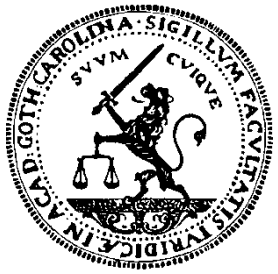

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Outsourcing Asylum: The EU Disembarkation Centers Proposal

JURM02 Graduate Thesis

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Contents

Summary

This thesis has examined the external developments of the EU's asylum policy. It has been described, that since its creation, the Common European Asylum System (CEAS), has been based on the notion that a strengthening of the EU's external borders is a requisite in order to ensure the sustainability of a common area without internal borders. Since the so-called migration crisis in 2015, the EU has demonstrated an increased interest in moving border controls for refugees and migrants outside the EU, on the territory of other states. In this context, on 28 June 2018, the EU Council presented the Disembarkation Centers Proposal, where migrants would be hosted and screened in order to determine if they qualified for international protection, before reaching the EU territory. In view of this, the thesis has identified that one of the paradoxes in the development of the EU's external asylum policy is that although the EU has established rights-sensitive standards and procedures for assessing protection claims of asylum seekers within its jurisdiction, it has simultaneously established barriers that prevent asylum seekers to benefit from it.

In order to examine to what extent, the "outsourcing" of asylum, for instance through the Disembarkation Centers Proposal are compatible with the CEAS, an in particular with the principle of *non-refoulement*, the thesis has examined the concepts of jurisdiction and state responsibility in relation to the principle of non-refoulement. While the assessment of jurisdiction has illustrated the adaptability of international law, especially human rights law, and the law of state responsibility to the measures taken by the EU in external migration controls, the inventiveness of the EU and its Member States seems to surpass the adaptability of EU and international law. Consequently, it seems that disembarkation centers could lawfully be established outside of the EU territory, in order to receive migrants intercepted outside the territory of the EU, provided that specific conditions are met; in particular, that the principle of *non-refoulement* in the Refugee Convention and in the European Convention on Human Rights is respected.

Sammanfattning

Denna uppsats har undersökt den externa utvecklingen av EUs asylpolicy. Uppsatsen har beskrivit att EUs Asylsystem, the Common European Asylum System (CEAS), har allt sedan sitt upprättande varit baserad på idén om att en förstärkning av EUs yttre gränser är en förutsättning för upprätthållandet av ett inre gemensamt område utan interna gränser. Efter den så kallade "migrationskrisen" år 2015, har EU uppvisat ett ökat intresse av att flytta gränskontroller för migranter och flyktingar utanför EU, i andra staters territorier. I den här kontexten, presenterade det Europeiska rådet, den 28 juni 2018, ett förslag för så kallade "Disembarkation Centers", där migranter skulle kunna tas emot och bli screenade för att kunna ta reda på om de var i behov av internationellt skydd innan de nådde EUs territorium. Uppsatsen har mot denna bakgrund, identifierat att en utav paradoxerna I EUs externa asyl policy, är att trots att EU har etablerat regler och förfaranden för att varna mänskliga rättigheter, så har EU samtidigt satt upp barriärer som hindrar asylsökande från att dra nytta av dem. För att kunna undersöka till vilken grad "outsourcandet" av asyl, till exempel genom förslaget om Disembarkation Centers, är kompatibelt med CEAS, och i synnerhet med principen om non-refoulement, har uppsatsen undersökt de två koncepten jurisdiktion och statsansvar. Trots att denna undersökning visserligen har visat på anpassningsbarheten hos internationell rätt, särskilt internationell människorättslagstiftning, och statsansvarsrätt i förhållande till EU's åtgärder för att flytta ut gränskontroller, verkar EU's uppfinningsrikedom överträffa EU-rättens och den internationella rättens anpassningsbarhet. Det verkar därför som att "Disembarkation Centers" hade kunnat inrättas lagligen utanför EU's territorium, med syftet att ta emot migranter som blivit stoppade utanför EU's territorium, under förutsättning att vissa specifika villkor är uppfyllda, särskilt att principen om non-refoulement i Flyktingkonventionen och den Europeiska Konventionen om de Mänskliga Rättigheterna ska respekteras.

Preface

I would like to thank my supervisor, Eleni Karageorgiou, for her valuable encouragement and guidance throughout the different stages of the writing process. Thank you for advising me over Skype and WhatsApp since I could not be physically present in Lund.

A big thank you to all my wonderful friends, my family, Guillaume and Gibban for supporting me and for believing in me. You are the best.

Lastly, I want to thank my amazing classmates and teachers throughout my law studies, both in Lund and Lyon. You have made these past years truly memorable.

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Karolin Jönsson

Abbreviations

ARSIWA	Draft Articles on Responsibility of States for Internationally Wrongful Acts
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
FRONTEX	The European Border and Coast Guard Agency
IBM	Integrated Border Management
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILM	International Law Commission
IOM	International Organization for Migration
Refugee Convention	Convention Relating to the Status of Refugees
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
VLCT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Background

"The false notion that migration is the most serious security threat to Europe and that it is an existential threat to the EU is used to justify any measure, including those that undermine the rule of law […], as well as the trend of illegal measures being proposed by interior ministers – the very people who are supposed to defend the rule of law."[1]

This reaction was written by the European Council of Refugees and Exiles as a response to the European Council meeting in Brussels on the 28 June 2018, where EU leaders met to discuss migration. The German NGO *Pro Asyl* referred to the council meeting as the "summit of shame"[2] after EU leaders agreed to "swiftly explore the concept of regional disembarkation platforms"[3]. These reactions illustrate that the European debate on asylum and migration is a topic that continues to divide the debate amongst policy makers possibly now more than ever.

In 2015, 1 255 600 first time asylum seekers applied for international protection in the European territory.[4] The number, that was more than double that of the previous year, was of such importance that the phenomenon became known in the public debate as the "migration crisis"[5]. This "crisis" revealed short-comings in the Common European Asylum System (CEAS) and strengthened the European Union's (EU) interest in externalization of asylum in order to shift the responsibility towards non-EU states.[6] In this

[1] "*The Story of the Summit: European Solutions not EU Solutions."* European Council on Refugees and Exiles, 29 June 2018.
[2] *European Council on migration: documentation and reactions to the "summit of shame"* Statewatch, 2 July 2018.
[3] Non-paper on regional disembarkation platforms.
[4] Eurostat, 4 March 2016.
[5] It could be argued that the use of the term "migration crisis" in Europe is not accurate since about 80 percent of refugees live in countries neighboring their countries of origin. See for example: UNHCR figures at a glance 2019.
[6] Frelick, B., Kysel, I, M, and Podkul, J, 2016, p. 207.

context, the EU-Turkey Agreement of the 18th of March 2016[7], was concluded with the purpose of stemming the movements of migrants arriving from Turkey to Europe. In order to pursue this objective, the EU agreed to finance a Facility for Refugees in Turkey.[8] According to the EU-Turkey Statement, all new irregular migrants and asylum seekers arriving from Turkey to the Greek islands and whose applications for asylum have been declared inadmissible should be returned to Turkey.[9] The agreement is an example of the outsourcing of asylum outside the European borders through cooperation with third countries.

Although the arrivals of migrants and refugees have diminished to what is perceived as a more manageable level[10], the crisis period continues to affect European politics and to push law and policy reform. That reform has to a large extent focused on how the EU manages its external border.[11] At the EU summit in Brussels on the 28th of June 2018 mentioned in the opening paragraph, members of the European Council met to discuss migration. Instead of finding a solution to the dissent amongst the Member States delaying the reform of the CEAS, two new instruments were presented that could further limit the entry of migrants and refugees in the EU; "disembarkation platforms" and "controlled centers".[12] The controlled centers would be located on EU soil and would supposedly provide a centralized reception infrastructure where EU border authorities and agencies would distinguish between individuals in need of international protection and those who would be promptly returned.[13] The disembarkation platforms, which will be the focus of this thesis, would serve the objective of providing a space, most likely in a Northern African state, where vessels could disembark people rescued at sea.[14] Although the European Council came up

[7] EU-Turkey Statement, 2018.
[8] EU-Turkey Statement, 28 June 2018.
[9] EU-Turkey Statement and Action plan, 2019.
[10] 580 800 first-time asylum seekers applied for international protection in the EU Member States in 2018. See Eurostat: Asylum Statistics.
[11] European Council conclusions, 28 June 2018.
[12] Ibid.
[13] Non-paper on regional disembarkation platforms, 2018.
[14] Ibid.

with a rather vague agreement, it demonstrated the seriousness of the migration challenge to the EU.[15] Fundamentally, what was agreed between the Member States was to explore the possibility to build centers outside the EU, where migrants could be screened for asylum and from where only legitimate refugees would be able to enter the EU territory. While these centers in non-EU countries supposedly would operate in "full respect of international law"[16], the European Council did not further specify the legal admissibility and practicability of their establishment as well as how and where refugees would be resettled. Instead, the European Council called on the Council and the Commission to explore the concept of regional disembarkation platforms, in close cooperation with relevant third countries as well as United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM).[17]

The European Council is determined to continue to reinforce the control of the EU's external borders in order to "prevent a return to the uncontrolled flows of 2015 and to further stem illegal migration on all existing and emerging routes".[18] The outsourcing of protection responsibilities raises the question of the extraterritorial protection of human rights: are there legal objections against the externalization of border controls in European law? More importantly, to what extent is the outsourcing of asylum compatible with the fundamental principle of *non-refoulement* that prohibits states from expelling or returning ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened.[19] While there is a general consensus that the prohibition of *refoulement* is triggered when an asylum seeker seeks admission within a state's territory or at the borders,[20] it is less clear how the *non-refoulement* obligation would be applied if state borders no longer could be understood as a geographical line that demarcates a state's territory. In other words, what if border controls no

[15] European Council conclusions, 28 June 2018.
[16] European Council conclusions, 28 June 2018.
[17] Non-paper on regional disembarkation platforms, 2018.
[18] European Council conclusions, 28 June 2018.
[19] See Chapter 2.2.1.
[20] G. S Goodwin-Gill and J. McAdam, 2007, p. 208.

longer take place at the territorial border itself but are moved outside a state's territory? The focus on strengthening the EU's external borders as well as the outsourcing of asylum, illustrated by the disembarkation centers proposal, suggests that the post-crisis development has shifted asylum into a securitized issue more than a protection issue. To refer back to the ECRE citation above, there might be a risk that the notion of migrants and asylum seekers as security threats, would lead to measures that could potentially undermine the rule of law in the EU.

1.2 Purpose and Research Questions

This thesis will examine the external development of the CEAS, particularly the "outsourcing" of asylum, as demonstrated by the EU-Turkey statement and the disembarkation centers proposal. By moving the external borders away from European soil and financing third states in order to carry out asylum procedures, it could be argued that the EU Member States are outsourcing its responsibility to protect human rights obligations. The purpose of the thesis is, on the one hand, to assess if the focus on the external dimension of EU asylum policy could be part of a broader trend, and on the other hand, to examine if this conduct is in accordance with the rules inherited in the CEAS and in particular with the prohibition of *non-refoulement*.

In view of the purposes submitted above, the thesis seeks to answer the following research question:

To what extent is the outsourcing of asylum through the establishment of disembarkation centers in third countries compatible with the CEAS and the principle of non-refoulement?

In order to clarify and substantiate the answer of the main research question set forth above, each chapter of the thesis will aim to address the following sub-questions:

- *What are the main policy instruments relating to the external dimension of the EU's asylum policy? (Chapter 2)*
- *What is the relation between these measures and border management? (Chapter 3)*
- *Under what circumstances may these measures trigger the obligation of states to protect persons from refoulement? (Chapter 4)*

1.3 Delimitations

Regarding the CEAS, not all aspects of the system are relevant for the research question and the purpose of the thesis. Consequently, the main focus will be on the external dimension of the CEAS which is of particular importance for the thesis. In addition, due to the limits of the thesis, it is not possible to assess all measures of outsourcing asylum in the EU. The thesis will therefore focus on one specific case, the disembarkation centers proposal. This choice is motivated by the fact that it is one of the most recent examples of outsourcing asylum suggested by the EU. The thesis will not assess other measures taken by the EU as a response to the so-called migration crisis, such as the reform of CEAS directives and regulations, national maritime operations and EU Member States bilateral agreements with third countries, other than briefly.

As regards the analysis of the disembarkation center proposal, it should be noted that the European Commission have presented three different scenarios regarding their physical location. In its note entitled "The legal and practical feasibility of disembarkation options",[21] the Commission presented as one potential scenario, the possibility that such centers could be located in the EU territory. This scenario is however strikingly similar to the proposed "controlled centers" that would be set up in the EU territory. As the purpose of the thesis is to examine the outsourcing of asylum, this scenario will not

[21] European Commission: Regional Disembarkation Arrangements – Follow-up to the European Council Conclusions of 28 June 2018.

be considered. Instead, the thesis will examine the two other scenarios in which the disembarkation centers would be located in a third country.

Asylum and migration are regulated in several international treaties, regional agreements and in the national law of the EU Member States. With respect of the limits of this thesis, domestic legislation will not be addressed, except indirectly as a consequence of the assessment of case law by international and regional judicial bodies. The focus will instead be on relevant EU law, in combination with the obligation of *non-refoulement* as an international and regional human rights obligation.

Finally, a few words need to be said about the legal delimitations. Regarding the extraterritorial human rights obligations, a general analyze of such obligations goes beyond the scope of this thesis. Instead, the focus will be limited to the *non-refoulment* obligation which is generally believed to be the cornerstone of international refugee protection.[22] The principle of *refoulement* and the concept of jurisdiction, will be discussed in the European context, based on provisions in EU law[23] and on the case law of the ECtHR. Thus, other international legal sources and case-law have not been included in the thesis.[24] Although it would be interesting to include an international perspective regarding these issues, the limitations of the thesis make it complicated to provide such a broad discussion. The thesis will thereby engage with the obligation of *non-refoulement* of the EU Member States, as set out in the 1951 Geneva Convention Relation to the Status of Refugees (1951 Refugee Convention), the European Convention on Human Rights (ECHR) as well as the Charter of Fundamental Rights of the European Union (EU Charter). In addition, EU primary and secondary law will be assessed in order to explain the CEAS and its relevance for the research question. The

[22] Chetail, V., 2001, p. 3; Wouters, C.W, 2009, p. 1; Molnar, T, 2016, p. 56.
[23] With the exception of the principle of non-refoulement in the Refugee Convention that has to be respected according to the TFEU and the EU Charter, see Chapter 2.2.1.
[24] See for example the non-refoulement obligation in Article 3 of the CAT and Article 7 ICCPR.

part on the concept of jurisdiction will be based on the ECHR and the case law of the ECtHR.

