Leiden Journal of International Law (2017), 30, pp. 49–70
 doi:10.1017/S0922156516000625

INTERNATIONAL LAW AND PRACTICE

Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context

SEUNGHWAN KIM*

Abstract

The principle of *non-refoulement* found in the UN Convention on the Status of Refugees has been widely regarded as the core element of the international refugee protection regime. However, in the recent era of restrictive external migration controls, its significance and ambit diminished to the extent that states began to regard it as a general moral principle that imposed only narrowly defined legal constraints. In particular, interception or interdiction of refugees on the high seas came to be regarded as activities falling outside the legal ambit of the *non-refoulement* obligation. However, in Europe, this has begun to change. The *non-refoulement* obligation found in Article 3 of the European Convention on Human Rights (ECHR) has been recognized as a legal constraint on state sovereignty in relation to migration controls on the high seas. This article scrutinizes how the developing concept of jurisdiction in human rights law, particularly as found in the ECHR, has expanded the scope of application of the principle of *non-refoulement*, and presents some important implications. The concept of state sovereignty has begun to undergo a paradigm shift that places extraterritorial human rights concerns relating to external migration controls squarely within a legal rather than merely a moral framework.

Keywords

European Convention on Human Rights; extraterritorial jurisdiction; migration controls at sea; non-refoulement; refugee law

1. INTRODUCTION

> No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened . . .[1]

* Ph.D, Faculty of Law, University of Victoria, BC, Canada [shkim318@hotmail.com]. I would like to thank Professor Donald Galloway for his detailed comments on the article as well as assistance with English expressions and idioms. I also thank Professor Scott Watson and the anonymous reviewers for their comments on the article. This article is a revised and extended version of a paper prepared for the International Human Rights Law course at the University of Victoria in April 2013, titled 'The Principle of *Non-Refoulement* on the High Seas'.

[1] 1951 Convention relating to the Status of Refugees, 189 UNTS 137, Art. 33(1).

The principle of *non-refoulement* has long been recognized as the central principle of international refugee law. Regrettably, major refugee-intake countries have denied its extraterritorial applicability in the conduct of external migration controls such as interdiction or interception of refugees on the high seas.[2] However, the European Court of Human Rights (ECtHR) in *Hirsi* has successfully challenged such state practices by expanding the scope of application of the *non-refoulement* obligation beyond state territory.[3]

The principle of *non-refoulement* is enshrined in various European instruments. Typical examples are Article 19(2) of the Charter of Fundamental Rights of the European Union and Article 78(1) of the Treaty on the Functioning of the European Union.[4] In the context of joint-maritime operations at sea co-ordinated by Frontex, EU Regulation 656/2014 also ensures respect for the principle of *non-refoulement*.[5] Moreover, the principle of *non-refoulement* is regarded as binding in the course of EU military operations against human smuggling or trafficking in the southern central Mediterranean (EUNAVFOR MED), launched in June 2015.[6] This article exclusively focuses on the principle of *non-refoulement* under the European Convention on Human Rights (ECHR).[7]

It examines how the shift in judicial analysis of the principle of *non-refoulement* under the ECHR has occurred. The shift may be attributable to the recent development of the concept of jurisdiction in human rights law. The point of departure is Article 1 of the ECHR, which reads as follows: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'[8] In the relevant cases, the ECtHR has duly recognized that jurisdiction within the meaning of Article 1 of the ECHR is established even beyond state territory in cases of physical custody of persons by state agencies. Since physical custody is implicated in interdiction operations at sea, the jurisprudence

---

2 A.M. North, 'Extraterritorial Effect of Non-Refoulement', *The International Association of Refugee Law Judges World Conference*, 7–9 September 2011, available at www.fedcourt.gov.au/publications/judges-speeches/justice-north/north-j-20110907 (accessed 22 January 2015); See George Bush, 'Executive Order 12807 – Interdiction of Illegal Aliens,' *The American Presidency Project*, 24 May 1992, available at www.presidency.ucsb.edu/ws/index.php?pid=23627 (accessed 22 January 2015), para. 2: '(2) The international legal obligations of the United States under the United Nations Protocol Relating to the Status of Refugees (U.S. T.I.A.S. 6577; 19 U.S.T. 6223) to apply Article 33 of the United Nations Convention Relating to the Status of Refugees do not extend to persons located outside the territory of the United States . . . '

3 *Hirsi Jamaa and Others v. Italy*, Decision of 23 February 2012, Application no. 27765/09 (*Hirsi*).

4 European Union, Charter of Fundamental Rights of the European Union, 18 December 2000 (2000/C364/01), O.J. 364/3; Consolidated Version of the Treaty on the Functioning of the European Union, 26 October 2012, O.J. C326/47; S. Saliba, 'Non-refoulement, push-backs and the EU response to irregular migration', 13 May 2015, *European Parliamentary Research Service*, available at epthinktank.eu/2015/05/13/non-refoulement-push-backs-and-the-eu-response-to-irregular-migration/ (accessed 23 September 2015).

5 European Parliament and Council Regulation (EU) No 656/2014 of 15 May 2014 on establishing rules for the surveillance of the external sea borders in the context of operational co-operation co-ordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, para. 10.

6 See Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), O.J. L 122/31, para. 6.

7 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, CETS No. 5 (ECHR).

8 Ibid., Art. 1.

https://doi.org/10.1017/S0922156516000625 Published online by Cambridge University Press

of the ECtHR has not only challenged the traditional concept of jurisdiction and state sovereignty, but it has also made a significant breakthrough in the protection of refugees intercepted by European states on the high seas.

In order to fully appreciate the developing concept of jurisdiction and its relevance in expanding the scope of application of the *non-refoulement* obligation, it is necessary to canvass the case law of the ECtHR that has recognized a wide range of accounts of jurisdiction beyond state territory. In particular, the *Hirsi* case is scrutinized as a case that, more than any other, has expanded the scope of application of the *non-refoulement* obligation even to the high seas in the context of the developing concept of jurisdiction in the ECHR. Furthermore, new potential to further expand the scope of application of the *non-refoulement* obligation is considered through an examination of the concept of state responsibility in public international law and the principles derived from the case law of the ECtHR. Before analyzing the case law of the ECtHR, it is important to acknowledge academic debates on the meaning of jurisdiction in human rights law. Because these debates provide a necessary context in which to read the case law of the ECtHR, the article begins there.

2. The meaning of jurisdiction under public international law and human rights law

In public international law, jurisdiction, as a core element of state sovereignty, has in general been regarded as being 'closely related to the national territory'.[9] Simply stated, the concept of jurisdiction has traditionally been regarded as territorial in nature.[10] Two components of jurisdiction have been recognized: prescriptive and enforcement jurisdiction.[11] Malcolm N. Shaw explains the two components as follows:

> It is particularly necessary to distinguish between the capacity to make law, whether by legislative or executive or judicial action (prescriptive jurisdiction or the jurisdiction to prescribe) and the capacity to ensure compliance with such law whether by executive action or through the courts (enforcement jurisdiction or the jurisdiction to enforce).[12]

In human rights law, including the ECHR, the meaning of jurisdiction has been the subject of considerable debate among scholars. In particular, scholars diverge in their opinions as to whether the notion of jurisdiction in human rights law is essentially territorial as found in general international law. On the one hand, it has been argued that the concept of jurisdiction found in human rights law should be distinguished from that found in general international law. For instance, Anja Klug and Tim Howe point out two different objectives of jurisdiction in general international law and human rights law:

---

9 M.N. Shaw, *International law* (2003), 572–3; R. Lawson, 'Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights', in F. Coomans and M.T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (2004), 83 at 87.

