations to bring their contribution in the field of migration. See, Alessia Di Pascale, 'Migration Control at Sea: The Italian Case' in Ryan and Mitsilegas 2010, 296.

<sup>1220</sup> On 6 August 1998, an agreement was signed in the form of an Exchange of Letters concerning the entry and readmission of people in an irregular position. Another agreement on police cooperation was concluded on 13 December 2003.

<sup>1221</sup> Readmission agreement signed on 27 July 1998.

<sup>1222</sup> Agreement on the movement of persons signed on 24 February 2000.

<sup>1223</sup> The details of the Agreements between Italy and Libya have already been provided. With regard to Egypt, instead, while an Agreement on police cooperation was concluded on 18 June 2000, a Readmission Agreement was signed on 9 January 2007.

<sup>1224</sup> For an analysis of all these agreements, see, Paula Garcia-Andrade, 'Extraterritorial Strategies to Tackle Irregular Immigration by Sea: a Spanish Perspective' in Ryan and Mitsilegas 2010, 311 ff.



African countries of origin or transit.<sup>1225</sup> For instance, pursuant to the MoUs signed by Spain with Mauritania and Senegal, immigration officers, nationals of these African countries, were brought onboard to carry out interdiction activities in their territorial waters.<sup>1226</sup>

Because of the lack of public access to the text of these arrangements, it is not possible to inquire as to their exact content, the degree of involvement of Spanish authorities in the enforcement of maritime operations, and the legal safeguards applied by Spain to the passengers of detected vessels.<sup>1227</sup> All in all, however, the rationale of the accords negotiated by Italy and Spain with African countries points to conditioning the transfer of technical equipment, vessels, funding, and the organization of training courses to a more decisive involvement of countries of origin or transit in the prevention of irregular migration flows to Europe.

Without any claim of exhaustiveness, it is also worth observing that both the US and Australia have been particularly involved in interdiction and extraterritorial processing policies. The US has mainly targeted irregular boat arrivals from Haiti and Cuba. As provided by a bilateral agreement signed by the US and Haiti in

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<sup>1225</sup> See, for instance, the reply of Frontex to the NGO ILPA (Immigration Law Practitioners' Association).

<sup>1226</sup> Jorrit Rijpma, 'Building Borders: the Regulatory framework for the Management of the External Border of the European Union' (PhD Thesis European University Institute, Florence, 2009) 341-342, as quoted in Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalization of Migration Control* (Cambridge University Press 2011) 133.

<sup>1227</sup> Garcia-Andrade 2010, 321.

September 1981, after intercepting and searching vessels suspected of transporting irregular migrants from Haiti, people transferred aboard US Coast Guard cutters were subjected to a summary screening.<sup>1228</sup> Although from 1981 to 1990 almost 23,000 Haitians were intercepted and repatriated, only six persons were provided with a full asylum hearing and taken to the US to pursue their claims.<sup>1229</sup> Since September 1991 and the fall of the democratically-elected President Aristide, a second massive wave of Haitians began to make their way to the US by boat. However, those who had an arguable protection claim were no longer transferred to the US, but instead held on intercepting ships and transferred then to Guantanamo Bay where a US facility was created as a holding and processing centre for asylum seekers.<sup>1230</sup>

In 1994, following a remarkable hike of the number of people fleeing Cuba by boat, the US entered into an agreement with this country. While the Cuban government committed itself to prevent the departure by boat of undocumented migrants, the US would admit

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<sup>1228</sup> Migrants Interdiction Agreement (23 September 1981) US-Haiti, 33 UST 3559, 3560.

<sup>1229</sup> See, Bill Frelick, 'US Refugee Policy in the Caribbean: No Bridge Over Troubled Waters' (1996) 20(2) *Fletcher Forum of World Affairs* 67; Stephen H. Legomsky, 'The USA and the Caribbean Interdiction Program' (2006) 18(3-4) *IJRL* 677, 679.

<sup>1230</sup> For an overview of the practice of interdiction on the high seas and extraterritorial processing at Guantanamo Bay, see, Daniel Ghezelbash, 'Shifting Sands and Refugee Boats: the Transfer of Migration Control Policies between the United States and Australia', in Gauci, Giuffr  and Tsourdi 2014. See also, Azadeh Dastyari and Effeney Libbey, 'Immigration Detention in Guantanamo Bay' (2012) 6(2) *Shima: The International Journal of Research into Island Cultures* 49.

20,000 Cubans per year through orderly procedures.<sup>1231</sup> With the exception of those Cubans transferred to Guantanamo Bay for extraterritorial processing after showing credible and genuine protection claims to onboard adjudicators, all other arrivals were returned to Cuba.<sup>1232</sup>

As far as Australia is concerned, in September 2001, in the aftermath of the *Tampa* incident,<sup>1233</sup> the Australian government launched the ‘Pacific Solution.’ One of the initiatives - realized by means of an MoU between Australia (would-be destination country) and Indonesia (transit country) - consisted of intercepting, on the high seas, asylum seekers making their way to Australia aboard unauthorized vessels.<sup>1234</sup> If the attempts to tow or escort these boats back to Indonesia failed, asylum seekers were transferred to Manus

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<sup>1231</sup> Bill Frelick, ‘US Refugee Policy in the Caribbean: No Bridge over Troubled Waters’ (1996) 20(2) *Fletcher Forum of World Affairs* 67, 71.

<sup>1232</sup> *ibid* 72. ‘Both the practices of interdiction and extraterritorial processing on Guantanamo Bay continue to this day. In 2012, there were a total of 2,955 interdictions, with 1,275 Cubans, 977 Haitians, 456 Dominicans, 23 Chinese, 79 Mexicans, 7 Ecuadorians and 5 migrants with other nationalities. As of February 2012, there were a total of only 33 migrants (all Cubans) being held at Guantanamo.’ See, Ghezelbash 2014.

<sup>1233</sup> For an analysis of the incident, see, Chantal Marie Jeanne Bostock, ‘The International Legal Obligations owed to the Asylum Seekers on the MV Tampa’ (2002) 14(2-3) *IJRL* 279; Mary Crock and Daniel Ghezelbash, ‘Do Loose Lips Bring Ships?: The Role of Policy, Politics and Human Rights in Managing Unauthorized Boat Arrivals’ (2010) 19 *Griffith Law Review* 238.

<sup>1234</sup> On the recent Australian plan to ‘tow back boats to Indonesia, see, Maria O’ Sullivan, ‘Push backs’ of Boats to Indonesia’, *Castan Center for Human Rights Law*, 18 July 2013 <<http://castancentre.com/2013/07/18/push-backs-of-boats-to-indonesia/>> accessed 20 August 2013. On migration to Australia and refugee rights, see also, Penelope Mathew, ‘Anywhere but Here: Australia and “boat people”’ (2011) 1 *Migration Australia* 20; Penelope Mathew, ‘Limiting Good Faith: “Bootstrapping” Asylum Seekers and Exclusion from Refugee Protection’ (2010) 29 *Australian Yearbook of International Law* 135.

Island or Nauru for extraterritorial processing of their protection claims.<sup>1235</sup>

In May 2011, a bilateral agreement was negotiated with Malaysia with the aim to deter asylum seekers from travelling by boat to Australia.<sup>1236</sup> Under the terms of the arrangement, 800 asylum seekers, arrived in Australia by boat, would be removed to Malaysia where they would ‘go to the back of the [asylum] queue.’<sup>1237</sup> In return, Australia would commit to accept the resettlement of 4000 UNHCR-recognized refugees from Malaysia over four years. Quite soon, however, the Australian High Court struck down the agreement on the ground that Malaysia did not provide sufficient safeguards regarding transferred asylum seekers.<sup>1238</sup>

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<sup>1235</sup>Under the Pacific Solution, some territories were ‘excised’ from Australia’s migration zone. A further initiative involved the removal of asylum seekers, who entered at a certain excised zone, to a designated country, such as Nauru and Papua New Guinea, where offshore detention facilities had been set up. Asylum seekers processed in Nauru and Papua New Guinea were not granted access to the same refugee status determination procedures applied on the Australian mainland. See, *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth), amending s 5(1) of *Migration Act 1958* (Cth). See, Mary Crock, ‘In the Wake of Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows’ (2003) 12(1) *Pacific Rim Law & Policy Journal* 49.

<sup>1236</sup> Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement (25 July 2011) (Australia–Malaysia Arrangement).

<sup>1237</sup> See, Q&A, ‘Gillard Reaches Asylum Agreement with Malaysia’ (7 May 2011) <<http://www.abc.net.au/news/stories/2011/05/07/3210503.htm?site=qanda>> accessed 20 August 2013.

<sup>1238</sup>*Plaintiff M70/2011 v Minister for Immigration and Citizenship and Another; Plaintiff M106 (by his litigation guardian, Plaintiff M70/2011) v Minister for Immigration and Citizenship and Another* (2011) 280 ALR 18; For an analysis of the case, McAdam and Wood, ‘Australian Asylum Policy All at Sea: an Analysis of *Plaintiff M70/2011 v Minister for Immigration and Citizenship* and the Australia–Malaysia Arrangement’ (2012) 61 ICLQ 274; Sasha Lowes, ‘The Legality of Extraterritorial Processing of Asylum Claims: The Judgment of the High Court of

### **7.5.1. Encountering Frontex**

The Lisbon Treaty reckons the development of a ‘common immigration policy’ and the gradual introduction of an ‘Integrated Border Management’<sup>1239</sup> as major political objectives.<sup>1240</sup> According to the Council, Integrated Border Management encompasses, *inter alia*, border control, detection and investigation of cross-border crimes, migration control measures in third countries, cooperation with neighbouring countries, inter-agency cooperation for border management and coordination of the activities of Member States and the EU in the abovementioned areas.<sup>1241</sup>

Operational cooperation between the Member States, including cooperation under the aegis of Frontex (the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union) is one of the main components of this strategy.<sup>1242</sup> Although this Chapter is not about

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Australia in the 'Malaysian Solution' Case' (2012) 12 HRLR 168; Michelle Foster, 'The Implications of the Failed 'Malaysian Solution': The Australian High Court and Refugee Responsibility Sharing at International Law' (2012) 13 MJIL 395.

<sup>1239</sup> The Integrated Border Management concept was first established by the European Commission on the basis of the Laeken Conclusions of December 2001. See, 'Towards integrated management of the external borders of the EU member states', COM(2002) 233 final, 7 May 2002. See also, Presidency Conclusions, Laeken 14-15 December 2001, Council doc. SN 300/1/01 REV 1, para 42.

<sup>1240</sup> See, Articles 77(1)(c) and 79(1) of the TFEU.

<sup>1241</sup> EU Finnish Presidency, Council Conclusions of 4-5 December 2006, Press Release 15801/06, 27.

<sup>1242</sup> Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, [2004] OJ L 349/1 (Frontex Regulation), as amended by Regulation (EU) no 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation

Frontex,<sup>1243</sup> an overview of its main tasks will, however, assist the reader in having a more limpid picture of the different strategies pursued by the EU and its Member States to ‘defend’ their external borders from unauthorized arrivals.

Established in 2004, Frontex is mandated to assist EU countries in applying the concept of integrated management of the external borders and to streamline cooperation between national border authorities.<sup>1244</sup> The Agency has been entrusted with different areas of activity catalogued in Article 2 of Regulation (EU) No 1168/2011. It plans, coordinates, implements, and evaluates joint operations

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(EC) no 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. See also, Regulation (EC) no 863/2007 of the European Parliament and of the Council of 11 July 2007, establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) no 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, [2007] OJ L 199/30 (RABIT Regulation).

<sup>1243</sup> Burgeoning literature has already been produced on Frontex. See, e.g.; Violeta Moreno-Lax, ‘The EU Regime on Interdiction, Search and Rescue, and Disembarkation: the Frontex Guidelines for Intervention at Sea’ (2010) 25(4) *International Journal of Marine and Coastal Law*; Efthymios Papastavridis, ‘Fortress Europe’ and FRONTEX: Within or Without International Law? (2010) 79(1) *NJIL*; Anneliese Baldaccini, ‘Extraterritorial Border Controls in the EU: the Role of Frontex in Operations at Sea’ in Ryan and Mitsilegas 2010, 229 ff; Arias Fernández, Gil, ‘Frontex and Illegal Immigration in the European Union’ in José Manuel Sobrino Heredia (ed) *Sûreté Maritime et Violence en Mer = Maritime Security and Violence at Sea* (Bruylant 2011); Moreno-Lax 2011a; Seline Trevisanut, *Immigrazione Irregolare via Mare: Diritto Internazionale e Diritto dell’Unione Europea* (Jovene 2012); Anna Liguori and Novella Ricciutti, ‘Frontex ed il rispetto dei diritti umani nelle operazioni congiunte alle frontiere esterne dell’Unione Europea’ 2012 6(3) *DUDI* 539; Sarah Léonard, ‘EU Border Security and Migration into the European Union: FRONTEX and Securitisation through Practices’, in Christian Kaunert and Sarah Léonard (eds), *Developing European Internal Security Policy: after the Stockholm Summit and the Lisbon Treaty* (Routledge 2012); Jorrit Rijpma, ‘Hybrid Agencification in the Area of Freedom, Security and Justice and its Inherent Tensions: the Case of Frontex’, in M Busuioc, M Groenleer and J Trondal (eds), *The Agency Phenomenon in the European Union: Emergence, Institutionalisation and Everyday Decision-making* (Manchester University Press 2012).

