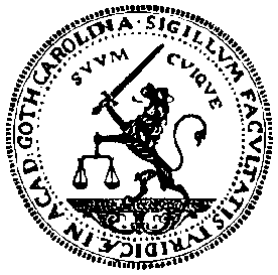

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The Privatization of Migration Detention: State Responsibility for Offshore Detention Centers

JURM02 Graduate Thesis

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Contents

Summary

In the last three decades, detention centers have become the preferred method to manage the migration flow in multiple states within the European Union (EU). In correlation to the increasing use of detention centers, there has been a shift from states having a type of monopoly on migration management functions, to an increase of states outsourcing their responsibility to private companies. When states outsource their responsibilities to private companies, and more specifically to Private Military and Security Companies (PMSC), they also distance themselves from the conduct and the potential human rights abuses that is taking place in the detention centers.

EU and the EU member states are now also considering to implement so-called offshored detention centers which implies that the detention centers are no longer situated within the states territory, and subsequently, further distancing themselves from the detained migrants. By adding another layer of distance between the state and the migrants, it becomes increasingly difficult to hold a state responsible for the conduct in privatized offshored detention centers.

The purpose of the present thesis is therefore to determine how a EU member state can be held responsible for the acts and omission perpetrated by PMSC personnel in offshored detention centers, primarily through what is known as the functional jurisdiction approach. This approach has been recently put forward by Violeta Moreno-Lax in the pending case of *S.S. v. Italy* at the European Court of Human Rights (ECtHR) and it remains to be seen whether the ECtHR will accept this new interpretation of jurisdiction within art. 1 of The European Convention on Human Rights (ECHR).

Furthermore, in view of the said purpose the thesis analyses if it is possible to hold a EU member state responsible through the current frameworks of ARSIWA and the ECHR and how the functional approach is interpreted by Moreno-Lax in the pending case of *S.S. v. Italy*.

It is concluded in the thesis that it is a near impossibility to find state responsibility regarding the aforementioned issue through the current frameworks of ARSIWA and ECHR. The latter framework is however pivoting towards a more situational and functional approach when determining extraterritorial jurisdiction. Additionally, it is also concluded that if Moreno-Lax interpretation of functional jurisdiction is accepted by the ECtHR, it could be applicable through analogy to determine state responsibility when human rights abuses have occurred in an offshored privatized detention centers. By analyzing the situation *in toto*, and not only focusing on the specific circumstance, the ECtHR would have a strong possibility of activating jurisdiction on a case-by-case basis through a state's contactless-control.

Sammanfattning

Under de senaste 30 åren har migrationsförvar (Engelska: *Detention centers*) blivit metoden att föredra när det gäller hanteringen av migrationsströmmarna i flera länder inom Europeiska Unionen (EU). I samband med den ökade användningen har det även skett en förändring från att stater har ett slags monopol gällande hanteringen av migrationsfunktioner till att stater delegerar (Engelska: *Outsource)* ansvaret till privata företag. När stater delegerar ansvaret till privata företag och mer specifikt till Private Military and Security Companies (PMSC), distanserar de sig från de händelser och potentiella överträdelser av mänskliga rättigheter som sker i migrationsförvaren.

EU och EU:s medlemsstater har nu börjat överväga att implementera migrationsförvar belägna utanför EU:s gränser, så kallad offshoring. Metoden skapar ytterligare distans mellan staten och migranterna och gör det svårare att hålla en stat ansvarig för de handlingar som sker i privatiserade migrationsförvar, som dessutom är lokaliserade extraterritoriellt.

Syftet med uppsatsen är därmed att fastställa hur en medlemsstat i EU kan hållas ansvarig för handlingar som begåtts av PMSC i extraterritoriella privatiserade migrationsförvar. Främst kommer det ske genom den så kallade funktionella jurisdiktionen (Engelska: *Functional jurisdiction approach)* som har lagts fram av Violeta Moreno-Lax i fallet *S.S. v. Italy* som är anhängiggjort vid Europadomstolen. Det återstår att se om Europadomstolen kommer acceptera den nya tolkningen av jurisdiktionen i ljuset av Europeiska konventionen om skydd för de mänskliga rättigheterna (EKMR), art. 1.

Mot bakgrund av det nämnda syftet kommer uppsatsen att analysera möjligheten att hålla en medlemsstat i EU ansvarig för handlingar som begåtts av PMSC i extraterritoriella privatiserade migrationsförvar genom ARSIWA och ECHR så som de ser ut idag. Det kommer även fastställas hur Moreno-Lax tolkar den funktionella jurisdiktionen i fallet *S.S. v. Italy.*

Uppsatsen drar slutsatsen att det är nästintill omöjligt att hitta statsansvar genom ARSIWA och EKMR så som de tolkas idag. EKMR lutar dock mer mot en händelseorienterad och funktionell metod när extraterritoriell jurisdiktion diskuteras, jämfört med ARSIWA. Dessutom konstateras det i uppsatsen att om Moreno-Lax tolkning av den funktionella jurisdiktionen godtas av Europadomstolen kan den även analogiskt tillämpas för att bestämma statsansvar när överträdelser av mänskliga rättigheter har skett i extraterritoriella privatiserade migrationsförvar. Genom att analysera situationen *in toto* har Europadomstolen en stark möjlighet att från fall till fall aktivera jurisdiktion genom en stats kontaktlösa kontroll.

Preface

Nu har det blivit min tur att lämna juristprogrammet och det är med blandade känslor jag säger tack och hejdå till staden som har varit mitt hem i 5 år.

Tack till mamma, pappa och Hanna som alltid stöttat mig. Tack till alla vänner som berikat min studietid. Thank you, Daria, for all the kind and insightful words and encouragements during the writing process.

Sista året på juristprogrammet blev inte riktigt som vi hade tänkt oss. Allt som många förknippar med studentlivet såsom baler, valborgsfirade, fullpackade högljudda dansgolv och examensfirande ställdes in. Istället har vi fått skapa oss en ny vardag. Trots denna omtumlande och skrämmande tid har vi ändå lyckats fylla den med mycket glädje, vänskap och gemenskap. Allt detta är tack vare mina fantastiska vänners. Tack för alla middagar, filmkvällar, promenader och vardagliga ögonblick som jag fått dela med er. Tack för att ni är ni och för alla oförglömliga minnen ni gett mig.

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Lund den 6 december 2020

Rebecca

Abbreviations

ARSIWA	Articles on Responsibility of States for International Wrongful Acts
CoE	Council of Europe
De facto	In fact, whether by right or not
De jure	Having a right or existence as stated by law
De lege ferenda	With a view of the future law
De lege lata	The law as it exists
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
In toto	As a whole
NSA	Non-State Actor
PMSC	Private Military and Security Company
UN	United Nations
UNHRC	United Nations Human Rights Council

1 Introduction

1.1 Background

In the last three decades, detention centers have become the preferred method to manage the migration flow in multiple states within the European Union (EU).[1] Migrants who are placed in detention centers after having crossed the border into an EU member state are usually not detained because they have conducted an illegal act under the state's criminal law, but instead because the state have detained them in order to carry out administrative procedures, such as deportations or decisions on asylum claims.[2]

In correlation to the increasing use of detention centers, there has been a shift from states having a type of monopoly on migration management functions, to an increase of states outsourcing their responsibility to private companies. Privatization of detention centers take on various forms and degrees depending on the country and the detention center itself. Privatization can pertain to pretty much everything, from administration and logistics to security and healthcare.[3]

Over the years, there have been multiple reports on different human rights abuses taking place within the walls of private detention centers. The abuses range from horrific living conditions, medical neglect and arbitrary use of confinement, to sexual abuse and deaths.[4] The accountability mechanisms

[1] Arbogast, Lydie, "*Migrant detention in the European Union: A thriving business*", Migreurop, July 2016, at. 7. Online: https://www.migreurop.org/IMG/pdf/migrant-detention-eu-en.pdf. (Hereinafter Arbogast, "Migrant detention in the European Union")

[2] Flynn, Michael and Cannon, Cecilia, "*The privatization of immigration detention: Towards a global view*", A Global Detention Project Working Paper, September 2009, at. 3. Online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2344196 (hereinafter Flynn and Cannon, "*The privatization of immigration detention*")

[3] Gammeltoft-Hansen, Thomas, "*Private Actor Involvement in Migration Management",* In Nollkaemper, André and Plakokefalos, Ilias (eds.), *The Practice of Shared Responsibility in International Law,* Cambridge University Press, 2017, at. 527-529. (Hereinafter Gammeltoft-Hansen, *Private Actor Involvement in Migration Management").*

[4] UN General Assembly, "*Use of mercenaries as a means of violating human rights and impeding the exercise of the rights of people to self-determination*", *immigration and border management on the protection of the rights of all migrants*", Report of the Working

towards Private Military and Security Companies (PMSC) have been weak, and in the rare case when the abuse has been exposed, the repercussions are few or non-existent. Instead, states have on multiple occasions renewed and expanded their contracts or replaced a company with another, regardless of their history in human rights abuses.[5]

When states outsource their responsibilities to PMSC, they also distance themselves from the conduct that is taking place in the detention centers. EU and the EU member states are now considering to implement so-called offshored detention centers, and subsequently, further distancing themselves from the detained migrants.[6] By adding another layer of distance between the state and the migrants, it becomes increasingly difficult to hold a state responsible regarding the conduct that is taking place in the privatized offshored detention centers. The legal frameworks for the protection of human rights are not developing at the same fast pace and are not adapting to the fast-changing ways in which detention centers are managed. This creates a legal uncertainty where states have a possibility to construct detention centers extraterritorially and delegate the management of the centers to PMSC and then claim that it is not within their jurisdiction when human rights abuses occur.[7]

Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination (Working Group), 4 August 2017, A/72/286, para. 33. (Hereinafter A/72/286)

[5] UN General Assembly, "*Impact of the use of private military and security services in immigration and border management on the protection of the rights of all migrants*", Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, 9 July 2020, A/HRC/45/9, paras. 64–66. (Hereinafter A/HRC/45/9)

[6] Offshore detention centers imply that the detention centers are no longer situated within the states territory. The state who wants to offshore their detention center goes into contract with another state to situate the centers there and, subsequently, transport the migrants to another states territory while their claim is being processed. Lethbridge, Jane, "*Privatization of Migration and Refugee Service and Other Forms of State Disengagement*", Public Services International Research Unit, March 2017, at. 32. Online: https://www.epsu.org/sites/default/files/article/files/PSI-EPSU%20Privatisation%20of%20Migration%20%26%20Refugee%20Services_EN.pdf (Hereinafter Lethbridge, "*Privatization of Migration and Refugee Services")*

[7] See Davitti, Daria, "*Beyond the Governance Gap: Accountability in Privatized Migration Control",* 2020, German Law Journal, 21(3), at. 498-499. (Hereinafter Davitti, "*Beyond the Governance Gap")*

The legal uncertainty revolving offshored privatized detention centers and how to find state responsibility has been debated by various human rights scholars and different possible solutions have been put forward. One possible approach that has not yet been discussed is an application by analogy of the functional approach to jurisdiction. This approach has been recently put forward by Violeta Moreno-Lax in the pending case of *S.S. v. Italy* at the European Court of Human Rights (ECtHR).[8] It remains to be seen whether the ECtHR will accept this new interpretation of jurisdiction within art. 1 of The European Convention on Human Rights[9] (ECHR). While the case of *S.S. v. Italy* is a case where human rights abuses are allegedly perpetrated by the state of Italy, it is still of importance and value to analyze whether such an approach could be applied by analogy to find state responsibility in cases when human rights abuses have been committed by private actors in offshored privatized detention centers.

1.2 Purpose and research questions

The purpose of the present thesis is to determine how a EU member state can be held responsible for the acts and omission perpetrated by PMSC personnel in offshored detention centers, primarily through a functional jurisdiction approach.

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

- Is it possible to hold a EU member state responsible for acts and omission perpetrated by PMSC in offshored detention centers, through the current frameworks of ARSIWA[10] and the ECHR?

[8] Moreno-Lax, Violeta, "*The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, S.S. and Others v. Italy, and the "Operational Model*", German Law Journal 21(3), 2020, 385-416. (Hereinafter Moreno-Lax, "*The Architecture of Functional Jurisdiction")*

[9] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms,* as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 (Hereinafter ECHR)

[10] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No.10 (A/56/10), chp.IV.E.1 (Hereinafter ARSIWA)

- How is the functional jurisdiction approach interpreted by Moreno-Lax and how is it applied in the pending case of *S.S. v. Italy*?
- Can a EU member state be held responsible for acts and omission perpetrated by PMSC in offshored detention centers, through the application of Moreno-Lax' interpretation of functional jurisdiction?

1.3 Delimitations

As to the geographical delimitation, the thesis will focus on how to hold states within the EU responsible. In order to delimit the scope of the thesis even further, the research question will only concern the challenges of when a human rights abuse has been perpetrated by a PMSC personnel and not by state agents, in an extraterritorial detention center.

The thesis will not discuss the merits of the abuse and whether the individual acts or omissions perpetrated by PMSC amounts to a human rights violation within the existing legal frameworks. It will solely address if a state can be held responsible, regardless of what type of abuse that has taken place.

Furthermore, the thesis will focus on how a state can be held responsible. It will not include how the company or the individual who conducted the abuse can be held responsible. Even though questions regarding accountability mechanism for individuals and the company are highly interesting, those areas of enquiry falls outside the scope of this thesis.

Additionally, the thesis will focus on the interpretation of jurisdiction as argued by Violeta Moreno-Lax. There are multiple interpretations on how to broaden jurisdiction and other scholars have argued for a more situational or functional understanding of jurisdiction, in line with Moreno-Lax arguments. The reason behind the decision to focus on Moreno-Lax' interpretation is because it is now argued in the pending case of *S.S. v. Italy* in the ECtHR. The interpretation can come to have great legal value if the ECtHR decides in favor of how it is argued by Moreno-Lax.

Regarding the legal delimitations, the thesis will only address the legal frameworks ARSIWA and the ECHR. While other instruments can be relevant when discussing state responsibility for conduct perpetrated by private actors, ECHR and ARSIWA are the most relevant frameworks in the present thesis and the other frameworks therefore falls outside the scope of this thesis. ECHR is solely applied by Moreno-Lax in the case of *S.S. v. Italy* and therefore it will be the framework that is mostly discussed and analyzed throughout this thesis. While Moreno-Lax does not discuss ARSIWA, I believe it is important to consider, since it is a leading legal framework on state responsibility. Both regional and international courts have applied ARSIWA more frequently since its adoption in 2001 and it is of great relevance to many court decisions.[11]

1.4 Perspective, methodology and materials

Throughout the thesis, a human rights perspective is applied. The reason behind adopting this perspective is that the privatization of offshored detention centers has both short- and long-term human rights consequences for the individual migrant who has been detained. It is therefore of great importance to determine responsibility for the human rights abuses that are taking place in the detention centers. The thesis builds on the concept of state's positive obligations towards individuals who are within their jurisdiction. The arguments are not only based on *de lege lata* considerations but also on *de lege ferenda*. The thesis challenges the territorial approach connected to jurisdiction and instead interprets jurisdiction based on the state's *de facto* control. This is in line with the concept applied in international human rights law. It is not up to the state to determine freely if they have

[11] Garciandia, Rosana, "*State responsibility and positive obligations in the European Court of Human Rights: The contribution of the ICJ in advancing towards more judicial integration*", Leiden Journal of International Law, 2020, 33, 177-187, at. 178. (Hereinafter Garciandia, "*State responsibility and positive obligations in the European Court of Human rights)*

jurisdiction or not. If the state exercises sufficient control the state is bound by the human rights obligation towards the individual migrants.[12]

Furthermore, a doctrinal method is mostly applied in the thesis which adopts a *de lege lata* argumentation. It is applied in the present thesis to understand, explain and critically analyze the current legal frameworks we have today. By identifying the legislation in relation to the aforementioned issue, one can determine if the current legislation is enough to hold states responsible.[13]

As of chapter four and when answering the third research question, an analytic method is then applied. By including the functional jurisdiction approach and analyzing if it could be applied when determining state responsibility, the thesis is proposing changes to fill the gaps of the current system which is in line with the analytic method. The method allows for a wider use of sources compared to the doctrinal method and it is applied in order to not only *determine* the established law, but to also have an *analytic and critical* approach to the aforementioned issue. Since the jurisdiction is still only argued in the pending case of *S.S. v. Italy* and has not yet been determined as a legit legal tool, the thesis therefore also adopts a *de lege ferenda* argumentation.[14]

When researching international law, a different scope of materials is required compared to domestic law. The primary sources will be the provisions, doctrine and case-law that stems from the two main international frameworks, ARSIWA and ECHR. Subsidiary sources, such as highly qualified scholars and organizations will be used to draw complimentary information to the analysis. As an example, mentions can be made to the United Nations, the EU, the Global Detention Project, and scholars such as Gammeltoft-Hansen, Arbogast, Davitti and Moreno-Lax.