10 Shaw, *supra* note 9, at 573; Lawson, *supra* note 9, at 87.

11 M.N. Shaw, *International law* (2008), 645–6.

12 Ibid. Shaw also states that '[j]urisdiction, although primarily territorial, may be based on other grounds, for example nationality, while enforcement is restricted by territorial factors': ibid., at 646.

https://doi.org/10.1017/S0922156516000625 Published online by Cambridge University Press

> The objective of the traditional notion of State jurisdiction … is to delineate the spheres of different sovereign States in a way that it respects the sovereignty of each State … Jurisdiction in the context of human rights law, however … defines the applicability of human rights obligations, and thus opens the possibility to assess State responsibility under human rights law.[13]

By the same token, Conall Mallory has remarked that '[h]uman rights law jurisdiction does not deal with a State's rights, but with its responsibilities and obligations to which it has committed through accession to an international treaty'.[14] Marko Milanovic also argues that:

> … the notion of jurisdiction in human rights treaties relates essentially to a question of fact, of actual authority and control that a state has over a given territory or persons. 'Jurisdiction', in this context, simply means actual power, whether exercised lawfully or not – nothing more, and nothing less.[15]

Significantly, Klug and Howe suggest that in international human rights law, jurisdiction may be established by 'factual control (over territory or person), *de jure* jurisdiction, or "a personal link"'.[16] From this perspective, the notion of jurisdiction in human rights law is not primarily territorial, but it is established by factual evidence such as effective control over persons even outside states' territories.

On the other hand, other scholars argue for the necessity of retaining a territorial notion of jurisdiction in human rights law. Dominic McGoldrick argues that, '[t]he meaning(s) of extraterritorial application have to be within a general framework of jurisdictional analysis in public international law. They are questions of law, not of philosophy or ethics, although those disciplines may have affected the relevant law.'[17] The primacy of the territorial notion of jurisdiction in the context of human rights law has often been proposed against the background of 'potential clashes with foreign territorial jurisdictions'.[18] This perspective does not deny the notion of extraterritorial jurisdiction per se; however, it accepts extraterritorial jurisdiction only in exceptional cases.

---

[13] A. Klug and T. Howe, 'The Concept of State Jurisdiction and the Applicability of the Non-refoulement Principle to Extraterritorial Interception Measures', in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges* (2010), 69 at 98.

[14] C. Mallory, 'I. European Court of Human Rights Al-Skeini and Others v United Kingdom (Application no 55721/07) Judgment of 7 July 2011', (2012) 61 *International and Comparative Law Quarterly* 301, at 309.

[15] M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011), 41.

[16] Klug and Howe, *supra* note 13, at 76. The 'personal link' refers to the 'cause-and-effect' approach in which jurisdiction may be established on the basis of: '"personal link" between the State and the victim through the State's action'; for example, Klug and Howe observe in the *Alejandre* case (the Inter-American Commission case) that, '[i]n the absence of any territorial or physical personal control exercised by Cuba, it was the sheer act of bombing which established the "personal link" and brought the victims under the authority of Cuba': Klug and Howe, *supra* note 13, at 87–8; *Alejandre Jr., et al. v. Cuba*, Report No. 86/99, Case 11.589, Inter-American Commission on Human Rights (29 September 1999).

[17] D. McGoldrick, 'Extraterritorial Application of the International Covenant on Civil and Political Rights', in F. Coomans and M.T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (2004), 41 at 42.

[18] See generally T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (2011), 112. Mactavish J in *Amnesty International Canada v. Canada (Canadian Forces)* stated that, 'a "control of the person" test would be problematic in the context of a multinational military effort … Indeed, it would result in a patch work of different national legal norms applying in relation to detained Afghan citizens in different parts of Afghanistan, on a purely random-chance basis': *Amnesty International Canada v. Canada (Canadian Forces)*, 2008 FC 336, para. 274, [2008] F.C.J. No. 356.

3. Case law of the ECtHR

Banković[19]

In *Banković*, the applicants were citizens of the Federal Republic of Yugoslavia (FRY) who brought an action against NATO states on behalf of themselves and their deceased family members, arguing that NATO's air strike on Radio Televizije Srbije (RTS) and the concomitant deaths of their family members during the Kosovo crisis were, *inter alia*, breaches of the right to life (Article 2 of the ECHR).[20] The critical issue in this case was whether the extraterritorial activities of air strikes by NATO could trigger the application of the ECHR for NATO countries. Regarding jurisdiction, the Grand Chamber stated:

> In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention.[21]

The Court flatly rejected a 'cause-and-effect' concept of jurisdiction as proposed by the applicants.[22] The Court recognized four exceptional cases to territorial jurisdiction:[23] (i) extradition or expulsion; (ii) 'effective control' over a territory by military action;[24] (iii) activities of 'diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State';[25] and (iv) effects produced outside by an action inside the territories.[26] Having said that, the Court held that the case was inadmissible due to the failure to establish jurisdiction.

In the ensuing academic debates, Milanovic has argued that the Court's reasoning that the notion of jurisdiction found in Article 1 of the ECHR is essentially territorial is not only 'unsupported by anything produced by the Court' but also is in contradiction with 'the Court's own established jurisprudence'.[27] Milanovic grapples with models of extraterritorial jurisdiction found in the jurisprudence of the ECtHR, along with other human rights treaties, *which are not essentially territorial in nature*:

> First, there is what I will call the *spatial model* of jurisdiction – a state possesses jurisdiction whenever it has *effective overall control of an area* . . . . Secondly, there is the *personal*

---

19 *Banković and Others v. Belgium and Others*, Decision of 12 December 2001, Application no. 52207/99 (*Banković*).
20 Ibid., para. 28.
21 Ibid., para. 67.
22 Ibid., para. 75. With respect to the 'cause-and-effect' approach proposed by the applicants, the Court states that '. . . the applicants' submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention. The Court is inclined to agree with the Governments' submission that the text of Article 1 does not accommodate such an approach to "jurisdiction"': ibid. See also *supra* note 16.
23 See M. Giuffré, 'Watered-Down Rights on the High Seas: Hirsi Jamma and Others v Italy', (2012) 61 *International and Comparative Law Quarterly* 728, at 732.
24 *Banković*, *supra* note 19, paras. 68–71. The Court relies on the *Loizidou* case in which Turkey exercised 'effective overall control' over the concerned place by military actions which involved 30,000 army personnel: *Loizidou v. Turkey*, Decision of 23 March 1995, Application no.15318/89; *Loizidou v. Turkey*, Decision of 28 November 1996, Application no. 15318/89.
25 *Banković*, *supra* note 19, para 73.
26 Ibid., paras. 68–73.
27 Milanovic, *supra* note 15, at 22.

https://doi.org/10.1017/S0922156516000625 Published online by Cambridge University Press

> *model* of jurisdiction (or 'state agent authority') – a state has jurisdiction whenever it exercises *authority or control over an individual.*[28]

Milanovic's critique on the decision of the *Banković* court is persuasive, as case law before and after *Banković* appears to have been inconsistent with the territorial principle set out by the *Banković* court, or at least it gives such an impression.[29] The *Issa* case below stands at the heart of such an impression.[30]

On the other hand, Sarah Miller remarks that the *Banković* court introduced the primarily territorial notion of jurisdiction as a general thread found in both international law and the jurisprudence of the ECtHR, while fully recognizing exceptional cases to such a territorial notion of jurisdiction whether under public international law, e.g., the flag state jurisdiction, or in case law of the ECtHR.[31] With respect to critique of seemingly inconsistent case law relating to the concept of jurisdiction before and after *Banković*, Miller argues as follows:

> The European Court's seemingly inconsistent treatment of exceptions to territorial jurisdiction becomes a coherent body of law when these cases are viewed as manifestations of a territorially centred rule … By extending extraterritorial jurisdiction only to cases where a signatory state is essentially exercising functional sovereignty abroad, the Court strikes a balance between the twin, competing purposes of the Convention as a regional, European instrument and as a universalist charter for human rights.[32]

In this regard, Miller highlights the requirement of 'a strong nexus to state territory' in establishing jurisdiction of the ECHR.[33]

Issa v. Turkey[34]

In many respects, this case is as controversial as the *Banković* case. The fact that it was decided after *Banković* makes the concept of jurisdiction all the more confused. In 2004, the Chamber in *Issa* dealt with the alleged killings of Iraqi shepherds by Turkish soldiers. There are three distinctive features in this judgment that are recognized and highlighted by Lord Brown in *Al-Skeini*.[35] Firstly, the Court in *Issa* adopts a more or less flexible concept of control.[36] Secondly, and importantly, the Court relies on the decisions of international bodies such as the Inter-American Commission of Human

---

28 M. Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg', (2012) 23 EJIL 121, at 122 (emphasis in original).

29 See generally S. Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention', (2009) 20 EJIL 1223, at 1225; Mallory, *supra* note 14, at 304; See also *R. (on the application of Al-Skeini) v. Secretary of State for Defence* [2007] UKHL 26 (*Al-Skeini*), para. 67 per Lord Rodger: '[t]he problem which the House has to face, quite squarely, is that the judgments and decisions of the European Court do not speak with one voice'.