<sup>1244</sup> Recital 31 of the Regulation (EU) no 1168/2011.

conducted using Member States' staff and equipment at the external maritime, land, and air borders; trains border guards across the Union; conducts risk analysis on the ongoing situation at the external border; conducts research on technological advancement, which is relevant for the control and surveillance of Europe's external borders; 'assists Member States in circumstances requiring increased technical and operational assistance at the external borders, taking into account that some situations may involve humanitarian emergencies and rescue at sea';<sup>1245</sup> created European Border Guard Teams (EBGT), which are meant to intervene in crisis situations at the external border, including joint operations, pilot projects or rapid interventions in accordance with Regulation (EC) No 863/2007; assists Member States in forcibly returning, through joint operations, foreign nationals staying irregularly on the territory of the EU; develops and operates information systems on the risks and current state of affairs at the external borders; cooperates with non-EU/Schengen countries that are identified as countries of origin or transit of irregular migrants to Europe.

The 2011 amendment emphasizes that the Agency:

Shall fulfil its tasks in full compliance with the relevant Union law, including the Charter of Fundamental Rights of the European Union [...]; the relevant

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<sup>1245</sup> *ibid* Article 2(da).

international law, including the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951; obligations related to access to international protection, in particular the principle of *non-refoulement*; and fundamental rights[...].<sup>1246</sup>

More specifically, Article 2(1a) provides that:

In accordance with Union and international law, no person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of *non-refoulement*, or from which there is a risk of expulsion or return to another country in contravention of that principle. The special needs of children, victims of trafficking, persons in need of medical assistance, persons in need of international protection and other vulnerable persons shall be addressed in accordance with Union and international law.

With regard to the relationship between Frontex and Member States, the latter should report to the Agency on any operational matters falling outside the framework of the Agency.<sup>1247</sup> Frontex can also rely on guest officers who are defined as national experts from Member States to be seconded to the Agency.<sup>1248</sup> Pursuant to the amended Article 10(2), their executive authority is subject to international and EU law and shall comply with fundamental rights and the national law of the Member State hosting the operation.

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<sup>1246</sup> *ibid* Article 1(2).

<sup>1247</sup> *ibid* Article 2(2).

<sup>1248</sup> *ibid* Article 15(a)(5).



The *Hera* and *Nautilus* maritime operations constitute some of the joint missions performed at the external borders of the EU Member States. Without going into the details of these missions, it is worth observing that *Hera* was first launched, on 17 July 2006, at the request of Spain engaged with the management of irregular flows from the Canary Islands. The main purpose of this cooperative operation, which resulted in the involvement of different countries at various times, was both to deter irregular migration by sea and to identify traffickers and smugglers.<sup>1249</sup> Screening of irregular migrants was carried out through the secondment of experts from participating States.<sup>1250</sup> Additionally, Frontex authorities attempted to prevent the departure of boats loaded with migrants heading to Europe by intercepting them directly in the territorial waters of the countries of embarkation and returning them to ports of departure, namely Senegal, Mauritania, and Cape Verde.<sup>1251</sup>

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<sup>1249</sup> For more information on *Hera* 2006 and 2007, see, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions. Report on the evaluation and future development of the FRONTEX Agency (SEC(2008) 150 final, 13 February 2008) <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0067:FIN:EN:PDF>> accessed 20 August 2013. To read more on *Hera* 2008 and 2009, see, respectively, Frontex General Report 2008, 40; and Frontex General Report 2009. They are both available at: <[http://frontex.europa.eu/assets/About\\_Frontex/Governance\\_documents/Annual\\_report/2008/frontex\\_general\\_report\\_2008.pdf](http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Annual_report/2008/frontex_general_report_2008.pdf)> and <<http://www.europarl.europa.eu/document/activities/cont/201008/20100805ATT79751/20100805ATT79751EN.pdf>> accessed 20 August 2012.

<sup>1250</sup> Frontex Press Release, ‘Longest FRONTEX coordinated operation – HERA, the Canary Islands’, 19 December 2006.

<sup>1251</sup> BBC News, ‘Stemming the immigration wave’, 10 September 2006 <<http://news.bbc.co.uk/2/hi/europe/5331896.stm>> accessed 20 August 2013.

Although a number of Framework Agreements and MoUs exist between Spain and the African countries concerned,<sup>1252</sup> the legal basis of Frontex interception and return missions is not clear. In this regard, Frontex has stated that:

Persons that were intercepted during Joint Operation HERA 2008 at sea [...] have either been convinced to turn back to safety or have been escorted back to the closest shore (Senegal or Mauritania). Spain concluded agreements with Mauritania and Senegal which allow diverting of would-be immigrants' boats back to their points of departure from a certain distance of the African coastline [...]. A Mauritanian or Senegalese law enforcement officer is always present on board of deployed Member States' assets and is always responsible for the diversion.<sup>1253</sup>

No data was collected with regard to possible asylum applications made by intercepted migrants.<sup>1254</sup>

With regard to the Nautilus operation, its main goal is 'to strengthen the control of the Central Mediterranean maritime border [...] and also to support Maltese authorities in interviews with the immigrants' who mostly came from Eritrea, Somalia, Ethiopia, and Nigeria.<sup>1255</sup> First established in June 2007, Nautilus has become

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<sup>1252</sup> See, Section 7.5.

<sup>1253</sup> Frontex Press Release, 'HERA 2008 and NAUTILUS 2008 Statistics', 17 February 2009.

<sup>1254</sup> Moreno-Lax 2011a, 382.

<sup>1255</sup> Frontex Press Release, 'Joint Operation Nautilus 2007 – the end of the first

permanent and continues to be deployed with the participation of different Member States.<sup>1256</sup> Nautilus 2008 followed the reach of an agreement between participating Member States whereby migrants rescued in the Libyan Search and Rescue Area would be returned to Libya, or to the closest safe port if readmission to Libya was not possible.<sup>1257</sup> Lacking Libya's consent, intercepted migrants were all disembarked on Italian and Maltese soil.<sup>1258</sup>

What is uncertain is the degree of interrelatedness between Nautilus 2009 and the Italian push-back campaign. What is certain, however, is that these two strategies coincided in time.<sup>1259</sup> According to Human Rights Watch, on 18 June 2009,

[a] German Puma helicopter operating as part of the Operation Nautilus IV coordinated [the] Italian Coast Guard interception of a boat carrying about 75 migrants 29 miles south of Lampedusa. The Italian Coast Guard reportedly handed the migrants over to a Libyan patrol boat, which took them to Tripoli.<sup>1260</sup>

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phase', 6 August 2007.

<sup>1256</sup> To read more on Nautilus 2006 and Nautilus 2007, refer to the European Commission, SEC (2008) 150 final; for Nautilus 2008 and Nautilus 2009, see, Frontex General Report 2008 and Frontex General Report 2009.

<sup>1257</sup> Frontex Press Release, 'Go ahead for Nautilus 2008', 7 May 2008.

<sup>1258</sup> Frontex Press Release, 'HERA 2008 and Nautilus 2008 Statistics', 17 February 2009.

<sup>1259</sup> Nautilus ran, indeed, from April to October 2009, while Italy's push-backs were carried out from May to November 2009.

<sup>1260</sup> HRW 2009a, 37.

Frontex has promptly reacted by categorically excluding any kind of involvement in activities aimed at redirecting migrants and refugees crossing the Mediterranean by unseaworthy boats to Libya. Operation Nautilus 2009 was, indeed, underway on that very same day, but in a different operational area.<sup>1261</sup> All in all, despite the secrecy of the operational plan of Nautilus 2009, according to many, the complementarity between Frontex operations and the Italian-Libyan patrols aimed at halting the arrival of unauthorized migrants through the Mediterranean seems, yet, quite evident.<sup>1262</sup>

In the aftermath of the Arab Spring, the EU has started both to earmark considerable sums of humanitarian aid to North African countries and to support transfer of foreign nationals from Libya to their countries of origin.<sup>1263</sup> Border control and surveillance policies were also reinforced through the mobilization of Frontex. For example, on 20 February 2011, after a request from Italy, the EU Agency deployed the Joint Operation EPN Hermes aimed at ‘assisting

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<sup>1261</sup> Frontex Press Release, ‘Frontex not involved in diversion activities to Libya’, 21 September 2009.

<sup>1262</sup> Moreno-Lax 2011a. According to some, the Agency seems to recognize its involvement in the push-back campaign. See e.g., Judith Crosbie, ‘Frontex “may be helping” Italian migration policy’, *European Voice*, 24 September 2009 <<http://www.europeanvoice.com/article/imported/frontex-may-be-helping-italian-migration-policy/65936.aspx>> accessed 3 January 2012.

<sup>1263</sup> See Commission Press Release, ‘The European Commission’s humanitarian response to the crisis in Libya’ MEMO/11/143, Brussels, 4 March 2011; Commission factsheet, ‘Humanitarian aid and civil protection: Libya crisis’, 25 October 2011 <[http://ec.europa.eu/echo/news/2011/20110823\\_02\\_en.htm](http://ec.europa.eu/echo/news/2011/20110823_02_en.htm)> accessed 20 August 2013.

Italy in controlling vessels carrying immigrants and refugees<sup>1264</sup> and at ‘detecting and preventing illegitimate border crossings to the Pelagic Islands, Sicily, and the Italian mainland.’<sup>1265</sup> Frontex officials also carried out the pre-screening of intercepted migrants, interviewed migrants on travel routes, and gathered information on arrival numbers for the purpose of developing risk analyses. The Hermes operation was led by Italy, which provided naval and aerial equipment. It was also supported by France, Germany, Malta, the Netherlands, Spain, and by experts coming from 11 Member States.

Started in February 2011, the Hermes mission was then extended on several occasions,<sup>1266</sup> and run until the end of August 2012.<sup>1267</sup> In the effort to primarily thwart unauthorized entries by strengthening Europe’s border control response capability in the Central Mediterranean, Frontex, and the EU more broadly, have been criticized for not doing enough to prevent deaths at sea.<sup>1268</sup> For instance, the uncoordinated responses to migration from North Africa

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<sup>1264</sup> EU Commissioner Malmström, Statement announcing the launch of the Frontex operation ‘HERMES’ in Italy as of 20 February 2011, MEMO/11/98, Brussels, 20 February 2011.

<sup>1265</sup> Frontex Press Release, ‘HERMES 2011 running’, 21 February 2011, 2.

<sup>1266</sup> Frontex, ‘Hermes Operation Extended’ <<http://www.frontex.europa.eu/news/hermes-operation-extended-OWmwti>> accessed 20 August 2013.

<sup>1267</sup> For an analysis of the Hermes operation, see, Sergio Carrera, Leonhard den Hertog and Joanna Parkin, ‘EU Migration Policy in the wake of the Arab Spring. What prospects for EU-Southern Mediterranean Relations?’ *MEDPRO Technical Report No. 15*, August 2012, 4-5.

<sup>1268</sup> Human Rights Watch, ‘EU: Put Rights at Heart of Migration Policy’, 20 June 2011 <<http://www.hrw.org/news/2011/06/20/eu-put-rights-heart-migration-policy>> accessed 20 August 2013.

and the lack of clear rules in terms of search and rescue responsibilities led to the death of 63 sub-Saharan Africans who did not receive adequate assistance by military vessels engaged in the patrols at sea.<sup>1269</sup>

As a response to the annulment by the ECJ of the 2010/252/EU Council Decision, in April 2013, the European Commission presented a proposal for a Regulation establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex.<sup>1270</sup> However, the Meijers Committee, in May 2013, issued a report pointing to the flaws of the new proposal, in particular with regard to: i) the lack of guarantees pertaining to the presence, in the country of disembarkation, of legal advisors and interpreters, as well as the availability of a remedy before an

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<sup>1269</sup> See, Parliamentary Assembly of the Council of Europe Report ‘Lives lost in the Mediterranean Sea: Who is responsible?’, Committee on Migration, Refugees and Displaced Persons, Rapporteur Ms Tineke Strik. See also, Jack Shenker, ‘Aircraft carrier left us to die, say migrants’, *The Guardian*, 8 May 2011 <<http://www.guardian.co.uk/world/2011/may/08/nato-ship-libyan-migrants>> accessed 20 August 2013>.

<sup>1270</sup> Proposal for a Regulation of the European Parliament and of the Council ‘establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex’ (COM(2013) 197 final), 12 April 2013. This Proposal meets some of the criticisms raised by the Council Decision 2010/252/EU of 26 April 2010 ‘supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.’ Decision 2010/252/EU intended to reinforce the protection of fundamental rights and to guarantee respect for the principle of *non-refoulement* in sea operations by informing people on the place of disembarkation, establishing clear rules of engagement for joint patrolling and the disembarkation of intercepted or rescued persons in order to ensure the safety of those seeking international protection, and to prevent loss of life at sea. The decision was, however, annulled by the Court of Justice upon request of Parliament. See, CJEU 5 September 2012, Case C-355/10, *European Parliament v Council of the European Union*.

independent authority with suspensive effect; ii) the absence of provisions indicating that interception measures should be performed in conformity with the provisions on entry conditions and refusal of entry in the Schengen Border Code.<sup>1271</sup>

This Section on Frontex, however descriptive, was yet functional to a broader understanding of the EU response to unauthorized arrivals by sea, land, and air, beyond the specificity of the Italian context. To conclude this first Part of the Chapter - which rests on a punctual illustration of facts and collection of empirical material – the next Section will provide the reader with further information on Italy’s cooperation with North African countries after the 2009 crisis and the 2011 Arab Spring. This is to show the continued relevance of the legal analysis carried out throughout this Chapter with regard to the role of bilateral agreements for technical and police cooperation in hampering refugees’ access to protection, and the international responsibility of States engaged in joint migration controls.