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[12]Noll, Gregor, "*Theorizing Jurisdiction*" in Anne Orford and Florian Hoffmann (eds.), Oxford Handbook of the Theory of International Law, Oxford University Press, 2016, at. 602–607.
[13] Sandgren, Claes, "*Rättsvetenskap för uppsatsförfattare: Ämne, material, metod och argumentation*", 4th Edition, Nordstedts Juridik, 2018, at. 48–49.
[14] Ibid, at. 50-51.

In chapter 4, I have solely applied the legal paper by Moreno-Lax when demonstrating the applicability of the functional approach. While other scholars have discussed functional jurisdiction or a similar approach, their interpretation is not included in this thesis. The reason is because Moreno-Lax has a unique interpretation of functional jurisdiction and is one of the principal legal counsel representing the claimant in the case of S.S. v. Italy. If the ECtHR rules in favor of S.S., the interpretation she has applied will be the one with most legal substance compared to other interpretations.

Throughout the thesis, news articles have also played an important role when demonstrating to the reader what is happening in the detention centers. I have used them with caution, and with the knowledge that they do not have the same substance as, for example, reports from well-established organizations. The majority of the news articles are from The Guardian which has been investigating the detention centers on Manus Island and Nauru over the years. The newspaper has a high credibility in relation to their investigation and reports.

1.5 Terminology

In the absence of a universal definition of the term "migrant", the thesis will refer to the definition determined by the UN. The term migrant therefore includes, "all persons who are outside the State of which they are a citizen or national, or, in the case of stateless persons, their State of birth or habitual residence. The term includes migrants who intend to move permanently or temporarily and those who move in a regular or documented manner, as well as migrants in irregular situations."[15]

The term "detention centers" needs further explanation as well. According to the EASO Asylum Report from 2020, it defines detention centers as "the confinement of an applicant for international protection by a Member State, where the applicant is deprived of his or her freedom of movement. The

[15] A/HRC/45/9, para. 16.

detention of asylum seekers is governed by specific provisions of EU law, namely by the recast Reception Conditions Directive, recast Asylum Procedure Directive and the Dublin III Regulation."[16] Therefore, the thesis will include all types of confinement where the migrant is deprived of his or her freedom of movement, regardless of whether the center is called reception center, open center, pre-removal center, and so on.

The last term that needs further clarification is "Private Military and Security Companies", PMSC. The definition of the term is as followed:

> "corporate entities providing, on a compensatory basis, military and/or security services by physical persons and/or legal entities. This definition focuses on the activities performed by corporate entities rather than the way a company may self-identify. Services include, for example: knowledge transfer with security, policing and military applications; development and implementation of informational security measures; land, sea or air reconnaissance; satellite surveillance; and manned or unmanned flight operations of any type."[17]

Throughout the thesis, I use the terms private company, private actor and PMSC interchangeably.

1.6 Outline

In this introductory chapter, the thesis' purpose and research questions will be introduced. The thesis' method, materials and delimitations are also presented.

In chapter two, a general overview of detention centers is presented, including the history of the privatization and securitization of borders, the definition of offshore detention centers and how the trend is evolving in the EU member states regarding extraterritorial centers. The chapter provides the reader with

[16] European Asylum Support Office (EASO), "*EASO Asylum Report 2020: Annual Report on the Situation of Asylum in the European Union",* at. 157. Online*:* https://easo.europa.eu/sites/default/files/EASO-Asylum-Report-2020.pdf
[17] A/HRC/45/9, para. 15.

the relevant information and research on the overall change in attitude towards migrants, a change that underpins the privatization of detention centers. Furthermore, the chapter also discusses the neglect and abuse that migrants have to endure when arriving to the EU border.

In chapter three the legal frameworks of ARSIWA and ECHR are explained and analyzed. It presents to the reader the specific provisions that relate to state responsibility and examines whether they can be applied in state-PMSC relations.

In chapter four the functional jurisdiction approach, as argued in the pending case of *S.S. v. Italy*, is introduced and examined. This explanatory chapter gives the reader the necessary information on how to interpret functional jurisdiction, as is argued by Moreno-Lax.

In the fifth chapter the thesis analyzes whether a functional jurisdiction approach can be applied in order to hold states responsible for human rights abuses perpetrated by PMSC personnel on offshored detention centers and what the challenges are of applying a functional approach by analogy to such circumstances.

The thesis sixth and final chapter constitutes a concluding chapter which summarizes the findings of the study.

2 General overview of detention centers for migrants

2.1 Introduction

In the past 30 years or so, there has been a shift from states having a monopoly on migration management functions, to an increase in states outsourcing their responsibility to private companies. Outsourcing has affected many levels of migration-related tasks, not only in detention centers. It includes functions such as airline carriers carrying out migration controls before a person boards the plane, corporations being in charge of visa applications, forced removals, health and food services, controlling the border, running the technology at borders, and so on.[18] Detention centers for migrants or, in other words, administrative detention centers, manifest themselves when a state restricts the movement of an individual through confinement as a non-punitive administrative measure in order for an immigration procedure to be implemented. The individual has therefore not been charged with any crime but is incarcerated because of an administrative procedure regarding their status in the country.[19]

In parallel to the increase in the privatization of detention centers, states have also increasingly securitized their borders. Countries have leaned towards a progressive militarization of their borders, especially during the years after 9/11.[20] The security measures introduced include multiple restrictions on regular migration pathways, making it nearly impossible for people who do

[18] Gammeltoft-Hansen, "*Private Actor Involvement in Migration Management*", at. 527-529.
[19] European Migration Network, "*The use of detention and alternatives to detention in the context of immigration policies – Synthesis Report for the EMN Focused Study 2014*", 2014, at. 4. Online: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/irregular-migration/00_synthesis_report_detention_study_final.pdf (Hereinafter European Migration Network (2014))
[20] Arbogast "*Migrant detention in the European Union*", at. 6.

not have the correct documentations on them and want to seek asylum to use regular and safe migration pathways. This in turn, forces people who are in need of various kinds of protection to "travel by irregular means amid complex and mixed migration movement, often in large numbers"[21]. Subsequently, when more migrants started arriving by irregular means, states implemented different policies and laws, which in turn reduced the possibility of irregular entry.[22]

In order to further push towards securing the borders and reduce the influx of irregular migration, states, organizations and individuals have turned away from a more neutral terminology, such as, "irregular migrant" and "irregular entry" when addressing migration issues. Instead, many EU member states and EU institutions have substituted the word "irregular" for "illegal". The risk of this type of demeaning language is that it creates instant suspicion towards migrants passing the border irregularly. [23] Migrants who are in detention centers are usually not convicted criminals, instead they are administrative detainees, who have been detained by the state in order to carry out administrative procedures, such as deportations or decisions on asylum claims.[24]

Since the 1990s there has been an exponential trend by states to secure and militarize their borders and a mentality that borders need to be protected from foreigners. Similarly, states have increased their outsourcing possibilities and privatized multiple areas within migration management. Additionally, states are now considering the creation of detention centers located outside of their own territory. This implies entering into an agreement with another state to establish that the detention centers will be situated on their territory instead.

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[21] A/HRC/45/9, para. 18.
[22] Ibid, para. 19.
[23] Guild, Elspeth, Commissioner for Human Rights, "*Criminalisation of Migration in Europe: Human Rights Implications*", CommDH/IssuePaper(2010)1, at. 4-5. Online: https://rm.coe.int/16806da917
[24] Flynn and Cannon, "*The privatization of immigration detention*", at. 3. It is also important to note that under the 1951 Refugee Convention, a refugee should not be penalized for irregular entry. See UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series, vol. 189, art. 31(1).

When the migrants are intercepted they will be transported to the third country where the detention center is located and where they will be waiting for a decision on their asylum application.[25] This approach is called offshoring.[26]

When the detention centers are not only privatized but also offshored, states distance themselves from the responsibility vested upon them for the migrants. This distancing, through the privatization and offshoring of the detention center, enables them to claim that they cannot be held responsible for the conduct exercised in another country by the personnel of private companies. By adopting this approach, the possibility of finding the nexus between the state and the individual and getting justice for those who have been victims of human rights abuses in the detention centers is a near impossibility under the existing international legal standards.[27]

States, who have outsourced their migration management to PMSC, usually argue from the perspective of costs reduction. It is said that private companies will manage the same services for a lower cost than if government officials would be assigned to the same tasks. However, when researching why there is a decrease in costs for private companies compared to government organizations, the reason is that the competition between the different companies results in lower funding towards the detention centers. In order to lower the costs and increase the companies' profits, the natural consequence is a worsening of the living conditions and services in the centers. Crucially, since companies' main goal is profit, the protection of rights of the migrants is usually overlooked.[28]

The remainder of this chapter will provide a more detailed explanation of EU's trend towards the privatization of detention centers and what it entails.

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[25] Lethbridge, "*Privatization of Migration and Refugee Services",* at. 27 and 32.
[26] For the definition of the term "offshore" see Refugee Council of Australia, "*Australia's offshore processing regime: The facts*", May 2020. Online: https://www.refugeecouncil.org.au/offshore-processing-facts/ (Accessed 13 November 2020) (Hereinafter RCA, *"Australia's offshore processing regime: The facts")*
[27] See section 3.2 and 3.3 for a more in-depth analysis.
[28] Arbogast "*Migrant detention in the European Union*", at. 44.

Furthermore, it will discuss the offshore approach as Australia has implemented and applied it and where EU member states stand regarding this approach.

2.2 The privatization of detention centers in the EU

During the last three decades, the method of choice used by EU member states to manage migration flows has been the use of detention centers. Parallel to this development, EU member states are now, not only increasingly relying on detention measures, but have also commenced to delegate the different areas of detention management to private companies. This has created a lucrative business for many PMSC. It must be said that not all EU member states have resorted to the privatization. However, as this thesis will come to demonstrate, there is a clear trend towards the increased use of private companies in detention centers.[29]

As mentioned above, states vary in the level of delegation to private companies in migration detention centers. The UK was the first EU member state to outsource detention centers and today, the majority of the detention centers are run by private companies.[30] Nine out of the thirteen detention centers are run by private contractors and forced removals have been completely outsourced to PMSC. The security company G4S held an exclusive contract for all removal centers between 2005 and 2010.[31] UK's detention centers are also managed by a handful of transnational companies, such as GEO group, Mitie, Serco and Tascor.

Italy still manages the majority of reception and detention centers, but the management and detainee care services are now more frequently outsourced

[29] Ibid at. 38.
[30] Ibid at. 12.
[31] The reason behind the termination of the contract was because of the death of a deportee at Heathrow Airport in 2010. The contract was however, awarded to a new private contractor. See Gammeltoft-Hansen, "*Private Actor Involvement in Migration Management*", at. 530.

to private companies. The public sector in France also manages its facilities and centers. However, certain tasks such as catering, laundry, cleaning and sometimes reception services are delegated to private companies.[32] Germany has increased the use of reception centers for asylum seekers and all of these are now run by PMSC. Other migration centers in Germany are usually managed by the public sector. However, many of the services are outsourced to private companies.[33] In 2015, JVA Buren, which was the largest deportation detention center in Western Europe, had more than half of the staff privately employed.[34]

While human rights abuses are not solely perpetrated by personnel from private companies – misconduct by public actors are also reported - there is strong indication that there is an increasing risk of human rights abuses when the management is delegated to the private sector. The push towards making a profit within a for-profit company and the unrealistic bids they have to provide in order to win the contracts does not create an environment for the companies to put the migrants first and secure their safety within the detention centers.[35]

Abuses by PMSC have been repeatedly documented throughout the years. There have been reports of deteriorating living conditions, reduced personnel and medical assistance, shortage of food and unqualified and untrained personnel in order for the company to cut costs. In 2017, the BBC Panorama Programme "Undercover" released a documentary regarding the mistreatment of detainees in UK's Brook House immigration removal center. It did not only reveal the prison-like facilities the detainees were kept in, but also the systematic culture of physical and verbal abuse by the G4S-

[32] Arbogast "*Migrant detention in the European Union*", at. 20.
[33] Lethbridge, "*Privatization of Migration and Refugee Services",* at. 23.
[34]Axster, Sabrina, "*A Tale of Two Countries: The Privatization of Immigrant Detention in Germany and the United States*", The American Institute for Contemporary German Studies at John Hopkins University, June 2017. Online: https://www.aicgs.org/publication/a-tale-of-two-countries/. For a more in-depth study of multiple European countries see Arbogast, "*Migrant detention in the European Union*".
[35] A/72/286, para. 23.

personnel.[36] Detained women have reported cases of sexual violence and rape by the PMSC personnel, especially in detention centers for women.[37] There have also been multiple deaths of detainees when in custody in UK detention centers.[38]

In Germany, there is an on-going trial regarding 32 guards and workers who are accused of abusing migrants. The alleged conduct includes grievous bodily harm, deprivation of liberty, coercion and theft. Many of these guards were employed by the private company European Home Care.[39] The detention centers in Germany have the minimum requirements of training personnel in detention centers and has an unregulated security industry.[40]

The above examples are provided here to demonstrate that abuse in privatized detention centers is not unusual. Abuses in detention centers are not solely perpetrated by PMSC personnel. However, as mentioned above, there is a greater risk that abuses can occur when the management is delegated to private actors. The reports demonstrate that human rights abuses do occur when PMSC are involved in the management of detention centers and there is no sign that privatization will subside. To the contrary, the trend indicates that it will most likely increase in the coming years. It is therefore necessary to determine state responsibility regarding conducts by PMSC personnel. This could have the impact of state creating structured and durable frameworks relating to the outsourcing of migration related tasks to private companies.

[36] Holt, Alison, "*What I saw when I went undercover: The 21-year old whistleblower at the immigration removal center",* BBC. Online: https://www.bbc.co.uk/news/resources/idt-sh/g4s_brook_house_immigration_removal_centre_undercover (15 November 2020)
[37] A/72/286, para. 44.
[38] Arbogast "*Migrant detention in the European Union*", at. 52.
[39] Global Detention Project, "*Country Report, Immigration Detention in Germany: From open arms to public backlash",* August 2020, at. 32.
[40] Lethbridge, "*Privatization of Migration and Refugee Services*", at. 23.

