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Legal Rights and Obligations of
States with Regard to Interception at
Sea: Extraterritorial Application of
the Principle of *Non-refoulement*

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Contents

SUMMARY	3
PREFACE.....	4
ABBREVIATIONS	5
1 INTRODUCTION	6
1.1 BACKGROUND.....	6
1.2 PURPOSE AND RESEARCH QUESTIONS	9
1.3 METHODOLOGY AND OUTLINE	10
1.4 DELIMITATION.....	11
2 THE PRINCIPLE OF NON-REFOULEMENT AND INTERNATIONAL HUMAN RIGHTS LAW.....	12
2.1 THE <i>NON-REFOULEMENT</i> PRINCIPLE IN THE REFUGEE CONVENTION	12
2.2 THE COMPLEMENTARY PROTECTION AND THE PRINCIPLE OF <i>NON-REFOULEMENT</i> IN HUMAN RIGHTS LAW	14
2.3 THE <i>NON-REFOULEMENT</i> PRINCIPLE AS A PRINCIPLE OF CUSTOMARY INTERNATIONAL LAW	15
3 EXTRATERRITORIAL APPLICATION OF THE HUMAN RIGHTS TREATIES.....	17
3.1 DEFINING EXTRA-TERRITORIAL APPLICATION	17
3.2 THE MEANING OF JURISDICTION.....	18
3.2.1 <i>Jurisdiction In General International Law</i>	18
3.2.2 <i>Jurisdiction In The Human Rights Context</i>	21
3.3 JURISPRUDENCE ON THE EXTRATERRITIOAL APPLICATION OF HUMAN RIGHTS	22
3.3.1 <i>Territorial Control</i>	23
3.3.1.1 <i>Territorial control in case of occupied territories</i>	23
3.3.1.2 <i>The ECtHR "effective territorial control" concept</i>	25
3.3.2 <i>Control Over Persons</i>	28
3.3.3 <i>"Cause And Effect" Approach For Establishing Jurisdiction</i>	30
3.3.4 <i>Consular Jurisdiction And Flag State Jurisdiction As Part Of Effective Control</i>	31
3.4 SUMMARY REMARKS	34
4 APPLICABILITY OF THE PRINCIPLE OF NON-REFOULEMENT WITH REGARD TO INTERCEPTION AT SEA	35
4.1 TERRITORIAL SEA	36
4.2 CONTIGUOUS ZONE.....	38
4.3 HIGH SEAS.....	39
4.3.1 <i>Extraterritorial Application Of The Principle Of Non-refoulement</i>	40
5 CONCLUSION.....	42
BIBLIOGRAPHY	43
TABLE OF CASES.....	47

Summary

The migration of people by sea is not a new phenomenon. Since early days, people whose lives have been under threat or people in search of better living conditions often have taken this route. However, today States are trying to prevent every attempt of irregular migration as they have established policies of interception at sea. They often engage in interceptions without taking into consideration the condition of the persons who have been intercepted and their need for international protection. Moreover, States recently have advanced their interception practice on the high seas, claiming that they do not have any international obligations towards the persons that have been intercepted. However, as the thesis will argue, migrants, asylum seekers or refugees are not left in “legal black hole” when they are intercepted beyond State’s territorial borders, in an extraterritorial context. Human rights including the principle of *non-refoulement* as a core norm of the refugee law, also apply in extraterritorial context wherever a State exercises jurisdiction. Any action by a State, which does not comply with their human rights obligations, will result in a violation of these obligations including the principle of *non-refoulement*.

Preface

This thesis is written as part of my studies at the Master's program in International Human Rights Law at the University of Lund in Sweden in the period of 2010-2012. The greatest debt of gratitude I owe to my supervisor, Dr Leila Brännström, who has provided me with support and guidance throughout the writing process. I also want to express my gratitude to the staff of the Faculty of Law, the Raoul Wallenberg Institute of Human Rights and Humanitarian Law and to all my colleagues and friends. Finally, I want to extend my gratitude to the members of my closest family who have been supportive as ever. Since this is my first research project, I want to dedicate it to my parents.

Abbreviations

ACHR	American Convention on Human Rights
CAT	Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ExCom	Executive Committee on the International Protection of Refugees
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
OAU	Convention Governing the Specific Aspects of Refugee Problems in Africa
PCIJ	Permanent Court of International Justice
UNHCR	United Nations High Commissioner for Refugees
UNCLOS	United Nations Convention on the Law of the Sea
UN	United Nations
US	United States

1 Introduction

1.1 Background

The interception at sea, as an immigration control measure, is used by States in order to control irregular migration processes and deter irregular migrants from reaching their intended destination. Today, States also implement these immigration control measures in an extraterritorial context, beyond State's territory. With the advancement of the immigration control measures beyond their territory, States try to circumvent the international obligations arising from international human rights and refugee law they have agreed to. However, as the thesis is arguing, the externalization of the immigration control measures beyond the territory of the State will not relieve the State of its human rights and refugee law obligations, in particular obligations arising due to the principle of *non-refoulement* towards the persons that have been intercepted at sea. In any situation of implementing interception operations at sea, if States exercise jurisdiction over the intercepted vessels or persons, then they are obliged to respect the international obligations that they have previously agreed to.

Interception at sea in migration context occurs when mandated authorities representing a State, locate a boat, prevent its onward movement, and either take the passengers and crew onto their own vessel, accompany the vessel to port, or force an alteration in its course.¹ It is important to note, that these boat arrivals often carry mixed composition of persons aboard the vessels including asylum seekers, refugees and persons eligible for subsidiary or complementary protection, economic migrants, victims of trafficking or persons at risk of being trafficked.² It is the State's duty to recognize the mixed composition of persons and ensure that the immigration control policies including the interception measures will not deprive them from their fundamental human rights.³ Moreover, the interception measures must include clear guidelines on the identification and referral of persons who may need international protection, and on other measures potentially affecting rights, such as deprivation of liberty and restriction on freedom of movement.⁴ Intercepting these mixed flows of individuals at sea and not offering international protection to persons in need would breach the international human rights obligations of States including the principle of *non-refoulement*.

¹ Joanne van Selm and Betsy Cooper, Report: The new "boat people": Ensuring Safety and Determining Status, (Migration Policy Institute, January 2006) 5.

² Report: The interception and rescue at sea of asylum seekers, refugees and irregular migrants, Committee on Migration, Refugees and Population, Rapporteur: Mr Arcadio DÍAZ TEJERA, Spain, Socialist Group, (1 June 2011) 8.

³ Ibid 21.

⁴ Ibid.

Although it often results in human rights violations, several States still use the interception at sea as a practice of controlling irregular migration. In the European context, Italy is one of the States that exercises interceptions as a means to control and prevent irregular migration. Regarding the Italian experience, the first attempt of immigration control was made in 1997, in response to the arrival of 30 000 irregular migrants from Albania.⁵ The legal basis for this interception of migrants and return of vessels was given in a 1997 bilateral agreement between Italy and Albania.⁶ The interception was exercised both in international and Italian waters, while the Albanian authorities used different means to prevent the departure of boats.⁷ Within the period of 1998-2003 the number of irregular migrants has gradually decreased, notwithstanding an increase in 1999 when 46,481 migrants were intercepted.⁸

As a primary destination, Italy has also been involved in interceptions of vessels, departing from North Africa, generally carrying persons from Libya but also Tunisia, Morocco and Algeria.⁹ Thus, in 2008, approximately 36 000 persons arrived in Italy by sea and 75% of these applied for asylum. Moreover, around 70% of all asylum applications, received by Italy, were from persons arriving by boat.¹⁰ In total 141,245 migrants have been registered as arriving by sea at the island of Lampedusa or Sicily in the period of 2002-2008.¹¹ Starting from 2009, Italy was intercepting vessels in international waters off Lampedusa, taking the migrants on board and returning them to Libya.¹² The development of this practice of intercepting migrants in international waters was based on the bilateral cooperation between Italy and Libya and the several agreements concluded between these two countries.¹³ Although the interception operations performed by Italy had a legal entitlement in the bilateral agreements, with the interception of vessels departing from Libya and returning them back to the country of departure, Italy was in breach of its human rights obligations including the principle of *non-refoulement*. This was also confirmed in the most recent decision of the European Court of Human Rights (ECtHR).¹⁴

The arrival by sea of migrants, asylum seekers or refugees and the phenomenon of "boat people" is certainly not a new one, and not one that is particular or exclusive to Europe.¹⁵ Thus, examples of migrants intercepted

⁵ Bernard Ryan and Valsamis Mitsilegas, *Extraterritorial Immigration Control: Legal challenges* (Martinus Nijhoff publishers, 2010) 31.

⁶ Ibid.

⁷ Paola Monzoni, Sea- Border Crossings: "The Organization of Irregular Migration to Italy, Mediterranean Politics" 12 (2007) 172.

⁸ van Selm and Cooper (n 1) 58.

⁹ Report (n 2) 7.

¹⁰ Ibid 8.

¹¹ Ryan and Mitsilegas (n 5) 32.

¹² Matteo Tondini, "Fishers of Men? The interception of Migrants in the Mediterranean Sea and their Forced Return to Libya", (Inex paper October 2010) 4.

¹³ Ibid.

¹⁴ *Hirsi Jamaa and others v. Italy*, Application No.27765/09, Judgment of 23 February 2012

¹⁵ Report (n 2) 7.

at sea can be also found in the State practices of the United States of America (US) as well as Australia.

The US interception practices have been taking place since 1981 and have mainly involved the interception of vessels departing from Caribbean countries. The interception practices came into effect as a response to the “Mariel Boatlift” from Cuba in 1980 when 124,776 Cuban migrants arrived in the US.¹⁶ Later, following the Cuban example, other refugees or persons in need of international protection attempted to reach the US shores by boat.¹⁷ However, in order to curtail immigration by persons departing from Haiti, on September 28 1981, US President Ronald Reagan issued an executive order authorizing interception which declared, in part, that “the entry of undocumented aliens from the high seas is hereby suspended and shall be prevented by the interdiction of certain vessels carrying such aliens.”¹⁸ The US interception practice continued to be effective also in the following years. Thus, in 1994 in the Straits of Florida, the US government implemented interception as an answer to another attempted boatlift and prevented the entry of illegal migrants from Cuba to the US.¹⁹ During this operation 10,190 Cubans were intercepted.²⁰

The third largest group of irregular migrants, intercepted by the US authorities, departed from the Dominican Republic with peak of arrivals being noted in 1995-1996.²¹ According to the figures of the US Coast Guard, in 2004, the number of intercepted Dominicans was more than a half of the nearly 10,000 interceptions in the Caribbean.²² It should be noted that the US interception policy is quite controversial since the US government’s position, supported by the Supreme Court, is that the international obligations arising from the 1951 Convention relating to the Status of Refugees do not apply beyond territorial waters²³. However, this decision of the Supreme Court has been highly criticized.²⁴ The US interception practice has served as a model for the development of other States’ intercepting practices. Such was the case with Australia that modeled its “Pacific Solution” or “Pacific Plan” upon the USA’s Caribbean Plan interception policy.²⁵ The “Pacific Solution” concerned vessels mainly

¹⁶ Kathleen Newland, “The US and the Caribbean” in Joanne van Selm and Betsy Cooper, *The new “boat people”: Ensuring Safety and Determining Status*, (Migration Policy Institute, January 2006, 72.