### ***7.5.2. Bilateral cooperation after the Arab Spring***

Pursuant to the agreement on technical and police cooperation signed with Tunisia on 5 April 2011, as a bulwark against mass

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<sup>1271</sup> To read the Meijers Committee Note, refer to ‘Note on the Proposal for a Regulation establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex (COM(2013) 197 final), 23 May 2013 <<http://www.statewatch.org/news/2013/may/meijers-committee-note-surveillance-external-sea-borders.pdf>> accessed 20 August 2013.

arrivals from North Africa in 2011, Italy committed itself to supplying its South Mediterranean partner with twelve new and refurbished patrol boats, hundreds of off-road vehicles,<sup>1272</sup> and 100 million Euros. In turn, Tunisia committed itself to patrolling its coastal waters and to accepting the repatriation of migrants arriving in Italy after 6 April 2011 and removed from the country on the basis of accelerated identification procedures. This new cooperation with Tunisia led to a revival of the ‘push-back’ policy at sea already tested by Italy in 2009. On 21 August 2011, for example, 104 persons were collectively pushed back to the ports of departure by means of the classified agreement between Italy and Tunisia.<sup>1273</sup>

As to the interdiction procedure, boats are usually sought by the Navy (Marina Militare), which informs the Revenue Police (Guardia di Finanza) in charge of controlling irregular migration and defending national frontiers. These two bodies coordinate with each other to watch over the crafts (so-called ‘targets’), check their route, their speed and general navigation conditions. Once a boat is observed to be sailing away from Tunisia, it is engaged by Navy or Revenue

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<sup>1272</sup> See, Migrants at Sea, ‘Italy-Tunisia Reach Migration Agreement: 6 Months Residency Permits for Tunisians Already in Italy; Accelerated Return Procedures for Newly Arriving Tunisians’ (6 April 2011) <<http://migrantsatsea.wordpress.com/2011/04/06/italy-tunisia-reach-migration-agreement-6-month-residency-permits-for-tunisians-already-in-italy-accelerated-return-procedures-for-newly-arriving-tunisians/>> accessed 20 August 2012.

<sup>1273</sup> Cosentino 2011.



Police vessels, which transfer the unauthorized passengers to Italian patrol boats and then to Tunisian guard ships.<sup>1274</sup>

On 15 December 2011, Italy and the new Benghazi-based Libyan National Transitional Council (NTC) reached an agreement on the reactivation of the Italy–Libya Friendship Treaty.<sup>1275</sup> In June 2011, they signed a new agreement to combat unauthorized flows of migrants to Italy. If ‘everything must change so that everything can stay the same’,<sup>1276</sup> this seems to be the case after the signature of a Memorandum between the Italian government and the NTC. Negotiated in the aftermath of a violent conflict, the Memorandum reinstates the same terms of the accords previously concluded with the Gaddafi government by confirming the commitment to a shared management of migration through the reactivation of preceding agreements, including the 2007 and 2009 technical protocols. As part thereof,<sup>1277</sup> the two parties will provide mutual assistance and cooperate in the fight against unauthorized migration, including repatriation of irregular migrants.

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<sup>1274</sup> *ibid.*

<sup>1275</sup> See, Ministry of Foreign Affairs Note, ‘Italy-Libya: Reactivation of the Treaty of Friendship’, 15 December 2011 <[http://www.esteri.it/MAE/EN/Sala\\_Stampa/ArchivioNotizie/Approfondimenti/2011/12/20111215\\_ItaliaLibiaTrattatoAmicizia.htm](http://www.esteri.it/MAE/EN/Sala_Stampa/ArchivioNotizie/Approfondimenti/2011/12/20111215_ItaliaLibiaTrattatoAmicizia.htm)> accessed 3 January 2012.

<sup>1276</sup> This is one of the famous phrases pronounced by the Prince of Salina in the 1958 Novel *The Leopard* written by G Tomasi di Lampedusa.

<sup>1277</sup> See, Migrants at Sea, ‘Memorandum of Understanding between Italy and Libyan NTC’ (20 June 2011) <<http://migrantsatsea.wordpress.com/2011/06/20/memorandum-of-understanding-between-italy-and-libyan-nct/>> accessed 20 August 2013.

Italy and Libya have recently reiterated the desire to strengthen their friendship and cooperation in the control of irregular migration. In the oral agreement of 3 April 2012 (published only in June) between the Ministries of the Interior of the two countries,<sup>1278</sup> satisfaction has been expressed for the new program launched by Italy to train Libyan police officers in security-related fields, including frontiers control and leading of vessels.<sup>1279</sup> The accord also provides for exchange of experts to fight irregular migration,<sup>1280</sup> and the construction of the medical centre of Kufra and other reception facilities for unauthorized migrants, with the support of the EU Commission.<sup>1281</sup> In Section 3, Libya commits itself to promptly inform Italian authorities of any issues regarding the monitoring of Libyan territorial and maritime borders ‘for the purpose of contrasting the departure of migrants from its territory (emphasis added).’ On the other hand, Italy engages in supplying Libya with all technical means and equipment to fortify surveillance of Libyan frontiers. The two governments also convene on the need for a revival of the activities for the monitoring of Southern borders by planning maritime

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<sup>1278</sup> Processo Verbale della Riunione tra il Ministro dell’Interno della Repubblica Italiana ed il Ministro dell’Interno della Libia (Tripoli, 3 April 2012) (Oral Agreement Italy-Libya 2012).

<sup>1279</sup> *ibid* Section 1.

<sup>1280</sup> *ibid*.

<sup>1281</sup> *ibid* Section 2. Human rights organizations have expressed their criticism against the Italy-Libya agreement. See, e.g., Amnesty International, ‘L’accordo Italia - Libia in materia di immigrazione mette a rischio i diritti umani’ (18 June 2012) <<http://www.amnesty.it/accordo-italia-libia-in-materia-di-immigrazione-mette-a-rischio-i-diritti-umani>> accessed 20 August 2013.

operations pursuant to their bilateral agreements and international law of the sea. Needless to say, the parties finally ‘commit themselves to respect human rights as enshrined in international agreements and conventions.’<sup>1282</sup>

### **7.6. Hampering access to protection through pre-arrival interceptions**

Section 7.4.3 presented the whole spectrum of bilateral agreements for technical and police cooperation as the legal basis for interception and return activities performed under Libya’s responsibility, regardless of Italian officials’ presence on board the interdicting crafts placed under Libyan command. Moreover, it showed how these bilateral accords, implemented beyond territorial frontiers, represent a key component of the legal and political framework within which the forced return of refugees to the country of embarkation is made possible after interception by EU Member States, such as in the 2009 push-backs.

International responsibility for human rights violations may arise every time States exercise jurisdiction.<sup>1283</sup> It is tightly related to the existence of a State’s obligation, and is intended to verify whether a

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<sup>1282</sup> *ibid* Section 3.

<sup>1283</sup> Marko Milanovic, ‘From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties’ (2008) 8 HRLR 411, 417.

certain State is liable for the violation of the obligation in point. Mindful of the vastness of obligations incumbent upon EU Member States under both the law of the sea and international human rights law, focus is placed here on responsibility triggered by violations of the fundamental principle of *non-refoulement*, which is closely correlated to the lack of access to asylum procedures and effective remedies for individuals intercepted at sea.

Although the Geneva Convention is silent about its extraterritorial application, scholars and the UNHCR agree that ‘the ordinary meaning of *refouler* is to drive back, repel, or re-conduct, which does not presuppose a presence in-country’ thereby encouraging the view that Article 33(1) would encompass rejection at the border, in transit zones, and on the high seas.<sup>1284</sup> While specific territorial limitations have been set forth in other Articles of the Geneva Convention, no such restriction is embodied in paragraph 1 of Article 33.<sup>1285</sup> Accordingly, the UNHCR has stressed that Article 33(1) applies also

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<sup>1284</sup> See, e.g., Lauterpacht and Bethlehem 2001, 87, 110; Coleman 2009, 253; Walter Kälin, Martina Caroni and Lukas Heim, ‘Article 33 para 1 (Prohibition of Expulsion and Return (Refoulement)’ in Andreas Zimmermann (ed) *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) 1361, 1367; UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-refoulement*, 12 para 24. See also, Goodwin-Gill and McAdam 2007, 246; Hathaway 2005, 339; Andreas Fischer Lescano and Tillman Lohr, *Border Control at Sea: Requirements under International Human Rights and Refugee Law* (European Centre for Constitutional and Human Rights 2007) 14; Moreno-Lax 2011b, 411-20. For a broader analysis on the extraterritoriality of the principle of *non-refoulement* under international refugee law and human rights law, see, Section 2.5 of this thesis.

<sup>1285</sup> See, Roland Bank, ‘Refugees at Sea; Introduction to Art. 11 of the 1951 Convention’, in Zimmermann 2011, 815, 833, 835.

beyond the territorial frontiers of a State party to the Convention.<sup>1286</sup>

In some circumstances, national jurisprudence has adopted a restrictive interpretation of the *ratione loci* of the principle of *non-refoulement*. For example, in a case concerning the push-back of Haitians who attempted to flee their country and seek protection in the US, the US Supreme Court refused the extraterritorial relevance of *non-refoulement*, as codified in Article 33(1) of the Geneva Convention.<sup>1287</sup> Nevertheless, the *Sale* case has been harshly criticized by the Inter-American Commission on Human Rights, which held that ‘that Article 33 had no geographical limitations.’<sup>1288</sup> Likewise, in the *Prague Airport* case, the English Court of Appeal convened that *Sale* was ‘wrongly decided’ as it shall be ‘impermissible to return refugees from the high seas to their country of origin.’<sup>1289</sup>

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<sup>1286</sup> Inter-American Commission on Human Rights, *Haitian Centre for Human Rights et al. v United States of America*, Decision of the Commission as to the merits of Case 10.675 United States 13 March 1997, para 157 (*Haitian Centre Case*). See also UNHCR, *Gene McNary, Commissioner, Immigration and Naturalization Service, et al (Petitioners) v Haitian Centres Council, Inc et al (Respondents). Brief Amicus Curiae of the Office of the High Commissioner for Refugees in Support of Respondents*, October 1992, 85-102.

<sup>1287</sup> See, *US Supreme Court, Sale, Acting Commissioner, INS v Haitian Centres Council* [1993] 113 (USSC) 2549.

<sup>1288</sup> *Haitian Centre Case*, para 157. Among scholars, see, e.g., Guy S Goodwin-Gill, ‘The Haitian *Refoulement* Case: A Comment’ (1994) 6 IJRL 103; Steven H Legomsky, ‘The USA and the Caribbean Interdiction Program’ (2006) 18 IJRL 679; JY Carlier, ‘Droit d’asile et des Réfugiés: de la Protection aux Droits’ (2007) 332 *Recueil des Cours de l’Académie de Droit International* 107.

<sup>1289</sup> *Regina (European Roma Rights Centre) and Others v Immigration Officer at Prague Airport* [2003] EWCA Civ 666, paras 34-35.

Placing our attention on international human rights bodies, it is possible to observe that the jurisprudence of the HRC,<sup>1290</sup> the Committee against Torture,<sup>1291</sup> and the ECtHR<sup>1292</sup> - as examined in Chapter 2 - have increasingly confirmed the extraterritorial applicability of the relevant treaties when States deal with individuals who risk being subjected to torture or degrading treatment if handed over to the authorities of their countries of origin or transit.<sup>1293</sup> The ECtHR has also clearly emphasized States' duty to prevent *refoulement* from occurring, wherever jurisdiction is exercised.<sup>1294</sup> While the applicability of the principle of *non-refoulement* in cases of expulsion and extradition has been recognized on several occasions,

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<sup>1290</sup> The HRC recognizes the extraterritorial scope of the relevant Covenant to the *non-refoulement* obligation where individuals are either within or outside the territory of a State party, but under the control of the State itself. This also implies a prohibition to 'extradite, deport, expel or otherwise remove' a person where reliable grounds exist to believe that she will suffer an irreparable harm either in the readmitting country or in any other country to which she could subsequently be removed (HRC General Comment no 31, 'The nature of the general legal obligation imposed on States parties' UN Doc CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para 12). See also, the HRC Concluding Observations on the United States of America' UN Doc CCPR/C/USA/CO/3Rev. 1, 18 December 2006, para 16); *Mohammad Munaf v Romania*, 21 August 2009 Comm no CCPR/ C/96/D/1539/2006, para 14.2; HRC General Comment no 2, 'The prohibition of torture and cruel treatment or punishment (Article 7)' UN Doc HRI/HEN/1/rev.1, 28 July 1994, para 9; *Kindler v Canada*, Comm no 470/1991, 11 Nov 1993, para 13.2.

<sup>1291</sup> According to Article 3 of the CAT, no State party can extradite, return, or expel a person to another State where he would be in danger of being subjected to torture. On the extraterritorial applicability of the Convention to any territory 'under the *de facto* effective control of the State party', see, 'Conclusions and Recommendations on the United States of America', 1–19 May 2006, CAT/C/USA/C/2, para 15; *JHA v Spain*, 21 Nov 2008, CAT/C/41/D/323/2007; see also, General Comment 2 'Implementation of Article 2 by States parties', 24 January 2008, CAT/C/GC/2, para 6; *Sonko v Spain* UN Doc CAT/C/47/D/368/2008 (20 February 2012) para 10.3.

<sup>1292</sup> See, e.g., *Medvedyev v France*; *Xhavara v Italy*; *Women on Waves v Portugal*; *Hirsi v Italy*; *Al Jedda v UK*; *Al Skeini v UK*; *Al Saadoon v UK*.

<sup>1293</sup> See, Chapters 2, 3, and 4 for a description of the relevant case law.