2.3 Offshore detention centers

2.3.1 Introduction

In recent years, the EU has, in regard to migration management, pivoted towards an externalization of their borders through international cooperation and bilateral agreements. The EU and its member states have managed to indirectly achieve this aim by supporting states and organizations through financial and political means. By supporting neighboring countries in producing and maintaining a stronger and more militarized migration policy structure and border controls, there will be a decrease in the number of migrants ever reaching the EU border.[41]

In connection to the externalization of detention centers, there have been discussions at both regional and national level on how the EU could adopt a method that is more in line with Australia's approach.[42] Australia is seen as the "founder" of the offshore approach and it is their model that lays the foundation for all other states that are interested of embracing offshoring. Australia's model has set an alarming precedent on how the offshoring system is applied and the most significant examples are Australia's detention centers in Nauru and Papa New Guinea.[43]

The offshore approach would entail a partnership between the EU member states and third countries where the detention centers would actually be situated.[44] The approach has not yet been practically implemented in the EU

[41]Majcher, Izabella, Flynn, Micheal and Grange, Mariette, "I*mmigration Detention in the European Union – In the Shadow of the "Crisis*", European Studies of Population Vol. 22, Springer, 2020, at. 461. (Hereinafter Majcher, Flynn and Grange, "*Immigration Detention in the European Union")*

[42] Witschge, Loes, "*European proposals to outsource asylum centres condemned",* Aljazeera, June 2018. Online: https://www.aljazeera.com/news/2018/06/28/european-proposals-to-outsource-asylum-centres-condemned/?gb=true (Accessed 20 November 2020)

[43] Ibid.

[44] Stevis-Gridneff, Matina, "*Europe Keeps Asylum Seekers at a Distance, This Time in Rwanda*", The New York Times, September 2019. Online: https://www.nytimes.com/2019/09/08/world/europe/migrants-africa-rwanda.html (Accessed 15 November 2020)

and its member states. However, the latter have opened up to the possibility of situating centers extraterritorially and expressed a positive view on the offshore approach.[45] This has been heavily criticized by human rights activists and non-government organizations. People are seen as objects who, instead of having "the right to have rights"[46], are being "passed around by countries in exchange for money or in exchange for political recognition."[47]

2.3.2 Australia's offshore detention centers

Australia's claim in relation to offshore detention is that they "send people to another country to process their refugee claims".[48] The Australian Government calls this 'regional processing'. Australia's most well-known partnerships are with Nauru and Papa New Guinea. The partnerships date back to 2001 after the so-called "Tampa crisis". A Norwegian boat was denied entry to Australian waters after having rescued 438 migrants from a sinking fishing boat.[49] Australia did not want to take responsibility and therefore managed to sign an agreement with Nauru and New Zealand which meant that all the migrants who were on the fishing boat would instead be sent to Nauru and New Zealand. When the deal was done the migrants were taken onboard a boat on Australian waters, with the Australian flag, and then transported to Nauru and New Zealand.[50] In the aftermath of the Tampa crisis, the Australian government enacted legislative measures known as the Pacific Solution. This new policy determined that migrants that arrived by boat to Australia would be transferred to offshore detention center on Nauru and

[45] See section 2.4 for a more thorough explanation on EU's positive trend towards offshore detention centers.
[46] The famous sentence was created by Hannah Arendt in her book The Origins of Totalitarianism. Arendt, Hannah, "*The Origins of Totalitarianism*", Penguin Classics, 2017.
[47] Witschge, Loes, "*European proposals to outsource asylum centres condemned",* Aljazeera, June 2018. Online: https://www.aljazeera.com/news/2018/06/28/european-proposals-to-outsource-asylum-centres-condemned/?gb=true (Accessed November 20)
[48] RCA, *"Australia's offshore processing regime: The facts*", at. 1.
[49] UN, Human Rights Council (UNHRC), "*Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru",* 24 April 2017, A /HRC/35/25/Add.3, paras. 7-8.
[50] RCA, "*Australia's offshore processing regime: The facts",* at. 2.

Manu Island. They would be detained there until their asylum claims were processed.[51]

The government of Australia has not only sent migrants to different countries to be detained while waiting for their asylum claims to be processed. The centers have also been completely outsourced to private companies. They are managed by several multinational companies who specialize in these types of security services. Over the years, there have been significant allegations of abuse by these private companies, ranging from assault and self-harm attempts to sexual abuse, child abuse and despicable living conditions.[52]

In 2016, the so-called Nauru files were leaked. It was a report that was leaked from Australia's detention center on Nauru Island. There were over 2,000 incident reports which amounted to more than 8,000 pages. The reports included sexual abuse, self-harm attempts, child abuse and horrific living conditions which amounted to an understanding of the systematic structure of cruelty that took place behind the walls of the detention center.[53] The incident reports were written by guards, caseworkers and teachers on the Island, all of them being from private contractors, such as Broadspectrum, Wilson

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[51]See Phillips, Janet, *The 'Pacific Solution' revisited: a statistical guide to the asylum seeker caseloads on Nauru and Manus Island*, Parliament of Australia – Department of Parliamentary Services, September 2012. Online: https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1893669/upload_binary/1893669.pdf;fileType=application/pdf.
See also the latest Memorandum of Understanding between Australia and Nauru and Australia and Papa New Guinea, respectively. MOU: *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues*, 29 August 2012. MOU: *Memorandum of Understanding Between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to, and Assessment and Settlement in, Papua New Guinea of Certain Persons, and Related Issues*, 8 September 2012.

[52]Farrell, Paul, "*Immigration department suppressed detention contractor's name due to boycotts*", The Guardian, March 2017. Online: https://www.theguardian.com/australia-news/2017/mar/29/immigration-department-suppressed-detention-contractors-name-due-to-boycotts (Accessed November 20)

[53] Farrel, Paul, Evershed, Nick and, Davidson, Helen, "*The Nauru files: cache of 2,000 leaked reports reveal scale of abuse of children in Australian offshore detention",* The Guardian, August 2016. Online: https://www.theguardian.com/australia-news/2016/aug/10/the-nauru-files-2000-leaked-reports-reveal-scale-of-abuse-of-children-in-australian-offshore-detention (Accessed 26th October 2020)

Security, International Health and Medical Services.[54] Before the reports were leaked, the Australian government knew about the abuses and did not take any action in order to investigate or prevent them. In a statement from the Australian Immigration and Border Protection Agency, it was stated that these "leaked documents reflected "unconfirmed allegations or uncorroborated statements and claims" and "not statements of proven fact".[55]

The state of Australia was set on keeping the offshore detention center open, even though the allegations of abuse were brought to light. However, by the end of 2019, the detention facility was closed and there was no one living in the detention center.[56] The migrants are now instead living in the Nauruan community and the Australian government has not demonstrated a willingness to transfer them to Australia to be settled.

At Manus Island, there have been similar allegations regarding abuse by the staff of the detention center. While the quantity of the reports is not as substantial as the allegations on Nauru Island, it still demonstrates the horrific living conditions and neglect the migrants endures. It includes high levels of self-harm and poor mental health, inadequate health care system for the migrants, multiple deaths and abusive conduct by the personnel.[57]

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[54] To read the individual reports see Evershed, Nick, Lui, RI, Farrell, Paul and Davidson, Helen, "*The lives of asylum seekers in detention detailed in a unique database",* The Guardian. Online: https://www.theguardian.com/australia-news/ng-interactive/2016/aug/10/the-nauru-files-the-lives-of-asylum-seekers-in-detention-detailed-in-a-unique-database-interactive (Accessed 22 November 2020)

[55]Garcia Bochenek, Michael, "*Leaked Nauru Files Show Horrors of Australia's Refugee Detention System: Canberra Should Close Operations on Nauru",* Human Rights Watch, August 2016, Online: https://www.hrw.org/news/2016/08/10/leaked-nauru-files-show-horrors-australias-refugee-detention-system (Accessed 24 October 2020)

[56]Hollingsworth, Julia and Watson, Angus, "*Taking Australia's asylum seekers was a 'deal with the devil:' former Nauru leader",* CNN, April 2019. Online: https://edition.cnn.com/2019/04/18/australia/nauru-former-president-intl/index.html (Accessed 10 November 2020)

[57] The Senate Legal and Constitutional Affairs Committee secretariat, "*Serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre*", April 2017, at. 39-48.

Abdul Aziz Muhamat, who is a human rights activist and former immigration detainee in Australia's offshore detention center, states that migrants "are being completely destroyed, physically and mentally. Twelve people have died". There are only single men who are sent to the detention center on Manus Island, and it is reported that the mental health of these men is in a detriment state where around 100 of them are believed of harming themselves or already have attempted suicide.[58] The center was forcibly closed in October 2017 after the High Court of Papa New Guinea held that the detention center situated within their territory was unconstitutional and illegal and thereby the center was ordered to be terminated.[59] It was reported that the last four men left the island the 2nd of March 2020.[60]

Australia's offshore approach on migration management has been nothing but a whirlwind of criticism and human rights abuses. The UN Working Group on Arbitrary Deprivation has produced multiple reports that have been critical to the use of offshore detention centers and argued that the indefinite deprivation of liberty of some refugees are unlawful.[61] Australia has not only intercepted boats who have migrants onboard and sent them to completely different countries, far away from their borders. They have also outsourced

[58]Davidson, Helen, "*Former Manus Island detainee tells UN 'Human being are being destroyed',* The Guardian, 27 June 2020. Online: https://www.theguardian.com/australia-news/2019/jun/27/former-manus-island-detainee-tells-un-human-beings-are-being-destroyed (Accessed 10 November 2020) and Mohamed, Charmain, "*The bravery of those who speak out from Manus Island will go down in history*, *Amnesty* International, 21 November. Online: https://www.amnesty.org/en/latest/news/2018/11/the-bravery-of-those-who-speak-out-from-manus-island-will-go-down-in-history/ (Accessed 10 November 2020)

[59] Belden Norman Namah MP v Hon Rimbink Pato, National Executive Council and the Independent State of Papua New Guinea, SCA No. 84 of 2013, Supreme Court of Justice (Papua New Guinea), 26 April 2016.

[60] RCA, *"Australia's offshore processing regime: The facts",* at. 2.

[61] See UNHRC, Opinions adopted by the Working Group on Arbitrary Detention at its eightieth session, 20-24 November 2017: *Opinion No. 71/2017 concerning Said Imasi (Australia)*, 21 December 2017, A/HRC/WGAD/2017/71. UNHRC, Opinions adopted by the Working Group on Arbitrary Detention at its seventy-ninth session, 21-25 August 2017: *Opinion No. 42/2017 concerning Mohammad Naim Amiri (Australia)*, 22 September 2017, A/HRC/WGAD/2017/42. UNHRC, Opinions adopted by the Working Group on Arbitrary Detention at its seventy-eighth session, 19-28 April 2017: *Opinion No. 28/2017 concerning Abdalrahman Hussein (Australia)*, 16 June 2017, A/HRC/WGAD/2017/28. UNHRC, Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17-26 April 2018: *Opinion No. 20/2018 concerning William Yekrop (Australia)*, 20 June 2018, A/HRC/WGAD/2018/20. UNHRC, Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17-26 April 2018: *Opinion No. 21/2018 concerning Ghasem Hamedani (Australia)*, 29 May 2018, A/HRC/WGAD/2018/21.

all the personnel on these islands to private contractors. In doing so, they have created as much distance as possible between the State of Australia and the migrants.

Since the closing of both detention facilities, Australia has not taken responsibility for any wrongdoings by the private companies, stating that the abuses did not take place within its jurisdiction. The government has consistently maintained that the actions and conditions in the detention centers are not under its responsibility but instead the responsibility of the country whose territory the detention centers are situated on.[62] The UN firmly holds that since Australia pays for, manages and has the ultimate authority over the centers, they have a "clear and undeniable" responsibility for the migrants and what happens within the walls of the detention centers.[63] Unfortunately, there is still no case against Australia where it has been determined that they are responsible for the wrongdoings within the detention centers. In the class action between former detainees on Manus Island and the state of Australia, it was settled that Australia would pay the claimants $70 million in compensation however, no admission of liability was determined.[64]

2.4 The EU's view on offshoring

While states within the EU have not yet implemented an offshoring approach, such as the one in Australia, there are reasons to believe that they are also heading in the same direction. Since the 1990s, the EU and its member states have outsourced their control of the borders to third countries including

[62] UNHRC, "*Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru: comments by the State*", 17 May 2017, A/HRC/35/25/Add.4, Response to paras. 109, 117 and 120.
[63] UNHRC, "*Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*", 24 April 2017, A/HRC/35/25/Add.3, paras. 73 and 79.
[64] Supreme Court of Victoria, "*Kamasaee v. Commonwealth of Australia and Ors: Statement related to the Manus Island Detention Center Class Action*", March 2018. Online: https://www.supremecourt.vic.gov.au/news/kamasaee-v-commonwealth-of-australia-and-ors and *Majid Karami Kamasaee v The Commonwealth of Australia and Ors* [2017] VSC 537.

training the guards, financing support, surveillance equipment etc.[65] There has been a partnership created with Turkey to return migrants when crossing the Greek/Turkey border[66], as well as partnerships with Libya to prevent migrants from reaching the EU waters, especially Italian waters.[67]

Since 2015, there have been discussions within France, the Netherlands, Germany and Denmark[68] regarding the use of a similar offshore approach as Australia. According to Abdul Aziz Muhamat, when he was in Geneva at a EU conference, people expressed that "Australia has done a beautiful job", and there was an overall positive outlook on offshoring.[69] There have been a few EU proposals regarding establishing reception centers in third countries over the years. However, none of them have been pushed forward. The reason behind the stalling of the proposal is that it has not been defined if it is in line with human rights obligations vested upon the EU member states (in particularly under the ECHR) and what the challenges will be if introducing offshoring in Europe. There were too many unanswered questions for this proposal to be moved forward.[70]

In recent times, there has been evidence that the UK government is now considering sending asylum seekers to Moldova, Morocco or Papa New Guinea.[71] There have been detailed proposals from the government on how

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[65] Lethbridge, "*Privatization of Migration and Refugee Services*", at. 27.
[66] Council of the EU, "*EU Turkey statement, 18 March 2016",* Press Release 144/16.
[67]MOU: *Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic*, 2 February 2017.
[68] Majcher, Flynn and Grange, "*Immigration Detention in the European Union",* at. 216.
[69] MacGregor, Marion, "*EU trying to replicate Australia's Offshore Detention Centers, Refugee Activist Warns",* InfoMigrants, July 2020. Online: https://www.infomigrants.net/en/post/25711/eu-trying-to-replicate-australia-s-offshore-detention-centers-refugee-activist-warns (Accessed 23 September 2020)
[70] Carrera, Sergio and Guild, Elspeth, "*Offshore processing of asylum applications: Out of sight, out of mind?*", Center for European Policy Studies, January 2017. Online: https://www.ceps.eu/ceps-publications/offshore-processing-asylum-applications-out-sight-out-mind/ (Accessed 24 September 2020)
[71] Lewis, Paul, Pegg, David, Walker, Peter and Stewart, Heather, "*Revealed: No 10 Explores sending asylum seekers to Moldova, Morocco and Papa New Guinea",* The Guardian, September 2020. Online: https://www.theguardian.com/uk-news/2020/sep/30/revealed-no-10-explores-sending-asylum-seekers-to-moldova-morocco-and-papua-new-guinea (Accessed 3 October 2020)

this would be enacted, including detailed plans on costs estimated on building the camps in the countries cited above. It is said that these documents were issued directly by Downing Street and the Prime Minister, Boris Johnson's spokesperson confirmed that the UK was considering an offshore approach, much similar to Australia's offshore detention centers.[72] The UK might go even further than Australia, since Australia only intercept migrants outside of Australian waters. The UKs proposal would involve relocating migrants and asylum seekers to these offshore detention centers when they have arrived in the UK and are clearly within the country's jurisdiction.[73] It must be mentioned that the foreign office has been very critical of the proposal and is citing legal, practical and diplomatic obstacles regarding such offshore detention centers. Even though the dismissive advice produced within the UK government, it appears that Downing Street might be pushing forward on the proposals. It is part of a plan to reintroduce an even more radical hostile environment[74] after exiting the EU at the end of 2020.[75]