¹⁷ Ibid.

¹⁸ Executive order 12324, 46 Federal Register 48109 (29 September 1981).

¹⁹ Newland (n 16) 74.

²⁰ This figure is notably more than the total intercepted during the decade of 1983-1993, Ibid.

²¹ Ibid 75.

²² US Coast Guard “Alien Migrant interdiction” : <http://www.uscg.mil/hq/cg5/cg531/AMIO/FlowStats/currentstats.asp> (accessed 2 may 2012).

²³ *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993).

²⁴ James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, Cambridge 2005) 336-339.

²⁵ Susan Kneebone, “The Pacific Plan: The provision of effective protection?” (2006) *International Journal of Refugee Law* 18, 696, 697.

arriving from Indonesia carrying with them migrants from Afghanistan with possible claims for protection as refugees²⁶. It arose as an answer to the arrival of the Norwegian registered container ship, the MV Tampa, with a cargo of 433 asylum seekers in the waters off Australia's Christmas Island in late August 2001.²⁷ The main characteristic of the "Pacific solution" was that it excised certain remote islands, coastal ports and northern coastal stretches as well as territorial waters from Australia's "migration zone" so as to prevent the making of valid claims in those places.²⁸ The asylum seekers that arrived in these excised territories became "offshore entry persons" that may apply for asylum with the United Nations High Commissioner for Refugees (UNHCR), but Australia maintained that they had no obligation to grant them visa or entry to mainland territory.²⁹ Moreover, these "offshore entry persons" were prohibited from bringing legal proceedings to challenge their detention and transfer.³⁰ The Australian government proposed that all "designated unauthorized arrivals" be transferred to Nauru or Papua New Guinea for offshore asylum processing.³¹

With the "Pacific Solution" and the excision of territories Australia intended to circumscribe the international obligations that they owed to people in need of international protection, such as the asylum seekers arriving by sea. The excision of territory, as a means of denying access to asylum procedures, may constitute a violation of Australia's obligations arising from the 1951 Refugee Convention as well as the obligations arising from different human rights instruments and customary international law.³²

1.2 Purpose and Research Questions

The purpose of the thesis is to give a comprehensive overview of the issue regarding vessels carrying migrants, asylum seekers and refugees intercepted at sea, in order to argue that these persons who are in need of international protection are not left in a legal vacuum because of the characteristics of the environment where they have been intercepted, namely the sea. Hence, the thesis will analyze the legal rights of States to intercept vessels carrying migrants, asylum seekers or refugees at sea and their obligations arising out of the act of interception, in particular obligations arising due to the principle of *non-refoulement*. The ultimate question that the thesis will try to answer is whether and under which conditions the principle of *non-refoulement* is applicable, with particular attention paid to the extraterritorial context. It has been affirmed that the principle finds

²⁶ Ibid 696.

²⁷ Ibid 697.

²⁸ Migration Amendment (Excision from Migration Zone) Act 2001; Kneebone (n 23) 697.

²⁹ T.Gammeltoft- Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press, Cambridge, 2011) 116.

³⁰ Migration Act 1958, section 494AA.

³¹ G. S. Goodwin- Gil and Jane McAdam, *The Refugee in International Law* (Oxford: 3rd Ed.2007) 255-6.

³² Ibid 257.

expression (whether explicit or implicit) in human rights law. Having that in mind, the paper is arguing that the principle of *non-refoulement* should also have an extraterritorial application because of the extraterritorial application of human rights, which in spite of being contested of States, has been affirmed in many occasions. If States exercise jurisdiction in any occasion of intercepting a vessel, then they are obliged to respect human rights obligations including the principle of *non-refoulement*.

1.3 Methodology and Outline

The nature of the present research focuses on establishing *lex lata*. Thus, relevant international human rights instruments and jurisprudence by different human rights bodies will be analyzed in order to provide an answer to the research question. The author is aware that *lex lata* is inherently not able to provide ready-made answers and that its reconstruction necessitates the construction of normative considerations. However on the whole, the present research attempts to further expand the application of international human rights law, in particular the principle of *non-refoulement*. This attempt of the author finds support in the words of Milanovic who states that: ‘one could also view this phenomenon as a corollary of the widespread ‘humanization’ that international law has been subjected to under the influence of human rights’.³³

As was already mentioned, the ultimate question that the thesis will try to answer is whether and under which conditions the principle of *non-refoulement* is applicable also in an extraterritorial context. In order to answer the question, the thesis, in the second chapter, puts forward arguments that the principle of *non-refoulement*, although primarily established in refugee law, is also a human right principle because it finds expression in human rights law. It also argues that today the principle of *non-refoulement* is a principle of customary international law. The third part of the paper will examine and analyze the extraterritorial application of human rights. The chapter first analyzes the concept of jurisdiction in general international law and human rights respectively. Decisions from various human rights bodies will be analyzed, in order to affirm the extraterritorial application of human rights. The findings made in this chapter, the most important of which is that human rights are applicable extraterritorially, will be used as a basis for the next chapter. The fourth chapter will analyze the applicability of the principle of *non-refoulement* with regard to interception at sea and the legal rights and obligations of States arising from the implementation of these intercepting policies in the different maritime zones. Having in mind the arguments put forward in the second chapter and the arguments put forward in the third chapter, this chapter will argue that the principle of *non-refoulement* also applies extraterritorially, because it is part of human rights law. It will be argued

³³ Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy*, (Oxford University Press, 2011) 6.

that whenever States exercise jurisdiction their human rights obligations including the principle of *non-refoulement* will be triggered.

1.4 Delimitation

The aim of the thesis is to analyze the interception at sea as an immigration control measure. The paper will not examine other immigration control measures such as the visa requirements or cooperation with carriers and their compliance with human rights and refugee law. The interception at sea as an immigration control measure was chosen by the author because of the specific environmental circumstances of the area where these interceptions occur and because of the fact that States often argue that their actions or conduct towards the persons intercepted at sea, particularly on the high seas, are not governed by any international obligations, under human rights or refugee law.

2 The Principle Of *Non-refoulement* And International Human Rights Law

2.1 The *Non-refoulement* Principle In The Refugee Convention

The *non-refoulement* principle as enshrined in Article 33 of 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol (hereinafter Refugee Convention) provides that:

- “1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”

The first paragraph of the Article 33 sets out an obligation for States not to return or remove a person to the territories where this person will be at risk, regardless of whether those territories are the country of origin of the person concerned.³⁴ As the only guarantee for refugees, the principle is often referred to as the “cornerstone” or “centerpiece” of the international refugee protection regime.³⁵ The scope of application of Article 33, in relation to the category of individuals protected by this norm, needs to be examined. In this regard there has been some debate about whether Article 33 offers protection from *refoulement* only to those formally recognized as “refugees” under the 1951 Refugee Convention³⁶ or whether its coverage also extends

³⁴ E. Lauterpacht and D. Bethlehem, “*The Scope and Content of the Principle of Non-refoulement*”: in Erika Feller, Volker Türk, Frances Nicholson (eds), in “*Refugee protection in International law: UNHCR's global consultations on international protection*” (2003) 122.

³⁵ Gammeltoft- Hansen (n 29) 44.

³⁶ Article 1 A (2), The term “refugee” shall apply to any person who: “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.

to asylum-seekers.³⁷ Hathaway is in support of the latter stating that: ‘the duty of *non-refoulement* inheres on a provisional basis even before refugee status has been formally assessed by a state party’.³⁸ He further argues that ‘because it is one’s *de facto* circumstances, not the official validation of those circumstances that gives rise to Convention refugee status, genuine refugees may be fundamentally disadvantaged by the withholding of rights pending status determination’.³⁹ Moreover, drawing a distinction between genuine refugees and asylum seekers will also negatively affect the persons that are intercepted at sea. It is a fact that both groups of persons are in need of international protection. Not offering protection to those who have not yet had their status declared by the intercepting State, such as the asylum seekers, would lead to a breach of the principle of *non-refoulement*. Thus, the pending status determination and official recognition of a refugee may negate the protection under Article 33. This view has been also supported by the UNHCR.⁴⁰

The principle of *non-refoulement* does not explicitly guarantee access to the territory of the destination state or admission to the procedures granting the refugee status.⁴¹ However, today a broader interpretation of the *non-refoulement* has been established.⁴² Noll gives an interesting definition of the principle of *non-refoulement* that supports today’s approach: ‘*Non-refoulement* is about being admitted to the State community, although in a minimalist form of non-removal. It could be described as a right to transgress an administrative border’.⁴³ This affirms that the principle is also applicable in situations arising at the borders, which means that States are not allowed to reject at the frontier persons who have a well-founded fear of persecution.⁴⁴ This view was also supported by the UNHCR Executive Committee (ExCom) on the International Protection of Refugees Conclusion in its Conclusion No.6 (XXVIII) which explicitly affirmed the ‘fundamental importance of the observance of the principle of *non-refoulement*- both at the border and within the territory of a State.’⁴⁵ Thus it

³⁷ B. Miltner, “*Human Security and Protection from Refoulement the Maritime Context*” in Alice Edwards and Carla Ferstman (eds) “*Human Security and Non-Citizens*” *Law, Policy and International Affairs* (Cambridge University Press, Cambridge, 2010) 202.

³⁸ Hathaway (n 24) 303.

³⁹ Ibid.

⁴⁰ According to the UNHCR: A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is *recognised* because he is a refugee. UNHCR 1979: Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng/REV.1 (Reedited, Geneva, January 1992) para.28.

⁴¹ Seline Trevisanut, “The Principle of *Non-refoulement* at Sea and the Effectiveness of Asylum Protection” Volume 12 (2008) Max Planck Yearbook of United Nations Law 205, 208.

⁴² Goodwin-Gill and McAdam (n 31) 208.

⁴³ G. Noll, “Seeking Asylum at Embassies: A Right to Entry under International Law?” 17 (2005) *International Journal of Refugee Law* 542, 548.

