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The EU's Migration Control in the Central Mediterranean: The protection from *refoulement* in situations of interception on the high seas

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Table of Contents

List of abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEAS	Common European Asylum System
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CSDP	Common Security and Defence Policy
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EU	European Union
EUNAVFOR	European Union Naval Force
EURODAC	European Dactyloscopy
FRA	European Union Agency for Fundamental Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
NGO	Non-governmental Organization
SAR	International Convention on Maritime Search and Rescue
SOLAS	International Convention for the Safety of Life at Sea
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNHCR	United Nations High Commissioner for Refugees
VCLT	Vienna Convention on the Law of Treaties

Summary

The use of the term ‘refugee crisis’ does already suggest a scenario that apparently, the European Union was not expecting and consequently, was not prepared to tackle. As the mass influx of asylum seekers arrived in Europe in 2015, the national reception systems, especially in states of first arrival such as Greece and Italy were disrupted, and the Common European Asylum System was put to a test. Reluctant to assume the legal responsibility for further asylum seekers arriving at the Union’s external borders, the EU and its member states responded with extraterritorial migration control measures, such as the interception of vessels in the Mediterranean Sea, to prevent more people from arriving at Europe’s border.

This thesis addresses the resulting legal situation in the Mediterranean and defines and analyzes new challenges to the protection from *refoulement* in situations of interception on the high seas. It thereby illustrates certain shortcomings within the Common European Asylum System and demonstrates the consequences for the protection from *refoulement*.

The thesis shows that current migration control practices of the EU and its members states in the Mediterranean cause gaps in the protection of the *non-refoulement* principle and that, as a consequence, migrants and refugees being intercepted on the high seas are left without sufficient protection from *refoulement*. It thereby identifies certain flaws in the Common European Asylum System and in its implementation as an underlying cause of the insufficient protection from *refoulement*. The thesis argues that only a European Union and a Common European Asylum System based on solidarity and shared responsibility would be able to ensure compliance with the principle of *non-refoulement* and guarantee its protection for migrants and refugees on their way to and arriving in Europe.

1 Introduction

1.1 Background

When looking at migration throughout the world today, the dimension and variety of measures used by states to control migration towards their own borders becomes evident. To account for such measures states usually resort to the concept of state sovereignty and the thereof derived sovereign border control.[1] Not only the ever-increasing globalization makes one question if this unconditional understanding of state sovereignty is still contemporary, but also the understanding of human rights as being universal. There is the fundamental idea of human rights as rights that are inherent to every person and consequently, that a single human rights standard should apply across the world.[2] Whereas the concept of state sovereignty gives states the right to control access to their territory, the concept of universal human rights in turn raises the question if there are any limits on how states carry out said control.[3] The relevance of questions such as this becomes evident when seeing how European states reacted to the so-called refugee crisis.

The term refugee crisis is mostly being used today to refer to the massive increase in the number of persons irregularly crossing the European Union's (EU) external borders seeking asylum between the spring of 2014 and the beginning of 2016, reaching its climax in October 2015 with 222'800 arrivals in one month.[4] This widely spread understanding however, deemphasizes the dimension of the humanitarian crisis, which continues unabated at the Mediterranean Sea borders still today.[5] In 2018 the number of migrants who died trying to reach the European

[1] THOMAS GAMMELTOFT-HANSEN, Access to Asylum, International Refugee Law and the Globalisation of Migration Control, Cambridge University Press (2011), 13.
[2] See e.g. LOUIS HENKIN, The Universality of the Concept of Human Rights, in: The Annals of the American Academy of Political and Social Science, Vol. 506 (1989), 10-16.
[3] See ANDREW BROUWER AND JUDITH KUMIN, Interception and Asylum: When Migration Control and Human Rights collide, in: Canada's Journal on Refugees, Vol. 21:4 (2003), 13.
[4] https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics (accessed 5 March 2019); https://data2.unhcr.org/en/situations/mediterranean (accessed 5 March 2019).
[5] See e.g. ELIAS STEINHILPER AND ROB GRUIJTERS, Border Deaths in the Mediterranean: What We Can Learn from the Latest Data, March 2017 https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/03/border-deaths (accessed 28 February 2019).

border by crossing the Mediterranean Sea is estimated at 2'275. Even though this constitutes a decrease of fatalities compared to the years before, the number is still horrendously high and the number of deaths per migrant who made the crossing did even slightly rise.[6]

While one would expect the EU and its member states to address this humanitarian crisis by e.g. search and rescue operations, they did instead intensify migration control to address what they perceived as the problem, namely the increased arrivals and irregular migration.[7] Part of this intensified migration control were extraterritorial migration control measures in the Mediterranean.

The term extraterritorial migration control or externalization of borders describes how states try to prevent migrants and refugees to get onto their territory even before reaching the actual border in order to avoid legal obligations. When looking at such extraterritorial migration control measures throughout the world, they appear in different forms.

For instance, many states impose financial penalties on carriers that transport improperly documented persons into their territory. As it is in the carriers' interest to avoid such sanctions, they are indirectly put into a position where they have to check the travelers' documents in order to allow them on board. In order to assist carriers with such travel document controls, many states have even started to deploy so-called immigration control officers or airline liaison officers.[8]

A further example of extraterritorial migration control can be seen in Australia with its so-called Pacific Solution. Under this policy Australia has contractual agreements with Nauru Island and Papua New Guinea's Manus Island in the Pacific Ocean, where they have established refugee-processing centers and were asylum seekers are sent directly without even reaching the territory of Australia.[9]

[6] See UNHCR, Desperate Journeys, Refugees and Migrants arriving in Europe and at Europe's Borders, January-December 2018, https://data2.unhcr.org/en/documents/download/67712 (accessed 28 February 2019); See also https://www.npr.org/2019/01/03/681956995/number-of-migrant-deaths-in-mediterranean-fell-in-2018?t=1551349041365 (accessed 28 February 2019).

[7] The term 'irregular migration' is defined by the European Council as "Movements of persons to a new place of residence or transit that takes place outside the regulatory norms of the sending, transit and receiving countries." See https://ec.europa.eu/home-affairs/content/irregular-migration-0_en (accessed 19 May 2019).

[8] A. BROUWER AND J. KUMIN, 10; More on this topic in FRANK MCNAMARA, Member State Responsibility for Migration Control within Third States – Externalisation Revisited, in: European Journal of Migration and Law, Vol. 15:3 (2013).

[9] For further details see e.g. ASHER LAZARUS HIRSCH, The Borders Beyond the Border: Australia's Extraterritorial Migration Controls, in: Refugee Survey Quarterly, Vol. 36 (2017).

A last example is the interception at sea, that can *inter alia* be observed in the Mediterranean, where states intercept and restrain vessels with irregular migrants and force them back to the point of departure or other third countries, without any individual processing and examination of asylum claims.

Even though the externalization of borders is not a new phenomenon, its occurrence and variety has been noticeably increasing in the last couple of years. As the mass influx of persons seeking international protection arrived in Europe in 2015, the national reception systems, especially in states of first arrival such as Greece and Italy were disrupted and the solidarity within the EU was put to a test. Reluctant to bear the legal responsibility for further asylum seekers arriving at their border, several European states as well as the EU itself responded with extraterritorial migration control, such as the interception of vessels on the high seas or in the waters of third states.[10]

An example of such a European response was the launch of the European Naval Force Operation Sophia by the Council of the European Union in 2015. According to the Council the operation was launched to tackle the root causes of the crisis and prevent more people from dying at sea.[11] Declared by the EU as the main aim of the operation was the combatting of human smuggling and trafficking networks in the southern Central Mediterranean, allowing the EU to board vessels suspected of smuggling or trafficking persons towards the EU and to search, divert or even seize the vessels.[12] But with this operation came not only the authority to use coercive powers against suspected smugglers and traffickers but also the obligation to

[10] See i.a. VIOLETA MORENO-LAX, Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control? in: Human Rights Law Review, Vol. 12:3 (2012), 574 at 574; THOMAS SPIJKERBOER, Wasted Lives. Borders and the Right to Life of People Crossing Them, in: Nordic Journal of International Law, Vol. 86 (2017), 1 at 2; ROXANA BARBULESCU, Still a Beacon of Human Rights? Considerations on the EU Response to the Refugee Crisis in the Medtierranean, in: Mediterranean Politics, Vol. 22:2 (2017), 310 at 302, 303; T. GAMMELTOFT-HANSEN, 2; with regard to Greece see *M.S.S. v. Belgium and Greece* No. 30696/09 (ECtHR, Grand Chamber, 21 January 2011); with regard to Italy see *Tarakhel v. Switzerland* No. 29217/12 (ECtHR, Grand Chamber, 4 November 2014).

[11] Council Decision (CFSP) 2015/778 of 18 May 2015 by the Council of the European Union on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED).

[12] See GRAHAM BUTLER AND MARTIN RATCOVICH, Operation Sophia in Uncharted Waters: European and International Law Challenges for the EU Naval Mission in the Mediterranean Sea, in: Nordic Journal of International Law, Vol. 85 (2016), 235 at 236, 237.

rescue the migrants present on the vessels in question.[13] The Council of the EU in its decision specifically prescribes that the operation needs to be conducted in accordance with international law and highlights the fact that different international legal instruments include the obligation to assist persons in distress at sea and to deliver these persons to a place of safety.[14] However, on the one side the operation is known to have intercepted vessels on the high seas and instead of embarking on the European coast, the persons on the vessels were returned to Libya from where they originally departed. On the other side, the operation includes a cooperation with Libya and training of the Libyan coastguards to prevent vessels from leaving the Libyan territorial waters and return them to Libyan soil. These practices are strongly criticized as Libya cannot be regarded as a place of safety, especially since most of the people that have been forcibly returned are forced to reside in detention camps under inhuman conditions.[15]

As the example above shows, extraterritorial migration control subsequently raises the issue of extraterritorial protection of human rights. In these situations, a variety of human rights, such as the right to life[16], the right to leave a country[17], the right to seek asylum[18] or the prohibition of collective expulsion[19] are affected. Out of the many human rights issues resulting from the above illustrated interception measures at sea, this thesis will mainly be focusing on the principle of *non-refoulement* as it is considered the cornerstone of the international refugee protection.[20] The prohibition of *refoulement* is a principle explicitly or implicitly enshrined in various human rights instruments and ensuring that no one is to be returned to a state where they will be persecuted or subjected to inhuman or degrading treatment.[21] In order to fulfill this human rights obligation, states need, according to a dominant view, to permit a first gate

[13] See e.g. GIORGIA BEVILACQUA, Exploring the Ambiguity of Operation Sophia Between Military and Search and Rescue Activities, in: GEMMA ANDREONE (ed.), The Future of The Law of the Sea, Springer 2017, 165 at 166.
[14] Council Decision (CFSP) 2015/778, 6.
[15] See e.g. MARIANNE RIDDERVOLD, A humanitarian mission in line with human rights? Assessing Sophia, the EU's naval response to the migration crisis, in: European Security, Vol. 27:2 (2018), 158 at 158, 159; Human Rights Watch, EU: Shifting Rescue to Libya Risks Lives, Italy should Direct Safe Rescues, Report from 19 June 2017, https://www.hrw.org/news/2017/06/19/eu-shifting-rescue-libya-risks-lives (accessed 26 March 2019); see also https://euobserver.com/migration/139881 (accessed 26 March 2019).
[16] See i.a. Art. 6 ICCPR, Art. 2 ECHR and Art. 2 CFREU.
[17] See i.a. Art. 12 (2) ICCPR and Art. 2 (2) Protocol Nr. 4 to the ECHR.
[18] See i.a. Art. 14 UDHR and Art. 18 CFREU.
[19] See i.a. Art. 4 of the Protocol 4 to the ECHR and Art. 19 (1) CFREU.
[20] See i.a. GUY S. GOODWIN-GILL AND JANE MCADAM, The Refugee in International Law, 3rd Edition, Oxford University Press 2007, 50; T. GAMMELTOFT-HANSEN, 44.
[21] See Art. 33 of the 1951 Refugee Convention, Art. 7 ICCPR, Art. 3 CAT, Art. 3 ECHR and Art. 19 (2) CFREU.

admission for the purpose of status determination.[22] Current extraterritorial migration control practices however prevent migrants and refugees from reaching the actual border and asking said admission. These practices therefore compromise the protection provided by the principle of *non-refoulement* and raise the question to what extent states are obliged to refrain from extraterritorial migration control that might result in *refoulement*.[23]

As this short introduction has demonstrated, the principle of *non-refoulement* poses a challenge to the traditional concept of state sovereignty. Even though states have a sovereign right to control their borders, this absolute sovereignty has been partially relinquished through the voluntary ratification of international treaties and through state practice that over the years have contributed to render some norms customary.[24] Hence, the developments described above makes one question if it indeed is legally possible to circumvent legal obligations through the externalization of borders and what role the EU and its asylum system plays in these developments. These legal issues will be the underlying subject matter of this thesis.

1.2 Purpose and research question

The purpose of the present thesis is to analyze new challenges to the *non-refoulement* principle posed by recent extraterritorial migration control practices of the EU and its member states in the Mediterranean. To achieve this purpose, the thesis will assess to what extent the current international and European legal framework adequately addresses situations in which vessels carrying migrants and refugees are being intercepted on the high seas. The author thereby wants to demonstrate possible shortcomings in the Common European Asylum System (CEAS) and explore their consequences for the protection from *refoulement.*

In view of said purpose the thesis seeks to answer the following research question:

> *How do recent EU operations in the Central Mediterranean challenge the protection from refoulement on the high seas and how could the current European legal framework on asylum strengthen this protection?*

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[22] See i.a. G. GOODWIN-GILL AND J. MCADAM, 215; G: BUTLER AND M: RATCOVICH, 252; see also TOM DANNENBAUM, Watered-Down Rights on the High Seas: Hirsi Jamaa and Others v Italy, in: International and Comparative Law Quarterly, Vol. 61 (2012), 728 at 745.

[23] See NANDA OUDEJANS, CONNY RIJKEN AND ANNICK PIJNENBURG, Protecting the EU External Borders and The Prohibition of Refoulement, in: Melbourne Journal of International Law, Vol. 18 (2018), 2.

[24] A. HIRSCH, 51; see JAN KLABBERS, International Law, 2nd Edition, Cambridge University Press 2017, 29.

In order to answer the research question set forth above, the following sub-questions will be addressed:

How is the prohibition of refoulement regulated within the EU context?

What are the recent state practices and EU operations in the Mediterranean and what is their impact on the protection from refoulement?

What legal issues do these practices and operations bring?

What is the role of the CEAS within these legal issues?

1.3 Delimitations

As to the geographical delimitation, the thesis will focus on migration control in the Central Mediterranean Sea. In order to delimit the scope of the thesis further, the research question is only concerned with the legal situation on the *high* seas. According to Art. 2 (1) of the United Nations Convention on the Law of the Sea (UNCLOS) the sovereign territory of a coastal state includes its land territory, its internal waters and its territorial see. With regard to the definition of territorial sea, Art. 3 UNCLOS enshrines that every state has the right to establish the breadth of its territorial sea up to a distance of 12 nautical miles from its coast.[25] The high seas on the other hand, is defined in Art. 86 UNCLOS and consist of the part of the sea, that is not included in the exclusive economic zone[26], the territorial waters nor the internal waters of a state. As this is the part of the sea that does not belong to the sovereign territory of any state and can therefore not be seen as generally being part of any state's jurisdiction, it raises interesting legal issues, which is the reason for choosing this focus.