<sup>1294</sup> See, e.g., *Hirsi v Italy*; *Xhavara v Italy*, 5; *WM v Denmark* App no 17392/90 (EurComm, 14 October 1992).

the applicability of this principle to people intercepted on the high seas during offshore migration operations has been less conclusive, until the 2012 *Hirsi* decision.<sup>1295</sup> In this judgment, the ECtHR held that there had been an extraterritorial violation of Article 3 of the relevant Convention on account of the fact that the applicants were exposed a) to the risk of ill-treatment in Libya, and b) to the risk of repatriation to Somalia and Eritrea.<sup>1296</sup> According to the Court, Italy exercised a ‘continuous and exclusive *de jure* and *de facto* control’ over the migrants found at sea,<sup>1297</sup> thus upholding the same jurisdiction threshold applied in *Medvedyev*, where, however, the intercepted vessel was simply escorted from the international waters to France.

As explained in Chapter 2, the Court’s reasoning is not exhaustive on this point and the *Hirsi* case gives room to contend that also a *minimal control* would be sufficient to engage the jurisdiction of the State exercising migration controls beyond borders.<sup>1298</sup> Shifting thus emphasis from State action *per se* to the *consequences* of that action, physical contact does not amount to an essential requisite to engage jurisdiction. In this view, jurisdiction (and potentially responsibility)

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<sup>1295</sup> For commentary on the *Hirsi v Italy* case and the application of *non-refoulement* on the high seas, see, Giuffré 2012b; Moreno-Lax 2012a; Maarten Den Heijer, ‘Reflections on *Refoulement* and Collective Expulsion in the *Hirsi* Case’ (2013) 25(2) IJRL 695.

<sup>1296</sup> For an extensive analysis of the extraterritorial applicability of the principle of *non-refoulement* and the *Hirsi v Italy* case, see, Section 2.5 of this thesis.

<sup>1297</sup> *Hirsi v Italy*, para 81.

<sup>1298</sup> *ibid* para 79.

under international human rights law can also be engaged in those operations of looser-control at sea where State action falls short of arresting or detaining the individuals concerned.<sup>1299</sup> Thus, actions such as intimating a boat to modify its course by screaming or steaming nearby until it is heading outside the territorial waters or the contiguous zone, as well as conducting or escorting the ship to a third country can amount to ‘effective control.’ If preventing entry to territorial waters does not automatically amount to *refoulement*, violations of this principle arise if the concerned persons are returned to the frontiers of a territory where their life and liberty can be seriously threatened.<sup>1300</sup> Therefore, interdicting authorities shall always determine whether a specific third State is ‘safe, accessible, and reachable for the boat in question.’<sup>1301</sup>

The *Hirsi* ruling also confirms States’ obligation to inform refugees about their rights, ensure access to asylum procedures and effective remedies, and assess the safety of the third country. Although the Geneva Convention does not expressly bind States to grant access to asylum procedures, such an obligation can be implicitly derived by the principle of *non-refoulement* (Article 33(1)) whose content and scope needs to be shaped in good faith through the

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<sup>1299</sup> Roland Bank, ‘Refugees at Sea; Introduction to Article 11 of the 1951 Convention’ in Zimmermann 2011, 841.

<sup>1300</sup> For a thorough review of the case law of international human rights bodies on State extraterritorial obligations, see, Section 2.5 of this thesis.

<sup>1301</sup> Bank 2011, 849.



joint reading of international refugee and human rights law instruments interpreted on the basis of their ordinary meaning in light of their object and purpose.<sup>1302</sup> Therefore, not only should refugees be entitled to substantiate their protection claims before competent authorities onshore in order to dispel any risk of ill-treatment upon return, but, if intercepted on the high seas, they should also be disembarked in a safe place and receive access to fair and effective asylum procedures.<sup>1303</sup>

This Chapter's main conclusion is that the implementation of bilateral agreements on technical and police cooperation can hamper refugees' access to protection—that is to say *non-refoulement* as well as access to asylum procedures and effective remedies. Indeed, as explained in Part I of this thesis, the enforcement of *non-refoulement*, under international refugee and human rights law, has two procedural consequences: the duty of the State to advise the individual in question about her entitlement to obtain international protection, and

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<sup>1302</sup> See, in particular, Article 3 and 13 of the ECHR, Article 3 of the CAT, and Article 7 of the ICCPR, which have been extensively examined in Chapters 2, 3, and 4 of this thesis. On the interplay between refugee law and human rights law, see, Tom Clark and Francois Crépeau, 'Mainstreaming Refugee Rights. The 1951 Refugee Convention and International Human Rights Law' (1999) 17(4) NQHR 389. Also the EXCOM Conclusion no 95 (LIV) on International Protection (10 October 2003) underlines the 'complementary nature of international refugee and human rights law.'

<sup>1303</sup> For an extensive analysis of the extraterritorial applicability of the right to access asylum procedures, see, Section 3.4.1.

the duty to provide fair asylum procedures and an effective remedy to an individual.<sup>1304</sup>

The jurisprudence of the ECtHR, more than other international bodies, has interpreted the prohibition of *refoulement* as requiring access to an effective and rigorous examination of protection claims,<sup>1305</sup> even in extraterritorial contexts. To give an example, in *Hirsi v Italy*, for the first time, the Court recognizes the duty of the intercepting State to guarantee access to asylum procedures when refugees are intercepted on the high seas. Indeed, preventing people from lodging their protection claims would both heighten the risk of *refoulement* and indirectly lead to a violation of Article 3 of the Convention.<sup>1306</sup> Along the same lines, the Court found that the summary return of interdicted refugees without access to an individualized status determination procedure and without a thorough and rigorous assessment of their requests before the removal measure was enforced amounted to a violation of Articles 3 and 13 of the

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<sup>1304</sup> See, Section 3.2 and in particular, Kälin, Caroni and Heim 2011, 1395 for the view that *non-refoulement* entails an obligation to ensure access to an effective remedy that is available in law and in practice. According to the Committee against Torture, ‘the prohibition on *refoulement* contained in Article 3 [of the Convention] should be interpreted the same way to encompass a remedy for its breach.’ See, *Agiza v Sweden*, para 13.8. The jurisprudence of the ECtHR is abundant of cases where the notion of an effective remedy under Article 13 is interpreted as requiring independent and rigorous scrutiny of a claim that there exists a real risk of *refoulement* contrary to Article 3 of the ECHR. See, e.g., *Jabari v Turkey*, para 50. For further case law, refer to Section 4.4 of this thesis.

<sup>1305</sup> For instance, in the *Amuur v France* decision, the ECtHR asserted that effective access to asylum procedures must be ensured also to asylum seekers retained in the international zone of an airport. See, *Amuur v France*, para 43.

<sup>1306</sup> *Hirsi v Italy*, paras 185, 201-5. For a broader analysis on the extraterritorial right to access asylum procedures, see, Section 3.4.1 of this thesis.

Convention and Article 4 of Protocol 4.<sup>1307</sup>

To sum up, since States shall fulfil these procedural guarantees (*non-refoulement*, access to asylum procedures, and effective remedies) also in respect of migrants and refugees found at sea,<sup>1308</sup> joint patrols of international waters carried out with the purpose of intercepting migrants and refugees before they are able to enter the territorial jurisdiction of a EU Member State, and return them to the port of departure, undercut the right of asylum seekers to seek and find shelter abroad.

## **7.7. State responsibility beyond borders: the role of Italy in extraterritorial immigration controls**

### ***7.7.1. Jurisdiction and responsibility compared***

This Chapter could stop at Section 7.6, which sought to answer the key research question this thesis intends to tackle. However, due to the sensitivity and complexity of the issue of extraterritorial migration controls, the following sections pursue the analysis further by exploring the emerging debate on State Responsibility under general

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<sup>1307</sup> *ibid*, paras 205-7. On the extraterritorial applicability of the right to an effective remedy under the ECHR, see, Section 4.4.1 of this thesis.

<sup>1308</sup> *Hirsi v Italy*, Concurring Opinion 44-45. See also, the Parliamentary Assembly of the Council of Europe, ‘Resolution 1821 (2011) on the Interception and Rescue at Sea of Asylum Seekers, Refugees, and Irregular Migrants’, paras 9.3–9.6.

international law in situations of bilateral cooperation against irregular migration. As discussed in the previous Section, the implementation of agreements for technical and police cooperation beyond borders may *de facto* hamper the enjoyment of essential refugee rights. However, it cannot automatically be inferred that EU Member States, which cooperate with third countries in patrolling external maritime borders, are internationally responsible under human rights law if intercepted migrants and refugees are returned to countries where their life is irremediably endangered.

A prerequisite to engage responsibility under human rights law is that States exercise jurisdiction over persons returned to unsafe ports of departure as a consequence of joint patrols carried out either on the high seas or in the coastal waters of the country of embarkation.<sup>1309</sup> But let us assume that it is either difficult to establish whether or not a State exercises jurisdiction, or it can be shown that it did not exercise such an effective control as demanded by human rights law to establish jurisdiction. At this point, it would be interesting to look at whether there is a customary norm prohibiting *refoulement*, whose violation is governed by the ILC Articles on State Responsibility. Focusing on State Responsibility would enable identification of an internationally accountable actor, even if indirectly, whenever States

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<sup>1309</sup> This point has already been examined in the course of this thesis. See, as an example, the *Hirsi v Italy* case.

engage in human rights violations with regard to people that do not fall under their effective control and authority.

As a preliminary note, it is worth clarifying that in this context the study of State Responsibility is not intended to be comprehensive, but is limited to an overview of the kinds of liability a EU Member State might incur in contexts of cooperative migration control. However, I then move more specifically into the subject of indirect responsibility under Article 16 of ILC Articles, and take a definite stance on Italy's possible complicity with Libya for violation of the principle of *non-refoulement* while performing activities of migration control at sea. It would moreover exceed the scope of this Chapter to proceed with a comprehensive analysis of concepts such as jurisdiction, attribution, the different conditions to assert responsibility, and its legal consequences. Nevertheless, a number of specifications are needed.

In general international law, 'jurisdiction' points to the authority of the State to regulate the conduct of natural and legal persons by means of its domestic law. Such an authority, which is grounded in, and delimited by international law, includes both the power to prescribe and the power to enforce legal rules.<sup>1310</sup> 'Jurisdiction' in human rights treaties is not a legal competence, but refers to a *factual*

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<sup>1310</sup> For a distinction between prescriptive jurisdiction and enforcement jurisdiction, see, Vaughan Lowe and Christopher Staker, 'Jurisdiction' in Malcolm Evans (ed), *International Law* (Oxford University Press 2010) 335–6. See also, Malcolm Shaw, *International Law* (Cambridge University Press 2008) 645.

power that a State exercises over persons or territory.<sup>1311</sup> Every time a State exercises this power - meant as effective control and authority over a territory or a person - it must protect and ensure the rights of the people concerned.<sup>1312</sup> Moreover, doctrine,<sup>1313</sup> as well as the jurisprudence of the International Court of Justice (ICJ)<sup>1314</sup> and international human rights bodies, has been interpreting ‘jurisdiction’ as operating extraterritorially.<sup>1315</sup>

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<sup>1311</sup> Milanovic 2008, 417.

<sup>1312</sup> See, e.g., the *Lopez Burgos v Uruguay* case where the deciding factor in determining jurisdiction is not ‘the place where the violation occurred, but rather 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.’ *Lopez Burgos v Uruguay*, 29 July 1981, ICCPR A/36/40 para 12.1. On the application of the concept of ‘functional jurisdiction’ to activities taking place beyond territorial frontiers, see, Gammeltoft-Hansen 2011, 124. See, Sections 2.5.3 and 2.5.3.1 of this thesis for a discussion on jurisdiction in extraterritorial contexts.

<sup>1313</sup> Guy S Goodwin-Gill, ‘The Extraterritorial Reach of Human Rights Obligations: A Brief Perspective on the Link to Jurisdiction’ in L Boisson de Chazournes and M C Kohen (eds), *International Law and the Quest for its Implementation/Le Droit International et la Quête de sa Mise en Oeuvre: Liber Amicorum Vera Gowlland-Debbas* (Brill 2010) 293; Marko Milanovic (ed), *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011).

<sup>1314</sup> Relevant are the two judgments of the ICJ in the Wall Advisory Opinion and in the *Congo-Uganda* case where the Court held that State responsibility under human rights law may be engaged by States carrying out a military occupation of a foreign territory. See, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports (2004), Advisory Opinion, 9 July 2004, paras 109–111; see also, Armed Activities on the Territory of Congo (*Democratic Republic of Congo v Uganda*), ICJ Reports (2005), Judgment, 19 December 2005, paras 216, 220. In the absence of a general rule imposing the respect of human rights obligations only within State territory, the ILC has affirmed that acts or omissions attributable to a State can engage its international responsibility, ‘regardless of whether they have been perpetrated in national or foreign territory.’ See, Report of the ILC on the work of its twenty-seventh session, Yearbook of the ILC 1975, vol II, 84.