⁴⁴ Lauterpacht and Bethlehem (n 34) 113; Noll (n 43) 549.

⁴⁵ 1977 para.(c).

has been demonstrated that the principle not only applies in the territory of a State⁴⁶, but also applies in an extraterritorial context or in the high seas, as will be argued in the final chapter.

2.2 The Complementary Protection And The Principle Of *Non-refoulement* In Human Rights Law

The principle of *non-refoulement* is wider than its expression in Article 33 of the 1951 Refugee Convention.⁴⁷ A large number of States permit persons to remain in their territory who are not refugees in the sense of the Refugee Convention; because return to the country of origin is not possible or not advisable⁴⁸. The complementary protection, in legal terms, ‘describes States’ protection obligations arising from international legal instruments and custom that complement or supplement the 1951 Refugee Convention’⁴⁹ It is, in effect a shorthand term for the ‘widened scope of *non-refoulement* under international law’.⁵⁰ The complementary protection may be based on a human rights treaty or on more general humanitarian principles, such as the provision of assistance to persons fleeing from generalized violence.⁵¹

The obligation not to return a person to a territory where he will face harm may be express or implied. In this regard, Article 3 of the Convention against Torture (CAT) expressly prohibits States from removing a person to another State when there are substantial grounds for believing that he would be in danger of being subjected to torture.⁵² The prohibition of refoulement is also applied as a component of the prohibition of torture or inhuman or degrading treatment as included in Article 7 of the 1966 International Covenant on Civil and Political Rights (ICCPR).⁵³

At the regional level, Article 3 of the European Convention for Human Rights (ECHR) has consistently been interpreted to include the prohibition of refoulement to places where individuals may fear torture, inhuman or degrading treatment or punishment.⁵⁴

⁴⁶ Lauterpacht and Bethlehem (n 34) 110.

⁴⁷ Goodwin- Gil and McAdam (n 31) 285.

⁴⁸ Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, Oxford 2007) 20.

⁴⁹ Goodwin- Gil and McAdam, (n 31) 285.

⁵⁰ Ibid.

⁵¹ McAdam (n 48) 21.

⁵² Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1464 UNTS 85.

⁵³ Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994) 9.

⁵⁴ Gammeltoft- Hansen (n 29) 87; The application of Article 3 to situations of *non-refoulement* was for the first time affirmed in the case of *Soering vs. United Kingdom*, ECtHR, Application No. 14038/88, 7 July 1989.

Article 2 (3) of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa also includes a *non-refoulement* clause and provides that:

“No person shall be subjected by ... to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened.”

Another regional instrument that includes provision in respect to the *non-refoulement* is the 1969 American Convention on Human Rights (ACHR). Article 22 (8) of this Convention reads:

“In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions”.

In light of the instruments above that include the principle of *non-refoulement* in their provisions, it should be noted that the principle of *non-refoulement* is also a human rights principle. However, unlike the *non-refoulement* under Article 33 of the Refugee Convention from which derogations are allowed, the *non-refoulement* under human rights law is absolute.⁵⁵ This is also one of the arguments used to prove that the principle of *non-refoulement* has attained a status of customary international law, as will be argued in the next section.

2.3 The *Non-refoulement* Principle As A Principle Of Customary International Law

It was submitted that the *non-refoulement* principle finds expression in different international instruments, whether directly or indirectly. The widespread adherence to the principle has led some to suggest that the *non-refoulement* is part of customary international law.⁵⁶ In 2001, the State parties to the Refugee Convention formally acknowledged that the applicability of the principle of *non-refoulement* ‘is embedded in customary international law’.⁵⁷ Lauterpacht and Bethlehem draw support for the customary status of the principle, taking into consideration the number of instruments where the principle is enshrined and the fact that 90 percent of the United Nations (UN) Member States are party to one or more conventions that include the *non-refoulement* as an essential component.⁵⁸

⁵⁵ McAdam (n 48) 22.

⁵⁶ Gammeltoft- Hansen (n 29) 88.

⁵⁷ UN High Commissioner for Refugees, *Declaration of States Parties to the 1951 Convention and Its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, HCR/MMSP/2001/09, para.4; Hathaway (n 40) 364.

⁵⁸ Lauterpacht and Bethlehem, (n 34) 149.

They further argue that establishing *non-refoulement* as part of customary international law dictates ‘that the responsibility of a State will be engaged in circumstances in which acts or omissions are attributable to that State wherever these may occur’.⁵⁹ As it was argued in the previous section, since refugee status determination is instrumental in protecting primary human rights, the nature of the prohibition of *refoulement* depends on the nature of the human right being protected by it.⁶⁰ When there is a risk of serious harm as a result of foreign aggression, internal armed conflict, extrajudicial death, forced disappearance, death penalty, torture, inhuman or degrading treatment, forced labor, trafficking in human beings, persecution, or trial based on a retroactive penal law or on evidence gathered by torture or inhuman and degrading treatment in the receiving State, the obligation of *non-refoulement* is an absolute obligation of all States.⁶¹ With this extension and content, the prohibition of *refoulement* has evolved at the universal level beyond the scope of Article 33 of the Refugee Convention.⁶² Thus, it is shown to be a principle of customary international law binding on all States, even those not parties to the UN Refugee Convention or any other treaty for the protection of refugees.⁶³

Preliminary conclusions

Following the central argument of the thesis, the aim of this chapter is to show that the principle of *non-refoulement* is wider than its expression in Article 33 of the Refugee Convention. Although primarily established in refugee law, the chapter is arguing that the principle of *non-refoulement* also finds expression in human rights law. The chapter is trying to expand the application of the principle of *non-refoulement* by offering protection from *refoulement* also to persons who are not refugees in the sense of the Refugee Convention. Offering complementary protection to persons not falling under the ambit of the Refugee Convention, shows that the principle of *non-refoulement* as contained in Article 33 of the Refugee Convention, from being less extensive has evolved and has widened its scope of application under international law. Due to the nature of human rights that are protected with the prohibition of *refoulement*, the principle has attained a status of a principle of customary international law.

⁵⁹ Lauterpacht and Bethlehem (n 34) 160; Gammeltoft- Hansen (n 29) 88.

⁶⁰ Concurring Opinion of Judge Pinto De Albuquerque (Concurring Opinion) in Hirsi Jamaa and others v. Italy (n 14).

⁶¹ Ibid.

⁶² Hathaway (n 24) 363.

⁶³ Concurring Opinion (n 60).

3 Extraterritorial Application Of The Human Rights Treaties

Before answering the question whether States are obliged to respect the principle of *non-refoulement* when acting extraterritorially, the extraterritorial application of human rights treaties needs to be examined. Today, it has been widely accepted that human rights apply extraterritorially and the main aim of this chapter is to argue that. It was already submitted that the principle of *non-refoulement* also finds expression in other international and regional instruments besides the Refugee Convention. Although the geographical scope of application of Article 33 of the Refugee Convention has been questioned, the complementarily and mutually reinforcing nature of the international human rights law and the refugee law, speak strongly in favor of delineating the same territorial scope for all expressions of the *non-refoulement* principle, whether developed under refugee or human rights law.⁶⁴

This chapter will also examine the concept of jurisdiction in human rights context and its evolution expressing the difference with the concept of jurisdiction in general international law. State jurisdiction in human rights context is the basis for the extraterritorial application of human rights treaties. Furthermore, the chapter will include analysis of human rights case law from the jurisprudence of different human rights bodies, where it has been ascertained that human rights apply extraterritorially. The analysis will examine different situations where the human rights bodies have found that States have exercised jurisdiction in extraterritorial context that have triggered their human rights obligations.

3.1 Defining Extraterritorial Application

Before dealing with the concept of jurisdiction and its different meanings, the extraterritorial application of human rights treaties will be defined. The 'extraterritorial application simply means that at the moment of the alleged violation of his or her human rights the individual concerned is not physically located in the territory of the State party in question, a geographical area over which the State has sovereignty or title.'⁶⁵ This would mean that an issue of extraterritorial application of human rights most often would arise when States act beyond their sovereign borders and the conduct is attributable to the State.⁶⁶ However, the extraterritorial application does not require the existence of the extraterritorial act, instead it requires for the individual to be located out of the State's territory, while the

⁶⁴ Anja Klug and Tim Howe in Bernard Ryan and Valsamis Mitsilegas (eds): *Extraterritorial Immigration Control: Legal challenges* (Cambridge University Press 2010) 71.

⁶⁵ Milanovic (n 33) 8.

⁶⁶ Conduct is defined as either the commission of an act, or of omission to act. *Ibid.*

violation of his rights may also take place inside the territory of that State.⁶⁷ An illustrative example would be when a State decides to take the property within its territory of its own national living in a different country. If we accept that the ECHR applies to the taking of property in the territory of the State, since the person concerned is outside the territory of that State, this would trigger the extraterritorial applicability of the ECHR. In relation to the next sections of this chapter it should be noted that the “title over territory” as such is not mentioned in the relevant human rights treaties as a threshold for their extraterritorial application (with possible exception of the ICCPR), instead the treaties require for the person to be within or subject to the jurisdiction of the state⁶⁸ Therefore it is necessary to determine what kind of jurisdiction can trigger the treaties application in extraterritorial context. As it will be discussed, this concept of jurisdiction refers to the jurisdiction in human rights context and is about a *de facto* control over territory or persons and it has a different purpose from the jurisdiction in general international law which serves to determine the legality of exercise of state power.⁶⁹

3.2 The Meaning Of Jurisdiction

The term jurisdiction is included in many of the human rights treaties in respect to defining their scope of application.⁷⁰ In order to correctly interpret the phrase “within the jurisdiction” or “subject to jurisdiction” present in the provisions of human right treaties, this section will first examine the meaning of the concept of jurisdiction in general international law.⁷¹ By establishing what the latter concept actually is and what it does, it will be easier to define the difference between this concept and the concept of jurisdiction in human rights context.

3.2.1 Jurisdiction in General International Law

The most common meaning of the jurisdiction of States ‘concerns the scope of competence of a State, delimited by international law, to regulate the conduct of physical and legal persons, and to enforce such legislation’.⁷² In relation to this meaning of the term of jurisdiction various definitions have been provided. According to Lowe, ‘jurisdiction is the term that describes the limits of the legal competence of a State or other regulatory authority (such as the European Community) to make, apply and enforce rules of conduct or the consequence of events’.⁷³ He further argues that, as the

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Michel Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, 2009) 56-57.

⁷⁰ For example: Article 1 ECHR, Article 2.1 ICCPR, Article 1 ACHR, Article 2 (1) CRC, Article 2(1), 5(1)(a), 5(2), 7(1), 11, 12, 13, 16, and 22(1) CAT.

