Yildiz Demir, Ayse (2025) *Externalization of migration control: international legal guarantees against the erosion of refugee protection.* PhD thesis.

https://theses.gla.ac.uk/85274/

Copyright and moral rights for this work are retained by the author

A copy can be downloaded for personal non-commercial research or study, without prior permission or charge

This work cannot be reproduced or quoted extensively from without first obtaining permission from the author

The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the author

When referring to this work, full bibliographic details including the author, title, awarding institution and date of the thesis must be given

Enlighten: Theses
https://theses.gla.ac.uk/
research-enlighten@glasgow.ac.uk

Externalization of Migration Control: International Legal Guarantees against the Erosion of Refugee Protection

Ayse Yildiz Demir

Submitted in fulfilment of the requirements of the Degree of Doctor of Philosophy

School of Law, College of Social Sciences

University of Glasgow

30 January 2025

Abstract

Over 70,000 migrants have perished or disappeared since 2014, with the Mediterranean alone claiming 30,000 lives. These figures are not mere statistics; they signify the human cost of an evolving architecture of exclusion. Destination states, intent on preventing migrants from setting foot on their soil, have extended their borders outward—outsourcing migration control to transit states, private actors, and extraterritorial processing regimes. What emerges is a system designed to evade responsibility, where the right to life, the prohibition against torture, and the right to seek asylum are systematically eroded.

This thesis examines how interception operations, extraterritorial processing centres (EPCs), and readmission agreements (RAs) function as instruments of externalisation, shifting control beyond state borders while hollowing out international legal guarantees. Through jurisdictional loopholes and political manoeuvring, states detach themselves from direct responsibility, despite exercising effective control over those they seek to exclude. The principle of non-refoulement, long a cornerstone of refugee protection, is compromised when individuals are forcibly returned to unsafe territories through RAs, held in degrading offshore detention sites, or abandoned at sea following pushbacks. Yet international law does not permit such abdication of responsibility. This study contends that states cannot circumvent obligations merely by shifting migration control beyond borders. Whether through functional jurisdiction, extraterritorial human rights obligations, or principles of state responsibility, legal frameworks exist to hold externalising states to account. By mapping these legal avenues and exposing the structural injustices underpinning externalisation, this thesis argues for urgent reform to close the gaps that enable violations to persist under the guise of migration management. The erosion of legal guarantees is not an inevitable consequence of border control—it is a deliberate choice. The question remains whether and to what extent states will be responsible.

Table of Contents

Acknowledgement

As a researcher at the beginning of my academic journey, I extend my deepest gratitude to those who have supported me throughout this long, challenging, yet rewarding four-year PhD journey—my esteemed supervisors.

I am profoundly grateful to my first supervisor, Dr. Anni Pues, whose invaluable legal knowledge, unwavering support, and encouragement sustained me through this process, particularly during the challenges of starting my PhD amid the pandemic. Her dedication and insightful feedback played a crucial role in shaping and completing this research.

My sincere thanks also go to my second supervisor, Dr. Aslı Özçelik-Olcay, whose precise and constructive feedback greatly enhanced the quality of my thesis. Her sharp insights and recommendations were instrumental in refining my work. I am equally grateful to my third supervisor, Dr. Charlie Peevers, for her thoughtful comments and for broadening my legal perspective despite our limited opportunities to work together.

I owe immense gratitude to my husband, Ali Utku Demir, who patiently endured my emotional ups and downs, proofread countless pages, and engaged in deep discussions that enriched my perspective. I also appreciate my dear friend, Rania Mohiuddin-Agir, for her invaluable proofreading and insightful feedback from a policy-maker and social scientist standpoint.

Finally, I express my gratitude to the Republic of Türkiye's Ministry of National Education for the YLSY Scholarship, which enabled me to pursue my studies in the United Kingdom, and to my family for their unwavering support. A special thanks to my closest friends, Onur Dinç and Fethiye Dinç, for their constant encouragement throughout this journey.

Author’s declaration

“I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.”

Printed Name: ___Ayse Yildiz Demir_____

Signature: _____

Abbreviations

Term	Abbreviation
African Charter on Human and Peoples' Rights	ACHPR
American Convention on Human Rights	ACHR
Articles on the Responsibility of States for Internationally Wrongful Acts	ARSIWA
Asylum and Migration Management Regulation	AMMR
Asylum Procedures Directive	APD
Common European Asylum System	CEAS
Convention Against Torture	CAT
Court of Justice of the European Union	CJEU
Cruel, Inhuman, or Degrading Treatment or Punishment	CIDTP
European Convention on Human Rights	ECHR
European Union	EU
Extraterritorial Processing Centre	EPC
Inter-American Commission on Human Rights	IACHR
International Convention for the Safety of Life at Sea	SOLAS
International Covenant on Civil and Political Rights	ICCPR
International Organization for Migration	IOM
Maritime Search and Rescue Convention	SAR Convention
Memorandum of Understanding	MoU
Readmission Agreement	RA
Convention Relating to the Status of Refugees	RC
Return Directive	RD
Safe Country of Origin	SCO
Safe Third Country	STC

Search and Rescue	SAR
United Nations Convention on the Law of the Sea	UNCLOS
United Nations High Commissioner for Refugees	UNHCR

1. General Introduction

1.1 Introduction

Since 2014, over 70,000 migrants have been reported dead or missing globally, 30,000 of them in the Mediterranean Sea, accelerated by increasingly restrictive migration control measures implemented by destination countries.[1] These alarming figures underscore a deeper crisis: the systematic externalisation of migration control, which raises critical questions about potential human rights impacts resulting from these policies. While the stated aim of these measures is to manage irregular migration flows, there are concerns that these practices may endanger the lives and dignity of those seeking safety, prompting questions about their compatibility with the right to life, the prohibition of torture and inhuman or degrading treatment, and the right to seek asylum.

Migration control is no longer confined to actions within the borders of destination countries. Instead, it extends beyond national boundaries, often involving the delegation of border control responsibilities to third countries or non-state actors. These externalisation strategies—whether through pushbacks on the high seas, pullbacks in transit countries, or offshore processing centres— may prevent migrants from reaching destination states, potentially exposing them to grave risks. Consequently, understanding the legal responsibilities of states engaged in such practices is critical to safeguarding fundamental human rights.

The term “externalization” in migration control refers to measures extending beyond the national borders of destination countries. One common form of externalization is

[1] IOM, 'Missing Migrants' https://missingmigrants.iom.int/data 29 October 2024.

outsourcing,[2] where border control responsibilities are delegated to a non-state or third-country actor. This study treats both the physical relocation of border control beyond national boundaries and the delegation of control to external actors as forms of externalization, as they both involve intervention with individuals outside the destination country. Rather than focusing on terminology, this study emphasizes examining the responsibilities of states, regardless of whether interventions are conducted by the destination country's agents or third parties.

Similarly, some scholars distinguish between externalization, defined as the relocation of border control outside a state's territory, and the "external dimension," which involves agreements with third countries to manage or return irregular migrants.[3] This distinction often hinges on the level of control the destination state exerts over migrants. However, this study does not categorise methods based on whether control is direct or indirect. Instead, it considers all forms of migration control that extend beyond national boundaries or shift the asylum process to a third country as externalization.

The principle of non-refoulement serves as a safeguard for the life and freedom of individuals by its definition,[4] establishing a close link with the right to life and the prohibition against torture and inhuman or degrading treatment, which are often jeopardized by externalization practices. For individuals subjected to externalization, the most immediately threatened rights are the right to life and the right not to be subjected to

[2] Agnese Pacciardi and Joakim Berndtsson, 'EU Border Externalisation and Security Outsourcing: Exploring the Migration Industry in Libya' (2022) 48(17) *Journal of Ethnic and Migration Studies* 4010–4028, 4010–12.
[3] Frank McNamara, 'Member State Responsibility for Migration Control within Third States – Externalisation Revisited' (2017) 15(3) European Journal of Migration and Law 319–335; Vito Todeschini, 'The Externalisation of Migration Control: An Assessment of the European Union's Policy in the Light of the Charter of Fundamental Rights' (2016) *European Journal of Migration and Law* 18(3) 395–426; Frank McNamara, 'Control and Responsibility in European Union Migration Law and Policy: A Study of Externalisation and Privatisation' (2015) https://aei.pitt.edu/79438/ accessed 11 September 2024; Anna Triandafyllidou, 'Multi-levelling and Externalizing Migration and Asylum: Lessons from the Southern European Islands' (2014) 9(1) *Island Studies Journal* 7–22.
[4] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (RC), art 33(1) prohibits the expulsion or return ("refoulement").

torture or inhuman treatment. These rights warrant detailed examination within this context. Additionally, as externalization aims to prevent irregular migrants from reaching the destination country, the right to seek asylum also comes under threat. Each method of externalization impacts the right to seek asylum differently. For example, outsourcing a third party may infringe upon this right by violating the "right to leave" for migrants subjected to pullbacks, while pushbacks may infringe upon it through breaches of non-refoulement.

The core research questions that guide this thesis are as follows: "Does the externalization of migration control by developed states violate fundamental rights, including the right to life, the prohibition against torture, and the right to seek asylum and how?", "What international legal obligations exist to protect these rights, and how should they apply to externalization practices?", "To what extent do specific externalization methods—such as interceptions, EPCs, and RAs—affect state responsibilities and accountability under international law?" and "Can the legality and legitimacy of externalization of migration control methods be justified when they are carried out for the purposes of national security and public order, but lead to violations of human and refugee rights?" These questions are addressed systematically throughout the thesis, building from the conceptual foundation of externalization and state obligations to detailed analyses of specific practices and their legal implications. The structure of the thesis reflects this progression, with each chapter contributing to the overall argument that externalization, as practiced by destination states, often contravenes international human rights standards. This study's focus on externalization stems from its impact on fundamental human and refugee rights. By preventing irregular migrants from reaching the destination country and transferring them to third countries or their countries of origin, externalization often leads to rights violations. While the literature frequently discusses how externalization affects the

principles of non-refoulement,[5] other fundamental rights such right to life, and the prohibition against torture and inhuman treatment or right to seek are also at risk. This study explores how a broader spectrum of rights—including those beyond non-refoulement and the prohibition of inhuman treatment—are endangered by externalization practices.

This thesis, therefore, focuses on potential violations of fundamental human and refugee rights, examining how these rights intersect and impact one another. In the literature review of this chapter, the rights violations associated with externalization are revealed, highlighting this study's unique contribution to discussions on state responsibilities. Following this, the fifth section introduces the main research questions, addressing the obligations of states under international law in response to rights violations emerging from externalization, and outlines the thesis structure.

1.2 The Paradigm of Externalization of Migration Control

To clarify the scope of this thesis, it is essential to define externalization of migration control and explain the paradigm associated with it. Externalization occurs through various methods, and its definition can shift depending on the specific mechanisms employed. In the literature, externalization typically falls into three categories: preventing arrivals of irregular migrants by strengthening external border controls; obstructing departures through externalized border controls and asylum processing in third countries; and establishing partnerships between destination countries and their neighbours.[6] While this

[5] Mariagiulia Giuffré, 'Readmission Agreements and Refugee Rights: From a Critique to a Proposal' (2013) 32(3) *Refugee Survey Quarterly* 79, 85–87; John von Doussa, 'Human Rights and Offshore Processing' (2007) 9 *UTS Law Review* 41; Eve Lester, 'The Right to Liberty' (ANU College of Law Research Paper No 21.35); Peter Billings (ed), *Crimmigration in Australia* (Springer, 2019).
[6] Paul McDonough and Tamara Tubakovic, 'International Refugee Law and EU Asylum: Accordance and Influence' (2 March 2022) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4047986> accessed 10 June 2024.

thesis primarily follows these categories, it also introduces additional sub-categorisations to capture nuanced differences and similarities among externalization methods.

The first category examined in this thesis is the obstruction of irregular migrant arrivals through interception, specifically pushbacks beyond the destination country's external borders. Geographically, pushbacks often occur on the high seas, in territorial waters, or within third-country territories, where destination states actively prevent migrants—including potential asylum seekers—from reaching their jurisdiction.[7] These practices are a form of extraterritorial state action designed to block access to the legal frameworks of the destination country, thereby avoiding obligations under international law. Pushbacks are a central focus here because they physically prevent migrants from arriving by intercepting and returning them to third countries or points of origin. In this thesis, actions taken by the destination state's agents to control borders beyond national boundaries are examined as pushbacks. This section provides an overview of the conceptual categories of externalization, and subsequent chapters, particularly the one on externalization methods, will offer a more detailed analysis of pushbacks and related practices.

Another method under externalised border control in this thesis is "pullbacks," which involves enhanced measures to prevent the departure of irregular migrants. Although McDonough and Tubakovic classify the prevention of departures under a separate category,[8] this thesis groups both pushbacks and pullbacks under the overarching category of interception. Since both types involve controlling migrants beyond the destination country's borders, they are treated together to analyse states' differing responsibilities in each context. The main distinction lies in the location of these operations and the agents

[7] Bill Frelick, Ian M Kysel, and Jennifer Podkul, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) 4(4) Journal on Migration and Human Security 190–220, 193; Thomas Gammeltoft-Hansen and Nikolas Feith Tan, 'Extraterritorial Migration Control and Deterrence' in Cathryn Costello, Michelle Foster, and Jane McAdam (eds), The Oxford Handbook of International Refugee Law (Oxford University Press 2021).
[8] McDonough and Tubakovic (n 6).

involved. Pullbacks specifically refer to operations carried out by agents of a third country, often with financial or logistical support from the destination country, to prevent irregular migrants from leaving.

In addition to enhanced border controls, the second category encompasses externalized asylum processing, where asylum applications are handled outside the destination country's territory. While the establishment of extraterritorial/offshore centres is justified by destination countries as a necessary measure to deter dangerous boat journeys to Australia and combat people smuggling by disrupting smugglers' business model,[9] this thesis will focus on the consequences of restricting the access of irregular migrants to destination countries. Some EPCs prevent migrant arrivals by intercepting them before they reach destination states, such as in Australia's offshore processing policy.[10] Other centres, like those in Libya, are established in transit or origin countries with support from destination countries, aiming to prevent migrants from departing toward destination states.[11] Accordingly, these centres in transit countries or countries of origin prevents departures of irregular immigrants towards to destination countries. Since asylum claims are often not processed in centres located in transit or origin countries, these facilities act more as extraterritorial detention centres than true externalized asylum processing centres.

---

[9] Madeline Gleeson and Natasha Yacoub, *Cruel, Costly and Ineffective: The Failure of Offshore Processing in Australia* (Kaldor Centre for International Refugee Law 2021) 5.

[10] Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (Cambridge University Press, 2018), 85 para 3; Natalie Klein, 'Assessing Australia's Push Back the Boats Policy under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants' (2014) 15 Melb J Intl L 414, 416 para 1; National Museum Australia, 'Tampa Affair' (2001) https://www.nma.gov.au/defining-moments/resources/tampa-affair accessed 10 March 2021; Nikolas Feith Tan, 'International Models of Deterrence and the Future of Access to Asylum' in Satvinder Singh Juss (ed), Research Handbook on International Refugee Law (Edward Elgar Publishing 2019) 172 para 3; Penelope Mathew, 'Australian Refugee Protection in the Wake of the Tampa' (2002) 96 AJIL 661; Royal Australian Navy, 'Australian Operational Service Medal' https://www.navy.gov.au/australian-operational-service-medal accessed 01 March 2021.

[11] European Neighbourhood Policy and Enlargement Negotiations, 'EU Trust Fund for Africa: The North of Africa Window – Libya' (March 2022) https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-03/EUTF_libya_en.pdf accessed 7 June 2024; ' MoU between the Government of the State of Libya and the Government of the Italian Republic on cooperation in the field of development, combating illegal immigration, human trafficking and fuel smuggling and on reinforcing the border security' (2017) art 2 https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf accessed 10 June 2024.

Accordingly, this thesis's second categorization of externalization focuses on how extraterritorial centres obstruct both the arrival and departure of irregular migrants.

The third category of externalization examined in this thesis involves partnerships between destination states and transit or origin countries to facilitate the return of irregular migrants. These partnerships, which include both formal and informal agreements, are often prominent in cooperation between the EU and neighbouring states. Depending on each state's position within irregular migration flows, these agreements serve different purposes.

It is worth noting that the EU, while a supranational organisation rather than a state, is included and referred as a whole in this analysis due to its significant role in shaping migration control policies and externalisation practices through its member states. The focus on the EU will narrow down specific countries like Italy and Greece due to their distinct histories and experiences with different externalisation methods. These countries serve as critical case studies due to their geographical positions, the pressures they face as frontline states, and their involvement in practices such as interceptions, pushbacks, and RAs.

When partnerships return migrants to the first EU country they entered, known as the first safe country or first country of asylum,[12] they align with the Dublin III Regulation. Under this regulation, the first EU country an irregular migrant enters is responsible for handling applications for international protection,[13] making this country the primary location for asylum processing. While the Dublin Regulation operates within a shared legal space

[12] Giuffré (n 5) 85; Anna Triandafyllidou, 'Multi-levelling and Externalizing Migration and Asylum: Lessons from the Southern European Islands' (2014) 9(1) Island Studies Journal 7–22, 9; Frelick et al (n 7) 191–6; Common European Asylum System (CEAS); Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (APD) [2013] OJ L180/60, arts 36-38.

[13] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31, art 13(1).

defined by the EU's common migration and asylum policies, this practice can be understood as a form of internal externalisation, where migration responsibilities are effectively shifted between member states. The broader implications of the Dublin Regulation and its connection to externalisation practices are discussed in detail later in chapters related RAs,[14] where the EU's role as a supranational organisation and its legal framework for migration control are analysed comprehensively. Thus, returning migrants to the first EU country aligns with a form of internal externalization within the EU framework.