<sup>1315</sup> See, e.g., the HRC’s oft-quoted case *Lopez-Burgos v Uruguay*, paras 12.1–2. On a general note, the ECtHR has considered as a decisive element for determining State jurisdiction and, therefore, the application of the relevant treaty, whether a certain person falls within the effective control and authority of a contracting State, regardless of whether it is exercising public powers or not. See, e.g., *Loizidou v Turkey* (Preliminary Objections) (1995) 20 EHRR 99, paras 62–4; *Cyprus v Turkey*

Although jurisdiction is a condition for engaging State responsibility,<sup>1316</sup> the two concepts should not be equated. Whilst ‘State jurisdiction’, in human rights law, is ‘a question of a State’s control over the victims of [human rights] violations [...] or, more generally, control over the territory in which they are located’,<sup>1317</sup> ‘responsibility’ refers to the liability of a State for a violation of the rights of a person who is within its jurisdiction. However, jurisdiction in international law delimits municipal legal systems of States,<sup>1318</sup> and is an emanation of one State’s sovereignty, that is, the claim both to regulate its own public order, and exercise power *vis-à-vis* other States.<sup>1319</sup> Unlike the human rights context - where jurisdiction is ‘a question of fact, of actual authority and control’<sup>1320</sup> - in general international law, this power relies on legal entitlements or competences.<sup>1321</sup>

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(2002) 35 EHRR 30, paras 76, 80; *Ilascu and Others v Moldova and Russia* (Merits) (2005) 40 EHRR 46, para 384; *Ocalan v Turkey* (Merits) (2005) 41 EHRR 985, para 91; *Issa and Others v Turkey* (2005) 41 EHRR 27, paras 68–71; *Pad and Others v Turkey* App no 60167/00 (ECtHR, 28 June 2007) paras 53–5; *Al-Saadoon and Mufdhi v United Kingdom* (2010) 51 EHRR 9; *Medvedyev v France*, para 81; *Al Skeini v UK*, (2011) 53 EHRR 18, para 149; *Hirsi v Italy*, para 81. See also, *WM v Denmark* concerning extraterritorial *non-refoulement* from an embassy in the territory of a non-Contracting Party to the ECHR.

<sup>1316</sup> Oliver De Schutter (ed), *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press 2010) 124.

<sup>1317</sup> Milanovic 2008, 446.

<sup>1318</sup> *ibid* 447.

<sup>1319</sup> *ibid*, 420; Ian Brownlie (ed), *Principles of Public International Law* (Clarendon Press 2008) 297.

<sup>1320</sup> Milanovic 2008, 447.

<sup>1321</sup> Sir Franklin Berman, ‘Jurisdiction: the State’, in P Capps, MD Evans and S Konstantinidis (eds), *Asserting Jurisdiction* (Hart Publishing 2003), xix.

The secondary rules of State responsibility concern, instead, ‘the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom.’<sup>1322</sup> In Ago’s words, ‘it is one thing to define a rule and the content of the obligation it imposes and another to determine whether that obligation has been violated and what should be the consequences of the violation.’<sup>1323</sup> For this second aspect of responsibility proper, it would be important to verify what kind of responsibility could be established, under general international law, when States commit an international wrongful act while carrying out external migration controls autonomously or in conjunction with another actor.

On a general note, States are responsible for any conduct of their organs whether they ‘exercise legislative, executive, judicial, or any other functions.’<sup>1324</sup> As outlined by Article 2 of the ILC Codification,

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<sup>1322</sup> James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text, and Commentaries* (ILC Commentary) (Cambridge University Press 2002) 74.

<sup>1323</sup> Roberto Ago, ‘Second Report on State responsibility, by Special Rapporteur – the origin of international responsibility’, Extract from the Yearbook of the ILC (1970), vol II, doc A/8010/Rev.1, 178, para 7(c). The dichotomy between primary and secondary rules of international law is not defended as correct by part of the doctrine. Linderfalk, for instance, criticizes the assumption that State responsibility can be described as separate from the ordinary rules of international law. See, Ulf Linderfalk, ‘State Responsibility and the Primary-Secondary Rules Terminology – The Role of Language for an Understanding of the International Legal System’ (2009) 78 NJIL 53, 72.

<sup>1324</sup> Article 4(1) of the ILC Articles. Additionally, under Article 5, States may engage responsibility even for ‘[t]he conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority ...’



the requirements for determining an international wrongful act are twofold: first, the conduct at issue must be attributable to the State; second, the conduct must consist of the infringement of an international legal obligation in force at that time for that State.

As interception and forced return measures can assume various forms, identifying the exact scope of both States' obligations toward refugees in the context of controls at sea, and concurrent responsibilities in case of infringement of these obligations, could be complicated. In particular, the following Sections concentrate on the modalities of execution of the 2009 push-backs and, more broadly, on the police cooperation set up by the bilateral technical Protocols concluded between Italy and Libya in 2007 and 2009.

The patterns of State cooperation connected to readmission of unwanted migrants, who often travel along with refugees, are multifarious. EU countries may train the border guards of a third State, supply them with patrol boats, exchange police and immigration officers, participate with their own officials in mixed crews, intercept boat migrants by means of their own vessels and hand them over to the authorities of the country of embarkation, or delegate such functions directly to the third State itself.

Since in joint migration controls, EU Member States can attract either direct or indirect responsibility if they disregard refugee or human rights, responsibility should be tackled on an *ad hoc* basis

following rules on attribution of State conduct. For the purpose of this thesis, the conduct that should be attributable to a EU Member State to establish the international wrongful act, and therefore, its international responsibility, would be the return of intercepted refugees ‘to territories where their lives and freedoms would be threatened.’<sup>1325</sup> State practice, since the adoption of the Geneva Convention, has provided persuasive evidence that the principle of *non-refoulement* has achieved the status of customary international law.<sup>1326</sup> As a matter of human rights law, the principle of *non-refoulement* is a corollary to the prohibition on torture, cruel, inhuman and degrading treatment, or punishments, as enshrined in several international instruments,<sup>1327</sup> such as the ICCPR and the CAT, ratified by both Italy and Libya.<sup>1328</sup>

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<sup>1325</sup> Goodwin-Gill and McAdam 2007, 277.

<sup>1326</sup> The customary status of *non-refoulement* has also been confirmed by several scholars, including: Kay Hailbronner, ‘*Non-refoulement* and ‘Humanitarian’ Refugees: Customary International Law or Wishful Legal Thinking?’ in D Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s* (Martinus Nijhoff Publishers 1988) 128–9; William Schabas (ed), *Non-refoulement, Human Rights, and International Cooperation in Counter-terrorism* (Liechtenstein 2006) 7; Geoff Gilbert, ‘Is Europe Living Up to its Obligations to Refugees?’ (2004) 15 EJIL 963, 966; Goodwin-Gill and McAdam 2007; Aoife Duffy, ‘Expulsion to Face Torture? *Non Refoulement* in International Law’ (2008) 20(3) IJRL 373, 389; Trevisanut 2008, 218. For an opposite view, see, Hathaway 2005, 363-70. For broader discussion on the customary status of *non-refoulement*, refer to Section 2.2 of this thesis.

<sup>1327</sup> In this vein, the *jus cogens* value of *non-refoulement* can be derived by the absolute prohibition on torture. Under Article 41(2) of the ILC Codification, ‘No State shall recognize as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation.’ Article 40(1) refers to the international responsibility ‘entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.’

<sup>1328</sup> See, Chapter 2 for an analysis of *non-refoulement* under human rights law.

***7.7.2. Independent responsibility and attribution of State conduct to another State***

Relying on the empirical material deployed in Sections 7.2 and 7.3, this Section sketches out two kinds of responsibility that a EU Member State may incur where it is involved in a common action against irregular migration together with a third country. First, in the case of joint border controls - even when patrols have been moved to the territorial waters of a non-EU third country - States can be found independently responsible. In these circumstances, the ILC Articles require the conduct of State organs must be attributable to the two States and entail a breach of their international obligations, *in casu* the principle of *non-refoulement* (independent responsibility).<sup>1329</sup>

A second possible scenario exists where responsibility is assigned to a EU Member State for the actions of the border guards of a third country. In this case, foreign border authorities should be conceived of as subsidiary organs of the EU country and executors of its immigration policies. Pursuant to Article 6 of the ILC Articles,

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<sup>1329</sup> See Articles 2 and 4 of the ILC Articles. Pursuant to Article 2: ‘There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.’ Under Article 4: ‘1) The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2) An organ includes any person or entity which has that status in accordance with the internal law of the State.’ See also, Crawford 2002, 145–6. See also, Crawford 2002, 145–6.

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Acting on instructions is not sufficient to attribute conduct of a State organ to another State and it is necessary that the organs of the third country ‘act in conjunction with the machinery of that [EU] State and under its exclusive direction and control, rather than on instructions from the sending State.’<sup>1330</sup>

Let us now try to apply the notion of independent responsibility to our case study. Although this kind of responsibility would be *in principio* the best suited to describe the condition of joint maritime operations, it is likely that Italy would not be appointed separate responsibility for conduct attributable to it when interception is conducted by vessels under Libyan command in either Libyan territorial waters or on the high seas. In these circumstances, Libya is fully competent to decide upon matters related to navigation, patrolling, and interception.

By contrast, on 6 May and 30 August 2009, refugees intercepted on the high seas were transferred to Italian vessels, shipped to Libya, and handed over to Libyan authorities. Thus, the wrongful act -

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<sup>1330</sup> Crawford 2002, 103.

consisting of subjecting returned persons to inhuman treatment and *refoulement* to countries of origin – could be separately attributed both to Italy and Libya. To be more specific, in the context of the push-backs object of the *Hirsi v Italy* case, no issue of complicity arises, as Italy autonomously conducted the operations by means of its own vessels and Italian personnel.

Independent responsibility might also be invoked *ex hypothesi* to a situation in which Libyan ships enter either Italian territorial waters to rescue or interdict boat migrants and refugees and drive them back to the coast of North Africa. Indeed, the coastal State - which holds primary responsibility both for addressing any protection claim and for transporting rescued migrants in a reasonable time to a ‘place of safety’<sup>1331</sup> - by authorizing the third country to intervene, exercises its sovereign authority. Since, under Article 33(1) of the UNCLOS, a State retains jurisdiction over immigration matters in its contiguous zone, Italy would remain primarily responsible if it authorized Libya to intercept migrants, including refugees, in this area.<sup>1332</sup> However, if permission were not granted, Libya would not only violate Italian

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<sup>1331</sup> Pursuant to Article 2(1) of the UNCLOS, the sovereignty of a coastal State extends to the territorial sea. See, generally, Trevisanut 2008; E Turco Bulgherini, ‘Acque Territoriali e Sicurezza Marittima’ (2010) 3, Online Gnosis Rivista Italiana di Intelligence <<http://gnosis.aisi.gov.it/Gnosis/Rivista24.nsf/servnavig/57>> accessed 20 August 2012. See also, UNHCR Executive Committee, ‘Conclusion on Protection Safeguards in Interception Measures’, UN doc no 97 (LIV) – 2003, 10 Oct 2003, para (a)(i) <<http://www.unhcr.org/496323740.html>> accessed 20 August 2013.

<sup>1332</sup> This is, yet, an *ex hypothesi* reasoning as Italy has not yet proclaimed a clear contiguous zone.

sovereignty but would also be primarily responsible for the protection of interdicted people.<sup>1333</sup>

The application of Article 6 of the ILC Articles should also be excluded. Indeed, according to the 2007 and 2009 agreements between Italy and Libya, the latter operates within its own command on board of vessels supplied by the Italian government. Therefore, the argument that African border guards receive training, funding, technical equipment, and assistance cannot be utilized to consider African border authorities as subsidiary organs of the Italian government.<sup>1334</sup> It remains, thus, to be seen which alternative avenues can satisfactorily be pursued through the institution of State responsibility.

### *7.7.3. Indirect responsibility for aiding and assisting another State*

A State could be held indirectly accountable for an internationally wrongful act committed by another State by means of its ‘aiding and assisting’ the third country itself in performing an illicit operation through supportive political statements, the provision of

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<sup>1333</sup> Barbara Miltner, ‘Irregular Maritime Obligations: Refugee Protection in Rescue and Interception’ (2006–2007) 30 Fordham Int’l LJ 75, 122–3.

<sup>1334</sup> See, Den Heijer 2010a, 192–3.

infrastructures, technical utilities, or financial support. Under Article 16 of the ILC Codification:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.

This provision does not tackle attribution or questions of joint and several liabilities since the abetting State did not itself carry out the conduct but assisted the conduct of another State.<sup>1335</sup> As indicated in the chapeau to Article 16, a wrongful conduct refers to violations of international obligations by the assisted State, the ‘latter’, ‘which distinguishes the situation of aid or assistance from that of co-perpetrators or co-participants in an internationally wrongful act.’<sup>1336</sup> Therefore, Article 16 ‘establishes a distinct wrong of complicity, independent of the wrong committed by the perpetrating State’<sup>1337</sup>

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<sup>1335</sup> Report of the ILC to the General Assembly, Fifty-First Session, A/54/10 (1999) para 266.

<sup>1336</sup> Crawford 2002, 148. For the issue of joint responsibility of several States for the same injury, see, Article 47 of the ILC Articles.

<sup>1337</sup> *ibid.* For the issue of joint responsibility of several States for the same injury, see Article 47 of the ILC Articles.

that remains primarily responsible, while the assisting State has a purely supporting role.<sup>1338</sup>

To give an example, a State may be responsible for violation of the principle of non-*refoulement* where it knowingly assists another State to return refugees to a place where their life or liberty might be threatened.<sup>1339</sup> Even if the first State does not itself carry out the unlawful conduct, but supplies equipment with knowledge of the intentions of the assisted State, a strong enough link exists to establish complicity. Therefore, this Section, slightly departing from the context of the 2009 push-backs, explores whether Article 16 could be used to delimit State responsibility within the framework of the general cooperation between Italy and Libya established by the technical Protocols on migration control.

It is likely that Italy engaged jurisdiction, under human rights law, for sending refugees intercepted on the high sea (on 6 May and 30 August 2009) back to Libyan ports on its own vessels, in violation of the fundamental rights of individuals placed under its control. With regard to the push-backs of 6 May, the ECtHR found that Italy had jurisdiction and therefore responsibility for violations of the fundamental rights of returned persons. Diverse operational missions can however be performed. For instance, on the remaining occasions

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<sup>1338</sup> *ibid.*

<sup>1339</sup> Michelle Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State' (2007) 28 MJIL 223, 263.



in 2009, migrants and refugees were interdicted by Italian authorities and transferred to Libyan vessels in charge of returning them to Tripoli. Instead, in many other cases, which obtained less public attention, Libyan authorities performed interceptions directly in their territorial waters or on the high seas, without the intervention of Italian warships.