⁷¹ Gondek (n 69) 47.

⁷² Ibid.

⁷³ V. Lowe, “Jurisdiction” in M.D. Evans (eds): *International Law* (Oxford University Press 2010 3rd edition OUP) 313.

jurisdiction of tribunals, the jurisdiction of States is an instance of the concept of the scope of the powers of a legal institution.⁷⁴ Another author describes the jurisdiction (legal authority) as the competence or capacity of States to exercise its power.⁷⁵ Jurisdiction in general international law is not a unitary concept and it includes two, possibly three different types or set of powers.⁷⁶ However, before analyzing the different types of this concept of jurisdiction it should be noted that there is an additional dimension of jurisdiction that is not covered by the common presentation of the concept of jurisdiction in general international law, as will be explained in the following sub-section.

Three different types of powers are included in the concept of jurisdiction in general international law. The first type of jurisdiction is the jurisdiction to prescribe or prescriptive jurisdiction also called “legislative” jurisdiction of States to make or prescribe rules with regard to persons inside or outside the territory of the State.⁷⁷ The second one, the jurisdiction to enforce or executive jurisdiction is the authority of the State to apply or enforce the rules that it has previously prescribed.⁷⁸ The third type of jurisdiction, called the adjudicatory or judicial jurisdiction refers to the right of courts to adjudicate cases, though this type of jurisdiction may be subsumed under the State’s prescriptive and enforcement jurisdiction.⁷⁹ A distinction has to be drawn between the jurisdiction to prescribe and the jurisdiction to enforce. There is one general rule with regard to the exercise of enforcement jurisdiction that says that States cannot exercise this type of jurisdiction in the territory of any other State without the consent of that State.⁸⁰ This general rule was established by the Permanent Court of International Justice (PCIJ) in its *S.S Lotus* case judgment. The PCIJ in this case stated the following:

‘Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.’⁸¹

⁷⁴ Ibid 314.

⁷⁵ Malcolm N. Shaw, *International Law* (Cambridge University Press, Cambridge 2003, 5th edition) 572; R. Higgins, *Problems and Process: International Law and How we Use It* (Oxford University Press 1994) 56.

⁷⁶ R. O’ Keefe, “*Universal Jurisdiction: Clarifying the Basic Concept*”, (2004), 2 JICL 735, 736; Milanovic (n 33) 23; Gondek (n 69) 51.

⁷⁷ Milanovic (n 33) 23; Gondek (n 69) 51.

⁷⁸ Milanovic (n 33) 23.

⁷⁹ Lowe (n 73) 317; Milanovic (n 33) 23; Gondek (n 69) 51.

⁸⁰ Ian Brownlie, *Principles of Public International Law*, (Oxford 2003 6th edition), 306; Lowe (n 73) 335; Gondek (n 69) 53.

⁸¹ Ser. A No. 10 (1927) pp.18-19.

According to the last submission it will be noted that any enforcement without the consent of the territorial State will be unlawful.⁸² However, lawful examples of exercise of this type of jurisdiction would be the consular jurisdiction of States over their nationals abroad or the ship-rider agreements made between States, both of which are grounded in the consent of the territorial State.⁸³ As was mentioned above, the prescriptive jurisdiction grants power to States to legislate for persons inside their own territory, which makes this type of jurisdiction territorial as the jurisdiction to enforce.⁸⁴ Although the large number of situations that States will seek to regulate will occur in State's own territory, there are situations when States exercise prescriptive jurisdiction outside their territory without the consent of other States.⁸⁵ However, according to Lowe: 'claims of one State to prescribe rules for persons in another State encroach upon the right of the State where those persons are based to exercise jurisdiction itself over those persons within its territory.'⁸⁶ In situations when States exercise prescriptive jurisdiction outside their territory it is necessary for there to be some clear connecting factor between the legislating State and the conduct that it seeks to regulate.⁸⁷

There are several bases for exceptions to territorial jurisdiction that in effect allow to States to legislate outside their borders: starting with the principle of nationality (or active personality) according to which a State may legislate for its nationals even when they are outside the State's territory; secondly, the principle of passive personality (or passive nationality) according to which States may prohibit conduct that can directly harm its nationals; next, the protective principle according to which a State may exercise jurisdiction to persons for acts done abroad which affect the security of the State- for example, currency, immigration and economic offences; and finally the principle of universality according to which every State can exercise jurisdiction and prosecute persons regardless their nationality for acts or conduct if that conduct harms the international community as a whole, such as piracy and crimes against international law.⁸⁸ However, it should also be noted that, in addition to these bases for exercising (prescriptive) jurisdiction, certain States have also asserted more controversial bases such as the "effects doctrine" developed first in the US antitrust law.⁸⁹

⁸² Milanovic (n 33) 24.

⁸³ Milanovic (n 33) 24; Lowe (n 73) 335.

⁸⁴ Brownlie (n 80) 297.

⁸⁵ Milanovic (n 33) 24.

⁸⁶ Lowe (n 73) 319.

⁸⁷ Ibid 320.

⁸⁸ Milanovic (n 33) 24-25; Lowe (n 73) 318-335; Brownlie (n 80) 299-305; Gondek (n 69) 50-53.

⁸⁹ According to this doctrine "a state has jurisdiction even when an act has only economic effects in its territory, although it is performed by non-nationals outside the territory of the state." Lowe (n 73) 322; Milanovic (n 33) 25; Gondek (n 69) 305.

One should also note that the above- mentioned principles often overlap in practice.⁹⁰ This, however, does not mean that one principle should necessarily be subordinate to another.⁹¹ Likewise, State jurisdictions can and do also overlap and more than one system of municipal law can apply to the same conduct or situation.⁹² The difficulties of applying the principles governing prescriptive and enforcement jurisdiction have been noted and are implicit in the nature of jurisdiction.⁹³ Therefore the development of strict rules that would divide the jurisdiction between sovereign States in any practical matter is not possible.⁹⁴ As Lowe states: ‘the solution of jurisdictional problems has to be found by increasing the sensitivity of States to the constraints imposed by international law, and also to the fact that the interest of other States demand respect.’⁹⁵ If States are ready to overstep the limits of their jurisdiction they ‘must first seek the agreement and cooperation of other States.’⁹⁶

3.2.2 Jurisdiction In Human Rights Context

Subsequent to the analysis of the main principles regarding the concept of jurisdiction in general international law in the previous sub-section, the present sub-section will examine the function and notion of the concept of jurisdiction in human rights context that differs from the previous concept. In addition to this, the function of the concept of jurisdiction in human rights context does not serve to determine the legality of the exercise of state power, but rather, to determine whether in a specific instance a particular State is bound to respect its human rights obligations.⁹⁷ This type of jurisdiction as such is not about the legal entitlement of States to exercise authority, but is about the *de facto* power exercised by the State over territory or persons.⁹⁸

In order to further examine the extraterritorial application of human rights, the following section will analyze the most relevant human rights case law and show how the concept of jurisdiction in human rights law is used as basis for extraterritorial application of human rights. This in turn is also relevant for the extraterritorial application of the principle of *non-refoulement*, as the second chapter established that it is also a human rights principle. The extraterritorial application of human rights has been analyzed by many authors, however for the purposes of the thesis the organizational structure according to which the presentation of the case law will be made is borrowed from the authors Anja Klug and Tim Howe⁹⁹ and also includes the

⁹⁰ Brownlie (n 80) 305.

⁹¹ Ibid.

⁹² Milanovic (n 33) 25.

⁹³ Lowe (n 73) 337.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Gondek (n 69) 52; Gammeltoft- Hansen (n 29) 107.

⁹⁸ Milanovic (n 33) 25.

⁹⁹ Klug and Howe (n 64) 69.

most recent cases concerning the extraterritorial application of human rights in maritime context that has been analyzed by the present author.

3.3 Jurisprudence On The Extraterritorial Application Of Human Rights

As was mentioned in the previous sub-section, the present section of the paper will analyze the most relevant human rights case law from international and regional courts as well as human rights treaty bodies. The extraterritorial application of human rights has been examined by the following international bodies: International Court of Justice (ICJ); the monitoring bodies of international and regional human rights treaties such as the United Nations Human Rights Committee¹⁰⁰; the United Nations Committee against Torture (CAT Committee)¹⁰¹; the Inter-American Commission on Human Rights (IACHR)¹⁰²; and the (ECtHR)¹⁰³.

Although none of the cases that will be analyzed in this section examined the *non-refoulement* obligation, except for the case of *Hirsi Jamaa*¹⁰⁴, they involve situations where the above-mentioned bodies have found that human rights apply extraterritorially. The extraterritorial application of human rights will be used as a starting point to show that the principle of *non-refoulement* should also have an extraterritorial application. However, this issue will be discussed in the next chapter. In addition, it should be noted that during the analysis of the case law, the respective bodies have used different bases or criteria for establishing extraterritorial jurisdiction for human rights purposes.¹⁰⁵

3.3.1 Territorial Control

As was previously mentioned, the *de facto* power or control over territory establishes the State's jurisdiction in human rights context.

¹⁰⁰ The UN Human Rights Committee is responsible for supervising the implementation of the ICCPR (part IV, Article 28).

¹⁰¹ The CAT Committee is responsible for supervising the implementation of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, GA/RES/39/46 1984 part II, Article 17.

¹⁰² The IACHR's mandate is based on the Charter of the Organization of American States (OAS) (Chapter XV, Article 106) and the 1969 American Convention of Human Rights (Pact of San Jose, Costa Rica). The commission has also interpreted the 1948 American Declaration of the Rights and Duties of Man (OAS resolution XXX, Adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948).

¹⁰³ The ECtHR is responsible for supervising the implementation of the European Convention of Human Rights (section II, Article 19).

¹⁰⁴ *Hirsi Jamaa and others v. Italy* (n 14).

¹⁰⁵ *Gammeltoft- Hansen* (n 29) 109.

3.3.1.1 Territorial Control In Cases Of Occupied Territories

The first of the mentioned bodies, the ICJ has examined the extraterritorial application in two cases, both of which concerned occupied territories. In its 2004 Advisory Opinion on the “*Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory*” the Court found that ‘the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated regime, are contrary to international law’ and that Israel was responsible not only under the international humanitarian law, but also under the international human rights law.¹⁰⁶

In its 2005 “*Case Concerning Armed Activities on the Territory of the Congo*”, the ICJ concluded that Uganda was the occupying power at that time.¹⁰⁷ In order to come to this conclusion the Court found it necessary to establish that ‘Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government.’¹⁰⁸ Uganda as an occupying power was under obligation which ‘comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.’¹⁰⁹

In a similar way the United Nations Human Rights Committee in its Concluding Observations expressed concerns on the report submitted by Israel on its implementation of the ICCPR, in which Israel continues to deny its responsibility to fully apply the Covenant in the occupied territories.¹¹⁰ In this regard, ‘the Committee points to the long-standing presence of Israel in these territories, Israel’s ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein.’¹¹¹

Moreover, at a regional level, in the case of *Coard et al. v. United States*¹¹², the IACHR also found that military occupation establishes jurisdiction in human rights context. In this case, the Commission concluded that the USA had violated its human rights obligations under the American Declaration on the Rights and Duties of Man¹¹³, during the military action led by the armed forces of the United States of America in Grenada in October 1983.