With regard to extraterritorial migration control practices in the Mediterranean, the thesis is temporally limited to practices from 2014 on, when the migration flows through the Mediterranean Sea started to increase. As a consequence, the control of the EU's Mediterranean border increased and thus extraterritorial migration control practices, including interception measures.

[25] For a more detailed definition of territorial sea, see also Art. 4 and 5 UNCLOS.
[26] See Part V UNCLOS.

Even though individual practices of states as well as actions by non-governmental organizations (NGO's) will be referred to shortly, the thesis will focus on the examples of the EU operations Triton and Sophia to describe how extraterritorial migration control is practiced in the Mediterranean Sea. This delimitation was made as the thesis concerns extraterritorial migration control in the Central Mediterranean, which is where these operations are active. Furthermore, both operations were adapted in order to deal with the increase of migration flows starting in 2014, which is the timeframe this thesis seeks to analyze.[27]

As to the legal delimitations, it will not be possible to analyze extraterritorial human rights obligations overall but rather will the focus lay on the prohibition of *refoulement*. The principle of *non-refoulement* is widely considered the core element of international refugee protection and an analysis of its extraterritorial application does therefore not only make an interesting but also a very important focus area.

The thesis will thereby engage with *non-refoulement* obligations of EU member states, arising from the 1951 Geneva Convention Relation to the Status of Refugees (1951 Refugee Convention), the European Convention on Human Rights (ECHR), the International Covenant of Civil and Political Rights (ICCPR), the Convention against Torture (CAT) as well as the Charter of Fundamental Rights of the European Union (CFREU). In addition, EU primary as well as EU secondary law will be used in order to explain the European asylum system and its relevance for the present topic.

Even though legal instruments such as the United Nations Convention on the Law of the Sea (UNCLOS), the International Convention for the Safety of Life of Sea (SOLAS) and the International Convention on Maritime Search and Rescue (SAR) are very relevant with regard to the protection of persons on the high seas, the rights and obligations of these conventions will not, or only briefly, be referred to in this thesis. The focus is rather on the *non-refoulement* principle enshrined in the instruments mentioned above.

Further, the thesis concentrates on the *non-refoulement* obligations of states rather than on the issue of state responsibility for a possible neglection of said obligation and violation of the prohibition of *refoulement*. The purpose of the thesis is thereby to analyze and to define

[27] See EUGENIO CUSUMANO, Rescue as organized hypocrisy: EU maritime missions offshore Libya between humanitarianism and border control, in: Cooperation and Conflict, Vol. 54:1 (2019), 3 at 4.

challenges to the protection from *refoulement* on the high seas in the light of current migration control practices. Even though questions of responsibility would be highly interesting to address, it falls outside this purpose and is further a too extensive topic with regard to the extent of this thesis.

Related to the question of state responsibility is the issue of privatization of migration control. In parallel with the increase in external border controls, one has also seen a shift towards an increased role of private actors, assuming crucial functions in regard to said migration control. This shift towards privatization of usually governmental functions, even though highly interesting, falls outside the scope of this thesis' research.[28]

1.4 Methodology

The present thesis uses a legal dogmatic method. It is based on current positive law and considers relevant international and European law, such as the 1951 Refugee Convention, the European Convention on Human Rights, the International Covenant of Civil and Political Rights, the Convention against Torture as well as the law of the European Union.

For matters of interpretation of international law, there will be references to the Vienna Convention on the Law of Treaties (VCLT). Notably Art. 31 VCLT as the general rule of interpretation will be applied, stating in its first paragraph that:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The VCLT is widely understood as a codification of customary international law on treaty interpretation and is therefore considered applicable to the 1951 Refugee Convention even

[28] See T. GAMMELTOFT-HANSEN, 35, 158.

though entering into force subsequently.[29] The ICCPR and the CAT on the other hand entered into force after the VLCT and are therefore subject to its rules of interpretation.

With regard to the interpretation of the ECHR, the thesis will refer to the interpretation principles developed by the European Court of Human Rights (ECtHR). The ECtHR has established that the Convention is to be interpreted according to the objective of the treaty and in a way that makes its safeguards practical and effective.[30] Further, the Court considers the Convention a living instrument which is to be interpreted in the light of present-day conditions.[31]

As to EU law, the interpretation of the legal instruments of the EU is dependent on a several methods.[32] However, according to the Court of Justice of the European Union (CJEU), EU law is to be interpreted particularly in the light of its aim and its original intention.[33] Primarily relevant for the interpretation of EU law is consequently the teleological method of interpretation.

Apart from the law described above, the thesis will also consider state practice based on Decisions of the Council of the EU, Documents and Reports by EU Agencies, relevant literature, statistics and news reports. Said practice will be put in relation to the relevant written and unwritten law while considering case law by relevant legal bodies. The thesis is further based on the written work of relevant scholars, legal commentaries and reports by different NGOs.

1.5 Terminology

The specific situation analyzed in this thesis is the situation of interception on the high seas. As the persons subjected to these interception measures, at the point of the interception have not yet been through a status determination procedure, this thesis will refer to them as *migrants and refugees* in order to include all persons affected.

[29] See SHAI DOTHAN, In Defence of Expansive Interpretation in the European Court of Human Rights, in: Cambridge Journal of International and Comparative Law, Vol 3:2 (2014), 508 at 510; See G. GOODWIN-GILL AND J. MCADAM, 7, 8.
[30] See i.a. *Soering v. The United Kingdom*, No 14038/88 (ECtHR, 7 July 1989), para. 87; S. DOTHAN, 513.
[31] See i.a. *Tyrer v. The United Kingdom*, No 5856/72 (ECtHR, 25 April 1978), para. 31.
[32] MARIA-TERESA GIL-BAZO, The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law, in: Refugee Survey Quarterly, Vol. 27:3 (2008), 33 at 40.
[33] See i.a. *Erich Stauder v. City of Ulm, Sozialamt* (C-29/69), (CJEU, 12 November 1969), para. 3.

1.6 Outline

Following this introduction in Chapter 1, Chapter 2 focuses on the principle of *non-refoulement* within the European legal context. The chapter will explain the concept of state sovereignty, the understanding thereof within the EU and demonstrate its tension with human rights. The chapter will further provide a profound understanding of the principle of *non-refoulement* and present the different legal provisions in international and European law in which the principle is prescribed. Finally, the chapter will explain the meaning of solidarity within the EU, illustrate the CEAS and make the reader understand how the principle of *non-refoulement* is embedded in this system.

Chapter 3 demonstrates how extraterritorial migration control is exercised in the Central Mediterranean, by presenting the examples of the EU operations Triton and Sophia. The chapter will illustrate how interception practices might aim at circumventing human rights obligations and show the impacts of these practices on the protection from *refoulement*.

Chapter 4 highlights selected legal issues with regard to the protection from *refoulement* on the Mediterranean high seas. On the one hand, it will discuss the content and scope of the principle of *non-refoulement* as such. On the other hand, it will explain the concept of jurisdiction, demonstrate the complexity of extraterritorial jurisdiction and present and suggest different approaches to establish jurisdiction on the high seas in order to reduce legal protection gaps in the Mediterranean.

Chapter 5 will put the migration control practices in the Central Mediterranean as well as the legal issues resulting therefrom in relation to the CEAS. It will demonstrate how states are given a lot of discretion to circumvent their human rights obligations, creating protection gaps and allowing for the violation of the prohibition on *refoulement*. The author thereby suggests that European solidarity and shared responsibility within the EU is an important step to closing this gap and to guarantee protection from *refoulement*.

Chapter 6 will conclude by presenting an overview of the findings of the thesis and relating them to its purpose and the research question set forth in Chapter 1.

2 The principle of *non-refoulement* within the European legal context

2.1 Introduction

This chapter will provide an understanding of sovereignty within the EU context and illustrate why a tension between sovereignty and human rights might occur. The chapter will further explain the principle of *non-refoulement,* as a principle of human rights, based on the different legal provisions the principle is protected by. The third part of the chapter will shed light on the meaning of solidarity within the EU, illustrate the CEAS and show how the principle of *non-refoulement* is embedded in this system.

2.2 State sovereignty within the EU and its tension with human rights

Before turning to the principle of *non-refoulement* as such, it is important understand the broader picture in which this human rights principle is imbedded and therefore to discuss the relationship between the state and its human rights obligations. As mentioned briefly in the introduction there is a tension between the concept of state sovereignty and human rights. Human rights are rights inherent to every human being regardless of where in the world one is situated. State sovereignty on the other hand, is the control of each and every state over its own territory and the persons within it. State sovereignty thereby also includes sovereign border control and the right of each state to decide who might and might not enter its territory.[34] Actions taking place on the high seas however, add an additional complexity to the concept of sovereignty, as the high seas are no state's territory.

In situations of interception on the high seas, where migrants and refugees are being hindered from reaching a safe border and are left or being sent back to circumstances contradictory to fundamental human rights, the theoretical tension between the concept of state sovereignty and human rights becomes a practical and real issue.

[34] See e.g. T. GAMMELTOFT-HANSEN, 12, 13; A. HIRSCH, 51.

In this regard, *Thomas Gammeltoft-Hansen* has suggested that there are two sides to the concept of sovereignty. On the one hand, there is national sovereignty providing states with the freedom to act unrestricted and which includes the right to exclude foreign nationals from their territory. On the other hand, there is international sovereignty by which states have ratified international treaties, such as human rights treaties, that limit the national freedom to act and place human rights obligations on states.[35] In order words, as states are endowed with sovereignty they can also make the sovereign choice to give up part of their sovereignty through the ratification of international treaties. This would then again suggest that where a state, as a part of its international sovereignty, has chosen to commit to certain human rights obligations, the concept of national sovereignty would have to step aside.

As the by *Gammeltoft-Hansen* suggested international sovereignty, the notion of sovereignty within the EU does also differ from the traditional and absolute understanding of national sovereignty where states are given the freedom to act unrestrictedly. The accession to the European Union, raises the question if the state sovereignty of member states is being replaced or accompanied by a kind of Union sovereignty. How and if the member states' sovereignty is divided or shared with the Union is still an issue of disputation. However, since the substance of state sovereignty is public power and since said public power is divided among the EU and its member states, this would suggest a division of sovereignty between the two. Such a division of sovereignty is supported by many legal authors and requires a relative understanding of sovereignty rather than an absolute one.[36] Such a relative notion of sovereignty, fits both the concept of international sovereignty as described above as well as the notion of a shared sovereignty between the EU and its member states. As the world today is shaped by globalization where states for instance are parties to international treaties or are part of international, supranational or regional organizations, the notion of sovereignty needs to adapt to this development. A relative notion of sovereignty is compatible with the fact that states out of their own will, through e.g. the ratification of treaties or the accession to the EU forfeit part of their sovereignty. Coming back to the tension between state sovereignty and human rights described in the beginning of this subchapter, said tension is, with a relative understanding of sovereignty, diminished to a great degree. The state can simply exercise its public powers freely as long as it has not chosen to delimit this freedom by e.g. the ratification of an international treaty or by being part of state practice that evolves into customary law. Has the state in question

[35] T. GAMMELTOFT-HANSEN, 13.
[36] See i.a. DIETER GRIMM, The Constitution of European Democracy, Oxford University Press 2017, 45.

however chosen to commit to certain human rights obligations, the fulfillment of these obligations proceeds the free exercise of public powers based on state sovereignty.

In view of the above, the relation between sovereignty and human rights seems clear – in theory. However, in practice, when looking at the EU border management in the Central Mediterranean, one sees how EU member states come up with practices that allow them to circumvent the human rights obligations that they have voluntarily committed to by acting outside their own territory. One could therefore claim that the EU and its member states attach more importance to the sovereign control of their borders than to the compliance with their human rights obligations or even use border control as a means to avoid human rights obligations in the first place.

Amongst the most debated aspects of asylum and refugee law in the international as well as the European legal context is the relationship between the State's sovereign right to control its borders and its duty to adhere to the principle of *non-refoulement*.[37]

2.3 The principle of *non-refoulement* in international and EU law

The principle of *non-refoulement* is considered the cornerstone of international refugee law and prohibits the direct or indirect removal of an individual to a state or a territory where they run a risk of being subjected to inhuman or degrading treatment. This does not necessarily have to be the individual's country of nationality or residence but refers to every territory where such a risk exists. Relevant is thereby the existence of a real risk, not that this risk actually materializes. The purpose of the prohibition of *refoulement* is to prevent human rights violations before they actually occur.[38] The principle of *non-refoulement* consequently puts upon the states the obligation to give way to its ordinary rules of immigration control and to determine, for all asylum seekers arriving at its territory, if such a real risk is present.[39] The principle therefore constitutes an important legal protection mechanism for people fleeing from situations where their human dignity is disrespected, and their human rights are violated.

[37] ELSPETH GUILD, The Complex Relationship of Asylum and Border Controls in the European Union, in: VINCENT CHETAIL, PHILIPPE DE BRUYCKER AND FRANCESCO MAIANI (eds.), Reforming the Common European Asylum System, The New European Refugee Law, Brill Nijhof 2016, 39.

[38] ALICE EDWARDS, International Refugee Law, in: DANIEL MOECKLI, SANGEETA SHAH AND SANDESH SIVAKUMARAN (eds.), International Human Rights Law, 3rd Edition, 539 at 547; CORNELIS WOLFRAM WOUTERS, International Legal Standards for the Protection from Refoulement, Intersentia 2009, 25.

[39] See T. GAMMELTOFT-HANSEN, 14.

The principle of *non-refoulement* is an independent principle of human rights law that is explicitly or implicitly enshrined in several human rights treaties.

In its Art. 33 on prohibition of expulsion or return the 1951 Refugee Convention states:

> (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 CAT entails a provision on *non-refoulement* in its Art. 3:

> (1) No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> (2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

The prohibition of *refoulement* is further included in Art. 7 ICCPR on the general prohibition of torture, or other cruel, inhuman or degrading treatment or punishment. The UN Human Rights Committee in its General Comment No. 20 on Art. 7 ICCPR thereby states:

> "In view of the Committee, State parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement."[40]

[40] UN Human Rights Committee, General Comment No. 20 on Art. 7 ICCPR, 10 March 1992, para. 9.

The ECtHR has repeatedly confirmed that the principle of *non-refoulement* is part of the Convention's general provision on prohibition of torture in Art. 3 ECHR.[41]

Finally, the CFREU has included the principle of *non-refoulement* in its Art. 19 (2):

> No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

While the *non-refoulement* obligations stemming from the different international treaties are similar, they are not synonymous and differ in their scope of protection.
For instance, the protection in the 1951 Refugee Convention is only provided to individuals that meet the definition of refugee as defined in Art. 1 of the Convention. The scope of the protection is therefore limited personally, but also geographically, as the definition of refugee entailed in the 1951 Refugee Convention requires the individual in question to be outside their own country.[42] A further differentiation can be made with regard to the material scope of protection. While the CAT protects only from torture the ICCPR, ECHR, and the CFREU protect from other forms of inhuman and degrading treatment as well. The 1951 Refugee Convention on the other hand makes its protection conditional on the individual risking being persecuted for specific reasons.[43]

In addition to these international human rights instruments, the principle of *non-refoulement* is also a principle of customary international law. International customary law offers protection from *refoulement* with regard to persecution as well as torture or cruel, inhuman or degrading treatment or punishment.[44]

The following subchapter will demonstrate how the principle of *non-refoulement* is enshrined in EU primary law, while laying down the legal basis for a common asylum system and showing the relevance of European solidarity for said system.