Another focus of this thesis is the return of irregular migrants from an EU state to a third country outside the EU, facilitated by formal or informal partnerships. When the purpose of these partnerships is to return irregular migrants to a non-EU state considered a STC from which they arrived, it aligns with the STC concept. Article 38 of APD specifies that irregular migrants may be returned to a country deemed safe. When an EU member state returns irregular migrants to a non-EU country, this external migration control method allows the EU to keep those migrants outside its jurisdiction. These agreements, referred to as RAs in this thesis, apply whether they are formal or informal, regardless of the specific terminology used by the contracting states.

There is ongoing debate regarding whether RAs, which facilitate the return of irregular migrants from a destination state to a transit or origin country, fall under the concept of externalization of migration control. Some literature differentiates between *externalization*, where destination states establish "metaphorical" borders within third countries[15] by exercising direct control over irregular migrants—either through their immigration

[14] See chapters 6 and 7.
[15] In the case of *R (European Roma Rights Centre and Others) v Immigration Officer at Prague Airport* [2004] UKHL 55, Lord Bingham suggested the concept of the border as a metaphorical line, arguing that British immigration officers posted abroad, such as those at Prague Airport, did not engage British jurisdiction; McNamara (n 3) 325–330.

officials or by employing agents to carry out migration control—[16] and the "external dimension," where destination states exert weaker, indirect control over migration flows, as exemplified by the European Neighbourhood Policy and EU RAs.[17] This thesis, however, does not distinguish between indirect and direct control when assessing the responsibility of destination states in cases of human and refugee rights violations. Both forms of control contribute to externalized migration management efforts. Consequently, this thesis categorizes RAs as a method of externalization, given that they enable destination states to avoid their responsibilities over asylum processes by transferring migrants to third countries.

Accordingly, this thesis will not differentiate between the external dimension and externalization, as it seeks to demonstrate in Chapter 2 why RAs constitute a key method of externalization. Thus, the third category of the externalization paradigm in this thesis is RAs, given that an externalizing destination state holds full, direct control over irregular migrants during their return and can externalize the asylum process by transferring migrants to a third country under these agreements.

1.3 Methodology

This thesis adopts a doctrinal and socio-legal methodology to explore the complex legal landscape surrounding externalized migration control, focusing on its implications for fundamental human and refugee rights. Through rigorous analysis of legal instruments, case law, policy documents, and comparative case studies, this research seeks to delineate

[16] Mcnamara (n 3) 327. Sandra Lavenex, 'Shifting Up and Out: The Foreign Policy of European Immigration Control' (2006) 29 *West European Politics* 329, 329;
[17] ibid; Marise Cremona and Jorrit Rijpma, 'The Extra-Territorialisation of EU Migration Policy and the Rule of Law' (2007) EUI Working Paper 2007/01; S Collison, 'Visa Requirements, Carrier Sanctions, Safe Third Countries and Readmission: The Development of an Asylum "Buffer Zone" in Europe' (1996) 21 Transactions of the Institute of British Geographers NS 76, 76; C Billet, 'EC Readmission Agreements: A Prime Instrument of the External Dimension of the EU's Fight Against Irregular Immigration. An Assessment After Ten Years of Practice' (2010) 12 European Journal of Migration and Law 45–79.

the responsibilities of states in migration control practices that extend beyond their territorial borders. This section outlines the assumptions, the approach to legal research, the selection of case studies, and the integration of theoretical frameworks that guide the analysis of human rights protections within the context of externalization.

To elucidate who is in the scope of this thesis it is necessary to put forward certain definitions. Individuals who submit a request to be recognized as refugees in the destination country, either upon arrival or even before arrival depending on internal or external application processes, are referred to as asylum seekers. On the other hand, irregular migrants are those who enter the destination country through methods not authorized by that country's legal framework or remain in the country without legal status. According to RC article 1, a person qualifies as a refugee if they "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of [their] nationality and is unable or, owing to such fear, is unwilling to avail [themself] of the protection of that country; or who, not having a nationality and being outside the country of [their] former habitual residence, is unable or, owing to such fear, is unwilling to return to it."[18] While regional conventions, such as the 1969 Organization of African Unity (OAU), RC[19] and the 1984 Cartagena Declaration,[20] expand this definition by including individuals fleeing generalized violence or other serious disruptions to public order, this thesis adheres strictly to the RC. The Convention's broader, international applicability makes it a more comprehensive framework for defining refugees compared to region-specific instruments. Under the RC, an individual does not need official refugee status to be entitled to refugee

[18] RC art 1(A)(2); Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267, art 1(2).
[19] Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45, art 1(2);
[20] Cartagena Declaration on Refugees (adopted 22 November 1984), art III(3) states 'generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order'.

rights; thus, irregular migrants fitting the Convention's definition are considered refugees in this thesis, regardless of formal status.[21] The foundation of this research is a doctrinal analysis of primary legal sources, such as international conventions, customary international law, national laws, and judgments that are pivotal to understanding state obligations concerning asylum seekers and refugees. Doctrinal analysis enables an interpretation of core principles, including the right to life, the prohibition of torture and inhuman treatment, and the right to seek asylum, within the framework of externalized migration control. By engaging with central instruments—such as the RC, ECHR, the ICCPR[22], and various EU directives—[23] this study clarifies how these legal standards apply to externalized practices like pushbacks, pullbacks, offshore processing, and RAs. The RC's principle of non-refoulement, as a foundational legal concept, is examined in particular depth, given its relevance to understanding the limitations imposed on states when managing migration beyond their borders.

Complementing the doctrinal approach is a socio-legal perspective that contextualizes the legal analysis within broader political and social dynamics. This perspective is essential for understanding how security-driven motivations underpin states' externalization strategies, influencing their interpretation and application of international human rights principles. The socio-legal approach entails reviewing academic literature, policy analyses, and reports from international organizations to shed light on the interplay between state sovereignty, migration control, and human rights. By situating the legal analysis within this

[21] UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees' (reissued February 2019) https://www.unhcr.org/media/handbook-procedures-and-criteria-determining-refugee-status-under-1951-convention-and-1967 accessed 08 September 2024

[22] RC; European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[23] APD; Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (RD) [2008] OJ L348/98; European Commission, 'New Pact on Migration and Asylum' COM(2020) 609 final.

socio-political context, the research reveals how externalization policies align with states' goals of regulating migration flows, even as they increasingly impinge on rights protections for migrants and asylum seekers.

The thesis further employs a comparative case analysis to examine specific externalization practices in various developed states, particularly the European Union, Australia, and the United States. This comparative approach provides insights into how different jurisdictions implement migration control strategies, assessing whether these practices align with or diverge from international legal standards. Key case studies—such as Australia's offshore processing centres and EU-sponsored detention facilities in Libya—serve to highlight common themes and divergences in the application of externalization, focusing on compliance with the principles of non-refoulement, the right to life, and the prohibition against torture. Each case study offers a window into the operational realities of externalization, illustrating how specific practices impact human rights and state accountability in distinct geopolitical contexts. This comparative lens not only highlights variations in state approaches but also identifies patterns that reveal systemic challenges to upholding human rights in the realm of externalized migration control.

Central to the analysis is the concept of state responsibility, particularly in cases where extraterritorial actions result in human rights violations. This thesis critically engages with international legal standards concerning state responsibility, drawing on both primary texts and case law to examine how jurisdiction and control are exercised in externalized practices. The research pays close attention to legal doctrines of "effective control" and "functional jurisdiction," as these concepts determine when and how states may be held accountable for any rights violation that occurs outside their territorial borders. Cases from the ECtHR, such as Hirsi Jamaa and Others v. Italy,[24] serve as foundational examples for

[24] Hirsi Jamaa and Others v Italy (2012) 55 EHRR 21.

understanding the application of these doctrines in practice. The analysis of state responsibility includes an exploration of positive and negative obligations imposed by the ECHR and ICCPR, focusing on how these obligations apply to externalization practices that expose migrants to potential harm.

While this thesis engages substantively with the doctrine of state responsibility as defined in international law, the term *responsibility* is also used in a broader and functional sense throughout the thesis. In sections dealing specifically with breaches, attribution, and legal consequences, responsibility is used in its formal and doctrinal meaning. However, in section titles and analytical discussions addressing the design, implementation, and facilitation of externalised migration practices, the term may reflect a wider notion of responsibilities incumbent upon states. This includes their *primary obligations* under instruments such as the ECHR, ICCPR, CAT, and RC, as well as normative and policy-based expectations to uphold fundamental rights in shared or extraterritorial contexts. This terminological choice is intended to capture both the binding legal duties and the anticipatory standards that govern state behaviour in the evolving architecture of migration control.

1.4 Literature Review and Contribution to Knowledge

In its essence, this thesis explores how externalization practices impact fundamental human and refugee rights, focusing on international legal guarantees that safeguard these rights against erosion. This section outlines the rationale for selecting specific rights for analysis, reviews how the literature approaches human and refugee rights violations in the context of externalization and clarifies this thesis's original contribution to the field.

A substantial body of literature critically examines externalisation practices and their implications for international refugee protection. Prominent scholars, such as Hathaway,

Gammeltoft-Hansen, Moreno-Lax, and Giuffré, have provided foundational insights. Hathaway emphasises the erosion of refugee rights through restrictive migration policies,[25] while Gammeltoft-Hansen critically assesses state accountability within extraterritorial migration control.[26] Moreno-Lax argues externalisation undermines effective access to asylum procedures, highlighting tension between migration management and refugee protection.[27] Similarly, Giuffré focuses explicitly on the human rights impacts within EU readmission agreements, critiquing the application of the 'safe third country' concept.[28] This thesis contributes uniquely to this discourse by systematically evaluating externalisation practices specifically through the lens of state responsibility under international law, examining the interplay between operational measures, national security, jurisdictional challenges, and rights obligations in international law. Unlike previous studies, this research explicitly interrogates states' legal justifications alongside empirical evidence of human rights risks through cases, thereby bridging critical theory with practical legal assessment.

Further in the existing literature on international human rights law, the primary focus is often on how externalization violates the principle of non-refoulement, which prohibits returning individuals to places where they face serious harm.[29] Since externalization often involves relocating irregular migrants to third countries or returning them to their country of origin, this principle is frequently the main concern. However, the literature tends to omit an in-depth analysis of other rights closely associated with non-refoulement, such as the right to life and the prohibition of torture and CIDTP, especially regarding the specific

[25] James C Hathaway, The Rights of Refugees under International Law (Cambridge University Press 2005).
[26] Thomas Gammeltoft-Hansen, Access to Asylum: International Refugee Law and the Globalisation of Migration Control (Cambridge University Press 2011).
[27] Violeta Moreno-Lax, Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law (Oxford University Press 2017);
[28] Mariagiulia Giuffré, The Readmission of Asylum Seekers under International Law (Hart Publishing 2020).
[29] Nanda Oudejans, Conny Rijken, and Annick Pijnenburg, 'Protecting the EU External Borders and the Prohibition of Refoulement' (2018) 19 Melbourne Journal of International Law 614, 615-617; Jennifer Hyndman and Alison Mountz, 'Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe' (2008) 43(2) Government & Opposition 249;

actions or omissions of agents of externalizing states, including physical harm, forced detainment, or deprivation of liberty. [30] This thesis seeks to address this gap by examining how state actions, whether direct or supported by externalizing states, contribute to violations of the prohibition of torture. In this way, it situates the international legal protections available to individuals confronted with externalization methods and the responsibilities of states within a broader framework beyond non-refoulement. Consequently, the literature on migration control classifies these measures based on factors such as the location of control, the entities conducting it, and the destinations to which migrants are directed.

In parallel, this thesis examines if and how externalizing states' actions may violate the right to life, including both intentional acts and omissions by these states or their partners. Existing literature often links the principle of non-refoulement to the prohibition of torture but rarely examines this connection in relation to the right to life. By addressing how the right to life is jeopardized within the framework of non-refoulement violations, this thesis expands the literature to show the broader impacts of externalization on fundamental rights.

Another key focus of this thesis is the right to seek asylum, which is directly threatened by externalization practices aimed at preventing irregular migrants from reaching destination states. Externalization reduces the number of asylum applications within destination countries' jurisdictions, restricting individuals' ability to seek asylum. Although the literature notes that international law does not explicitly guarantee the right to be granted

[30] Aoife Duffy, 'Expulsion to Face Torture? Non-Refoulement in International Law' (2008) 20(3) International Journal of Refugee Law 373, 373–390 https://doi.org/10.1093/ijrl/een022 accessed [insert date of access]; Başak Çalı, Cathryn Costello, and Sarah Cunningham, 'Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies' (2020) 21(3) *German Law Journal* 355, 355–384 https://doi.org/10.1017/glj.2020.28 accessed [insert date of access]; Thomas Gammeltoft-Hansen, 'The Refugee and the Globalisation of Migration Control' in *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge Studies in International and Comparative Law, Cambridge University Press 2011) 11–43.

asylum, this thesis will not limit itself to discussing the right to asylum in terms of state discretion.[31] Instead, it will focus on the right to seek asylum elsewhere, considering the impact of various externalization methods.

When discussing potential violations of the right to seek asylum, this thesis will explore how related rights—such as the right to leave, the right to freedom of movement, the principle of non-refoulement, and the prohibition on criminalizing irregular migration—are affected by externalization. These rights enable individuals to pursue asylum and are closely interrelated. Thus, this thesis examines how breaches of these related rights may lead to violations of the right to seek asylum. Unlike previous studies, which often treat these rights in an isolated view with a focus on different aspects of externalisation,[32] this thesis offers a more integrated approach by examining the interplay between these rights and the right to seek asylum.

The thesis further contributes to the literature by analysing rights violations across three main methods of externalization: interception of irregular migrants, EPCs, and RAs. Although the literature discusses a range of externalization methods—including carrier sanctions, pre-departure checks, visa restrictions, and joint border patrols—[33] this thesis

---

[31] Guy S Goodwin-Gill, *The Refugee in International Law* (1st edn, Oxford University Press 1983) 121; Atle Grahl-Madsen, *Territorial Asylum* (Almqvist & Wiksell 1980) 2; Kay Hailbronner, 'Molding a New Human Rights Agenda' (1985) 8 *Washington Quarterly* 183, 184.

[32] See, for example, Emilie McDonnell, 'Challenging Externalisation Through the Lens of the Human Right to Leave' (2021) International Journal of Refugee Law 33(4) 715-736, 731; Alice Edwards, 'Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants' https://www.unhcr.org/media/no-17-back-basics-right-liberty-and-security-person-and-alternatives-detention-refugees accessed 30 September 2023 19, 11-12; Mariagiulia Giuffré, 'Readmission Agreements and Refugee Rights' in *The Readmission of Asylum Seekers under International Law* (Hart Publishing, 2020) 151-154; Cathryn Costello, 'Human Rights and the Elusive Universal Subject: Immigration Detention under International Human Rights and EU Law' (2012) 19(1) Indiana Journal of Global Legal Studies 257–303; Violeta Moreno-Lax, 'The Right to Seek Asylum in the European Union and the Criminalization of Irregular Migration' (2008) 10 European Journal of Migration and Law 379–407;

[33] Salvatore Fabio Nicolosi, 'Externalisation of Migration Controls: A Taxonomy of Practices and Their Implications in International and European Law' (2024) 71 Netherlands International Law Review 1–20; Thomas Gammeltoft-Hansen and Nikolas Feith Tan, 'Extraterritorial Migration Control and Deterrence' in Cathryn Costello, Michelle Foster, and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021); Frelick et al (n 7); Theodore Baird and Thomas Spijkerboer, 'Carrier

concentrates on these three primary methods. The choice is due to the direct control that destination states or their agents exercise over migrants in these contexts, allowing for an analysis of state responsibility based on jurisdiction and attribution. In methods such as carrier sanctions or pre-departure checks, destination states typically provide financial, technical, or logistical support to third countries rather than exercising direct control over migrants. In these cases, destination states' jurisdiction does not extend over migrants in a way that could invoke effective control or functional jurisdiction, and actions by agents of third countries cannot be attributed to the destination states.

Focusing on interception, EPC, and RAs also allows the thesis to examine how these practices directly impact human and refugee rights. While various externalization measures implemented by origin or transit countries—such as carrier sanctions or visa restrictions—may contribute to rights violations, these instances are less likely to involve direct responsibility on the part of the destination states compared to the methods this thesis focuses on. When states intercept migrants beyond their borders, maintain EPCs, or enforce RAs, they often assume a more direct role in the process, resulting in a clearer connection to potential rights violations.

Additionally, the selected methods of externalization are inherently more likely to result in rights violations of the type examined in this thesis. For example, the right to life and the prohibition of torture are particularly at risk when individuals are forcibly intercepted, held in detention, or returned to their country of origin or transit country. Moreover, as these practices occur beyond the national borders or legal jurisdictions of destination states—

Sanctions and the Conflicting Legal Obligations of Carriers: Addressing Human Rights Leakage' (2019) 11(1) Amsterdam Law Forum 4–19 < https://amsterdamlawforum.org/articles/10.37974/ALF.325> accessed 11 June 2024.

such as on the high seas or in offshore detention centres—migrants whose rights, such as non-refoulement or the right to seek asylum, are at risk become increasingly vulnerable.

1.5 Thesis Structure

The thesis begins in Chapter 2 by introducing the primary concepts underpinning this research: externalization and its impact on international legal obligations. This section tries to conceptualise key terms such as safe country and refoulement as a basis for other chapters and explores how externalization extends migration control beyond national borders, allowing destination states to shift migration management to third countries or regions outside their jurisdiction. It analyses externalization through a legal lens, defining key terms such as interceptions, extraterritorial processing, and RAs. Additionally, the discussion incorporates international legal frameworks that inform the analysis of externalization, particularly the RC, ECHR, and the ICCPR. Together, these instruments provide a baseline for understanding states' obligations toward asylum seekers, including the principle of non-refoulement, the right to life, and the prohibition against torture, establishing the necessary context for assessing the compliance of specific externalization practices in later chapters.