There is still no mentioning on who would manage the UKs offshore detention centers. It is likely that these facilities would either be managed by UK public sector officers or delegated to private companies, and more specifically to PMSC. If we would draw a conclusion based on the overall approach, structure and how privatization has been progressing not only in the UK but in the whole of the EU, there are reasons to believe that the UK will outsource the management to private contractors. If this were about to

[72] Flynn, Michael, "*UK: Plans Replicate Australia's Maligned Offshore Detention Regime Ignore a Long History of Failure and Suffering*", Global Detention Project, October 2020. Online: https://www.globaldetentionproject.org/uk-plans-to-replicate-australias-maligned-offshore-detention-regime-ignore-a-long-history-of-failure-and-suffering (Accessed 15 October 2020)

[73] Lewis, Paul, Pegg, David, Walker, Peter and Stewart, Heather, "*Revealed: No 10 Explores sending asylum seekers to Moldova, Morocco and Papa New Guinea",* The Guardian, September 2020. Online: https://www.theguardian.com/uk-news/2020/sep/30/revealed-no-10-explores-sending-asylum-seekers-to-moldova-morocco-and-papua-new-guinea (Accessed 3 October 2020)

[74] The hostile Environment approach is measures taken by the UK to make staying in the state as difficult as possible for people without leave to remain, in the hopes that they may "voluntarily leave". To read more about the hostile environment approach in the UK see Goodfellow, Maya, "*Hostile Environment: How immigrants became scapegoats*", Verso Books, 2019.

[75] Global Detention Project, *"United Kingdom: An Overview",* 1 October 2020. Online: https://www.globaldetentionproject.org/countries/europe/united-kingdom

happen, the UK government would follow the established trend of privatizing its detention centers, regardless of whether they are on UK territory or not.

In the late summer of 2020, the EU announced the New Pact on Migration and Asylum which aims to address the imbalance in how member states have shared the burden of migrant arrivals and in the way in which the procedure for asylum has so far been distributed.[76] The new pact proposes a screening mechanism at the preliminary stage. This screening would be applicable to third country nationals who have arrived at the EU border without the right to enter. This type of screening mechanism would involve the use of detention centers while the migrant's applications are being processed. During this time, the applicants would not be allowed to enter the territory of the Member state. The screening would instead be enacted directly at the external EU borders.[77] The result would be that many migrants and asylum-seekers would be kept at the external borders of the EU, in detention centers, which in turn, represents a *de facto* offshore approach.

There has not been an official discussion regarding who will be managing the detention centers. However, if one analyses the common structure and pathway regarding privatization, there is a possibility that there will be a partnership between the public and private actors. The new proposed border procedures heavily draw on the hotspot approach that has already been used in Italy and Greece. This further demonstrates that it will most likely be PMSC managing the detention centers since the hotspots in Greece are operated by EASO who in 2019, once again, delegated the security services

[76] Ruy, Donatienne and Yayboke, Erol, "*Deciphering the European Union's New Pact on Migration and Asylum",* Centre for Strategic and International Studies, September 2020. Online: https://www.csis.org/analysis/deciphering-european-unions-new-pact-migration-and-asylum (Accessed 4 October 2020)
[77] Markard, Nora, "*Paper doesn't blush: The Commission presents a plan that does nothing to address the realities at the EU borders",* Heinrich Böll Stiftung, October 2020. Online: https://eu.boell.org/en/2020/09/30/paper-doesnt-blush-commission-presents-plan-does-nothing-address-realities-eu-borders#_ftnref7 (Accessed 20 October 2020)

in Greece to G4S. The operations involve Lesbos, Chios, Samos, Kos, Leros, Athens, Thessaloniki, and Alexandroupoli.[78]

2.5 Concluding remarks

The privatization of migration management functions, especially the management of migration detention centers, has increased in various EU member states and there is no evidence of it slowing down. States are pivoting towards not only privatizing detention centers but also following in the footsteps of Australia's offshore approach, distancing themselves as much as possible from the migrants and the protection of rights they are under obligation to provide. Australia's offshore detention centers set an alarming precedent that states cannot only physically distance themselves from the migrants by not having them on their territory but they can also legally distance themselves from the responsibility they have towards protecting them.

While offshore detention centers have not yet been officially implemented in the EU, the trend clearly indicate a risk that a type of *de facto* detention centers will be the approach used by the EU and its member states. It is not unreasonable to expect that current offshore discussions will soon turn into an inevitable reality and that, at least, parts of the functions will be outsourced to private companies. In order to avoid another situation like the ones in Nauru and Manus Island, international and regional communities need to determine, with more clarity, how and when a state is responsible for human rights abuses perpetrated by PMSC in extraterritorial situations like the one related to offshoring. Outsourcing migration detention centers should not imply outsourcing the responsibility of states.

[78] EASO, "*List of contracts awarded by the European Asylum Support Office in 2019 in accordance with Point 3.3 of Annex I to the Financial Regulation applicable to the general budget of the Union*" Online: https://easo.europa.eu/sites/default/files/easo-contracts-awarded-2019.pdf and EASO, "*Malta-Valletta: Provision of security services in Greece 2017/S 045-081807: Contract award notice*", 2017. Online: https://www.easo.europa.eu/sites/default/files/2017-OJS045-081807-en-ts.pdf

3 The legal framework

3.1 Introduction

The established trend of privatizing detention centers does not come without legal implications and accountability issues. Unfortunately, the legal framework on the protection of human rights of migrants in detention centers and their ability to obtain a remedy for the abuses suffered is not developing at a pace fast enough to meet the challenges of privatization. This has created an accountability gap where both PMSC and states easily go unpunished. In addition to the increase of privatization, one can see the parallel trend whereby EU member states and the EU institutions are now considering offshoring. This creates another dimension of legal uncertainty and legal gaps since states then have the possibility of constructing the detention centers outside of their territory and subsequently claim that it is not within their jurisdiction when human rights abuses occur.[79]

This issue has been brought to light by some human rights scholars[80], and there is a push towards creating clear legal structures in order to prevent states from indirectly outsourcing their responsibility for people who are seeking their protection. In this chapter, I will demonstrate what potential legal avenues exist and if they can be applied on offshore privatized detention centers. It will also analyze the direction that the international community is heading relating to extraterritorial jurisdiction and state responsibility for

[79] See chapter two for a more in-depth explanation and analysis.
[80]See for example Davitti, "*Beyond the Governance Gap"*, Gammeltoft-Hansen, "*Private Actor Involvement in Migration Management*", at. 530, Arbogast, "*Migrant detention in the European Union*".

Non-State Actors (NSA). The legal instruments which will be included in this chapter's analysis are ARSIWA[81] and the ECHR[82].

3.2 Holding states responsible under ARSIWA

The general rule in ARSIWA is that a state is not responsible for the acts or omissions conducted by private companies. The idea behind this presumption is that international law usually limits state responsibility to only include conduct by organs of the state or by agents of the state.[83] However, there are exceptions to the rule. Under certain provisions, a state can still be held responsible for acts and omissions conducted by actors other than state agents. The provisions where there is a possibility of finding responsibility for states, especially in light of privatization of migration detention centers are located in art. 5 and art. 8 ARSIWA.

In order for an act to be conceived as an international wrongful act of a state within ARSIWA, the act or omission has to be "attributable to the state under international law" and has to "constitute(s) a breach of an international obligation of the state".[84] Regarding the requirement of attribution, the International Court of Justice, ICJ, has asserted that a state can only be responsible for *its own conduct* which creates a high threshold of attributing

[81] State responsibility was an area of interest in developing international law and the United Nations formed the International Law Commission to deal with and codify this new body. The articles have been commended by UN General Assembly and have been widely applied and approved in practice, including the ICJ. See Crawford, James, "*Articles on Responsibility of States for Internationally Wrongful Acts*, United Nations Audivisual Library of International law, 2012, at. 1-2. Online: https://legal.un.org/avl/pdf/ha/rsiwa/rsiwa_e.pdf

[82] The ECtHR is a judicial organ that established the ECHR which consists of articles protecting the human rights of the individuals who are under the jurisdiction of a signatory state. There are 47 signatory states to the ECHR and all the signatories are bound to guarantee the rights and freedoms set out in the ECHR. The decisions rendered by the Court is binding and has great precedent over both international and internal law. See Council of Europe, "*The European Convention on Human Rights – A living Instrument",* 2020. Online: https://www.echr.coe.int/Documents/Convention_Instrument_ENG.pdf

[83] *Report of the International Law Commission on the Work of Its Fifty-Third Session*, (2001) 2 Year Book INT'L L. COMM'N 31, UN. Doc. A/CN.4/SER.A/2001/Add.1, at. 38 para. 2. Online: https://legal.un.or/l/ublication/earbook/nglis/lc_2001_v2_p2.pdf (Hereinafter ARSIWA Commentary)

[84] Art. 2 ARSIWA.

the specific act to the state.[85] The requirement of attribution can be met if, for example, the private actors exercise governmental authority or it can be shown that the state is directing or controlling the specific act.[86] Therefore, in order to find state responsibility, there needs to be a nexus between the state and the event surrounding the abuse. This is a very challenging threshold and there is great difficulty in proving that the link has not been severed between the state and the private actor. The element of responsibility does not include a general rule on whether a test should be applied subjectively or objectively. In other words, the provision does not imply that a state requires to have some degree of fault, intent, culpability, negligence or due diligence. Instead, it depends on the context of each situation and the circumstances surrounding the alleged abuse.[87]

3.2.1 Art. 5 ARSIWA

> *"The conduct of a person or entity which is not an organ of the state under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."*[88]

The provision deals with conduct that is not directly executed by an organ of the state but has instead been delegated to an NSA. The provision is of interest to the privatization of migration detention centers because PMSC often carry out different tasks that would usually be conducted by a state's government.[89] According to the commentary of art. 5 ARSIWA, it is only in special cases that the article would include private companies in the term "entity". In the commentary, private security firms are actually mentioned as companies who

[85] ICJ, *Nicaragua v. United States of America, Military and Paramilitary Activities,* Judgement of 27 June 1986, Merits, para. 116. (Hereinafter The Nicaragua case)
[86] See art. 5 and art. 8 ARSIWA.
[87] ARSIWA Commentary, at. 34 para. 3. Art. 2.
[88] Art. 5 ARSIWA.
[89] Davitti, "*Beyond the Governance Gap",* at. 498.

exercise public powers in a way where states can be held responsible for their acts and omissions. However, the commentary refers to private security firms which are contracted out by the state to manage prisons and not migration detention centers.[90]

The reason why this is important is because article 5 limits its provisions to entities which are "empowered by *internal law* to exercise governmental authority"[91]. When states outsource their management of prisons, it is most commonly done through national legislation. However, when states contract out their management of migration detention centers it is instead done through contractual agreements. These contracts are not enough as a legal instrument to empower the PMSC with the public power as referenced in art. 5, because they are not, as indicated, regulated by law. Migration detention centers are in most cases seen as administrative measures and will not be covered by regulations pertaining to prisons and detention centers in the criminal justice system.[92]

Because of the limitations of art. 5, and the way that states have delegated their management of migration tasks to private companies through contract, it is highly unlikely to hold states accountable for the abuse perpetrated by PMSC. The formal threshold that it needs to be regulated by internal law will be difficult to surpass in this context. States are showing no intention of changing the way in which they contract out their management tasks, and as long as it is done through contract, it appears that they cannot be held responsible under art. 5 ARSIWA.

[90] ARSIWA Commentary, at. 43 para. 2.
[91] Ibid at. 43 para. 6.
[92] Davitti, "*Beyond the Governance Gap",* at. 498-499.

3.2.2 Art. 8 ARSIWA

> "*The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."*[93]

Article 8 focuses on the factual relationship between the state and the entity engaging in the wrongful conduct. Since the general rule is that acts and omission perpetrated by private companies are not attributable to the state, the article deals with two situations that are excepted from the rule. The first circumstance is when a private company acts on instruction of the state in carrying out a specific act. The second exception deals with a "more general situation where private persons act under the State's direction or control."[94]. It is important to find the existence of a real link between the company who has performed the act and the state's government.[95]

The first situation can quite quickly be precluded because of the contractual relationship between the state and a PMSC who manages the detention centers. The reason behind that assessment is because the exception can only be applied if it can be proven that the contract itself states the instructions on how to carry out the wrongful conduct. States are careful when constructing the contracts between them and the PMSC and they usually leave out the substantive scope. It would only specify the activities that should be carried out, but it is up to the individual PMSC on planning and executing those activities.[96] In order for the exception to be applicable, the state needs to have explicitly stated that the PMSC should execute specific tasks that are in violation of human rights provisions.

[93] Art. 8 ARSIWA.
[94] ARSIWA Commentary, at. 47 para. 1.
[95] Ibid.
[96] Davitti, "*Beyond the Governance Gap",* at. 499.

Regarding the second scenario, i.e. the situation where a private company acts under the direction or control of a state, one needs to find a well-established nexus between the state and the act perpetrated by the company. The element of direction or control - to what extent a state needs to be involved in the conduct surrounding the event in order to be perceived as controlling or directing the conduct - has been discussed in case-law.[97] In the Nicaragua case, the ICJ discussed if the conduct of the Contras in Nicaragua was attributable to the USA. The Court determined that while the United States planned, directed and supported the Contras, they did not "exercise such a degree of control in all fields as to justify treating the Contras as acting on its behalf".[98] They did not execute a level of effective control over the operations where the alleged human rights violations were committed. The Court stated that a "general situation of dependence and support would be insufficient to justify attribution of the conduct to the State."[99].

The Appeals Chamber of the International Tribunal for the Former Yugoslavia has also discussed the level of control needed to find a state responsible for NSA.[100] Here the Court found that it needs to prove an overall control which goes beyond the mere financing and equipping of such force. It became a requirement that the state also needs to be involved in the planning and supervision of military operations.[101] While the two cases, mentioned above, addressed the control requirement based on two different circumstances as well as different legal issues, it is clear that the threshold is set high. Furthermore, these cases have also determined that the level of control needed to attribute a conduct to the state depends on the particular situation in the specific case.[102]

[97] ARSIWA Commentary, at. 47 paras. 3 and 4.
[98] The Nicaragua case, paras. 109 and 115.
[99] Ibid and ARSIWA Commentary, at. 43 para. 4.
[100] ICTY, *Prosecutor v Tádic* (IT- 94-1-A), Appeals Chamber, Judgment of 15 July 1999. (Hereinafter the Tádic case)
[101] The Tádic case, para. 137.
[102] ARSIWA Commentary, at. 48 para. 5.