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[41] See e.g. *Soering v. The United Kingdom* (Fn. 30), para 91; *Cruz Varas and Others v. Sweden*, no. 15576/89 (ECtHR, 20 March 1991) para. 70; *M.S.S. v. Belgium and Greece* (Fn. 10); *Hirsi Jamaa and Others v. Italy* No. 27765/09 (ECtHR, Grand Chamber, 23 February 2012).
[42] Own country in this regard means country of nationality or of the person in question has no nationality country of last habitual residence (Art. 1 (2) 1951 Refugee Convention).
[43] These reasons being race, religion, nationality, membership of a particular social group or political opinion.
[44] G. GOODWIN-GILL AND J. MCADAM, 354.

2.4 European solidarity and the legal basis of a Common European Asylum System in EU Primary Law

Since the foundation of the EU, solidarity has been a fundamental value of the Union. This European solidarity applies vertically to the relation between the Union and its citizens as well as horizontally to the relation between the member states.[45] Both the value of vertical solidarity and the value of horizontal solidarity are enshrined in in the founding treaties of the EU.[46] As will be demonstrated as follows, solidarity is enshrined in several provisions of the EU's legal framework. It should therefore not only be considered a fundamental value of the Union but rather, as stressed by *Violeta Moreno-Lax*, EU solidarity produces legal obligations for its members states.[47]

In its chapter regarding border checks, asylum and immigration the Treaty on the Functioning of the European Union (TFEU) in Art. 80 specifically states:

> The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.

This provision specifically establishes that the principle of solidarity applies to the Common European Asylum System that will be explained as follows.

[45] See e.g. ANDREA SANGIOVANNI, Solidarity in the European Union, in: Oxford Journal of Legal Studies, Vol. 33:2 (2013), 213 at 213, 214.
[46] Preamble and Art. 3 TEU; Preamble and Art. 67 TFEU.
[47] VIOLETA MORENO-LAX, Solidarity's reach: Meaning, dimensions and implications for EU (external) asylum policy, in: Maastricht Journal of European and Comparative Law, Vol. 24:5 (2017), 740 at 743.

The concept of the EU citizenship was established through the Treaty on European Union (TEU). Art. 3 (2) of the Treaty states:

> The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external borders controls, asylum, immigration and the prevention and combating of crime.

One of the main intensions of this provision is the abolition of internal borders in order to enable the freedom of persons, goods, services and capital throughout the EU.[48]

The abolition of internal borders is further enshrined in Art. 67 (2) TFEU which creates a legal basis for the CEAS:

> It [The Union] shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.

The idea of a European Union without internal borders was translated into action with the Schengen Agreement in 1985 and the Convention Implementing the Schengen Agreement in 1990[49]. The creation of the Schengen system was accompanied by the adoption of the Dublin Convention, with the purpose of determining the state responsible for the examination of asylum applications. With the treaty of Amsterdam entering into force in 1999 the Schengen acquis was integrated into the framework of the EU and asylum was shifted from being an inter-governmental issue to a community issue.[50] This can be considered the starting point of the CEAS.

[48] See Art. 3 TEU; see also Art. 67 (1) TFEU.

[49] The Schengen acquis - Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks of checks at their common borders, 19 June 1990.

[50] VINCENT CHETAIL, The Common European Asylum System: Bric-à-brac or System, in: VINCENT CHETAIL, PHILIPPE DE BRUYCKER AND FRANCESCO MAIANI (eds.), Reforming the Common European Asylum System, The New European Refugee Law, Brill Nijhof 2016, 9.

Art. 67 (2) TFEU does however not only create a legal basis for the elimination of internal border controls and the creation of a common European asylum system but does also speak of fairness towards third-country nationals. This fairness could be understood as a third form of European solidarity besides the horizontal and vertical solidarity laid down above – the external solidarity towards third-country nationals. This understanding is *inter alia* supported by *Violeta Moreno-Lax*, stating that Art. 67 TFEU requires the EU to act in a solidary manner towards the rest of the world that results in a fair outcome for refugees.[51] Considering that the migration control measures in the Mediterranean are mostly directed at third-country nationals, this provision and the call for solidarity it entails, is particularly relevant.

Viewing Art. 80 TFEU in conjunction with Art. 67 and Art. 78 TFEU, demonstrates how the principle of European solidarity is connected with the principle of *non-refoulement* within the CEAS. Art. 78 (1) TFEU thereby states:

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

This paragraph defines the relationship between the CEAS and the EU's international legal obligations, including the principle of *non-refoulement*, which is of particular significance for this thesis. The provision clearly states that the EU's asylum system needs to respect the principle of *non-refoulement* and be in accordance with the 1951 Refugee Convention.

[51] V. MORENO-LAX, Solidarity's reach (Fn. 47), 743.

The legal necessity for the CEAS to respect the principle of *non-refoulement* is also prescribed in the CFREU.

Art. 18 CFREU is based on Art. 78 TFREU and establishes a right to asylum.[52] It thereby states:

> The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 2951 and the Protocol if 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

Resulting from this, the right of asylum guaranteed by Art. 18 CFREU must include the protection from *refoulement.*[53]

As already set forth in Chapter 2.3, Art. 19 CFREU in its second paragraph also guarantees the protection from *refoulement* within the CEAS. The provision thereby incorporates the relevant case law from the ECtHR regarding Art. 3 ECHR, which will be expanded on in Chapter 4.[54]
In its first paragraph the article prohibits collective expulsion. Hence, its purpose is to ensure that every decision is based on an individual examination.[55] In what way the protection from collective expulsions might be compromised in the course of current migration control practices in the Mediterranean, will become apparent in Chapter 3.

This subchapter has demonstrated how the principle of *non-refoulement* is enshrined in EU primary law. The following subchapter will show how the CEAS, based on the provisions presented above, has been implemented into EU secondary law and how these instruments guarantee the protection from *refoulement.*

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[52] RUDOLF GEIGER, DANIEL-ERASMUS KHAN AND MARKUS KOTZUR (eds.), European Union Treaties, A Commentary, Hart Publishing 2015, 1081.
[53] See VIOLETA MORENO-LAX, Accessing Asylum in Europe, Extraterritorial Border Controls and Refugee Rights under EU Law, Oxford University Press 2017, 282.
[54] R. GEIGER, D. KHAN AND M. KOTZUR, 1082.
[55] Ibid.

2.5 The realization of a Common European Asylum System in EU Secondary Law

The CEAS aims at the harmonization of the asylum legislation throughout the EU and to achieve a truly common system.[56] The legal instruments set up to fulfill this aim are the Reception Conditions Directive recast[57], the Asylum Procedures Directive recast[58], the Qualification Directive recast[59] and the Dublin III Regulation[60] which, as demonstrated in the previous subchapter, in accordance with EU primary law all have to ensure the compliance with the principle of *non-refoulement*.

The Reception Conditions Directive establishes the minimum standards for a full set of benefits granted to asylum seekers in the member states. The EU considers the dignified standard of living for asylum seekers one of its primary aims in the area of asylum and the Reception Conditions Directive seeks to ensure that that aim is fulfilled.[61] In its recital 3 the Directive affirms that the reception conditions need to be in accordance with the principle of *non-refoulement*.[62]

The Asylum Procedures Directive aims at the harmonization of the asylum processes between the member states. By means of this directive the EU wants to achieve that similar cases are treated alike and reach the same result regardless in what member state the application is being examined.[63] Recital 3 of the directive affirms the full and inclusive application of the Refugee Convention as well as the principle of *non-refoulement*.[64]

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[56] See VINCENT CHETAIL, 3.
[57] Directive 2013/33/EU laying down standards for the reception of applicants for international protection (recast).
[58] Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast).
[59] Directive2011/95/EU on standards for the qualification of third-country nationals and stateless persons as beneficiaries of international protection, for a uniform status for refugees or for person eligible for subsidiary protection, and for the content of the protection granted (recast).
[60] Regulation (EU) No 604/2013 establishing the criteria and mechanism for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person (recast).
[61] EVANGELIA LILIAN TSOURDI, EU Reception Conditions: A Dignified Standard of Living for Asylum Seekers?, in: VINCENT CHETAIL, PHILIPPE DE BRUYCKER AND FRANCESCO MAIANI (eds.), Reforming the Common European Asylum System, The New European Refugee Law, Brill Nijhof 2016, 271.
[62] Asylum Reception Conditions Directive, recital 3.
[63] Asylum Procedures Directive, recital 8, 12.
[64] Asylum Procedures Directive, recital 3.

The Qualification Directive establishes the criteria in order to qualify as refugees or people in need of international protection. It further defines the content of the protection granted.[65] The purpose of the Directive is to set a minimum standard for the qualification of the refugee status or subsidiary protection. This minimum standard has to be in accordance with fundamental principles of international and EU law.[66] In its Art. 21 the Qualifications Directive entails the obligation of all member states to respect the principle of *non-refoulement*.

The three directives above were introduced with the objective to harmonize and unify the asylum system within the EU and to ensure the compliance with the principle of *non-refoulement* and with the rights of the 1951 Refugee Convention and other relevant treaties. However, even if the directives seem to fulfill this objective in theory their implementation is marked by shortcomings in practice.[67]

The Reception Conditions Directive establishes a minimum standard of reception conditions in order to ensure a dignified standard of living for asylum seekers. However, not all member states live up to these standards. For instance, the ECtHR in its case *M.S.S. v. Belgium and Greece* pointed out that with the Reception Conditions Directive comes an obligation for the member states to provide minimum standard for the reception of asylum seekers such as accommodation and decent material conditions.[68] It considered the circumstances which the applicant had to live in as an asylum seeker in Greece as humiliating treatment, in disrespect of his dignity and not only contradictory to the Reception Conditions Directive but also to Art. 3 ECHR.[69]

[65] Art. 1 Qualification Directive.
[66] HELENE LAMBERT, The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law, in: International and Comparative Law Quarterly, Vol. 55:1 (2006), 161 at 163.
[67] The intention of the examples illustrated below is not to demonstrate all the shortcomings of the three directives but rather to give examples where they do not live up to their objective.
[68] *M.S.S. v. Belgium and Greece* (Fn. 10), para. 250.
[69] Ibid. paras. 263, 264.

The Asylum Procedures Directive ensures access to the asylum procedure and establishes common basic procedural guarantees. However, also in this regard, in particular overburdened states have been known to neglect their obligations. The ECtHR case of *Sharifi and Others v. Italy and Greece* concerned the expulsion of third country nationals from Italy to Greece who had no access to asylum procedures. The Court considered the fact that the applicants did not have the opportunity to contact a lawyer nor a translator and were not informed about their rights as being contradictory to the Asylum Procedures Directive.[70]

The Qualification Directive aims to provide a common minimum standard for the qualification of refugee status or subsidiary protection. However, when looking at statistics on successful asylum applications, there are striking differences among the member states. For example, comparing the protection rates for Afghan asylum applicants within the EU in 2017, one sees how the protection rate was 91.6 % in Italy, 46.6 % in Germany and 1.4 % in Bulgaria. In other words, in 2017, the chance of an Afghan's asylum application to be successful in Italy was over 60 times larger than in Bulgaria and almost twice as large as in Germany.[71] Consequently, asylum seekers from a specific country of origin receive different kinds of protection, if any at all, depending on the member state to assess the asylum claim. The Qualification Directive does therefore not seem to have fulfilled its aim of a common qualification standard.[72]

As the examples above show, there are situations where the Reception Conditions Directive, the Asylum Procedures Directive and the Qualification Directive do not live up to their main objective of a harmonized and unified European asylum system, but rather some states do not reach the prescribed standards and the standards vary between among the member

[70] *Sharifi and Others v. Italy and Greece* No. 16643/09 (ECtHR, 21 October 2014), para. 169.

[71] See BEND PARUSEL, Afghan Asylum Seekers and the Common European Asylum System, Bundeszentrale für politische Bildung, October 2018, https://www.bpb.de/gesellschaft/migration/laenderprofile/277716/afghan-asylum-seekers-and-the-common-european-asylum-system (accessed 19 May 2019), based on Eurostat data.

[72] See e.g. HÉLÈNE RAGHEBOOM, The International Legal Status and Protection of Environmentally-Displaced Persons: A European Perspective, Brill Nijhoff 2017, 180; Likewise argue *Marten Den Heijer, Jorrit Rijpma and Thomas Spijkerboer* when asking the question why a an Afghan refugee should accept being assigned to a member states where it is highly likely that her asylum claim will be rejected when it is very probable that it will be accepted in another state (MARTEN DEN HEIJER, JORRIT RIJPMA AND THOMAS SPIJKERBOER, Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System, in: Common Marktet Law Review, Vol. 53 (2016), 607 at 614).

states.[73] What the directives do is to set minimum standards that the national legislation must meet.[74] If and how these standards are implemented however, differs widely.[75] Looking closer at the three directives, one might not only say that the member states do not live up the prescribed standards, but also that the CEAS itself is leaving quite a wide margin of discretion to the members states and therefore allowing for such variations.[76] As pointed out by *Marten Den Heijer, Jorrit Rijpma and Thomas Spijkerboer* this margin of discretion might lead member states to lower their standards in order to attract a lower number of asylum seekers.[77]

This lack of harmonization and uniformity might in turn have a negative effect on the protection from *refoulement* within the CEAS. Where member states offer reception conditions that are to be considered inhuman or degrading, and where asylum seekers are being transferred to these states without a proper examination of their asylum claim including the conditions awaiting them, the CEAS can in practice no longer ensure the compliance with the *non-refoulement* principle.

A further component of the CEAS is the Dublin System. The Dublin III Regulation has the purpose of determining the state responsible to examine the application of an asylum seeker within the member states of the Regulation. The basic principle of the Dublin Regulation is the responsibility of that member state into which the asylum seeker first entered respectively in which he first got registered by the Eurodac-System.[78] The operation under the Dublin Regulation is consequently dependent on the so-called Eurodac-System which collects and compares finger prints of registered asylum seekers.[79] According to the explained basic principle, if a member state is not the state of first entry, it has the right to transfer the asylum seeker in question to the member state in which they first got registered for the purpose of status determination. In its recital 3 the Dublin III Regulation however

[73] See e.g. M. DEN HEIJER, J. RIJPMA AND T. SPIJKERBOER, 609.
[74] See i.a. Art. 5 Asylum Procedures Directive, Art. 3 Qualification Directive and Art. 4 Reception Conditions Directive.
[75] See e.g. M. DEN HEIJER, J. RIJPMA AND T. SPIJKERBOER, 609.
[76] See SAMANTHA VELLUTI, Reforming the Common European Asylum System: Legislative Developments and Judicial Activism of the European Courts, Springer 2013, 45-68.
[77] M. DEN HEIJER, J. RIJPMA AND T. SPIJKERBOER, 612.
[78] See Chapter III and Art. 3 (2) Dublin III Regulation.
[79] Regulation (EU) No. 603/2013 on the establishment of 'Eurodac'; see Dublin III Regulation, recital 30.

guarantees that nobody shall be sent back to persecution and that the principle of *non-refoulement* always has to be maintained.

The Dublin System might, *prima facie*, seem like a fair distribution of responsibility among the member states, but two important circumstances are thereby being neglected.[80] Firstly, the Regulation does not consider the fact that member states positioned at the European border, are much more likely to be the state of first entry and will therefore carry a greater responsibility. The problem is consequently, that each member state has to fend for itself, regardless of how many asylum seekers they receive.[81] Secondly, the Dublin System is built upon the idea of mutual trust between the member states. In other words, the system builds upon the assumption that every member state respects the rights of asylum seekers in accordance with international and EU law. However, due to different socio-economic circumstances but also precisely because the asylum systems of the states positioned at the EU's external border are more likely to be overstrained, not all the member states are given the same prerequisites and can therefore not provide the same standards. With regard to the principle of *non-refoulement* this means that the conditions in member states can, due to a combination of an overstrained national asylum system and rather poor socio-economic preconditions, amount to inhuman or degrading treatment and a transfer to that member state will constitute a violation of the prohibition of *refoulement*.
These two circumstances make one question the combability of the Dublin System with not only the vertical and horizontal European solidarity explained above, but also with the external solidarity towards third-country nationals.