In Chapter 3, the thesis examines how principles of jurisdiction and state responsibility apply to externalization practices, focusing on the extraterritorial reach of states' obligations. This section evaluates the relevance of effective and functional jurisdiction to migration control operations conducted outside national borders. Through analysis of case law, including judgments from the ECtHR, this chapter clarifies the circumstances under which states may be held responsible for rights violations committed extraterritorially. Particular attention is given to cases such as Hirsi Jamaa and Others v. Italy,[34] where the

[34] *Hirsi Jamaa and Others v Italy* (n 20)

ECtHR held that Italy's pushback operations in the Mediterranean constituted an exercise of jurisdiction, thereby triggering Italy's human rights obligations. This section thus provides a legal foundation for understanding when and how states are obligated to uphold rights protections beyond their borders, setting the stage for discussions on interceptions, asylum processing, and RAs.

Following this, Chapter 4 explores interception practices, particularly as they relate to pushbacks and pullbacks in the context of migration control. This section argues that interceptions—whether conducted in territorial waters of origin or transit countries, on the high seas, or within third-country territories—often directly contravene the right to life, the prohibition against torture and the right to seek asylum. By intercepting migrants and forcibly returning them to unsafe environments, states risk exposing individuals to serious harm, including violence, detention, and persecution. The legal analysis includes a review of international standards, such as non-refoulement and the prohibition of torture and CIDTP, and demonstrates the potential for human rights violations inherent in interception practices, underscoring the need for strict compliance with international obligations.

Chapter 5 then shifts focus to EPCs as a central feature of externalized migration control. Examining offshore detention facilities, such as those implemented by Australia and the EU-supported centres in Libya, it assesses their impact on the right to life, the right to seek asylum and the prohibition of torture. This section argues that these centres, which hold individuals outside the destination state's territory, create legal *grey zones* where fundamental rights are often compromised. The analysis highlights risks such as prolonged detention, lack of access to adequate asylum procedures, and substandard living conditions. By examining relevant international standards, such as the CAT, alongside documented cases of abuse, this chapter critiques the compatibility of extraterritorial processing with states' obligations to respect and protect fundamental rights.

In Chapter 6, the thesis addresses RAs and the concept of safe third countries as mechanisms of externalization. These agreements enable destination states to return migrants to countries deemed safe, often without adequate assessment of safety or potential risks of refoulement. This section considers EU RAs and their implications for the principle of non-refoulement, focusing on cases where these agreements facilitate transfers to countries with poor human rights records or inadequate asylum systems.

In chapter 7, the legal and procedural standards under the RC, APD, RD and New Pact on Migration and Asylum to be fully implemented by 2026[35] where relevant are examined to evaluate whether RAs align with or undermine international obligations. Although RAs serve migration control objectives, the section contends that they often fail to adequately protect refugee rights, particularly concerning asylum access and protection from torture and mistreatment.

This thesis, therefore, contributes to the literature by illustrating the broad and often severe implications of externalized migration control for fundamental rights. By systematically analysing legal frameworks, case law, and specific externalization practices, it argues for stricter enforcement of international human rights obligations in migration control policies, advocating for a more rights-centred approach to managing migration beyond borders.

1.6 Conclusion

In sum, this thesis investigates how the externalization of migration control by destination states impacts fundamental human and refugee rights. Through practices such as

[35] European Commission, 'Pact on Migration and Asylum' (European Commission, 21 May 2024) https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en accessed 29 January 2025; Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive) [2008] OJ L348/98; Regulation (EU) 2024/1351 of the European Parliament and of the Council of 20 June 2024 on asylum and migration management [2024] OJ L183/1 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32024R1351.

pushbacks, pullbacks, extraterritorial asylum processing, and RAs, states increasingly seek to manage migration beyond their borders. By outsourcing control or shifting it to external actors and third countries, these practices frequently limit refugees' access to essential protections, compromising core rights such as the right to life, the prohibition against torture and inhuman or degrading treatment, and the right to seek asylum. This thesis contends that these methods collectively raise important questions over erosion of the international guarantees enshrined to protect vulnerable individuals.

The study's focus on the principle of non-refoulement and corollary rights highlights how externalization places migrants at risk of severe harm, often contravening states' obligations under international law. This work argues that other intertwined rights, such as the right to life and the prohibition of torture, also warrant urgent examination within this context. Additionally, the right to seek asylum, often constrained by policies designed to limit migration flows into destination states, remains a critical and underexplored area of concern within externalized migration control.

In the chapters that follow, each aspect of externalization—whether through jurisdiction, interceptions, extraterritorial asylum processing, or RAs—is examined in depth to illustrate how these practices challenge international human rights standards. This thesis ultimately seeks to demonstrate that while externalization may serve state interests in controlling migration, it often comes at the expense of the rights and protections owed to individuals, raising significant legal concerns that warrant closer scrutiny and responsibility.

2. The Scope and Methods of Externalization of Migration Control

2.1 Introduction

Over the last decades, migration control with distinctively evolving methods has been one of the objectives of states with the motivation to bring irregular migration under control and to protect the right to sovereignty. To succeed this objective, developed states being the last destination for many have kept pursuing current migration control methods since the 1980s or putting forth new methods to deter the influx of people towards their territory. Externalization is the most common and prominent policy to control migration and stop asylum seekers and refugees from crossing borders in some of the key destination states. The US, Australia and European states have all developed similar methods of moving control mechanisms beyond their borders. Such methods include interceptions of irregular immigrants, keeping them in EPCs and returning them based on RAs-, which are the most prevalent and controversial ways in developed destination states to manage the movement of migration occurring out of control of states.

To comprehend international legal issues on the human and refugee rights that externalization of migration control gives rise to, the framework of externalization needs to be drawn. Accordingly, questions of which policies of states on migration control constitute externalization, how these policies affect human and refugee rights beyond national borders of these states and why these states can be held responsible because of these violations can be discussed and answered. The question of what externalization of migration control is firstly needs to be addressed. Moving further, the chapter will reveal two main issues: terms of the safe country and the principle of non-refoulement related to three methods of externalization.

This chapter will offer a description for externalisation methods. Although challenging and complicated because of the ever-changing and non-standardised nature of such methods, such a definition will help to understand which policies of states constitute externalization of migration control. It better allows to identify how states try to avoid their international responsibilities on human and refugee rights. Accordingly, finding a definition on externalization of migration control and defining features of different methods are important to address international legal concerns on human and refugee rights.

Starting with the background of externalisation methods, this chapter moves to the current implementation in key destination states and regions as well as legal concerns about their practice. Subsequent to the section on the scope of externalization, this chapter is divided into three sections to tackle the concept, implementations with examples, and legal questions about the interception of irregular migrants, holding of irregular migrants at the EPCs, and the RAs, respectively.

This chapter will then discuss the interception of irregular migrants, focusing on how the right to sovereignty serves as a fundamental legal basis for such practices, while also raising significant legal concerns regarding states' obligations under international human rights and refugee law, as well as issues surrounding jurisdiction in interception operations. Hence, it will address what the legal issues are for states to shed light on responsibilities and obligations of states party to international human rights instruments enshrining the rights of the people in need of international protection. The next section evaluates EPCs usually appointed by bilateral agreements to protect destination territories against so-called "*immigrant invasion*"[1] until the asylum decisions are made. Regional cases and examples

[1] Andrew Bolt, 'Our Sense of Unity Lost to the New Tribes Dividing Us' *Herald Sun* (3 August 2019) https://www.heraldsun.com.au/news/opinion/andrew-bolt/andrew-bolt-our-sense-of-unity-lost-to-the-new-tribes-dividing-us/news-story/d156abe8d811b5ceaf3a464bad41f8ee accessed 11 August 2022; Jo Becker, 'The Global Machine Behind the Rise of Far-Right Nationalism' *The New York Times* (10 August 2019) https://www.nytimes.com/2019/08/10/world/europe/sweden-immigration-nationalism.html accessed 17 December 2024.

will be outlined to delve into the question of which country will be responsible whilst causing the human and refugee rights violations at the EPCs in upcoming chapters. Lastly, the chapter will address bilateral RAs. It is argued that these agreements, while aimed at facilitating the return of irregular immigrants to their countries of embarkation or transit, often serve as mechanisms for states to evade their responsibilities under the RC and other international human rights instruments. The analysis will explore whether these agreements comply with the obligations and responsibilities arising from international human rights law or, conversely, whether they undermine the principles of non-refoulement and the broader protection framework for refugees and migrants.

2.2 Conceptualisation of Externalization of Migration Control

Balzacq explains externalization as incorporation of the EU's Justice and Home Affairs policies into the EU's external affairs, as highlighted in a 1999 and 2000 European Council documents[2] to protect internal security.[3] Specifically for the externalisation of migration control, Frelicket et al.'s work refers to state actions *extraterritorially* taken to prevent migrants, including asylum seekers, from entering their jurisdictions or territories, or to deem them legally inadmissible without assessing their individual protection claims.[4] This conceptual framing is significant because it underscores how externalization shifts migration control beyond national borders, allowing states to mitigate domestic political pressures while extending their reach to territories outside their direct jurisdiction. It

[2] European Parliament, 'Santa Maria da Feira European Council: 19 and 20 June 2000 Conclusions of the Presidency' (European Parliament) https://www.europarl.europa.eu/summits/fei1_en.htm accessed 30 July 2024; European Parliament, 'Tampere European Council: 15 And 16 October 1999 Conclusions of the Presidency' (European Parliament) https://www.europarl.europa.eu/summits/fei1_en.htm accessed 30 July 2024.

[3] Thierry Balzacq, 'The Frontiers of Governance: Understanding the External Dimension of EU Justice and Home Affairs' in Thierry Balzacq (ed), *The External Dimension of EU Justice and Home Affairs: Governance, Neighbours, Security* (Palgrave Macmillan 2009) 2-3

[4] Bill Frelick, Ian M. Kysel, and Jennifer Podkul, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) 4(4) *Journal on Migration and Human Security* 190, 193

reveals the strategic objective of state actions to reduce the inflow of migrants and asylum seekers by outsourcing migration management to third countries.

These actions include direct or indirect methods for externalization of migration control. Direct methods compromise of interdiction or preventive actions whereas indirect methods refer to the support and assistance of states to each other to extend the migration control of destination states toward a third party state before irregular immigrants step in their territory or legal jurisdiction[5] via multilateral, bilateral or unilateral state collaboration.[6] From another perspective, McNamara argues that externalisation involves shifting the border outward, creating a "*metaphorical*" border within a third state that allows a state to implement its border control mechanisms directly within that state.[7] This approach provides states with direct control, for instance, either through the use of their immigration officials or by deputising local agents to perform migration control tasks. The concept of an "external dimension," however, reflects an indirect extension of migration control within the state's diplomatic and cooperative relations with third countries such as European Neighbour Policy and RAs.[8]

While these distinctions between "externalisation" and "external dimension" highlight varying methods and scopes of control, I argue that such a differentiation is analytically unnecessary and impractical. For the purposes of examining externalisation, such distinctions only hold relevance in delineating the state responsibilities that arise from direct versus indirect actions. Treating them as separate concepts risks complicating

---

[5] ibid, see discussion of indirect methods; See for direct methods: Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge Studies in International and Comparative Law, Cambridge University Press 2011) 11-25; James C Hathaway, The Rights of Refugees under International Law. Cambridge: Cambridge University Press. 301-340;
[6] ibid; UNCHR, 'Report of the Special Rapporteur on the human rights of migrants, François Crépeau: Regional study: management of the external borders of the European Union and its impact on the human rights of migrants' (2013) UN Doc A/HRC/23/46.
[7] Frank McNamara, 'Member State Responsibility for Migration Control within Third States – Externalisation Revisited' (2017) 15(3) *European Journal of Migration and Law* 319–335; *R (European Roma Rights Centre and Others) v Immigration Officer at Prague Airport* [2004] UKHL 55.
[8] ibid.

analyses and detracts from a comprehensive understanding of how externalisation functions in practice. Considering these definitions of the scholarship, I concur with Frelicket et al.'s view for different methods of externalisation and will come up with a comprehensive definition accordingly.

To start with, there are three main elements to highlight. The first of them is the *extraterritorial component* which Balzacq associates with "remote control" over other states, eventually bringing out the practice of "extraterritorial conduct of border management far beyond hard material limits. [9] On the other hand, Gammeltoft-Hansen and Hathaway refer to "non-entrée policies" and extension of cooperative deterrence against migration towards the home or transit states' territories.[10] A migration control measure taken beyond the national borders of destination states to extend the area where they control migration is considered a measure including the extraterritorial component. For instance, interception of irregular immigrants on the high sea or in the territorial waters of another state to push them back simply meets this element because it is taken beyond national borders of the destination state. Accordingly, this method directly corresponds to "non-entrée policies" since pushback and pullback operations aim to prevent irregular immigrants from entering national territories or under territorial jurisdiction of the destination state.

However, this element, the extraterritorial component, is a controversial issue for externalisation methods like EPCs and RAs since irregular immigrants can be subjected to these methods after their arrival in the destination state. Although these irregular immigrants in the destination country are sent to an EPC or returned to another state based

[9] Balzacq (n 3) citing Didier Bigo and Elspeth Guild (eds), *Controlling Frontiers: Free Movement Into and Within Europe* (Ashgate 2005) and Virginie Guiraudon and Christian Joppke (eds), *Controlling a New Migration World* (Routledge 2001).
[10] Gammeltoft-Hansen (n 6).

on a RA, the extraterritorial component is also met since the solution for migration control is based on sending individuals out of jurisdiction/territorial area of the destination state. For instance, RAs with the aim to quickly return irregular immigrants to other countries as a solution to irregular migration control do not feature a direct extraterritorial element. Nevertheless, such agreements have an extraterritorial dimension, as countries do not offer appropriate solutions for these people within their territories. Thus, while defining a method or tool as externalization, "non-entrée policies" or "remote control" would not be sufficient. Instead of that, the extraterritorial component, i.e., finding a solution for migration control beyond national borders of destination states regardless of whether operations are pursued beyond borders or within the territories of destination states, should be used as an element because it is a part of all three main methods of externalization.

Secondly, externalization of migration control focuses on *irregular immigrants*, including asylum seekers and refugees, who attempt to cross borders or remain in a country without legal authorization.[11] The nature of the situation stems from the fact that irregular immigrants, by definition, lack the proper documentation or permission required to enter or stay in a state's territory. This makes them the primary focus of preventive or interceptive migration control measures. Conversely, legal immigrants have already undergone the required administrative or legal processes, such as visa issuance or asylum procedures, which preclude the need for such externalized control. Preventive or interceptive solutions are therefore inherently directed at irregular immigrants, as the objective of externalization is to prevent unauthorized entry or transit before it occurs, rather than addressing those who are lawfully present.

Thirdly, Lavenex suggests that externalization methods often rely on *state cooperation*, except the cases which the externalising state takes one-sided actions i.e. States carry out

[11] See section 1.4 for the definition of irregular immigrants.

pushback operations without the support of other states, such as on the high sea. [12] Gammeltoft-Hansen highlights the shift to privatisation of migration control from third state affiliation.[13] While Gammeltoft-Hansen might have a valid point with private actors, there must always be the consent or support of a third state. To exemplify, to return irregular immigrants a transit country or a country of origin, or externalize asylum process, a RA or an arrangement allowing the asylum process in another country needs to be signed by at least two states. Likewise, to pursue some pullback or pushback operations, state cooperation is needed to pursue operations, keep returned immigrants into its territories or prevent irregular immigrants from leaving its territories. However, this cooperation is not always needed for a destination/externalizing state pursing an interception operation on the high seas because it can pursue this operation. To exemplify, certain destination states may independently intercept and push irregular immigrants back toward international waters without support from other states. That said, in some contexts, interception operations are carried out collaboratively by supranational entities like Frontex, which acts as a collective effort by EU member states to manage external borders. Hence, this element is not always met for all main externalization of migration control.

In order to provide a definition that captures the fluidity of externalization methods, I propose to define externalisation as all measures taken by the destination state against immigrants regardless of their itinerary, with the intention of externalising all or some of the migration processes outside the state's territory. Hence, these include interception of irregular migrants beyond their national borders when these individuals attempt to cross borders, or return of arrived people to their countries of origin or a transit and STC based on an agreement signed between relevant states.

[12] Sandra Lavenex, 'Shifting Up and Out: The Foreign Policy of European Immigration Control' (2006) 29(2) West European Politics 329, 330.
[13] Gammeltoft-Hansen (n 6) 158-208.

In closing the existing gap in the literature, it is suggested here that externalization is not only about migration control methods aiming “remote control” or “non-entrée” of irregular immigrants. While this description is correct for interceptions taking place beyond national borders of destination states and supported by destination states but carried out by a transit country or country of origin of irregular immigrants. However, it is missing for interceptions taking place beyond national borders of destination states and carried out directly by destination states because these interceptions do not include “remote control” despite aiming “non-entrée.” Also, RAs and externalised asylum processing centres do not include both “remote control” and “non-entrée” because these externalization methods aim to return irregular immigrants who have already arrived in destination states. Thus, all migration control methods including *extraterritorial component against irregular immigrants*-such as returning irregular immigrants to another country, processing asylum requests in another country or intercepting these individuals beyond their national borders-constitute externalization regardless of controlling immigration remotely or non-entree.

2.2.1 Conceptualisation of Safe Country

The concept of a "safe country" is central to migration governance frameworks, particularly in defining the parameters for returning or processing individuals seeking international protection. While there is no universally agreed definition in international law, the concept has been shaped regionally, particularly within the EU CEAS, through legislative instruments such as the APD, which has been repealed and is in transition under the New Pact.[14] For consistency in evaluating past cases and given its continued relevance, this thesis will focus on the CEAS framework while referencing the New Pact where

[14] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60 (Asylum Procedures Directive, APD); European Commission, ‘New Pact on Migration and Asylum’ COM(2020) 609; European Commission, ‘Pact on Migration and Asylum’ https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en accessed 17 December 2024.

applicable. This framework aims to categorize states as "safe" based on their capacity to offer effective protection against persecution or harm, their compliance with international human rights standards, and their provision of access to asylum procedures. The designation is operationalized primarily through two applications: the "safe third country" (STC) concept and the "safe country of origin" (SCO) concept.