30 *Issa and Others v. Turkey*, Decision of 16 November 2004, Application no.31821/96 (*Issa*).

31 Miller, *supra* note 29, at 1232–4.

32 Ibid., at 1245. As for the concept of functional sovereignty, Miller suggests that '[i]n "effective control" cases, this functional sovereignty takes the form of *de facto* control over another state's territory. In diplomatic and consular cases, it takes the form of quasi-sovereign functions within an embassy or in relation to a signatory state's own citizens …': ibid., at 1245.

33 See ibid., at 1236.

34 *Issa, supra* note 30.

35 *Al-Skeini, supra* note 29.

36 *Issa, supra* note 30, para. 74: '[t]he Court does not exclude the possibility that, as a consequence of this military action, the respondent State could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq … '; see also *Al-Skeini* (UK case), *supra* note 29, para. 80.

https://doi.org/10.1017/S0922156516000625 Published online by Cambridge University Press

Rights and the Human Rights Committee (HRC), whose jurisprudence has developed a conception that is closely related to a 'personal model' of jurisdiction in Milanovic's terms.[37] Thirdly, the Court focuses on 'the activity of the contracting state, rather than on the requirement that the victim should be within its jurisdiction',[38] which gives the impression that the Court in *Issa* may have confused jurisdiction with state responsibility, a distinction that is discussed below.[39]

Although Milanovic has argued that the *Issa* court 'endorsed the personal model of jurisdiction in addition to the spatial one',[40] Miller vehemently opposes this view of the *Issa* Court, stating that:

> Under the logic of *Issa*, jurisdiction is not primarily territorial; a state is bound by the Convention wherever it acts, and its obligations abroad are no different from its obligations at home. This premise is diametrically opposed to the Court's conclusions in *Banković* . . . [41]

The stark discrepancy in opinions regarding the concept of jurisdiction between Milanovic and Miller is hardly surprising, having regard to a wide range of decisions of the ECtHR.

3.1 The continuing debate on the meaning of jurisdiction in case law after *Banković*

In 2005, in *Öcalan* v. *Turkey*,[42] the Grand Chamber held that:

> [i]t is common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish *authority* and therefore within the 'jurisdiction' of that State . . . even though in this instance Turkey exercised its *authority* outside its territory.[43]

It appears that the Court endorsed the 'personal model' adopted by the *Issa* court above.[44] In 2009, the ECtHR in *Al-Saadoon* held that the UK government should prohibit the transfer of the applicants in Iraq, over whom it exercised 'exclusive control', to the Iraqi authorities.[45] In this case, the Court found a jurisdictional linkage as follows:

> The Court considers that, given the total and exclusive *de facto*, and subsequently also *de jure*, control exercised by the United Kingdom authorities over the premises in

---

37 *Issa*, *supra* note 30, paras. 71–5; *Al-Skeini* (UK case), *supra* note 29, para. 75; See Milanovic, *supra* note 28, at 122.

38 *Al-Skeini* (UK case), *supra* note 29.

39 See M.D. Evans, 'State Responsibility and the European Convention on Human Rights: Role and Realm', in M. Fitzmaurice and D. Sarooshi (eds.), *Issues of State Responsibility before International Judicial Institutions* (2004), 139 at 140; See M. Milanovic, 'Grand Chamber Judgment in Catan and Others' (2012) *EJIL:Talk!*, available at www.ejiltalk.org/grand-chamber-judgment-in-catan-and-others/ (accessed 23 January 2015).

40 Milanovic, *supra* note 15, at 183.

41 Miller, *supra* note 29, at 1228.

42 *Öcalan v. Turkey*, Decision of 12 May 2005, Application no. 46221/99 (*Öcalan*).

43 Ibid., para. 91 (emphasis added).

44 Milanovic, *supra* note 15, at 167 .

45 *Al-Saadoon and Mufdhi v. The United Kingdom*, Decision (admissibility) of 30 June 2009, Application no. 61498/08, (*Al-Saadoon*).

https://doi.org/10.1017/S0922156516000625 Published online by Cambridge University Press

> question, the individuals detained there, including the applicants, were within the United Kingdom's jurisdiction . . . [46]

The main issue in another important case, *Medvedyev*, is closely related to that of maritime interception.[47] In 2010, a Cambodia-registered ship, the *Winner*, was intercepted on the high seas by a French frigate for the purpose of implementing anti-drug measures under the agreement with the Cambodian government. Later, crew members brought an action against France, arguing that they suffered the deprivation of liberty while being detained on the *Winner* by French authorities. The Grand Chamber in *Medvedyev* held that:

> . . . as this was a case of France having exercised full and exclusive control over the *Winner* and its crew, at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France's jurisdiction for the purposes of Article 1 of the Convention . . . [48]

In other words, *de facto* effective control over persons and the vessel is sufficient to establish a jurisdictional link without *de jure* jurisdiction, e.g., the flag state jurisdiction.[49]

In light of these cases, it does appear that, after *Banković*, the ECtHR has not emphasized the territorial nature of jurisdiction as much as it did previously. In this regard, Lawson proposes a 'gradual approach to the notion of jurisdiction' under which the obligation to uphold the rights of the ECHR depends on the degree of effective control over territory or persons.[50] In contrast, Miller has argued that, '[t]he European Court has never found jurisdiction in cases involving a state's extraterritorial actions absent some preceding or subsequent nexus to the state's physical territory'.[51] Miller points out that the applicants in *Öcalan* were forced to return to the territory of Turkey and this fact gives rise to territorial nexus.[52] In fact, in *Medvedyev*, the concerned crew members also had been taken to the territory of France where they were convicted for drug-related charges.[53]

3.2 *Al-Skeini*:[54] The end of dispute?

In 2011, the Grand Chamber of the ECtHR in *Al-Skeini* attempted to clarify the issue of jurisdiction. In brief, the Court acknowledged all the case law that is seemingly inconsistent. It confirmed that jurisdiction under Article 1 of the ECHR is 'primarily territorial'.[55] The Court also recognized 'a number of exceptional circumstances' outside of territorial boundaries, which could give rise to the establishment of

---

46 Ibid., para. 88.
47 *Medvedyev and Others v. France*, Decision of 29 March 2010, Application no. 3394/03 (*Medvedyev*).
48 Ibid., para. 67.
49 Milanovic, *supra* note 15, at 162.
50 Lawson, *supra* note 9, at 84.
51 Miller, *supra* note 29, at 1236.
52 Ibid.; See M. O'Boyle, 'The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on "Life after Bankovic"', in F. Coomans and M.T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (2004), 125 at 134.
53 *Medvedyev*, *supra* note 47, paras. 15–26.
54 *Al-Skeini and Others v. The United King*dom, Decision of 7 July 2011, Application no. 55721/07 (*Al-Skeini*).
55 Ibid., para. 131.

https://doi.org/10.1017/S0922156516000625 Published online by Cambridge University Press

jurisdiction.[56] The Court acknowledged two critical exceptional categories: 'state agent authority and control' and 'effective control over an area'.[57]

Relevant to the current focus on external migration controls, under the title of 'State agent authority and control', the Court, importantly, recognized:

> … in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction. This principle has been applied where an individual is taken into the custody of State agents abroad.[58]