Thus, when it comes to the contractual relationship between states and PMSC which are managing the detention centers, states cannot be held responsible because they do not meet the requirements of either effective control or overall control. After a PMSC has signed a contract with a state, the company becomes independent and is not controlled or instructed by the state in such a way that meets the threshold of article 8 ARSIWA.[103] In order for the state to be held responsible, there needs to be a more progressive and modern interpretation on the definition of effective control and it needs to reflect the way states increasingly outsource management functions which were before solely managed by the public sector.

3.3 Holding states responsible under ECHR

In order to hold states responsible for acts or omissions which are in violation of the rights and freedom set forth in the Convention, the preliminary condition is that such acts or omissions should fall within the state's jurisdiction.[104] Thereby, the first step is to determine if the abuse is even within the state's jurisdiction. Article 1 states as follows;

> *"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."*

As stated in the Bankovic case[105], which discusses acts that have been conducted extraterritorially, the threshold for jurisdiction is primarily territorial and "other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case".[106]

[103] Davitti, "*Beyond the governance gap*", at. 499.
[104] Council of Europe, "*Guide on Article 1 of the European Convention on Human rights: Obligation to respect human rights – Concepts of "jurisdiction" and impunity",* Updated on 31 December 2019, at. 5. Online: https://www.echr.coe.int/documents/guide_art_1_eng.pdf (Hereinafter CoE, "*Guide on Article 1 of the ECHR*")
[105] ECHR, *Bankovic and Others v. Belgium and 16 other states*, Grand Chamber Decision as to the admissibility of Application no. 52207/99, 12 December 2001.
[106] CoE, *Guide on Article 1 of the ECHR*, at. 7.

Jurisdiction has always been seen as something territorial and when the conduct has been executed outside of the state's territory, strong evidence is needed to demonstrate that the state did have control over the situation even though it was not within its territory. In this case the exception to the rule is set very high and does not give much room for a more extensive interpretation. In light of this, there has been debates over the years on what jurisdiction, within art. 1 ECHR, should include. The ECtHR case law have recognized certain exceptions that can still give rise to a state's jurisdiction within art. 1, beyond territorial jurisdiction.[107]

The exceptions are divided into two different types of jurisdiction. The first is *spatial jurisdiction*, which is when the contracting state has some type of effective control over a defined territory. The second exception is when the contracting state has personal effective control over an individual, called *personal jurisdiction*.[108] Both of these approaches have been discussed in the case-law and by different scholars of international law.

3.3.1 Spatial jurisdiction

Spatial jurisdiction is defined in the Loizidou-case[109], which is also the leading case regarding extraterritorial jurisdiction. The Court states that "the concept of 'jurisdiction' under article 1 of the Convention is not restricted to the national territory of the Contracting States"[110]. It further determines that

> "The responsibility of a Contracting Party could also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such

[107] Ibid at. 12.
[108] De Boer, Tom, "*Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection*", Journal of Refugee Studies, March 2015, Volume 28, Issue 1, 118–134, at. 125.
[109] ECtHR, *Loizidou v. Turkey,* Application no. 15318/89, 18 December 1996. (Hereinafter the Loizidou case)
[110] Ibid para. 52.

> control whether it be exercised directly, through its armed forces, or through a subordinate local administration."[111].

The issue with spatial jurisdiction as interpreted in the Loizidou-case, is that when discussing it in light of offshoring detention centers, most of the court's cases have depended on military intervention over a larger area in the third state and determined that there needs to be a certain duration of their presence.[112] It is therefore challenging to see how extraterritorial detention centers could reach the threshold of spatial jurisdiction within the meaning of the Loizidou case.

In 2004, however, the Court concluded in the Issa case[113] that a more inclusive interpretation of the spatial jurisdiction is possible. They rejected the requirements mentioned above and stated that it cannot exclude the possibility that, because of a military action, the "respondent State could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory".[114] The Court argued that if the applicants were within a specific area, at the relevant time, they would be within the jurisdiction of the other state.[115] Furthermore it has also been determined that the presumption of jurisdiction would be strong even if the acts were not directly associated to the agents of the controlling state.[116]

This interpretation has opened up opportunities for a broader use of art. 1 ECHR, and that it is not necessary, within the requirement, that the contracting state has control over a larger area over a specific amount of time in a third state. Instead, the Court has progressed into including the control over smaller parts of a territory within the threshold of jurisdiction.

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[111] Ibid.
[112] Gammeltoft-Hansen, Thomas, "*Access to Asylum: International Refugee Law and the Offshoring and Outsourcing of Migration Control"* PhD Thesis, Aarhus University, 2009, at. 166. Online: https://www.peacepalacelibrary.nl/ebooks/files/371249635.pdf (Hereinafter Gammeltoft-Hansen, "*Access to Asylum")*
[113] ECtHR, *Issa and Others v. Turkey,* Application no. 31821/96, 16 November 2004. (Hereinafter the Issa case)
[114] Ibid para. 74.
[115] Ibid.
[116] Gammeltoft-Hansen, "*Access to Asylum",* at. 166.

Unfortunately, it still seems highly unlikely that the lower threshold of jurisdiction would include smaller entities such as embassies, military installations or detention centers.[117]

The Court has opened up for the possibility of interpreting jurisdiction as a living instrument, and adapting it to the modern reality we live in today. We can see that the Court is following a trend of reading art. 1 ECHR more inclusively and progressive, and if this trend continues, it is likely that a more situational approach will be used when analyzing extraterritorial situations, especially in regard to offshore detention centers. However, at this moment, with the legislation we have today, it would still be difficult to determine that the state that has offshored its detention center to another country still has jurisdiction under the spatial approach.

3.3.2 Personal jurisdiction

The other exception is connected to the state having a more personal control over an individual. Two of the leading cases regarding the personal approach are the cases of Al-Skeini[118] and Al-Jedda[119]. The latter case is about the detention of a British National in Iraq by British Soldiers. The Court concluded that the detention center, while situated in Basra City, was exclusively controlled by British Soldiers and that "the applicant was therefore within the authority and control of the United Kingdom throughout"[120]. The decision to hold the applicant detained was made by the British forces and even though the decision to keep holding the applicant was reviewed by Iraqi government and non-United Kingdom representatives, it was determined that it did not prevent that the applicant was within the jurisdiction of the United Kingdom.[121]

[117] Gammeltoft-Hansen, "*Access to Asylum",* at. 166–167.
[118] ECtHR, *Al-Skeini and Others v.* The United Kingdom, Application no. 55721/07, 7 July 2011. (Hereinafter the Al-Skeini case)
[119] ECtHR, *Al-Jedda v. The United Kingdom*, Application No. 27021/08, 7 July 2011. (Hereinafter the Al-Jedda case)
[120] Ibid para. 85.
[121] Ibid.

The other case, Al-Skeini, concerned whether the relatives of six Iraqi nationals who were killed by British soldier in Iraq, and whose death were not effectively investigated by the UK, fell within the United Kingdom's jurisdiction. The Court stated that what is decisive in these types of cases is "the exercise of physical power and control over the person in question."[122]. It continued to determine that "the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under section I of the Convention that are relevant to the situation of that individual."[123].

Once again, the Court has set a high threshold for personal jurisdiction by demanding that the individual is under the full physical control of the extraterritorially acting state.

Analyzing both the cases mentioned above and how other human rights scholars have interpreted it, there is a high possibility that a state can be held responsible for events occurring in the detention centers situated extraterritorially, if the state exercises complete and physical control over the individual.[124] It leaves little doubt that in cases of detention centers run by state agents, the individuals fall within the jurisdiction of the state that have control over the facility.[125]

Unfortunately, the precedent that the state needs to have full physical control over the individual can come to undermine the possibility of holding states responsible for acts done by private companies who have been delegated to manage the extraterritorial detention centers. Since the management is no longer exercised by state agents, the state in question could argue that they no longer have the control needed in order to determine jurisdiction within art. 1 ECHR. I believe that if the Court leans on the definition of "full physical

[122] The Al Skeini case, para. 136.
[123] Ibid para. 137.
[124] Gammeltoft-Hansen, "*Access to Asylum*", at. 167.
[125] Ibid at. 172.

control", the states who do not only outsource their detention centers to third countries but also privatize the management of these facilities, will not fall within the jurisdiction of art. 1 ECHR. Subsequently, they will not be held responsible for acts committed towards the migrants.

It is important to note that the Court has taken some significant steps towards a more functional and more including approach when determining jurisdiction. The decisions rather reflect the reality of how jurisdiction should be interpreted nowadays and that a strict interpretation of territorial jurisdiction does not mirror today's view and use of a state's jurisdiction. However, if one wants to fill the legal gap regarding state responsibility towards offshore privatized detention centers, there is a need to further determine how a state can be responsible even if it does not have the full physical control of the individual.

3.4 Concluding remarks

When analyzing the provisions in light of privatization of detention centers, especially on the notion of offshoring, it is clear that it does not fall within the general rule of territorial jurisdiction. Instead, it needs to be proven that it falls within one of the exceptions, as mentioned above, in order to hold states responsible.

Gammeltoft-Hansen argues that the most relevant test is to see if "the state can be said to exercise sufficient authority over the individual asylum-seeker or refugee. The general recognition that extraterritorial jurisdiction may flow from the activities of diplomatic and consular agents acting abroad (…) could at face value encompass most types of migration control enacted by states themselves in the territory of another state."[126]. The issue is that the threshold for personal jurisdiction is set rather high; the state needs full physical control, and if the management is contracted out to PMSC, the state loses that control. If instead examining the spatial model with today's case-law, it is not possible

[126] Ibid at. 167.

to reach the threshold of having effective control over such a small area on another state's territory. The Court is however leaning towards a more progressive way to interpret spatial jurisdiction and has opened up for the possibility to extend the scope of what falls within this approach. What is of importance in the spatial approach is that if it has been determined that the state does have effective control over a territory within another states border, it is responsible for all acts that occur under that territory, regardless of whether it was done by a state agent or a PMSC.

The issue when it comes to extraterritorial jurisdiction is that there is no clear definition of what it entails, and it seems as the ECtHR tries to tailor the notion of effective control to different situations. However, there is a positive shift towards a more functional approach when determining extraterritorial jurisdiction and interpreting art. 1 as a living instrument and adapting the provision to the structure of today's world. Jurisdiction is no longer read as strictly territory within the state borders but instead as a floating definition, needed to be analyzed on a case-by-case basis and determined on the *de facto* relationship between the state and the abuse that occurred.

As we will see in the next chapter, Moreno-Lax argues for the Court to step away from the separation of jurisdiction, regarding both spatial and personal as well as territorial and extraterritorial. Jurisdiction should instead be viewed as something situational and functional. Furthermore, Moreno-Lax argues that we should determine jurisdiction by analyzing the situation *in toto*, taking into account both *de facto* and *de jure* elements. If the Court can find a nexus between the state and the individual, then the jurisdictional link has been established, regardless of whether the acts are territorial or extraterritorial.[127]

[127] Moreno-Lax, "*The Architecture of Functional Jurisdiction"*.

4 Functional jurisdiction

4.1 Introduction

As illustrated in chapter 3, there have been discussions regarding a more progressive approach when it comes to how jurisdiction within art. 1 ECHR should be interpreted. The Court has opened up for a possibility to interpret the term more broadly and more in line with the globalized world we live in today. Over the last few years there have been human rights scholars who have argued for a more functional and inclusive approach in regard to how to interpret jurisdiction, and one of them is Violeta Moreno-Lax.

Moreno-Lax has challenged the territorial approach to jurisdiction and has sought to shift the structure to a more functional and dynamic approach. At the moment, she represents the claimant in the ongoing pending case of *S.S. v. Italy* at the ECtHR.

The case will not be decided for a few years and it is still unclear whether or not the functional jurisdiction argument will be accepted by the Court. However, the Courts decisions have, in more recent years, pivoted toward a more functional approach and this case gives the Court the possibility to decide a landmark decision on what should be included within the meaning of jurisdiction. So, while multiple scholars have discussed possible functional interpretations of jurisdiction, Moreno-Lax' interpretation could be of great importance if the Court agrees with this interpretation. It will set a strong precedent regarding a functional interpretation of jurisdiction and effective control.

Moreno-Lax and her legal team claim that the events that took place on November 6, 2017, fall within Italy's jurisdiction under art.1 ECHR.[128] She argues that

[128] Moreno-Lax, "*The Architecture of Functional Jurisdiction",* at. 387.

> contactless control by an ECHR party, exercised through remote management techniques and/or in cooperation with a local administration acting as a proxy, may nonetheless amount to effective control and engage Convention obligation – whether it be exercised over persons, territory or specific situations abroad.[129]

In other words, she intends to illustrate that a state can have jurisdiction without having any kind of direct contact with the individual or the situation. Instead, when looking at the bigger picture and all the components behind the specific situation, one can determine that the state did have effective overall control, and subsequently, exercise jurisdiction within the definition of art. 1 ECHR.

The purpose behind this chapter is to demonstrate to the reader how Moreno-Lax and the rest of her team would determine functional jurisdiction and how it would be applied in individual cases. I will illustrate how Moreno-Lax interprets jurisdiction and how it has been applied in the *S.S. v. Italy* case. Throughout this section, Moreno-Lax' article on functional jurisdiction will be the lead source.

4.2 Summary of the *S.S. v. Italy* case

The case concerns the events that took place around midnight between the 5th and the 6th of November 2017. Moreno-Lax argues that while the violations that occurred between these dates were conducted by the Libyan personnel on-board a Libyan ship, Italy still exercised effective control over the migrants. They argue that by applying a functional approach to jurisdiction one can establish a nexus between Italy and the applicant when looking at the situation as a whole and the overall involvement of Italy.[130]

[129] Ibid at. 387.
[130] Ibid at. 404-405.