The APD represents the first supranational instrument to codify standards for determining a country's safety, providing detailed criteria under Articles 36 to 38.[15] A STC is defined as one where an individual may seek protection in accordance with international law and where the principle of non-refoulement is respected, along with broader safeguards such as access to fair and efficient asylum procedures. A SCO, on the other hand, refers to a state where systemic persecution or harm does not occur, allowing it to be deemed safe for nationals or habitual residents of that state. The APD emphasizes the need for objective, reliable, and up-to-date information in determining such designations.

Despite its foundational role, the APD's application of the safe country concept has faced significant scrutiny and adaptation. Under the New Pact on Migration and Asylum, the criteria for safe country designations are streamlined and redefined through Asylum Procedures Regulation. This regulation seeks to align Member States' practices by revising and consolidating the criteria for designating both STCs and SCOs. Considering the recent law cases are evaluated in the context of APD, it is crucial to understand what this first supranational instrument[16] on safe country states.

[15] ibid arts 36, 37, 38, 39.
[16] Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007) 397.

To qualify as a STC under Article 38(1) of the APD, a state must meet specific requirements. [17] Similarly, a SCO designation under Article 37 of the APD requires that the country generally does not produce refugees or expose individuals to persecution or harm due to race, religion, nationality, membership in a particular social group, or political opinion[18] and such countries are expected to uphold democratic principles, the rule of law, and fundamental human rights as outlined in international instruments. [19] Notably, Article 36 of the APD stipulates that the designation of SCOs must be regularly reviewed to ensure continued compliance with safety criteria.

These EU standards are complemented by national practices, which demonstrate the varied interpretations and implementations of the safe country concept. For example, Ireland maintains a highly restrictive list of safe countries, with South Africa as its sole designation, reflecting a cautious approach.[20] In contrast, Member States like France and Malta adopt more expansive lists, often incorporating countries that align with their geopolitical or migration priorities. [21] An interesting variation arises in the UK's approach, which still retains a safe country list post-Brexit, where safe country designations differentiate between men and women. For example, countries such as Gambia, Ghana, Kenya, and Sierra Leone are considered safe for men but not for women, recognizing gender-specific risks that may undermine safety.[22] This nuanced approach underscores the

[17] APD art 38/1: It must respect the principle of non-refoulement as enshrined in Article 33 of the RC, ensuring that individuals are not returned to territories where their life or freedom would be at risk. The country must not subject individuals to torture, inhuman, or degrading treatment or punishment in compliance with the ECHR, the ICCPR, and the CAT. It must provide effective protection mechanisms, including access to an asylum procedure and safeguards against onward deportation (chain refoulement).
[18] Convention Relating to the Status of Refugees (RC) UN Doc A/RES/429(V) (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 33(1).
[19] ibid art 33/1; ECHR art 3; ICCPR art 16; CAT art 3.
[20] Statewatch, 'Safe Countries of Origin' (2015) https://www.statewatch.org/media/documents/news/2015/oct/eu-commssion-safe-countries-of-origin.pdf accessed 10 December 2023.
[21] ibid.
[22] ibid. Hélène Lambert, '"Safe Third Country" in the European Union: An Evolving Concept in International Law and Implications for the UK' (2012) 26(4) *Journal of Immigration Asylum and Nationality Law* 336, 336–354.

complexities involved in determining safety and the need for individualized assessments to account for intersecting vulnerabilities.

Outside the EU and the UK, other jurisdictions adopt differing approaches to the safe country concept. In Australia, the Migration Act 1958 governs the designation of safe third countries, with criteria emphasizing effective protection and compliance with non-refoulement.[23] This broad definition is not explicitly reflected on Australia's arrangements with PNG and Nauru.[24] Similarly, in the United States, Section 208(a)(2)(A) of the Immigration and Nationality Act defines a STC as one that provides access to a full and fair asylum process, freedom from persecution, and protection from torture.[25] The US is known to have operationalized this definition through the Safe Third Country Agreement with Canada.[26]

The practical application of the safe country concept has also been contentious,[27] particularly in its implementation under RAs and externalized asylum processing. While these contexts fall outside the immediate focus of this conceptualization, it is worth noting their reliance on the presumption of safety in receiving states. For instance, Turkey's designation as a STC under EU agreements is controversial due to its geographic limitation under the RC, which excludes non-European asylum seekers from full protection.[28] Such

[23] Migration Act 1958 (Commonwealth of Australia) section 91D.
[24] ibid; see sections 2.3.1 and 2.4.1.
[25] 8 United States Code (USC) Section 1158.
[26] Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (Safe Third Country Agreement) (signed 5 December 2002, entered into force 29 December 2004) 2354 UNTS 175.
[27] Goodwin-Gill and McAdam (n 14) 392–407; Cathryn Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?' (2005) 7(1) European Journal of Migration and Law 35–70; Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection, and the Common Market of Deflection* (Kluwer Law International 2000) 182–211; María-Teresa Gil-Bazo, 'The Practice of Mediterranean States in the Context of the European Union's Justice and Home Affairs External Dimension: The Safe Third Country Concept Revisited' (2006) 18(3–4) International Journal of Refugee Law 571–600; Stephen H Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15(4) International Journal of Refugee Law 567–677.
[28] European Parliament, 'EU-Turkey Statement and Action Plan' https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-eu-turkey-statement-action-plan accessed 17 December

limitations highlight the risks of relying on safety designations without sufficient guarantees of effective protection.[29]

The EU's frameworks, particularly under the APD, have sought to formalize these processes in the absence of an international definition, but challenges remain in ensuring that safety designations are grounded in substantive evaluations rather than political expediency.[30] The safe country concept, as defined and operationalized within the EU and other jurisdictions, reflects an attempt to balance migration management with international protection standards. While the APD and its successors under the New Pact may provide a detailed framework for applying this concept, national and regional variations demonstrate its inherent complexities, to be discussed in detail in the context of extraterritorial processing and RAs. Ensuring the credibility and reliability of safe country designations requires constant evaluation, alignment with evolving international norms, and a commitment to substantive protection rather than operational efficiency and migration control.

2.2.2 The Principle of Non-Refoulement and Externalization

The principle of non-refoulement in RC (Article 33) is articulated in broad terms, stating that no refugee should be returned “in any manner whatsoever” to a country where they may face harm.[31] This principle is firmly embedded in multiple international instruments, including the CAT (Article 3), the ICCPR (Article 7), and ECHR (Article 3).[32] These legal

2022; Emanuela Roman, Theodore Baird, and Talia Radcliffe, 'Why Turkey Is Not a “Safe Country”' (Statewatch, 18 February 2016) https://www.statewatch.org/analyses/2016/why-turkey-is-not-a-safe-country/ accessed 12 October 2023; Dogus Simsek, 'Turkey as a "Safe Third Country"? The Impacts of the EU–Turkey Statement on Syrian Refugees in Turkey' (2017) 22 *Perceptions* 161.

[29] ibid; UN Committee against Torture, 'General Comment No 1 on the Implementation of Article 3 of the Convention in the Context of Article 22' (1997) para 2.

[30] ibid.

[31] RC art 33/1.

[32] ICCPR art 7; United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS

instruments collectively emphasize that no person should be sent to a location where they face substantial threats to their life, freedom, or dignity or where they risk torture and other CIDTP. This expansive language underscores that non-refoulement applies regardless of the specific mechanisms or pathways through which a transfer takes place.

To explain, direct refoulement occurs when a requesting state returns an asylum seeker to a country where they face persecution, ill-treatment, or human rights violations. In contrast, indirect or chain refoulement arises when an asylum seeker is returned to a first country, which then transfers them to a third country where they are exposed to similar risks of torture, persecution, or inhuman treatment.[33] However, the indirect refoulement is when an asylum seeker is returned from first returned country to a third country where he/she can still be exposed to torture, persecution, or derogation treatment. Both forms of refoulement stem from the requesting state's decisions and actions, which may fail to comply with international obligations under RAs.[34] As parties to the RC, states are required to review all asylum claims carefully before executing any return decision, ensuring they do not breach the non-refoulement principle.[35] The CAT reinforces this principle, prohibiting states from transferring individuals to locations where they face substantial risk of torture, even indirectly. In other words, the responsibility for preventing refoulement does not end with the initial transfer but extends along the full chain of custody.

In addition to treaty-based obligations, the principle of non-refoulement has developed into a norm of customary international law, binding on all states regardless of their participation

85, art 3; ECHR, art 3; International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3, art 16; ACHR art 22(8); Inter-American Convention to Prevent and Punish Torture (adopted 9 December 1985, entered into force 28 February 1987) OAS Treaty Series No 67, art 13(4); Charter of Fundamental Rights of the European Union (2000) OJ C 364/1, art 19(2); Arab Charter art 28.

[33] Maarten Den Heijer and Jessica Schechinger, 'Refoulement' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press 2017) 481, 484-485.

[34] ibid.

[35] Florian Trauner and Imke Kruse, 'EC Visa Facilitation and Readmission Agreements: A New Standard EU Foreign Policy Tool?' (2008) 10 European Journal of Migration and Law 411, 433.

in specific treaties. This *jus cogens* customary status of non-refoulement broadens its applicability and obliges states to prevent refoulement, whether direct or indirect, in all migration control activities.[36] In practice, this means that states must ensure the protection of individuals against refoulement through all agents acting under state authority, including authorized private actors or contractors engaged in migration control.[37] States, therefore, hold a duty to implement procedures that prevent refoulement and to ensure that any country they transfer individuals to can provide the full range of protections required under international law.

Indirect refoulement poses particular challenges in externalized migration control. Jennifer Hyndman and Alison Mountz have described this broader phenomenon as *neo-refoulement*, highlighting how states employ mechanisms such as interception, third-country agreements, and extraterritorial processing to shift responsibilities for migration control while still exposing individuals to harm.[38] They argue that these practices result in the denial of protection by proxy, effectively bypassing the legal safeguards enshrined in the principle of non-refoulement. Neo-refoulement thus underscores the critical importance of rigorous guarantees in state cooperation with third countries to prevent systemic risks to individuals.

Interception operations, a key tool in externalization strategies, often highlight the risks of indirect refoulement. These operations, conducted in territorial or international waters, may result in migrants being returned to unsafe countries or stranded in dangerous conditions. [39] For example, in *Hirsi Jamaa and Others v. Italy*, the ECtHR has highlighted Libya's

[36] UN doc HCR/MMSP/2001/09 (2001) para 4, alongside analysis in Goodwin-Gill, McAdam and Dunlop, The Refugee, 300–306. For the contrary view, see Hathaway, Rights of Refugees, 435–465.
[37] RC art 33/1; CAT art 3; ICCPR art 7; ECHR art 3.
[38] Jennifer Hyndman and Alison Mountz, 'Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe' (2008) 43(2) Government and Opposition 249–269.
[39] Nanda Oudejans, Conny Rijken, and Annick Pijnenburg, 'Protecting the EU External Borders and the Prohibition of Refoulement' (2018) 19 *Melbourne Journal of International Law* 614, 616 para 4.

insufficient protections and high risks of onward deportation to unsafe environments underscored Italy's breach of the non-refoulement principle. [40] This judgment illustrates how interception practices, even when conducted extraterritorially, must adhere to the obligation to avoid refoulement.

The risks of indirect refoulement also extend to transfers to third countries hosting extraterritorial detention centres. These centres, often established through bilateral agreements, are designed to house asylum seekers while their claims are processed. However, the safety and protection offered in these host states are frequently inadequate. States transferring individuals to such centres are bound by the principle of non-refoulement if the host country fails to uphold robust human rights safeguards or exposes individuals to further transfers to unsafe locations. The responsibility to prevent such outcomes requires transferring states to ensure that third countries meet the necessary protection standards before initiating transfers.

Case law continues to highlight the importance of ensuring safe conditions in receiving countries. In *M.S.S. v. Belgium and Greece*, the ECtHR found Belgium in breach of the non-refoulement principle by returning an asylum seeker to Greece, where dire conditions in refugee camps posed significant risks to the individual's health and security. [41] This case along with *Hirsi Jamaa and Others v. Italy* demonstrate that states cannot rely on presumptions of safety in third countries without conducting comprehensive and individualized assessments. These examples underscore the necessity of adhering to the non-refoulement principle in all migration control activities, particularly those involving partnerships with transit or third countries that may not comply with international obligations.

[40] Hirsi Jamaa and Others v. Italy (2012) 55 EHRR 21.
[41] M.S.S. v. Belgium and Greece [GC] (Application No. 30696/09, ECtHR, 21 January 2011).

When designating safe countries, states must conduct rigorous assessments to confirm that receiving countries provide the full range of protections required under international law. These evaluations must account for both the host state's capacity to provide effective protection and the risks of onward deportation to unsafe environments. Failure to meet these standards increases the likelihood of chain refoulement, whereby individuals are transferred through multiple jurisdictions without adequate protection, ultimately exposing them to harm. As explored further in subsequent chapters, the principle of non-refoulement underpins these obligations and highlights the need for responsibility in externalized migration control.

In summary, direct and indirect refoulement represent significant challenges to the principle of non-refoulement, particularly in the context of externalized migration strategies. States must ensure that individuals under their control—whether intercepted at sea, transferred to third countries, or detained in extraterritorial centres—are not exposed to risks of persecution or inhumane treatment. The obligation to uphold non-refoulement applies universally to all agents acting under state authority and extends beyond territorial borders to extraterritorial operations. While this section sets the foundation for understanding the risks associated with non-refoulement, the following chapters will provide detailed analyses of case law, treaty obligations, and state practices in addressing these challenges.

2.3 The Scope of Interception

Interception of vessels can be summarised as all types of preventive and punitive measures taken by a state beyond its borders in conformity with international and domestic

commitments to stop irregular migrants at sea.[42] These may include circumvention of irregular migrants from leaving departure points or returning them to these points. The first time, interception of irregular migrants was used as a method of border control was in 1981. Haiti and the US signed an agreement on keeping the vessels filled with Haitian asylum seekers away from the USA border.[43] Since then, interception has become one of the most popular methods of migration control. European states use it in particular in the Mediterranean Sea[44] as does Australia together with countries in South Asia. [45] Considering the significance of this method, it is critical to better understand its background and the legal issues linked to it.

2.3.1 Background and Implementations

There is still no consensus over a unified definition of interception in international law, as methods vary based on geographical factors, migration routes, and state-specific practices.[46] The scope and implementation of interception operations have also evolved from preventing smuggling vessels or self-organized boats to more comprehensive and robust migration control strategies.

---

[42] Enkelejda Koka and Denard Veshi, 'Irregular Migration by Sea: Interception and Rescue Interventions in Light of International Law and the EU Sea Borders Regulation' (2019) 21(1) European Journal of Migration and Law 26, 33 para 2.
[43] Haiti-United States: Agreement to Stop Clandestine Migration of Residents of Haiti to the United States (United States-Haiti) (23 September 1981) No. 277.
[44] Dr Jeff Crisp, 'What is Externalization and Why is it a Threat to Refugees?' *Clatham House* (14 October 2020) https://www.chathamhouse.org/2020/10/what-externalization-and-why-it-threat-refugees accessed 18 June 2024; Eurostat, 'Migration and migrant population statistics' https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Migration_and_migrant_population_statistics accessed 18 June 2024.
[45] Australian Government, 'Migration program statistics' https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/live/migration-program accessed 20 June 2024.
[46] Violeta Moreno-Lax, 'Externalisation of Migration Controls: A Taxonomy of Practices and Legal Consequences' (2023) 8(2) *European Papers* 655–678; Michael Kagan, 'Interception and Asylum: When Migration Control and Human Rights Collide' (2002) 21(3) *Refuge: Canada's Journal on Refugees* 5–18; Sam Blay, Jennifer Burn, and Patrick Keyzer, 'Interception and Offshore Processing of Asylum Seekers: The International Law Dimensions' (2007) 9 *UTS Law Review* 7–25; UNHCR, 'Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach' (9 June 2000) EC/50/SC/CRP.17 https://www.unhcr.org/media/interception-asylum-seekers-and-refugees-international-framework-and-recommendations-0 accessed 17 July 2024.

Interception methods are shaped by factors such as the routes and vehicles used by migrants, the technological capabilities of states, and the terms of bilateral or multilateral agreements. For example, destination states may push boats carrying irregular migrants away on the high seas, or, based on agreements, they may conduct interception operations within the territorial waters of origin or transit countries. Similarly, origin and transit countries, often supported by destination states, intercept migrants before they leave their shores. In essence, interception operations include actions intended to prevent irregular migrants from reaching destination countries by redirecting or returning them, depending on the state conducting the operation and its location. When an interception operation redirects migrants away from their intended destination, it is referred to as a *pushback*. Conversely, if the operation returns migrants to their initial point of departure, it is termed a *pullback*. Both terms illustrate the evolving complexity of interception practices as tools of migration governance.

Interception operations are primarily employed by developed regions such as the USA, Australia, and the European Union (EU) to manage irregular migration flows beyond their national borders.[47] These states often serve as focal points for migration due to their perceived higher standards of living, economic stability, and stronger governance frameworks,[48] making them attractive destinations for migrants fleeing conflict, poverty, or persecution. those countries are hotspots for irregular immigrants. In addition to being hotspots for migration, these regions possess significant technological and financial

[47] Frelick et al (n 4) 199; U.S. Customs and Border Protection (CBP), 'Newsroom: Statistics' https://www.cbp.gov/newsroom/stats accessed 15 June 2024; Frontex, 'Publications' https://www.frontex.europa.eu/publications/ accessed 15 June 2024; Australian Border Force, 'Operation Sovereign Borders Monthly Update: June 2024' (26 July 2024) https://www.abf.gov.au/newsroom-subsite/Pages/Operation-Sovereign-Borders-Monthly-Update-June-2024-26-07-2024.aspx accessed 15 June 2024; Refugee Council of Australia, 'Statistics on Asylum Seekers and Refugees' https://www.refugeecouncil.org.au/asylum-boats-statistics/2/ accessed 15 June 2024.