The Dublin System has been heavily criticized precisely because of its lack of solidarity and shared responsibility. *Francesco Maiani*, for instance, criticizes the unequal distribution of responsibility and the absence of solidarity measures the Dublin System entails. He believes that this in turn creates an incentive to abuse the system, which seems like a reasonable argument when looking at current extraterritorial migration control practices in the

[80] See i.a. *Marten Den Heijer, Jorrit Rijpma and Thomas Spijkerboer* stating that the allocation of asylum seekers is based on false premises (M. DEN HEIJER, J. RIJPMA AND T. SPIJKERBOER, 607, 610).
[81] See ibid. 612.

Mediterranean.[82] Also, *Violeta Moreno-Lax* highlights the non-solidarity in the Dublin System and considers the first country of entry criteria as a shift rather than a sharing of responsibility.[83] *Silvia Morgades-Gil* considers the system deeply flawed and based on the false assumption, that after the harmonization trough the EU Directives of the CEAS the asylum systems in every member state are equivalent and in accordance with human rights and international refugee law.[84] The unfairness of the Dublin system has further been highlighted by *Marten den Heijer, Jorrit Rijpma and Thomas Spijkerboer*, who seem to agree that the system leads to lack of solidarity within the EU as well as towards third country nationals. They thereby find the system to on the one hand, distribute the responsibility unfairly between the member states and on the other hand, to be unfair towards asylum seekers. This unfairness does in turn create an incentive for both the disadvantaged member states and the disadvantaged asylum seekers to frustrate the system. While overburdened states at some point are not only incapable but also unwilling to maintain the system, asylum seekers who e.g. faced highly deficient reception conditions would travel onward.[85]

These are only a few amongst many scholars who have expressed criticism and argue for a change of the Dublin System.

The malfunctioning of the Dublin System is also visible when looking at relevant case law of the ECtHR and the CJEU. Especially with regard to border states receiving the majority of asylum seekers, such as Greece or Italy, the ECtHR has affirmed that the idea of mutual trust cannot always be relied on.[86] The idea of mutual trust has also been relativized by the

[82] FRANCESCO MAIANI, The Dublin III Regulation: A New Legal Framework for a More Humane System? in: VINCENT CHETAIL, PHILLIPPE DE BRUYCKER AND FRANCESCO MAIANI (eds.), Reforming the Common European Asylum System, The New European Refugee Law, Brill Nijhoff 2016, 101 at 114.

[83] V. MORENO-LAX, Solidarity's reach (Fn. 47), 753.

[84] SILVIA MORGADES-GIL, The Discretion of States in the Dublin III System for Determining Responsibility for Examining Applications for Asylum: What Remains of the Sovereignty and Humanitarian Clauses After the Interpretations of the ECtHR and the CJEU? in: International Journal of Refugee Law, Vol. 27:3 (2015), 433 at 441.

[85] MARTEN DEN HEIJER, JORRIT RIJPMA AND THOMAS SPIJKERBOER, *The systemic failure of the Common European Asylum System, as exemplified by the EU-Turkey deal*, March 2016, http://thomasspijkerboer.eu/thomas-blogs/the-systemic-failure-of-the-common-european-asylum-system-as-exemplified-by-the-eu-turkey-deal/ (accessed 19 May 2019).

[86] With regard to Greece see e.g. *M.S.S. v. Belgium and Greece* (Fn. 10); with regard to Italy see e.g. *Tarakhel v. Switzerland* (Fn. 10).

CJEU which has held that the Dublin System cannot operate on the conclusive assumption that all member states of the EU act in accordance with the fundamental rights of the EU but rather that this assumption is rebuttable.[87] The Court highlights that in situations where one member state has to carry a disproportionate burden compared with other member states this might lead to the inability of said state to cope with the situation in practice.[88] In situations like these, one sees how a conflict within the CEAS between the idea of mutual trust and the principle of solidarity on the one hand, and fair sharing of responsibility between the member states on the other hand, may occur.[89] This conflict within the CEAS as well as the lack of solidarity in the Dublin System ask for a change of the system towards a system that attaches more value to solidarity and shared responsibility.

In this regard, one does however need to point out that, in line with Art. 80 TFEU, the EU has tried to relieve overburdened member states by e.g. introducing relocation measures.[90] Said relocation to other less strained member states however, has been very slow and the success so far quite moderate.[91] This rather poor implementation indicates that the inequality produced by the Dublin System is too profound to change by individual measures, but rather that, as already indicated above, a change of the whole system is needed.[92]

[87] *N.S. v. Secretary of State for the Home Department* (C-411/10) and *M.E. and Others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* (C-493/10), (CJEU, Grand Chamber, 21 December 2011), para. 104; see also https://eutopialaw.com/2012/01/25/case-comment-n-s-v-secretary-of-state-for-the-home-department-c-41110/ (accessed 2 April 2019).

[88] *N.S. v. Secretary of State for the Home Department* (Fn. 87), para. 87.

[89] Ibid., paras. 10, 83.

[90] See European Commission, Communication from the Commission on a European Agenda on Migration, COM (2015) 240, May 2015; Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, L 239/146; Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the bene t of Italy and Greece, L 248/80.

[91] See e.g. European Commission, Communication from the Commission, Progress report on the Implementation of the European Agenda on Migration, COM (2018) 301, May 2018; European Commission, Communication from the Commission, Progress report on the Implementation of the European Agenda on Migration, COM (2019) 126, March 2019; see in this regard e.g. GIANNA-CARINA GRÜN, How the EU's resettlement plan is failing to meet its goal, November 2018, https://www.dw.com/en/how-the-eus-resettlement-plan-is-failing-to-meet-its-goal/a-46473093 (accessed 27 May 2019); or MAIA DE LA BAUME, Why the EU's refugee relocation policy is a flop, June 2016, https://www.politico.eu/article/why-eu-refugee-relocation-policy-has-been-a-flop-frontex-easo-med/ (accessed 27 May 2019).

[92] See ECRE, Relying on Relocation, ECRE's Proposal for a Predictable and Fair Relocation Arrangement Following Disembarkation, Policy Paper 6 (2019), 6, https://www.ecre.org/wp-content/uploads/2019/01/Policy-Papers-06.pdf (accessed 27 May 2019).

2.6 Concluding remarks

This chapter has demonstrated that in situations of interception on the high seas, the theoretical tension between state sovereignty and human rights becomes a real issue. In order to guarantee the protection of human rights extraterritorially, a shift in the understanding of sovereignty towards a European and international understanding thereof would be needed. The chapter has further shown, that the principle of *non-refoulement* as the cornerstone of international refugee law is enshrined in several international as well as European human rights instruments and how the principle is embedded in the CEAS. However, the chapter has also pointed towards a lack of solidarity and shared responsibility within the CEAS and claims that these deficiencies impairs the protection from *refoulement* on the high seas.

The severity of the lack of solidarity and shared responsibility within the CEAS and its impairment on the protection from *refoulement* becomes evident when looking at recent migration control practices in the Mediterranean, which will be expanded on in the following chapter.

3 Migration control operations in the Central Mediterranean

3.1 Introduction

As described shortly in the introduction, the EU and its members states have increasingly adopted practices of intercepting migrants and refugees at sea in order to prevent them from reaching the European borders. This thesis focuses on situations on the high seas of the Central Mediterranean where vessels are being restrained and forced back to the point of departure or other third countries.

There is no internationally accepted definition of maritime interception. The UNHCR deprives the meaning from examination of State practice and defines interception as “all measures applied by a state, outside its national territory, in order to prevent, interrupt or stop the

movement of persons without the required documentation crossing international borders by […] sea, and making their way to the country of prospective destination."[93]

When observing current and recent operations and practices in the Mediterranean, there are different actors involved in activities meeting this definition. Apart from the EU, also individual member states as well as NGOs are active in the Central Mediterranean. However, rather than to present the reader with a complete overview of all the practices and operations in the Mediterranean, the thesis will provide two specific examples of EU operations and therefore focus on activities of the EU and the member states involved in the joint operations.

To deal with the migration in the Mediterranean the EU has in the past years launched different operations with different mandates and operating in different parts of the Mediterranean Sea. This chapter will focus on the two EU operations Triton and Sophia, as these were operations that were adapted in the Central Mediterranean in order to deal with the increase of migration flows starting in 2014.[94]

Before illustrating the chosen operations, one needs to clarify that many of the EU operations in the Mediterranean are Frontex operations, so is operation Triton. Frontex started operating as the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union in October 2005. Its primary task is to coordinate joint operations between the EU member states at the external borders of the EU, at sea, land and in the air. Consequently, the operation of Frontex resulted in a variety of different EU joint operations operating in parallel to the migration control practices of the individual member states. Actions carried out by Frontex are subject to its founding regulations as well as to the CFREU.[95] Operation Sophia on the other hand, is a Common Security and Defence Policy

[93] Executive Committee of the High Commissioner's programme, Standing Committee 18th Meeting, Interception of asylum-seekers and refugees: The international framework and recommendations for a comprehensive approach (EC/50/SC/CPR.17), 9 June 2000, https://www.unhcr.org/excom/EXCOM/3ae68d144.pdf (accessed 8 April 2019); see also UN High Commissioner for Refugees (UNHCR), Conclusion on Protection Safeguards in Interception Measures No. 97 (LIV) 2003, 10 October 2003, No. 97 (LIV) 2003, https://www.refworld.org/docid/3f93b2894.html (accessed 8 April 2019).

[94] See E. CUSUMANO, 4.

[95] See Council Regulation (EC) No 2007/2004 of October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union; Council Regulation (EC) No 863/2007 establishing a mechanism for the creation of Rapid Border Intervention

(CSDP) operation within the framework of the EU's Maritime Security Strategy based on a decision from the Council of the European Union.[96] The operation is managed by the EU Naval Force (EUNAVFOR), but does however maintain a close cooperation with Frontex and Frontex is the main partner of the operation.[97]

In 2017, Frontex as the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union was replaced by the European Border and Coast Guard.[98] Comparing the legal framework for joint operations between the original Frontex and the European Border and Coast Guard regulation one does however not see any significant changes. As pointed out by *Eugenio Cusumano* the name European Border and Coast Guard suggests a greater emphasis on rescue, yet the tasks and areas of operation remain the same. He therefore uses the term rebrand rather than replacement.[99] The establishment of the European Border and Coast Guard did consequently not have a remarkable effect on the joint operations in the Mediterranean.[100]

3.2 Operation Triton

In November 2014 Frontex launched Operation Triton for the purpose of surveilling and controlling the EU's southern border. Triton's mandate was mainly to help Italy to control the migrant flows in the Sicily Channel – in other words, the main focus of the operation was on

Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulation the tasks and powers of guest officers; EU Parliament and Council Regulation (EU) No 1168/2011 of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

[96] Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED); Council of the European Union, European Union Maritime Security Strategy, 11205/14, 24 June 2014.

[97] SOPHIE DURA, The EU in the Central Mediterranean: Impact and Implications of the Comprehensive Approach, in: European Journal of Migration and Law, Vol. 20 (2018), 205 at 206, 209.

[98] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

[99] E. CUSUMANO, 9.

[100] See FELIX VACAS FERNANDEZ, The European Operations in the Mediterranean Sea to Deal with Migration as a Symptom: From the Italian Operation Mare Nostrum to Frontex Operations Triton and Poseidon, Eunavfor-Med and Nato's Assistance in the Aegan Sea, in: Spanish Yearbook of International Law, Vol. 20 (2016), 93 at 99.

border control.[101] The operation was supposed to replace the Italian operation Mare Nostrum, which was launched by Italy as a reaction to the drastic increase of deaths in the Mediterranean and especially after the tragic death of 336 migrants at the coast of Lampedusa in the beginning of October 2013. This operation was essentially of humanitarian nature, aiming at the rescuing and saving of migrants in the Mediterranean Sea. During its year of operation, Mare Nostrum was successful in saving over 150'000 lives at sea. However, as Italy had to take care of all migrants rescued in legal, economic and social terms, this effort could in the long term not be carried by Italy alone. Consequently, the Italian government asked the EU for a cooperation, which led to the replacement of Mare Nostrum with Operation Triton.[102] In other words a search and rescue operation got replaced by an operation focusing on migration control. Even though Frontex according to its regulations is bound by the CFREU and in particular the principle of *non-refoulement*, Operation Triton is known, by means of *inter alia* interception, to have prevented migrants from reaching the European border.[103] And although, according to Frontex, search and rescue was also an important part of the operation, Triton's role with regard to search and rescue in the Central Mediterranean remained limited, and from a humanitarian perspective it was never able to substitute Mare Nostrum.[104]

Already while Mare Nostrum was still active, the operation met criticism in the EU, due to the mainly humanitarian nature of the Italian operation, as a search and rescue operation rather than an operation to control the European borders. The EU thereby feared that operations such as these would function as a pull factor. Not only did the focus of the new established Frontex operation Triton change towards the control of migration flows towards the EU but at the same time the composition and budget were drastically reduced compared to the Italian operation. This reduction in combination with shift in focus away from search and rescue resulted in the worst tragedies in the Mediterranean so far where over 1000 people died within just a couple

[101] See V. MORENO-LAX, Accessing Asylum in Europe (Fn. 53), 195.
[102] F. VACAS FERNANDEZ, 97, 98; PAOLO CUTTITTA, Repoliticization Through Search and Rescue? Humanitarian NGOs and Migration Management in the Central Mediterranean, in: Geopolitics, Vol. 23:3 (2018) 632 at 638; V. MORENO-LAX, Accessing Asylum in Europe (Fn. 53), 194, 195.
[103] See i.a. Council Regulation (EC) No 863/2007, recital 18, 19 and Art. 2; EU Parliament and Council Regulation (EU) No 1168/2011, recital 30 and Art. 1
[104] See E. CUSUMANO, 9, 10, 15.

of days.[105] Focusing instead on border control, operation Triton has been highly criticized by several human rights organizations for intercepting and blocking vessels with migrants and refugees.[106]

In 2018 Triton was replaced by operation Themis, which is still operating the Central Mediterranean but covers a much larger area, also reaching in to the Eastern and Western parts of the Mediterranean. The reason for the expansion is, according to Frontex, a new shift in migration routes.[107] Themis does in contrast to Triton not longer include the legal obligation to transport rescued migrants to the European border. Rather, the new operation leaves the decision of disembarkation to the state who is operating the specific mission.[108] Frontex has further highlighted that the new operation has an enhanced law enforcement focus, while still including search and rescue as a crucial component.[109] One might interpret this as a further step on the road from a search and rescue to surveillance and border control operation.[110] Consequently, one could conclude that this operation gives the operating states even more discretion to perform push-back operations and compromise the protection from *refoulement.*

[105] See F. VACAS FERNANDEZ, 100, 101; see also VIOLETA MORENO-LAX, The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through-Interdiction/Rescue-Without-Protection' Paradigm, in: Journal of Common Market Studies, Vol. 56:1 (2018) 119 at 126; see also E. CUSUMANO, 9, 10.