The Court explicitly endorses the *Issa*, *Al-Saadoon* and *Medvedyev* cases; all three cases share the fact that states exercised 'total', 'full' or 'exclusive' control over persons and places.[59]

The most significant statement of the Court in *Al-Skeini* is that, '[w]hat is decisive in such cases is the *exercise of physical power and control over the person in question*'.[60] In this statement, there is no nexus to the physical territory of a state. In addition, the Court emphasized that the exceptions 'must be determined with reference to the particular facts'.[61] In other words, ECtHR jurisprudence regarding jurisdiction is primarily based on facts rather than on a generalizable principle.[62]

In *Al-Skeini*, the claimants were relatives or family members of six Iraqi people who were allegedly killed or died due to mistreatment by British forces personnel. When this case was heard in the House of Lords in the United Kingdom, five alleged victims were held not to have been under the jurisdiction of the UK. Lord Rodger stated that the UK troops did not exercise 'effective control' over those who were killed in the course of military operations of British forces, even in the sense of *Issa*.[63] On the other hand, the Secretary of State conceded that the victim, Mr. Mousa, was within the ambit of jurisdiction of the ECHR as he was detained and severely beaten in a British military base in Iraq, which caused his death.[64]

However, the ECtHR overruled the decision of the House of Lords, even finding jurisdiction in relation to the applicants other than Mr. Mousa:

> … the United Kingdom (together with the United States) assumed in Iraq the *exercise of some of the public powers normally to be exercised by a sovereign government*. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised *authority and control* over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.[65]

---

56 Ibid.
57 Ibid., paras. 133–40.
58 Ibid., para. 136.
59 Ibid.
60 Ibid (emphasis added).
61 Ibid., para. 131.
62 O'Boyle, *supra* note 52, at 128.
63 *Al-Skeini* (UK case), *supra* note 29, para. 83.
64 Ibid., para. 61.
65 *Al-Skeini*, *supra* note 54, para.149 (emphasis added).

https://doi.org/10.1017/S0922156516000625 Published online by Cambridge University Press

'Authority and control' over persons is qualified by the circumstances in which the UK exercised the functions of 'the public powers normally to be exercised by a sovereign government'.[66] Milanovic rightly remarks that:

> ... the Court applied a *personal* model of jurisdiction to the *killing* of all six applicants, but it did so only *exceptionally*, because the UK exercised *public powers* in Iraq. But, *a contrario*, had the UK *not* exercised such public powers, the personal model of jurisdiction would not have applied.[67]

The decision in *Al-Skeini* may be interpreted as nothing but confirming all the case law in the past. In fact, the *Banković* court fully recognized the extraterritorial jurisdiction in the case where a contracting state 'exercises all or some of the public powers normally to be exercised by that Government' through 'the consent, invitation or acquiescence of the Government of that territory'.[68] However, significantly, the Court at least clarifies two things in relation to the scenario of interdiction of refugees at sea: (i) jurisdiction is not necessarily associated with a territorial nexus in the case of custody of a person on the vessel by a contracting state; and (ii) additional exceptional cases to the territorial nature of jurisdiction can be established according to facts (e.g., the level of control or influence) rather than fixed principles (e.g., territorial nature), which opens the door for the possibility of establishing jurisdiction in the case of a contracting state's indirect involvement in interdiction of refugees within the territorial waters of a third state.

3.3 *Hirsi Jamaa and Others* v. *Italy*[69]

The *Hirsi* case provides a meaningful point of contact between the developing concept of jurisdiction in the ECHR and the extraterritorial reach of the principle of *non-refoulement*. It is the *Hirsi* court's analysis of the concept of jurisdiction that has made it possible to expand the scope of the obligation of *non-refoulement* found in Article 3 of the ECHR. As the ECHR applies extraterritorially, so too does the *non-refoulement* obligation, which is embedded in Article 3 of the ECHR.

In 2009, about 200 migrants, including alleged asylum seekers and refugees, attempted to leave Libya for Italy by boat. On the high seas, however, they were intercepted by Italian coastguard and police vessels, and then were transferred onto Italian military ships. In the end, they were returned to Tripoli, Libya, without any process of identification, nor any attempt to determine claims for refugee status that may have been forthcoming. Later, 24 people of African origin who were among the returned group brought claims against Italy in the ECtHR, arguing that Italy had breached the ECHR and its Protocol by failing to secure their rights and freedoms, even though they were within its jurisdiction.[70]

The Court held that Italy was liable for breaching Articles 3 and 13 of the ECHR and Article 4 of Protocol No.4, as a result of the interdiction and its subsequent pushback

---

66 Ibid.
67 Milanovic, *supra* note 28, at 130 (emphasis in original).
68 *Banković*, *supra* note 19, para. 71 (footnotes omitted).
69 *Hirsi*, *supra* note 3.
70 Ibid.

https://doi.org/10.1017/S0922156516000625 Published online by Cambridge University Press

activities that occurred on the high seas.[71] With respect to the jurisdictional issue, the Court held that factual evidence established jurisdiction within the meaning of the ECHR in that 'the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities'.[72] The Court considered the fact that the applicants were transferred onto vessels flying Italian flags, which established *de jure* jurisdiction on the high seas according to international maritime law and the relevant domestic Italian laws.[73] Furthermore, the Court also recognized *de facto* jurisdiction based on factual evidence of exclusive control of the applicants by Italian military personnel.[74] Significantly, in this case, the Court did not require a territorial nexus in establishing jurisdiction; the interdicted migrants were not brought to the territory of Italy, but were pushed back to Libya from the high seas. In fact, the purpose of interdicting migrants on the high seas is to 'escape' from such a territorial connection in order to circumvent domestic legal constraints.[75]

Equally significant is the Court's analysis of the principle of *non-refoulement*, which it identified as an essential aspect of Article 3 of the ECHR.[76] In relation to an alleged breach of Article 3 of the ECHR, the Court states that:

> ... the Court's task is ... to ascertain whether there were sufficient guarantees that the parties concerned would not be arbitrarily returned to their countries of origin,

---

71 The ECHR, *supra* note 7, at Art. 3: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment', Art. 13: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity', Art. 4 of Protocol No. 4: 'Collective expulsion of aliens is prohibited.'

72 *Hirsi*, *supra* note 3, paras. 81, 146, 148, 156–8. Notably, James Crawford has critiqued the decision of the ECtHR in relation to the extraterritorial applicability of Art. 4 of Protocol No. 4 ('Prohibition of collective expulsion of aliens'). Crawford is adamant that Art. 4 of Protocol No. 4 has a 'territorial limitation' on the basis of the plain meaning of 'expulsion', 'the drafting history' of the provision of Art. 4, 'important norms of international law' including Art. 33 of the Refugee Convention, and the definition of 'expulsion' provided by the International Law Commission: J. Crawford, 'Chance, Order, Change: The Course of International Law (Volume 365)', *Collected Courses of the Hague Academy of International Law* (2013), paras. 347–53. Crawford is averse to the idea that the scope of applicability of Art. 4 of Protocol No. 4 is exclusively defined by Art. 1 of the ECHR, and, in particular, he contends that, '... collective expulsion of aliens is a serious breach of international law, and Article 4 is expressed as an absolute and non-derogable prohibition. As such, it must be interpreted narrowly and precisely. If any measure preventing groups of aliens from entering the territory of a Contracting State is prohibited, then the words of Article 4 cease to have meaning': Crawford, ibid., at 349–50. In general, the concept of 'limited jurisdiction' has been endorsed by various arbitral tribunals; for example, in the *Eurotunnel* case, an arbitral tribunal (that consists of 5 members, including Crawford himself) held that 'the Tribunal's jurisdiction is limited to claims which implicate *the rights and obligations of the Parties under the Concession Agreement* ...': Eurotunnel (*The Channel Tunnel Group Ltd and France-Manche S.A v. The Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland and le ministre de l'équipement, des transports, de l'aménagement du territoire, du tourisme et de la mer du Gouvernement de la République française*), Partial Award, 132 ILR 1 (2007), para. 153 (emphasis added); see V. Vadi, *Analogies in International Investment Law and Arbitration* (2015), at 102–3.