1.4 Methodology and Material

In order to pursue the purpose and answer the research questions, the traditional judicial method have been employed. The traditional judicial method is applied in order to identify the established law and the current legal positions, through the application of the generally accepted sources of law. Consequently, the answers will be sought in legislation, preparatory works, case-law and the legal doctrine.[25]

In accordance with the traditional juridical method, the material applied in the thesis essentially consists of the traditional sources of EU law and International law; international conventions and treaties, international customary law, general principles of law, judicial decisions and doctrine.[26] Even though the last two constitute a subsidiary source of international law according to article 38 in the Statute of the International Court of Justice (ICJ statute), they provide a useful illustration of the current provisions of international law.[27] To answer the research question in line with the purpose of the thesis, the assessment of EU primary law and secondary law is crucial. In addition, the thesis will examine various policy instruments and frameworks set out by the EU that are of relevance to the development of the external dimension of the Common European Asylum System, such as the Tampere Conclusions, the Hague Programme and the Stockholm programme. In order to facilitate the study of the external dimension of EU asylum policy, literature by well-established scholars and acknowledged textbook authors have been employed.

[25] Korling and Zamboni, 2013, p. 21.
[26] Art. 38 (1) Statute of the International Court of Justice (ICJ statute).
[27] Henriksen, 2017, p.31.

Regarding the interpretation of the ECHR, the thesis respects the principles of interpretation set out by the European Court of Human Rights (ECtHR). The Court has established that the Convention shall be interpreted according to the object and purpose of the Convention and applied in a way that makes its safeguards practical and effective. Also, any interpretation of the rights and freedoms guaranteed has to be consistent with the general spirit of the Convention, which is an instrument designed to maintain and promote the ideals and values of a democratic society.[28] In addition, the Convention is considered as a living instrument that shall be interpreted in the light of present-day conditions.[29]

The analysis of the thesis will mainly be based on the principle of *non-refoulement* and its connection to the concepts of jurisdiction and state responsibility. These concepts have been examined based on the case law of the ECtHR, as well as the legal doctrine that have dealt with these issues. In this regard, I would particularly like to point out the impressive contributions by Violeta Moreno-Lax, Thomas Gammeltoft-Hansen and James Hathaway that have provided valuable insights and interesting perspectives for the thesis' investigation.

Regarding the disembarkation centers proposal, it was first presented by the European Council following the Council meeting in June 2018.[30] Thereafter, it was developed in a non-paper[31] and a note entitled "The legal and practical feasibility of disembarkation options" [32] released by the Commission, which provided some insights into how the disembarkation centers would function. However, many practical details remain missing. The material regarding the disembarkation centers proposal is therefore somewhat limited. In addition, although other forms of "outsourcing" asylum and border controls in the EU

[28] *Soering v The United Kingdom,* Application no. 14038/88, Council of Europe, European Court of Human Rights, 7 July 1989, para. 87.
[29] *Tyrer v The United Kingdom,* Application no. 5856/72, Council of Europe; European Court of Human Rights, 25 April 1978*,* para. 31.
[30] European Council conclusions, 28 June 2018.
[31] Non-paper on regional disembarkation platforms, 2018.
[32] European Commission: Regional Disembarkation Arrangements – Follow-up to the European Council Conclusions of 28 June 2018.

have been discussed by scholars,[33] the disembarkation centers proposal has not been subject to any deeper investigation in the literature as far as I know. Although this might be seen as a weakness, as it complicates the legal assessment of the proposed centers, the lack of material is also what makes it an important and interesting subject to investigate.

1.5 Terminology

The terms used in European asylum law need some clarification, as the terms "refugee", "asylum seeker" and "migrant" are often used inter-changeably, even though they refer to different legal statuses.[34] "Migrant" is the general term for people who move from one region to another. This movement might be voluntary or because of poverty or other difficulties.[35] The term "asylum seeker" is used for someone who has left their country to seek international protection.[36] In EU law, international protection takes two forms. In the first place, protection as a "refugee" refers to a person who has fled their country and cannot return because of a well-founded fear of persecution due to their race, religion, nationality, membership of a particular social group or political opinion.[37] In the second place, a person who does not qualify for refugee status, but has fled because they face serious harm may qualify for subsidiary protection.[38] Serious harm may consist of the death penalty or execution; or torture or inhuman or degrading treatment or punishment of an applicant in their country of origin; or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.[39] The term "illegal immigrant" is sometimes used by EU officials or others in an effort to distinguish between economic migrants and migrants seeking asylum or those with refugee status. This implies that

[33] See for instance, Frelick, B., Kysel, I, M, and Podkul, J, 2016; Andrade, P.G., 2010; Hyndman, J., and Mountz, A., 2008; Rijken, C., Pijnenburg, A., & Oudejans, N., 2018.
[34] Amnesty International: Refugees, Asylum Seekers and Migrants.
[35] Amnesty International: Refugees, Asylum Seekers and Migrants.
[36] Amnesty International: Refugees, Asylum Seekers and Migrants.
[37] Article 2(d), Directive 2011/95/EU (Recast Qualification Directive).
[38] Article 2(f), Directive 2011/95/EU (Recast Qualification Directive).
[39] Article 15, Directive 2011/95/EU (Recast Qualification Directive).

economic migrants are all illegal. However, migration flows are generally mixed, and migrants themselves travel with different motives, making such simple characterizations generally inaccurate and unhelpful.[40] Therefore, the term "illegal immigrant" will not be used in the thesis, except when included in citations.

1.6 Outline

Following the introduction in Chapter one, Chapter two focuses on asylum in the EU. The chapter describes the principle of non-refoulement and external dimension of EU asylum policy, including the external developments of the Common European Asylum System and its impact on the cooperation with third countries. Chapter three assesses the development of EU policy on border controls with particular attention to the European Border and Coast Guard Agency (FRONTEX) and the concept of Integrated Border Management (IBM). It is followed by a discussion about how these measures might implicate human rights challenges in Chapter four. Chapter five summarizes the findings and conclusions in the previous chapters and seeks to answer the research question.

[40] Mattila, H.S. (2001). p.57-58.

2 Asylum in the EU

2.1 Introduction

This chapter aims to identify and describe the main policy instruments relating to the external dimension of the EU asylum policy. In this way, the chapter has a two-fold purpose: to identify the legal regime that would govern the proposed disembarkation centers, and to explain the external developments that has led up to the proposal. To this end, the first section of the chapter will outline the relevant legal provisions in relation to the disembarkation centers proposal, mainly focusing of the prohibition of *refoulement* and some specific instruments of the CEAS. The second sub-section of the chapter will describe of the external developments of the CEAS in order to review its legal implications for the outsourcing of asylum and migration controls.

2.2 Legal Framework

2.2.1 The Prohibition of *Refoulement* in the European Legal Context

At the international level, the Convention Relating to the Status of Refugees agreed in Geneva on 28 July 1951 (and entered into force on 22 April 1954) as completed by its 1967 Protocol that entered into force in 4 October 1967 (the Refugee Convention) is considered as "the cornerstone of the international legal regime for the protection of refugees"[41] by the Court of Justice of the European Union, which interprets EU asylum law in conformity with it. The Refugee Convention is built on Article 14 of the 1948 Universal Declaration of Human Rights, which recognizes the right of persons to seek asylum from persecution in other countries.

[41] See the Judgment of the Court of Justice of 2 March 2010 in Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi and Dier Jamal* v *Bundesrepublik Deutschland*, EU:C:2010:105, para 52.

Although the EU is not a party to the Refugee Convention, all its Member States are parties to it, as well as most of the coastal States of the Mediterranean Sea.[42] The Refugee Convention sets out the rights of individuals who are granted asylum and the responsibilities of States that grant asylum but does not provide for any procedural provisions regarding the granting of asylum status. In particular, the Refugee Convention provides for the prohibition of expulsion or return ("*refoulement*) in its Article 33:

(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.[43]

The *non-refoulement* principle is generally regarded as the cornerstone of refugee protection.[44] It prohibits the direct or indirect removal of an individual to a state or a territory where he or she run a risk of being subjected to inhuman or degrading treatment and also covers persons seeking asylum until a final decision is made on their application. The purpose of the prohibition of *refoulement* is to prevent human rights violations before they actually occur.[45] The prohibition of *refoulement* is an independent principle of human rights law that is integrated in several human rights treaties.[46]

[42] Libya and Lebanon are not Parties to the Refugee Convention.
[43] Convention relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 33(1) ("Refugee convention").
[44] Chetail, V., 2001, p.3; Wouters, C.W, 2009, p.1; Molnar, T, 2016, p.56.
[45] Edwards, A, 2017, p. 547.
[46] See Article 3, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); Article 7, International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

Article 33 is applicable on all individuals claiming refugee status and oblige states to let a person that claims refugee status remain at least until the asylum claim is determined. This, since being a refugee does not depend on the granting of refugee status, but rather on factual circumstances.[47] The prohibition of *refoulement* in the Refugee Convention binds all sub-divisions of the contracting state, including all the organs of the state or other persons or bodies exercising governmental authority.[48] This has an important impact on the scope of the protection, as acts of *refoulement* undertaken by, for example, a private air carrier or transit official acting pursuant to statutory authority will engage the responsibility of the state concerned. Furthermore, the principle of *non-refoulement* according to the Refugee Convention is applicable to conduct wherever this occurs, no matter if it is beyond the national territory of the State in question, in international zones, at transit points, at border posts or other points of entry.[49] However, the principle of *non-refoulement* in Article 33(1) Refugee Convention has some limitations. First of all, it is not absolute since it does not apply to individuals who pose a security threat to the state or who has been convicted of a particularly serious crime, as stated in Article 33(2). Secondly, the *non-refoulement* principle in article 33 offers protection only to refugees while persons who are not granted this status can be expelled. Thirdly, there is no monitoring body that guarantees the compliance of the Refugee Convention, although Article 35(1) of the Convention provides that the Contracting States undertake to cooperate with UNHCR in the exercise of its functions, particularly its supervisory responsibility. All EU Member States are signatories of the Refugee Convention, which they implement through national legislation. UNHCR advises the Member States and EU institutions on their international obligations and drafts recommendations for their relevant policies, for instance to the EU Presidency.[50] Lastly, the protection in the 1951 Refugee

[47] Gammeltoft-Hansen, T and Hathaway, J. C, 2015, p 239.
[48] See ILC, *Draft Articles on the International Responsibility of States for Internationally Wrongful Acts* (2001) [cit. ARSIWA].
[49] Lauterpacht, E and Bethlehem, D, 2003, p. 111.
[50] European Parliament, The EU and the UN Refugee agency (UNHCR), 2015.

Convention is only provided to individuals that falls within the definition of refugee as defined in Art. 1 of the Convention. Thus, the scope of the protection is not only personally limited, but also geographically, since the refugee definition in the 1951 Refugee Convention requires the individual in question to have left the country of nationality or if the individual has no country of nationality, the country of last habitual residence.[51] In addition, the principle of *non-refoulement* is also a principle of customary international law which offers protection from *refoulement* with regard to persecution as well as torture or cruel, inhuman or degrading treatment or punishment.[52]

The principle of *non-refoulement* is also a core component of the prohibition of torture and cruel, inhuman or degrading treatment or punishment for all persons, regardless of their legal status, according to Article 3 of the ECHR as interpreted by the European Court of Human Rights (ECtHR). This provision do not allow for any derogation, exception or limitation, which means that there are no exceptions to them no matter what the person might have done in the past.[53]

Adding to this, the principle of *non-refoulement* is also a central part of the EU's fundamental rights regime, reflected in Article 78 (1) of the Treaty of the functioning of the European Union (TFEU) as well as in Articles 18 and 19 of the Charter of Fundamental Rights of the European Union (EU Charter) Article 18 of the EU charter stipulates that

> The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union.

[51] See Article 1 (2) 1951 Refugee Convention.
[52] Goodwin-Gill, G. S and McAdam, J., 2007, p.354.
[53] See Article 3 ECHR.

Article 19 (2) of the EU Charter states that "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." Essentially, these provisions mirror the international human rights obligations on the EU Member States.

Furthermore, secondary EU law has expanded the prohibition of *refoulment* by establishing subsidiary protection for individuals who are in need of international protection because they are facing a risk of torture, inhuman or degrading treatment, or a serious threat to life caused by indiscriminate violence in the context of international or internal armed conflict.[54] According to EU law, the prohibition of *refoulement* applies to all persons within the jurisdiction of the state.[55] In addition, the obligation of *non-refoulement* not only prohibits the removal, expulsion or extradition to a country where a person may be at risk of persecution or other serious harm (direct refoulement) but also to countries where individuals would be exposed to a serious risk of onward removal to such a country (indirect refoulement).[56]

2.2.2 The Common European Asylum System

In order to analyze the disembarkation centers proposal, the EU legislative framework on asylum, the CEAS, has to be considered in addition to the EU Charter and to the relevant provisions of EU primary law. In short, the CEAS is a legislative framework established by the EU regulating and setting out common standards in the field of asylum.[57] The CEAS consists both of

[54] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU. article 15;
Elgafaji v Staatssecretaris van Justitie, C-465/07, European Union: Court of Justice of the European Union, 17 February 2009, para. 35.
[55] Article 1 of the ECHR stipulates that states shall ensure the rights of the *Convention* to anyone within their jurisdiction.
[56] Hathaway, J. C., 2005, p.323.
[57] European Commission: Common European Asylum System 2019.

primary EU law, such as the TFEU[58], the Treaty on European Union, (TEU)[59], and the EU Charter[60], as well as secondary EU law, such as The Temporary Protection Directive (2001)[61], The Qualification Directive recast (2011)[62]; The Eurodac Regulation recast (2013)[63]; The Dublin III Regulation recast (2013)[64]; The Reception Conditions Directive recast (2013)[65] and; The Asylum Procedures Directive recast (2013)[66]. This framework, with regard to some specific instruments of particular interest to the disembarkation centers proposal, will be described below in brief and general terms.

The Asylum Procedures Directive 2013/32/EU (APD) requires for a regular asylum procedure to examine international protection needs, a prioritized

[58] European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01.
[59] European Union, Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002
[60] European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02.
[61] Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof, 7 August 2001, OJ L.212/12-212/23; 7.8.2001, 2001/55/EC.
[62] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU.
[63] Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast), 29 June 2013, OJ L. 180/1-180/30; 29.6.2013, (EU)2003/86.
[64] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 29 June 2013, OJ L. 180/31-180/59; 29.6.2013, (EU)No 604/2013.
[65] Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), 29 June 2013, OJ L. 180/96 -105/32; 29.6.2013, 2013/33/EU. (Hereafter "ARCD")
[66] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU. (Hereafter "APD")

procedure[67] to examine protection needs of vulnerable or likely well-founded cases, an accelerated procedure[68] to examine protection needs of likely unfounded or security-related cases and a border procedure[69] to rapidly conduct admissibility or study the merits. Article 6 of the APD also states that accessibility to such procedures is necessary in order to respect the principle of *non-refoulement*. Article 9 of the APD stipulates the principle that an applicant is entitled to remain in the Member State examining its application until a final decision has been made. Furthermore, a number of other Articles in the APD grant additional procedural guarantees to applicants. When situated in the EU territory, prospective applicants for refugee status benefit entirely from EU asylum law. In this regard, territorial waters of a Member State is considered as being an integral part of the territory of the Union's Member States. This is also confirmed by Article 3 of the APD, which expressly provides that the Directive applies in the territory of Member States including in their territorial waters.