[48] Economist Intelligence Unit, 'Democracy Index 2023' (Economist Intelligence Unit 2023) https://www.eiu.com/n/campaigns/democracy-index-2023/ accessed 30 July 2024; Our World in Data, 'Democracy Index (EIU) and Civil Rights Score (BTI)' (Our World in Data) https://ourworldindata.org/ accessed 30 July 2024.

capabilities, enabling them to observe, intercept, and redirect irregular migrant flows with precision. These advantages have allowed developed states to expand their migration control practices into third countries and international waters through advanced surveillance technologies, bilateral agreements, and well-resourced enforcement agencies.[49] To better understand how interception has become a central tool in migration governance, the practices of three key regions—the USA, Australia, and the EU—are examined next, focusing on their unique approaches and the geopolitical factors shaping their strategies.

2.3.1.1 The United States' Interception Practices

The United States began employing interception as a migration control strategy in 1981 through a bilateral agreement with Haiti, which allowed US vessels to intercept Haitian boats on the high seas and return them to Haitian territorial waters.[50] Since then, the USA has expanded its approach by signing multiple agreements with Central American and Caribbean countries. These agreements include joint operations, guard training, and permissions for US interception vessels to operate in the territorial waters of partner states,[51] effectively extending US migration control beyond its borders. While many of these agreements were initially framed as countermeasures against drug smuggling and terrorism, controlling irregular migration has emerged as a significant outcome.[52] Notably, in the mid-1990s, the USA increased its Coast Guard operations to redirect Cuban migrants to Guantanamo Bay or Panama, where asylum claims could be processed.[53]

---

[49] Tugba Basaran, *Security, Law and Borders* (London: Routledge, 2011) 72.
[50] ibid 76.
[51] Joseph E. Krámek, 'Bilateral Maritime Counter-Drug and Immigrant Interdiction Agreements: Is this the World of the Future' (2000) 31 UMiamilnter-AmLRev 121, 142
[52] ibid.
[53] Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, 2012) 187

In addition to its maritime operations, the USA has also focused on securing its land border with Mexico. The Mérida Initiative, introduced in 2014,[54] provided Mexico with funding, training, and equipment to implement the "Southern Borders Programme." Similar support was extended to Honduras and Guatemala.[55] Unlike maritime agreements, the Mérida Initiative does not permit the USA to conduct interceptions directly within these countries. Instead, partner countries intercept irregular migrants within their territories, preventing them from reaching the US border. For example, Mexico has intercepted and returned migrants to their countries of origin, mirroring US-led pushback strategies.

These agreements reflect a shift in the USA's migration control strategy, from direct interceptions to externalized operations where origin and transit countries carry out pushback and pullback operations with US support. By providing financial and logistical assistance, the USA enables these countries to intercept migrants on its behalf. This externalization strategy illustrates how interception practices evolve when destination states transfer operational responsibilities to partner states, while still maintaining significant influence over migration control outcomes.

2.3.1.2 Australia's Interception Practices

Australia's reliance on interception as a migration control tool reflects its status as a prominent destination for irregular migrants within the Pacific region.[56] Due to its geographic isolation, Australia has consistently sought to manage migration through

[54] Clare Ribando Seelke and Kristin Finklea, 'US-Mexican Security Cooperation: The Mérida Initiative and Beyond' (Congressional Research Service Report R41349, Createspace Independent Publishing Platform 2017) 2.
[55] Ian Kysel and Jennifer Podkul, 'Interdiction, Border Externalization, and the Protection of the Human Rights of Migrants, Working Paper submitted as written testimony to: The Inter-American Commission on Human Rights.' (2015) New York/Storrs: Women's Refugee Commission/Human Rights Institute, 9 <https://www.law.georgetown.edu/human-rights-institute/wp-content/uploads/sites/7/2017/07/2015-WRC-HRI-Submission-to-IACmHR.pdf> accessed 20 March 2021.
[56] IOM, 'Regional Data Overview: Oceania' (Migration Data Portal, 2024) https://www.migrationdataportal.org/regional-data-overview/oceania accessed 30 July 2024; Luke Heemsbergen and Angela Daly, 'Leaking Boats and Borders: The Virtu of Surveilling Australia's Refugee Population' (2017) 15(3/4) *Surveillance & Society* 389, 391.

externalized measures, including bilateral agreements and maritime interceptions.[57] Unlike the USA, which frequently conducts interceptions in the territorial waters of partner states, Australia's interception practices largely focus on its own maritime boundaries. Australian authorities regularly intercept and return vessels approaching their territorial waters.[58]

One of the most notable incidents shaping Australia's interception policies was the Tampa Crisis of 2001, where a Norwegian container ship, MV Tampa, rescued 433 asylum seekers attempting to reach Australia from Indonesia.[59] Despite the asylum seekers' demands to be taken to Christmas Island,[60] Australian authorities denied the ship entry, citing national security concerns.[61] This event triggered significant international controversy over the authority of the Australian government to control its maritime borders and manage asylum seeker arrivals. [62]

In response, the Australian government introduced the "Pacific Solution" in 2001, which involved diverting intercepted migrants to EPCs in PNG and Nauru.[63] As part of this policy, the Australian Defence Force (ADF) launched "Operation Relex," a series of maritime interception operations from 2001 to 2006. [64] These operations aimed to tow vessels carrying irregular migrants back to Indonesia or redirect them to Pacific states that

---

[57] ibid; Thomas Gammeltoft-Hansen and Nikolas Feith Tan, 'Extraterritorial Migration Control and Deterrence' in Cathryn Costello, Michelle Foster, and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 511-5.
[58] Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (Cambridge University Press, 2018),85.
[59] Natalie Klein, 'Assessing Australia's Push Back the Boats Policy under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants' (2014) 15 Melb J Int'l L 414, 416 para 1
[60] National Museum Australia, 'Tampa affair' (2001) <https://www.nma.gov.au/defining-moments/resources/tampa-affair> accessed 10 March 2021
[61] ibid.
[62] Penelope Mathew, 'Australian Refugee Protection in the Wake of the Tampa' (2002) 96 American Journal of International Law 661; Natalie Klein, 'Assessing Australia's Push Back the Boats Policy under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants' (2014) 15 Melbourne Journal of International Law 414.
[63] Nikolas Feith Tan, 'International models of deterrence and the future of access to asylum' in Satvinder Singh Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar Publishing, 2019) 172 para 3
[64] Royal Australian Navy, 'Australian Operational Service Medal' https://www.navy.gov.au/australian-operational-service-medal accessed 01 March 2021.

had signed agreements with Australia for the offshore processing of asylum claims.[65] Reports indicate that at least 47 boats (carrying 2,476 people) were intercepted between 2001 and 2021. [66]

Although the Pacific Solution formally ended in 2008, Australia's interception practices have continued with limited transparency. It remains unclear whether current operations occur in Australia's contiguous zone, on the high seas, or within the territorial waters of other states. In recent years, vessels have reportedly been diverted back to Indonesia rather than transferred to processing centres.[67] This lack of clarity regarding the geolocation of interception operations raises concerns about responsibility and compliance with international obligations.

2.3.1.3 Europe's Interception Practices

The Mediterranean Sea serves as a key route for irregular migration, with an estimated 341,010 people attempting the journey in 2023 alone.[68] The Mediterranean Sea serves as a key route for irregular migration, with an estimated 341,010 people attempting the journey in 2023 alone. Wars, conflict, and oppressive regimes in the surrounding regions drive migrants toward southern and eastern European states, particularly Italy, Greece, and Spain, as entry points to the European Union. To control these flows, EU countries, supported by Frontex and bilateral agreements, employ extensive interception operations aimed at protecting the external Schengen borders.

---

[65] Penelope Mathew, 'Australian Refugee Protection in the Wake of the Tampa' (2002) 96 AJIL 661.
[66] Refugee Council of Australia, 'Statistics on boat arrivals and boat turnbacks' https://www.refugeecouncil.org.au/asylum-boats-statistics/2/ accessed 02 July 2021; Parliament of Australia, 'Boat 'turnbacks' in Australia: a quick guide to the statistics since 2001' https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1819/Quick_Guides/BoatTurnbacksSince2001 accessed 23 July 2021.
[67] Natalie Klein, 'A Case For Harmonizing Laws On Maritime Interceptions Of Irregular Migrants' (2014) 63(4) The International and Comparative Law Quarterly 787, 788.
[68] Medecins Sans Frontières, 'In 2023, 3,041 people died trying to cross the Mediterranean Sea.' https://www.msf.org/mediterranean-migration-depth accessed 15 June 2024.

Italy has been particularly active in using pushbacks, returning over 60,000 migrants to Libya since 2016.[69] Similarly, Greece, with Frontex's support, intercepted 9,768 people in 2020.[70] The EU initially relied on bilateral agreements to enable southern countries to manage migration flows independently.[71] To give a set of examples, Italy and Albania signed an agreement in 1997 allowing Italian authorities to intercept vessels in Albanian waters. [72] Italy's longstanding cooperation with Libya began with a 2000 agreement framed around combating organized crime[73] but expanded in subsequent agreements in 2007, 2008, and 2009 to include training, equipment, and financial support. [74] Despite Libya's political instability, the two countries signed a 2017 MoU to strengthen migration control.[75] Similarly, Spain signed agreements with Morocco in 2004 and Mauritania in 2006, allowing for joint patrols and interception operations in third-country territorial waters.[76] These agreements, often financed by the EU, illustrate Europe's reliance on external partners to manage migration beyond its borders.

Frontex represents a milestone in EU migration control, coordinating joint operations in the Mediterranean, Aegean, and Atlantic seas.[77] Key missions such as Operation Hera

---

[69] Amnesty International, ' "Between Life And Death" Refugees And Migrants Trapped In Libya's Cycle Of Abuse' https://www.amnesty.org/download/Documents/MDE1930842020ENGLISH.pdf accessed 16 July 2021, 17.
[70] Mare Liberum, 'Pushback Report 2020',1 https://mare-liberum.org/en/pushback-report/ accessed 16 July 2021
[71] Frank McNamara, 'Member State Responsibility for Migration Control within Third States - Externalisation Revisited' (2013) 15 Eur J Migration & L 319, 326.
[72] Basaran (n 49) 78.
[73] Martino Reviglio, 'Externalizing Migration Management through Soft Law: The Case of the Memorandum of Understanding between Libya and Italy' (2020) 20(1) Global Jurist 1, 4 para 1; Statewatch, 'EU Migration Policies and Their Impact on Human Rights' (2019) https://www.statewatch.org/media/documents/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf accessed 30 June 2024; Médecins Sans Frontières, 'Italy-Libya Agreement: Five Years of EU-Sponsored Abuse in Libya and the Central Mediterranean' (MSF 2023) https://www.msf.org/italy-libya-agreement-five-years-eu-sponsored-abuse-libya-and-central-mediterranean accessed 30 June 2024; Middle East Institute, 'Italy and Its Libyan Cooperation Program: Pioneer of the European Union's Refugee Policy' (MEI 2023) https://www.mei.edu/publications/italy-and-its-libyan-cooperation-program-pioneer-european-unions-refugee-policy accessed 30 June 2024.
[74] ibid Reviglio.
[75] ibid.
[76] Basaran (n 49) 79.
[77] Anna Triandafylliadon and Angeliki Dimitriadi, 'Migration Management at the Outposts of the European Union: The Case of Italy's and Greece's Borders' (2013) 22 Griffith L Rev 598, 611-2.

(targeting the Canary Islands) and Operation Nautilus (focused on the central Mediterranean) have sought to intercept unauthorized arrivals before they reach EU borders.[78] Frontex has also experienced significant budget growth, from €6.2 million in 2005 to €922.1 million in 2024, reflecting its expanding role in migration governance.[79]

In summary, the EU's interception practices share similarities with the USA's approach in relying on agreements to conduct operations in third countries' territorial waters. However, Europe's geographic proximity to regions of origin necessitates a focus on both maritime and land-based interception. Moving forward, the legal frameworks and implications of these practices are analysed in the following sections.

2.3.2 Legal Basis and Issues of Interception

The primary foundation of the states while intercepting unpermitted vessels trespassing their borders is the right to *sovereignty*. Sovereignty can be understood as "the supreme legitimate authority within a territory*"*.[80] The principle of sovereignty in international law provides states with the right to decide over who may enter or not their borders due to this supreme authority. This sovereignty includes full authority over their national territories, territorial waters, which extend up to 12 nautical miles from the coastal state,[81] and aerial domain. Thus, the state has the right to take a set of actions including the right to intercept in these areas within the framework of the law against attempts towards its borderline.

Alongside, when the legal basis of interception actions beyond territorial waters is considered, state sovereignty and the Law of the Sea play a critical role in international

[78] Klein (n 68) 792.
[79] Frontex, 'Budget 2005–2024' https://prd.frontex.europa.eu/ accessed 17 December 2024.
[80] Daniel Philpott, 'Sovereignty: An Introduction and Brief History' (1995) 48(2) Journal of International Affairs 353.
[81] UNCLOS (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, art 3.

law. According to both customary law and treaty law, such as the UNCLOS, sovereignty in territorial waters is limited by the right of innocent passage granted to foreign-flagged vessels.[82] However, this right can only be exercised if the passage does not involve activities listed under Article 19 of UNCLOS, such as those infringing migration laws.[83] A coastal state may use force to prevent such vessels from entering its territorial waters or to require their departure from the contiguous zone, [84] extending up to 24 nautical miles beyond territorial waters.[85] This authority allows states to legislate domestic migration laws and intercept vessels violating these laws within their jurisdictional zones.

In contrast, interception on the high seas presents a different and critical challenge since the high seas fall outside any single state's sovereignty. Flagged vessels generally enjoy the right to passage without interference during peacetime. [86] Exceptions include bilateral agreements, police cooperation arrangements, or memoranda of understanding between intercepting states and flag states. For example, when a state suspects a foreign-flagged vessel of violating migration laws, bilateral agreements allow for interception.[87] Unilateral actions, such as those undertaken by Italy to intercept beyond the territorial waters in 2002,[88] lack legal basis under international frameworks like 1958 High Seas Convention,[89] the UNCLOS,[90] and the 2000 Migrant Smuggling Protocol.[91] Especially, the Protocol

[82] ibid art 17.
[83] ibid art 19(2)(g).
[84] ibid art 33(1).
[85] ibid art 33(2).
[86] Jasmine Coppens, 'Migrants in the Mediterranean: Do's and Don'ts in Maritime Interdiction' (2012) 43 Ocean Dev & Int'l L 342, 345.
[87] Basaran (n 49) 74.
[88] ibid 75.
[89] Convention on the High Seas (opened for signature 29 April 1958, entered into force 30 September 1962) 450 UNTS 11, art 22. established that the high seas are open to all nations and no state may subject any part of the high seas to its sovereignty. Article 2 emphasizes the freedom of navigation, overflight, fishing, and the laying of submarine cables and pipelines, among other freedoms.
[90] UNCLOS superseded the 1958 Convention, which further codified these principles and introduced the concept of Exclusive Economic Zones (EEZs). Article 87 of UNCLOS reiterates that the high seas are open to all states and must be used for peaceful purposes.
[91] It requires states to cooperate in preventing and combating migrant smuggling while respecting the rights of those being smuggled as per Protocol against the Smuggling of Migrants by Land, Sea and Air Supplementing the Convention against Transnational Organized Crime (opened for signature 12 December 2000, entered into force 28 January 2008) 40 ILM 384 (2001) art 8.

permits measures against smuggling vessels only under strict rules, such as flag state consent or when allowed by specific agreements.[92] Thus, interception on the high seas remains tightly regulated under international law.

The relevant interception operations also raise broader legal issues, including jurisdiction beyond territorial waters and potential violations of intercepted migrants' rights. When these rights are infringed by intercepting states, the states' jurisdictional responsibilities must be assessed based on their obligations under human rights and refugee law. These issues are explored further on later chapters.[93]

2.4 The Scope of Extraterritorial Processing Centres

Detaining irregular migrants in EPCs is another externalised migration control method. These include centres where irregular migrants are kept until their identification, or attainment of the refugee status, or the voluntary repatriation. In addition to decide on asylum claims, state authorities detain irregular immigrants for identity determination with the grounds of security protection, and for deterrence to discourage them from continuing their claims and encourage voluntary return to their country of origin.[94]

2.4.1 Background and Implementations

EPCs have become a prominent migration management tool, allowing states to process asylum seekers outside their territories. Early examples include Australia's Pacific Solution, with centres on Nauru and PNG's Manus Island (established in 2001), and the US's use of Guantanamo Bay in the 1990s to detain Haitian and Cuban asylum seekers.[95]

---

[92] ibid.
[93] See sections 3.3 and 4.
[94] Ghezelbash (n 58) 135.
[95] Sarah Leonard and Christian Kaunert, 'The External Dimension of EU Asylum and Migration Policy: Securing Cooperation and Externalizing Failure?' (2016) Forced Migration Review

Both countries sought to deter irregular arrivals and manage asylum claims offshore, keeping migrants outside their national borders during processing. Recently, European countries have begun exploring similar methods, raising significant legal questions regarding compliance with the prohibition of refoulement, the right to seek asylum, and broader human rights obligations.