¹⁰⁶ 2004 Advisory Opinion on the “*Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory*, ICJ Gen. List No.131, 9 July 2004 (2004 Advisory Opinion).

¹⁰⁷ *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Congo)*, ICJ Gen. List No. 116, 19 December 2005.

¹⁰⁸ *Ibid*, para 173.

¹⁰⁹ *Ibid*, para.178.

¹¹⁰ UN Human Rights Committee, CCPR/C/79/ Add.93, 1998, para.10

¹¹¹ *Ibid*.

¹¹² Case 10.951, Report No. 109/99, September 29, 1999.

¹¹³ AG/RES. 1591 (XXVIII-O/98).

However, it should be noted that although this case involved military action by the USA against Grenada, the Commission did not establish its decision using the test of “territorial control”. Instead, the Commission based its decision on the personal control criteria, with meaning that the US had control over the petitioners. For the purposes of this case, the Commission held that jurisdiction

‘it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one State, but subject to the control of another State – usually through the acts of the latter’s agents abroad.’¹¹⁴

The ECtHR has also affirmed the recognition of occupation as a situation when human rights apply extraterritorially. The Court examined the extraterritorial application of the ECHR in two cases regarding the occupation of Turkey over Northern Cyprus.¹¹⁵ Both decisions of the ECtHR were based on the effective territorial control criteria necessary for establishing jurisdiction. This criterion was examined first in the case of *Loizidou v. Turkey*¹¹⁶. In this case the Court examined whether the continuing denial of the applicant’s access, a Cypriot national, to her property was a matter, which fell within Turkey’s jurisdiction. In this regard, the ECtHR found that Turkey exercised effective control over Northern Cyprus and it argued that:

‘In conformity with the relevant principles of international law governing State responsibility, that the responsibility of a Contracting Party could also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory.’¹¹⁷

In both decisions the ECtHR taking into consideration the strong presence of the Turkish Armed forces determined that the effective control criteria should be applied.¹¹⁸ Moreover, in order to find the applicants within the jurisdiction of Turkey, the ECtHR referred to the Government of the Republic of Cyprus ‘continuing inability to exercise their Convention obligations in northern Cyprus’.¹¹⁹ Moreover, the ECtHR established that the applicants were within the jurisdiction of Turkey as result of the need to avoid a vacuum in human rights protection and also because of the special character of the Convention as an instrument of European public order (*ordre public*).¹²⁰

¹¹⁴ *Coard et al. v. United States* (n 112) para.37.

¹¹⁵ *Loizidou v. Turkey*, Application. No. 15318/89, Judgment of 18 December 1996; *Cyprus v. Turkey*, Application. No.25781/94, Judgment of 10 May 2001.

¹¹⁶ Application No. 15318/89, Judgment of 18 December 1996.

¹¹⁷ *Ibid.*, para. 52.

¹¹⁸ *Loizidou v. Turkey* (n 115) para.56; *Cyprus v. Turkey* (n 115) para.76.

¹¹⁹ *Cyprus v. Turkey* (n 115) para.78.

¹²⁰ *Ibid.*

According to the analysis above it can be concluded that the *de facto* control over territory in a situation of occupation establishes jurisdiction of the occupying power and triggers the applicability of human rights in an extraterritorial context. However, it should be noted that a situation of occupation does not need to exist in order for the extraterritorial applicability of human rights to be triggered.¹²¹ As a matter of fact the decisions made by the ECtHR in relation to the Cyprus cases were based on a determination of the level of effective control by the Turkish State and not by the existence of occupation.¹²²

3.3.1.2 The ECtHR “Effective Territorial Control” Concept

In addition to the previous submissions, it should be noted that the ECtHR has also further examined the criteria of *de facto* control over territory in situations other than occupation that can also establish “jurisdiction” of the State within the meaning of Article 1 of the ECHR and trigger the State’s obligation to respect human rights.

In this regard, the most important case in relation to the subject of extraterritorial application of human rights is the case of *Bankovic and others v. Belgium and 16 other NATO states*¹²³. Although often subject to criticism the case has a lasting impact on national and international case law and has been used as a reference point in all cases subsequently adjudicated by the ECtHR in relation to the extraterritorial application of human rights.¹²⁴ The case concerned the bombing by the North Atlantic Treaty Organisation (NATO) of the Radio Televizije Srbije (Radio-Television Serbia, “RTS”) as part of the NATO’s campaign of air strikes against the Federal Republic of Yugoslavia (FYR) during the Kosovo conflict. On 23 April 1999, a missile launched from a NATO aircraft hit one of the RTS buildings. During the bombing several people were killed and injured. The applicants, people injured and relatives of the deceased complained that the extraterritorial act, namely the bombing of the RTS headquarters by NATO violated their rights under Articles 2 (right to life), 10 (freedom of expression) and 13 (right to an effective remedy) of the ECHR.¹²⁵ However, in its assessment, the ECtHR rejected the arguments of the applicants that the aerial bombing on the territory of FYR fulfilled the criteria of effective control over territory and that the NATO forces exercised jurisdiction that triggered their human rights obligations within the meaning of Article 1 of the ECHR.¹²⁶ Furthermore, the Court noted that during the air strikes the NATO forces did not exercise territorial control, to such an extent as the

¹²¹ “The Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.” 2004 Advisory Opinion (n 106) para.111.

¹²² Klug and Howe (n 64) 79.

¹²³ Application No.52207/99, Admissibility Decision, 12 December 2001.

¹²⁴ Gondek (n 69) 169.

¹²⁵ *Bankovic and others v. Belgium and 16 other NATO states* (n 123) paras.6-13, 28.

¹²⁶ *Ibid.*, paras.54-82.

level of effective control in the Cyprus cases.¹²⁷ Moreover, the Court rejected the applicant's argument that the ECHR should apply proportionally to the control in fact exercised and stated that:

'The determination of "jurisdiction" can be done by adapting the "effective control" criteria developed in the above-cited Loizidou judgments (*preliminary objections* and *merits*) so that the extent of the positive obligation under Article 1 of the Convention to secure Convention rights would be proportionate to the level of control in fact exercised'.¹²⁸

On the contrary, in paragraph 75 of the decision, the ECtHR held that the rights and freedoms defined in the Convention could not 'divided and tailored in accordance with the particular circumstances of the extra-territorial act in question.' Thus, according to Bankovic, 'effective territorial control requires full physical control over a territory'.¹²⁹ This would mean that even the complete control of the airspace could not be considered enough.¹³⁰ One aspect in Bankovic which was found to be quite controversial was included in paragraph 80 of the decision where the Court stated that:

'The Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States.'

However, as it will be discussed further down the text, later decisions of the Court show that the Court did not envisage general exclusion of the application of the ECHR in territories beyond the territories of the Contracting parties.¹³¹

The case of *Isaa and others v. Turkey*¹³² is another case from the jurisprudence of the ECtHR that examined the extraterritorial application of the ECHR to the activities of Turkey in the territory of Iraq. The case concerned the detention and killing of a group of Iraqi shepherds in Northern Iraq by Turkish soldiers during a military operation in the period between March and April 1995. The applicants were the relatives of the persons killed. Moreover, in this case the Court had to examine whether the persons killed were under the effective control of Turkey and therefore within the jurisdiction of the respondent's State. In this regard the Court stated however, that:

¹²⁷ Ibid, paras.70 and 71.

¹²⁸ Ibid, para.46.

¹²⁹ Klug and Howe (n 64) 80.

¹³⁰ Gondek (n 69) 174.

¹³¹ *Isaa and others v. Turkey*, Application No. 31821/96, Judgment of 16 November 2004, *Öcalan v. Turkey*, Application No. 46221/99, Judgment of 12 May 2005; Klug and Howe (n 64) 80.

¹³² Application No. 31821/96, Judgment of 16 November 2004.

‘Notwithstanding the large number of troops involved in the aforementioned military operations, it does not appear that Turkey exercised effective overall control of the entire area of northern Iraq’¹³³

The Court further compared the situation in Issa with the situation in Northern Cyprus and noted that the situation in the present case is in contrast with the situation in Northern Cyprus (Loizidou v. Turkey and Cyprus v. Turkey) cases where the troops were situated for a much longer period of time and were stationed throughout the whole territory of Northern Cyprus.¹³⁴ In addition, the Court was not satisfied that the applicants' relatives were within the jurisdiction of the respondent State and it held that the ECHR was not applicable.¹³⁵

The case of *Ilaşcu and Others v. Moldova and Russia*¹³⁶ is another important judgment from the post-Bankovic jurisprudence of the ECtHR where the Court was dealing with the question of applicability of the ECHR outside the territory of a respondent State and the question of its applicability in the territory of the State remaining outside of its control.¹³⁷ In this case the applicants alleged serious human rights violations committed against them in the region known as Moldovan Republic of Transdniestria (MRT), which is part of the Moldovan territory but governed by a separatist government strongly supported by Russia. In the Court's view, both Moldova and Russia exercised jurisdiction as they both had effective control over the region. The decision of the Court, that Russia exercised effective territorial control was based on the fact that in the region of Transdniestria the effective control was exercised by the MRT and not by the only legitimate government of the Republic of Moldova under international law.¹³⁸ Moreover, it held that the MRT

‘remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation.’¹³⁹

Moreover, in the Court's view, the fact that the Moldovan government did not exercise effective control over the region of Transdniestria and over the MRT authorities did not mean that Moldova did not exercise jurisdiction over the applicants.¹⁴⁰ Following this reasoning the Court found that Moldova

¹³³ Ibid, para.75.

¹³⁴ Ibid.

¹³⁵ Ibid, para.82.

¹³⁶ Application No. 48787/99, Judgment 8 July 2004.

¹³⁷ Gondek (n 69) 185.

¹³⁸ *Ilaşcu and others v. Moldova and Russia* (n 137) para.330.

¹³⁹ Ibid, para.392.

¹⁴⁰ Ibid, para.333.