The Asylum Reception Conditions Directive 2013/33/EU (ARCD) in particular, lays down the principle of freedom of movement of migrants who have applied for international protection, but also allows Member States to decide on their residence.[70] Article 8 of the ARCD sets out the conditions of the possible detention of asylum seekers, which is not possible "for the sole reason"[71] that they are asylum seekers. In this regard, it should also be noted that Article 21 of the Qualification Directive obliges the Member States to respect the principle of non-refoulement.

[67] Article 31(7) APD.
[68] Article 31(8) APD.
[69] Article 31(8) and 43 APD.
[70] Article 7 ARCD.
[71] Article 8(1) ARCD.

2.3 External Developments of EU Asylum Policy

2.3.1 The Tampere Conclusions

The harmonization of Member States' asylum law was first pursued through intergovernmental cooperation under the 1992 Maastricht Treaty[72] and later by acknowledging asylum as an area of communitarian competence under the 1997 Amsterdam Treaty.[73] Although the Amsterdam Treaty contributed to the development of the CEAS by providing the legal basis for the creation of such a common system, it did not make any explicit reference to it. Instead, the CEAS was created by the 1999 Tampere Conclusions, where the European Council decided that the CEAS would be implemented in two phases.[74] According to the Tampere Programme, the CEAS would be based on the full and inclusive application of the 1951 Refugee Convention, as part of the development of the Area of Freedom, Security and Justice ("AFSJ").[75] However, the intention was that the scope of the CEAS would be wider than the Refugee Convention and its Protocol. While the CEAS, just like the Refugee Convention, would lay down criteria for qualification for refugee status and the benefits attached thereto, it would also establish a system which would regulate all components of asylum. As laid down in the Tampere conclusions, in the short term the CEAS was to include:

"A clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common

[72] European Union, Treaty on European Union (Consolidated Version), Treaty of Maastricht , 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002, See Title VI on cooperation in the field of Justice and Home Affairs.
[73] European Union: Council of the European Union, Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts, 10 November 1997, See Article 63.
[74] European Council, Presidency Conclusions, Tampere European Council 15 and 16 October 1999, SN 200/99, Brussels, paragraph 13. (Hereafter "Tampere Conclusions")
[75] Craig S. and Zwaan K., 2019, p.27.

minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status."[76]

2.3.2 The Hague Programme

Regarding the external dimension of the CEAS, the Tampere Conclusions stressed that there was a "need for a consistent control of external borders to stop illegal immigration"[77] and that the EU and the Member States were invited to work towards "a greater coherence of internal and external policies of the Union".[78] Other than that, it did not set out any further details. Instead, it was the Hague Programme, a policy instrument endorsed by the European Council in November 2004,[79] that officially launched common action in the system's external dimension. Despite acknowledging the need to "contribute in a spirit of shared responsibility to a more accessible, equitable and effective international protection system in partnership with third countries", the main objectives of the external dimension of the Hague Programme were, on the one hand, to enhance the protection capacity in regions of origin and, on the other hand, managing of migration flows.[80] In the Hague Programme, the Member States also expressed their demand for third countries to take partial responsibility for managing migratory flows. While this demand was not new, it was the first time it was given such an important place in work program of the EU.[81] In order to accomplish this ambition, the EU established Regional Protection Programmes (RPPs) in regions of origin and transit, consisting of a range of measures under EU financing that would be protection oriented, but at the same time focused on cooperation, actions on migration management and return.[82] Human Rights Watch noted at the time that while

[76] Tampere Conclusions, paragraph 14.
[77] Ibid, para 3.
[78] Ibid, paras 11-12.
[79] European Union, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 13 December 2004, 2005/C 53/01. (Hereafter the Hague Programme)
[80] The Hague Programme, para 1(6).
[81] Rodier, C., 2006, p. 6-7.
[82] European Commission, Communication of the European Commission on the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin, "improving access to durable solutions", COM(2004) 410, p. 18-19.

"the RPPs' goals of strengthening the protection capacity and improving access to durable solutions in the target countries are laudable, [t]he RPPs concept raises concerns […] that the EU will use the existence of such programs as a pretext to declare the target countries 'safe third countries.' The EU could then return asylum seekers and migrants who transited through these countries even though effective protection could not be guaranteed"[83]

In relation to this it should be noted that the RPP's were actually inspired by a policy paper called "A New Vision for Refugees", presented by the British Prime Minister Tony Blair a few years earlier in 2003. The policy paper set out that the EU would establish Regional Protection Areas (RPAs) near refugee-producing countries, which would have the purpose both to contain refugees in countries of first arrival and to serve as places to which asylum seekers that had arrived in Europe could be deported.[84] Finding insufficient support for the proposal, the United Kingdom withdrew it, and it was never formally considered.[85] Nevertheless, the New Vision has persisted through the years and has arguably inspired the 2016 EU-Turkey Action Plan for stemming the irregular flow of migrants and asylum seekers into the EU.[86] This will be described later in the chapter.

In 2006 the Commission initiated the process of evaluation of the first phase of the CEAS in order to improve the instruments in the second phase, as required by the Hague Programme.[87] Albeit the implementation of the minimum standards set out in the first phase legislative instruments, the reception of applicants, procedures and assessment of qualification for international protection still varied between the Member States. This called for a second phase of the CEAS in order to achieve a higher degree of

[83] Human Rights Watch, 2006, p. 4.
[84] See Noll, G, 2015.
[85] Human Rights Watch. 2006, p. 5.
[86] Frelick, B., Kysel, I, M, and Podkul, J, 2016. p. 206.
[87] The Hague Programme, p. 3.

harmonization and improved standards in line with the principle of providing equal access to protection across the EU.[88]

2.3.3 The Lisbon Treaty

The Lisbon Treaty[89] which entered into force on the 1st December 2009 and amended the TEU (originally known as the Maastricht Treaty) and the TFEU (originally known as the Treaty of Rome), had an important impact on the CEAS. While the obligations deriving from Treaty of Amsterdam were limited to the adoption of minimum standards, the Lisbon Treaty significantly strengthened the legal basis for a common policy on asylum and subsidiary protection. Article 78 of the TFEU stipulates that

> "The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties."[90]

Article 78 TFEU defines the relationship between the CEAS and the EU's international legal obligations, including the principle of *non-refoulement*. 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. Furthermore, it should be noted that with the adoption of the Lisbon Treaty did the EU Charter come into direct effect, as provided by Article 6(1) TEU, thereby becoming a binding source of primary law binding upon the EU institutions and its Member States when they implement EU law. Thus, the legal necessity for the CEAS to respect the principle of *non-refoulement* is also prescribed in the EU Charter.

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[88] European Union: European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Policy Plan on Asylum. An Integrated Approach to Protection Across the EU, 17 June 2008, COM(2008) 360, p. 3.
[89] The Lisbon Treaty amended the Treaty on European Union as well as the TEC, which it renamed the Treaty on the Functioning of the European Union (TFEU).
[90] Article 78(1) TFEU.

The Lisbon Treaty also added an explicit legal basis for the EU's actions in the external dimension of asylum with a provision that envisages measures comprising "partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection".[91] More importantly, it conceptualized such measures as an inherent part of the CEAS.[92] Article 67(2) TFEU also accentuated the recognition that the abolition of intra-EU borders required a strengthening of external border controls, and cooperation in the field of asylum and immigration as a compensatory measure:

> "It [The EU] 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."[93]

This demonstrates that the idea behind the CEAS has two conflicting objectives – to enhance asylum protection on the one hand and to make sure asylum is asked in the frontline countries of the EU in order to combat "asylum shopping" or secondary movement of migrants on the other hand.[94] Policies in the area of external border controls have in this way been considered necessary in order to ensure the sustainability of a common area without internal borders. Arguably, this inherent conflict has been a part of the system from the very beginning.[95]

2.3.4 The Stockholm Programme

In 2009 the European Council adopted the Stockholm Programme[96], which like the Hague Programme, is a multiannual programme for the development

[91] Article 78(2)(g) TFEU.
[92] Article 78(2) TFEU.
[93] Article 67(2) TFEU.
[94] Guild, E, 2006, p. 640–641.
[95] Bauloz, C., Ineli-Ciger, M., Singer, S., and Stoyanova, V., 2015, p 1–2.
[96] European Union: Council of the European Union, The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens, 2010/C 115/01. (Hereafter "The Stockholm Programme").

of the AFSJ. The Stockholm Programme accentuated the importance of the CEAS external dimension. It stated that "promoting solidarity within the EU is crucial but not sufficient to achieve a credible and sustainable common policy on asylum".[97] More specifically, it stressed the need for the Union to provide added value in particular on the cooperation with third countries in order to improve the Union's capacity to carry out border control:

"Union external cooperation should focus on areas where Union activity provides added value, in particular:

— Migration and asylum, with a view to increasing Union dialogue and cooperation with countries of origin and of transit in order to improve their capacity to carry out border control, to fight against illegal immigration, to better manage migration flows and to ensure protection as well as to benefit from the positive effects of migration on development; return and readmission is a priority in the Union's external relations."[98]

2.3.5 The Global Approach to Migration and Mobility

Following the Stockholm Programme, in 2011, the Commission adopted the Global Approach to Migration and Mobility ("GAMM"), as an updated version of the Global Approach to Migration ("GAM"), established in 2005.[99] The GAMM is the overarching framework of the EU's external migration and asylum policy. It defines how the EU conducts its policy dialogues and cooperation with third states, including development cooperation, and is embedded in the EU's overall external action.[100] The ambition of the GAMM is to establish balanced and comprehensive partnerships with third countries covering all relevant aspects of migration.[101]

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[97] The Stockholm Programme, para 6.2.3.
[98] The Stockholm Programme, para 7.3.
[99] European Union: European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions : The Global Approach to Migration and Mobility, 18 November 2011, COM(2011) 743 final. (Hereafter "The Global Approach to Migration and Mobility"). GAMM is a revised version of the Global Approach to Migration (GAM), see Communication COM(2007) 247 final 2.
[100] European Parliament, Asylum policy factsheet.
[101] The Global Approach to Migration and Mobility, see under "introduction". See also European Commission: Global Approach to Migration and Mobility (GAMM).

The focus on the notion of "partnership" that lies at the center of the GAMM has according to Conte been associated with a shift in EU policy towards an inclination to establish more comprehensive relations with third countries on migration issues, including the promotion of actions aimed at exploiting the positive impact of migration on development processes.[102]

2.3.6 The EU-Turkey Agreement

In 2015, the EU's south-eastern border saw the continent's largest migratory wave since Second World War when 885,000 migrants crossed it to reach the EU.[103] As a response to this challenge, the leaders of the EU activated the EU-Turkey Joint Action Plan[104] together with Turkey on the 29th of November 2015. The Action Plan included several intended actions in order to fight irregular immigration to the EU.[105] Following the Action Plan, the so-called EU–Turkey Statement was concluded on 18 March 2016.[106] Its purpose was to stem illegal entry into the EU as well as to "break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk"[107]. In order to accomplish this, readmission and resettlement measures were combined by returning firsthand arrivals in Greece to Turkey and resettling, for every Syrian readmitted by Turkey, another Syrian from Turkey to an EU Member State.

Between March 2016 and March 2018, there was 1563 returns to Turkey under the EU–Turkey Statement and 601 returns under the Greece–Turkey bilateral admissions protocol.[108] The Statement also included a financial support for a coordinating mechanism called "Facility for Refugees" with the aim to guarantee "the optimal mobilisation of relevant existing EU financing

[102] Conte, C. and Cortinovis, R., 2018, p.6.
[103] FRONTEX, Migratory routes.
[104] EU–Turkey Joint Action Plan, 2015.
[105] For a comprehensive overview of the intentions, see EU-Turkey Joint Action Plan, 2015.
[106] EU-Turkey Statement, 2018.
[107] Ibid.
[108] European Commission, COM (2018) 250, 14 March 2018, p. 7.

instruments, either as humanitarian assistance or non-humanitarian assistance, to ensure that the needs of refugees and host communities are addressed in a comprehensive and coordinated manner."[109] Furthermore, the EU signed a contract of €20 million in august 2016 to financially support the Turkish coast guard's capacity. According to the contract, the IOM is to develop the capacities of the Turkish coast guard for search and rescue operations.[110]

The EU-Turkey agreement has had a large impact on the arrivals to the EU territory. In 2018, irregular border crossings into the EU fell to the lowest figure in five years, 150.000, which according to the European Commission is mainly a result of "innovative approaches to partnership with third countries" such as the EU-Turkey Statement.[111]

2.3.7 The Concept of Conditionality

The chapter has so far showed that the beginnings of EU cooperation on migration and asylum matters were marked by the imperative of containing movements in European countries. Moreover, policies in the area of external border controls were considered preconditions in order to ensure the sustainability of a common area without internal borders. In this context, it might be useful to highlight the concept of conditionality, that is, incentives in the form of "sticks and carrots" to be offered to third countries in order to secure their cooperation in the management of migration.[112]

Although the EU has employed conditionality as part of its asylum and migration policy in the past,[113] according to Conte, the trend towards establishing more comprehensive relations with third countries on migration

[109] EU-Turkey Statement, 2018.
[110] European Commission, COM (2017) 130, 2 March 2017, p. 12.
[111] European Commission, COM (2019) 481 final, 16 October 2019 p. 1.
[112] Conte, C. and Cortinovis, R., 2018, p. 4.
[113] For a more comprehensive description of conditionality in EU asylum and migration policy, see Bamberg, K., Fabbri, F. and McNamara, F.; Conte, C. and Cortinovis, R., 2018, p. 15-23.

issues as a part of the GAMM in 2011, has expanded after the "migration crisis". Conte states that "the EU has reinforced its determination to use leverage and incentives to obtain cooperation from third countries on control of migration flows."[114] In this way, the EU ties border control and readmission demands to other areas of cooperation, by rewarding those countries that support the EU's migration agenda.

In November 2015, the EU held a comprehensive dialogue on migration with African countries which culminated with the EU–Africa summit held in Valletta. The summit resulted an action plan covering different priority domains, including legal migration and mobility, international protection and asylum, the fight against irregular migration and human trafficking, readmission and return.[115] The implementation of the action plan was supported by an "Emergency Trust Fund for stability and addressing the root causes or irregular migration and displaced persons in Africa".[116] In parallel, the EU focused its efforts on increasing cooperation with Turkey as described above.