Australia's Pacific Solution marked the formalization of offshore processing centres. Asylum seekers arriving by boat were sent to centres in Nauru and Manus Island, where their claims were processed. While this policy drastically reduced boat arrivals, it faced extensive criticism over the inhumane conditions in the centres and prolonged detention periods. Similarly, Italy's recent agreement with Albania involves constructing two centres to process asylum seekers rescued at sea.[96] While the agreement aims to reduce overcrowding in Italian centres and deter irregular migration, it faces challenges over its potential violation of human rights and logistical feasibility. [97]

The UK's Rwanda Plan, announced in 2022, proposes transferring asylum seekers to Rwanda for processing and potential resettlement. [98] Under this plan, once asylum seekers are transferred, they lose the right to seek asylum in the UK. [99] This plan has faced legal challenges regarding Rwanda's designation as a STC and its compliance with international

---

https://www.fmreview.org/leonard-kaunert accessed 21 September 2021; Peter Mares, *Borderline: Australia's Response to Refugees and Asylum Seekers in the Wake of the Tampa* (2002); Arthur C Helton, 'The United States Government Program of Intercepting and Forcibly Returning Haitian Boat People to Haiti: Policy Implications and Prospects' (1993) 5(3) International Journal of Refugee Law 341.

[96] Human Rights Watch, 'Italy's Dodgy Detention Deal with Albania' https://www.hrw.org/news/2024/02/01/italys-dodgy-detention-deal-albania accessed 07 July 2024.

[97] Foreign Policy, 'Italy-Albania Deal: Migrants, EU Offshore Centers, and Asylum' (13 January 2025) https://foreignpolicy.com/2025/01/13/italy-albania-deal-migrants-eu-offshore-centers-asylum/ accessed 17 January 2025; Devdiscourse, 'Italy's Bold Asylum Plan: Detention Centers in Albania' (09 January 2025) https://www.devdiscourse.com/article/law-order/3220162-italys-bold-asylum-plan-detention-centers-in-albania accessed 17 January 2025.

[98] UK Government, 'UK-Rwanda Treaty: Provision of an Asylum Partnership' https://www.gov.uk/government/publications/uk-rwanda-treaty-provision-of-an-asylum-partnership/uk-rwanda-treaty-provision-of-an-asylum-partnership-accessible#part-2--relocation-arrangements accessed 02 June 2024.

[99] ibid.

standards[100] and eventually scrapped by the new UK government.[101] These examples highlight a pattern of states externalizing migration control to third countries, often accompanied by significant human rights concerns and legal controversies.

2.4.1.1 The USA's Extraterritorial Processing Centre Practices

The United States' use of EPCs is exemplified by Guantanamo Bay, which has been used to detain irregular migrants arriving by sea.[102] Under the lease agreement between the USA and Cuba, Guantanamo Bay remains under Cuban sovereignty but is fully governed by US jurisdiction.[103] In 1981, the USA began using the facility to detain Haitian asylum seekers intercepted at sea while their claims were processed. By the mid-1990s, the USA shifted its interception strategy, diverting intercepted vessels to Panama, where detention centres housed migrants until their claims were resolved. Panama's role in hosting these centres further illustrates the externalization of US migration control.[104]

More recently, the Migrant Protection Protocols (MPP), implemented in 2019, have furthered the externalization trend.[105] Under this agreement, the USA returns migrants, including those seeking asylum, to Mexico, where they must wait for their claims to be processed in US courts.[106] Migrants are housed in designated Mexican border towns rather than formal detention centres. While not involving offshore detention centres, the MPP

---

[100] UK Government, 'The Safety of Rwanda: Asylum and Immigration Bill Factsheet' https://www.gov.uk/government/publications/the-safety-of-rwanda-asylum-and-immigration-bill-factsheets/safety-of-rwanda-asylum-and-immigration-bill-factsheet-accessible accessed 24 December 2024; R (*AAA and Others v Secretary of State for the Home Department)* [2023] UKSC 55.
[101] BBC News, 'Rwanda Plan: UK Supreme Court Rules Rwanda Is Not a Safe Country for Asylum Seekers' (14 December 2024) https://www.bbc.com/news/articles/cz9dn8erg3zo accessed 27 December 2024.
[102] Nikolas Feith Tan, 'The Manus Island Regional Processing Centre: A Legal Taxonomy' (2018) 20(4) European Journal of Migration and Law 427, 430.
[103] Basaran (n 49) 99.
[104] Douglas Guilfoyle, Shipping Interdiction and the Law of the Sea (Cambridge University Press, 2012) 187, 193.
[105] Department of State Office Of The Spokesperson 'U.S.-Mexico Joint Declaration' <https://2017-2021.state.gov/u-s-mexico-joint-declaration/index.html> accessed 20.05.2024; Homeland Security, 'Migrant Protection Protocols' <https://www.dhs.gov/archive/migrant-protection-protocols> accessed 25.05.2024; United States Code, Title 8, § 1225 (2021); United States Code, Title 8, § 1229a (2021);
[106] ibid

externalizes asylum processing by requiring migrants to remain outside US territory during the adjudication process.

These practices illustrate the USA's longstanding reliance on extraterritorial arrangements to deter irregular migration and manage asylum claims. Through strategies ranging from the use of Guantanamo Bay to bilateral agreements like the MPP, the USA has consistently prioritized keeping asylum seekers away from its territory during processing, a pattern mirrored in other countries' externalization efforts.

2.4.1.2 Australia's Extraterritorial Processing Centre Practices

As introduced above, Australia's Pacific Solution formalized the use of offshore processing centres as a migration control strategy. Agreements with PNG and Nauru established detention centres to process asylum claims for irregular migrants arriving by boat.[107] From 2001, these centres served as key elements of Australia's efforts to manage migration flows from South and Southeast Asia. Migrants intercepted en route to Australia were transferred to Manus Island (PNG) or Nauru, where their asylum claims were processed without entering Australian territory.

By 2013, Operation Sovereign Borders replaced the Pacific Solution, further institutionalizing offshore processing. Between 2013 and 2020, Australia transported approximately 3,000 migrants to these centres, with financial and logistical support provided to Nauru and PNG.[108] Australia also relied on international organizations like the IOM and the UNHCR to manage facilities and assess asylum claims. This involvement

[107] Tan (n 53) 431 para 4
[108] Australian Parliament, 'A Certain Maritime Incident: Chapter 10 - Senate Committees' (2002) https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/maritimeincident/report/c10 accessed 30 June 2024; Luke Heemsbergen and Angela Daly, 'Leaking Boats and Borders: The Virtu of Surveilling Australia's Refugee Population' (2017) 15 (3/4) Surveillance and Society 389, 389 para 1; UNHRC, Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru A/HRC/35/25/Add.3, para 10

allowed Australia to externalize migration responsibilities while retaining significant influence over processing outcomes.[109]

The role of international organizations became particularly notable in the Regional Coordination Framework (RCF) launched in 2011.[110] Under this framework, the IOM handled basic services and provided advice to migrants, while the UNHCR assessed asylum claims. [111] Indonesia, though not a RC signatory, became a key partner in intercepting and housing migrants under domestic laws.[112] This model illustrates how destination states, like Australia, can use partnerships and outsourcing to shift migration management responsibilities to third countries while circumventing certain international obligations.[113]

Despite the termination of the Pacific Solution in 2008[114] and replacement of RCF with the "Operation Sovereign Borders" in 2013,[115] offshore processing has remained controversial. In 2016, the Supreme Court of PNG ruled that detaining asylum seekers on Manus Island violated the PNG Constitution, which prohibits arbitrary detention.[116] Therefore, the detention of the people transferred from Australia to the Manus Island detention centre has no valid basis in PNG law.[117] As recently as January 2025, the UN Human Rights

---

[109] ibid Australian Parliament.
[110] Sebastien Moretti, 'Between Refugee Protection and Migration Management: The Quest for Coordination Between UNHCR and IOM in the Asia-Pacific Region' (2017) 29(4) International Journal of Refugee Law 465.
[111] Basaran (n 49) 93 paras 2-3; ibid Australian Parliament.
[112] ibid.
[113] ibid.
[114] UNHCR, 'Australia's Pacific Solution Draws to a Close' (UNHCR, 2008) https://www.unhcr.org/uk/news/australias-pacific-solution-draws-close accessed 30 July 2024.
[115] The change in policies were due to change of power in government, as described in Parliament of Australia, 'Developments in Australian Refugee Law and Policy: The Abbott and Turnbull Coalition Governments (2013–2016)' (2016) https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/Australian_refugee_law_and_policy accessed 30 July 2024.
[116] Supreme Court of Papua New Guinea, Namah v. Pato (SC1497, 26 April 2016) http://www.paclii.org/pg/cases/PGSC/2016/13.html accessed 30 July 2024; Paula Gerber, Cai Wilkinson, Anthony J Langlois and Baden Offord 'Human rights in Papua New Guinea: is this where we should be settling refugees?' (2016) 22(1) Australian Journal of Human Rights 27, 29-30.
[117] ibid.

Committee found that Australia was responsible for the arbitrary detention of asylum seekers in offshore facilities, including Nauru, emphasizing that outsourcing asylum processing does not absolve a state of its human rights obligations.[118]

Similarly, the UN Special Rapporteur on Torture found Australia in violation of the CAT due to conditions at Manus Island.[119] While offshore processing centres aim to deter irregular migration, their operation has raised serious human rights concerns, which are analysed in subsequent chapters.

2.4.1.3 Europe's Extraterritorial Processing Centre Practices

Extraterritorial asylum processing has recently gained traction in Europe, with notable examples such as the UK's Rwanda Plan and Italy's agreement with Albania. These policies reflect broader trends of externalizing migration management to third countries, often raising legal and human rights concerns.

The UK-Rwanda Plan, introduced in 2022 under the Migration and Economic Development Partnership (MEDP), proposes transferring irregular migrants and asylum seekers to Rwanda. [120] While the plan was initially delayed due to judicial rulings, which found Rwanda not to be a STC under Article 3 of the ECHR[121] the agreement was later

[118] United Nations Human Rights Committee, 'Australia responsible for arbitrary detention of asylum seekers in offshore facilities' (OHCHR, 9 January 2025) https://www.ohchr.org/en/press-releases/2025/01/australia-responsible-arbitrary-detention-asylum-seekers-offshore-facilities accessed 26 January 2025.
[119] Juan Ernesto Mendez, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2015) UN Doc A/HRC/28/68 <https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC_28_68_E.doc> accessed 10 March 2021.
[120] House of Commons Library, 'The UK-Rwanda Migration and Economic Development Partnership' (Briefing Paper CBP-9568, 2024) https://researchbriefings.files.parliament.uk/documents/CBP-9568/CBP-9568.pdf accessed 2 June 2024; UK Government, 'UK-Rwanda Treaty: Provision of an Asylum Partnership' https://www.gov.uk/government/publications/uk-rwanda-treaty-provision-of-an-asylum-partnership/uk-rwanda-treaty-provision-of-an-asylum-partnership-accessible#part-2--relocation-arrangements accessed 02 June 2024.
[121] ECHR art 3; R (*AAA and Others v Secretary of State for the Home Department)* [2023] UKSC 55.

revised in December 2023 to address these concerns.[122] Alongside this, the UK enacted the Act on the Safety of Rwanda, designating Rwanda as a safe country and outlining safeguards for transferees' rights.[123] Although the plan has since been shelved by the new UK government, these measures were intended to legitimize the transfers and respond to criticisms regarding compliance with non-refoulement.

Italy has adopted a similar strategy by signing an agreement with Albania to establish asylum processing centres in Albanian territory. Under this agreement, Italy will construct and manage the centres, while Albania will provide external security.[124] This approach resembles Australia's Pacific Solution by relocating irregular migrants outside national borders until their asylum claims are resolved.[125] By processing asylum seekers offshore, Italy aims to alleviate overcrowding in domestic centres while deterring irregular migration.

The EU and Italy have also extended their externalization policies to Libya. Through the EU Support on Migration in Libya, the EU and its Member States, particularly Italy, have provided significant financial support—amounting to €700 million—to bolster Libya's border management and reception centre capacity. [126] While these centres do not process asylum claims, they detain intercepted migrants until they are returned to their countries of

---

[122] UK Government, 'UK-Rwanda Treaty: Provision of an Asylum Partnership' https://www.gov.uk/government/publications/uk-rwanda-treaty-provision-of-an-asylum-partnership/uk-rwanda-treaty-provision-of-an-asylum-partnership-accessible#part-2--relocation-arrangements accessed 02 June 2024.
[123] UK Government, Illegal Migration Act (2024)
[124] Deutsche Welle, 'Italy to send migrants to reception centers in Albania' (DW, 6 June 2024) https://www.dw.com/en/italy-to-send-migrants-to-reception-centers-in-albania/a-67323829 accessed 15 June 2024.
[125] BBC, 'Europe migrant crisis: Italy to build migrant centres in Albania' https://www.bbc.co.uk/news/world-europe-68132537#:~:text=Albania's%20constitutional%20court%20has%20approved,to%20reach%20Italy%20each%20year. accessed 10 June 2024; Integrazionemigranti, 'Protocollo d'intesa tra Italia e Albania in materia di gestione dei flussi migratori' https://integrazionemigranti.gov.it/it-it/Ricerca-news/Dettaglio-news/id/3496/Protocollo-dintesa-tra-Italia-e-Albania-in-materia-di-gestione-dei-flussi-migratori accessed 10 June 2024.
[126] European Neighbourhood Policy and Enlargement Negotiations, 'EU Trust Fund for Africa: The North of Africa Window – Libya' (March 2022) https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-03/EUTF_libya_en.pdf accessed 07 June 2024, 1.

origin.[127] These arrangements, formalized through a MoU between Italy and Libya, enable the EU to prevent irregular migrants from reaching its borders, effectively outsourcing migration control.[128] Although this policy of the EU and Italy does not constitute holding irregular immigrants in the centres while processing their asylum requests, these individuals are kept in the reception centres located in Libya until returned to their countries of origin. As a result, this policy of the EU and Italy paves the way to build and run detention centres in an extraterritorial area, in this case Libya. Therefore, the centres in Libya are also considered analysed as an EPCs as a method of externalization of migration control in this thesis.

In summary, Europe's approach to EPCs mirrors broader patterns seen in the USA and Australia, focusing on deterrence, externalization, and the delegation of migration responsibilities to third countries. However, such policies consistently face significant legal and human rights challenges, as explored in subsequent chapters.

2.4.2 Legal Basis and Issues of Extraterritorial Processing Centres

Proponents of migration detention, whether onshore or offshore, frequently justify the policy using two main arguments: first, that irregular arrivals must be identified for security and health reasons to mitigate potential risks to public safety;[129] and second, that mandatory detention ensures migrants attend immigration hearings.[130] These arguments are

[127] ibid 2.
[128] Odysseus Network, 'Memorandum of Understanding between the Government of the State of Libya and the Government of the Italian Republic on cooperation in the field of development, combating illegal immigration, human trafficking and fuel smuggling and on reinforcing the border security' (2017) https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf accessed 10 June 2024.
[129] Ghezelbash (n 58) 134.
[130] ibid 135.

representative of discussions and policies across regions such as the USA, Australia, and the EU, which utilize detention as a tool for migration management.

While detention may be justified under international human rights law in specific circumstances, such as ensuring public safety or facilitating legal proceedings, it must comply with fundamental principles such as reasonableness, necessity, and proportionality, [131] as required by ICCPR (Article 9). [132] Detention policies must not be arbitrary and must be based on individualized assessments that balance public safety concerns with the right to liberty.[133] However, international law imposes significant restrictions on migration detention. The RC prohibits penalizing asylum seekers for irregular entry or stay, making punitive detention legally questionable.[134] Similarly, arbitrary detention is explicitly prohibited under Article 9 of the ICCPR, which requires that any detention be justified, necessary, and proportionate. These principles aim to prevent excessive or prolonged detention and underscore the importance of alternatives to detention when less restrictive measures can achieve the same objectives.

Another key legal feature of migration detention is its reliance on administrative decisions, rather than judicial orders. While immigration detention may be permissible under international law, [135] it must comply with the principles of reasonableness, necessity, and proportionality, as outlined in Article 9 of the ICCPR. The UN Human Rights Committee has emphasized the importance of individualized assessments, ensuring that decisions are tailored to the unique circumstances of each case. This acknowledges that while

[131] Human Rights Committee, General Comment No 35: Article 9 (Liberty and Security of Person), 112th session, UN Doc CCPR/C/GC/35 (16 December 2014) [18] citing Human Rights Committee, Views: Communication
No 560/1993, 59th session, UN Doc CCPR/C/59/D/560/1993 (30 April 1997) [9.3]–[9.4] (‘A v Australia ’).
[132] ICCPR art 9.
[133] UNHCR, Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012) para 34.
[134] RC art 31(1).
[135] Ghezelbash (n 58) 35.

individuals fleeing persecution may share common needs, their distinct experiences and vulnerabilities necessitate a case-by-case evaluation. Generalized detention policies risk violating these international norms, as they fail to respect the specific circumstances of each individual.

Necessity and proportionality are two interwoven principles that further guide the legality of detention under international human rights law. The principle of proportionality requires that the justification for detention—such as public safety or immigration hearings—be balanced against the individual's right to liberty and freedom of movement. Detention should only be ordered if it is the least restrictive means available to achieve the intended purpose. Similarly, the principle of necessity dictates that detention must only be pursued when no viable alternative measures exist for controlling migration or safeguarding public health and safety. If these principles are not satisfied, detention may be deemed arbitrary under international law.

The duration of migration detention is another critical issue, as prolonged detention risks violating international human rights standards. Detention must be strictly limited to achieving its fundamental aims and must be justified on a case-by-case basis. Arbitrary or mandatory detention practices are inconsistent with these principles and prohibited under international law.

This chapter has outlined the methods and legal foundations of EPCs, focusing on the underlying justifications and compliance challenges. The specific human and refugee rights issues—such as the right to liberty, the prohibition of arbitrary detention, and non-refoulement—will be analysed in detail in later chapters.[136]

[136] See sections 4 and 5.