During the evening of the 5th, the Maritime Rescue Coordination Center (MRCC), situated in Rome, got a distress call from the high seas. This distress call was communicated to all the ships transiting in the areas, which included the Sea Watch 3 and the Ras Al Jadar who belonged to the Libyan Coast Guard (LYCG). Both the Sea Watch 3 and the Ras Al Jadar arrived at the scene about an hour later and were met by a capsizing dingy carrying around 150 people on board. Witnesses recall that the Ras Al Jadar did not help the migrants, instead they took pictures of them, cursed and threw things at them. Ras Al Jadar did not send down life jackets and witnesses state that when the boat arrived it created a strong water movement that led to the loss of around 20 people in the dingy.[131]

Meanwhile, the Sea Watch 3 directly started rescue procedures and took on-scene command over the situation, which the LYCG crew on board the Ras Al Jar objected to. It is unclear whether The MRCC ordered Sea Watch 3 or Ras Al Jadar to take on-scene command, however, there are transcripts from the conversation between MRCC and LYCG where MRCC directly asked the LYCG to take command which the LYCG agreed to.[132]

During the search and rescue operation, Sea Watch 3 continued to help the people in the dingy, trying to get them on board their ship. Ras Al Jadar, on the other hand, did not. After several persons had already passed away, the Ras Al Jadar, threw down a rope for people to climb up on. Some of the migrants, in the midst of the chaos, climbed on board Ras Al Jadar while some swam towards the Sea Watch 3. On board the Ras Al Jadar, some of the persons, including the applicants in the case, were tied down and beaten by the LYCG personnel. When the boat left the scene with the migrants on board, six of the applicants jumped overboard and were then retrieved by the Sea Watch 3. The other two applicants were taken to a camp in Nigeria where

[131] Ibid at. 388-389 and De Leo, Andreina, "*S.S: and Others v. Italy: Sharing Responsibility for Migrants Abuses in Libya",* PILPG, January 2020. Online: https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2020/4/23/ss-and-others-v-italy-sharing-responsibility-for-migrants-abuses-in-libya (Accessed 3 December 2020)
[132] Moreno-Lax, "*The Architecture of Functional Jurisdiction",* at. 389-390.

they were abused for over a month. After a month, they were offered either "voluntary repatriation" or indefinite detention. The applicants agreed to be returned to Libya.[133]

As Moreno-Lax also states in her article, in order to understand the case, one needs to look at the bigger picture of Italy-Libya relations.[134] Both Italy and the EU have invested greatly into the establishment of Libyan Search and Rescue Operations so that the Libyans can assume responsibility over rescue and stem irregular migration to the EU. Italy and Libya signed the Treaty of Friendship in 2008 where it states that the parties need to define actions to stem irregular migration flow. Furthermore, the Treaty also provides a provision calling on establishing an integrated system of frontier surveillance in Libya, where Italy would pay half of the costs and the EU would pay the other half.[135]

In 2017, the parties further developed a Memorandum of Understanding which broadened the measures mentioned above and established a stronger collaboration between the states whereby they would define the priorities, funding needs, implementation strategies and monitoring actions. Italy would also finance the detention centers in Libya and train the personnel.[136] In February of 2020 the Memorandum was extended for three more years.[137] Parallel to these agreements both Italy and the EU have politically supported the cooperation between the parties. Moreno-Lax argues that when taking all of these circumstances into consideration, Italy did exercise effective control

[133] Ibid at. 388-391.
[134] Ibid at. 390.
[135] Law No. (2) of 1377 FDP/2009 AD on ratifying the Treaty of Friendship, Partnership, and Cooperation between the Great Socialist People's Libyan Arab Jamahiriya and the Republic of Italy, art.19. Online: https://security-legislation.ly/sites/default/files/lois/7-Law%20No.%20%282%29%20of%202009_EN.pdf
[136] MOU: *Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic*, 2 February 2017.
[137] Amnesty International," Libya*: Renewal of migration deal confirms Italy's complicity in torture of migrants and refugees",* January 2020. Online: https://www.amnesty.org/en/latest/news/2020/01/libya-renewal-of-migration-deal-confirms-italys-complicity-in-torture-of-migrants-and-refugees/ (Accessed 23 October 2020)

over the situation and thus had jurisdiction over the conduct exercised by the Libyan coast guards.

4.3 The functional approach

Moreno-Lax begins to describe jurisdiction as a sovereign-authority nexus and not as something that should be based on territoriality. She argues that a state has jurisdiction if it exercises state power with a normative aspect and if they have a *de facto* political and legal authority. There would be an established link between the individual and the state if it can be proven that there is this type of normative power with a claim of legitimacy. "What matters to characterize state conduct as jurisdiction in the human rights sense is the underlying sovereign-authority nexus that connects the state to those within its might and the control it thereby purports to exercise, whether *de jure* or *de facto*, rather than the legality of its conduct."[138]. When the nexus has been established there is no need to determine the place of the conduct since it would seem quite contradictory to permit a state to conduct violations of human rights on the territory of another state which it would not be able to perpetrate within its own borders.[139]

She continues by stating that the principle of territoriality is not something she disagrees with. However, it should be seen as a rebuttable presumption if there exists a link between the conduct of the state and the abuse, regardless of whether the conduct took place within the state's territory. When there has been an established public-power relation, the "jurisdictional connection is activated, triggering the application of human rights obligations."[140].

The interpretation which Moreno-Lax stands behind is that the term "functional" is meant to symbolize the literal "functions" that the government exercises in the given case. It combines both the personal and spatial

[138] Ibid at. 397.
[139] Ibid at. 396-397.
[140] Ibid at. 398.

jurisdiction and focuses on the situational aspect. Merging both personal and geographical aspects creates the possibility that effective control over persons and territory will not be the only way to activate jurisdiction. Control over general policy areas or tactical operations should be taken under consideration as well. It can thereby create a nexus between the state and the individual even before violations have happened, through the planning and execution of policy and operational conduct over which the state has effective control.[141] The effective control should be measured in light of the state's influence on the resulting situation and what conditions it generates for the actual enforcement of the situation and not the physical control over the territory or the individual. Instances of legislative, executive and/or judicial activity should be equally important when establishing jurisdiction.[142]

In the case of *S.S. v. Italy*, Moreno-Lax argues that the Italian state has exercised elements of public power, both territorially and extraterritorially, both directly and through a proxy, and that taken together, these circumstances produce overall effective control. When establishing the jurisdictional link, the legal team divides the findings into three elements - *the impact element, the decisive influence element* and *the operational element*. The elements can separately or independently amount to the threshold of jurisdiction; however, it can also activate jurisdiction by combining all three elements and apply them in conjunction with each other.[143]

4.3.1 The impact element

The impact element is regarding the state's proximity and the predictability of the results when planning and exercising a state action. If the state's conduct is sufficiently proximate to the consequences which would amount to a violation of a right that is guaranteed in the Convention, and the

[141] Ibid at. 403.
[142] Ibid at. 404.
[143] Ibid at. 405.

consequences were known or ought to be known by the state, the conduct would meet the threshold to active jurisdiction within art. 1 ECHR.

The knowledge requirement is based on the facts the state had at the time of the event. It would be taken into account, when determining the jurisdictional link, if the state could reasonably foresee the results of their sovereign activity, be it legislative, executive or judicial. It is therefore not important if the act was performed within or outside of the state's geographical territory, but instead whether the act produced effects outside of the state's border. Considering information, instruction and guidance by the state is essential as well as if the state's conduct helped facilitate the whole process and created conditions for several violations to be perpetrated. If the violation was a direct consequence of state action or if there is a causal link between the action that occurred within a territory, and the negative impact on the human rights of persons outside its territory, there is a great possibility that it would amount to a state's positive, due diligence obligation which is attached to an individual when they are within a state's jurisdiction.[144]

4.3.2 The decisive influence element

The decisive influence element is designed to take into consideration when a state exercises jurisdiction through indirect means. Instead of state sovereignty being carried out through the state officials, it is instead implemented through the medium of a local administration in a third country, regardless of whether it be by legal consent, de facto authorization or none of them. It has been discussed in multiple case-law that when a third actor comes under the concerned state's decisive influence, the latter state can still maintain jurisdiction. The threshold for this type of jurisdiction is conditional on the third actor having a degree of dependency and support received from the state in question. If the third actor is continuingly existing based on the military, economic, financial and political support by the contracting state, it would entail that the same state remains responsible for the policies and

[144] Ibid at. 404-408.

actions conducted by such third actor. It would create a continuous and uninterrupted link of responsibility which would not be severed even if they did not have direct involvement in the specified violation.[145]

The decisive influence element has been aimed at the more spatial jurisdiction. However, Moreno-Lax argues that there are multiple components which demonstrate that Italy has influenced the policies and practices in correlation to elements of decisive influence. It should also be taken into account if the results were planned and expected by the contracting state and what the aim was of the support given to the third actor. If it could be established that the contracting state did have a decisive influence element in regard to the violation, it would not need to have been through the direct involvement of the same state but instead conducted by a third proxy.[146]

4.3.3 The operative involvement element

The last element - the operative involvement element - is applied when determining how much the contracting state has been involved in the actual operational parts of the overall situation. It is based on the public power doctrine that is accepted in the Al-Skeini case. When a state exercises *some* of the public powers which are normally exercised by another party, the state could maintain jurisdiction.[147]

Operative involvement can include, but is not limited to, dispatch and coordination of resources, developing plans and policies, having a continuing dialogue with the third actor, debriefing and briefing of personnel etc. If the state has assumed effective authority over individual operations, they are responsible for violations within the policy areas that are under its control. In order to meet the threshold of the operative involvement element, the contracting state needs to have quite a high level of involvement in both specific operations and the overall management of operations. It is not

[145] Ibid at. 409.
[146] Ibid at. 408-411.
[147] Ibid at. 411–412.

necessary for the state to have detailed control over the very specific act that is conducted by individuals, but instead to determine if the state has effective control over the situation at hand.[148]

4.4 Concluding remarks

Recent decisions from the ECtHR have pivoted around the interpretation of the meaning of jurisdiction within art. 1 ECHR. The Court has opened up towards a functional jurisdiction where it does not solely look at the specific incident but also analyzes the overall situation and take it into consideration. Moreno-Lax and her legal team in the pending case of *S.S. v. Italy* build their claim on this new interpretation and pushes the Court to go even further. They argue that there is no longer a need to distinguish between the spatial and personal model, or territorial and extraterritorial, but instead evaluate the sovereign-authority nexus between the state and the individual in the specific situation through an exercise of public power.

In order to determine *effective control*, it can both be through direct physical constraint and through indirect forms of control. The Court should also evaluate the situation as a whole which includes both *de jure* and *de facto* elements of control. When determining jurisdiction, it is important to include the planning and deploying as well as what the state knew or ought to have known before the conduct, regardless of whether it is through its own agents or by a proxy third actor. In order to determine functional jurisdiction and the sovereign-authority nexus, Moreno-Lax applies three different factors, the impact, decisive influence and operative involvement factors. By analyzing the three elements separately as well as together, the Court can make a decision whether or not the state in question had jurisdiction over the specific conduct.

Moreno-Lax emphasizes that functional jurisdiction is not about minimizing international cooperation and multinational agreement, but about the parties

[148] Ibid at. 411-413.

needing to observe their human rights commitments when international agreements are determined.[149] If the Court would make a decision in favor of Moreno-Lax interpretation and determine that functional jurisdiction is a legit tool to apply when establishing the threshold set out in art. 1 ECHR, it could help build other positive cases in the future and "counter the changing means through which states perpetrate violation offshore"[150].

[149] Ibid at. 413-416.
[150] Ibid at. 416.

5 Applying functional jurisdiction to offshored privatized detention centers

5.1 Introduction

Functional jurisdiction and its applicability, as put forward by Moreno-Lax is based on the relationship between two states. In the case of *S.S. v. Italy,* it is relating to the *de facto* and *de jure* nexus between Italy and Libya and how the conduct performed by Libyan personnel on board a Libyan ship may still be attributable to the state of Italy through a sovereign-authority nexus. If the ECtHR agrees with Moreno-Lax' interpretation and accepts the notion of the functional jurisdiction, it would not only have a positive impact on protecting human rights in state to state relations, it could also be of importance in situations of partnership between states and NSA.

In today's international legislation concerning state responsibility, there is a high threshold for effective control, jurisdiction and the overall attribution of acts perpetrated by private actors. It has been demonstrated to the reader in chapter three that while we have provisions that open up for the possibility to include these types of circumstances and allow for broader interpretation, this yet remains to happen. This uncertainty creates an opportunity for states to distance themselves from the responsibilities that come with every individual within their jurisdiction. It would be an incitement for states to have better human rights policies and structures if it would be determined that acts perpetrated by private companies would still be attributed to the state.

It needs to be determined that a state is just as responsible for the conduct in the offshored privatized detention centers as they are if the centers would be situated on their territory and managed solely by state agents. The use of offshored privatized detention centers does not create a *de facto* state immunity.

After having discussed the *de lege lata* and what the functional approach entails as well as the aims of its applicability in the previous chapter, this chapter will now analyze *de lege ferenda* and if the functional approach could also be applied to state-NSA relations. By making an analogy on the functional jurisdiction one can determine if it can be applied to regulate state responsibility for the harm caused by private actors.

5.2 The relationship between ECtHR and ARSIWA

Before applying the functional approach to offshored privatized detention centers, there is need to address the relationship between the ECtHR and ARSIWA and if the framework could be of substance when discussing the aforementioned issue. The articles enshrined in ARSIWA have been used increasingly since its adoption in 2001. The instrument has been reference 47 times in ECtHR cases and 18 times by the ICJ. There have also been references in opinions; 102 by the ICJ and 70 by the ECtHR. ARSIWA remains, as general international law, relevant to many decisions attributed to different International Courts. ECtHR case law is however, as has been demonstrated previously, departing from certain ARSIWA principles and is adopting a broader interpretation of rights that is contained in ECHR.[151]

While the ICJ has on multiple occasions engaged art. 8 ARSIWA and its applicability on effective control, ECtHR rarely mentions the article in their decisions. This could indicate that the effective control test, as described by the ICJ, raises some challenges in practice and that the ECtHR is instead leaning towards a broader interpretation of certain rights. The control test set forth by the ICJ has a high threshold in order to hold states responsible, especially when the conduct is perpetrated extraterritorially or felt outside the state border. This interpretation is quite restrictive compared to the ECtHR which has a higher degree of judicial integration in this aspect. It is therefore difficult to include ARSIWA in finding more compatibility with the

[151] Garciandia, "*State responsibility and positive obligations in the European Court of Human rights,* at. 178.

functional jurisdiction put forth by Moreno-Lax. The interpretation is more in line with the ECtHR trend toward a more inclusive interpretation of state responsibility.[152] If the ECtHR rules in favor of a functional interpretation of jurisdiction, hopefully it could be seen as an incentive for the ICJ to clarify certain principles enshrined in ARSIWA, in order to find a more coherent and structured framework that other courts could also benefit from.

5.3 Applying functional jurisdiction to state-PMSC relations

Functional jurisdiction is first and foremost a possible tool to hold a state responsible for conducts when the state does not have any direct contact with the individual or the situation. While the *S.S. v. Italy* case is about state to state partnership, one can see many similarities with the state-PMSC partnership that is evolving in detention centers for migrants. There are indications that states are exercising elements of public power territorially and extraterritorially, both directly and through the delegated PMSC. The question is if an application by analogy of functional jurisdiction to offshored privatized detention centers could amount to an established sovereign-authority nexus, and subsequently determine state responsibility for the acts and omissions conducted in the detention centers.

The coming sections include an application by analogy of functional jurisdiction as well as an analysis whether there is a possibility of holding states responsible for the conduct of PMSC personnel on extraterritorial detention centers. The sections will be divided into the same divisions used by Moreno-Lax – the impact, the decisive influence and the operative involvement element.

[152] Ibid at. 182-183.

5.3.1 The impact element

As mentioned above, the impact element is based on the knowledge that the state had at the time. I believe this can be divided into two aspects. The first concerns the states knowledge of the specific PMSC. The background information they possess in regard to how the companies manage other detention centers or other functions that is of importance to the state when determining if the company should manage the centers. The second aspect is based on the overall situation that derives from the outsourcing and offshoring of detention centers.

Regarding the first aspect, I argue that it has to be determined on a case by case basis. The reason behind this is that different PMSC have different backgrounds. We can for example take the company G4S, which has been mentioned above, as an example. The company have been in multiple reports regarding abuse and human rights violations, and there are strong arguments that a state could predict the results of delegating the functions to this specific company. If the state would outsource the functions to a company that has such an undisputed reputation of human rights abuses, it would be possible to argue that the state knew or at least ought to have known that there is a risk of abuses being perpetrated by the PMSC personnel. The state's proximity to the results are also within the threshold since the occurred abuses are the direct consequence of the state's direct involvement in the contractual agreement between the state and the company.