‘still had a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it was in its power to take and that were in accordance with international law to secure to the applicants the rights guaranteed by the Convention’.¹⁴¹

3.3.2 Control Over Persons

This part of the section will analyze several cases where the human rights bodies had to examine the “control over person” criteria, which in addition to the criteria of “control over territory”, may also establish State jurisdiction and trigger their human rights obligations. All of the cases analyzed concern arrest, detention or abduction committed by State agents in the territory of a foreign State, where the abducting State does not have effective control over that territory. Before going into analysis of the jurisprudence of the different human rights bodies it should be noted that the ICJ is excluded from the analysis because there is no decision on this issue to date. However, it should be also noted that in its Israeli Wall opinion, the ICJ refers to the two respondent cases from the Human Rights Committee jurisprudence which could be interpreted as support for this criterion.¹⁴²

In this regard, the Human Rights Committee have examined the “control over person” criteria in several cases against Uruguay that all concerned abduction committed by Uruguayan agents in foreign States. One of the relevant cases is the case of Lopez Burgos v. Uruguay¹⁴³ that concerned the abduction of the applicant, a recognized UNHCR political refugee in Argentina by the “Uruguayan security and intelligence forces” who were aided by Argentine paramilitary groups.¹⁴⁴ After the kidnapping and two-week detention in Buenos Aires, he was illegally and clandestinely transported to Uruguay, where the special security forces at a secret prison detained him incommunicado for three months.¹⁴⁵ The Committee noted that ‘these acts which were perpetrated by Uruguayan agents acting on foreign soil’ brought the applicant under the jurisdiction of Uruguay within the meaning of Article 2 (1) of the ICCPR. Furthermore, the Committee stated that:

‘The reference in article 1 of the Optional Protocol to “individuals subject to its jurisdiction” does not affect the above conclusion because the reference in that article is not to the place where the violation occurred, but *rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred*’.¹⁴⁶

¹⁴¹ Ibid, para.331.

¹⁴² 2004 Advisory Opinion (n 106) para.109; Klug and Howe (n 64) 82.

¹⁴³ UN Doc. CCPR/C/13/D/52/1979, 29 July 1981.

¹⁴⁴ Ibid, para.2.2.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid, para.12.2.

The second case against Uruguay, where the Committee reaffirmed this view is the case of *Celiberti de Casariego v. Uruguay*¹⁴⁷. In this case the applicant was arrested in Porto Alegre (Brazil) together with her two children. Uruguayan agents with the connivance of two Brazilian police officials carried out the arrest.¹⁴⁸

In its recent decision of 2008, *J.H.A. v. Spain*¹⁴⁹, the CAT Committee also examined whether “control over persons” may establish State jurisdiction in human rights context. The decision concerned the detention of Indian nationals rescued at sea by Spain, after a distress call, but then detained for a period of time in Mauritania. The Committee held that the exercise of *de jure* and *de facto* control over persons constitutes jurisdiction¹⁵⁰ and subsequently submitted that:

‘In the present case, the Committee observes that the State party maintained control over the persons on board the *Marine I* from the time the vessel was rescued and throughout the identification and repatriation process that took place at Nouadhibou. In particular, the State party exercised, by virtue of a diplomatic agreement concluded with Mauritania, constant *de facto* control over the alleged victims during their detention in Nouadhibou. Consequently, the Committee considers that the alleged victims are subject to Spanish jurisdiction insofar as the complaint that forms the subject of the present communication is concerned’.¹⁵¹

The ECtHR has examined the “control over person” criteria in the case of *Öcalan v. Turkey*¹⁵². As to the facts of the case, the applicant, Mr. Öcalan, who was the leader of the PKK (Workers' Party of Kurdistan), was arrested and abducted by Turkish officials from Kenya, with the help of Kenyan authorities.¹⁵³ In this case the Court found that Turkey exercised jurisdiction and stated that:

‘It is common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the “jurisdiction” of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory.’¹⁵⁴

Another case where the ECtHR have examined the “control over person” criteria that can trigger the State’s jurisdiction was the case of *Isaa*¹⁵⁵ mentioned above. In this case, the Court also held that:

¹⁴⁷ UN Doc. CCPR/C/13/D/56/1979, 29 July 1981, para.10.3

¹⁴⁸ *Ibid*, para.2.2.

¹⁴⁹ CAT/C/41/D/323/2007, 21 November 2008.

¹⁵⁰ CAT/C/GC/2, para.16, 24 January 2008.

¹⁵¹ *J.H.A. v. Spain* (n 149) para.8.2.

¹⁵² Application No. 46221/99, Judgment of 12 May 2005.

¹⁵³ *Ibid*, para.13-19.

¹⁵⁴ *Ibid*, para.91.

¹⁵⁵ *Isaa and others v. Turkey* (n 131).

‘A State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State’s authority and control through its agents operating – whether lawfully or unlawfully - in the latter State’.¹⁵⁶

Thus, the Court have examined both the test of “control over territory” and “control over persons”, although the claim that Turkey had personal control over the victims was also rejected by the Court.

What is important to note is that, following from the analysis of the case law of the different human rights bodies, State jurisdiction was triggered from the moment that relevant control was exercised.¹⁵⁷ Thus, the criterion of control over persons depends on the level of physical control over the person and not on the duration of time that it is exercised.¹⁵⁸

3.3.3 “Cause And Effect” Approach For Establishing Jurisdiction

The “cause and effect” approach as a basis for establishing jurisdiction in human rights context flows from the *de facto* relationship between the individual and the State and it may be drawn from the act of the State or the potential that a State has to act.¹⁵⁹

In *Alejandre et al. v. Cuba*¹⁶⁰ Cuba was found responsible by the IACHR for failing to comply with its international obligations contained in the American Declaration of the Rights and Duties of Man when it shot down two civilian aircrafts outside Cuba’s 12 miles territorial waters and killed four people. The Commission referred to the ECtHR jurisprudence and argued that a State’s jurisdiction encompasses ‘all the persons under their actual authority and responsibility’.¹⁶¹ Furthermore, since it was found that ‘the victims died as a consequence of direct actions of agents of the Cuban State’, the Commission found ‘conclusive evidence that agents of the Cuban State, although outside their territory, placed the civilian pilots under their authority.’¹⁶² Cuba did not exercise territorial or personal control in the specific case, instead it was the act of bombing that established the *de facto* relationship and brought the victims under the jurisdiction of Cuba.¹⁶³

¹⁵⁶ Ibid, para.71.

¹⁵⁷ Klug and Howe (n 64) 85.

¹⁵⁸ Ibid.

¹⁵⁹ Gammeltoft- Hansen (n 29) 125.

¹⁶⁰ Case 11.589, Report No. 86/99 September 29, 1999.

¹⁶¹ Ibid, para.24.

¹⁶² Ibid, para.25.

¹⁶³ Klug and Howe (n 64) 88.

3.3.4 Consular Jurisdiction And Flag State Jurisdiction As Part Of Effective Control

The consular jurisdiction as a form of extraterritorial jurisdiction that may trigger the State's human rights obligations was affirmed in the European Commission's¹⁶⁴ decision of *M. v. Denmark*¹⁶⁵. As to the facts in *M v. Denmark*, the applicant, a citizen of German Democratic Republic (DDR) in an attempt to leave the DDR entered the premises of the Danish Embassy in Berlin, but was then handed over to the DDR police by embassy personnel. Moreover, the applicant complained that his right to liberty and security of person guaranteed by Article 5 of the ECHR was violated when he was handed over to the DDR police. The Commission found that the complaints were directed against the Danish diplomatic authorities and that the ECHR had an extraterritorial application in this case as:

'Authorised agents of a State, including diplomatic or consular agents,bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property.'¹⁶⁶

Moreover, the Commission found responsible the DDR responsible for the violations as it was the State where the action took place:

'In these circumstances the Commission finds that the applicant was not deprived of his liberty or security of person within the meaning of Article 5 of the Convention by an act of the Danish diplomatic authorities but by an act of the DDR authorities.'¹⁶⁷

Despite the fact that there have not been many decisions in regard to "flag state" jurisdiction and consular jurisdiction, they have still been recognized as forms of extraterritorial jurisdiction exercised by States. The ECtHR recognized these two forms of extraterritorial jurisdiction in its *Bankovic* decision where it stated that:

'The Court notes that other recognized instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State.'¹⁶⁸

In addition, two other decisions from the jurisprudence of the ECtHR have shown that the flag State jurisdiction can trigger the applicability of the ECHR. The first, the decision of *Xhavara and others v. Italy and Albania*¹⁶⁹ concerned the sinking of a ship flying under an Albanian flag carrying

¹⁶⁴ The body examining Convention applications until 1998, before those were sent to the Court.

¹⁶⁵ Application No. 17392/90, Decision of 14 October 1992.

¹⁶⁶ *Ibid.*, para.1.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Bankovic and others v. Belgium and 16 other NATO states* (n 123) para.73.

¹⁶⁹ Application No. 39473/98, Admissibility decision of 11 January 2001.

Albanian migrants wishing to enter Italy illegally. The accident occurred following a collision between the vessel carrying migrants and an Italian warship whose crew was trying to board the vessel for migration purposes. In the incident 58 people died. Furthermore, it is important to note that Italy and Albania have signed an agreement authorizing the Italian navy to board and search Albanian vessels as part of the measures for discouraging illegal migration. The Court noted that the Italian warship directly caused the sinking of the Albanian vessel and that Italy, as the flag State, was responsible for the human rights violations caused by this incident.¹⁷⁰ However, the Court dismissed the application in *Xhavara* since it found that Italy had fulfilled its obligation to conduct an independent investigation by commencing a criminal prosecution of the commanding officer of the warship.¹⁷¹

*Medvedyev and others v. France*¹⁷² is another decision from the jurisprudence of the ECtHR that concerned an interception on the high seas exercised by a French coastguard ship towards a Cambodian ship that was under suspicion of drug trafficking. The applicants in this case, crewmembers of the Cambodian ship, were arrested. They complained that they have been deprived of their liberty contrary to Article 5 of the ECHR. The Court found that France exercised jurisdiction on the high seas and held that:

‘Having exercised full and exclusive control over the *Winner* and its crew, at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France's jurisdiction for the purposes of Article 1 of the Convention’¹⁷³

In the assessment of the merits of the case, the Court held that the deprivation of liberty to which the applicants were subjected to, was not in accordance with a procedure prescribed by law and found a violation of the applicants' rights under Article 5 (1).¹⁷⁴ However, the Court did not find violation under Article 5 (3) as alleged by the applicants. In their consideration, the Court took into account the duration of the deprivation of liberty suffered by the applicants and held it was justified by ‘wholly exceptional circumstances’¹⁷⁵, with meaning that it had not been materially possible for France to bring the applicants physically before a legal authority any sooner.¹⁷⁶ It should be noted that, this shows that the Court assessed France's responsibility under the ECHR, based on the capacity to

¹⁷⁰ Ibid, para.1.