73 *Hirsi*, *supra* note 3, paras. 77–8.

74 Ibid., para. 80.

75 See generally M. Giuffré, 'State Responsibility Beyond Borders: What Legal Basis for Italy's Push-backs to Libya?', (2012) 24 *International Journal of Refugee Law* 692, at 693; Gammeltoft-Hansen, *supra* note 18, at 77; N. Frenzen, 'US Migrant Interdiction Practices in International and Territorial Waters', in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges* (2010), 375 at 393.

76 See also *Chahal v. The United Kingdom*, Decision of 15 November 1996, Application no. 22414/93, para. 80; See generally UN High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, January 2007, at 9 (footnote 42).

> where they had an arguable claim that their repatriation would breach Article 3 of the Convention.[77]

Judge Pinto De Albuquerque in the concurring opinion also recognized that:

> … the *non-refoulement* obligation can be triggered by a breach or the risk of a breach of the essence of any European Convention right, such as the right to life, the right to physical integrity and the corresponding prohibition of torture and ill-treatment …[78]

In order to ascertain whether there was a breach of Article 3, the Court in *Hirsi* examined various documents, including those of the UNHCR and various human rights bodies, and held that:

> … the Court considers that when the applicants were transferred to Libya, the Italian authorities knew or should have known that there were insufficient guarantees protecting the parties concerned from *the risk of being arbitrarily returned to their countries of origin*, having regard in particular to the lack of any asylum procedure and the impossibility of making the Libyan authorities recognise the refugee status granted by the UNHCR.[79]

In this regard, Italy was liable for breach of the principle of *non-refoulement*. The principle of *non-refoulement* was initially codified under Article 33 of the UN *Convention on the Status of Refugees* (The *Refugee Convention*), which provides that:

> No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[80]

Major refugee-intake countries such as the United States and Australia have denied that this provision has extraterritorial application to the scenario of interdiction on the high seas.[81]

The decision in *Hirsi* offers a challenge to such state practice by removing the principle of *non-refoulement* from its original context 'in the framework of international refugee law', and placing it within the context of human rights law relating to the high seas.[82] In human rights law, the scope of application of the *non-refoulement* obligation is not limited to states' territories. Since the principle is considered to be 'the cornerstone of asylum and of international refugee law', its extraterritorial application is of paramount significance in an era of restrictive external migration

---

77 *Hirsi*, *supra* note 3, para. 148. The Court identified two aspects relating to alleged violation of Art. 3: 1) whether the applicants had been exposed to 'the risk of inhuman and degrading treatment in Libya'; 2) whether the applicants had been exposed to 'the risk of arbitrary repatriation to Eritrea and Somalia': *Hirsi*, *supra* note 3, paras. 84–5, 138–9.

78 Ibid., at 60 (Concurring Opinion of Judge Pinto De Albuquerque) (footnote omitted).

79 Ibid., para. 156 (emphasis added).

80 Convention relating to the Status of Refugees, *supra* note 1.

81 North, *supra* note 2. The Supreme Court of the United States in *Sale* stated that '… both the text and negotiating history of Article 33 [of the *Refugee Convention*] affirmatively indicate that it was not intended to have extraterritorial effect': *Chris Sale, Acting Commissioner, Immigration and Naturalization Service, et al. v. Haitian Centers Council, Inc., et al.*, 509 U.S. 155, 113 S.Ct. 2549 at 2563 (1993).

82 See generally Klug and Howe, *supra* note 13, at 70.

https://doi.org/10.1017/S0922156516000625 Published online by Cambridge University Press

controls.[83] Moreover, the doctrine of jurisdiction in human rights law may expand the scope of application of the *non-refoulement* obligation to the extent that it may cover an emerging trend of interdiction or interception practice within the territorial waters of a third country.

4. The emerging practice of interdiction at sea

So far, this article has shown that the ECtHR case law has developed the concept of jurisdiction to apply to cases where state agencies exert extraterritorial physical control over a person. As a result of *Hirsi*, a jurisdiction linkage within the meaning of Article 1 of the ECHR will exist where a state attempts to interdict or intercept refugees on the highs seas by using its own personnel and vessels. If it is determined that breach of the *non-refoulement* obligation occurred, the interdicting states will be held to be legally responsible for their conduct under Article 3 of the ECHR. Therefore, the enforceable rights under Article 3 of the ECHR, coupled with the developing concept of jurisdiction, has made it possible for the principle of *non-refoulement* to reach extraterritorially in a way that legally constrains interdiction practice of European states on the high seas.

However, the Grand Chamber's decision in *Hirsi* should not be understood as putting an end to interdiction policy altogether. Interdiction policy does not, in and of itself, breach the principle of *non-refoulement*. In fact, although the general rule is that no state may exercise its jurisdiction over a ship on the high seas except for the flag state, in exceptional cases, a state may implement interdiction operations on another flag vessel on the high seas in a legitimate manner.[84] For example, a state may take appropriate measures in relation to people on board under Article 8 of the Smuggling Protocol, if it is believed that the vessel is implicated in human smuggling.[85] The scope of the measures depends on the content of a flag state's authorization.[86] In the case of stateless vessels, a warship may visit the vessels on the high seas under Article 110 of Convention on the Law of the Sea (UNCLOS), though it is not clear whether it authorizes the arrest of crew on board.[87] Moreover, bilateral agreements may provide a legal basis for interception or interdiction. In fact,

---

[83] UN High Commissioner for Refugees, *UNHCR Note on the Principle of Non-Refoulement*, November 1997, available at www.unhcr.org/refworld/docid/438c6d972.html (accessed 27 January 2015); See UN High Commissioner for Refugees, *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, 31 January 1994, available at www.unhcr.org/refworld/docid/437b6db64.html (accessed 27 January 2015), para. 2; See Gammeltoft-Hansen, *supra* note 18, at 100.

[84] See generally R.R. Churchill and A.V. Lowe, *The Law of the Sea* (1999), 208; 1982 Convention on the Law of the Sea, 1833 UNTS 2, Art. 92 (UNCLOS).

[85] 2000 Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime, 2241 UNTS 507, at Art. 8 (the Smuggling Protocol).

[86] Ibid.

[87] See N. Klein, 'The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts against the Safety of Maritime Navigation', (2008) 35 *Denv J Int'l L & Pol'y* 287, at 298–302; See generally Churchill and Lowe, *supra* note 84, at 214. In cases of piracy and unauthorized broadcasting, UNCLOS Arts. 105 and 109 respectively authorize a seizure of the vessel and arrest of persons on board.

legal bases of Italy's interdiction operation on the high seas in *Hirsi* were bilateral agreements concluded between Italy and Libya in the period of 2007 to 2009.[88]

This being the case, two conditions must be met in order to hold a contracting state of the ECHR liable for its interdiction policy. First and foremost, it should be determined that jurisdiction under Article 1 of the ECHR is established. Even though there may be breach of the *non-refoulement* obligation under Article 3 of the ECHR, without the establishment of jurisdiction under Article 1, the ECtHR will declare a case inadmissible. Secondly, an actual breach of the *non-refoulement* obligation should be found in the process of interdiction. The absence of adequate identification procedure for refugees in the process of interdiction may give rise to a breach of the *non-refoulement* obligation. Goodwin-Gill remarks that relevant authorities should 'identify all those intercepted, and keep records regarding nationality, age, personal circumstances and reasons for passage'.[89] In a similar manner, Stephen H. Legomsky argues that, '[i]f interdiction must be used … adequate provision for full and fair refugee status determinations is critical.'[90]

At this juncture, it is important to examine a different type of interdiction practice, joint patrol, which may not involve physical custody of a person by a contracting state of the ECHR. It appears that this practice has become another trend of external migration controls at sea. Paula García Andrade succinctly summarizes the emerging practice of joint patrol conducted by both a European state and an African state:

> As regards the exercise of specific powers in the framework of joint sea patrols, a coastal State could authorize a third State, Spain in this case, to perform surveillance and interception activities, either by allowing the presence of Spanish agents on board the coastal State's ships, or by permitting the deployment of surveillance operations undertaken by Spanish State ships. In any case the powers of the authorised State's agents depend on the scope of the authorisation given by the agreement or memorandum signed for that purpose, and in any event national agents of the African countries involved should be on board, since the latter are entitled to enforce the third country internal legislation on border control with regard to vessels intercepted inside its territorial waters.[91]

According to the extract, Spain is *indirectly* involved in the interdiction or interception of asylum seekers within the territorial waters of an African state – in this case, it is the coastal state that enforces the law within its territorial waters, not Spain. In fact, several contracting states of the ECHR have concluded bilateral agreements

---

88 *Hirsi*, *supra* note 3, para. 19.