Major attention rests on the modalities of collaboration and assistance deriving from the terms of the bilateral technical Protocols and the Partnership Treaty. For instance, under the terms of the 2007 and 2009 technical Protocols, Libya is autonomously committed to sea patrols, which may result in the diversion of migrants and refugees to the country of embarkation under the full command of Libyan authorities. Article 16 of ILC Codification does not tackle attribution or questions of joint and several liabilities, since the abetting State does not itself commit the internationally wrongful act but assists another State, which performs the illicit conduct.<sup>1340</sup> Thus, as Crawford explains, ‘by assisting another State to commit an internationally wrongful act, a State should not necessarily be held to indemnify the victim for all the consequences of the act, but only for those which [...] flow from its own conduct.’<sup>1341</sup>

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<sup>1340</sup> ILC Report, para 266.

<sup>1341</sup> Crawford 2002, 151.

Although, according to the text of the 2007 and 2009 technical Protocols, only Libyan authorities on board the military vessels are entrusted with the responsibility and the legal authority for the operational missions at sea, Italy has substantively supported its partner by providing funding, training, consultancy, as well as surveillance equipment. Therefore, the question is whether a certain threshold is reached to establish that Italy was aware that its assistance could be used to perform a wrongful conduct.

Regrettably, there is little jurisprudence of help in defining the contours of ‘aiding and assisting’ responsibility.<sup>1342</sup> This leaves ample room for interpretation. According to the ICJ, for example, it is not necessary that the assistance provided by the aiding State be essential to the commission of the international wrongful act, but it must at least have ‘contributed significantly to that act.’<sup>1343</sup> In addition, the violation constituting an internationally wrongful conduct must concern the infringement of a norm that would amount to wrongful conduct in both States.<sup>1344</sup>

A quite wide category of actions can be encompassed within the reach of Article 16, such as training, economic assistance, the

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<sup>1342</sup> Although Article 16 of the ILC Articles is not strictly relevant for the *Bosnia and Herzegovina v Serbia and Montenegro case (Genocide Convention Case)*, the ICJ takes the opportunity to make some considerations on the concept of ‘aid or assistance’ (ICJ judgment of 26 February 2007, paras 420–4).

<sup>1343</sup> Crawford 2002, 149.

<sup>1344</sup> *ibid.*

provision of confidential information,<sup>1345</sup> as well as political or legal aid, even in the form of treaties employed to facilitate the performance of the illicit act.<sup>1346</sup> As the scope *ratione materiae* of Article 16 is so vast, the mental element has been interpreted very restrictively.<sup>1347</sup> If on the one hand, it can be presumed that a State is aware of the circumstances making the conduct of the assisted State internationally wrongful, it is also true that configuring such a responsibility is not an easy task. Indeed, the threshold for establishing indirect responsibility is very high, and the process of proving that that aid or assistance has been intentionally given ‘with a view to facilitate the commission of the wrongful act’ would be cumbersome.

The mental element requirement still remains a hotly debated issue because of the problems of representing a State as an entity able to formulate conscious decisions.<sup>1348</sup> Moreover, in order to avoid responsibility, a State could intentionally avoid making public

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<sup>1345</sup> James Crawford, ‘Second Report on State Responsibility’ (1999) Yearbook of the ILC vol II (part I) 50, n 349.

<sup>1346</sup> Bernahrd Graefrath, ‘Complicity in the Law of International State Responsibility’ (1996) 29 RBDI 370, 374. On the scope of ‘aid and assistance’, see, Helmut P Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press 2011) 192-230.

<sup>1347</sup> Georg Nolte and Helmut Philip Aust, ‘Equivocal Helpers-Complicit States, Mixed Messages and International Law’ (2009) 58 ICLQ 1, 10.

<sup>1348</sup> Maarten Den Heijer, ‘Europe and Extraterritorial Asylum’ (PhD Thesis, University of Leiden 2010) 94.

pronouncements stating its will.<sup>1349</sup> Taking into account the difficulty in determining the state of mind of a State, such a strict mental requirement would also lead to the exclusion of those cases where States commit international wrongful acts not from a desire to violate human rights, but because they implicitly accept the risk that breaches of fundamental rights may occur while pursuing different and less harmful objectives.<sup>1350</sup> Rather than focusing on the mental reasons driving State action, greater attention should be drawn on the assessment of whether the assisting State was aware that its assistance would be put to wrongful use.

Conversely, the ILC is very keen to emphasize that a high threshold must be met, otherwise international responsibility could be triggered anytime a State engages in bilateral cooperation with a third country.<sup>1351</sup> It has, thus, stressed that the ‘eventual possibility’ that a wrongful act could derive from a State’s assistance is not sufficient to establish the link between the facilitating act and the wrongful conduct.<sup>1352</sup> Rather, it is to be proved that an accomplice State aided

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<sup>1349</sup> On the difficulty of inferring intention, and therefore complicity, from public statements, see, Graefrath, 375–6.

<sup>1350</sup> Nahapetian 2002, 126–7.

<sup>1351</sup> Nolte and Aust 2009, 14.

<sup>1352</sup> Report of the ILC on the work of its thirtieth session, Yearbook of the ILC 1978, vol II (Part II) 49–50, para 18.

another country by accepting, with knowledge of the facts, the serious risk that wrongful acts would be committed.<sup>1353</sup>

#### *7.7.2.1. Italy's responsibility for 'aiding and assisting' Libya?*

In light of the above, what rests to be explored is whether by assisting Libya in patrolling its territorial and international waters to intercept and return migrants and refugees to a territory where their life could be irremediably endangered, Italy acted with full knowledge of the circumstances in which its aid or assistance would be used. Providing assistance that facilitates only occasional wrongdoings should not be sufficient to raise the threshold of State responsibility to a level falling within Article 16 of the ILC Articles.<sup>1354</sup>

It cannot be argued that this was the case with the Italy–Libya cooperation in migration control. Indeed, in 2009, 834 persons were returned to the port of departure, within the framework of a well-organized policy, over the course of nine separate operations, during which migrants and refugees were handed over to the Libyan authorities after their interception on the high seas by Italian vessels. Push-backs, frequently repeated over six months between 6 May and 6 November, were carried out in a systematic fashion with the approval of both governments. On several other occasions, after the

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<sup>1353</sup> *ibid.* See also, *Bosnia Genocide Case*, para 432.

<sup>1354</sup> Den Heijer 2010b, 98.

entry into force of the 2009 Executive Protocol, Libyan officials interdicted irregular migrants and refugees heading to Europe, in their territorial waters or on the high seas, without the intervention of Italian vessels.<sup>1355</sup> Unfortunately, keeping track of the number of people halted and returned to Libya before they could encounter the authorities of a EU Member State is practically impossible.

Despite the transfer of the maritime operations to Libyan authorities, and the attempt to keep the details of ‘anti-immigration activities’ classified, a great deal of information on the treatment of migrants in Libya, and the form of its cooperation with Italy, is in the public domain. As explained in Section 7.2 of this thesis, Italian officials were always on board the vessels used to ship migrants and refugees back to Libya, or to transfer passengers to Libyan crafts. They thus had full knowledge of the circumstances, and were fully aware that intercepted refugees were terrified of being returned to Libyan guardianship.<sup>1356</sup> In this respect, there is room to presume not

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<sup>1355</sup> Information on the interception operations autonomously carried out by Libyan authorities is difficult to obtain. However, the following video shows the actual phase of interdiction of unauthorized migrants by Libyan authorities with the vessels supplied by the Italian government. ‘Switch off the engine otherwise you are going to die’ is the warning shouted by the Libyan authorities to migrants on the rubber dinghy. See <<http://www.rainews24.rai.it/it/canale-tv.php?id=13231>> accessed 20 August 2013.

<sup>1356</sup> As a Lieutenant of the Italian Revenue Police involved in the maritime operations confessed: ‘Push-backs are among the cruellest services we perform and in the last months cases of “mutiny” have been recorded [...]. A large part of the [intercepted] irregular migrants are ready for anything; they fear being driven back to Libya and threaten to kill themselves in front of us. [...] Even at the risk of undergoing disciplinary action, I will never do it again.’ Excerpts of an interview drawn from Francesco Viviano, ‘Noi Finanziari Ostaggi di Tripoli Su Quelle Navi Non Vogliamo Salire’ *Repubblica* (15 Sept 2010) (author’s translation)

only that Italy was conscious of the ‘eventual possibility’ of the harmful use of its aid but, more decisively, that it knew its aid would be put to wrongful use.

The Italian overarching intent to outsource its responsibilities for migrants and refugees, by supporting Libya in its role of watchdog of Europe’s gateways for the containment of irregular migration by sea, has been corroborated by the numerous public and official statements from both the Italian and Libyan governments.<sup>1357</sup> It has also been confirmed by factual data and by the conclusion of bilateral agreements establishing a detailed framework for mutual cooperation.

For example, over the last decade, Italy assisted Libya on a regular basis with the provision of funding, vessels, satellite devices, technical equipment for patrolling land and maritime borders, night-vision devices, binoculars, all terrain vehicles (ATV), life boats, and sacks for the transportation of corpses.<sup>1358</sup> It also provided training for border officials, confidential information, consultancy, money for

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<[http://www.repubblica.it/cronaca/2010/09/15/news/finanziere\\_mazara-7088107/](http://www.repubblica.it/cronaca/2010/09/15/news/finanziere_mazara-7088107/)> accessed 20 August 2013.

<sup>1357</sup> Especially after the conclusion of the 2008 Partnership Treaty and the 2009 Executive Protocol, the Italian government started to publicly flaunt the close relationship created with its Southern Mediterranean partner, by announcing that this newly-established cooperation would soon have set the pace for the readmission by Libya of all the unauthorized migrants intercepted at sea on their way to the EU borders, thus shutting down once and for all this migration route. See, for instance the communication published on the website of the Minister of the Interior, ‘Contrasto immigrazione, Maroni: intesa firmata in Libia’ <<http://www.governo.it/Notizie/Ministeri/dettaglio.asp?d=41871>> accessed 20 August 2013.

<sup>1358</sup> See, Paolo Cuttitta, ‘Readmission in the Relations between Italy and North African Mediterranean Countries’ in Cassarino 2010a, 49.

both the construction of reception centres<sup>1359</sup> and charter flights both to return irregular migrants from Libya to source countries,<sup>1360</sup> and to transfer police officers stationed at Libyan diplomatic and consular offices to work on migration issues.<sup>1361</sup>

In order to infer that the assistance provided by Italy to Libya falls *in toto* under the scope of Article 16, it should be demonstrated that aid and assistance were intentionally given ‘with a view to facilitate the commission of the wrongful act’ by Libya, and that the accomplice State accepted with full ‘knowledge’ of the facts the

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<sup>1359</sup> From August 2003 to December 2004, Italy supplied Libyan authorities with technical equipment and financed the construction of three detention centers in Gharyan, Sebha, and Kufra. According to some, these centres are no longer intended for confining undocumented migrants, but rather for police training and as border medical centres. See, Paoletti 2010, 59. However, all of the asylum seekers I have interviewed in 2013 reported that before reaching Europe, they were detained for several months in the Gharyan detention centre. They described this place as a prison where black migrants are tortured, beaten, and humiliated on a daily basis.

<sup>1360</sup> Italy paid for fifty charter flights to remove 5,688 irregular entrants from Libya to ten different source countries. Between October 2004 and March 2006, Italy also financed the removal of over 3,000 migrants to Libya. See, European Commission Report, ‘Technical Mission to Libya on Illegal Migration’ (27 November – 6 December 2004) doc 7753/05, 59–61, <<http://www.statewatch.org/news/2005/may/eu-report-libya-ill-imm.pdf>> accessed 20 August 2013.

<sup>1361</sup> Beyond the Italian case, migration deterrence policies performed in tandem with third countries have been supported by Western countries under different forms. Immigration detention in neighbouring countries is one of the policy exports used by Europe, North America, and Australia to create a buffer zone to deny access to asylum in those States signatories to the Geneva Convention. For instance, the European countries have built immigration detention centres in Ukraine and North Africa, while the United States has funded a detention centre in Guatemala. See, Amy Nethery, Brynna Rafferty-Brown, and Savitri Taylor, ‘Exporting Detention: Australia-funded Immigration Detention in Indonesia’ (2013) 26(1) JRS 88-9. Since the mid 1990s, Australia has funded immigration detention in Indonesia, thus extending its asylum policy well beyond its boundaries into the jurisdiction of another country. As a consequence, refugees have been deprived of a durable solution to their plight in the Asia-Pacific region, and continue to be held in detention facilities that fall short of international human rights standards. As durable solution, the UNHCR has identified voluntary repatriation, local integration, and third country resettlement. For an analysis of the Australian detention policy beyond territorial borders, see, Nethery, Rafferty-Brown, and Taylor 2013, 104-6.



serious danger that a wrongful act would be carried out.<sup>1362</sup> Such conduct would include the violation of the customary principle of *non-refoulement*, which also enjoys a peremptory status as corollary to the prohibition of torture.

Is it, therefore, possible to assume that Italy knew or could reasonably expect - at that material time - that a real risk existed of migrants and refugees being returned to the territory of a country where they could suffer torture, or other inhuman and degrading treatment? If so, Italy can potentially be held accountable for assisting Libya in violating the principle of *non-refoulement*. Indeed, refugees are notoriously victims of torture and inhuman treatment in Libya, and are exposed to the risk of onward expulsion to their countries of origin.<sup>1363</sup>

As confirmed by the ECtHR in the *Hirsi* judgment, not only Italy ‘could not ignore’ the treatment reserved by Libya to migrants and refugees, but it also had an obligation to proactively find out the real situation of migrants and refugees before proceeding with their expulsion.<sup>1364</sup> Numerous reports by international organizations and NGOs depicted the grievous treatment of irregular immigrants in

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<sup>1362</sup> For a comprehensive analysis of the subjective element, refer to Aust 2011, 230-49.