In May 2015, the European Agenda on Migration was published. According to the European Commission, it is a comprehensive document "intended to address immediate challenges and equip the EU with tools to better manage migration in the medium and long term, in the areas of irregular migration, borders, asylum and legal migration."[117] The European Agenda on Migration meant an important shift towards more emphasis on hard borders and security, with one pillar explicitly devoted to more effective border management.[118] In early 2016, the Commission released a Communication on establishing a new Partnership Framework with third countries under the European Agenda on

[114] Conte, C. and Cortinovis, R., 2018, p. 6.
[115] Valletta Summit, 11-12 November 2015 Action Plan.
[116] European Council (2015) Emergency Trust Fund for Africa – Factsheet.
[117] European Commission, European Agenda on Migration.
[118] European Union: European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration, 13 May 2015, COM(2015) 240.p. 10-12.

Migration.[119] The Partnership Framework proposed by the Commission, which explicitly takes the EU–Turkey deal as a model, states that the EU should employ in a coordinated manner all the instruments, tools and leverage available to the EU in different policy areas, including development aid, trade, migration, energy and security. In particular, the Communication stated that "positive and negative incentives", should be integrated in the EU's policy:

"The EU and its Member States should combine their respective instruments and tools to agree compacts with third countries in order to better manage migration. This means, for each partner country, the development of a mix of *positive and negative incentives*, the use of which should be governed by a clear understanding that the overall relationship between the EU and that country will be guided in particular by the ability and *willingness of the country to cooperate on migration management*. The full range of policies, financial instruments and EU's external relations instruments will need to be used." [120]

Oxfam has described the Migration Partnership Framework as "an attempt to outsource the EU's obligation to respect human rights"[121] Moreover, a joint statement signed by 104 NGOs released in June 2016 expressed deep concerns about the direction taken by EU external migration policy, and specifically about attempts to make deterrence and return the main objective of the EU's relations with third countries.[122] According to the statement, the new Partnership Framework with third countries risks cementing a shift towards an approach that serves a single objective, to curb migration, at the expense of upholding fundamental values and human rights:

"[…] despite the stated commitment to respect the principle of non-refoulement, there are no safeguards envisaged to ensure that human rights, rule of law standards and protection mechanisms are in place. As a result, people risk being deported to countries where their

[119] European Commission. Communication on Establishing a New Partnership Framework with Third Countries under the European Agenda on Migration. COM(2016) 385 final.
[120] European Commission. Communication on Establishing a New Partnership Framework with Third Countries under the European Agenda on Migration. COM(2016) 385 final. p.17 [Emphasis added]
[121] *"Migration compact is an attempt to outsource EU's obligation to respect human rights"* Oxfam, 2016.
[122] *"Joint NGO statement ahead of the European Council of 28-29 June 2016 - NGOs strongly condemn new EU policies to contain migration"* ACT Alliance EU, 2016.

rights are not safeguarded. Responsibility and liability for human rights violations do not end at Europe's borders."[123]

In this context, it is important to note that the EU is spending more and more money on the cooperation with third countries. In May 2018, the Commission put forward its opening proposal for the 2021-2017 Multiannual Financial Framework (MFF) to be negotiated by EU institutions in the following two years.[124] Among other things, it anticipates an increase in investment for EU external actions as well as the establishment of a flexibility mechanism to address existing or emerging urgent priorities, including migratory pressures. At the heart of the proposal is a new Neighborhood, Development, and International Cooperation Fund for cooperation with third-countries. The fund will combine 12 different funds worth 89,6 billion euros, which is about 15 billion more than was pledged for the 12 funds under the previous budget.[125] As observed by Cooper, the Commission's structure for the new MFF takes stock of the experience of emergency instruments established during the crisis years (such as the EU Trust Fund for Africa and the Facility for Refugees in Turkey) by providing the EU budget with increased flexibility and financial leverage to tackle potential migration challenges in the future.[126]

2.3.8 The Resettlement Framework

As have been displayed above, resettlement is an integral part of the EU-Turkey statement, and of the cooperation with third countries in general. Therefore, it deserves some further explanation. Resettlement within EU asylum policy refers to the admission of non-EU nationals in need of international protection from a non-EU state to a Member State where they are granted protection. Accordingly, resettlement has three main objectives: to provide refugees with international protection, ensure a durable solution, and strengthening solidarity and responsibility sharing between the Member

[123] Ibid.
[124] European Commission. A Modern Budget for a Union that Protects, Empowers and Defends: The Multiannual Financial Framework for 2021-2027. (SWD(2018) 171 final).
[125] Hooper, K, 2018.
[126] Ibid.

States.[127] In the words of the Commission, it is intended to be a safe and legal alternative to irregular journeys to the EU territory,[128] and can be defined as "[t]he transfer of refugees from the country in which they have sought refuge to another State that has agreed to admit them."[129]

Historically, the resettlement efforts within the EU have been carried out by the Member States voluntarily and on an *ad hoc* basis.[130] However, on the 13 July 2016, as part of the reform of the CEAS and the long-term policy on better migration management, the Commission presented a proposal which aimed to provide for a permanent framework with standard common procedures for resettlement across the EU, as a complement to existing national and multilateral resettlement initiatives.[131] On the 12 October 2017, the European Parliament's Civil Liberties, Justice and Home Affairs (LIBE) committee adopted the report on the proposal and a decision to enter into interinstitutional negotiations. The Parliament confirmed that decision during the October II plenary session.[132]

However, already in the initial stages, the Council and the Parliament clashed on a number of issues while negotiating the Resettlement Framework. Based on the negotiations and the most evident conflicting points, there can be distinguished two different approaches to the framework. The Council promoted the Resettlement Framework as "a strategic instrument to manage migration flows"[133], while the Parliament stressed the humanitarian character of resettlement. More specifically, the Council emphasized the strategic and geopolitical objectives of migration management that resettlement could contribute to, accentuating that the "resettlement framework is part of a well-

[127] European Parliament, Resettlement of Refugees: EU Framework, 2019, p. 2.
[128]European Commission, Delivering on Resettlement, 2019.
[129]European Commission, Glossary: "Resettlement".
[130] European Parliament, Resettlement of Refugees: EU Framework, 2019, p. 6.
[131] Ibid. p. 1.
[132] European Parliament, 2018: EU asylum, borders and external cooperation on migration, recent developments, p. 12-13.
[133] Council of the European Union, 2017, "EU resettlement framework: Council ready to start negotiations", Press Report.

managed migration policy".[134] In addition, the Council insisted on the inclusion of a conditionality element when collaborating with third countries on resettlement. This is creating a strong link between the EU's commitment to resettlement and the overall cooperation of third countries on migration management. Arguably, the Council sees an opportunity to reduce incentives for irregular migration, in particular through the expansion of protection systems in the cooperating third countries.[135]

In contrast to this, the Parliament's October 2017 report stated that resettlement must not be used for foreign policy objectives or depend on third countries' cooperation on other migration-related matters. Instead, the parliament stressed that the resettlement framework should be a humanitarian programme based on the annual global projected resettlement needs and managed mainly by the UNHCR.[136] In line with the Parliament's position, UNHCR has emphasized the need to preserve the traditional, humanitarian role of resettlement as a protection tool for the most vulnerable. Accordingly, resettlement should work as a complement to other ways of migration and not prevent the spontaneous arrival of refugees and other migrants.[137]

2.4 Conclusion

This chapter has aimed to describe some fundamental rules of EU asylum law. According to the TFEU, the CEAS has to ensure a compliance with the principle of *non-refoulement* in accordance with the Refugee Convention and other relevant treaties, such as the ECHR. Furthermore, the EU Charter, stipulating the right to asylum, is binding upon the EU institutions and its Member States when they implement EU law. In addition to this, under the EU asylum *acquis*, the procedural rules set out in the APD, as well as the rules concerning reception conditions in the ARCD offers further human rights

[134] Council of the European Union, 2018, "Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council".
[135] Bamberg, K., Fabbri, F. and McNamara, F.; Conte, C. and Cortinovis, R., 2018, p. 17.
[136] European Parliament, Resettlement of Refugees: EU Framework, 2019, p. 5-6.
[137] UNHCR, 2016, "UNHCR's Observation and Recommendations on the EU Resettlement Framework proposal", p. 4-5.

protection to migrants and asylum seekers (at least in theory). When situated in the EU territory, prospective applicants for refugee status benefit entirely from EU asylum law. On the contrary, for migrants are outside the EU's jurisdiction, the CEAS is not applicable.

This chapter has also aimed to describe the main policy instruments relating to the external dimension of the EU asylum policy. To this end, the chapter has described the creation and main developments of the CEAS external dimension, mainly by the Tampere programme and the Hague programme in its first phase, and the Lisbon Treaty, the Stockholm Programme and the GAMM in its second phase.

Already in the Tampere Conclusions establishing the CEAS, external policies were promoted in order to control the external borders and "stop illegal immigration". Following this, the external dimension of asylum policy has been present in all of these policy instruments, for example; by the establishment of RPP's under the Hague Programme; the conceptualization of the cooperation with third countries under the Lisbon Treaty; the call for added value to such cooperation under the Stockholm Programme; and finally with the establishment of "partnerships" with third countries that lies at the center of the GAMM.

After the "migration crisis" the external dimension of EU asylum policy has been further developed and gained in importance. In my view, the EU-Turkey statement demonstrates a policy shift in European asylum strategy to external partners. This policy shift has given rise to the employment of incentive-based cooperation with third countries, as has been highlighted by the discussion on the concept of conditionality. The new resettlement framework, as part of the CEAS reform post 2015, further points towards the outsourcing of asylum as a rising trend in EU asylum policy. More importantly, the assessment of the development after the "crisis" indicates that the CEAS external dimension is disproportionately focused on capacity building, rather than offering opportunities for legal entry to protection seekers. In my view, the trend

towards the outsourcing of asylum therefore implies a weakening of refugees' human rights protection.

As have been demonstrated in the chapter, the notion that the abolition of intra-EU borders requires a strengthening of external border controls as a compensatory measure, has been present from the very beginning of the CEAS. The development of EU border management, and its connection with EU asylum policy will be explained in the next chapter.

3 Border management in the EU

3.1 Introduction

This chapter will focus on the development of EU policy on border controls, with particular attention taken to the European Border and Coast Guard (FRONTEX) and Integrated Border Management (IBM) as a concept developed in parallel with the CEAS. In order to better understand the context which have led up to the disembarkation centers-proposal, it is useful to understand the interaction between the IBM and the CEAS, or more specifically, the connection between border controls and asylum policy within the EU. Although two seemingly distinct policy areas, asylum and border management are actually interrelated. This interrelation can be demonstrated by Article 80 TFEU that refers to fields of external border controls, asylum and migration. More specifically, Article 80 TFEU establishes the principle of solidarity as applicable equally to the policies on external border controls, asylum and immigration (Articles 77 to 79 TFEU).

3.2 The European Border and Coast Guard FRONTEX

"To ensure the effective implementation of European integrated border management, a European Border and Coast Guard should be established."[138]

That follows from the Regulation 2016/1624, establishing The European Border and Coast Guard, also known as Frontex. Originally, Frontex (The European Agency for the Management of the Operative Cooperation at the External Borders of the Members States of European Union) was established

[138] Recital (5) Frontex Regulation.

in 2004 by Council Regulation 2007/2004.[139] The regulation established rules for cooperation between the Member States and for assistance to Member States with regard to technical and operational issues concerning the management of the Union's external borders. The Frontex activities started on an operational level in 2006. Its tasks are to promote, coordinate and develop European border management in line with the EU Charter and the concept of IBM.[140]

As the "migration crisis" put a lot of pressure on the Member States border authorities, the European Parliament called for a strengthening of Frontex. As a result, in December 2015, the European Commission put forward a proposal for a new European Border and Coast Guard with the aim of reinforcing the management and security of the EU's external borders and supporting national border guards. The new agency was launched in October 2016[141] and Regulation 2007/2004 was thus repealed by Regulation 2016/1624, establishing Frontex, the European Border and Coast Guard Agency.[142] The purpose of the Regulation, is to "establish a European Border and Coast Guard to ensure European integrated border management at the external borders with a view to managing the crossing of the external borders efficiently."[143] This includes addressing migratory challenges, with the purpose to uphold the free movement of persons within the EU.[144]

The new legal framework has shifted the reasoning of FRONTEX powers, by implementing a proactive rather than reactive approach. More specifically, the FRONTEX operational tasks shall not only focus on assisting the Member

[139] Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L349/1.
[140] Frontex: Origin and tasks.
[141] European Parliament, 2019. The EU response to the Migration Challenge.
[142] 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. (Hereafter "Frontex Regulation")).
[143] Article 2 Frontex Regulation.
[144] Ibid.

States and enhancing their coordination, but also preventing potential national vulnerabilities.[145]

FRONTEX may require Member States to effectively implement EU law and to take immediate action under emergency situations.[146] FRONTEX may even intervene in the territory of the Member States to ensure that the EU border management and asylum measures are applied, and that the Schengen area and the CEAS are not ultimately jeopardized.[147] In particular, Regulation 2016/1624 delegates the FRONTEX greater technical and operational competences. The FRONTEX may acquire its own technical equipment and have a Rapid Reaction Pool of at least 1500 border guards to be deployed immediately in joint operations or rapid border interventions.[148] Significantly, FRONTEX is also empowered to monitor the effective functioning of the external borders of the Member States,[149] carry out vulnerability assessments,[150] verify whether a Member State is able to effectively enforce EU law and detect deficiencies in the management of its borders.[151]

Moreover, in the aftermath of the "refugee crisis", the European Commission adopted on 13 May 2015 the above-mentioned European Agenda on Migration. The Agenda aimed to design a common strategy in which the Member States, the EU institutions, the AFSJ agencies, international organizations, civil society, local authorities and third countries are all involved in a coordinated manner. Among these actors, FRONTEX was mandated to play a key inter-agency operational role in hotspots areas[152]. In the hotspot areas, the experts and technical equipment deployed by

[145] Article 8(b) and 13 Frontex Regulation.
[146] Article 13 (6) and (8) Frontex Regulation.
[147] Article 19 Frontex Regulation.
[148] Article 8(h) and 20(5) Frontex Regulation.
[149] Article 14 Frontex Regulation.
[150] Article 13 Frontex Regulation.
[151] Recitals 21-24 Frontex Regulation.
[152] 'Hotspot area' refers to an area in which the host Member State, the Commission, relevant Union agencies and participating Member States cooperate, with the aim of managing an existing or potential disproportionate migratory challenge characterized by a significant increase in the number of migrants arriving at the external borders, see article 2(10) Frontex Regulation.

FRONTEX also assists the national authorities in disembarking, screening, registering, identifying, fingerprinting, debriefing and assessing the nationality of the arriving migrants, as well as facilitating and coordinating the return operations of those migrants with no right to remain in the EU.[153]

In this regard, Regulation 2016/1624 stipulates that Member States "retain primary responsibility for the management of their sections of the external borders" and that "the Agency shall support the application of Union measures relating to the management of the external borders by reinforcing, assessing and coordinating the actions of Member States in the implementation of those measures and in return".[154] Although the specific functions and the extent of the hands-on support that FRONTEX develop *de facto* in the hotspots are difficult to determine due to its vague legal mandate, their operational tasks arguably go beyond the pure technical assistance of Member States and the promotion of coordination.