It could be argued that if a company does not have a reputation as such, and there are no reports of a systematic structure of abuse toward the migrants within the company, the predictability towards the results is not fulfilled. Therefore, there is a need to determine this on a case-by-case basis since an evaluation should be conducted to determine both the history of the specific company and what the state knew at the time when planning and exercising the state action. Furthermore, in order to strengthen the argument of the abuse being of such a degree that it enables the state to caution on delegating

migration management to the specific private company, the abuses cannot be sporadic and isolated but instead based on a systematic structure of abuses conducted by multiple personnel members with no clear accountability mechanisms within the company. The greater evidence there are of a company having a systematic structure of violence by its personnel which the state knew or ought to have known about, the greater possibility it is of activating a state's responsibility.

The second aspect is in regard to the overall situation of offshored privatized detention centers and if it could have some substance in the predictability element. It can be said that abuse perpetrated by PMSC personnel is not an isolated or sporadic occurrence but has instead been proven to occur in multiple private detention centers. If considering the only precedent where a state has both outsourced and offshored centers, which is Australia, it does not give a positive outlook on the ensuring of human rights of the detained migrants. Taken in conjunction with the systematic abuses that do occur by PMSC in privatized centers situated within state borders, it strongly suggests that states ought to have known the possibility that their actions could have adverse human rights consequences, which would at least activate a requirement of due diligence when offshoring and outsourcing detention centers.

It could be difficult to argue that the second scenario, on its own, amounts to the threshold of jurisdiction or attribution. However, as Moreno-Lax argue, it is important to consider the situation *in toto,* including the information the state had when actively signing a contract with a PMSC. If the state, in addition, decides to delegate the management to a company that has a record of systematic abuses of human rights, it would at least oblige a state to have clear accountability and monitoring mechanisms and make sure that the individuals are protected within their jurisdiction. It would enable the state's positive due diligence obligation to protect against the risk of abuse towards the migrants.

5.3.2 Decisive influence element

If we continue to the decisive influence element, the aim is to consider when the state exercises jurisdiction through indirect means. The state does not need to physically manage the centers, they could instead carry out state sovereignty through a third actor. As Moreno-Lax mentions, the state could exercise its state functions by legal consent or de facto authorization. In light of offshoring, the state has gone into an agreement with the PMSC who manages the centers. It is therefore based on legal consent. The element is also conditional on the PMSC having a degree of dependency and support by the state in question.

One of the examples Moreno-Lax mentions is the economic and financial support given by a state. When a state goes into contract with a PMSC to manage a detention center, it is also conditional on the state's compensation attributed to the company in order to fulfil its duties. When a state announces their search for private companies to manage the centers, it is based on competition between the applicants. Who can manage the detention centers and at what cost? The company that wins the bid is given the agreed upon financial support from the state and can subsequently begin to execute its duties within the detention center. The company is therefore reliant on the state and without its financial support, the company would not be able to manage the detention center. The moment the state withdraws it financial support – the PMSC withdraws from the center.

Furthermore, we can establish a state's political support through multiple channels, such as, the active participation from the state to go into an agreement with a private company. Without the state's active consent, there would not be any delegation of migration functions. As has been mentioned in previous sections, states have publically endorsed the outsourcing and offshoring of detention centers. States are openly discussing both on how to create more opportunities to have reception centers on the external border of the EU and the continuation of outsourcing the migration management to

private companies. It is due to the political climate in many countries that outsourcing of migration management is as widespread as it is today. The UK, for example, has expressly stated that it wants to adopt a similar approach to the one in Australia. While EU member states may not be as straight forward as the UK, there was a clear political support to create a similar structure when they adopted the new migration pact.[153] Instead of the states contributing to the decrease of the abuses that are perpetrated by PMSC towards migrants, they are increasing their outsourcing possibilities and delegating more functions to private companies.[154]

What could be more difficult to demonstrate is the state's aim regarding the delegation of the centers to other countries and to PMSC. In the Italy-Libya cooperation, the aim of stemming irregular flows of migrants to Europe, especially to Italy, was explicitly stated in their documents and agreements. Even though Italy was not involved in each and every individual action, the comprehensive investment of Italy made the pull-backs a reality during 2017. However, in other cases of outsourcing and offshoring detention centers, the aim is not as explicit. State do not officially declare that the reason behind their new approach is to distance themselves from the migrants and avoid responsibility. Instead, the reason put forth by the states is to establish faster reception centers, and that it improves the migrants' overall treatment and conditions when reaching the external border.[155]

The aim of offshoring and privatization has been presented to be about the well-being of the migrants, while the actual results have clearly demonstrated different outcomes. There are however indications that the aim of UKs plans to offshore detention centers is part of the plan to discourage and deter

[153] See chapter 2.2 and 2.3 for a more in-depth explanation.
[154] Moreno-Lax, "*The Architecture of Functional Jurisdiction"*, at. 410.
[155] European Commission, "*A fresh start on migration: Building and striking a new balance between responsibility and solidarity*", Press Release 23 September 2020. Online: file:///Users/becca/Downloads/A_fresh_start_on_migration__Building_confidence_and_striking_a_new_balance_between_responsibility_and_solidarity_.pdf

migrants to seek asylum in the UK, all in line with the hostile environment approach. However, this has not been officially declared.

The states and the EUs reluctance to prescribe what the actual aim is for offshoring detention centers or their unwillingness to understand the actual results of such an approach could create difficulty in determining that the results of distancing themselves from the migrants and the responsibilities that comes with an individual were planned and expected. However, I believe, that a level of foreseeability by the states can be argued to a certain degree. The reason behind this is the widespread knowledge regarding the responsibility gap within privatized detention centers in the EU and also regarding Australia's offshore approach, and that this knowledge should be known or ought to be known by the states.

One element that can point to the states disregard for their human rights obligations is regarding the states argument that it is more cost-efficient for them to delegate the functions to private companies instead of state agents managing the centers. The aim of decreasing the expenses and the competition between PMSC regarding who can save more money, puts pressure on the companies and forces the companies to minimize their expenses in order to manage the centers on the specific budget. Consequently, the states' argument that it is more cost efficient for them to outsource their detention centers has the actual outcome of a worsening of the living conditions and safety within the detention centers, because the company's attempt to minimizing their expenses. The argument that it is not to distance themselves from the migrants but instead of lowering the costs of such centers is not a valid "excuse", since the well-known results is a worsening of the migrants living conditions.

In conclusion, I believe that while there is some difficulty in determining the aim of the state's decisions to offshore and privatize detention centers, it does not undermine the facts which speak for the states decisive influence element in these cases. While they do not have a direct involvement in the human

rights abuses that occurred, they are still responsible for its policies and actions and it is the state's economic and political support that creates a continuous and uninterrupted link of responsibility. The support opens up for the possibility to outsource and offshore the centers which subsequently creates a strong indication that the state exercise decisive influence over the company in a way that triggers jurisdiction. The state's direct participation in the outsourcing of management to private companies and putting pressure on them to make it as cost-effective as possible, exerts decisive influence over the overall implementation of offshoring private detention centers.

5.3.3 Operative involvement element

Lastly, we have the operative involvement element. The aim behind this element is to cover the situation where a state assumes some of another state's public powers, which normally pertains to the territorial state, through consent, invitation or acquiescence. In the case of *S.S. v. Italy*, the discussion is surrounding a state to state relationship and not regarding a relationship between a state and a private company. There is a difficulty in applying the operative involvement element and making an analogy in regard to finding state responsibility regarding a state-PMSC relation. The reason behind this is because PMSC is first and foremost not a state and the PMSC has been delegated to manage state functions from the offshoring state and not the territorial state which the public power pertains to.

However, one possible argument for the analogy to be applicable on the issue at hand is if we would apply it on the relationship between the two states and not between the state and the PMSC. It could be argued that the state who has offshored the detention center to the territorial state, has assumed state functions on the other states territory through consent, invitation or acquiescence. Through a (formal or informal) agreement with the territorial state, the state has taken over some state functions when they situate their detention centers on another state's territory and is in charge of who is incarcerated there, the personnel and the overall administration and

infrastructure of the center. Usually, the agreement does not explicitly determine who is in control of the detention center and who has the ultimate responsibility. Therefore, the indication of a state's involvement needs to be ascertained by the circumstance surrounding the agreement and not what is, or is not explicitly stated in the agreement.

The argumentation would thereby indicate that in finding state responsibility through the conduct of PMSC personnel, one would first have to determine the operative involvement element based on the relations between the two states in question. If one would determine that the state who has offshored the detention center have taken on state functions in another state and thereby assumed overall control over that area, one could in the next step discuss the relation between the state and the PMSC through the decisive influence and impact element. It would be applied as a first step in the determination of jurisdiction in light of art. 1 ECHR.

5.4 Concluding remarks

The aim of the functional jurisdiction approach is to analyze the situation *in toto,* taking in multiple aspects in order to determine the overall picture. The final goal is to establish whether there is an underlying sovereign-authority nexus connecting the state to the management of the migrants, regardless of the migrants being located outside of the state's borders as well as if the connection is "direct" or through a proxy.

When applying the functional approach on offshored privatized detention centers and analyzing if it could be applicable to find states responsible for the human rights abuses that are taking place within the centers, one can see many similarities with the case of *S.S. v. Italy*. While there are differences as well, it can be argued, that taking everything into consideration, there is a strong possibility of finding state responsibility through the functional approach.

As mentioned in the last section when determining the operative involvement element, instead of applying it directly to the state-PMSC relations, it would be applicable as a first step to determine the state to state relation. When discussing offshored detention centers, there will always be a link between the offshoring state, who wants to situate its detention center on another state's territory, and the territorial state. By firstly determining the states connection through the operative involvement element and analyzing how the offshoring state is taking control over the territory where the detention centers would be situated, one would acquire a better overview of the situation. Taking the state to state relation under consideration is in line with the foundation of the functional approach, which is to analyze the situation *in toto*, including other parties and circumstances which could contribute to the understanding of the situation. By including this element in the first step, one could determine and demonstrate the type of control the offshoring state has been attributed through the consent of the territorial state. It is in fact not the territorial state that has any control over the specific area, but has instead permitted the offshoring state to act out certain state functions on a part of their territory.

After having analyzed the state to state connection, the second step would be to analyze the impact and decisive influence element. As described earlier, the elements can be analogically examined on the state-PMSC relations and determine the type of control the state has over the situation. Based on the impact element, there are clear indications regarding the state's knowledge at the time of the planning and executing of offshored and privatized detention centers. While it needs to be determined on a case-by-case basis, there are strong indications that the state has knowledge about the augmented risk of human rights abuses when both offshoring and privatizing the detention centers. The state is also in close proximity of the results since the company's violation is a direct consequence of the state's action to go into a contractual agreement with the company in question.

In my opinion, one of the strongest arguments in favor of the assertion that a state has jurisdiction within the meaning of art. 1 ECHR is the decisive influence element. The PMSC has a strong dependency and support by the state, both financially, economically and politically. While the state does not have a direct involvement in the specific abuse that has occurred, they have carried out state functions through a third proxy - the PMSC. It is clear that their indirect involvement creates a continuous and uninterrupted link of responsibility and that their decisive influence over the company has strong indications of triggering jurisdiction.

In sum, I argue that if Moreno-Lax interpretation of functional jurisdiction is accepted by the ECtHR, it could be applicable through analogy to determine state responsibility when human rights abuses have occurred in an offshored privatized detention centers. By combining all three elements of functional jurisdiction and analyzing the situation *in toto*, and not only focusing on the specific event, the ECtHR would have a strong possibility of establishing a public power relation and activate jurisdiction, on a case-by-case basis. The state does not need the physical control over the detention center or the individual in order to trigger jurisdiction, but can instead have exercised such control through a third proxy, the PMSC, to produce overall effective control. Therefore, the state's outsourcing of extraterritorial detention centers does not include the outsourcing of their responsibilities toward the migrants who are detained there.

6 Conclusion

The purpose of the thesis has been to determine whether it is possible to hold states responsible for acts and omissions perpetrated by PMSC in offshored detention centers. The first research question is therefore if the current frameworks of ARSIWA and ECHR has the possibility to establish state responsibility. Chapter three examines both ARSIWA and ECHR and determines that while there is prospect towards a more functional and inclusive interpretation, it would be a near impossibility to determine state responsibility through our current frameworks.

ARSIWA has been proven to have a more restrictive and static interpretation. The threshold for effective and overall control is set high and only includes state responsibility for private actors in exceptional cases. ARSIWA is the leading framework when discussing and applying state responsibility and has been increasingly used by both national, regional and international courts since its adopting in 2001. However, when discussing responsibility for private actors, the interpretations has been quite stagnant and the ICJ has not expanded their interpretation when discussing extraterritorial conduct or effective control through private actors.

The ECtHR rarely mentions ARSIWA when discussing effective control and jurisdiction, and as mentioned above, the court's case law is departing from certain ARSIWA principles. Instead, in this matter, the court has leaned towards a more inclusive interpretation of certain rights. The case-law has moved towards a more functional and situational approach in the last years. While the legal framework in its current form is not enough to determine state responsibility for PMSC in offshored detention center, this progressiveness potentially opens up a door for a functional interpretation, as suggested by Moreno-Lax.

The second and third research question is examined in chapter four and five. The functional jurisdiction as interpreted by Moreno-Lax is described in relation to the pending case of *S.S. v. Italy.* The aim behind these chapters is to determine if it is possible to apply the functional jurisdiction approach by analogy to the state-PMSC relation in offshored privatized detention centers. While there are some differences between the partnership between two states and between a state and a private actor, there are also multiple important similarities. Applicability by analogy, however, has to be determined on a case-by-case basis which prevents me to draw the conclusion that a state will in every circumstance be held responsible for the acts and omissions that are perpetrated by PMSC personnel at an offshore detention center. However, I argue that it can be established that there is a strong indication that if the functional approach is approved by the ECtHR, it could also be applied by analogy to find state responsibility within offshore privatized detention centers.

As Moreno-Lax argues in her article, this new understanding of jurisdiction is not only directed towards migration by sea terrain but to multiple fields within international law where accountability gaps need to be closed. The aim is to clarify the limits of cooperation between parties which can contribute or lead to human rights abuses and determine a state's human rights obligations. It is therefore not limited to cooperation between states but between different parties when a state exercises contactless control over a situation.

While offshoring has not yet been applied in practice by EU member states, it is of great importance for the international and regional community to determine potential state responsibility. I believe that offshoring is an inevitable approach and one of the reasons for this inevitability is linked to the existing accountability gaps and the state's possibility to distance itself from the migrants, thus evading responsibility. Therefore, it needs to be legally determined that a state's human rights obligations extend to detention centers that are situated extraterritorially and managed by private actors. If the ECtHR decide in favor of the functional jurisdiction approach, it could

entail that the accountability gap in regard to state responsibility is filled before privatized offshoring by EU member states has even arisen.

If the legal conditions would be determined in a clear and concrete manner, it would force states to create better monitoring and accountability mechanisms to prevent human rights abuses that is perpetrated against migrants in offshore privatized detention centers. Therefore, there is a possibility for the ECtHR and the international community to make a clear statement regarding what offshoring and privatizing entails for individual states. Including the fact that the EU member states are equally responsible for the actions and omissions in their detention centers that are offshored and privatized, as they are for the centers that are within their territory and managed by public agents.

Bibliography

Books and edited collections

Arendt, Hannah, "*The Origins of Totalitarianism*", Penguin Classics, 2017.

Gammeltoft-Hansen, Thomas, "*Access to Asylum: International Refugee Law and the Offshoring and Outsourcing of Migration Control"* PhD Thesis, Aarhus University, 2009.