89 G. S. Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement', (2011) 23 IJRL 443, at 456.

90 S. H. Legomsky, 'USA and the Caribbean Interdiction Program', (2006) 18 IJRL 677, at 678–79. Legomsky is skeptical about the possibility of having a fair refugee status determination process on board. He states that '… in theory a fair refugee status determination could possibly be made outside the country's territory …. however, the practical obstacles to a fair procedure in conjunction with interdiction are formidable': ibid., at 686 (footnote 58).

91 P.G. Andrade, 'Extraterritorial Strategies to Tackle Irregular Immigration by Sea: A Spanish Perspective', in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges* (2010), 311 at 320 (footnote omitted).

https://doi.org/10.1017/S0922156516000625 Published online by Cambridge University Press

with northern African countries to such an effect.[92] With respect to characteristics of the agreements, Evelien Brouwer argues:

> These agreements must be considered the result of intense bargaining between the European states and the 'countries of transfer', exchanging economical and development aid for cooperation at the sea borders, and within the third state, activities preventing persons to leave the latter state.[93]

In these circumstances, can a contracting state of the ECHR be held responsible for a breach of the *non-refoulement* obligation under Article 3 of the ECHR? In other words, can the jurisdiction in Article 1 of the ECHR be established in relation to European states' *indirect* involvement in the interdiction of refugees within the territorial waters of African states? As examined in the case law above, the establishment of jurisdiction in the context of interdiction demands physical custody. The simple argument that refugees are sent back to the country of origin by indirect support of a contracting state of the ECHR without proving physical custody may not be sufficient to establish a jurisdictional linkage. In this regard, Mariagiulia Giuffré may be right in stating that, 'EU member states that cooperate with third countries in patrolling external maritime borders are not always responsible under human rights treaties'.[94] Thus, even if a breach of the *non-refoulement* obligation is found, a European state that co-operates with a third country may not be held liable for the breach.

4.1 State responsibility and complicity

Having observed a gap in human rights protections in these cases, some scholars look to the help of the public international law concept of state responsibility. For example, Giuffré introduces the International Law Commission (ILC)'s *Draft Article on State Responsibility* (ARSIWA)[95] in order to, 'provide a remedy because of a lack of the "jurisdictional link" between the state and the individuals concerned'.[96] Under the concept of state responsibility, a state engaged in joint patrolling within the territorial waters of another state may be responsible for the breach of the principle of *non-refoulement* on three accounts: (i) 'as a co-author of *refoulement*' under Article 47 of ARSIWA; (ii) for providing 'aid or assistance in the commission of an internationally wrongful act' under Article 16; and (iii) for a breach of a principle of international law, i.e., 'positive due diligence obligations'.[97] As joint maritime patrols encompass various forms of participation from European states (e.g., deployment of naval or

---

92 E. Brouwer, 'Extraterritorial Migration Control and Human Rights: Preserving the Responsibility of the EU and its Member States', in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges* (2010), 199 at 211.

93 Ibid.

94 Giuffré, *supra* note 75, at 733.

95 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Dos A/56/10 Supplement No. 10, GA 56th Session (2001), available at legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (accessed 11 February 2015) (ARSIWA).

96 Giuffré, *supra* note 75, at 694; See Gammeltoft-Hansen, *supra* note 18, at 139–40.

97 I thank an anonymous reviewer for the comments in relation to three accounts. For more details on the concept of due diligence as a principle of international law, see R.P.P Barnidge, 'The Due Diligence Principle Under International Law', (2006) 8 *Int'l Community Law Rev* 81.

https://doi.org/10.1017/S0922156516000625 Published online by Cambridge University Press

air forces, and ship-riders agreement), the scope of state responsibility necessarily varies in specific cases.[98] This article especially pays attention to two scenarios: (i) interception by European vessels under the authority of enforcement officers on board from the coastal state ('significant' contribution); and (ii) interception by the coastal state's vessels with the help of agents on board from European states ('limited' contribution).

4.1.1 As a co-author of refoulement

Article 47 of ARSIWA copes with a situation where several states are involved in the same internationally wrongful act whether independently or co-operatively, e.g., concerted military attacks.[99] The ILC Commentary remarks that '... in such cases each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act'.[100] Such a co-authorship may be found in the case of 'direct' participation in or 'sufficiently significant' contribution to an internationally wrongful act.[101] Scenario 1 ('significant' contribution) above may be the case.

However, it should be remembered that participating European states have no legal authority to interdict irregular migrants;[102] technically, they are 'merely' providing 'aid or assistance' to a coastal state's *own* patrolling activities. In this context, it may be difficult to demarcate co-authorship and complicity in relation to European participation in joint maritime patrols. Ian Brownlie has pointed out that the provision of 'aid or assistance' in the context of aggression may not give rise to joint-responsibility unless it is accompanied with 'the specific purpose of assisting an aggressor'.[103] However, as will be demonstrated below, such an 'intent' element is more problematic than helpful in finding state responsibility in relation to European states' participation in the joint patrolling.

4.1.2 Complicity under Article 16 of ARSIWA

Article 16 of ARSIWA is often invoked in relation to states' indirect involvement (complicity) in an internationally wrongful act. Article 16 provides:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

---

98 I thank an anonymous reviewer for the comments in relation to different fashions of joint patrolling.

99 See generally J. Crawford, *State responsibility: the General Part* (2013), 334–5; Art. 47(1) of ARSIWA: 'Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act'.

100 J. Crawford, *The International Law Commission's articles on state responsibility: introduction, text, and commentaries* (2002), 272.

101 Crawford, *supra* note 99, at 405. It is worth noting the statement of Nikolai Ushakov who attempted to circumscribe the scope of complicity in relation to state responsibility: '... participation must be active and direct. It must not be too direct, however, for the participant then became a co-author of the offence, and that went beyond complicity. If, on the other hand, participation were too indirect, there might be no real complicity': *Yearbook of the International Law Commission* 1978, Volume 1, UN Doc. A/CN. 4/ SER. A/ 1978 (1978), at 238 (N.A. Ushakov's statement, at para. 11).

102 Andrade, *supra* note 91, at 320, 322.

103 I. Brownlie, *System of the law of nations: State responsibility* (1983), 191.

https://doi.org/10.1017/S0922156516000625 Published online by Cambridge University Press

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.[104]

Relying on this article, Giuffré argues that, 'a state may be responsible for violation of the principle of *non-refoulement* where it knowingly assists another state to return refugees to a place where their life or liberty might be threatened'.[105] However, a careful reading of Article 16 may not warrant such a view. Although there has been a growing acceptance that Article 16 is reflective of customary international law,[106] Maarten den Heijer rightly observes that '[t]he international law concept of aiding and assisting, or complicity, is not without controversial elements'.[107] In other words, it is not a settled area of law. In particular, since no definition of 'aid or assistance' is provided in ARSIWA, neither the forms of complicity (e.g., whether it should be active, thus excluding omission), nor the nexus elements (e.g., whether it requires substantial contribution or mere participation), nor the subjective requirements (e.g., whether intent of the accomplice matters) are clear-cut.[108]

Nevertheless, a bottom-line understanding of the meaning and scope of 'aid or assistance' in current state practice may be suggested as follows: (i) the act of complicity should be 'significant' contribution to outcomes, albeit not necessarily in the form of essential or 'indispensable' contribution;[109] (ii) the act of complicity needs to be 'in the form of a positive act', thus excluding 'active incitement' or 'mere omission';[110] (iii) controversially, the act of complicity has to be accompanied with 'intent' as well as 'actual knowledge' of 'the circumstances of the internationally wrongful act';[111] and (iv) a complicit state must be bound by the same primary obligation that another state has breached (Article 16(b), the *Pacta Tertiis* rule).[112]

In the case of Scenario 1, it may be forcefully argued that there is a positive act on the part of a European state, which significantly contributes to maritime

---

[104] ARSIWA, *supra* note 95, at Art. 16.