3.3 Integrated Border Management

Integrated Border Management (IBM) is the concept by which the EU manages its external border. It involves national and international cooperation between all authorities and agencies involved in border security, with the aim to establish effective and coordinated border management at the EU's external borders.[155] Border surveillances have three main purposes in the EU entry regime. They are an identity-building tool; a security instrument; as well as a mechanism of migration control. For example, they are designed to assist in the fight against terrorism and organized crime, in the upholding of public order, and in the management of cross-border movement. But, from the three, the definition of border controls as a means to regulate access to territory and combat irregular flows is central to the EU conception of border

[153] Article 8(i) Frontex Regulation.
[154] Article 5 Frontex Regulation.
[155] European Commission: Definition of Integrated Border Management.

integration.[156] This follows clearly from the Frontex regulation that states: "European integrated border management is central to improving migration management. The aim is to manage the crossing of the external borders efficiently and address migratory challenges and potential future threats at those borders […]"[157]

The management of the EU's borders has been developed based on two main objectives amongst the Member States: to secure the common space and to control immigration in the common space.[158] In line with these objectives, the IBM structure has developed gradually.

Although IBM is a fairly new field, the emergence of the concept can be traced back to 2001, when the European Council recognized that the opening of the internal borders – with the incorporation of the Schengen Agreement into EU law with the Treaty of Amsterdam in 1999 – required a parallel strengthening of the outer borders, including more effective external border controls.[159] In this regard, it should again be reminded that the "need for a consistent control of external borders to stop illegal immigration" was mentioned in the Tampere Conclusions establishing the CEAS.[160] In May 2002, the requirement by the European Council to strengthen the external borders, was responded by a Commission Communication that introduced IBM.[161] When Frontex was established in 2004, IBM was not materially considered, and not even mentioned in the agency's founding Regulation Instead, it was the Justice and Home Affairs (JHA) Council Conclusions of 2006 that further developed IBM and presented the dimensions that would define the framework. These dimensions were, and are still, referred to as the four-tier access control model and include: "[…] measures in third countries,

[156] V. Moreno-Lax, 2017, p. 42.
[157] Recital (2) Frontex Regulation.
[158] Trevisanut, S., 2014, p. 109.
[159] European Union: Council of the European Union, Presidency Conclusions, European Council Meeting in Laeken, 14-15 December 2001, 15 December 2001.
[160] Tampere conclusions, para 3.
[161] Communication from the Commission to the Council and the European Parliament, "Towards Integrated Management of the External Borders of the Member States of the EU", COM(2002) 233 final.

cooperation with neighboring countries".[162] After those JHA Council Conclusions, Frontex and IBM both evolved slowly and in separate ways.[163]

The IBM was further developed in the years following the terrorist attacks of 11 September 2001 and the subsequent security requirements.[164] The connection between border management and control over criminal activities, including irregular migration, increasingly gained importance after the terrorist attacks in Madrid (2004) and London (2005).[165] As stressed by Carrera, the movement of people has since then become a suspicious activity potentially linked with criminality and organized crime.[166] In the context of the so-called migration crisis, radical and rapid reform began to take place, which made the future of Frontex a lot more entwined with the role of IBM.[167]

3.4 The Increased Connection Between Border Controls and Asylum Policy

As stated in the introduction to this chapter, the EU policy on border management and asylum are interrelated.[168] A reading of Article 80 TFEU, which refers both to asylum and border control measures when establishing the principle of solidarity, is the ultimate "proof" of the linkage between border controls and asylum. In the aftermath of the "migration crisis", IBM and asylum have been increasingly associated. In its Council conclusions on 26 June 2018, the European Council stressed the need for "flexible instruments" to combat "illegal migration". To meet this objective, "the internal security, integrated border management, asylum and migration funds should therefore include dedicated, significant components for external migration management."[169] In a similar way, Frontex have gotten

[162] Council of the European Union, Press release, 2006: Conclusions on Integrated Border Management.
[163] Bamberg, K., Fabbri, F. and McNamara, F.; Conte, C. and Cortinovis, R., 2018, p. 8.
[164] Carrera, S., 2010, p. 2.
[165] Adamson, F. B. 2006, p. 165-166.
[166] Carrera, S., 2010, p 10.
[167] Bamberg, K., Fabbri, F. and McNamara, F.; Conte, C. and Cortinovis, R., 2018, p. 8.
[168] See Article 80 TFEU.
[169] European Council conclusions, 28 June 2018.

increasingly involved with asylum, for example in the hotspots described above. In the Council conclusions of 26 June 2018, the Council also stressed the need to ensure the effective control of the EU's external borders with EU financial and material support, as well as the necessity to significantly step up the effective return of irregular migrants. The European Council has noted that in both respects, "the supportive role of FRONTEX, including in the cooperation with third countries, should be further strengthened through increased resources and an enhanced mandate."[170]

As have already been pointed out above, since the very beginning of European cooperation, the abolition of internal borders has been deemed to make immigration control more difficult. Even before the Maastricht Treaty, it was considered that the free movement of persons "could only be achieved by controlling migration flows".[171] As a response to the perceived danger of the uncontrolled arrivals that would be the consequence of the elimination of internal frontiers, the reinforcement and transfer of border protection to the external EU borders was quickly considered the best solution.[172] This trend was confirmed by the Commission, which repeatedly emphasized the migration control function of border surveillance after the entry into force of the Amsterdam Treaty.[173] Subsequently, the instrumentality of border management in controlling entry and preventing irregular movement has been accepted as a regular practice,[174] which in turn have been reinforced by the characterization of irregular migration as a security risk after 9/11.[175] Thus, the project of establishing an integrated system of border management has thereafter been connected to the objective of "combating illegal immigration

[170] European Council conclusions, 28 June 2018.
[171] Commission Communication to the Council and the European Parliament on Immigration. SEC (91) 1855 final, 23 October 1991, p. 9.
[172] Moreno-Lax, V., 2017, p 41.
[173] European Commission, Communication from the Commission, On Policy Priorities in the Fight Against Illegal Immigration of Third-Country Nationals, 19 July 2006, COM(2006) 402 final; and uropean Commission, Communication from the Commission to the Council, Reinforcing the Management of the European Union's Southern Maritime Borders, 30 November 2006, COM(2006) 733 final.
[174] Council Conclusions on the management of the external borders of the member states of the European Union, 5–6 June 2008.
[175] Moreno-Lax, V., 2017, p. 42.

with an integrated approach".[176] As stated by the Council, "Europe's external borders must be effectively and consistently managed [...] to effectively contribute to the prevention and deterrence of illegal immigration".[177] Consequently, IBM has turned into the principal means to "reduce" irregular flows and "bring down the number" of unauthorized persons arriving to the EU territory.[178]

Accordingly, the IBM concept has influenced the CEAS and has contributed to conflate border management, which is mainly a security issue, with asylum, which is mainly a protection issue. This conflation becomes evident by the use of the term "irregular migration". The UNHCR Special Rapporteur has expressed concerns regarding the fact that numerous EU migration policy documents, and especially Council conclusions and legislative acts, use the expressions "illegal migration" and "illegal migrants".[179] Even the Stockholm programme, with the role of promoting a common policy on asylum, emphasizes that

> "in order to maintain credible and sustainable immigration and asylum systems in the Union, it is necessary to prevent, control and combat illegal immigration as the Union faces increasing pressure from illegal migration flows, and particularly the Member States at its external borders, […]"[180]

This terminology links asylum seekers with crime and security concerns, which contributes to the negative discourses on migration, and further reinforces negative stereotypes of irregular migrants as criminals.[181] While irregular immigration (the movement of persons that takes place outside the laws, regulations, or international agreements governing the entry into or exit

[176] Council Conclusions on measures to be applied to prevent and combat illegal immigration and smuggling and trafficking in human beings by sea and in particular on measures against third which refuse to cooperate with the European Union in preventing and combating these phenomena, Council doc. 10017/02, p. 3.
[177] Council conclusions regarding guidelines for the strengthening of political governance in the Schengen cooperation, 8 March 2012, paras f) and g).
[178] Bratislava Declaration, 16 September 2016, p. 3 and 4.
[179] Crépeau,, F., 2013, p. 9.
[180] The Stockholm Programme, p.5.
[181] Crépeau,, F., 2013, p.10

from the State of origin, transit or destination)[182] and asylum are separate issues, refugees are regularly compelled to resort to smuggling and trafficking to access protection in the EU, in the absence of legal alternatives.[183] The related effect is that the efforts to combat irregular movement through extraterritorial border controls, also affects refugee movements. Ultimately, when implementing integrated border management measures in, or together with third countries, the EU and its Member States may become involved in activities where the application of fundamental rights obligations, specifically from the prohibition of *refoulement* is not fully settled.[184]

3.5 The Evolution of Border Controls in Relation to Third Countries

The post-Lisbon era has enlarged the security-centric core inherited from Schengen in multiple ways, leading to a "widening" and "deepening" of the IBM paradigm. This evolution has led to a process whereby EU borders have been "offshored" and "outsourced" simultaneously.[185] The "thickening" of the Union's external borders has had a significant impact on refugee movements and has arguably enabled the trend of outsourcing asylum in the EU post 2015 described above. In this context, IBM has become the central means to "reduce" irregular flows and "bring down the number" of unauthorized arrivals.[186]

Since the Lisbon Treaty, IBM has been developed in particularly three different directions; first, there has been a "widening" of controls through their digitalization; secondly, there has been a "thickening" of border management through its militarization. Thirdly, IBM has been "externalized"

[182] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3, Article. 5.
[183] European Commission: Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, COM(2016) 197, p. 14-16.
[184] European Union Agency for Fundamental Rights, 2017.
[185] Gammeltoft-Hansen, T., 2011. p. 2.
[186] Bratislava Declaration, 16 September 2016, p.3-4.

through the delocalization of checks, delegated to authorities stationed in third counties and private actors, in a dual effort towards the "offshoring" and "outsourcing" of borders.[187] The third development is of particular interest to the purpose of the thesis.

IBM's foreign policy role relates to two different areas – measures that are being carried out in third countries, such as advice and training by liaison officers and travel document experts – and cooperation with third countries, for example through the exchange of information and the establishment of appropriate communication channels.[188] The Frontex Regulation incorporated a strong foreign policy component within IBM, stating that cooperation with third countries in the areas covered by the regulation, is one of its defined components.[189] That cooperation focuses on "neighboring countries and on those third countries which have been identified through risk analysis as being countries of origin and/or transit for illegal immigration".[190]

Externalization of migration controls to third countries can be defined as "extraterritorial state actions to prevent migrants, including asylum seekers, from entering the legal jurisdictions or territories of destination countries or regions or making them legally inadmissible without individually considering the merits of their protection claims."[191] These actions may include unilateral, bilateral, and multilateral engagement of States.[192] Externalization efforts may also extend to measures aimed at diverting asylum seekers to third countries, such as to third-country processing centers or "protected areas" near countries of origin.[193]

Misleadingly, externalization tends to be framed as either or both a security imperative and a life-saving humanitarian endeavor rather than simply a

[187] Moreno-Lax, V., 2017, p. 35.
[188] See European Commission, 2010, "Guidelines for Integrated Border Management in European Commission External Cooperation".
[189] Frontex Regulation, Recital 3, Article 4(f).
[190] Frontex Regulation 4(f).]
[191] Frelick, B., Kysel, I, M, and Podkul, J, 2016. p.193.
[192] Crépeau,, F., 2013, p.10.
[193] Hyndman, J., and Mountz, A., 2008, p. 266.

strategy to restrain and control migration.[194] Externalization can be conducted through formalized migration policies and visa regimes, bilateral and multilateral policy initiatives between states, or through ad hoc policies and practices. Externalization policies and practices may be explicitly aimed at preventing the entry of migrants into a destination state or have only an indirect impact on migration.[195] The development of externalization has been enabled by the fact that migration policy has become an increasingly politicized issue. As highlighted by Crépeau, there is a trend in European asylum policy as being more focused on stopping irregular migrants rather than protecting their rights.[196]

According to Moreno-Lax, the final move in the IBM development may take two forms, which complement each other. First, the extraterritorialization of checks, which are physically de-localized to pre-border areas outside European soil, which can be seen as a "offshoring" mechanism, and secondly, their delegation to private actors and authorities stationed in third countries, which can be seen as a "outsourcing" mechanism.[197] In this way, the externalization of the EU borders does not only consist of the exchange of data, but rather through actual and direct collaborating with third parties in the management of external controls. This leads up to the disembarkation centers proposal.

3.6 The Disembarkation Centers Proposal

On 28 June 2018, the European Council presented the disembarkation centers proposal in its Council conclusions on migration, security and defense. In the conclusions, the European Council called on "the Council and the Commission to swiftly explore the concept of regional disembarkation platforms" for migrants rescued in the context of search and rescue

[194] Frelick, B., Kysel, I, M, and Podkul, J, 2016. p. 193.
[195] Ibid. p. 194.
[196] Crépeau,, F., 2013, p. 15.
[197] Moreno-Lax, V., 2017, p. 39.

operations.[198] According to those Conclusions, such "platforms should operate distinguishing individual situations, in full respect of international law and without creating a pull factor".[199]

Based on the council conclusions, the objective of the disembarkation centers appears to be to "to eliminate the incentive"[200] for migrants "to embark on perilous journeys"[201] by way of taking in charge those who are saved in "search and rescue operations" in accordance with the new rules (on disembarkation centers) to be adopted. The only information mentioned concerning the operational tasks of the disembarkation centers, is that they should distinguish individual situations. Their possible location is not clear either, since it is mentioned that the concept and the clear meaning of those centers has to be explored "in close cooperation with relevant third countries [...]",[202] and that they "should operate [...] in full respect of international law [...]"[203] without any mention of European Union law. This indicates that such centers should be located outside the EU, in third countries, which possibly would be willing to accept them. In a note entitled "The legal and practical feasibility of disembarkation options",[204] the European Commission presented three different scenarios for how the migrants would be brought to the disembarkation centers outside the EU territory: by interception of migrants in international waters (1), in territorial waters of a third state (2), or in the EU territory (3).

The features of the disembarkation centers have been described as follows:

"Partnerships on an equal footing: work with interested third countries will be brought forward on the basis of existing partnerships and offered support tailored to their specific political, security and socio-economic situation;

[198] European Council Conclusions, 28 June 2018., point 5.
[199] Ibid.
[200] Ibid.
[201] Ibid.
[202] Ibid.
[203] Ibid.
[204] European Commission: Regional Disembarkation Arrangements – Follow-up to the European Council Conclusions of 28 June 2018.