¹⁷¹ Klug and Howe (n 64) 85.

¹⁷² Application No.3394/03, Judgment of 29 March 2010.

¹⁷³ Ibid, para.67.

¹⁷⁴ Ibid, paras.76-103.

¹⁷⁵ Ibid, paras.127-134.

¹⁷⁶ E. Papastavridis, “*European Court of Human Rights, Medvedyev et al. v. France, (Grand Chamber Appl. No. 394/03) Judgment of 29 March 2010*” (2010) 59 (3) *International and Comparative Law Quarterly* 867, 880.

implement its obligations in an extraterritorial manner within the specific case.¹⁷⁷

The most recent and important decision in the context of maritime migration control that further affirms the extraterritorial application of human rights and raises significant questions in regards of the application scope of the *non-refoulement* principle is the judgment of *Hirsi Jamaa*.¹⁷⁸ The applicants in this case were 11 Somali and 13 Eritrean nationals who were part of a group of about 200 hundred individuals who left Libya aboard three vessels which were intercepted on 6 May 2009 about 35 nautical miles south of Lampedusa by three ships from the Italian Revenue Police (*Guardia di finanza*) and the Coastguard.¹⁷⁹ The occupants of the intercepted vessels were transferred onto Italian military ships and returned to Tripoli, however they were not told their real destination and none of them were identified before being transferred to the Libyan authorities.¹⁸⁰ Two men subsequently died in unknown circumstances following their arrival in Libya.¹⁸¹ Taking into consideration the fact that some of the applicants were granted refugee status by the UNHCR office in Tripoli and one of them was granted refugee status in Italy it can be concluded that these persons were in real need of international protection.¹⁸² The applicants claimed that their rights under Article 3, Article 4 of Protocol 4 and Article 13 of the ECHR had been violated.

In this decision it is important to note that the Court clarified that its jurisprudence on the principle of *non-refoulement* as expressed under Article 3 of the ECHR also applies in the high seas. Furthermore, this was the first case where the Court examined whether Article 4 of Protocol 4 applied in a case involving the removal of aliens to a third state outside national territory and whether the transfer of the applicants to Libya constituted collective expulsions within the meaning of the same provision of the ECHR.¹⁸³ In addition, it should be also noted that the decision stands as a landmark judicial reaffirmation of the long-standing jurisprudence of the Court on the protection of migrants from the risk of torture and inhuman treatment.¹⁸⁴ When it comes to the issue of jurisdiction and whether Italy has exercised jurisdiction or not in the instant case, the Italian government argued that they had not exercised “absolute and exclusive control” over the applicants and that the ‘vessels carrying the applicants had been intercepted in the context of the rescue on the high seas of persons in distress’ which brings the applicants out of the jurisdiction of Italy for the purposes of

¹⁷⁷ Klug and Howe (n 64) 86.

¹⁷⁸ *Hirsi Jamaa and others v. Italy* (n 14).

¹⁷⁹ *Ibid*, para.9-17.

¹⁸⁰ *Ibid*.

¹⁸¹ *Ibid*.

¹⁸² *Ibid*.

¹⁸³ *Ibid*, para.169.

¹⁸⁴ Francesco Messineo: “Yet another mala figura: Italy breached *non-refoulement* obligations by intercepting migrants’ boats at sea, says ECtHR”; <http://www.ejiltalk.org> (accessed 23 April 2012).

Article 1 of the ECHR.¹⁸⁵ However, the Court concluded that Italy exercised jurisdiction and observed that:

‘In the instant case the events took place entirely on board ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel. In the Court’s opinion, in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities. Speculation as to the nature and purpose of the intervention of the Italian ships on the high seas would not lead the Court to any other conclusion.’¹⁸⁶

3.4 Summary Remarks

The chapter examined the extraterritorial application of human rights as relevant starting point for establishing the extraterritorial application of the principle of *non-refoulement*. It also emphasized the difference between the two concepts of jurisdiction, jurisdiction in general international law and jurisdiction in human rights context. The latter is used as a basis for extraterritorial application of human rights and has primarily been established through an analysis of the factual situation arising in each particular case.¹⁸⁷ From the analysis of the decisions it can be concluded that there must be some kind of factual link between the individual and the State committing the human rights violation, thus, as explained above, a factual link can be established through the “control over persons” or “control over territory” tests.¹⁸⁸ In the context of maritime migration control, the extraterritorial application of human rights in respect to a State exercising jurisdiction on the high seas was also confirmed by the ECtHR which held that:

‘The special nature of the maritime environment cannot justify an area outside the law where individuals 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.’¹⁸⁹

¹⁸⁵ *Hirsi Jamaa and others v. Italy* (n 14) para.64-65.

¹⁸⁶ *Ibid.*, para.81.

¹⁸⁷ *Klug and Howe* (n 64) 89.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Medvedyev and others v. France* (n 172) para.81.

4 Applicability Of The Principle Of *Non-refoulement* With Regard To Interception At Sea

This present chapter will analyze the applicability of the principle of *non-refoulement* with regard to intercepting scenarios occurring at sea. The interception at sea of vessels carrying migrants, asylum seekers or refugees can take place in different maritime zones. Taking into consideration the logic of how the maritime zones are organized, the analysis will start with interception measures occurring in the territorial sea, then will continue with the contiguous zone and end with the analysis concerning the high seas.

It should be noted that the legal assessment of an intercepting scenario depends on the maritime zone where the scenario occurs. However, before examining the application of the *non-refoulement* principle in the different maritime zones, it is important to note that the United Nations Convention on the Law of the Sea (UNCLOS)¹⁹⁰, grants jurisdictional rights to States, where as these rights gives States the capacity to act in certain ways within certain circumstances.¹⁹¹ These jurisdictional rights of States (albeit somewhat limited) can be exercised in all of the different maritime zones. Thus States may hold a legal entitlement to intercept vessels at sea carrying migrants, asylum seekers or refugees. However, it should be further reiterated that if States exercise jurisdiction (*de jure* or *de facto*) during the act of interception at sea then this jurisdiction would trigger their human rights obligations including the application of the principle of *non-refoulement*.

Controversy arises around the question whether the principle of *non-refoulement* has an extraterritorial application. In this regard, it has often been argued by States that the principle is not applicable on the high seas. This chapter will build upon the findings from the previous chapter that human rights are applicable in an extraterritorial context, by establishing that the principle of *non-refoulement* also applies in an extraterritorial context because it finds expression in human rights law as shown in chapter 2 of the thesis.

¹⁹⁰ 1833 U.N.T.S 3; 21ILM 1261 (1982).

¹⁹¹ Mark Pallis, "Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts between Legal Regimes" (2002) Vol.14 No.2/3 International Journal of Refugee Law 329, 350.

4.1 Territorial Sea

The territorial sea is a band of waters adjacent to the coastline measuring 12 nautical miles from the baseline.¹⁹² It should be noted that within this zone States exercise sovereignty. Article 2 (1) of the UNCLOS provides that: ‘The sovereignty of a coastal State extends beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as territorial sea’.

The UNCLOS provisions confirm that States exercise jurisdiction in the territorial sea, however it is noted that they do not exert unlimited powers in this zone.¹⁹³ The exception to the exclusive powers of the coastal State in its territorial waters consists of the right of innocent passage as stated by Article 17 of the UNCLOS.¹⁹⁴ Thus, the right of innocent passage allows vessels to navigate it without entering internal waters or port, unless authorized by the coastal State.¹⁹⁵ This passage must be continuous and expeditious, with the exception of stopping or anchoring but only in so far as the same are incidental to ordinary navigation or rendered necessary by *force majeure* or distress or for the purpose of rendering assistance.¹⁹⁶

Furthermore, Article 19(1) of the UNCLOS states that passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. When it comes to the right of innocent passage central provision is Article 19(2)(g) of the UNCLOS which provides that the passage of a vessel is rendered non-innocent if the vessel engages in the:

‘Loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.’

It has already been mentioned that States exercise jurisdiction in their territorial sea, notwithstanding the fact of existence of innocent passage. This fact entitles coastal States to regulate migration activities within their territorial sea which certainly extends to measures intended to prevent the infringement of immigration law.¹⁹⁷ Article 21(1)(h) of the UNCLOS, gives power to the coastal State to adopt laws and regulations related to innocent passage through the territorial sea for the prevention of the infringement of its customs, fiscal, immigration or sanitary laws and regulations.¹⁹⁸

¹⁹² Richard Barnes in Bernard Ryan and Valsamis Mitsilegas (eds): *Extraterritorial Immigration Control: Legal challenges* (Cambridge University Press 2010) 120.

¹⁹³ Violeta Moreno-Lax, “Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea” (2011) Vol.23 No.2 International Journal of Refugee Law 174, 191.

¹⁹⁴ Trevisanut (n 41) 219.

¹⁹⁵ Moreno-Lax (n 193) 191; Article 18 (1) UNCLOS.

¹⁹⁶ Article 18 (2) UNCLOS.

¹⁹⁷ Barnes (n 192) 120.

¹⁹⁸ Article 21 (1) (h) UNCLOS.

Moreover, it should be noted that in this zone the coastal State can exercise criminal jurisdiction over vessels in the following circumstances: if the consequences of the crime on board the vessel extend to the coastal State; or the crime is of a kind to disturb the peace of the coastal State or good order of the territorial sea; or if assistance is requested by the master or agent of the flag State's or if measures are required to suppress drug trafficking.¹⁹⁹

Another provision that is in relation with the regulation of the right to innocent passage is Article 21(4) of the UNCLOS, which states that:

'Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea.'

In situations when passage may not be innocent there are several provisions which allow States to exercise jurisdiction in their territorial waters. According to Article 25(1) of the UNCLOS, coastal States may take any necessary steps in its territorial sea to prevent passage which is not innocent. Moreover, any such steps should always conform to other applicable rules of international law.²⁰⁰

Besides the provision mentioned above, the UNCLOS includes provisions for two additional measures that coastal States can resort to in a situation of non-innocent passage. The coastal State also has the right to take the necessary steps to prevent ships proceeding to internal waters or a call at a port facility outside internal waters, from breaching any of the conditions for admission of those ships to such areas.²⁰¹ Thus, coastal States may prescribe conditions for admission to ports, such as ensuring respect for immigration rules, which vessels entering the territorial sea with a view to using port facilities must respect.²⁰²

Article 25(3) includes the second provision when the passage of any ship can be suspended. Article 25(3) of UNCLOS provides that:

'The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published.'