[106] MARTINA TAZZIOLI, Border Displacements. Challenging the politics of rescue between Mare Nostrum and Triton, in Migration Studies, Vol. 4:1 (2016), 1 at 2. For instance by Human Rights Watch, ECRE and Pro Asyl, see https://www.ecre.org/operation-mare-nostrum-to-end-frontex-triton-operation-will-not-ensure-rescue-at-sea-of-migrants-in-international-waters/ (accessed 20 May 2019).

[107] https://frontex.europa.eu/along-eu-borders/main-operations/operation-themis-italy-/ (accessed 20 May 2019); https://openmediahub.com/2018/03/12/eu-sea-mission-themis-protect-europe-migration/ (accessed 20 May 2019).

[108] https://frontex.europa.eu/along-eu-borders/main-operations/operation-themis-italy-/ (accessed 10 May 2019); https://www.reuters.com/article/us-europe-migrants-italy/in-new-eu-sea-mission-ships-not-obliged-to-bring-migrants-to-italy-idUSKBN1FL62M (accessed 10 May 2019).

[109] https://frontex.europa.eu/along-eu-borders/main-operations/operation-themis-italy-/ (accessed 20 May 2019).

[110] See ANNA MORVERN, The 'refugee crisis' in the Mediterranean: The role of EU states, civil society and art, April 2018, https://www.opendemocracy.net/en/can-europe-make-it/refugee-crisis-in-mediterranean-role-of-eu-states-civil-society-and-art/ (accessed 20 May 2019).

3.3 Operation Sophia

As a reaction to yet another tragic incident offshore Lampedusa causing over 800 deaths, operation Triton was complemented by Operation Sophia in 2015.[111]

In contrast to Operation Triton, that was mainly active in the Sicily Channel which means the Northern Central Mediterranean Sea, EU Naval Force Operation Sophia operated more in the southern part of the Central Mediterranean and therefore focusing on the Migration from Libya rather than from Turkey.[112]

As already indicated in the introduction of this chapter, Sophia further differs from Triton and Themis as control and surveillance operations, by constituting a military crisis management operation that forms part of the EU's Common Security and Defence Policy. The legal basis of such a common policy is to be found in the TEU. Art. 41 (1) TEU thereby states:

> The common security and defence policy shall be an integral part of the common foreign and security policy. It shall provide the Union with an operational capacity drawing on civilian and military assets. The union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter.

Art. 43 TEU creates a legal basis for operations, such as Sophia, within the CSDP:

> The tasks referred to in Art. 42 (1), in the course of which the Union may use civilian and military means, shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. […]

[111] See Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED); E. CUSUMANO, 12.
[112] Council Decision (CFSP) 2015/778; G. BUTLER AND M. RATCOVICH, 236, 237; E. CUSUMANO, 13.

The aim of the operation is according to the Council of the EU the combatting of human smuggling and trafficking networks.[113] The Council its Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the southern Central Mediterranean (EUNAVFOR MED) states that this aim is to be reached by "undertaking systematic efforts to identify, capture and dispose of vessels and assets used or suspected of being used by smugglers or traffickers, in accordance with international law".[114] This description clearly demonstrates, that even though the operation was launched as a reaction to deaths in the Mediterranean, search and rescue is not a priority. Indeed, the operation is known to have rescued only a small part of the assisted migrants and refugees in the Central Mediterranean.[115] What is more the Council of the EU in its Decision (CSFP) 2015/778 further stipulates that the operation is to be conducted in accordance with international law, such as the 1951 Refugee Convention, the principle of *non-refoulement* and international human rights law. It further refers to *inter alia* the UNCLOS, that entails the obligation to search and rescue at sea.[116] However, and as already indicated in the introduction of this thesis, the operation has repeatedly intercepted vessels on the high seas and returned them to Libya, as their point of original departure. Part of the operation has also been a cooperation with Libya and training of Libyan coastguards in order to prevent vessels from leaving the Libyan territorial waters and return them to Libyan soil. These push-back operations and the cooperation with Libya have been strongly criticized. Especially since most of the people that have been forcibly returned are forced to reside in detention camps under inhuman conditions and Libya cannot be regarded a place of safety.[117] The United Nations (UN) have even qualified the situation for migrants in Libya as a "human rights crisis" and the UN refugee agency (UNHCR) has asked all states to allow civilians fleeing Libya access to their territories.[118]

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[113] Council Decision (CFSP) 2015/778, Art. 1 (1); G. BUTLER AND M. RATCOVICH, 236, 237.
[114] Council Decision (CFSP) 2015/778, Art. 1 (1).
[115] See e.g. European External Action Service (EEAS) EUNAVFOR Med Op Sophia – Six monthly report, 1 January–31 October 2016, 30 November 2016, http://statewatch.org/news/2016/dec/eu-council-eunavformed-jan-oct-2016-report-restricted.pdf (accessed 20 May 2019); European External Action Service (EEAS) EUNAVFOR Med – Strategic Review on EUNAVFOR MED Operation Sophia, 27 July 2018, https://www.statewatch.org/news/2018/aug/eu-sophia-libya-overview-11471-18.pdf (accessed 20 May 2019).
[116] Council Decision (CFSP) 2015/778, recital 6; see Art. 98 UNCLOS.
[117] See e.g. M. RIDDERVOLD, 158, 159; Human Rights Watch, EU: Shifting Rescue to Libya Risks Lives, Italy should Direct Safe Rescues, Report from 19 June 2017, https://www.hrw.org/news/2017/06/19/eu-shifting-rescue-libya-risks-lives (accessed 26 March 2019); see also https://euobserver.com/migration/139881 (accessed 26 March 2019).
[118] See Human Rights Watch Report, 19 June 2017 (Fn. 117).

Consequently, even though the Council of the EU in its decision on the adoption of Operation Sophia prescribes that the practices need to be in accordance with international law and thereby refers to *inter alia* the 1951 Refugee Convention and the principle of *non-refoulement*, the described interception practices seem to cause a severe compromise in the protection from *refoulement* in the Central Mediterranean.[119]

3.4 Concluding remarks

The description above of the two operations in the central Mediterranean are two examples of how, in order to prevent migration towards the EU, the EU has externalized its borders. EU Agencies such as Frontex or the EU Naval Force, in joint operations with member states, are known to rely on interception measures in the Mediterranean Sea in order to prevent potential asylum seekers from reaching Europe's actual border. Instead people are being forced back to their point of departure or other third countries, where often appalling conditions prevail, without any individual processing and examination of asylum claims.

Maria-Teresa Gil-Bazo claims that the EU's concern with asylum is primarily of utilitarian nature. The concern is not based on the wish to offer better protection to people seeking international protection, by adjusting the protection regime to current realities, but is rather based on the wish to control who enters EU territory.[120] Looking at the operations described above, one sees how the increased prioritization of border control is accompanied by an increasing practice of systemic interception at sea.[121] As a consequence, people often choose to take on longer and more hazardous rotes out of fear of interception and putting themselves in even greater risks. What is left is a situation, where people in need of international protection often lose their lives at sea or are sent back to their point of departure or other third states, without being given the chance to seek asylum and having their asylum claims examined.[122] Hence, one sees how the current migration control practices in the Central Mediterranean challenge the legal protection from *refoulement*. This marks the importance of the debate as to

[119] Council Decision 2015/778, Art. 1 (1), Recital 6; See G. BUTLER AND M. RATCOVICH, 252.
[120] M. GIL-BAZO, 572.
[121] Euro-Mediterranean Human Rights Network, Prioritising Border Control Over Human Lives, Violations of the Rights Migrants and Refugees at Sea, Policy Brief 2014, 15, https://www.refworld.org/pdfid/56fccbcbd.pdf (accessed 26 March 2019).
[122] See THOMAS SPIJKERBOER, The Human Costs of Border Control, in: European Journal of Migration and Law, Vol. 9 (2007), 127-139.

how far legal obligations go beyond state borders in relation to people who have not yet reached the state's territory and to what extent there is a right to be protected from *refoulement* on the high seas.[123] Legal issues arising when defining these obligations and rights will be addressed in the following chapter.

4 Legal analysis of the protection from *refoulement* on the high seas

4.1 Introduction

As indicated in the beginning of this thesis, practices of extraterritorial migration control subsequently raise the issue of the extraterritorial protection of human rights. Consequently, extraterritorial migration control is an example of the tension between state sovereignty and human rights, more specifically sovereign border control and the prohibition of *refoulement*, as highlighted in Chapter 2.2. Chapter 2 further showed that the principle of *non-refoulement* is protected by various international and European legal instruments, is a fundamental legal principle of the CEAS and is connected to the idea of European solidarity. The operations of the EU and its member states described in Chapter 3 however, challenge this protection from *refoulement* by intercepting vessels with migrants and refugees without any individual processing or examination of possible asylum claims. These challenges are to be discussed in this chapter.

The chapter aims at analyzing under what circumstances migrants and refugees who are being intercepted on the high Mediterranean seas are legally protected from *refoulement* and what legal issues arise when defining the scope of protection. The chapter is thereby divided according to specific legal complexities arising from migration control measures on the high seas, which all are relevant for the extent of the legal protection from *refoulement*. While first focusing on the content of protection offered by the legal principle of *non-refoulement* itself, the chapter will then continue to discuss the concept of jurisdiction and the establishment of extraterritorial jurisdiction.

[123] See M. GIL-BAZO, 572.

4.2 Content of protection

As already laid down in Chapter 2.3, the content of protection differs between different legal instruments in which the principle of *non-refoulement* is enshrined. While the 1951 Refugee Convention specifically protects refugees, other human rights instruments do not entail this personal limitation. Further, the CAT protects solely from torture whereas the ICCPR as well as the European instruments ECHR and CFREU protect from other forms of inhuman and degrading treatment as well. The 1951 Refugee Convention on the other hand, makes its protection dependent on the risk of being persecuted for specific reasons, whereas customary international law protects from persecution as well as torture or cruel, inhuman or degrading treatment.

What regards the content or the scope of the protection from *refoulement* there are however also more disputed questions. It is *inter alia* controversial among scholars if the location of the person in question is relevant to fall within the scope of the *non-refoulement* principle – a controversy that is especially important when the person in question is situated on the high seas. A minority of scholars represent the view, that the principle of *non-refoulement* only applies in situations where the person in question is already located on the territory of the host country.[124] However, as pointed out by *inter alia Violeta Moreno-Lax* the term "*refoulement*" was chosen deliberately instead of "return" or "expel" in order to also include situations where a person is rejected at a state's border.[125] The majority of scholars follow this view and argue that the *non-refoulement* principle would be diluted if people could be rejected at the border.[126] This interpretation appears to be in line with the general rule of interpretation provided by Art. 31 VCLT stating that a treaty should always be interpreted in light of its object and purpose. Taking as an example the *non-refoulement* provision in Art. 33 of the 1951 Refugee Convention, in its introductory note to the Convention, the Office of the United Nations High Commissioner for Refugees highlights that the Convention is underpinned by *inter alia* the principle of *non-*

[124] See N. OUDEJANS, C. RIJKEN AND A. PIJNENBURG, 4.
[125] VIOLETA MORENO-LAX, Must EU Borders Have Doors for Refugees: On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to o Provide International Protection to Refugees, in: European Journal of Migration and Law, Vol. 10 (2008), 315 at 333.
[126] See N. OUDEJANS, C. RIJKEN AND A. PIJNENBURG, 5; i.a. T. GAMMELTOFT-HANSEN, 45; V. MORENO-LAX, Accessing Asylum in Europe (Fn. 53), 251.

refoulement. It further states that the principle is so fundamental that it is not subject to reservations or derogations.[127] A main object of the Convention is consequently to ensure the protection from *refoulement.* Excluding situations where a person is being *refouled* at a state's border from the scope of protection, would be inconsistent with said object. In line with this interpretation, the majority of scholars represent the view that the application of the prohibition of *refoulement* is not restricted to a state's territory but also includes its border.[128]

Reflecting upon situations on the high seas, migration control measures are moved from the actual physical border to the high seas, hence borders are being externalized. Following the line of argumentation, that the *non-refoulement* principle would be diluted if people could be rejected at the border, the principle should also apply to externalized borders, in other words on the high seas.[129] If this was not the case, the externalization of migration control would undermine the principle of *non-refoulement* and compromise the protection it offers severely. A narrow interpretation would also give states more leeway to circumvent their *non-refoulement* obligations.

In favor of the application on the high seas speaks not only the original purpose of the principle but also, with regard to the externalization of the EU's border, the interpretation approaches of the European Courts.
According to the CJEU, the EU's legal instruments are to be interpreted particularly in the light of their aim and intention. *Inter alia* it is stated in the preamble to the CFREU that its aim is to strengthen the protection of fundamental rights in the light of changes in society or social progress. The increased migration through the Mediterranean Sea accompanied by external migration control measures of the EU and its member states is such a change in society, where the protection of fundamental rights needs to be guaranteed. Accordingly, it is generally

[127] See introductory note to the 1951 Refugee Convention.
[128] See i.a. N. OUDEJANS, C. RIJKEN AND A. PIJNENBURG, 5.
[129] Similar opinions have also been expressed by e.g. *Thomas Gammeltoft-Hansen* (T. GAMMELTOFT-HANSEN, 46) and *James C. Hathaway* (JAMES C. HATHAWAY, The Rights of Refugees under International Law, Cambridge University Press 2005, 336-339.

acknowledged that the scope of the *non-refoulement* principle in EU law reaches beyond the EU territory.[130]

According to the ECtHR, the ECHR is a living instrument that should be interpreted in the light of present-day conditions. The Convention is further to be interpreted in a way that makes its safeguards practical and effective. It is precisely developments such as the externalization of borders, that the law should be able to adapt to in order not to compromise its practical and effective protection.

Accordingly, the application of the principle of *non-refoulement* on the high seas has been confirmed by *inter alia* the UNHCR[131] and the UN Committee Against Torture[132] Also, the ECtHR in the case *Hirsi Jamaa and Others v. Italy* specifically confirmed the application of Art. 3 ECHR on the high seas.[133]

Especially relevant for the situation on the high seas, Judge *Pinto de Albuquerique* in *Hirsi Jamaa and Others v. Italy*, highlighted that the obligation to refrain from *refoulement* applies to everyone, regardless if they have not yet had their status declared or not even expressed the wish to be protected. The fulfillment of the *non-refoulement* obligation thereby requires the State to evaluate the individual's personal risk of harm. Such an evaluation is only possible, where there is access to a fair and effective status determination procedure.[134] It seems evident, that such a fair and effective status determination procedure requires time and resources that are not available on the high seas. One can therefore conclude, that the principle of *non-refoulement* cannot be guaranteed in the course of push-back operations at the high seas, but rather imposes on states the positive obligation to ensure first gate admission for the purpose of status determination.[135]

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[130] European Agency for Fundamental Rights (FRA), Scope of the Principle of non-refoulement in contemporary border management: evolving areas of law, Publications Office of the European Union 2016, 15.

[131] UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, para 24.

[132] General comment No. 2 (2008), CAT/C/GC/2/, para. 16, where the committee states that state parties are bound by the Convention in all areas where it exercises effective control; *J.H.A. v. Spain*, CAT/C/41/D/323/2007 (UN Committee Against Torture, 21 November 2008), where the committee found that Spain was bound by *non-refoulement* obligations when intercepting migrants and refugees on the high seas.

[133] *Hirsi Jamaa and Others v. Italy* (Fn. 41).

[134] *Hirsi Jamaa and Others v. Italy* (Fn. 41), Concurring Opinion by Judge Pinto de Albuquerique, p. 63, 69, 72, 77, 72. For more specific details on fair and effective procedure, see Judge Pinto de Albuquerique on p. 72.