[105] Giuffré, *supra* note 75, at 725.

[106] See generally M. Jackson, *Complicity in International Law* (2015), 150–3; See *Case Concerning Application of the Convention on the prevention and punishment of the crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgement of 26 February 2007, [2007] ICJ Rep. 43 (Advisory Opinions and Orders), para. 420.

[107] M.D. Heijer, 'Europe beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control,' in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges* (2010), 169 at 194 (footnote omitted).

[108] E.P. Aust, *Complicity and the law of state responsibility* (2011), 197, 219; Crawford, *supra* note 99, at 402–5; See generally Jackson, *supra* note 106.

[109] Aust, *supra* note 108, at 197, 212; Crawford, *supra* note 99, at 402–3; Jackson, *supra* note 106, at 158.

[110] Aust, *supra* note 108, at 209, 219, 226–30; Crawford, *supra* note 99, at 403, 405; See generally Jackson, *supra* note 106, at 155–7. See also *Case Concerning Application of the Convention on the prevention and punishment of the crime of Genocide*, *supra* note 106, para. 432. Jackson questions this dominant view by paying attention to the concept of 'culpable omissions', stating that 'the other elements of a complicity rule will pull into the ambit of complicity particularly culpable omissions that contribute significantly to the commission of the harm and exclude those that do not': Jackson, *supra* note 106, at 157.

[111] Aust, *supra* note 108, at 267; Crawford, *supra* note 99, at 405–8; Crawford, *supra* note 100, at 148; See generally Jackson, *supra* note 106, at 159–61. However, Jackson argues that there is no consensus among scholars about the requirement of intent. Instead, Jackson prefers 'a standard of knowledge', that is, the 'awareness with something approaching practical certainty as to the circumstances of the principal wrongful act': Jackson, ibid., at 160–1.

[112] For the *pacta tertiis* rule, see Arts. 34 and 35 of 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

https://doi.org/10.1017/S0922156516000625 Published online by Cambridge University Press

patrolling of a coastal state. On the other hand, the 'aid or assistance' in Scenario 2 may not meet the requirement of 'significant contribution'. With Scenario 1, then, the subjective element, i.e., intent, is a critical issue. This requirement of intent, though controversial, appears to have been recognized at least in state practice.[113] In fact, commentary on ARSIWA states that, 'Article 16 deals with the situation where one State provides aid or assistance to another with *a view to facilitating* the commission of an internationally wrongful act by the latter'.[114]

Accordingly, for a European state to be held responsible, it arguably must have provided aids such as patrolling vessels 'with a view to facilitating' a breach of the principle of *non-refoulement*. However, it should be noted that joint patrolling programmes, in which the European border agency, Frontex, has been involved, have been operated ostensibly for the purpose of combating irregular migration.[115] Even if it is conceded that a lesser stringent standard of knowledge should be adopted in the place of the controversial requirement of 'intent', it is important to recognize that the International Court of Justice (ICJ) has connected such knowledge with 'the specific intent of the principal perpetrator'.[116] In other words, a European state must be aware of *the coastal state's intention* to violate the principle of *non-refoulement* in the course of joint maritime patrols. Accordingly, it goes back to the issue of 'intent'. This being the case, it may be argued that the 'intent' element, whether it is required from a complicit party or a primary perpetrator, has rendered it difficult to hold a European state complicit in the breach of the principle of *non-refoulement* under Article 16 of ARSIWA.

4.1.3 Positive due diligence obligations

Some may argue that a complicit European state may be held responsible for the breach of positive due diligence obligations. International law has duly recognized positive due diligence obligations in various fields of law, most prominently in international environmental law.[117] For example, Miles Jackson has observed that, '... many instances of state participation in the harms caused by non-state actors are swept up by broader positive obligations imposed on states to protect against harms to other states or individuals'.[118] On a European level, positive obligations have also

---

[113] Aust, *supra* note 108, at 267. Crawford remarks that '... this second element [intent] is sufficient to eclipse entirely the requirement of knowledge, as an overt intention to assist presupposes knowledge of assistance. It has arguably been accepted into the customary ambit of complicity by the International Court ...': Crawford, *supra* note 99, at 407.

[114] Crawford, *supra* note 100, at 148.

[115] A.D. Pascale, 'Migration Control at Sea: The Italian Case', in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges* (2010), 281 at 289–92. For more details on the operation of Frontex in relation to migration controls at sea, see A. Baldaccini, 'Extraterritorial Border Controls in the EU: The Role of Frontex in Operations at Sea', in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges* (2010), 229.

[116] *The Bosnian Genocide*, *supra* note 106, para. 421: '... there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent *(dolus specialis)* of the principal perpetrator'.

[117] See Barnidge, *supra* note 97, at 121; See Jackson, *supra* note 106, at 130.

[118] Jackson, *supra* note 106, at 129 (footnote omitted).

https://doi.org/10.1017/S0922156516000625 Published online by Cambridge University Press

been recognized in relation to rights set out in the ECHR, whether independently or in conjunction with Article 1 of the ECHR.[119]

It is significant to note that positive due diligence obligations are normally contemplated as duties of states *within* their territories – in other words, due diligence obligations 'retain their territorial character'.[120] Accordingly, in the context of external migration controls, it is not that breach of positive obligations incurs state responsibility, but that extraterritorial jurisdiction should give effect to the positive obligations so as to trigger the issue of state responsibility. After all, it goes back to the issue of jurisdiction rather than state responsibility.

4.2 An approach based on the jurisprudence of the ECtHR

The state responsibility approach certainly has some merits in the case of complicity; however, ambiguous or controversial elements have rendered it much less applicable and effective in relation to holding a complicit European state responsible under ARSIWA, at least in the context of joint maritime patrols. More fundamentally, the ECtHR has been adamant that, in order for the ECHR to apply to a particular case, the first threshold is to establish jurisdiction under Article 1 of the ECHR, not attribution under state responsibility.[121] The ECtHR has not adopted the attribution concept as a legitimate means to establish 'jurisdiction'.[122] Michael O'Boyle plausibly argues that, '[t]he [state responsibility] approach … only makes sense as regards a treaty which has no limiting "jurisdiction" clause …'.[123] Thus, in the European context, the requirement of establishing jurisdiction under Article 1 of the ECHR cannot be circumvented by way of introducing the concept of state responsibility under ARSIWA.

This being the case, instead of relying on the concept of state responsibility, the focus should be shifted to the ECtHR's own case law – *de jure* or *de facto* jurisdiction. In relation to Scenario 1 above, Andrade raises an interesting question in relation to joint patrolling by Spain and Senegal:

> The situation envisaged would be more complicated if the person stopped had gone on board the Spanish ship which participated in the joint patrol. In that case, could we consider that, since the person would be under Spanish jurisdiction, the return to Senegalese territory would imply a violation of the 'non-refoulement' principle by Spain?[124]

It is probable that, in Scenario 1, European states still have *de jure* jurisdiction (the flag state jurisdiction) over matters on their vessels even within the territorial waters of a third country. Richard A Barnes states that, '[f]lag States enjoy prescriptive and enforcement jurisdiction over ships flying their flag wherever the vessel is

---

[119] J-F. Akandji-Kombe, *Positive obligations under the European Convention on Human Rights, Human Rights Handbooks No. 7* (2007), *Council of Europe*, at 8, available at rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680071f4d (accessed 18 September 2015).