2.5 The Scope of Readmission Agreements

Externalization policies do not only consist of methods aimed at preventing irregular migrants from crossing the borders but may also extend to the forced return of persons without legal documentation or who overstayed to a third state. These receiving states are most often not the country of origin, and the persons affected have no legal links to the receiving country. The EU-Turkey Statement and the Italy-Tunisia Bilateral Cooperation Agreement exemplify this practice, facilitating the return of irregular migrants from Greece to Turkey and from Italy to Tunisia, respectively, to prevent further irregular migration into Europe.[137]

This type of return is distinct from unilateral removal actions, which involve no external cooperation or shared responsibilities. In contrast, externalized returns inherently rely on collaboration with third states, involving elements of shared responsibility and formal cooperation. These elements align with the three aspects of externalization discussed earlier: the shifting of responsibilities to third countries, reliance on bilateral or multilateral frameworks, and the establishment of new operational mechanisms to manage irregular migration.

In practice, these types of returns are facilitated by bilateral or multilateral agreements, such as the early RA concluded between Poland and the Schengen States.[138]- Such agreements define the terms under which the requested state, often a transit or neighbouring state, agrees to readmit irregular migrants. These agreements commonly

[137] European Council, 'EU-Turkey Statement' (18 March 2016) https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/ accessed 12 June 2024; The EU-Tunisia MOU (2023) https://timep.org/2023/10/19/the-eu-tunisia-memorandum-of-understanding-a-blueprint-for-cooperation-on-migration/ accessed 25 June 2024.
[138] Kay Hailbronner, 'Readmission Agreements and the Obligation on States under Public International Law to Readmit Their Own and Foreign Nationals' (1997) 57(1) Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1, 8; *Schengen States v Republic of Poland* (March 1991) https://www.europarl.europa.eu/workingpapers/libe/104/poland_en.htm accessed 20 June 2021.

cover the return of (i) citizens of the requested state who entered or remained in the requesting state irregularly, (ii) irregular migrants from third countries who transited through the requested state, and (iii) stateless persons.[139] The scope and content of these agreements vary, shaped by factors such as the parties' geographical proximity, political objectives, and incentives for cooperation. [140]

The scope and parties of these agreements may raise legal questions, particularly concerning the avoidance of international obligations and liabilities under international law. For instance, requesting states—many of which have ratified the RC, its 1967 Protocol, and other key human rights treaties—may enter into RAs with states such as Indonesia, Thailand, and Malaysia in Southeast Asia, or Libya in North Africa. These requested states often lack binding obligations under the same conventions, creating concerns about the treatment of individuals returned to such jurisdictions. Considering these complexities, it is essential to examine historical evolution, implementation examples, and finally the legal basis associated with RAs in the following section.

2.5.1 Background and Implementations

Certain significant and contemporary examples of the RAs came out from the relationships between European states, as well as between them and their non-European partners. To analyse the modern RAs and their relation to externalised migration control, one needs to

[139] Intergovernmental Consultations for Asylum, Refugee and Migration Policies in Europe, North America and Australia, 'IGC Report on Readmission Agreements' (Intergovernmental Consultations, 2005) 9; Thomas Gammeltoft-Hansen, 'Externalisation: Attempt at Remote Control' in Thomas Gammeltoft-Hansen and Ninna Nyberg Sørensen (eds), *The Migration Industry and the Commercialization of International Migration* (Springer 2022) 66.

[140] Jean-Pierre Cassarino, 'Database of Readmission Agreements' https://www.jeanpierrecassarino.com/datasets/ accessed 22 June 2024; Hallee Nicole Caron, 'Persuasion without Protection: Readmission Agreements, Informal Arrangements, and the International Refugee Regime' (2020) 51, 62, 94; Alexander Betts, Protection by Persuasion: International Cooperation in the Refugee Regime (Cornell University Press 2009); Jennifer Hyndman and Alison Mountz, 'Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe' (2008) 43(2) Government & Opposition 249; Nils Philip Coleman, European Readmission Policy: Third Country Interests and Refugee Rights (1st edn, Martinus Nijhoff Publishers 2008) 11; Randall Hansen, 'The Politics of Cooperation: EU Readmission Agreements and Immigration' (2011) 13(4) European Journal of Migration and Law 387.

analyse the transition of these agreements from initial treaties of mutual return of each other's nationals to sophisticated and comprehensive externalisation frameworks. Fundamentally, the evolution of the RAs in Europe as to remand third country nationals, requested state's nationals or stateless people staying in the requesting state to the requested state can be probed into multiple generations. The academia divided them by three considering their changing character and international relations as well as historical milestones.[141] Recognising this classification, this paper will take a slightly different approach by going earlier in history, add another layer for precursor RAs and refer them as "generation zero" agreements.

2.5.1.1 Generation-zero Agreements

The origins of RAs in Europe can be traced back to early bilateral arrangements between Prussia and other German states in 1818,[142] through a series of bilateral agreements signed by Prussia and other German states,[143] followed by the first multilateral agreement, the Treaty of Gotha (1851).[144] These early treaties primarily facilitated the reciprocal expulsion and return of each other's nationals. A more significant example emerged in 1906, with a treaty between Germany and the Netherlands, which began to resemble modern RAs.[145] Until the end of World War II, these agreements were largely focused on the mutual return of nationals and seldom addressed third-country nationals or stateless individuals.[146] While these zero-generation agreements established the groundwork for more sophisticated

[141] Daphné Bouteillet-Paquet, 'Passing the Buck: A Critical Analysis of the Readmission Policy Implemented by the European Union and Its Member States' (2003) 5 European Journal of Migration and Law 359, 359-71; ibid Coleman, ch 1.
[142] ibid (Coleman).
[143] ibid 12 citing Hessen, *Sammlung Grossherzoglich Hessischer Gesetze Und* Verordnungen Volume 1 (Zabern, 1835) 16: "people who are not able to provide detailed identity documents are subject to readmission between German States and Prussia".
[144] ibid.
[145] ibid 13.
[146] Thomas Faist, Tobias Gehring, and Susanne U Schultz, 'European Interventions: On the Externalization of Migration Control' in *Mobility Instead of Exodus: Migration and Flight in and from Africa* (Springer Fachmedien Wiesbaden 2023) 65–78.

arrangements, they lacked the externalization strategies that define contemporary readmission policies, which aim to manage migration outside national borders.

2.5.1.2 First Generation Agreements

The post-WWII period saw the emergence of first-generation RAs, which European states used to address the unprecedented refugee crisis in Western Europe.[147] These agreements, signed throughout the 1950s and 60s, aimed to facilitate the resettlement and return of refugees while managing migration within a fragmented Europe. Following the establishment of the European Economic Community (EEC) in 1957, European states expanded measures at their external borders, focusing on third-country nationals who violated customs regulations. Similar to zero-generation agreements, these arrangements primarily facilitated the reciprocal return of nationals, but they began to include provisions for third-country nationals who had legally resided in the requested state before arriving in the requesting state.[148] While these agreements were limited in scope compared to modern policies, they marked an important transition toward formalized regional cooperation on migration management.[149] A significant development in the evolution of first-generation agreements was the establishment of the Benelux Economic Union, which created a free movement area and abolished internal border controls for nationals of Benelux countries as well as third-country nationals. This shift relocated border control functions to the external perimeter of Benelux. [150] Initially, the Benelux countries relied on internal mechanisms to expel and readmit third-country nationals,[151] but with Decision M/P (67) 1, they began extending these practices beyond the free movement area through agreements with third

[147] Bouteillet−Paquet (n 142) 362.
[148] ibid.
[149] ibid.
[150] Coleman (n 140) 15 citing Albertus Henricus Joannes Swart, *De toelating en uitzetting van vreemdelingen*, (Deventer Kluwer, 1978) 49-50 and Xavier Denoël, 'Les accords de réadmission du Benelux à Schengen et au-delà' (1993) 29(4) Revue trimestrielle de droit européen 636, 636-637.
[151] ibid;

countries.[152] Consequently, first-generation agreements became more focused on border control compared to zero-generation agreements, although they remained less mature and comprehensive than their successors.

2.5.1.3 Second Generation Agreements

The late 1980s and early 1990s marked the rise of second-generation RAs, coinciding with the establishment of the Schengen Area and the EU.[153] The demolition of the Berlin Wall triggered new migration flows from Central and Eastern Europe, prompting EU resettlement efforts and a focus on strengthening external border controls.[154] During this period, the EU lifted internal borders between Member States through the Schengen Agreement[155] and standardized external border policies under the Maastricht Treaty.[156] These developments transformed the EU into a unique supra-national actor with the authority to negotiate and conclude international agreements with third states, a significant shift from earlier bilateral agreements.

In line with these changes, European states gradually moved away from state-to-state RAs. Although some bilateral agreements persisted—such as the Spain-Moroccan Agreement of 1992— [157] their implications remained legally valid while new multilateral agreements were concluded to ensure consistency after the Maastricht Treaty. These second-generation agreements, with their multilateral focus, laid the groundwork for third generation

[152] ibid Denoël 636-640.
[153] Bouteillet−Paquet (n 142) 359.
[154] ibid.
[155] Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders (Schengen Agreement) [1985] OJ L239/13.
[156] Consolidated Version of the Treaty on European Union (Maastricht Treaty) [1992] OJ C325/5.
[157] Agreement between the Kingdom of Spain and the Kingdom of Morocco on the Movement of People, the Transit and the Readmission of Foreigners Who Have Entered Illegally (Spain-Morocco) (adopted 13 February 1992, entered into force 21 October 2012).

agreements after the Amsterdam Treaty (1997), as the EU began negotiating and concluding RAs on behalf of multiple Member States. [158]

2.5.1.4 Third Generation Agreements

This transition to third generation agreements highlighted the growing centralization of migration governance under the EU framework. While the EU began to conclude RAs with the third states, the Member States of the EU completely had competency over the return of the people staying illegally in the EU's territory according to provisions of the Maastricht Treaty.[159] Article 63(3)(b) of the treaty granted the European Community(EC) explicit authority to implement measures for the return of irregular migrants.[160] This provision also authorized the European Community to conclude RAs with third countries, making migration management a supranational competence.[161] Building on this framework, the Tampere European Council (1999) further reinforced the EC's authority, establishing a roadmap for creating an area of freedom, justice, and security in the EU. The Tampere Conclusions called for the negotiation of comprehensive RAs with third countries[162] and laid the foundation of the CEAS. These developments signalled the EU's

---

[158] Hallee Caron, 'Refugees, Readmission Agreements, and "Safe" Third Countries: A Recipe for Refoulement?' (2017) 12(1) Journal of Regional Security 27, 35.
[159] Martin Schieffer, 'Community Readmission Agreements with Third Countries - Objectives, Substance and Current State of Negotiations' (2003) 5 European Journal of Migration and Law 343, 343.
[160] The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:
(3) measures on immigration policy within the following areas:
(a) conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion,
(b) illegal immigration and illegal residence, including repatriation of illegal residents;
(4) measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States.
Measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements in Council of the European Union, *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts* (10 November 1997).
[161] Schieffer (n 160)
[162] ibid 347 para 2; Anna Triandafylliadon and Angeliki Dimitriadi, 'Migration Management at the Outposts of the European Union: The Case of Italy's and Greece's Borders' (2013) 22 Griffith L Rev 598, 601.

growing role as a collective actor in externalizing migration control by formalizing readmission procedures with non-EU states.

The Seville European Council further advanced the EU's efforts to formalize RAs as part of its broader externalization strategy. Building on the EU Action Plan on Combating Illegal Immigration (2002),[163] the Seville Council prioritized agreements with origin and transit countries, including Ukraine, Albania, Algeria, China, and Turkey. These agreements aimed to streamline the return of irregular migrants while addressing the logistical and political challenges of cross-border migration management.

To complement these agreements, the EU introduced key policy instruments such as the Twenty Guidelines on Forced Return, APD and RD.[164] These frameworks emphasized compliance with the principle of non-refoulement and the protection of fundamental human rights during the return process. By incorporating these safeguards, the EU sought to balance effective migration management with its international legal obligations.

2.5.1.5 Fourth Generation Agreements

In the 2010s, the EU intensified its use of RAs with non-EU countries to address rising irregular migration, particularly following the migration crisis in 2015. The EU-Turkey Statement marked a significant turning point in the evolution of RAs. Framed as a deal rather than a formal treaty, the agreement emphasized informal cooperation, committing Turkey to manage migration flows and readmit irregular migrants in exchange for financial

[163] Schieffer (n 160) 348.
[164] Caron (n 159) 36.

assistance and political concessions. This statement is often seen as the starting point for a broader trend toward informalization in EU migration governance.[165]

Given the informal nature of these arrangements, I propose classifying them as "fourth-generation agreements." Unlike earlier agreements, which were formalized treaties, these emerging arrangements prioritize flexibility and adaptability to rapidly changing migration dynamics. This shift reflects the EU's growing reliance on informal partnerships to expedite returns and externalize migration management, a trend further reinforced by the New Pact on Migration and Asylum.[166]

This trend is likely to continue to evolve under the New Pact, which emphasizes informal, flexible partnerships to manage migration beyond EU borders. The New Pact explicitly identifies countries such as Tunisia, Egypt, and Mauritania as key partners for externalized migration control, highlighting the EU's focus on return, readmission, and border management in collaboration with third-party states.[167] In its own words, the EU describes this approach as a "whole-of-the-route" strategy, addressing migration holistically by tackling root causes, fostering cooperation on border management, and ensuring the return of irregular migrants. Action Plans for key migration routes—such as the Central Mediterranean, Western Balkans, and Eastern Mediterranean—underscore this comprehensive, informal approach to externalization.[168]

---

[165] Mariagiulia Giuffré, 'Readmission Agreements and Refugee Rights' in *The Readmission of Asylum Seekers under International Law* (Hart Publishing 2020) 166–168; Eva Kassoti and Narin Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (Springer 2022) 2–3; Juan Santos Vara, Paula García Andrade, and Tamás Molnár (eds), *The Externalisation of EU Migration Policies in Light of EU Constitutional Principles and Values* (Springer 2021); Eleonora Frasca and Emanuela Roman, 'The Informalisation of EU Readmission Policy: Eclipsing Human Rights Protection Under the Shadow of Informality and Conditionality' (2020) 22(4) *International Community Law Review* 932–934; Meltem Ineli-Ciger, Orçun Ulusoy, and Özgenur Yigit-Aksu, 'Why Turkey Should Not Serve as a Blueprint for EU Migration Policy' in Sergio Carrera and Andrew Geddes (eds), *The EU Pact on Migration and Asylum in Light of the United Nations Global Compact on Refugees* (European University Institute 2021).
[166] New Pact (n 14).
[167] ibid.
[168] ibid.

In contrast to the EU context, the US and Australia adopt different strategies for migration control, relying less on formalized RAs and more on interdiction, offshore processing, and bilateral agreements with transit countries. These practices, discussed in earlier sub-chapters, reflect distinct approaches to externalizing migration management compared to the EU's evolving reliance on informal cooperation.

To summarize, the evolution of RAs—from early bilateral treaties to the informal, flexible arrangements of the fourth generation—illustrates their growing role as a key tool of externalized migration control. While early agreements primarily facilitated the reciprocal return of nationals, modern RAs encompass broader objectives, including the return of third-country nationals and stateless persons, externalized border management, and cooperation with third states.

The EU has emerged as a leading actor in formalizing these agreements, supported by regulatory frameworks such as the RD, APD and the regulations brought by New Pact on Migration and Asylum. Recent trends, including the informalization exemplified above reflect the EU's focus on achieving migration management goals while maintaining a degree of flexibility and underscore how RAs serve as a mechanism for externalization, shifting migration responsibilities beyond the borders of requesting states. However, they also raise significant questions about transparency, accountability, and the protection of fundamental rights, which will be explored further in chapters addressing RAs.[169]

2.5.2 Legal Basis and Issues of Readmission Agreements

RAs are a clear manifestation of the externalization of migration control, enabling countries to manage migration flows, reduce the number of migrants reaching their

[169] See sections 6 and 7.

borders, and add an "extraterritorial component" by shifting the responsibility for migration control to other states.[170] These agreements are typically concluded between requesting states (usually developed countries) and requested states (often developing countries), with the primary aim of facilitating the return of individuals who entered or stayed irregularly. While requesting states are often parties to the RC (except the U.S.) and other international human rights treaties, many requested states, such as Libya, Malaysia, or Indonesia, are not [171] Furthermore, the obligation of readmission is not strictly defined in international law, giving rise to legal complexities and ambiguities regarding the lawfulness of these agreements and the responsibilities they entail.

2.5.2.1 Readmission of Own Nationals

The readmission of a requested state's nationals aligns with established principles of international law, as it represents both an obligation for the state and a right for its citizens. This principle is reflected in several international instruments, including Article 13(2) of the UDHR, Article 12(4) of the ICCPR, and Article 5(d)(ii) of the ICERD, which collectively affirm the right of individuals to return to their country of nationality. As Weis has argued, nationality under international law imposes a dual obligation: it entitles individuals to return to their home state while concurrently obligating states to accept their nationals. Hailbronner similarly links this obligation to the principle of territorial

[170] Human Rights Watch, 'EU: Put Rights at Heart of Migration Policy' (2011) https://www.hrw.org/news/2011/06/20/eu-put-rights-heart-migration-policy accessed 12 June 2024; Leonhard den Hertog, 'Funding the EU-Morocco "Mobility Partnership": Of Implementation and Competences' (2016) 4(3) *European Journal of Migration and Law* https://link.springer.com/article/10.1007/s40309-015-0073-x accessed 12 June 2024; Ninna Nyberg Sørensen, 'Externalization at Work: Responses to Migration Policies from the Global South' (2019) 7(1) *Comparative Migration Studies* https://comparativemigrationstudies.springeropen.com/articles/10.1186/s40878-019-0157-z accessed 12 June 2024; M Jandl, 'The Estimation of Illegal Migration in Europe' (2007) 31(4) Refugee Survey Quarterly 101 https://academic.oup.com/rsq/article/31/4/101/1572600 accessed 12 June 2024.