<sup>1363</sup> On violations of Article 16 of the ILC Articles as a consequence of *refoulement*, see, Nolte and Aust 2009, 17.

<sup>1364</sup> *Hirsi v Italy*, para 133. The Court refers here to *Chahal*, paras 104-105; *Jabari*, para 40 and 41; and *MSS*, para 359.

Libya at the material time in which push-backs took place.<sup>1365</sup> It follows that Italian authorities, in full knowledge of the facts, exposed intercepted refugees to inhuman and degrading treatment by removing them to Libya, which, *inter alia*, did not offer any guarantees against repatriation to Somalia and Eritrea.<sup>1366</sup> According to the Court, ‘it was for the national authorities, faced with a situation in which human rights were being systematically violated [...] to find out about the treatment to which the applicants would be exposed after their return.’ This positive obligation to acquire knowledge before carrying out a certain action in tandem with a third State might also influence the way in which complicity can be established.

Immediately after the first push-back operation, both the European Commission<sup>1367</sup> and several human rights organizations raised concerns about such practice by both urging the Italian government to stop forced return, and by highlighting the disturbing conditions in which migrants and refugees are compelled to live once in Libya—a country that does not have a national asylum system in place,<sup>1368</sup> is

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<sup>1365</sup> See, *Hirsi v Italy*, paras 123–6.

<sup>1366</sup> *ibid*, para 137. On the existence of the ‘knowledge’ requirement in the Italy-Libya cooperation, see also, Thomas Gammeltoft-Hansen, ‘The Externalisation of European Migration Control and the Reach of International Refugee Law’ in E Guild and P Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Martinus Nijhoff 2011) 295.

<sup>1367</sup> The former EC Vice-President, Jacque Barrot, affirmed that the high sea operations conducted by Italy could entail its responsibility because of the extraterritorial application of the ECHR.

<sup>1368</sup> Victims of discriminatory treatments and all kinds of violence, these people can be confined for indefinite periods of time in overcrowded prisons, subjected to incommunicado detention – as revealed by the UN Committee against Torture –

not party to the Refugee Convention,<sup>1369</sup> and does not even recognize the existence of refugees in Africa.<sup>1370</sup> Moreover, Italy should have known that Libya used to indiscriminately repatriate irregular migrants and refugees to countries of origin by means of bilateral readmission agreements: indeed, in 2004, the European Commission, after a technical mission to Libya, had collected and published statistics on returns.<sup>1371</sup> Additionally, the 2009 Protocol explicitly requires Italy to assist Libya in boosting migrants' repatriation. Thus, Italy should also have known the risks migrants and refugees would be exposed to, even if the command and direction of the operations had been entirely delegated to Libya.

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with no access to lawyers, asylum procedures, or legal remedies. See, UN Committee against Torture and Leif Holmstrom (ed), *Conclusions and Recommendations of the UN Committee against Torture: Eleventh to Twenty-second Sessions (1993–1999)* (Martinus Nijhoff 2000) 133 s C, para 5.

<sup>1369</sup> See, e.g., UNHCR, 'Follow-up from UNHCR on Italy's Push-backs' (Briefing Notes, 12 May 2009) <<http://www.unhcr.org/4a0966936.html>> accessed 4 January 2012; Amnesty International, 'Dichiarazione della Sezione Italiana di Amnesty International dopo i Nuovi Respingimenti di Migranti verso la Libia' (11 May 2009)

<<http://www.amnesty.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/2007>> accessed 20 August 2013; Human Rights Watch, 'Italy/Libya: Migrants Describe Forced Returns, Abuse: EU Should Press Italy to Halt Illegal Forced Returns to Libya' (21 September 2009) <<http://www.hrw.org/news/2009/09/17/italylibya-migrants-describe-forced-returns-abuse>> accessed 20 August 2013.

<sup>1370</sup> As declared by Gaddafi at a joint press conference with the Italian Prime Minister, 'Africans do not have problems of political asylum. People, who live in the bush, and often in the desert, don't have political problems [...].' See, John Hooper, 'Awkward photo? There may be more to come as Colonel Gaddafi visits Rome' *The Guardian* (11 June 2009) <<http://www.theguardian.com/world/2009/jun/10/gaddafi-visit-italy-berlusconi>> accessed 20 August 2013. It is also worth observing that the Libyan criminal code provides that returned migrants who have eluded migration controls, regardless of whether they are refugees or not, are detained for at least three months. See, UNHCR Submissions in *Hirsi v Italy*.

<sup>1371</sup> See, European Commission Report 2004, 'Technical Mission to Libya on Illegal Migration.'

In the circumstance of pre-border controls jointly carried out by Italy and Libya or by Libya alone, the conditions posed by Article 16 of the ILC Articles appear to be fully met. They are summarized as follows: first, however complicated the process of detecting the intention of a State is, the mental element of the Italian government seems to have reached a threshold sufficient to trigger its indirect responsibility. As required by paragraph a) of Article 16, to be internationally responsible, an aiding State should have acted ‘with knowledge of the circumstances of the internationally wrongful act.’ Not only does Italy’s intention to return migrants and refugees to an unsafe country patently emerges from the pronouncements and practice of the Italian government,<sup>1372</sup> but Italy was also able to base its safety appraisal upon an enormous variety of available information concerning the human rights situation in Libya.

Second, an unequivocal link exists between the facilitating act and the subsequent wrongful conduct. Although the provision of training, technical equipment, and funding does not amount *per se* to an unlawful practice, Italy’s indirect responsibility can, nonetheless, be inferred from its assistance to refugees’ return to Libya with full knowledge of the systematic human rights violations migrants and asylum seekers would suffer in the recipient country. Considering that Italy is obliged under international law to abide by the fundamental

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<sup>1372</sup> See, e.g., the Statement of the Ministry of the Interiors, Maroni.

principle of *non-refoulement*, cooperating with Libya in returning migrants and refugees to a territory where they would suffer inhuman and degrading treatment also satisfies paragraph b) of Article 16 requiring that ‘the act would be internationally wrongful if committed by [the assisting] State.’

### **7.8. Concluding remarks**

Push-backs to Libya were conducted between May and November 2009 without serious consideration of both the risk of *refoulement* and the lack of effective asylum legislation in the readmitting country. Italy’s independent responsibility under international law could, hence, potentially be invoked, especially in those cases where it executed interception and accompaniment operations using its own vessels. Externalization of migration controls on the part of EU Member States may generally entail a hazardous shift of responsibility to third countries, which are often mischaracterized as ‘safe’ without in fact offering asylum seekers safeguards comparable to those available within the EU.

This Chapter primarily sought to demonstrate that, although ‘readmission’ of intercepted migrants does not readily follow from the text of bilateral agreements for technical and police cooperation between Italy and Libya, these instruments are used to entrust a non-EU third country with the command and responsibility of patrol and

return operations, which are generally carried out in international waters or in the coastal waters of the third country itself. Since their purpose is to avoid evasion of migration controls by transporting unauthorized migrants back to the ports of departure, these activities of maritime border control tend to prevent *ab initio* EU Member States from exercising jurisdiction.

The 2009 push-backs of migrants and refugees do not have a clear legal basis, as can be seen in the incongruent arguments provided by the Italian government. Nonetheless, their content is vague enough to open the way to any kind of collaboration between Italy and Libya in what they call ‘anti-immigration activity.’ This study has two main findings. First, it proves that the wide-ranging series of accords between Italy and Libya – including the 2007 and 2009 agreements for technical and police cooperation and the 2008 Partnership Treaty – constitute the multifaceted legal and political scaffold supporting the practice of interdiction and deflection of undocumented migrants and refugees to the ports of embarkation.<sup>1373</sup> Second, the actual implementation of these arrangements can hamper refugees’ access to protection—the overarching concept, including *non-refoulement* and access to asylum procedures and effective remedies in the EU Member State the intercepted refugee strove to reach.

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<sup>1373</sup> The potential role of unpublished *ad hoc* notes exchanged between national authorities to obtain authorization for the return of intercepted migrants to Libya cannot be overlooked.

Bearing in mind that the customary principle of safety of life at sea should always be respected, in the case of the 2009 push-backs, migrants and refugees interdicted by Italian authorities on the high seas were not granted the right to access onshore asylum procedures, or to challenge the refusal of entry, but were taken on board in international waters off Sicily in order to be returned directly to Libya, where well-founded reasons existed to presume that their life and liberty would be threatened.<sup>1374</sup> When migration controls are entirely shifted to a third country, no chance exists for a EU Member State to monitor the fate of intercepted migrants and refugees. This Chapter shows, therefore, how international human rights law complements State obligations under the law of the sea by ‘[importing] an additional legal meaning to the term “place of safety” for the disembarkation of rescued migrants.’<sup>1375</sup>

International human rights bodies have made clear that extraterritorial jurisdiction does not rely on competence and legal

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<sup>1374</sup> Although States have the sovereign right to decide the forms of entry and stay in their territory, it is nevertheless important that stringent checks at the border and interception measures do not obstruct the identification of those with genuine international protection claims. See, Volker Türk and Frances Nicholson, ‘Refugee Protection in International Law: an Overall Perspective’ in E Feller, F Nicholson, and V Türk (eds), *UNHCR Refugee Protection in International Law* (Cambridge University Press 2003).

<sup>1375</sup> Efthymios Papastavridis, ‘Rescuing Migrants at Sea: The Responsibility of States under International Law’ (Academy of Athens, 27 September 2011) 38 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1934352](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1934352)> accessed 20 August 2013. To read more on the interplay between human rights law and law of the sea, see, Efthymios Papastavridis, ‘European Convention on Human Rights and the Law of the Sea: the Court of Strasbourg in Unchartered Waters?’ in Malgosia Fitzmaurice and Panos Merkouris (eds) *The Interpretation and Application of the European Convention of Human Rights* (Martinus Nijhoff 2013).

entitlements, but on factual authority and control,<sup>1376</sup> even in cases where bilateral agreements tend to blur jurisdiction and responsibility by displacing the theatre of action beyond territorial frontiers. However, EU Member States that cooperate with third countries in patrolling external maritime borders are not always responsible under human rights treaties. When migrants are directly halted by the authorities of the country of embarkation in its territorial waters or on the high seas and driven back to the ports of departure, refugees are prevented from entering the sphere of jurisdiction of a EU Member State.

Considering that very complex operational situations may be put into motion, a case-by-case approach is the most suitable strategy to determine the degree of involvement of a EU Member State in the performance of external migration controls. Core norms under international refugee and human rights law shall be applicable in every offshore operational context, regardless of whether non-EU third countries patrol and divert intercepted migrants and refugees autonomously or in conjunction with a EU Member State. Thus, the last Section of the Chapter contends that Italy could engage indirect responsibility, under Article 16 of the ILC Articles, for its ‘aiding and assisting’ Libya in infringing a primary human rights obligation (*non-*

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<sup>1376</sup> Milanovic 2008, 428.



*refoulement*) through the unlawful containment of irregular migration by sea.

In this respect, the multifaceted framework of economical and technical support delivered to Libya by the Italian government, its innumerable pronouncements in favor of the return praxis, its positive obligation to assess Libya's safety before enforcing expulsion, as well as its failure to heed the recommendations of human rights organizations to stop removals to Libya, despite the wide availability of reliable information describing the miserable human rights situation of migrants and refugees in that country, corroborate the view that the mental element of the Italian government reached a threshold sufficient to potentially trigger its liability.

## **Chapter 8. Conclusion**

### **8.1. On the intertwining between agreements linked to readmission and refugee rights**

The central concern of this thesis was to develop the concept of *agreements linked to readmission* and thereby examining whether the implementation of these agreements may hamper refugees' access to protection in Europe. The wording 'agreements linked to readmission' has therefore been used to grasp the plethora of bilateral accords concluded by EU Member States with third countries both for smoothing the forced return of irregular migrants with no title to stay any longer within their territory, and for preventing arrivals by outsourcing or off-shoring migration controls.

As knots on a thread, readmission agreements, diplomatic assurances, and agreements for technical and police cooperation have been hitherto analysed in sequence both to shed light on their main features and tease out a number of situations in which their actual implementation undermines core refugee rights. This study has been triggered by the assumption that States increasingly tend to connect asylum with the fight against irregular immigration, thus often myopically adopting asylum measures driven by strict border control considerations.

These final pages will draw together all the main findings and suggestions proposed, and thus summarize the concluding remarks. The key question this thesis aimed to address was whether the implementation of bilateral agreements linked to readmission can undermine refugees' access to protection. 'Protection' is here understood as the combination of the right to *non-refoulement*, foundational principle of refugee law, and two correlated procedural entitlements, namely, the right to access asylum procedures and the right to an effective remedy, before return. In view of providing a substantive answer to this crucial issue, three sub-questions were examined in this study. They concerned: first, the content and scope of the right to *non-refoulement*, as well as the right to access asylum procedures and effective remedies before return; second, the relationship between agreements linked to the readmission of unauthorized migrants and the decision to return refugees to countries of origin or transit; third, the extent to which the text of bilateral agreements linked to readmission can be deemed compatible with core refugee protection standards, as enshrined in the main international refugee and human rights law treaties.