Gammeltoft-Hansen, Thomas, "*Private Actor Involvement in Migration Management",* In Nollkaemper, André and Plakokefalos, Ilias (eds.), *The Practice of Shared Responsibility in International Law,* Cambridge University Press, 2017.

Goodfellow, Maya, "*Hostile Environment: How immigrants became scapegoats*", Verso Books, 2019.

Majcher, Izabella, Flynn, Michael and Grange, Mariette, "I*mmigration Detention in the European Union – In the Shadow of the "Crisis*", European Studies of Population Vol. 22, Springer, 2020.

Noll, Gregor, "*Theorizing Jurisdiction*" in Anne Orford and Florian Hoffmann (eds.), Oxford Handbook of the Theory of International Law, Oxford University Press, 2016.

Sandgren, Claes, "*Rättsvetenskap för uppsatsförfattare: Ämne, material, metod och argumentation*", 4th Edition, Nordstedts Juridik, 2018.

Journal articles

Axster, Sabrina, "*A Tale of Two Countries: The Privatization of Immigrant Detention in Germany and the United States*", The American Institute for Contemporary German Studies at John Hopkins University, June 2017.

Carrera, Sergio and Guild, Elspeth, "*Offshore processing of asylum applications: Out of sight, out of mind?*", Center for European Policy Studies, January 2017.

Davitti, Daria, "*Beyond the Governance Gap: Accountability in Privatized Migration Control",* 2020, German Law Journal, 21(3).

De Boer, Tom, "*Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection*", Journal of Refugee Studies, March 2015, Volume 28, Issue 1, 118–134.

Garciandia, Rosana, "*State responsibility and positive obligations in the European Court of Human Rights: The contribution of the ICJ in advancing towards more judicial integration*", Leiden Journal of International Law (2020), 33, 177-187.

Moreno-Lax, Violeta, "*The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, S.S. and Others v. Italy, and the "Operational Model*"."", 2020, German Law Journal 21(3), 385-416.

UN documents and other materials

Crawford, James, "*Articles on Responsibility of States for Internationally Wrongful Acts*, United Nations Audivisual Library of International law, 2012. Online: https://legal.un.org/avl/pdf/ha/rsiwa/rsiwa_e.pdf

Report of the International Law Commission on the Work of Its Fifty-Third Session, (2001) 2 Year Book INT'L L. COMM'N 31, UN. Doc. A/CN.4/SER.A/2001/Add.1. Online: https://legal.un.or/l/ublication/earbook/nglis/lc_2001_v2_p2.pdf.

UN General Assembly, "*Use of mercenaries as a means of violating human rights and impeding the exercise of the rights of people to self-determination*", *immigration and border management on the protection of the rights of all migrants*", Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, 4 August 2017, A/72/286.

UN General Assembly, "*Impact of the use of private military and security services in immigration and border management on the protection of the rights of all migrants*", Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, 9 July 2020, A/HRC/45/9.

UNHRC, Opinions adopted by the Working Group on Arbitrary Detention at its seventy-eighth session, 19-28 April 2017: *Opinion No. 28/2017 concerning Abdalrahman Hussein (Australia)*, 16 June 2017, A/HRC/WGAD/2017/28.

UNHRC, Opinions adopted by the Working Group on Arbitrary Detention at its seventy-ninth session, 21-25 August 2017: *Opinion No. 42/2017 concerning Mohammad Naim Amiri (Australia)*, 22 September 2017, A/HRC/WGAD/2017/42.

UNHRC, Opinions adopted by the Working Group on Arbitrary Detention at its eightieth session, 20-24 November 2017: *Opinion No. 71/2017 concerning Said Imasi (Australia)*, 21 December 2017, A/HRC/WGAD/2017/71.

UNHRC, Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17-26 April 2018: *Opinion No. 21/2018 concerning Ghasem Hamedani (Australia)*, 29 May 2018, A/HRC/WGAD/2018/21.

UNHRC, Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17-26 April 2018: *Opinion No. 20/2018 concerning William Yekrop (Australia)*, 20 June 2018, A/HRC/WGAD/2018/20.

UNHRC "*Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru",* 24 April 2017, A/HRC/35/25/Add.3.

UNHRC, "*Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru: comments by the State*", 17 May 2017, A/HRC/35/25/Add.4.

Reports from other organizations

Amnesty International," Libya*: Renewal of migration deal confirms Italy's complicity in torture of migrants and refugees",* January 2020. Online: https://www.amnesty.org/en/latest/news/2020/01/libya-renewal-of-migration-deal-confirms-italys-complicity-in-torture-of-migrants-and-refugees/ (Accessed 23 October 2020)

Arbogast, Lydie, MigrEurop, "*Migrant detention in the European Union: A thriving business*", July 2016. Online: https://www.migreurop.org/IMG/pdf/migrant-detention-eu-en.pdf.

De Leo, Andreina, "*S.S: and Others v. Italy: Sharing Responsibility for Migrants Abuses in Libya",* PILPG, January 2020. Online: https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2020/4/23/ss-and-others-v-italy-sharing-responsibility-for-migrants-abuses-in-libya (Accessed 3 December 2020)

European Asylum Support Office (EASO), "*EASO Asylum Report 2020: Annual Report on the Situation of Asylum in the European Union".* Online*:* https://easo.europa.eu/sites/default/files/EASO-Asylum-Report-2020.pdf

European Migration Network, "*The use of detention and alternatives to detention in the context of immigration policies – Synthesis Report for the EMN Focused Study 2014*", 2014. Online: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/irregular-migration/00_synthesis_report_detention_study_final.pdf

Flynn, Michael, "*UK: Plans Replicate Australia's Maligned Offshore Detention Regime Ignore a Long History of Failure and Suffering*", Global Detention Project, October 2020. Online: https://www.globaldetentionproject.org/uk-plans-to-replicate-australias-maligned-offshore-detention-regime-ignore-a-long-history-of-failure-and-suffering (Accessed 15 October 2020)

Flynn, Michael and Cannon, Cecilia, "*The privatization of immigration detention: Towards a global view*", A Global Detention Project Working Paper, September 2009. Online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2344196

Garcia Bochenek, Michael, "*Leaked Nauru Files Show Horrors of Australia's Refugee Detention System: Canberra Should Close Operations on Nauru",* Human Rights Watch, August 2016, Online: https://www.hrw.org/news/2016/08/10/leaked-nauru-files-show-horrors-australias-refugee-detention-system (Accessed 24 October 2020)

Global Detention Project, "*Country Report, Immigration Detention in Germany: From open arms to public backlash",* August 2020.

Global Detention Project, *"United Kingdom: An Overview",* 1 October 2020. Online: https://www.globaldetentionproject.org/countries/europe/united-kingdom

Guild, Elspeth, Commissioner for Human Rights, "*Criminalisation of Migration in Europe: Human Rights Implications*", CommDH/IssuePaper(2010)1. Online: https://rm.coe.int/16806da917

Lethbridge, Jane, "*Privatization of Migration and Refugee Service and Other Forms of State Disengagement*", Public Services International Research Unit, March 2017. Online: https://www.epsu.org/sites/default/files/article/files/PSI-EPSU%20Privatisation%20of%20Migration%20%26%20Refugee%20Services_EN.pdf

Markard, Nora, "*Paper doesn't blush: The Commission presents a plan that does nothing to address the realities at the EU borders",* Heinrich Böll Stiftung, October 2020. Online: https://eu.boell.org/en/2020/09/30/paper-doesnt-blush-commission-presents-plan-does-nothing-address-realities-eu-borders#_ftnref7 (Accessed 20 October 2020)

Mohamed, Charmain, "*The bravery of those who speak out from Manus Island will go down in history, Amnesty* International, 21 November. Online: https://www.amnesty.org/en/latest/news/2018/11/the-bravery-of-those-who-speak-out-from-manus-island-will-go-down-in-history/ (Accessed 10 November 2020)

Phillips, Janet, *The 'Pacific Solution' revisited: a statistical guide to the asylum seeker caseloads on Nauru and Manus Island*, Parliament of Australia – Department of Parliamentary Services, September 2012. Online: https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1893669/upload_binary/1893669.pdf;fileType=application/pdf.

Refugee Council of Australia, "*Australia's offshore processing regime: The facts*", May 2020. Online: https://www.refugeecouncil.org.au/offshore-processing-facts/ (Accessed 13 November 2020)

Ruy, Donatienne and Yayboke, Erol, "*Deciphering the European Union's New Pact on Migration and Asylum",* Centre for Strategic and International Studies, September 2020. Online: https://www.csis.org/analysis/deciphering-european-unions-new-pact-migration-and-asylum (Accessed 4 October 2020)

Supreme Court of Victoria, "*Kamasaee v. Commonwealth of Australia and Ors: Statement related to the Manus Island Detention Center Class Action*", March 2018. Online: https://www.supremecourt.vic.gov.au/news/kamasaee-v-commonwealth-of-australia-and-ors

Official documents

Council of Europe, "*Guide on Article 1 of the European Convention on Human rights: Obligation to respect human rights – Concepts of "jurisdiction" and impunity",* Updated on 31 December 2019. Online: https://www.echr.coe.int/documents/guide_art_1_eng.pdf

Council of Europe, "*The European Convention on Human Rights – A living Instrument",* 2020. Online: https://www.echr.coe.int/Documents/Convention_Instrument_ENG.pdf

Council of the EU, "*EU Turkey statement, 18 March 2016",* Press Release 144/16.

Crawford, James, "*Articles on Responsibility of States for Internationally Wrongful Acts*, United Nations Audivisual Library of International law, 2012. Online: https://legal.un.org/avl/pdf/ha/rsiwa/rsiwa_e.pdf

European Asylum Support Office, "*Malta-Valletta: Provision of security services in Greece 2017/S 045-081807: Contract award notice*", 2017. Online: https://www.easo.europa.eu/sites/default/files/2017-OJS045-081807-en-ts.pdf

European Asylum Support Office, "*List of contracts awarded by the European Asylum Support Office in 2019 in accordance with Point 3.3 of Annex I to the Financial Regulation applicable to the general budget of the Union*" Online: https://easo.europa.eu/sites/default/files/easo-contracts-awarded-2019.pdf

European Commission, "*A fresh start on migration: Building and striking a new balance between responsibility and solidarity*", Press Release 23 September 2020. Online: file:///Users/becca/Downloads/A_fresh_start_on_migration__Building_confidence_and_striking_a_new_balance_between_responsibility_and_solidarity_.pdf

Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues, 29 August 2012.

Memorandum of Understanding Between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to, and Assessment and Settlement in, Papua New Guinea of Certain Persons, and Related Issues, 8 September 2012.

Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic, 2 February 2017.

The Senate Legal and Constitutional Affairs Committee secretariat, "*Serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre*", April 2017.

International legal instruments

Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No.10 (A/56/10), chp.IV.E.1.

Law No. (2) of 1377 FDP/2009 AD on ratifying the Treaty of Friendship, Partnership, and Cooperation between the Great Socialist People's Libyan Arab Jamahiriya and the Republic of Italy.

UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series, vol. 189, art. 31(1).

Newspaper articles

Davidson, Helen, "*Former Manus Island detainee tells UN 'Human being are being destroyed',* The Guardian, 27 June 2020. Online: https://www.theguardian.com/australia-news/2019/jun/27/former-manus-island-detainee-tells-un-human-beings-are-being-destroyed (Accessed 10 November 2020)

Evershed, Nick, Lui, RI, Farrell, Paul and Davidson, Helen, "*The lives of asylum seekers in detention detailed in a unique database",* The Guardian. Online: https://www.theguardian.com/australia-news/ng-interactive/2016/aug/10/the-nauru-files-the-lives-of-asylum-seekers-in-detention-detailed-in-a-unique-database-interactive (Accessed 22 November 2020)

Farrell, Paul, "*Immigration department suppressed detention contractor's name due to boycotts*", The Guardian, March 2017. Online: https://www.theguardian.com/australia-news/2017/mar/29/immigration-department-suppressed-detention-contractors-name-due-to-boycotts (Accessed November 20)

Farrell, Paul, Evershed, Nick and, Davidson, Helen, "*The Nauru files: cache of 2,000 leaked reports reveal scale of abuse of children in Australian offshore detention",* The Guardian, August 2016. Online: https://www.theguardian.com/australia-news/2016/aug/10/the-nauru-files-2000-leaked-reports-reveal-scale-of-abuse-of-children- in-australian-offshore-detention (Accessed 26 October 2020)

Hollingsworth, Julia and Watson, Angus, "*Taking Australia's asylum seekers was a 'deal with the devil:' former Nauru leader",* CNN, April 2019. Online: https://edition.cnn.com/2019/04/18/australia/nauru-former-president-intl/index.html (Accessed 10 November 2020)

Holt, Alison, "*What I saw when I went undercover: The 21-year old whistleblower at the immigration removal center",* BBC. Online: https://www.bbc.co.uk/news/resources/idt-sh/g4s_brook_house_immigration_removal_centre_undercover (15 November 2020)

Lewis, Paul, Pegg, David, Walker, Peter and Stewart, Heather, "*Revealed: No 10 Explores sending asylum seekers to Moldova, Morocco and Papa New Guinea",* The Guardian, September 2020. Online: https://www.theguardian.com/uk-news/2020/sep/30/revealed-no-10-explores-sending-asylum-seekers-to-moldova-morocco-and-papua-new-guinea (Accessed 3 October 2020)

MacGregor, Marion, "*EU trying to replicate Australia's Offshore Detention Centers, Refugee Activist Warns",* InfoMigrants, July 2020. Online:

https://www.infomigrants.net/en/post/25711/eu-trying-to-replicate-australia-s-offshore-detention-centers-refugee-activist-warns (Accessed 23 September 2020)

Stevis-Gridneff, Matina, "*Europe Keeps Asylum Seekers at a Distance, This Time in Rwanda*", The New York Times, September 2019. Online: https://www.nytimes.com/2019/09/08/world/europe/migrants-africa-rwanda.html (Accessed 15 November 2020)

Witschge, Loes, "*European proposals to outsource asylum centres condemned",* Aljazeera, June 2018. Online: https://www.aljazeera.com/news/2018/06/28/european-proposals-to-outsource-asylum-centres-condemned/?gb=true (Accessed 20 November 2020)

Tables of cases

Belden Norman Namah MP v Hon Rimbink Pato, National Executive Council and the Independent State of Papua New Guinea, SCA No. 84 of 2013, Supreme Court of Justice (Papua New Guinea), 26 April 2016.

ECtHR, *Al-Jedda v. The United Kingdom*, Application No. 27021/08, 7 July 2011.

ECtHR, *Al-Skeini and Others v.* The United Kingdom, Application no. 55721/07, 7 July 2011.

ECtHR, *Bankovic and Others v. Belgium and 16 other states*, Grand Chamber Decision as to the admissibility of Application no. 52207/99, 12 December 2001.

ECtHR, *Issa and Others v. Turkey*, Application no. 31821/96, 16 November 2004.

ECtHR, *Loizidou v. Turkey*, Application no. 15318/89, 18 December 1996.

ICJ, Nicaragua v. United States of America, Military and Paramilitary Activities, Judgement of 27 June 1986, Merits.

ICTY, *Prosecutor v Tádic* (IT- 94-1-A), Appeals Chamber, Judgment of 15 July 1999.

Majid Karami Kamasaee v The Commonwealth of Australia and Ors [2017] VSC 537.