[135] See G. GOODWIN-GILL AND J. MCADAM, 215; see also T. DANNENBAUM, 745; THOMAS GAMMELTOFT-HANSEN AND JAMES C. HATHAWAY, Non-Refoulement in a World of Cooperative Deterrence, in*:* Columbia Journal of Transnational Law, Vol. 53:1 (2015), 235 at 238; *Hirsi Jamaa and Others v. Italy* (Fn. 41), Concurring Opinion by Judge Pinto de Albuquerique, p. 69.

In the light of the above, a person should not need to be situated on a state's territory to enjoy the protection from *refoulement*, but rather the principle should apply to the state's border, including externalized borders on the high seas. The principle does impose upon states the positive obligation to ensure first gate admission for the purpose of status determination which can hardly be guaranteed in cases of interception on the high seas.

Having clarified the content of the principle of *non-refoulement* as well as the obligations the principle entails for states on the high seas, the following subchapter will address the matter of jurisdiction.

4.3 Jurisdiction

4.3.1 Understanding jurisdiction

As demonstrated by the reasoning laid down in the previous subchapter, it is supportable to suggest that the principle of *non-refoulement* is applicable on the high seas. However, the extraterritorial application of the principle in general is not enough to give rise to state obligations. Rather, state obligations are dependent on the exercise of jurisdiction, which constitutes an additional complexity when it comes to the protection from *refoulement* on the high seas. Hence, in order to shed light on this complexity and to understand how and where human rights give rise to state obligations, it is necessary to understand the concept of jurisdiction.

When looking at human rights treaties, they primarily use the concept of jurisdiction in order to define the geographical scope of their application.[136] For the interpretation of the term jurisdiction used in these human rights treaties it is important to understand the meaning of the term in public international law before turning to its meaning in international human rights law.

4.3.1.1 Jurisdiction in public international law

Jurisdiction is an emanation or an aspect of a state's sovereignty and describes its competence based in but also limited by international law to regulate the behavior of natural and legal

[136] See e.g. Art. 2 ICCPR, Art. 1 ECHR, Art. 2 CAT.

persons.[137] State jurisdiction in public international law therefore essentially concerns the extent of a state's right to regulate conduct and its consequences, whereas this right is being limited by other states' equal rights and sovereignty.[138] This understanding of jurisdiction is generally regarded to be closely linked to the national territory, which becomes evident when taking a look at the delimitations put on state jurisdiction by international law.[139] The territorial jurisdiction in general international law can be subject to exceptions and is therefore not absolute, essentially however, the notion of jurisdiction in general international law is considered to be territorial.[140]

4.3.1.2 Jurisdiction in human rights law

Having illustrated the meaning of jurisdiction in general international law, this section seeks to clarify the notion of jurisdiction in human rights law. The notion of jurisdiction in human rights law has led to a debate amongst scholars, whereas a majority argues that the concept found in human rights law needs to be distinguished from the essentially territorial one in general international law and while some argue in favor of retaining a territorial understanding of jurisdiction in human rights law as well.[141] Based on the objective of jurisdiction, *Anja Klug and Tim Howe* do for instance argue for a distinction between the concept in general international law and in human rights law. They do thereby identify the objective of the traditional notion of state jurisdiction as followed in general international law as the delineation between the spheres of different sovereign states in a manner that respects the sovereignty of each state. The objective of jurisdiction in the context of human rights law however, is according to them to define the applicability of human rights obligations and consequently to be able to assess state responsibility under human rights law.[142] Likewise argues *Conall Mallory*

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[137] JAMES CRAWFORD, Brownlie's Principles of Public International Law, 8th Edition, Oxford University Press 2012, 456; MARKO MILANOVIC, Extraterritorial Application of Human Rights Treaties, Law Principles and Policy, Oxford University Press 2011, 23.

[138] M. MILANOVIC, 26.

[139] MALCOLM N. SHAW, International Law, 8th Edition, Cambridge University Press 2017, 484; M. MILANOVIC, 25.

[140] KIM SEUNGHWAN, Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context, in: Leiden Journal of International Law, Vol. 30 (2017), 51.

[141] K. SEUNGHWAN, 51, 52; ELENI KANNIS, Pulling (Apart) the Triggers of Extraterritorial Jurisdiction, in: University of Western Australia Law Review, Vol. 40 (2015), 221 at 224, 225.

[142] ANJA KLUG AND TIM HOWE, The Concept of State Jurisdiction and the Applicability of the Non-refoulement Principle to Extraterritorial Interception Measures, in: BERNARD RYAN AND VALSAMIS MITSILEGAS (eds.), Extraterritorial Migration Control, Legal Challenges, Martinus Nijhoff Publishers 2010, 69 at 98.

and notes that jurisdiction in human rights law is not concerned with the rights of states but with its responsibilities and obligations.[143] *Marko Milanovic* further argues that jurisdiction in human rights law is a question of fact, *de facto* authority and control that a state has with regard to a specific territory or specific persons. Jurisdiction in the human rights context is therefore related to actual power, whether this power is exercised lawfully or not.[144] In this regard, *Klug and Howe* are of the opinion that jurisdiction in human rights law can be established by *de facto* control over a person or a territory, by *de jure* jurisdiction or through a personal link.[145] From this point of view, jurisdiction in human rights law cannot be primarily territorial, but is far more being established by factual circumstances such as effective control over persons even beyond a state's border.[146] Consequently, considering the objective as well as the establishment of jurisdiction, a distinction between the notion of jurisdiction in general international law and in human rights law, as illustrated in this chapter, appears legitimate and open ups the prospect for a wider understanding of extraterritorial jurisdiction within human rights law.

4.3.2 Extraterritorial jurisdiction in human rights law

After having illustrated the differences in the notion of jurisprudence in general international law and human rights law, this subchapter aims at providing a more in-depth understanding of extraterritorial jurisdiction in the human rights context based on relevant case law and scholarly opinions. Whereas this thesis is primarily concerned with the extraterritorial application of the principle of *non-refoulement*, what follows gives an overview of the extraterritorial application of human rights treaties in general, presenting different approaches used by international and European legal bodies or proposed by scholars to establish extraterritorial jurisdiction. The different approaches thereby are: jurisdiction through territorial control, flag jurisdiction, jurisdiction through personal control and jurisdiction by use of the cause and effect approach.[147]

4.3.2.1 Territorial control

Several international courts as well as human rights bodies have agreed that a high level of *de facto* control over a territory can establish jurisdiction.[148] In other words, under a territorial

[143] CONALL MALLORY, European Court of Human Rights Al-Skeini and Others v. United Kingdom (Application No. 22721/07) Judgment of 7 July 2011, in: International and Comparative Law Quarterly, Vol. 61 (2012), 301 at 309.
[144] M. MILANOVIC, 41.
[145] A. KLUG AND T. HOWE, 76.
[146] K. SEUNGHWAN, 52.
[147] See A. KLUG AND T. HOWE, 76.
[148] Ibid.

approach to jurisdiction, a state has jurisdiction over a territory that is under its control and is bound by human rights obligations to those within said territory.

Especially in cases of occupied territories, these legal bodies have repeatedly been faced with the question of the extraterritorial application of human rights treaties.

The International Court of Justice (ICJ) has in two cases been asked to clarify the question of jurisdiction in occupied territories. The Court thereby in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the occupied Palestinian territory* came to the conclusion that Israel due to its military activities as an occupying power in the Palestinian territory established jurisdiction and, in its actions, therefore were bound by human rights law, *i.a.* the ICCPR.[149] In its judgment in the case *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* the ICJ classified Uganda as an occupying power and declared them bound by human rights, when acting in that capacity beyond their own territory.[150]

The UN Committee against Torture in its General Comment No. 2 recognizes that jurisdiction is established wherever a State party exercises factual or effective control. Such control can also be exercised outside a state's own border.[151]

Further the ECtHR has affirmed extraterritorial jurisdiction in cases of occupation, for instance in the case *Loizidou v. Turkey*, which concerned the activities in the by Turkey occupied territory in Northern Cyprus where the Court found that Turkey exercised effective control over Northern Cyprus and was therefore bound by the human rights obligations of the ECHR.[152] In another case against Turkey, the Court additionally highlighted the necessity to establish the

[149] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (ICJ, 9 July 2004, Advisory Opinion), ICJ Rep 2004.
[150] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (ICJ, 19 December 2005, Judgment), ICJ Rep 2005.
[151] General comment No. 2 (2008), CAT/C/GC/2/, para. 16.
[152] *Loizidou v. Turkey* No. 15318/89 (ECtHR, 18 December 1996).

extraterritorial jurisdiction of Turkey in order to avoid a "vacuum in the system of human rights protection".[153]

In cases of occupation the jurisprudence seems to consistently agree that complete *de facto* control over a territory establishes jurisdiction and triggers human rights obligations.[154]

In contrast to the ICJ, the ECtHR has also used the concept of effective territorial control for its legal reasoning beyond cases concerning occupied territories.[155]

Subsuming one can say that the occupation of another state's territory generally triggers extraterritorial human rights obligations. Extraterritorial jurisdiction can also be established on foreign territory, that is not being occupied by the state in question but rather is under that state's effective control.

However, as this thesis focuses on situations on the high seas, jurisdiction cannot be established through control over a territory, but rather by relying on other approaches as will be demonstrated below.

4.3.2.2 Flag state jurisdiction

With regard to interception measures on the high seas, flag state jurisdiction is highly relevant as it determines under which jurisdiction a ship is operating. It establishes a connection between a vessel and a specific state and can therefore impose human rights obligations on the state whose flag the vessel is carrying.[156]

That a ship is under the jurisdiction of the state whose flag it is carrying, is laid down by Art. 94 UNCLOS. That said jurisdiction shall also include jurisdiction with regard to the human rights instruments the state in question has ratified seems evident. Such flag state jurisdiction has in particular been confirmed with regard to the ECHR.[157] For example, in the case of *Xhavara and others v. Italy and Albania* an Italian patrol boat intercepted a vessel with Albanian migrants in the Mediterranean Sea and caused the vessel to sink which resulted in the

[153] *Cyprus v. Turkey* No. 25781/94 (ECtHR, 10 May 2001), para 78.
[154] See A. KLUG AND T. HOWE, 78.
[155] See *i.a. Bankovic and Others v. Belgium and Others* No. 52207/99 (ECtHR, Grand Chamber, 12 December 2001); *Ilascu and Others v. Moldova and Russia* No. 48787/99 (ECtHR, Grand Chamber, 8 July 2004); *Chiragov and Others v. Armenia* No. 13216/05 (ECtHR, Grand Chamber, 16 July 2015).
[156] See e.g. *Hirsi Jamaa and Others v. Italy* (Fn. 41), para. 76.
[157] See e.g. *Medvedyev and Others v. France* No. 3394/03 (ECtHR, Grand Chamber, 29 March 2010) para. 65; *Hirsi Jamaa and Others v. Italy* (Fn. 41), paras. 77, 78.

drowning of 58 people. As the patrol boat was under the Italian flag, Italy was found to have violated the right to life, protected by Art. 2 ECHR.[158]

4.3.2.3 Personal control

Apart from a high level of *de facto* control over a territory, international courts and human rights bodies have also established jurisdiction in situations where a state has had *de facto* control over a person. Especially in cases of abduction on foreign territory, extraterritorial jurisdiction has repeatedly been established.[159]

The Human Rights Committee has with regard to the extraterritorial application of the ICCPR stated that the reference to "individual subject to its jurisdiction"[160] is not a reference to the territory where the violation occurred, but rather a reference to the individual and the state in relation to violated rights of the ICCPR, wherever such violations might have occurred.[161] The Committee further elaborates that Art. 2 (1) ICCPR imposes human rights obligation on states in relation "to all individuals within its territory and subject to its jurisdiction", meaning that a person can be subject to a state's jurisdiction even outside that state's territory.[162]

With regard to the extraterritorial application of the CAT, the UN Committee against Torture in its decision *J.H.A v. Spain* held that, constant *de facto* control over persons is enough to establish jurisdiction beyond the state's territory.[163] The extraterritorial application of the CAT by virtue of control over persons is also laid down in the General Comment No. 2, stating that the state parties are bound by the Convention in all areas where it exercises *de jure* or *de facto* effective control.[164]

With regard to the ECHR, the ECtHR has affirmed control over persons as a basis for state jurisdiction. Not only has the Court affirmed the extraterritorial application of the Convention

[158] See *Xhavara and Others v. Italy and Albania*, No 39473/98 (ECtHR, 11 January 2001).
[159] See e.g. E. KANNIS, 226, 232.
[160] Art. 1 of the Optional Protocol to the ICCPR.
[161] *Delia Saldias de Lopez v. Uruguay*, No. 52/1979 (Human Rights Committee, 29 July 1981) UN Doc. CCPR/C/OP/1 at 88, para. 12.2.
[162] Ibid., para. 12.3.
[163] See *J.H.A. v. Spain* (Fn. 132).
[164] General comment No. 2 (2008), CAT/C/GC/2/, para. 16.

in cases of detention on another state's territory[165] but it has also declared it possible for states to be bound by conventional rights towards persons who are in the territory of another state but are under the authority and control of the former state.[166] The Court thereby substantiated its argumentation with the remark that Art. 1 ECHR could not "be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory."[167]

As demonstrated above, extraterritorial application of human rights can be triggered by a certain level of physical control over persons outside the obliged state's territory. With regard to the topic of the present thesis, this raises the question, if and to what extent the control over persons approach is able to establish jurisdiction over persons on the high seas.

In the case *Hirsi Jamaa v. Italy*, the ECtHR delivered a judgment on interception on the high seas. The case concerned vessels with Somali and Eritrean nationals trying to reach Italy, who got intercepted by Italian authorities and transferred on to an Italian ship to Libya, where they were handed over to the authorities.[168] The Court argued, that the applicants were taken on board of ships of the Italian armed forces by Italian military personnel and were under the continuous and exclusive *de jure* and *de facto* control of these Italian authorities until they were handed over to the Libyan authorities. This, according to the Court, would reach the certain level of control required to establish jurisdiction in the sense of the Convention.[169] Consequently, when it comes to interception practices on the high seas, where persons are taken on board another vessel, these persons can be considered to be under the jurisdiction of the state under which the vessel is flagged.

Other interception practices might however not contain the momentum where the persons in question are taken on board on the acting vessel, but rather have their free passage blocked or in other ways are hindered from reaching their destination and are forced to return. In such situations, the exercised control will most certainly not reach the level of physical control that

[165] See e.g. *Öcalan v. Turkey* No. 46221/99 (ECtHR, Grand Chamber, 12 May 2015).
[166] See e.g. *Issa and Others v. Turkey* No. 31821/96 (ECtHR, 16 November 2004), para 71; *Al-Skeini and Others v. The United Kingdom* No. 55721/07 (ECtHR, Grand Chamber, 7 July 2011), para. 136; *Hirsi Jamaa and Others v. Italy* (Fn. 41), para. 80.
[167] *Issa and Others v. Turkey* (Fn. 166), para. 71; *Ben El Mahi and Others v. Denmark* No. 5853/06 (ECtHR, 11 December 2006).
[168] *Hirsi Jamaa and Others v. Italy* (Fn. 41), paras. 9 ff.
[169] Ibid., paras. 81 f.

according to the ECtHR seems to be required by the control over persons approach. This means, that persons affected by such interception practices would, due to lack of jurisdiction, remain unprotected from human rights violations and unprotected from *refoulement*. In order to avoid such protection gaps, the following subchapter discusses the cause and effect approach, as an additional and broader approach to establish jurisdiction extraterritorially.