No pull factors: resettlement possibilities will not be available to all disembarked persons in need of international protection and points of reception should be established as far away as possible from points of irregular departure;

No detention, no camps: Regional disembarkation arrangements mean providing a set of established procedures and rules to ensure safe and orderly disembarkation and post-disembarkation processing in full respect of international law and human rights;

EU Financial and logistical support: The EU is ready to provide financial and operational support for disembarkation and post-disembarkation activities as well as for border management with equipment, training and other forms of support."[205]

Against this background, there are a number of issues that need clarification. First, it is not clear where the platforms would be situated. So far, no country has agreed to host the disembarkation centers,[206] on the contrary, both Tunisia[207] and Libya[208] have refused. Italy's interior minister at the time, Matteo Salvini, proposed that the centers would be located in countries south of Libya, such as Niger, Chad, Mali and Sudan.[209] However, the African Union have previously dismissed the utilization of "migration holding camps" or "processing centers", calling them "de facto detention centers" and raising concerns regarding human rights.[210] Second, once they would have been disembarked, migrants and asylum seekers would be screened, registered, and given adequate assistance based on their individual needs. In return for cooperation on hosting these platforms, the EU would provide "tailor-made and targeted packages" for potential partners and cover all related costs for these platforms.[211] However, there has been little clarity

[205] European Commission, Managing migration: Commission expands on disembarkation and controlled centre concepts, 2018.
[206] *"EU admits no African country has agreed to host migration centre,"* The Guardian, 21 June 2018.
[207] *"Centres de migrants en Tunisie? «C'est non, au plus haut niveau» dit l'ambassadeur tunisien auprès de l'UE"* Le Soir, 20 June 2018.
[208] *"Libya cannot open permanent migrants camps, Mitig tells Italy's Interior Minister"*, Libyan Express, 25 June 2019.
[209] *"Illegal migration holding camps to be located outside Libyan borders, Italy to supply patrol boats to Libya",* Libyan Herald, 27 June 2018.
[210] African Union. Specialised technical committee (STC) on Migration, Refugees and Internally Displaced Persons Second Ordinary Session. 16-21 October 2017, p.7.
[211] Non-paper on regional disembarkation platforms, 2018.

about how they would work in practice. Third, while these centers in non-EU countries supposedly would operate in "full respect of international law",[212] the European Council have not further specified the legal admissibility and practicability of their establishment as well as how and where refugees would be resettled. Lastly, while the EU would provide operational and financial support to the cooperating third country, the extent of this assistance has not been further detailed.

The EU's non-paper[213] on regional disembarkation centers, developed following the EU Council meeting of June 2018, provided some insights into how the disembarkation centers would function. However, many practical details remain missing, and will ultimately depend on consultations once interested countries has been identified. Although the lack of clarification, the plans have been strongly criticized. For instance, Claude Moraes, Labour Member of the European Parliament and chair of the European Parliament's LIBE Committee, said that the Parliament "wouldn't cooperate on the budget" for disembarkation platforms as "these ideas are extreme".[214] Furthermore, Moraes stated that "offshoring has been tried before […] it is not an asylum system in our view, because you wouldn't guarantee human rights, you wouldn't guarantee proper processing and you wouldn't have any guarantee that someone who had any asylum claim would end up in the European Union."[215]

In addition, Iverna McGowan from Amnesty International's EU office have expressed that "In our experience, especially if we look at Australia and other countries, this raises a lot of human rights concerns. Under which jurisdiction, are there re-settlements or will it just be detention centers with human suffering and no ability for people to move out of these camps?"[216]. In response to this, the Commissioner for migration Dimitris Avramapoulos has

[212] Ibid.
[213] Ibid.
[214] *"European parliament 'won't pay for offshore migrant camps"* The Guardian 26 June 2018.
[215] Ibid.
[216] *"Europe doesn't have migration problem, says Amnesty"* Euronews, 26 June 2018.

defended the plan against criticism that it would be inhumane by stating that "I'm against Guantanamo Bay for migrants. This is against European values so it's out of the question."[217] Moreover, Avramopoulos continues to stress an organized and sustainable approach to disembarkation. On 9 January 2019 he stated that "the European Union cannot continue to rely on unorganised, ad-hoc solutions" when it comes to disembarkation.[218]

3.7 Conclusion

This chapter have sought to define the relation between EU asylum policy and border management. The chapter has demonstrated that since the "migration crisis", Frontex has obtained an increased mandate that also has implications on asylum. The new Frontex Regulation has shifted the reasoning of Frontex powers, by implementing a proactive rather than reactive approach. For instance, Frontex is empowered to monitor the effective functioning of the external borders of the Member States, carry out vulnerability assessments, verify whether a Member State is able to effectively enforce EU law and detect deficiencies in the management of its borders. If needed, Frontex may intervene in the territory of the Member States to ensure that the EU border management and asylum measures are applied. Following the European Agenda on Migration, Frontex has been mandated to play a key role in hotspots areas by assisting national authorities in disembarking, screening, registering, identifying, fingerprinting, debriefing and assessing the nationality of migrants, as well as facilitating and coordinating the return operations of migrants that has no right to remain in the EU. Thus, Frontex plays an increasingly important role for the EU's asylum and migration management.

[217] *"Avramopoulos: I am opposed to Guantanamo Bay for Migrants"* Euronews 21 June 2016.
[218] European Commission: Remarks by Commissioner Dimitris Avramopoulos on the solution found with regards to the disembarkation of NGO vessels and progress under the European Agenda on Migration, 9 January 2019.

The chapter has furthermore exposed the post-Lisbon era's contribution to a "widening" and "deepening" of the IBM paradigm, which in turn has led to the "offshoring" and "outsourcing" of EU borders. In my opinion, this trend has had two main effects on asylum. First, it has enabled the efforts to outsource asylum in the EU post 2015, as illustrated by the EU-Turkey statement and the disembarkation centers proposal. Secondly, it has had a significant impact on refugee movements. The effect of outsourcing border controls outside the EU territory compels refugees to resort to smuggling and trafficking to access the EU territory. In this way, the efforts to combat irregular movement through extraterritorial border controls, also affects refugee movements.

The chapter has thus demonstrated that although two seemingly distinct policy areas, asylum and border management are interrelated. Taking the risk to blur the lines between asylum and external border management, whereas the EU originally aimed to build those policies separately in order to uphold its legal obligations, reveals in my opinion that the EU ignorers the paradox of building a CEAS without foreseeing a road to allow asylum seekers to introduce their application in order to benefit from it. The disembarkation centers proposal is one of the latest suggested measures to outsource border controls. In my view, it can be seen as a further step towards outsourcing asylum from the EU territory as part of the EU's "innovative approaches to partnership with third countries."[219] The above-mentioned reactions to the proposal call for an examination of its legality and the possible human rights challenges it may imply. This investigation will be carried out in the following chapter.

[219] See Chapter 2.3.6.

4 Outsourcing Asylum: Human Rights Challenges

4.1 Introduction

This chapter aims to assess under what circumstances the outsourcing of asylum may trigger the obligation of states to protect persons from refoulement. In order to provide an answer to this sub-question, the chapter will discuss the relationship between external border control measures and the obligation of *non-refoulement,* with particular attention to its scope of application outside a state's territorial borders. The chapter will initially explain the developing concept of jurisdiction and its relevance in expanding the applicability of the *non-refoulement* obligation. The second part of the chapter will examine potential to further expand the scope of application through an examination of the concept of state responsibility in public international law. Based on the findings in these sections, the last part of the chapter will analyze the specific case of the disembarkation centers proposal as an example of the outsourcing of asylum.

4.2 Extraterritorial Jurisdiction in Relation to *Non-refoulement*

Jurisdiction in public international law, as a core element of state sovereignty, has generally been regarded as being "closely related to the national territory",[220] and has thus traditionally been considered as territorial in nature.[221] Consequently, jurisdiction in public international law is fundamentally about defining the exclusive competence of a state in respect of its own territory. In contrast to this, jurisdiction in human rights law serves

[220] Shaw, M. N. 2003, p. 572–3; Lawson, R. A., 2004, p. 87.
[221] Shaw, M. N. 2003, p. 573.

principally to define the scope of persons to whom a state ought to secure human rights obligations.[222]

The meaning of jurisdiction in human rights law has been the subject of extensive debate among scholars. In particular, scholars diverge in their opinions as to whether the notion of jurisdiction in human rights law is essentially territorial or if it can extend outside the State's territory.[223] A related issue is that one of the most disputed aspects of asylum and refugee law is the relationship between the state's sovereign right to control territorial borders versus the obligation to prevent *refoulement*.[224] With specific regards to the *non-refoulement* obligation in relation to border controls in third countries, there are two main positions amongst scholars.[225] While some argue that the prohibition of *refoulement* equally applies on a state's territory, at the borders of a state, on the high seas and when operating in a third country, others make distinction between these locations, by minimizing the responsibility of *non-refoulement* the more remotely the control is occurring.[226] This divide can be explained by mainly two factors.

First of all, the legal obligation to respect the prohibition of *refoulement* is complicated by the fact that there are "two competing territorial authorities with concurrent jurisdiction over the affected subject"[227], as border management in third countries includes more than one state. Secondly, the definition of *refoulement* might at a first glance suggest that *refoulement* can only occur if a person is removed from one state to another. In this way, it can be argued that intercepting of migrants in the territory of a third state does not qualify as *refoulement* in the meaning of article 33 in the Refugee Convention, as the person is not being pushed back over a physical border, but simply being contained within a third country. However, the critical point

[222] Den Heijer, M. and Lawson, R., 2013, p. 153.
[223] See for example Milanovic, M., 2017; Hampson, F., 2011; Lawson, R. A., 2004, p. 87. For an overview of the diverge amongst scholars, see Kim, S., 2017.
[224] Guild, E., 2016, p. 39.
[225] Rijken, C., Pijnenburg, A., & Oudejans, N., 2018, p. 620.
[226] Moreno Lax, V., 2008, p. 334–5; Noll, G., 2005, p. 542, 548–53; Hathaway, J. C., 2005, p. 335– 42. Rijken, C., Pijnenburg, A., & Oudejans, N., 2018, p. 620.
[227] Moreno Lax, V., 2008, p. 335.

triggering a state´s obligation to comply with human rights obligations, and in particular the prohibition of *refoulement*, is not only that the person concerned, if returned, crosses a territorial border, but also if the person crosses a state's *jurisdictional border* and is moved from one jurisdiction to another. As is stressed by Rijken et al.; "If the prohibition of refoulement is not exclusively territorially limited, it is conceivable that border control activities in third countries can also qualify as refoulement."[228] This interpretation finds support elsewhere.

Noll has suggested that the prohibition of *refoulement* is triggered by the crossing of a jurisdictional, or in his words, an administrative border, and thus does not have to imply the crossing of a territorial border.[229] According to Noll, jurisdiction thus has the possibility of functioning as a safety net when States attempt to circumvent human rights obligations.[230] This view is maintained both in European and international human rights law, where there are support for the claim that human rights obligations must govern extraterritorial activities. The next sub-chapter will provide an understanding of how this issue has been dealt with in the case law of the ECtHR.

4.2.1 ECtHR Case Law on Extraterritorial Jurisdiction

The ECtHR have dealt with the issue of extraterritorial jurisdiction in a few rulings. One of the first times that the ECtHR attended to the issue, was in it its admissibility decision Banković v Belgium ("*Banković*") where it was held that "[w]hile international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction [...] are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States".[231] Even though *Banković* has been heavily

[228] Rijken, C., Pijnenburg, A., & Oudejans, N., 2018, p. 623.
[229] Noll, G., 2005, p. 548.
[230] Gammeltoft-Hansen, T and Hathaway, J. C, 2015, p, 263.
[231] *Banković and others v Belgium,* Application no. 52207/99, Council of Europe: European Court of Human Rights, 12 December 2001, para 59, (Hereafter "*Banković*").

criticized and overruled,[232] the Court still maintains the view that "[a] State's jurisdictional competence [...] is primarily territorial" with the consequence that "acts of Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 [of the ECHR] only in exceptional cases".[233]

From this follows that as a general rule, all states have an obligation to respect, protect and fulfil the human rights of individuals located on their own territory. Inversely, extraterritorial human rights protection is only granted in exceptional cases, provided that there is a justification. Actually, the ECtHR has for a long time, both before and after *Banković*, accepted that a Convention State's *exercise of control* over individuals is sufficient to bring the individuals within the jurisdiction of that State.[234] For example, in Öcalan v Turkey the Court considered that despite a lack of territorial control, State officials could exercise sufficient effective control over a person in order to bring him or her within the state's jurisdiction.[235] Similarly, in Issa v Turkey, the Court considered that regardless of control over foreign territory, a state may be held accountable for "[a] violation of the Convention rights and freedoms of persons who are in the territory of another state but who are found to be under the former state's authority and control through its agents operating — whether lawfully or unlawfully — in the latter State."[236]

Accordingly, in the view of the ECtHR, jurisdiction may be established over an individual outside a state's territory if the state has *effective control* over that individual. The next question to be answered regards what situations that are relevant when establishing a jurisdictional link between persons affected by external border controls and the state authorizing such control.

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[232] Roxstrom, E., Gibney, M., and Einarsen, T., 2005.
[233] *Al-Skeini and Others v United Kingdom,* Application no. 55721/07, Council of Europe: European Court of Human Rights, 7 July 2011, para 131 (Hereafter *"Al-Skeini"*).
[234] Den Heijer, M. and Lawson, R., 2013, p. 621.
[235] *Öcalan v Turkey,* Application no 46221/99 Council of Europe; European Court of Human Rights, 12 March 2003, para 93.
[236] *Issa v Turkey, Application No 31821/96, Council of Europe: European Court of Human Rights, 16 November 2004,* para 71.

4.2.1.1 *De Jure* Control

First of all, as was confirmed by the ECtHR in *Hirsi Jamaa v Italy ("Hirsi")*, when a state is exercising *de jure* control over individuals outside the state territory, it has the effect that those individuals fall within the state's jurisdiction.[237] *De jure* control is exercised for instance when a state is boarding migrants on a state vessel operating outside the territorial waters, since states enjoy exclusive jurisdiction over vessels flying their flag.[238] In *Hirsi* the ECtHR clarified that a state cannot avoid jurisdiction by classifying the interception of migrants on the high seas as a rescue operation.[239] It should be noted, however, that the vessel in question was an Italian military vessel.[240] A narrow interpretation of *Hirsi* could therefore lead to the conclusion that the fact that the migrants were intercepted specifically by a military vessel, had implications for the establishing of *de jure* and *de facto* under the control of Italian authorities.

4.2.1.2 *De Facto* Control

Secondly, jurisdiction can be established where a state exercises *de facto* control over an individual.[241] This has been confirmed by the ECtHR in Al-Skeini v United Kingdom *("Al-Skeini")*, where the Court held that: "What is decisive in such cases is the exercise of physical power and control over the person in question".[242] This demonstrates that whether or not an individual falls within the jurisdiction of a state is believed to be a question of fact, not of law.[243] Consequently, is not so much the territorial location of the individual that matters the most, but rather the state's physical power and control over that individual, wherever located.