[120] Jackson, *supra* note 106, at 129–31.

[121] Miller, *supra* note 29, at 1235.

[122] *Banković*, *supra* note 19, para. 75.

[123] O'Boyle, *supra* note 52, at 131.

[124] Andrade, *supra* note 91, at 322 (footnote omitted).

https://doi.org/10.1017/S0922156516000625 Published online by Cambridge University Press

located. When a ship is within internal waters, port, or the territorial sea, jurisdiction is concurrent with the port/coastal State'.[125] Debates may arise concerning the characteristic of coastal state jurisdiction – whether the coastal state has 'plenary jurisdiction' or whether it can only exercise jurisdictional power over certain matters in a limited way.[126] In any event, it appears that flag state jurisdiction is not forfeited simply by a ship's entry into the territorial waters of a third country.

Significantly, it is probable that European states (flag states) may enjoy immunity from the coastal state's enforcement jurisdiction under Article 32 of the UNCLOS which reads, '[w]ith such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes'. [127] The European vessels engaged in the interdiction operations are government-operated patrol ships, which certainly are within the ambit of 'warships and other government ships operated for non-commercial purposes'.[128]

Furthermore, it also may be argued that European states can exercise effective control over intercepted migrants, thus *de facto* jurisdiction, on the grounds that they are held in custody on European vessels by joint crews that are made up of European crews and the coastal states' crews.[129] Therefore, in the light of jurisprudence of the ECtHR in relation to extraterritorial jurisdiction as examined above, such findings may arguably establish jurisdiction of a European state within the meaning of Article 1 of the ECHR.

Once jurisdiction is established, as shown above in *Hirsi*, the standard of knowledge required for holding a state responsible for the breach of the *non-refoulement* obligation under Article 3 of the ECHR is 'actual' or 'constructive' knowledge ('should have known').[130] Here, the jurisprudence of the ECtHR clearly differs from the controversial requirement of Article 16 of ARSIWA, that is, 'intent' of a participating state.

In relation to Scenario 2, the analysis is more complicated. There is neither *de jure* jurisdiction by virtue of flag state jurisdiction nor *de facto* jurisdiction by way of effective control over persons. In this circumstance, it seems to be hard to establish jurisdiction of a European state in relation to the ECHR under the current jurisprudence of the ECtHR. That being said, having regard to the progressive characteristic

[125] R.A. Barnes, 'The Operation of Flag State Jurisdiction', in D.R. Rothwell et al. (eds.), *The Oxford Handbook of the Law of the Sea* (2015), 310 at 311 (footnote omitted).

[126] Ibid.; Churchill and Lowe, *supra* note 84, at 92–100.

[127] UNCLOS, *supra* note 84, at Art. 32; See Churchill and Lowe, *supra* note 84, at 99; See also Barnes, *supra* note 125, at 312.

[128] With regard to the definition of 'other government ships operated for non-commercial purposes', see J. Kraska, *Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics* (2011), 248.

[129] The 2007 bilateral co-operation agreement between Italy and Libya stated that, '[m]ixed crews shall be present on ships, made up of Libyan personnel and Italian police officers, who shall provide training, guidance and technical assistance on the use and handling of the ships': *Hirsi*, *supra* note 3, para. 19. Furthermore, the 2009 agreement stipulated, '[t]he two countries undertake to organize maritime patrols with joint crews, made up of equal numbers of Italian and Libyan personnel having equivalent experience and skills . . . ': *Hirsi*, *supra* note 3, para. 19.

[130] *Hirsi*, *supra* note 3, para. 156; See generally Crawford, *supra* note 99, at 406.

https://doi.org/10.1017/S0922156516000625 Published online by Cambridge University Press

of the jurisprudence of the ECtHR in relation to extraterritorial jurisdiction,[131] we do hope to see the Court finding a way to establish extraterritorial jurisdiction in the case of complicity so that it may uphold the principle expressed in *Issa*: 'Article 1 of the Convention [ECHR] cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory'.[132]

5. Conclusion: Beyond Europe

Jurisdiction is a core element of state sovereignty that previously had been understood as essentially a territorial concept.[133] Furthermore, it has generally been thought that the concept of state sovereignty as it relates to border control is founded on the 'unconditional' power of a state.[134] However, this has begun to change in Europe. Case law of the ECtHR has in significant ways modified our understanding of the concepts of jurisdiction and state sovereignty.

State sovereignty has begun to reflect human rights concerns such as the principle of *non-refoulement*, even beyond states' territories. In this regard, the concept of state sovereignty in relation to external migration controls has undergone a paradigm shift from 'unconditional' sovereignty to 'accountable' sovereignty, at least within the European context.[135] The challenge is based on a liberal interpretation of the term, 'jurisdiction', found in Article 1 of the ECHR.

Importantly, on the international level, the *non-refoulement* principle is also found in many international treaties such as in Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[136] International human rights bodies, such as the Human Rights Committee (HRC) of ICCPR and the Committee against Torture, also have confirmed extraterritorial application of these human rights instruments.[137] The rulings of international human rights bodies

---

[131] Arguably, the decision in the *Catan* case supports the claim that a broader conception of complicity (based on the provision of significant 'background support' such as political, economic and military support) may be used to establish extraterritorial jurisdiction of the ECHR: *Catan and Others v. The Republic of Moldova and Russia*, Decision of 19 October 2012, Application no. 43370/04 18454/06 8252/05.

[132] *Issa, supra* note 30, para. 71.

[133] See Shaw, *supra* note 9, at 572–3; See Lawson, *supra* note 9, at 87.

[134] For example, a former Australian Prime Minister, John Howard, once stated that, '[w]e will decide who comes to this country and the circumstances in which they come': S. Clarke, 'Liberals accused of trying to rewrite history', *Australian Broadcasting Corporation*, 21 November 2001, available at www.abc.net.au/lateline/content/2001/s422692.htm (accessed 12 March 2015).

[135] See E. Haddad, *The Refugee in International Society: Between Sovereigns* (2008), 201: 'With the emerging human rights culture, a shift can be witnessed from an international society framed by sovereign impunity to an international society based on national and international accountability.'

[136] 1966 International Covenant on Civil and Political Rights, 999 UNTS 171 (ICCPR); 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (CAT); C. Droege, 'Detainees: Legal Framework, Non-Refoulement and Contemporary Challenges', *ICRC*, available at www.icrc.org/eng/assets/files/other/irrc-871-droege2.pdf (accessed 22 January 2015), at 671–2; See UN High Commissioner for Refugees, *UNHCR Note on the Principle of Non-Refoulement*, *supra* note 83.

[137] *Delia Saldias de Lopez v. Uruguay*, UN Doc. CCPR/C/13/D/52/1979, UN Human Rights Committee (29 July 1981), available at www.unhcr.org/refworld/docid/4028d4954.html (accessed 12 March 2015), para. 12.3; Committee Against Torture, *Conclusions and Recommendations of the Committee against Torture: United States of America*, CAT/C/USA/CO/2 (Advance unedited version), 36th session (18 May 2006), available

https://doi.org/10.1017/S0922156516000625 Published online by Cambridge University Press

may not have been as effective as the decisions of the ECtHR in domestic courts; however, they certainly give momentum to furthering discourse on extraterritorial application of the *non-refoulement* principle in other jurisdictions. The 'forgotten' principle of *non-refoulement* in an era of restrictive external migration controls has revived in Europe. This change of state practice in Europe, coupled with decisions of international human rights bodies, may give rise to worldwide impact on refugee laws and policies.

at www.state.gov/documents/organization/133838.pdf (accessed 12 March 2015), para. 20; See generally *J.H.A. v. Spain*, CAT/C/41/D/323/2007, UN Committee against Torture (21 November 2008), available at www.unhcr.org/refworld/docid/4a939d542.html (accessed 14 April 2015).