In reconstructing the meaning of core refugee rights, Part I of this thesis explored, through the lens of international human rights and refugee law, the content and scope of the relevant protection standards binding EU Member States each time that they deal with refugees'

admission and readmission. Occasional reference was made to EU law, especially the CFR, which, after the entry into force of the Lisbon Treaty lies at the heart of the Union human rights paradigm. Because of the vastness of the issue concerning the obligations of States under international and European law in the frame of immigration controls, the emphasis of Part I drew on the right to *non-refoulement*, and the right to access asylum procedures and effective remedies before removal. These rights are described as overarching terms whose full meaning can be better shaped through the use of different international refugee and human rights instruments, which require EU Member States to comply with a number of obligations every time they decide to return an asylum seeker apprehended either within the country or at the border of the host country. In addition, some international instruments (*in primis* the ECHR) more clearly than others recognize these obligations to apply also when migrants and refugees are intercepted outside the territorial jurisdiction of the would-be destination State.

With regard to the relationship between agreements linked to readmission and the return decision, my conclusion is that none of these three categories of bilateral arrangements constitutes *per se* the legal basis for the return of irregular migrants and asylum seekers to third countries. Decisions to remove an individual, refuse asylum, or exclude her from protection are not taken by States by means of one

of the selected agreements linked to readmission. However, they all facilitate the enforcement of the return orders and, to a greater or lesser extent, influence the choice of the host, or would-be host State to transfer unauthorized/unwanted foreigners to the authorities of a third country, thus hampering, in certain circumstances, refugees' access to protection, that is to say the combination of the right to *non-refoulement* and the right to access asylum procedures and effective remedies.

The quick answer to the question on the compatibility of the *text* of agreements linked to readmission with refugee rights is that no noteworthy issue of inconsistency seems to rise. Readmission agreements constitute purely administrative tools serving the purpose of smoothing the final stage of the return procedure for irregular migrants, rejected refugees, and asylum seekers whose claims will be examined elsewhere. They do not define criteria for the legality of a person's presence in a EU Member State, as this assessment is made by national authorities in compliance with domestic administrative law and the procedural safeguards enshrined in international and EU law. Similarly, diplomatic assurances for the fair and human treatment of the deportee tend to be very detailed, especially when formalized within written standardized MoUs. Finally, 'readmission' of intercepted migrants and refugees does not readily follow from the text of bilateral agreements for technical and police cooperation,

which are aimed to combat irregular migration to Europe through a system of joint patrols with the country of embarkation.

The seeming compatibility of the text of agreements linked to readmission with refugee rights is inherent to their personal scope of application. Indeed, these instruments are specifically designed to tackle only the return of *irregular migrants*. However, mixed flows are a *fait accompli*. Asylum seekers can be returned by means of a readmission agreement on a ‘safe third country’ ground, or can travel onboard the same boat along with other undocumented migrants intercepted at sea. In practice, the lives of these two vulnerable categories of foreigners are so intertwined that any analysis limited to assessing the compatibility of the *text* of agreements linked to readmission with refugee rights - without considering how their *actual implementation* also involves people seeking asylum - would be an insufficient and short-sighted one.

Therefore, with regard to the main research question on the impact of agreements linked to readmission on refugee rights, three key points need to be highlighted here. First, the fact that readmission agreements do not offer the legal basis for return decisions, as argued by Coleman in 2009, is not, in my view, the end of the story. Indeed, in situations of informal border controls and emergency, the existence of a *readmission agreement* may boost the use of swift and accelerated identification and return procedures with the risk of

removing asylum seekers, as unauthorized migrants, to allegedly ‘safe third countries.’ Second, the actual negotiation of *diplomatic assurances* in concrete situations does not only violate the principle of confidentiality of asylum applications, but it can also influence return decisions to countries where there is a risk of torture and inhuman and degrading treatment. Access to protection might therefore be hampered, in particular if assurances are exchanged with regard to asylum seekers sent to ‘safe third countries’ before an examination of their asylum claims is completed. Third, the implementation of bilateral *agreements for technical and police cooperation* aimed to intercept and return migrants and refugees to ‘unsafe’ countries of embarkation, before they are able to enter the territorial jurisdiction of a EU Member State and claim asylum, *de facto* undermines refugees’ access to protection.

From the foregoing, it emerges that the enforcement of bilateral agreements linked to readmission can jeopardize the right to *non-refoulement*, the right to access asylum procedures, and the right to an effective remedy before return. This result is not, however, uniform but assumes various degrees of intensity according to the right under consideration, the agreement at hand, as well as the time and place of application of the agreement itself—that is to say the point in which the State encounters the refugee. Therefore, studying all these accords as part of the overarching ‘agreements linked to readmission’ concept

does not only give us the possibility of unveiling their similarities and their common purpose – that is facilitating the return and readmission of unauthorized/unwanted foreigners to countries of origin and transit - but also, the opportunity to disclose their divergences and their altered paths. At the same time, getting to the end of this research journey, I can feel to conclude that there is more communality between these three categories of agreements than expected, in particular with regard to the negative impact they might have on refugees' access to protection. Having stated that, such an impact is mutable, and as a consequence, the follow up to the analysis varies from accord to accord.

## **8.2. The way forward**

This conclusive Section will provide a general assessment of the three categories of agreements linked to readmission by summing up the main points of interest for this subject. To start with, I do not seek to question the States' entitlement to both exercise their sovereignty and control their borders, even by means of bilateral cooperation with third countries. The argument is rather that EU Member States must always guarantee the rights of asylum seekers falling under their jurisdiction, whether they are found within their borders, at the border, or outside their borders. The crucial point is that EU Member States should not cooperate on migration control with entities that do not



abide by the law. The ECtHR emphasized this concept in *Al-Saadon v UK* by holding that ‘it is not open to a Contracting State to enter into an agreement with another State which conflicts with its obligations under the Convention.’<sup>1377</sup>

In relation to the way forward in the return/readmission process, and considering the different traits of the selected agreements, I have made a number of recommendations that may help States ensure a better protection of the rights of refugees subjected to a formal or informal return decision. First, diplomatic assurances – whether framed or not within MoUs - should not be considered reliable when issued by governments that practice torture in a systematic manner, have previously infringed similar undertakings,<sup>1378</sup> or notoriously fail to investigate the allegations of prohibited treatment against other detainees.<sup>1379</sup>

Second, where EU Member States engage in the negotiation of arrangements on extraterritorial migration control with third countries, they shall ensure that sufficient guarantees toward refugees are in place. This might imply the insertion, within the text of so-called agreements for technical and police cooperation, of specific clauses

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<sup>1377</sup> *Al-Saadon v UK*, para 138.

<sup>1378</sup> In the *Agiza v Sweden* case, for example, the Committee against Torture held that Egypt could not be relied upon by Sweden because it had already breached other clauses in the assurances, such as fair trial.

<sup>1379</sup> *Toumi v Italy* para 53. See also, *Ryabikin v Russia* App no 8320/04 (ECtHR 19 June 2008) para 119.

designed both to exclude asylum seekers from the personal scope of application of the accords and to ensure that they can express the reasons of their fear to return. However, echoing *Al-Saadoon*, I also believe bilateral agreements for technical and police cooperation should not be negotiated with countries that produce the largest numbers of refugees, or with transit countries that are notoriously known for the poor treatment meted out to migrants and refugees on their territory.

Third, as readmission agreements do not generally include separate provisions on refugees, I consider an added value the insertion of both non-affectation clauses and procedural human rights clauses creating extra safeguards for asylum seekers running the risk to be removed as unauthorized migrants, to allegedly ‘safe third countries.’ To this end, this thesis make a number of concrete proposals of draft provisions as a platform for further discussion among legal scholars and policy-makers.

I am confident the analysis developed in this work with regard to a number of case studies can be extended to the same categories of agreements negotiated by EU Member States with other third countries to govern the return of unauthorized/unwanted migrants to States of origin or transit. Considering the role that law can play in promoting refugee rights, the suggestions developed throughout this thesis can foster continuous progress in refugee protection and

improve the understanding of readmission agreements, diplomatic assurances, and agreements for technical and police cooperation, which often lack of both transparency and a comprehensive account.

In Chapter 5, I argue that the insertion of non-affection clauses and itemized procedural human rights clauses within the text of future bilateral readmission agreements should be positively considered if we want to see them acting as effective conditionality tools. Despite the costs deriving from a drafting process that gives centrality to human rights, I argue that the alternative of incurring in international responsibility for violating the *non-refoulement* obligation following the implementation of a readmission agreement would definitively be more troubling. Beyond enhancing legal certainty for governments and frontier authorities, non-affection clauses and human rights procedural safeguards would moreover present the advantage of making fundamental rights part of ordinary business and bilateral cooperation, rather than principles merely subject to specialized human rights instruments, thereby emphasizing the implicit acceptance by both parties, during return operations, of a ‘human rights *acquis*.’

Chapter 6 involves diplomatic assurances within the broad category of agreements linked to readmission. The bombing attacks in September 2001 and July 2005 constituted a turning point in the strategic approach of the US, the UK, and their allies more generally,

to national security, by reinforcing cooperation with countries of origin of ‘dangerous radicals.’ However, I am of the view that balancing arguments weighing up national security and the rights of foreigners should not be used to excuse derogations from fundamental human rights, such as *non-refoulement* to torture and inhuman treatment.<sup>1380</sup> Moreover, as earlier explained, I question the reliability of diplomatic assurances issued by governments that practice torture in a systematic manner, even if the deportee has been elevated to a case of high diplomatic significance. In a context in which the removal of suspected terrorists to unsafe countries has become highly a politicized issue, likely to be subjected to electoral interests myopically pandering to the xenophobic or panic-stricken reactions of public opinion, restating the salience of human rights as justiciable obligations becomes all the more urgent.

Chapter 6 also seizes a worrisome anomaly of the deportation with assurances system, namely that States deem pointless requesting assurances against torture from countries other than those that notoriously practice it. In the vicious circle created by security-related Memoranda, torture becomes, therefore, the prerequisite for keeping out certain countries from the arena of cooperation on the safe removal of third country nationals, but at the same time, and paradoxically, the *conditio sine qua non* for this cooperation. As

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<sup>1380</sup> On this point, see, Guy S Goodwin Gill, ‘Current Challenges in Refugee Law’ in Gauci, Giuffré and Tsourdi 2014, 19.

Prometheus' liver, eaten by a giant eagle all day long, became whole again during the night - in an endless cycle - similarly the combination diplomatic assurances/torture is set to ever-regenerate the same dilemmas and the same hurdles, as an irreconcilable oxymoron.

Chapter 7 collects and analyses both instances of State practice and the agreements for technical and police cooperation between Italy and Libya. In my view, such a review is not only of value in itself, but also, the results could serve as a point of reference in similar cases for courts and tribunals, as well as legal practitioners and policy makers. Joint offshore migration patrols carried out through bilateral agreements between a EU Member State and a third country have become increasingly attractive because of the presumption that States can be divested of their refugee and human rights law obligations by moving beyond their territorial frontiers. However, in light of the current drive toward reinvigoration of these cooperation agreements, this work aims to enhance EU governments' awareness that they cannot be divested of both their previously-contracted human rights obligations and their international responsibility (either direct or indirect) every time they offshore, or outsource, migration controls to the authorities of a third State.

Continuing to dig deeper into this topic, and as a next step, I identify four strands of enquiry on issues that remain unresolved in

this thesis, or continue to be unsettled in international law. First, doctrine should continue exploring the concrete meaning of the ‘effective control’ element as a facet of the concept of jurisdiction. Such a study would help lawyers, judges, and State authorities clearly establish whether, beyond any coercive conducts imposed on a person through the use of direct force, jurisdiction under human rights law can be engaged also when less intrusive measures entailing operations of looser-control at sea are in place.

Second, scholarship should more thoroughly address the issue of the legal status of diplomatic assurances. Such a research would contribute to provide an answer to three interrelated questions: i) whether diplomatic assurances are mere political commitments to act toward certain agreed ends, without any legally binding effect; ii) if so, why States need to frame their human rights commitments within bilateral political agreements, which replicate standards that have already been enshrined within international human rights treaties; and iii) whether such a reliance on bilateral *diplomatic* assurances can defy the protection of fundamental rights, *in primis* the prohibition of torture, inscribed within international human rights *treaties*.

A third strand of enquiry could be directed to developing the debate on the different kinds of responsibility arising from joint operations of migration control involving States as well as international organizations. I refer in particular to the study of joint

responsibility under Article 47 of ILC Articles, whereby several States can be held directly responsible for the commission of the same wrongful act. A connected question concerns how responsibility can be determined - from the perspective of both international and EU law - when the EU itself, through its organs and/or agencies, such as Frontex, operates in extraterritorial settings of migration control. As a fourth point, future research is needed to keep monitoring State practice of territorial and maritime borders control to ascertain whether diplomatic assurances and other types of formal or informal agreements are utilized both to prevent migrants and refugees' admission in Europe and to facilitate their return to countries of origin and transit.

To conclude, this thesis aims to develop the concept of *readmission* as a broad notion encompassing diverse cooperative arrangements of migration control. It reveals, additionally, the baleful impact readmission policies at times may have on refugees' access to protection, in particular the right to *non-refoulement*, as well as the right to access asylum procedures and effective remedies before return. Despite the fact that asylum is an intensely political topic and one which States tend to adopt through draconian measures so as to stop irregular migration and remove unwanted foreigners, this study shows to what extent international human right law and refugee law

‘exercise control’ over State action both within or beyond borders. It also pulls together areas of law and policy that are generally considered neatly distinct, and therefore unrelated also in a temporal sense. Return and readmission have indeed been studied *vis-à-vis* refugees’ access to protection, in search of a link that at face value appears overly remote. However, a fully-fledged analysis intertwining legal and practical issues reveals how in certain operative scenarios, especially in situations of extraterritorial migration controls, admission and readmission tend to overlap and answers are more convoluted than expected. It is this complexity that invites for continued scholarly and legal attention.



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