Taking into consideration the entitlements given to coastal States by the UNCLOS, it is undisputed that the coastal States exercise *de jure* jurisdiction in their territorial sea. During interception operations in the territorial sea with the exercise of *de jure* jurisdiction, coastal States also

¹⁹⁹ Article 27 (1) UNCLOS.

²⁰⁰ Moreno-Lax (n 193) 192.

²⁰¹ Article 25 (2) UNCLOS.

²⁰² Barnes (n 192) 124.

exercise *de facto* control. Thus, regardless of the approach of jurisdiction that will be used, whether *de jure* jurisdiction or *de facto* control, it can be easily concluded that the principle of *non-refoulement* is applicable in the territorial sea of a coastal State.

4.2 Contiguous Zone

The contiguous zone is the part of the high seas immediately adjacent to the territorial sea in which the coastal State is conceded certain limited police powers by international law.²⁰³ The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.²⁰⁴ For the purposes of establishing jurisdiction that will trigger State's obligations to respect the principle of *non-refoulement* we need to examine whether coastal States are entitled to exercise control in this zone.

Article 33 of the UNCLOS includes the word "control". It is suggested that the threshold of control is not limited to extreme cases that threaten the preservation of the State, but extends where there is a reasonable risk of any domestic law being breached.²⁰⁵

According to Article 33 (1) of the UNCLOS:

'In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.'

Furthermore, Article 33 does not limit States to punishing acts committed under its jurisdiction in the territorial waters, but also allows States to punish acts of a vessel situated within the contiguous zone, if the acts produce an infringement of a coastal State's customs, fiscal, sanitary and immigration laws within the territorial sea.²⁰⁶

From the provision included in Article 33 (1) it should be noted that States have legal entitlement to exercise control, although these entitlements are more limited in comparison to State's entitlements in the territorial sea. However, it can be argued that if coastal States have *de jure* jurisdiction in this zone, it indicates that they can also exercise *de facto* control. In an interception scenario as long as the coastal States exercises control, it is not

²⁰³ I. A. Shearer, "Problems of Jurisdiction and Law Enforcement against Delinquent Vessel" Vol.35 No.2 (1986) *The International and Comparative Law Quarterly* 320, 329.

²⁰⁴ Article 33(2) UNCLOS.

²⁰⁵ Barnes (n 192) 127.

²⁰⁶ Douglas Guilfoyle, "Maritime Interdiction of Weapons of Mass Destruction" 12 (2007) *Journal of Conflict & Security Law*, Oxford University Press 1, 7.

important under which criteria jurisdiction will be established. Therefore, if jurisdiction is established, the principle of *non-refoulement* will be applicable in the contiguous zone.

4.3 High Seas

It was mentioned in the beginning of this chapter that certain controversy follows the high seas in regards of the application of the principle of *non-refoulement* and whether or not it is applicable in this zone, too. In this regard it should be noted that States have increasingly taken advantage of the ambiguity in the law concerning the interception of vessels on the high seas to take extraterritorial measures to stop the flows of migration by sea.²⁰⁷ Furthermore, as in the previous zones, this sub-chapter will examine what kind of jurisdictional rights are granted to States under the UNCLOS that can trigger State's jurisdiction in the high seas to comply with its human rights obligations. In the absence of any entitlement to exercise jurisdiction and interception operations in this zone, the *de facto* control over the intercepted vessel or intercepted persons would be the crucial factor through which the jurisdiction of the intercepting State will be established-jurisdiction which in turn will trigger the application of the human rights law including the principle of *non-refoulement*.

In regards of the high seas, it should be noted that they are the parts of the sea that are not included in the exclusive economic zone; the territorial sea or in internal waters of a State; or in the archipelagic waters of an archipelagic State.²⁰⁸ This means that no State can exercise its sovereignty on this part of the sea.

Article 92 of the UNCLOS provides that ships are subject to the exclusive jurisdiction of the flag State, save in exceptional cases provided for in international treaties or general international law. The exceptional cases to exclusive flag State jurisdiction refer to exceptions in respect to stateless vessels and vessels engaged in piracy, slavery, unauthorized broadcasting and the illicit trade in narcotics.²⁰⁹

For the purposes of controlling maritime migration, the position of stateless vessels is particularly important given the distinct possibility that vessels engaged in irregular migration activities will lack a flag.²¹⁰ In regards of the vessels without any flag, States may have reasonable grounds for suspecting that the ship is without nationality and this would give States justification for boarding the vessel and performing a right of visit.²¹¹ Since the boarding of a vessel under these circumstances is permitted under the UNCLOS, the act of boarding as such can establish the State's *de jure* jurisdiction. Foreign

²⁰⁷ Barnes (n 192) 128.

²⁰⁸ Article 86 UNCLOS.

²⁰⁹ Articles 99-109 UNCLOS.

²¹⁰ Barnes (n 192)130; Goodwin- Gil and McAdam (n 31); Pallis (n 191) 350-353.

²¹¹ Article 110 (1) (d) UNCLOS.

flagged vessels on the high seas may be intercepted and boarded only under these “exceptional circumstances”, or where the acts of interference derive from powers conferred by treaty provision.²¹² A recent example of such a treaty provision is the bilateral agreements between States, where the flag State agrees to permit the authorities of another State to intercept its vessels.²¹³ Foreign flagged vessels on the high seas may be also intercepted if the consent of the State, under whose flag the vessel sailing, is obtained by the intercepting State.²¹⁴

4.3.1 Extraterritorial Application Of The Principle Of *Non-refoulement*

According to the submissions in the previous section, the *de jure* jurisdiction of a State that performs interceptions on the high seas can be established through the following means: the relevant UNCLOS provisions; previously established treaties between States; or through the consent of the State under whose flag the intercepted vessels is sailing. Although limited *de jure* jurisdiction, it can be acknowledged that States may exercise *de facto* control, which will trigger State’s human rights obligations towards the migrants, asylum seekers or refugees intercepted on the high seas. In the absence of a legal entitlement it is important to examine whether the intercepting State has *de facto* control over the intercepted persons. As was outlined in the previous chapter, the *de facto* control over persons can establish the State’s jurisdiction in human rights context and result in an extraterritorial application of human rights. In interception operations, certain acts or measures implemented by the intercepting State indicate the high level of *de facto* control that the intercepting State can exercise towards the vessels or the intercepted persons. Such measures involve stopping and boarding the vessel, towing it towards the open sea, transferring the intercepted persons on the vessel of the intercepting State or putting them under detention.²¹⁵

The applicability of the principle of *non-refoulement* in an extraterritorial context has been highly contested. Often it has been argued that the *non-refoulement* principle as guaranteed by Article 33 of the Refugee Convention is primarily territorial, in the sense that it applies to asylum seekers or refugees who have reached the territory of the state of asylum.

²¹² Article 110 (1) UNCLOS; Certain jurisdictional rights on the high seas granted to States can be found also in the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime.

²¹³ ‘The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?’, 1(1) Bulletin of Italian Politics 2009, 125-133; Agreement relating to the Establishment of a Cooperative Program of Interdiction and Selective Return of certain Haitian Migrants and Vessels involved in Illegal transport of persons coming from Haiti 1981, 33 UST 3559; *Xhavara and fifteen others v. Italy and Albania* (n 169).

²¹⁴ *Medvedyev and others v. France* (n 172).

²¹⁵ *Klug and Howe* (n 64) 96.

This was also the view of the American Supreme Court in the case of *Sale*,²¹⁶ which stated that:

‘A treaty cannot impose unanticipated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent. Because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions’²¹⁷

However, it was previously acknowledged that the principle of *non-refoulement*, although primarily established in refugee law, has been affirmed as part of the human rights law and finds expression in it whether explicit or implicit.²¹⁸ Today it also forms part of international customary law. This means that the principle of *non-refoulement* as contained in Article 33 of the Refugee Convention has evolved at a universal level and widened its scope of application.

Based on the different criteria used for establishing jurisdiction in human rights context, it was affirmed that human rights apply in an extraterritorial context. In situations when a State undertakes intercepting operations on the high seas and exercises jurisdiction towards the intercepted persons, that jurisdiction will trigger the State’s human rights obligations towards these persons. In this regard, if human rights apply extraterritorially, so should the principle of *non-refoulement* as it has been shown to be part of the human rights law. Thus, it can be argued that whenever States exercise jurisdiction, the principle of *non-refoulement* should apply. As Theodor Meron states: ‘the narrow territorial interpretation of a human right treaties is anathema for the basic idea of human rights, which is to ensure that a State should respect human rights of persons over whom it exercises jurisdiction.’²¹⁹

²¹⁶ *Sale v. Haitian Centers Council* (n 23).

²¹⁷ *Ibid*, at 2565.

²¹⁸ See section 2.2; Concurring Opinion (n 60).

²¹⁹ Theodor Meron, “Extraterritoriality of Human Rights Treaties” (1995) Vol. 89 No.1 *The American Journal of International Law* 78, 82.

5 Conclusion

The thesis sought to outline the real problems of persons that have decided to take the sea route in search of improved and more secure living conditions. However, the search for a better life often collides with the State's imperative of protecting its territorial integrity. According to the number of persons that have been intercepted at sea or have eventually succeeded in migrating using the sea route it seems that the interception at sea, as an immigration control measure, does not result in reducing the number of persons that are migrating. Rather, it sometimes results in causing greater danger to the lives of the migrants, asylum seekers or refugees.

As it was explained, in order to prevent further migration flows States have decided to advance the interception practice on the high seas, beyond their territory. However, even if States decide to perform interception operations on the high seas, they cannot circumvent their human rights obligations since it has been strongly established that human rights including the principle of *non-refoulement* have an extraterritorial application, as argued within the thesis. This is in conformity with the basic idea of human rights, which is to ensure that a State should respect the human rights of persons over whom it exercises jurisdiction. State practice contravening these obligations will result in a breach of the State's international obligations under human rights and refugee law towards migrants, asylum seekers or refugees at sea.

The fight against irregular migration may continue but not at the price of human lives. If States implement interception operations as part of their immigration control policy they need to make sure that the fundamental human rights of the intercepted persons will be respected. The persons intercepted at sea need to be humanely treated giving them a chance for international protection in any case when it is necessary. If anything less than this occurs, the practice of intercepting vessels carrying migrants, asylum seekers or refugees and pushing them back to the country of departure will easily result in violation of State's international obligations and most importantly, the principle of *non-refoulement*. And what is more important, it might create an incentive for States which currently implement interceptions at sea as part of their immigration control policy, to further expand and develop its implementation at the price of human lives.

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