4.3.2.4 Jurisdiction based on the cause and effect approach

This subchapter presents a broader approach to extraterritorial jurisdiction based on ECtHR case law that focuses more on the effect of a state's action than on the action itself.[170] This cause and effect notion of jurisdiction suggests, that a person falls within a state's jurisdiction whenever a state through its exercise of power causes human rights violations extraterritorially. In other words, who is affected by an action caused by the state, is under that state's jurisdiction. Compared to the territorial and personal approach, the cause and affect approach is based on a sufficient personal link rather than on a certain level of control.[171]

Even though the cause and effect notion of extraterritorial jurisdiction is not firmly established amongst human rights bodies and courts, one again and again comes across the approach in human rights case law.

For instance, in 1992 in the case of *Drozd and Janousek v. France and Spain* the ECtHR affirmed that the term jurisdiction is not limited to a state's territory, but that jurisdiction can also be established where a state produces effects outside its territory.[172]

On the other hand, the ECtHR rejected the cause and effect notion of jurisdiction in 2001 in the case of *Bankovic and others v. Belgium and others* and stated that the obligation to secure the rights and freedoms to everyone within a state's jurisdiction cannot be divided and tailored according to the specific circumstances of the extraterritorial act in question.[173]

However, after *Bankovic* the ECtHR has on several occasions again suggested the exceptional use of the cause and effect approach. For instance, in the case of *Issa and others v. Turkey* the ECtHR held that acts that produce an extraterritorial effect can in exceptional circumstances

[170] While this subchapter draws upon case law of the ECtHR, other human rights bodies, such as the Committee against Torture, have taken note of the cause and effect approach as well. See e.g. *Sonko v. Spain*, CAT/C/47/D/368/2008 (UN Committee against Torture, 20 February 2012), para. 10.1.
[171] See A. KLUG AND T. HOWE, 87.
[172] *Drozd and Janousek v. France and Spain* No 12747/87 (ECtHR, 26 June 1992), para. 91.
[173] *Bankovic and Others v. Belgium and Others* (Fn. 155), para. 75.

amount to exercise of jurisdiction.[174] The Court has also considered the effects of extraterritorial acts in other cases, such as *Pad v. Turkey*.[175]

However, even if the ECtHR seems to acknowledge the existence of a cause and effect notion of jurisdiction, the recognition of the approach still seems to be greatly inhibited with regard to its jurisprudence in favor of physical control over a person or territory to establish jurisdiction.[176]

Regarding interception on the high seas, it is unclear how the Court would decide with regard to jurisdiction, in a case where the exercised control would not reach the level of physical control required by the personal control approach.[177] As *Hirsi Jamaa* remains the only case where the Court has had to decide a case of interception at sea, we do not know if the Court would base its decision on the cause and effect approach, if it would not be able to establish jurisdiction based on the personal control approach. Even though the Court did not use the cause and effect approach in the case of *Hirsi Jamaa* it still recognized this notion of jurisdiction in its arguments by stating that acts producing effects outside a state's territory can in exceptionally circumstances constitute an exercise of jurisdiction.[178] Consequently, as mentioned above, the recognition of the approach still seems to be inhibited and the Court keeps highlighting that the effects of an action are only to be considered in exceptional circumstances.[179]

Would human rights courts choose to reject the cause and effect approach to establish jurisdiction in situations of interception on the high seas where the persons in question are not under the full physical control of the state but rather suffer human rights violations from the effects of the state's actions, this would lead to legal gaps in the human rights protection on the high seas. When thinking about the concept of jurisdiction, one also has to take into consideration the fact that states can affect a person from far away and without effective control over that person.[180] Denying this would lead to an insufficient protection of human rights for

[174] *Issa and Others v. Turkey* (Fn. 167), para. 68.
[175] *Pad and Others v. Turkey*, No 60167/00 (ECtHR, 28 June 2007), para. 53.
[176] See E. KANNIS, 236.
[177] See A. KLUG AND T. HOWE, 99.
[178] *Hirsi Jamaa and Others v. Italy* (Fn. 41), para. 72.
[179] See e.g. *Pad and Others v. Turkey* (Fn. 175), para. 53*;* or *Hirsi Jamaa and Others v. Italy* (Fn. 41), para. 72.
[180] See E. KANNIS, 237.

victims of extraterritorial state acts and leave persons on the high seas unprotected from certain interception practices.[181] The adoption of a cause and effect approach to jurisdiction would be a way of reducing these gaps in human rights protection and is therefore worth considering.[182]

As the cause and effect approach would constitute a lower threshold of jurisdiction, one could, as does *Hugh King*, suggest that the cause and effect notion of jurisdiction should only imply negative human rights obligations of states.[183] In other words, if jurisdiction was to be established based on the cause and effect approach, states would only be obliged to refrain from interfering with people's human rights but not have any positive duties. Relating this suggestion by *King* to the situation of interception on the high seas, the cause and effect approach would not establish the positive obligation of states to ensure first gate admission for the purpose of status determination, as a part of the *non-refoulement* principle. Such an interpretation of the cause and effect approach would therefore still leave behind remarkable legal protection gaps.

4.3.3 Concluding remarks on jurisdiction

When looking at human rights jurisprudence, the guiding criterion used to allocate human rights obligations to states is the territorial location of the rights holder. Extraterritorial jurisdiction in human rights law is still considered to be the exception and calls for special justification.[184]
Considering the relevant literature and case law on extraterritorial jurisdiction, territorial control is the extraterritorial trigger that has been mostly discussed and seems to be the most established. However more relevant for situations of interception on the high seas and therefore for the present thesis, is extraterritorial jurisdiction through the *de facto* control over persons in combination with flag jurisdiction as a *de jure* possibility to establish jurisdiction. With this approach however, jurisdiction has only been established on the high seas when the interception measure has included taking the persons in question on board on the ship that is exercising migration control and therefore exercising full control over them. Other interception measures, where persons for instance have their free passage blocked or in other ways are hindered from reaching their destination and are forced to return, would most certainly not reach the level of physical control that is required by said approach. The persons in question would consequently

[181] Ibid., 235.
[182] Ibid., 243.
[183] HUGH KING, Extraterritorial Human Rights Obligations of States, in: Human Rights Law Review, Vol. 9:4 (2009), 521 at 556. A similar idea is suggested by *Klug and Howe*, who say that jurisdiction could be limited to a specific subject matter and advise against an all or nothing approach to jurisdiction (A. KLUG AND T. HOWE, 99).
[184] See N. OUDEJANS, C. RIJKEN AND A. PIJNENBURG, 6.

not be subject to a state's jurisdiction, even though severely affected by its actions, but rather left without protection of their human rights and from *refoulement*. Consequently, the territorial and personal control notion of jurisdiction cannot keep pace with current migration control practices.

The cause and effect notion of jurisdiction as described above is more adequate with regard to current migration control practices, reflects the importance to acknowledge the current realities of how states use their power to affect persons outside their own territory and constitutes a possibility to reduce the gap in extraterritorial human rights protection.[185] If however, one follows *King's* suggestion, that the cause and effect approach does only impose negative obligations on states, the positive obligation of states to provide access to a fair and effective status determination procedure could not be established. This would obviously constitute a drawback of this approach and still leave a remarkable protection gap behind.

4.4 Concluding remarks

The previous subchapters have clarified the scope of the *non-refoulement* principle, demonstrated the complexities regarding extraterritorial jurisdiction and discussed different approaches to establish jurisdiction extraterritorially.

Regarding the content of the principle of *non-refoulement*, we have learned, that even though some scholars suggest that it is limited to persons that are already situated within the territory of the host state, a majority of scholars believe the principle to also protect people at a state's border. The principle of *non-refoulement* should therefore imply the right to a first gate admission for the purpose of status determination and the positive obligations of states to guarantee access to a fair and effective status determination procedure. As demonstrated in Chapter 3, the EU continues to externalize its borders and to exercise migration control on the high seas. The prohibition of *non-refoulement* should therefore also apply at these externalized borders in the high seas, as otherwise the principle of *non-refoulement* would be diluted and states would be further encouraged to intercept vessels on the high seas. Such an interpretation is also in accordance with the rules of legal interpretation.

The chapter has further demonstrated the differences in the notion of jurisdiction in international law and human rights law and has analyzed different approaches to establish extraterritorial jurisdiction. As for the determination under which jurisdiction a ship is

[185] See H. KING, 556. Also in favor of a broad interpretation of jurisdiction are *inter alia Klug and Howe* (A. KLUG AND T. HOWE, 101.)

operating, flag state jurisdiction determines that a ship is under the jurisdiction of the state whose flag it is carrying. We have further learned, that jurisdiction through territorial control is not suited as an approach to establish jurisdiction on the high seas. However, jurisdiction has been affirmed on the high seas by the ECtHR by using the personal control approach, which requires a certain level of physical control over the persons in question. In case some interception practices do not reach this level of control however, the persons being intercepted are, due to lack of jurisdiction, left unprotected from *refoulement*. The author in this regard, suggests the use of the broader cause and effect approach, that focuses on the effect of a state's action rather than on the action itself in order to keep pace with current migration control practices and reduce human rights protection gaps on the high seas.

This chapter has demonstrated that the extraterritorial migration control practices in the Mediterranean bring certain legal complexities with regard to the protection from *refoulement* and the obligations of states on the high seas. The following chapter provides a discussion of these findings in relation to the CEAS and its shortcomings.

5 The crisis in the Mediterranean – A crisis of solidarity provoking a lack of protection from *refoulement*?

5.1 Introduction

When looking at interception practices on the high seas of the Central Mediterranean, the thesis has shown how these practices challenge the protection from *refoulement.* It has thereby shown that it is hard to establish the scope of the protection and to fulfill the requirements of jurisdiction. This chapter aims at discussing these challenges in light of the CEAS and the idea of European solidarity. The chapter will discuss the emergence of protection gaps on the high seas, how and to what extent these gaps could be reduced and specifically, what would have to change within the EU and the CEAS to guarantee the protection from *refoulement*.

5.2 The CEAS – A crisis of solidarity?

The author suggests that a possible reason for the emergence or increase of extraterritorial migration control practices by the EU and its member states, is a general lack of solidarity within the EU and the CEAS.

Firstly, one might recognize a lack of vertical solidarity. On the one side, states are members of the Union, but do not always comply with EU law. For instance, as demonstrated in Chapter 2.5, the member states' implementation of the different directives within the CEAS is often deficient, which can be seen as lack of solidarity towards the Union itself. On the other side, the EU itself and especially the Dublin Regulation do not consider the vulnerable position of the member states positioned at the EU's southern border, which can be seen as a lack of solidarity from the Union towards these member states.

Secondly, there appears to be a lack of horizontal solidarity. Not only does the Union itself neglect the vulnerable situation of the member states in the south, but so do the member states. Especially Italy and Greece have repeatedly highlighted the inequity within the Dublin System and called for the responsibility to be shared fairly amongst the member states, however the other member states are unwilling to commit to such a change of the system. One at this point might recall that Art. 80 TFEU specifically calls for solidarity as well as a fair sharing of responsibility within the CEAS. However, the contemporary situation shows a lack of solidarity and a sharing of responsibility that cannot be considered to be fair but is rather based on self-interest and utilitarism. As a result of the margin of discretion the CEAS leaves to the member states with regard to the standards of protection, in combination with the unfair allocation of the Dublin System, one can also how observe member states providine low levels of protection in order to appear unattractive for asylum seekers.[186] In other words, one sees how the shortcomings of the CEAS are an incentive for member states to frustrate the system, which again demonstrates a lack of solidarity towards other member states, but also towards the EU.

Thirdly, a lack of external solidarity is recognizable. The current asylum system and the subsequent extraterritorial migration control practices are not fair towards third country nationals. There is a great variation between the conditions awaiting asylum seekers in the different member states and many states are not living up to the promised standards. This has again and again been criticized, for instance by *Silvia Morgades-Gil*, who points out that one cannot assume that the asylum systems in the member states are comparable in regard to the possibilities of obtaining protection as well as the content of said protection.[187] These significant differences are known to stimulate secondary movements.[188] In other words, also

[186] M. DEN HEIJER, J. RIJPMA AND T.SPIJKERBOER, 612.
[187] S. MORGADES-GIL, 436.
[188] M. DEN HEIJER, J. RIJPMA AND T.SPIJKERBOER, 612.

asylum seekers are known to frustrate the system by leaving the state actually responsible for their asylum claim and travelling onward. What is more, extraterritorial migration control measures, such as the interception at sea, aim at preventing third country nationals from reaching the European border and therefore at hindering these individuals from making asylum claims in the first place. Such practices seem inconsistent with the fairness towards third-country nationals as prescribed by Art. 67 (2) TFEU. In this regard, *Violeta Moreno-Lax* points out, that within the CEAS, solidarity functions as mean to an end, that must above all guarantee the needs of refugee protection.[189]

Moreno-Lax further argues, that in areas where the EU works closely together, a higher level of solidarity is required.[190] As demonstrated in Chapter 2.4 solidarity is not merely a fundamental value of the EU but produces obligations for its member states. When looking at the CEAS and its implementation as well as at current migration control practices of the EU and its member states at sea, these obligations do not seem to be fulfilled. Especially, considering that the CEAS is based on Art. 78 TFEU, that explicitly calls for the compliance of the system with the prohibition of *refoulement*, the EU's push-back operations in the Central Mediterranean seem to demonstrate a malfunctioning of the system.

European solidarity calls for a fair distribution of responsibility among the member states within the CEAS in accordance with their capacity. The situation today is characterized by a striking imbalance of responsibility between the member states to the disadvantage of the states positioned in the European south. As states of first entry, these states carry an unproportionate burden and have to fend for themselves, regardless of how many asylum seekers they receive. Even though the EU to some degree has tried to relieve these states by means of e.g. relocation measures, these measures have not managed to compensate the imbalance within the system.[191] The inequality within the CEAS demonstrates a need for a *de jure* as well as *de facto* shift of responsibility. In other words, there is a need for change within the Dublin system, leading to a fair distribution of responsibility, as well as the willingness of the member states to take on

[189] V. MORENO-LAX, Solidarity's reach (Fn. 47), 752.
[190] Ibid., 749.
[191] For more details see e.g. M. DEN HEIJER, J. RIJPMA AND T. SPIJKERBOER, 627-630.

this responsibility and demonstrate solidarity. This view is not only held by the author, but the Dublin Regulation has and continues to be a focus of scholarly criticism and many voice an urgent need for a change of the system.[192]

Such a change would hopefully reduce the overstraining of some states' asylum systems and consequently raise the standards of the asylum systems within the member states and their ability to live up the conditions set out by the CEAS directives. If there was to be a fair distribution of responsibility within the EU, the member states would most likely not feel the same need to prevent migrants and refugees from reaching their border. Consequently, if the responsibility would not be attributed due to first state admission, but based on the capacity of the member states, the incentive to exercise extraterritorial migration control in the Mediterranean would most likely decrease.

Only by reaching solidarity on the vertical and horizontal level, which would especially require a change of the Dublin System and the willingness of member states to share responsibility, the CEAS could truly reach its aim of harmonization and unification and make the idea of mutual trust work. This in turn, would lead to increased external solidarity towards third-country nationals on their way to or arriving in the EU and result in a better protection from *refoulement*.

Another underlying factor for the exercise of extraterritorial migration control, might be states' understanding of sovereignty, which still seems to be of a very traditional and national nature. However, the accession to the EU as well as international human rights obligations are challenging this understanding.