[237] *Hirsi Jamaa and Others v Italy, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012,* paras 77 and 82. (Hereafter "Hirsi")
[238] *Hirsi,* paras 77 and 82; Moreno-Lax, V., 2012, p.579–81.
[239] *Hirsi,* para 79.
[240] *Hirsi,* para 76.
[241] Rijken, C., Pijnenburg, A., & Oudejans, N., 2018, p, 625.
[242] *Al-Skeini*, para 136.
[243] Rijken, C., Pijnenburg, A., & Oudejans, N., 2018, p. 625.

According to Moreno-Lax, there needs to be a minimum level of physical coercion in order for *de facto* control to be established.[244] In *Al-Skeini*, the Court listed cases of "use of force" that brought individuals under state jurisdiction. Although it is not clear what specific acts qualify as *de facto* control, it seems that the decisive factor is the result – jurisdiction is established if the outcome of border control measures is that migrants are prevented from reaching the borders of a state.[245] In *Hirsi* the Court stated that:

"The removal of aliens carried out […] by the authorities of a State in the exercise of their sovereign authority, the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State, constitutes an exercise of jurisdiction within the meaning of Article 1 of the Convention [...]"[246]

Accordingly, it can be considered that it is irrelevant whether border control measures are being carried out on the high seas or on the territory or territorial waters of a third state. Jurisdiction can still be established for the state that is actually exercising *de facto* control.

4.2.1.3 The Exercise of Public Powers

A third way of establishing jurisdiction is through the exercise of public powers in a third state.[247] This has been established in the case law of the ECtHR. For instance, in *Al-Skeini,* the ECtHR held that:

"the Court has recognised the exercise of extraterritorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government [...] Thus, where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State [...]"[248]

[244] Moreno-Lax, V., 2012, p. 581.
[245] Moreno-Lax, V., 2012, p. 589.
[246] *Hirsi,* para 180.
[247] Gammeltoft-Hansen, T and Hathaway, J. C, 2015, p 239; Rijken, C., Pijnenburg, A., & Oudejans, N., 2018, p. 626.
[248] *Al-Skeini*, para.135.

From this follows that three conditions can be identified as relevant for the establishment of jurisdiction within the context of the exercise of public powers: (1) the state must act in accordance with custom, treaty or other agreement, (2) the public powers should be exercised by the government which have signed the agreement, and (3) the breach must be attributable to the acting state.[249] Hence, in cases of extraterritorial migration control, for example through disembarkation centers in third countries, jurisdiction might be triggered based on the exercise of the public powers doctrine on the condition that these three requirements are fulfilled.

4.3 State Responsibility for a Breach of the Prohibition of *Refoulement*

4.3.1 ARSIWA

The section above discussed in what situations there can be established a jurisdictional link between persons affected by external border controls and the state authorizing such control. This sub-chapter seeks to evaluate under what conditions state responsibility for a violation of the prohibition of *refoulement* may occur, as a complement to the concept of jurisdiction. Giuffré introduces the International Law Commission (ILC)'s *Draft Articles on State Responsibility* (ARSIWA)[250] in order to, "provide a remedy because of a lack of the "jurisdictional link" between the state and the individuals concerned".[251]

[249] Gammeltoft-Hansen, T and Hathaway, J. C, 2015, p 267-269.
[250] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Dos A/56/10 Supplement No. 10, GA 56th Session (2001), available at legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (accessed 11 October 2019) (ARSIWA).
[251] Giuffré, M., 2012, p. 694.

4.3.1.1 Elements of an Internationally Wrongful Act

According to article 2 of ARSIWA, about elements of an internationally wrongful act, state responsibility requires for two conditions to be fulfilled: first, that the conduct must be attributable to the state, and secondly, that it must constitute a breach of an international obligation of the state. As have been described above, it is an international obligation on states to respect the prohibition of *refoulement*, which means that such a breach could amount to an internationally wrongful act. This has been confirmed by the ECtHR, contending that the obligation to protect migrants from *refoulement* is triggered if the state authorities know, or should have known, that the state of disembarkation mistreats migrants, does not have proper asylum procedures in place, or practices forced returns or indirect refoulement without due process.[252] It should be noted that such an obligation is not triggered if migrants are being sent back to safe third countries or to a country in which alternative means for international protection is available.[253] However, states still need to respect the prohibition of collective expulsion as articulated in article 4 of the fourth protocol to the ECHR.[254] This means that interception activities need to grant each migrant an individual decision and providing them with effective remedies against that decision. Consequently, disembarkation of migrants to a third country without an objective and individual examination might also qualifiy as an internationally wrongful act under article 2 ARSIWA.[255]

4.3.1.2 Aid or Assistance

If the requirements of article 2 of the ARSIWA are not met, a state could still become responsible for aiding or assisting another state in breaching the prohibition of *refoulement*. According to article 16 ARSIWA, a state that is assisting another state in the commission of an internationally wrongful act is

[252] *M.S.S. v Belgium and Greece, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, para 358*; *Hirsi* paras 131 and 156.
[253] APD, Article 38(2)(c).
[254] Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 16 September 1963, ETS No 5 (entered into force 2 May 1968), as amended by Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 11 May 1994, ETS No 155 (entered into force 1 November 1998).
[255] Moreno-Lax, V., 2012, p. 589-591.

internationally responsible if "that State does so with knowledge of the circumstances of the internationally wrongful act" and "the act would be internationally wrongful if committed by that state". Article 16 imposes three requirements for responsibility to be triggered for an assisting state.[256] First, the state organ or agency providing aid or assistance must "be aware of the circumstances making the conduct of the assisted state internationally wrongful". Secondly, "the aid or assistance must be given with a view to facilitating the commission of that act and must actually do so". The third condition is that the wrongful act "would have been wrongful had it been committed by the assisting state itself".[257] Concerning human rights violations in particular, it must be determined "whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct" when facilitating human rights violations.[258] One problematic point in this regard, is that there is a lack of clarity as to when the requirements of Article 16 are fulfilled. On the one hand, there is not enough jurisprudence to provide guidance on the interpretation of the Article, and on the other hand, there is no consensus in the literature concerning at least three issues. These issues will be discussed in the following.

Regarding the first issue, "be aware of", it is not clear whether Article 16 requires intent or just knowledge. Some scholars, like Crawford, is of the opinion that the aiding state needs to have the *intention* to facilitate the commission of the wrongful act. Crawford contends that "knowledge of the circumstances" of the wrongful act, "requires an intention to facilitate the commission of the wrongful act".[259] In contrast to this, Lanovoy argues that

[256] Report of the Commission to the General Assembly on the Work of its Fifty-Third Session (23 April – 1 June and 2 July – 10 August)' [2001] II (2) *Yearbook of the International Law Commission* 31, p.66, para 3.
[257] Report of the Commission to the General Assembly on the Work of its Fifty-Third Session (23 April – 1 June and 2 July – 10 August)' [2001] II (2) *Yearbook of the International Law Commission* 31, p.66, para 3.
[258] Report of the Commission to the General Assembly on the Work of its Fifty-Third Session (23 April – 1 June and 2 July – 10 August)' [2001] II (2) *Yearbook of the International Law Commission* 31, p. 67, para 9.
[259] Crawford, J. 2013, p. 337.

merely the *knowledge* of the circumstances of the wrongful act is sufficient in order to trigger the responsibility of the complicit state. In his opinion, "[…] the test of knowledge of the circumstances of the wrongful act is adequate and should be further enhanced without bringing in intention as an additional condition for responsibility to arise".[260] Fry takes the argument even further and suggests that it is not necessary to prove actual knowledge, but that "should have known" could be sufficient in some cases.[261]

Secondly, there is a divide regarding the meaning of *aid or assistance*, especially whether it includes acts as well as omissions. Gammeltoft-Hansen and Hathaway stresses that omissions, for example not preventing another state from committing *refoulement*, is not enough to qualify as aid or assistance in the meaning of Article 16,[262] while on the contrary, Lanovoy contend that aid or assistance may also consist of omissions.[263] The later concludes that

> "[…] the participation that falls within the scope of responsibility for complicity is sufficiently broad to include omissions as these can, in principle, facilitate the commission of the wrongful act. The key question to be asked is whether a given action or omission made it easier for another State or international organisation to commit its wrongful act."[264]

Although there is no overwhelming support for the eviction of complicity by omission, in my opinion it is still difficult to determine which actions or omissions would qualify as aid or assistance in the meaning of Article 16. Therefore, it is not a strong argument.

The third conflicting issue concerns the fact that article 16(b) stipulates that the conduct must be internationally wrongful for *both* the assisting and the assisted state. In relation to the prohibition of *refoulement*, it is interesting to

[260] Lanovoy, V., 2016, p.240.
[261] Fry, J., 2014, p. 123.
[262] Gammeltoft-Hansen, T and Hathaway, J. C, 2015, p.279.
[263] Lanovoy, V., 2016, p. 184.
[264] Lanovoy, V., 2016, p. 185.

note that in the view of Gammeltoft-Hansen and Hathaway, it is not mandatory that the two states involved are bound by the same legal norm.[265] This means that article 16 is applicable regardless if State A is bound by the prohibition of *refoulement* because it has ratified the Refugee Convention, while State B has ratified for instance the CAT or the ICCPR. In relation to the purpose of this thesis, it is noteworthy that Gammeltoft-Hansen and Hathaway suggest that cooperation between states on migration control, in the form of aid and assistance (by providing equipment, financial support, training of personnel) could trigger the responsibility of the supporting state. They assert that

> "Because these non-entrée policies are implemented by, or under the jurisdiction of, the authorities of other countries, sponsoring states believe that they can immunize themselves from legal responsibility for the deterrence of refugees and other persons entitled to international protection [...] In truth, these new, cooperation-based non-entrée policies are rarely as 'hands off" as developed states like to suggest".[266]

The paragraphs above demonstrate that the interpretation of the requirements in article 16 ARSIWA affects the findings of state responsibility. Thus, it is not clear whether a state assisting a third country with migration control could trigger state responsibility under article 16 ARSIWA. The fact that there is not enough jurisprudence in that regard makes it complicated to draw any clear conclusions as to when states are responsible for aiding or assisting other States. Nevertheless, Gammeltoft-Hansen and Hathaway bring forward an argument that, in my opinion and based on the findings in this section, appears rather convincing. They reason that if the sponsoring state "has at least constructive knowledge that its contributions will aid or assist another country to breach its obligations and chooses to aid or assist notwithstanding such constructive knowledge", it would trigger state responsible under article 16 of the ARSIWA.[267]

[265] Gammeltoft-Hansen, T and Hathaway, J. C, 2015, p. 281.
[266] Gammeltoft-Hansen, T and Hathaway, J. C, 2015, p. 243.
[267] Gammeltoft-Hansen, T and Hathaway, J. C, 2015, p. 280.

4.3.1.3 Plurality of Responsible States

Lastly, it is worth mentioning Article 47 of ARSIWA which handles situations where several states are involved in the same internationally wrongful act. The Article stipulates that "Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act".[268] According to the Commentary to ARSIWA " […] in such cases each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act".[269] Such a co-authorship may be found in the case of *direct* participation in or *sufficiently significant* contribution to an internationally wrongful act.[270]

However, it may be difficult to define co-authorship and complicity in relation to European participation in external border controls. As is pointed out by Andrade, participating European states have no legal authority to interdict irregular migrants;[271] technically, they are merely providing aid or assistance to a coastal state's *own* patrolling activities. Also, it might be complicated to determine the required level of participation. On the one hand the participation must be active and direct in order to establish real complicity, on the other hand, if it is too direct, the participant might become the co-author of the offense.[272] Moreover, similar difficulties arise as was discussed in relation to Article 16. Brownlie has pointed out that the provision of aid or assistance in the context of aggression may not give rise to joint-responsibility

[268] Article 47(1) ARSIWA.
[269] Crawford, J., 2002, p. 272.
[270] Crawford, J., 2013, p. 405.
[271] Andrade, P.G., 2010, p. 320, 321.
[272] Yearbook of the International Law Commission 1978, Volume 1, UN Doc. A/CN. 4/ SER. A/ 1978 (1978), p. 238.

unless it is accompanied with "the specific purpose of assisting an aggressor".[273]

In my opinion, the concept of state responsibility certainly has some advantages in the case of complicity. However, in relation to holding an EU Member State responsible under ARSIWA, the approach might be hard to apply in an efficient way. The ECtHR has clearly pointed out that in order for the ECHR to apply to a particular case, the initial threshold is to establish jurisdiction under Article 1 ECHR and not attribution under state responsibility.[274] Furthermore, the ECtHR has not implemented the attribution concept as a legitimate means to establish "jurisdiction".[275] Consequently, the notion that jurisdiction under Article 1 of the ECHR can be circumvented by the means of introducing the concept of state responsibility under ARSIWA might not be sufficiently substantiated. This, however, might be subject to change in the future.

4.4 Analyzing the Disembarkation Centers Proposal

4.4.1 Financial and Operational Support

If the disembarkation centers proposal would be realized, the EU has set out that it would provide financial and operational support for disembarkation and post-disembarkation activities as well as for border management and other forms of support, for example by: providing equipment and training for search and rescue activities and border management; helping establish adequate and safe reception facilities and assistance to cover essential needs; support for returns, including voluntary returns, and reintegration support; support for local solutions including local integration, temporary stay and

[273] Brownlie, I., 1983, p. 191.
[274] Miller, S., 2009 p. 1235
[275] *Bankovic*, para. 75.

asylum applications in a third country; increased resettlement, including a new call for pledges if needed on top of the current scheme of 50.000 places.[276]

Since 2016, as observed by Moreno-Lax and Giuffré, the EU's policy and practice "aims to eliminate any physical contact, direct or indirect, between refugees and the authorities of would-be destination States" by transferring migration management to third countries.[277] This practice of "contactless control" present new challenges in terms of compliance with international human rights standards and determining responsibility.[278] There is a general consensus that a state does not exercise jurisdiction when it gives material aid to third countries (for instance equipment, financial support or training).[279] Giving material aid cannot qualify as *de jure* or *de facto* control, as the level of involvement of the EU Member State is insufficient. Nor are the requirements for the exercise of public powers met, since any violation of the prohibition of *refoulement* would be attributable to the third state rather than the EU Member State, as its involvement would be limited exclusively to financing.

However, the level of leverage exercised by EU Member States when financing the centers might amount to the exercise of jurisdiction. For jurisdiction to be established, the level of leverage must be important enough to amount to *de jure* and/or *de facto* control or meet the requirements for the exercise of public powers identified in Chapter 4.2. If the cooperation of a third country depends on the level of leverage, for example when funding of facilities is made dependent on the implementation of a border management policy, (as is the case in the EU–Turkey deal), the influence of the EU Member States might be such that it amounts to the exercise of *de facto* control.[280]

[276] European Commission: Regional Disembarkation Arrangements – Follow-up to the European Council Conclusions of 28 June 2018.
[277] Moreno-Lax, V. and Giuffré, M., 2017, p. 4.
[278] Ibid.
[279] Gammeltoft-Hansen, T and Hathaway, J. C, 2015, p. 276-277.
[280] Den Heijer, M., 2012, p. 263.