Relating back to issue of solidarity within the EU, said solidarity can be seen as a restriction of sovereignty as it calls for a shared sovereignty within the EU, partly preceding the individual sovereignty of the member states. To clarify, by joining the EU, member states need to shift their national notion of sovereignty towards a European notion. The interests of the EU can no longer be inferior to the interests of each members states, as member states need to act in solidarity with the EU and the other members states, and in accordance with EU law and its principles. In order for this to succeed, EU law should to the greatest extent possible take the interests of all member states into account.

With regard to international human rights obligations, states have, through the ratification of international treaties and trough state practice, committed themselves to such obligations. As

[192] See i.a. S. MORGADES-GIL, 441; V. MORENO-LAX, Solidarity's reach (Fn. 47), 753; F. MAIANI, 114; M. DEN HEIJER, J. RIJPMA AND T.SPIJKERBOER, 627.

states have made these commitments themselves, these obligations must prevail sovereign rights, such as border control. States therefore need to shift their understanding of sovereignty from a national towards a more international understanding.

Changes in these two aspects, in other words European solidarity and shared responsibility as well as a European and international understanding of sovereignty, would on the one hand raise the standards of the asylum systems within the member states and their ability to live up the conditions set out by the CEAS directives. On the other hand, it is to be assumed that there would be a considerable decrease in extraterritorial migration control, such as interception practices, in the Mediterranean, which would consequently reduce the risk to be *refouled* on the high seas.[193]

Having discussed the role of solidarity and sovereignty and how the two are connected when it comes to migration control, the chapter will continue by discussing the effects of interception practices on the high seas on the protection from *refoulement.*

5.3 Migration control in the Mediterranean – A gap in protection from *refoulement*?

This thesis expresses the view that migrants and refugees subjected to the EU's migration control practices in the high seas of the Central Mediterranean are not sufficiently protected from *refoulement.* The thesis has thereby defined a lack in *de facto* as well as in *de jure* protection on the high seas, which will be discussed as follows.

5.3.1 *De facto* protection

As to the *de facto* protection from *refoulement*, chapter 3 on migration control in the Mediterranean demonstrated how vessels with migrants and refugees on their way to the European border are being intercepted on the Mediterranean high seas and hindered from reaching EU territory. These individuals are thereby being forced to return to situations where

[193] See e.g. *Samantha Velluti*, who is suggesting that idea of national sovereignty stands in the way of a universal human rights protection (S. VELLUTI, 106).

often inhuman or degrading circumstances prevail, without any individual processing and examination of possible asylum claims. According to the prevailing opinion, represented *inter alia* by *Guy Goodwin-Gill and Jane McAdam*, the principle of *non-refoulement* obliges states to allow for first gate admissions for the purpose of status determination.[194] The described interception practices circumvent this obligation and therefore leave the persons in question unprotected from *refoulement*, which might result in persons being returned to circumstances contradictory to fundamental human rights.

Consequently, we see how interception practices on the Mediterranean high seas often leave migrants and refugees without any factual protection from *refoulement.* In other words, there appears to be a lack of *de facto* protection from *refoulement* on the high seas of the Central Mediterranean.

5.3.2 *De jure* protection

As to the *de jure* protection from *refoulement*, chapter 4 showed that said protection is impeded by certain legal complexities and that the range of protection is dependent on legal interpretation.

With regard to the scope of the protection from *refoulement*, the analysis showed that a person is entitled to protection from *refoulement* not only within a state's territory but also at its borders. Behind this understanding of the principle is the argument, that if the protection was to be limited to the state's territory, the principle would be diluted.[195] Especially, in consideration of the general rule of interpretation in Art. 31 VCLT, stating that a provision should be interpreted in light of its object and purpose as well as in good faith, the author agrees with this argument and recognizes the need of the protection to extend to the border. The author further believes that the externalizing of borders in the Mediterranean calls for an extension of the scope to the high seas, in order for the principle to live up to its purpose and not compromise the protection it aims to provide. In favor of such an understanding speak also the interpretation approaches of the European Courts and their case law.[196] As mentioned above, the *non-refoulement principle*, according to a majority view, imposes on states, an obligation ensure access to a fair and effective status determination procedure.[197] Art. 19 CFREU adds additional support to this view, by prohibiting collective expulsions and therefore implicitly guarantees an

[194] G. GOODWIN-GILL AND J. MCADAM, 215.
[195] See N. OUDEJANS, C. RIJKEN AND A. PIJNENBURG, 5; T. GAMMELTOFT-HANSEN, 45; V. MORENO-LAX, Accessing Asylum in Europe (Fn. 53), 251.
[196] See Chapter 1.4 on Methodology.
[197] See i.a. G. GOODWIN-GILL AND J. MCADAM, 215; G: BUTLER AND M: RATCOVICH, 252; see also T. DANNENBAUM, 745.

individual examination. In light of the above, this thesis argues that this obligation does also exist on the high seas, which would impose on states an obligation to ensure first gate admission for the purpose of status determination.

However, states do only owe said obligations if it exercises jurisdiction. In other words, state obligations are tied to state jurisdiction. Consequently, even if one agrees, that the scope of the principle of *non-refoulement* expands to the high seas, the obligation to protect from *refoulement* is only imposed on a state in case it exercises jurisdiction on the high seas. As demonstrated earlier in this thesis, in what cases interception amounts to exercise of jurisdiction is debatable and might seem unclear.

If the acting state on the high seas has sufficient control over the person in question, jurisdiction can be established through *de jure* flag jurisdiction and *de facto* personal control and the state in question would consequently be legally obliged to comply with the *non-refoulement* principle. If the state however, manages to push-back without such a level of physical control, many will argue that the state has no jurisdiction and therefore no obligation to provide protection from *refoulement.* This argumentation and its rather narrow understanding of extraterritorial jurisdiction make protection gaps appear and leave scope for states to lawfully neglect the principle of *non-refoulement*. This means that states would be successful in their circumvention of the law, which the author sees as an abuse of state sovereignty and as a lack of good faith.[198] If a state has the right to act outside its territory and decides to do so, said state needs to do so while respecting human rights. *Violeta Moreno-Lax* argues along these lines, stating that, looking at the current system, one could think it is possible for states to exercise migration control extraterritorially but that human rights obligations occur only where individuals present themselves at the physical border of the EU. In her opinion however, extraterritorial migration control cannot be exercised independently from their impact on the protection of the individual's human rights. In such cases, she argues, states should be obliged to comply with the principle of *non-refoulement* extraterritorially.[199] Similarly reasons also the ECtHR, when stating that a state shall not be allowed to perpetrate human rights violations outside its territory, which it could not perpetrate on its own territory.[200]

[198] A similar opinion was expressed by Judge Pinto de Albuquerique, stating that when a state acts outside its territory in matters that would be unacceptable inside its territory, the state lacks good faith (*Hirsi Jamaa and Others v. Italy* (Fn. 41), Concurring Opinion by Judge Pinto de Albuquerique, p. 69).

[199] See V. MORENO-LAX, Accessing Asylum in Europe (Fn. 53), 247.

[200] *Issa and Others v. Turkey* (Fn. 166), para. 71; *Ben El Mahi and Others v. Denmark* No. 5853/06 (ECtHR, 11 December 2006).

On the basis of the above, the author argues in favor of a cause and effect approach to jurisdiction, which focuses on the effect a state produces outside its own territory and is able to protect from human rights violations wherever persons are affected by a state's action. It has been suggested that the exercise of jurisdiction in such cases only carries negative obligations, as the threshold to establish jurisdiction is lower than when using approaches based on control. The rationale being, that a state might owe more, and especially positive, obligations towards a person on their own territory, but that it cannot refrain from respecting human rights when producing effects for people outside their territory.[201] However, following this suggestion the cause and effect approach would not be able to impose on states the positive obligation to ensure first gate admission for the purpose of status determination, as part of the *non-refoulement* principle. This thesis therefore argues that jurisdiction established on the cause and effect approach should carry negative as well as positive obligations for states in order to avoid a remarkable gap in the protection from *refoulement* on the high seas.
The cause and effect approach particularly make sense from a human rights perspective, as the focus is on the individual as a right holder rather than on the state as the duty bearer and the dignity of the human being is what is the main focus within human rights.

Relating this back to different notions of jurisdiction in international law and human rights law, a wider understanding of jurisdiction, as suggested with the cause and effect approach, is possible within human rights law, as jurisdiction results in responsibilities and obligations in contrast to international law, where jurisdiction marks the rights of states. A too broad understanding of jurisdiction within international law might be problematic, as this can lead to conflicting jurisdiction among different states which results in conflicting rights. However, as pointed out by *Nanda Oudejans, Conny Rijken and Annick Pinjenburg*, within human rights law, no such conflict of rights appears, but at the most multiple responsibilities and obligations. Consequently, a broader understanding of jurisdiction within human rights law should be possible and is necessary in the interest of human rights protection. Looking at interception practices in the Mediterranean, one sees the importance of legal protection from *refoulement*. In order to guarantee such legal protection, the notion of jurisdiction needs to keep pace with current realities, as otherwise states can continue to circumvent human rights obligations by acting on the high seas.

[201] See e.g. H. KING, 556.

5.4 Concluding remarks

This chapter has defined a lack of solidarity in different dimensions within the EU, which prevents shared responsibility within in the Union and which is further encouraged by a national and traditional understanding of state sovereignty. The author argues that only by reaching European solidarity and shared responsibility as well as a European and international understanding of sovereignty, a well-functioning asylum system where human rights are respected could exist. Such a change would assumably go hand in hand with a decrease of interception practices in the Mediterranean and consequently reduce the risk of being subjected to *refoulement.*

This chapter has further argued in favor of the opinion, that the principle of *non-refoulement* puts on state the positive obligation to provide access to a fair and effective status determination procedure. Such procedures will most likely not be guaranteed on the high seas. Interception practices on the high seas, therefore ignore this obligation and consequently leave migrants and refugees without any *de facto* protection from *refoulement.*

With regard to *de jure* protection from *refoulement* on the high seas, the author has, in line with the ECtHR and the CJEU, argued that the externalization of borders in the Mediterranean calls for an extension of its scope to the high seas. Legal protection from *refoulement* is further only possible, where a state exercises jurisdiction. The author thereby argues in favor of a wider understanding of jurisdiction that keeps pace with current realities in order to guarantee *de jure* protection from *refoulement*, even on the high seas.

6 Conclusion

The purpose of this thesis has been to discover and analyze new challenges to the protection from *refoulement* on the high seas posed by recent extraterritorial migration control practices of the EU and its member states in the Central Mediterranean. The thesis thereby set out to identify certain gaps in the protection from *refoulement* on the high seas and to illustrate how these protection gaps and the extraterritorial migration control practices in the first place, might be linked to shortcomings in the CEAS and a lack of solidarity in the EU.

To this end the thesis sought to answer the research question: "How do recent EU operations in the Central Mediterranean challenge the protection from *refoulement* on the high seas and how could the current European legal framework on asylum strengthen this protection?"

As regards the first part of this research question, the thesis has identified a lack of *de facto* protection on the high seas caused by current EU operations in the Central Mediterranean. As demonstrated in Chapter 3, vessels with migrants and refugees on their way to the European border are being intercepted on the Mediterranean high seas and hindered from reaching EU territory. Chapter 4 identified a right to have access to a fair and effective status determination procedure and consequently a legal obligation to allow for first gate admissions for the purpose of status determination. The described interception practices neglect this obligation and therefore leave the persons in question unprotected from *refoulement*, which might result in persons being returned to circumstances contradictory to fundamental human rights and amounting to inhuman and degrading treatment.

The thesis has further identified two main legal issues that might compromise *de jure* protection from *refoulement* on the high seas – the scope of protection as well as the establishment of jurisdiction.
With regard to the scope of protection on the high seas, this thesis represents the view that a person is entitled to protection from *refoulement* not only within a state's territory and at its border but also on the high seas. A narrower interpretation of the scope however, would result in a gap in the protection from *refoulement* on the high seas and, according to the author's view, dilute the principle of *non-refoulement*.

With regard to the exercise of jurisdiction on the high seas, it is an issue of debate and to some degree remains unclear if and when interception measures amount to exercise of jurisdiction.
If the acting state on the high seas has sufficient control over the person in question, jurisdiction can be established through *de jure* flag jurisdiction and *de facto* personal control, hence the state in question is legally obliged to comply with the *non-refoulement* principle. If the state however, manages to push-back without such a level of physical control, many will argue that the state has no jurisdiction and therefore no obligation to provide protection from *refoulement.* This argumentation and its rather narrow understanding of extraterritorial jurisdiction make protection gaps appear and leave scope for states to lawfully neglect the principle of *non-refoulement.* In order to reduce such protection gaps, this thesis has argued in favor of a cause and effect approach on jurisdiction, which focuses on the effect a state produces outside its own territory and is able to provide protection from human rights violations wherever persons are affected by a state's action. Jurisdiction established on the cause and effect approach should

thereby imply both negative and positive obligations to reach a sufficient protection from *refoulement* on the high seas which includes a fair and effective status determination procedure.

As to the second part of the research question, asking how the current European legal framework on asylum could strengthen the protection from *refoulement* on the high seas, the thesis has identified a lack of solidarity and an unequal distribution of responsibility within the CEAS as a substantial reason for the weakened protection from *refoulement* in the Central Mediterranean.

This thesis claims that only by reaching European solidarity, the Common European Asylum System could actually strengthen the protection from *refoulement*. European solidarity thereby calls for a fair distribution of responsibility among the member states within the CEAS in accordance with their capacity. The situation today is characterized by a striking imbalance of responsibility between the member states to the disadvantage of the states positioned in the European south and demonstrates a need for a *de jure* as well as *de facto* shift of responsibility. In other words, there is a need for change within the Dublin system, leading to a fair distribution of responsibility, as well as the willingness of the member states to take on this responsibility. Such a shift would relieve overburdened states and increase the capability and willingness of all member states to raise the standards of their asylum systems. A fair distribution of responsibility would not only lead to a higher standard of the asylum system, but also decrease the incentive to prevent migrants and refugees from reaching the EU border, since responsibility would not be attributed due to first state admission but based on the capacity of the member states.

One can therefore conclude, that only by reaching solidarity and shared responsibility, the CEAS could truly reach its aim of harmonization and unification and make the idea of mutual trust work. This in turn, would lead to increased external solidarity towards third-country nationals on their way to or arriving in the EU and result in a better protection from *refoulement.*

Related to the issue of solidarity, the thesis has defined states' traditional and nationally oriented understanding of sovereignty as another underlying reason for the exercise of extraterritorial migration control and consequently for the weakened protection from *refoulement* in the Mediterranean.

The thesis has shown that the accession to the EU as well as international human rights obligations challenge the traditional understanding of sovereignty and call for a shift towards a

more European and international understanding, where European and international obligations prevail certain traditional national rights, such as sovereign border control.

Changes in these two aspects, in other words the achievement of European solidarity and shared responsibility as well as a European and international understanding of sovereignty, would on the one hand raise the standards of the asylum systems within the member states and their ability to live up the conditions set out by the CEAS directives. On the other hand, it is to be assumed that there would be a considerable decrease in extraterritorial migration control in the Mediterranean, including interception practices, which would consequently reduce the risk to be subjected to *refoulement* on the high seas.

In conclusion, this thesis has shown that current EU operations in the Central Mediterranean cause gaps in the protection of the *non-refoulement* principle. In other words, migrants and refugees who are intercepted on the high seas are left without sufficient protection from *refoulement*. The thesis has thereby argued that only by reaching solidarity and a fair sharing of responsibility within the CEAS as laid down in Art. 80 TFEU, the CEAS would truly be able to ensure compliance with the principle of *non-refoulement* as prescribed by Art. 78 TFEU.

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