For instance, Moreno-Lax and Giuffré mean that the funding, training and equipment provided by the EU to Turkey under the EU–Turkey Statement, which is explicitly conditioned on Turkey "managing" migratory flows arguably constitute a form of "decisive influence"', which in turn constitutes "a form of indirect but nonetheless effective control that amounts to "jurisdiction" under Article 1 ECHR.[281] If the disembarkation centers would be arranged in a similar way, the level of leverage exercised by the EU and its member states might amount to jurisdiction. In addition, even if the disembarkation centers would not imply a leverage that is sufficient in order to establish jurisdiction, state responsibility could possibly arise on the basis of art 16 of the *ARSIWA,* although this option, in my opinion, is less probable.[282]

To conclude, even though it is not certain to argue that EU Member States would exercise jurisdiction by providing financial support to a third country that would establish a disembarkation center, it cannot be completely excluded, provided the level of leverage is high enough to trigger jurisdiction. Adding to this, the providing financial support may trigger state responsibility for aiding or assisting the third county. Naturally, an individual assessment is required for each specific case. However, if the financial contributions are used to commit human rights violations or otherwise take place despite reports of human rights violations in disembarkation centers, the responsibility of EU Member States could be triggered for such violations. In this regard, it should be reminded that Article 2 of the TEU stipulates that the EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.[283]

[281] Moreno-Lax, V. and Giuffré, M., 2017, p. 23-24.
[282] See Chapter 4.3.1.3.
[283] 2016 Consolidated Version of the Treaty on European Union, opened for signature 7 February 1992, [2016] OJ C 202/13 (entered into force 1 November 1993) Article 2.

4.4.2 Interceptions

4.4.2.1 Migrants Intercepted in the Territorial Waters of a Third State

Taking into account the undetermined character of the disembarkation centers and in the absence of any detail on how these centers would be organized and would operate, the thesis aims to assess their compatibility with European Law and the principle of *non-refoulement* only on the basis of the available information, i.e. their location, the refugees they would receive, the purposes they would pursue and the financial and operational support that would be given.

If migrants are intercepted in the territorial waters of a third state, they are in principle not under the control and the jurisdiction of the EU or its Member States. The consequence is that they are not subjected to EU asylum law, but instead to the law of the responsible third state and to relevant International Conventions, which this state may have ratified. In any case, according to the Refugee Convention and the ECHR, the principle of *non-refoulement* would forbid the establishment of a disembarkation platform outside of the EU in a non-safe third country where the concerned migrants and/or asylum seekers could suffer inhuman and degrading treatments. These centers must also ensure that migrants can benefit from the guarantees offered by the Refugee Convention and more generally by the ECHR.

4.4.2.2 Migrants Intercepted on the High Seas

If rescued on high seas, migrants are in principle not covered by EU Law, since they are not on the territory of a Member State. However, the situation might be different if they are intercepted by a vessel flying the flag of a Member State.

The APD seems to take into account a strict interpretation of the notion of territory of a Member State. Although states are considered to exercise their jurisdiction within their diplomatic representations, which are considered as part of their territory, Article 3(2) of the APD clarifies that this act is not applicable to the potential processing of applications for international protection in such locations. However, the APD does not provide any indication for migrants on board vessels flying the flag of Member States.

As have been demonstrated above, states usually exercise their jurisdiction on vessels flying their flag.[284] This jurisdiction can be applied in order to make the laws of the flag state applicable to the activities, relations or status of persons on board, in subjecting persons or things on board to their courts, and in enforcing or compelling compliance or punishing non-compliance with their laws. In the *Hirsi* case described above, the ECtHR considered that Italy had jurisdiction over migrants that an Italian military vessel had intercepted on the high seas, since the migrants were *de jure* and *de facto* under the control of Italian authorities. Accordingly, in case of a military vessel it must be concluded that the jurisdiction of the flag state prevails. However, the exposition on jurisdiction has showed that the jurisdiction of a state is, in general, territorial and that acts of states performed, or producing effects outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 ECHR only in exceptional cases.[285] Consequently, except in the cases of warships, it is not sure that vessels flying the flag of an EU Member State would be considered as a part of the territory of this Member State for the scope and the purpose the APD.

If the flag state would not be considered to exert jurisdiction, migrants cannot be considered as being *per se* in its territory, where they would benefit from the provisions set out in EU asylum law. As a consequence, while the migrants could be brought to the territory of the EU's Member States, it is also possible to disembark them outside of the EU, provided that the

[284] See Chapter 4.2.1.1.
[285] See Chapter 4.2.1

disembarkation center would not be located in a third state where the concerned migrants and/or asylum seekers could suffer inhuman and degrading treatments that would lead to a breach of the *non-refoulement* principle.

4.4.2.3 Migrants Intercepted in EU Territorial Waters

Migrants intercepted in the territorial waters of a Member State of the EU fall within the scope of European asylum law and should benefit from the guarantees offered by the CEAS. Therefore, such migrants could not be sent to disembarkation centers outside of the EU after they have been intercepted, without being granted access to the EU asylum procedures and without being granted the possibility to wait for the final decision on their application for international protection in conformity with the procedures set up by EU law. This would be against the prohibition of *refoulement* in the Refugee Convention and in EU law.

4.5 Conclusion

This chapter has aimed to address under what circumstances the measures relating to the external dimension of the EU asylum policy may trigger the obligation of states to protect persons from *refoulement*. To this end, the chapter has analyzed the disembarkation centers proposal, based on the application of the concept of jurisdiction and state responsibility.

Concerning state responsibility as a complement to the concept of jurisdiction, it certainly has some advantages in the case of complicity in my opinion. However, in relation to holding the EU or its Member States responsible for a breach of the *non-refoulement* obligation, the approach might not be an efficient remedy. In relation to the ECHR, the ECtHR has not implemented the attribution concept as a legitimate means to establish jurisdiction. Consequently, the notion that jurisdiction under Article 1 of the ECHR can be circumvented by the means of introducing the concept of state

responsibility under ARSIWA might not be sufficiently substantiated. This, however, might be subject to change in the future. In the meantime, it might be more realistic to rely on the concept of jurisdiction.

This chapter has showed that jurisdiction is a core element of state sovereignty that previously has been comprehended as essentially a territorial concept. However, this has begun to change in the European context. In particular, the case law of the ECtHR has significantly modified the understanding of the concept of jurisdiction. The *Hirsi* judgement referred to above, provided an important touch point between the concept of jurisdiction in the ECHR and the extraterritorial reach of the principle of *non-refoulement*. The court's analysis of the concept of jurisdiction in *Hirsi* has made it possible to expand the scope of the obligation of *non-refoulement* found in Article 3 of the ECHR. As the ECHR applies extraterritorially, so too does the *non-refoulement* obligation, which is embedded in Article 3 of the ECHR. In this way, the *Hirsi* judgement removed the principle of *non-refoulement* from its original context in the framework of international refugee law and placed it within the context of human rights law, in which the scope of application of the *non-refoulement* obligation is not limited to states' territories. Since the principle of *non-refoulement* is viewed as the cornerstone of asylum and of international refugee law, its extraterritorial application is of vital significance in an era of restrictive external migration controls. Still, in order to establish jurisdiction, this have to be based on *de jure* control, *de facto* control or the exercise of public powers.

The disembarkation centers proposal sets out that the EU will provide financial and operational support, equipment, training and other forms of support to a third country. As have been described above, the cooperation by third countries is often based on exchanging financial and development aid by the EU.[286] In these cases, the question arises whether the jurisdiction in Article 1 of the ECHR can be established in relation to European states'

[286] See Chapter 2.3.7.

indirect involvement in the interdiction of refugees within the territorial waters of an African state? From the examined case law above follows that the establishment of extraterritorial jurisdiction in the context of interdiction demands *de jure* control, or *de facto* control or possibly the exercise of public powers over a person.[287] Inversely, the fact that an individual is sent back to his or her country of origin by indirect support of a contracting state of the ECHR without performing the sufficient control over that individual, may not be enough to establish a jurisdictional link. Consequently, if the EU Member State would not be considered to exert jurisdiction, migrants would not benefit from the provisions set out in EU asylum law. This in turn, means that they could be disembarked outside of the EU, provided that the disembarkation center would not be located in a third state where the concerned migrants and/or asylum seekers could suffer inhuman and degrading treatments that would lead to a breach of the *non-refoulement* principle.

[287] See Chapter 4.2.1.

5 Findings and Conclusions

This thesis has examined the external developments of the EU's asylum *aqcuis*, with a particular focus on the "outsourcing" of asylum. The purpose of the thesis has, on the one hand, been to assess if the focus on the external dimension of EU asylum policy could be part of a broader trend, and on the other hand, to examine if this conduct is in accordance with the rules inherited in the CEAS and in particular with the prohibition of *non-refoulement*.

The creation of the CEAS was based on the notion of the strengthening of the external border as a prerequisite for the free movement of people within the EU. Similarly, the necessity for the EU to collaborate with third countries of origin was recognized in the very beginning of the CEAS. While the external dimension of the CEAS has been present throughout its development, since the "migration crisis", the EU has demonstrated an increased inclination towards moving protection measures outside the EU, on the territory of other states. This appears clearly through the EU's support for building capacity of protection in third countries by funding projects such as the disembarkation centers proposal. The thesis has thus identified that one of the paradoxes in the development of the EU's external asylum policy is that although the EU has established rights-sensitive standards and procedures for assessing protection claims of asylum seekers within its jurisdiction, it has simultaneously established barriers that prevent asylum seekers from setting foot on its territory or otherwise triggering protection obligations. In this way, the development of the external dimension of the EU's asylum *acquis* have made it harder for refugees and migrants to benefit from it.

In the context of cooperation with third states, the deployment of financial assistance has been included in a framework of cooperation whose ultimate aim is to stem the arrivals of refugees and migrants into the EU territory. In the light of the external developments of the CEAS, the disembarkation centers proposal indicates an intensification of the EU's efforts to involve

third countries in migration management, by using the concept of conditionality in the cooperation with these third countries. By this means, the EU ties border control and readmission demands to the granting of financial support, by rewarding those countries that are willing to assist the EU in pursuing its migration agenda. This incentive-based approach that lies at the heart of the outsourcing of asylum in cooperation with third countries rises several concerns. For instance, there is a risk that the increased border control-measures to stem down unauthorized movements, which are an integral part of those agreements, would have the consequence of reduce the protection space for refugees originating in or transiting through those countries.

Furthermore, while the "post-crisis" development of the CEAS external dimension have been overly focused on stemming irregular migrants, the lawful means of accessing protection in the EU have diminished. In this way, the various "innovative" measures that the EU has taken as part of its external border control policies have constrained access to protection and led asylum seekers to risk their lives on dangerous journeys in order to reach the EU territory. While the next stage of the harmonization of the CEAS remains in a deadlock due to the fact that EU Member States are unable to agree on common *internal* rules, the *external* developments have gained importance. This have been demonstrated for example by the GAMM, through the enlarged mandate of Frontex, the EU-Turkey Statement, the European Agenda on Migration, the Migration Partnership Framework, the Neighborhood, Development, and International Cooperation Fund for cooperation with third-countries with considerable increased funding of external measures in cooperation with third countries, and the and the disembarkation proposal. This trend can partly be explained by the expansion of IBM, drawing attention from the protection matter of asylum and emphasizing the security matters of asylum and migration.

In order to examine to what extent, the measures developed under the expansion of the external dimension of the EU's asylum policy, are

compatible with the CEAS and particularly with the prohibition of *non-refoulement*, the thesis has examined when a state exercises jurisdiction and when it incurs responsibility for aiding and assisting another state. The thesis has identified three triggers of jurisdiction that are based on extraterritorial human rights obligations, namely, *de jure* control, *de facto* control and the exercise of public powers.

Although the assessment of jurisdiction has illustrated the adaptability of international law, especially international human rights law, and the law of state responsibility to the inventiveness of the EU in external migration control, both of the concepts seems to lack sufficiency. In respect of state responsibility, as well as jurisdiction, there has been identified a lack of clarity as to whether jurisdiction in Article 1 of the ECHR can be established in relation to the *indirect* involvement in the interdiction of refugees and migrants outside the EU territory. Given the current situation in which the EU intensifies its cooperation with third countries, the inventiveness of the EU and its member states seems to surpass the adaptability of EU and international law. Consequently, in those situations, in which the EU or its member states financially support third countries or train or advise local authorities, the safety net function of jurisdiction seems to fail. A cynical way of put things would be to suggest that the EU use this lack of clarity by cooperating with third countries in order to prevent migrants from reaching the EU territory without incurring responsibility for breaching the prohibition of *refoulement*. In this respect, it should nevertheless be noted that the increasing recognition of the extra-territorial responsibility of states to fulfill their human rights obligations, such as in *Hirsi*, suggest that the ECtHR might recognize breaches of international law and standards in the context of the externalization of migration controls more broadly in the future.

When answering the research question of the thesis, the concept of jurisdiction is vital. The thesis has demonstrated that the establishment of extraterritorial jurisdiction in the context of interdiction demands *de jure* control, or *de facto* control or the exercise of public powers over the

concerned migrants and refugees. In the absence of such control exercised by a state over those migrants and refugees, the jurisdictional link cannot be established. This could be the case if the EU Member State would indirectly support a third country with interdiction. A lack of a jurisdictional link between the interdiction policy and the EU Member State, in turn, would have the consequence that the provisions set out in EU law would not apply to the migrants and refugees. In that case, the migrants and refugees could be disembarked outside of the EU as the disembarkation centers proposal sets out.

While taking into account the limited information currently available regarding the disembarkation centers proposal, and without prejudice to any further details concerning their organization and operations, it seems like the crucial element to take into account to assess their conformity with EU law and international law, is where the interception of migrants who would be brought in these centers *take place*. If the migrants would be intercepted in EU territory, they would fall within the scope of European asylum law and should therefore benefit from the guarantees offered by the CEAS. From this follows, that it would be against the prohibition of *non-refoulement* set out in the Refugee Convention and in EU law to send such migrants to disembarkation centers outside of the EU territory after they have been intercepted. However, if the migrants would be intercepted outside the EU territory, it seems that disembarkation centers could lawfully be established outside of the EU, in order to receive migrants intercepted outside the territory of the EU, provided that specific conditions are met; in particular, that the prohibition of non-refoulement in the Refugee Convention and in the ECHR is respected.

In this respect it should be remined that the principle of *non-refoulement* would forbid the establishment of a disembarkation platform outside of the EU in a third country considered not to be safe and where the concerned migrants and/or asylum seekers could be subjected to inhuman and degrading treatments. The disembarkation centers would also have to ensure that

migrants could benefit from the guarantees provided by the Refugee Convention and more generally by the ECHR.

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