[171] UNHCR, 'States Parties to the 1951 Convention and Its 1967 Protocol' (UNHCR 2023) https://www.unhcr.org/uk/media/states-parties-1951-convention-and-its-1967-protocol accessed 16 July 2024.

sovereignty, asserting that a state's refusal to readmit its nationals may infringe on the host state's sovereignty by preventing the lawful expulsion of foreigners.

However, Giuffré and Coleman caution against conflating a state's obligation to readmit its nationals with the individual right to return.[172] For instance, the European Council's legal opinion clarifies that there is no customary obligation under international law requiring the involuntary readmission of nationals without a formal agreement. Consequently, RAs often include clauses to formalize the process of returning unwilling nationals, despite the pre-existing international obligation. Moreover, I agree with this view and argue that RAs do not create a new international obligation requiring states to readmit their citizens; instead, they serve to facilitate and streamline the process of return.[173]

2.5.2.2 Readmission of Third-Country Nationals

In contrast, the readmission of third-country nationals lacks the same clear foundation in international law. Unlike the return of nationals, which is recognized as an obligation, there is no specific written international instrument compelling states to readmit non-nationals. Hailbronner has proposed that the principle of "good neighbourly relations" could impose a normative obligation on transit states to readmit third-country nationals, particularly when they have facilitated or tolerated irregular migration.[174] However, this interpretation has been challenged. Lammers, for example, argues that the principle of neighbourliness is primarily a negative obligation to avoid harm, rather than a positive duty to cooperate.[175]

---

[172] Giuffré (n 165) 134-140. Coleman (n 140).
[173] Annabelle Roig and Thomas Huddleston,' EC Readmission Agreements: A Re-evaluation of the Political Impasse' (2007) European Journal of Migration and Law 9 363, 364.
[174] Hailbronner (n 139) 32-35; European External Action Service (EEAS), 'European Neighbourhood Policy' https://www.eeas.europa.eu/eeas/european-neighbourhood-policy_en accessed 30 June 2024.
[175] Johan G Lammers, *Pollution of International Watercourses: A Search for Substantive Rules and Principles of Law* (Brill 1984) 568.

The European Neighbourhood Policy (ENP) illustrates how RAs have evolved to rely on good neighbourly relations. [176] These agreements often incentivize compliance by offering requested states political or economic benefits, such as visa facilitation. While this approach enables the EU to externalize migration management and share responsibility, it also creates imbalances in obligations between requesting and requested states. As Giuffré notes, while procedural efficiency may be achieved, the absence of robust safeguards in these agreements risks neglecting fundamental international obligations, such as the prohibition of refoulement.[177] While good neighbourly relations can facilitate regional cooperation, creating an obligation for states to readmit non-nationals without strong safeguards is legally questionable. These concerns are further complicated by the increasing reliance on informal arrangements, which, while expedient, often lack transparency and accountability. Such aspects will be explored further in Chapter 7, particularly in relation to informalization and the operationalization of non-affection clauses.

RAs often focus on procedural aspects—such as who, when, and how individuals will be returned—while neglecting explicit guarantees against refoulement.[178] This creates a legal tension in cases where asylum seekers are returned to states where their safety cannot be assured. This tension becomes particularly evident in the context of direct and indirect refoulement. Both scenarios reflect the requesting state's decision-making process under RAs and its obligation to review asylum claims prior to any return decision. As parties to

[176] ENP (n 127) governs the EU's relations with 16 of the EU's closest Eastern and Southern Neighbours. In addition to good governance, democracy, rule of law and human rights, three other sets of joint priorities have been identified, each of them covering a wide number of cooperation sectors: 1) economic development for stabilisation; 2) the security dimension and 3) migration and mobility through 'Bilateral cooperation' and 'Regional, Neighbourhood-wide and Cross-Border Cooperation' in EEAS.
[177] Giuffré (n 165) 186-187.
[178] UNHCR, Inter-State Agreements for the Re-Admission of Third Country Nationals, Including Asylum Seekers, and for the Determination of the State Responsible for Examining the Substance of an Asylum Claim (UNHCR 2001); Raymond N Rogers and Steve Peers, 'EC Readmission Agreements' in Raymond N Rogers and Steve Peers (eds), *EU Immigration and Asylum Law: Text and Commentary* (Martinus Nijhoff 2005).

the RC and relevant human rights instruments, requesting states must ensure that their actions align with the principle of non-refoulement, particularly when implementing RAs.

Most RAs, however, focus on facilitating returns without adequately addressing the risks of refoulement.[179] This omission raises questions about the lawfulness of RAs when the requesting state fails to comply with its international obligations. These issues underscore the importance of ensuring procedural safeguards and substantive reviews of asylum claims, particularly in agreements where explicit references to non-refoulement are absent.

In sum, RAs serve as administrative tools to facilitate the return of individuals, but their legal basis remains complex, particularly when addressing third-country nationals or the risks of refoulement. While the agreements streamline interstate cooperation, their reliance on informal arrangements and lack of explicit safeguards raise significant concerns about their lawfulness and compliance with international law. These challenges will be further analysed in subsequent chapters, with a focus on the obligations arising under the principle of non-refoulement and the operational dynamics of informalized agreements.

2.6 Conclusion

The externalization of migration control relies on strategies designed to manage irregular migration before individuals reach destination states. These methods shift migration management beyond national jurisdictions, focusing on interception at sea, EPCs, and RAs. While each operates within a distinct legal and practical framework, they collectively illustrate the extraterritorial and cooperative nature of contemporary migration governance.

The interception of irregular migrants, whether at sea or in third-country territories, exemplifies externalized control. Across regions, such operations share common features,

[179] Giuffré (n 166) 169-71.

including pushbacks, pullbacks, third-state cooperation, and extraterritorial enforcement. However, as examined in this chapter, their legality depends on operational context. States' rights to intercept vessels vary by jurisdictional zones, with broader authority in territorial and contiguous waters but stricter limits on the high seas under UNCLOS. Justifications often cite human trafficking or smuggling, yet these operations must comply with international human rights obligations. The potential rights impact underscores the need for further analysis, which follows in Chapter 4.

EPCs serve as another key mechanism, aiming to deter irregular arrivals and manage asylum claims offshore. As explored in this chapter, their legal basis raises significant questions, including the extent of supporting states' obligations, jurisdictional challenges, and the role of administrative decisions in refugee status determination. These centres blur responsibility between supporting and host states, often leading to legally questionable practices such as collective asylum assessments and effective control by destination states. This interplay between externalization and international legal obligations sets the stage for a deeper human rights analysis in Chapter 5.

RAs are a critical tool in externalized migration control, particularly in Europe, where they have evolved into complex return frameworks. While facilitating cooperation, they raise legal and ethical concerns, especially regarding third-country nationals and stateless persons. As discussed, states have no explicit international obligation to readmit non-nationals, making these agreements highly discretionary. Furthermore, compliance with non-refoulement is frequently neglected, particularly where procedural efficiency overrides substantive rights protections. These challenges, examined further in Chapters 6 and 7, reflect how RAs rely on informalization and burden-shifting to third states.

In conclusion, interception, extraterritorial processing, and RAs exemplify the evolving landscape of migration governance. However, their dependence on extraterritoriality, informal mechanisms, and third-state collaboration raises critical legal and ethical concerns. These methods challenge sovereignty boundaries while testing states' compliance with international human rights and refugee law. Subsequent chapters will further explore how externalization intersects with fundamental rights, assessing state obligations under treaty-based and customary international law to ensure migration control measures do not undermine human dignity and protection.

3. State Jurisdiction in the Context of Externalization of Migration Control

3.1 Introduction

The concept of jurisdiction plays a fundamental role in determining state responsibility under international human rights law. Human rights treaties impose obligations on states to guarantee fundamental rights to individuals under their jurisdiction.[1] This concept becomes particularly critical in the context of externalized migration control policies, where the allocation of state responsibility for human rights violations is often contested. Externalization methods, such as interception, the use of EPCs, and RAs, challenge traditional understandings of jurisdiction by shifting state actions and obligations beyond national borders.[2]

Externalization complicates the assignment of responsibility, as states often engage in activities that directly, indirectly or remotely affect individuals' rights. In such cases, questions arise about whether and how jurisdiction applies under international human rights law. This chapter develops an analytical framework for understanding jurisdiction in the context of externalized migration controls, focusing on three primary models of jurisdiction: spatial, personal, and functional. Spatial jurisdiction refers to a state's control

[1] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 1. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT), art 2(1); European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art 2(1); UN Human Rights Committee, 'General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) CCPR/C/21/Rev.1/Add.13, para 10.

[2] IOM, Glossary on Migration (International Migration Law Series, 2019) 45, 56; V Lowe, 'Jurisdiction' in M Evans (ed), International Law (2nd edn, Oxford University Press 2006) 335; M Shaw, International Law (6th edn, Cambridge University Press 2008) 645; M Akehurst, 'Jurisdiction in International Law' (1972–1973) 46 British Yearbook of International Law 145; C Ryngaert, Jurisdiction in International Law (Oxford University Press 2008) 5 et seq; Marco Milanovic, Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy (Oxford University Press 2011) 41; 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, 98

over a specific territory,[3] personal jurisdiction to its authority over individuals,[4] and functional jurisdiction to its ability to fulfil or violate its obligations regardless of direct territorial or personal control.[5] While jurisdiction under international human rights law is primarily associated with a state's territory in certain cases,[6] the applicability of human rights conventions may extend beyond territorial boundaries through spatial, personal and functional jurisdiction.[7]

This chapter proceeds by first offering an overview of the legal tests for the extraterritorial application of human rights across various regimes, beginning with global instruments like the ICCPR and CAT and extending to regional conventions such as the ECHR, and investigating especially the promise of the functional jurisdiction approach in the context of externalization. It then applies this framework to specific externalization practices, including interception at sea, EPCs, and RAs referring to different jurisdiction models as above. Overall, the chapter establishes a foundation for assessing the compliance of externalization policies with international human rights law.

[3] Shiri Pasternak, 'Jurisdiction' in Mariana Valverde (ed), *Routledge Handbook of Law and Society* (Routledge 2015) 36; *Banković and Others v Belgium and Others* App no 52207/99 (ECtHR, 12 December 2001), paras 67–75; *Loizidou v Turkey* (Preliminary Objections) App no 15318/89 (ECtHR, 23 March 1995), para 62.
[4] Daniel Klerman, 'Rethinking Personal Jurisdiction' (2014) 6(2) *Journal of Legal Analysis* 245, 245-303; *Al-Skeini and Others v UK* App no 55721/07 (ECtHR, 7 July 2011), paras 133–138.
[5] Alejandro E. Camacho and Robert L. Glicksman, 'Substantive and Functional Jurisdiction' in *Reorganizing Government: A Functional and Dimensional Framework* (NYU Press 2019) 21-30; Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the 'Operational Model' ' (2020) 21(3) German Law Journal 385, 402–404.
[6] *Banković and Others v Belgium and Others* (n 3) para 59.
[7] *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012); *Al-Skeini and Others v United Kingdom* (n 4); *Medvedyev and Others v France* App no 3394/03 (ECtHR, 29 March 2010); *Öcalan v Turkey* App no 46221/99 (ECtHR, 12 May 2005); *Ilich Sanchez Ramirez v France* App no 59450/00 (ECtHR, 4 July 2006); *Al-Saadoon and Others v United Kingdom* App no 61498/08 (ECtHR, 2 March 2010); *Al-Jedda v United Kingdom* App no 27021/08 (ECtHR, 7 July 2011); *Markovic and Others v Italy* App no 1398/03 (ECtHR, 14 December 2006); *Pad and Others v Turkey* App no 60167/00 (ECtHR, 28 June 2007).

3.2 Jurisdiction and Externalization

Understanding jurisdiction is pivotal when evaluating the legality of externalized migration control measures. This section examines how jurisdictional principles apply to various forms of extraterritorial action, particularly those where states exercise control beyond their borders. By exploring the tests developed in international human rights law and their relevance to externalization practices, this section lays the foundation for assessing when and how state obligations are triggered extraterritorially.

3.2.1 Legal Tests for the Extraterritorial Application of Human Rights: Spatial and Personal Control Tests

The extraterritorial application of human rights treaties is grounded in both convention provisions and judicial interpretations. Various judicial bodies like the HRC and the ECtHR have developed legal tests to clarify when a state's obligations extend beyond its territory, interpreting convention provisions on the scope of application of a treaty. For example, under Article 2(1) of the ICCPR, a state must respect and ensure the rights of individuals "within its territory and subject to its jurisdiction." [8] The HRC has interpreted this provision to include extraterritorial obligations wherever a state exercises control over individuals outside its territory, as affirmed in *Lopez Burgos v Uruguay*.[9] Similarly, the CAT requires states to prevent acts of torture "in any territory under its jurisdiction" (Article 2(1)), with the Committee Against Torture extending this to include areas where a state exercises effective control, such as detention facilities abroad.[10] These interpretations ensure responsibility for state agents or proxies operating extraterritorially.

[8] ICCPR art 2(1).
[9] Delia Saldias de Lopez v Uruguay, Communication No 52/1979, UN Doc CCPR/C/OP/1 at 88 (1984) https://juris.ohchr.org/casedetails/298/en-US accessed 17 October 2023 para 12-13.
[10] CAT art 2(1).

The ECtHR, under the ECHR, has developed robust jurisprudence on extraterritorial jurisdiction, applying two primary tests: effective control over territory or individuals.[11] In *Hirsi Jamaa v Italy*, the Court determined that Italy's interception of migrants on the high seas established jurisdiction due to the exercise of de facto effective control. Similarly, in *Al-Skeini v UK*, the Court extended jurisdiction to UK forces operating in Iraq based on their authority and control over individuals. Beyond Europe, other regional systems, such as the Inter-American and African human rights regimes, also recognize extraterritorial obligations. For instance, the Inter-American Court of Human Rights (IACtHR) in *Advisory Opinion OC-23/17* emphasized that states must respect and protect human rights beyond their borders when their actions or omissions impact individuals' rights.[12]

These frameworks collectively highlight that a state's human rights obligations may arise from its control over individuals or its authority exercised in areas beyond its national borders. By establishing jurisdiction in such cases, these legal tests ensure that states remain responsible for their extraterritorial actions or omissions, reinforcing the principle that human rights protections cannot be confined by territorial limits. However, significant gaps remain due to the high thresholds of the spatial and personal control tests. It is for this reason that the concept of functional jurisdiction has been proposed.

3.2.2 The Relevance of Functional Jurisdiction

The concept of functional jurisdiction, though contested, has emerged as a significant analytical framework in international human rights law for understanding state obligations in complex extraterritorial contexts. While effective control remains the primary threshold

[11] ECtHR held that Turkey exercised effective control over northern Cyprus through its military presence in *Loizidou v Turkey* (n 3) paras 56–57; ECtHR recognized that the UK's exercise of authority and control over individuals in Al-Skeini and Others v United Kingdom (n 4) paras 133–137.
[12] Inter-American Court of Human Rights, *Advisory Opinion OC-23/17* (15 November 2017) on the Environment and Human Rights (State Obligations in the Context of Transboundary Environmental Harm) https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf accessed 10 April 2023.

for establishing jurisdiction, functional jurisdiction extends beyond direct control to encompass the exercise of significant influence or authority through public powers.

Effective control is well-established in ECtHR jurisprudence as a basis for extraterritorial jurisdiction under Article 1 of the ECHR.[13] Cases such as *Hirsi Jamaa v. Italy* and *Al-Skeini v. UK* illustrate that a state's exercise of authority over individuals beyond its borders triggers human rights obligations.[14] Functional jurisdiction represents a broader approach, emphasizing the ability of states to influence or fulfil their human rights obligations, even without direct control. Scholars such as Shany advocate for a functional approach, arguing that states should be held accountable whenever they exercise significant power or influence over individuals.[15] This perspective challenges traditional notions of jurisdiction, focusing instead on the relational and operational dynamics of state actions.

Moreno-Lax has expanded the functional jurisdiction framework by introducing the concept of "contactless control,"[16] where states project authority through remote actions or proxies. For instance, in the pending case of *S.S. and Others v. Italy*, functional jurisdiction is debated in the context of Italy's funding, training, and operational coordination with Libyan authorities in maritime interception operations.[17] She further defines the term "*contactless control*" to explain this functional link through "remote management techniques and/or through a proxy third actor".[18] She has also analysed functional jurisdiction by reference to three factors, which this chapter will rely on.[19] According to

[13] Seunghwan Kim, 'Non-Refoulement and Extraterritorial Jurisdiction' (2017) 30 Leiden Journal of International Law 49, 51-53; ECHR art 1.
[14] Hirsi Jamaa v Italy (n 8) paras 79–81; Al-Skeini and Others v UK (n 4) paras 130–138.
[15] Yuval Shany, Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law (2013) 7(1) Law & Ethics of Human Rights 47–71.
[16] Moreno-Lax (n 5) 401–404.
[17] S.S. and Others v Italy App no 21660/18 (ECtHR, 17 March 2021).
[18] Moreno-Lax (n 5) 426-427.
[19] ibid 405-413.

Moreno-Lax, these include the *impact* of the destination state's actions on individuals, the *decisive influence* exerted through public power on behalf of the supporting state, and the *operative involvement* in operations, such as providing intelligence or operational directives.[20] These elements provide a framework for assessing responsibility when direct control is absent but influence is evident.

ECtHR judges have also contributed to the discourse on functional jurisdiction. Judge Bonello, in his concurring opinion in *Al-Skeini*, identified key state obligations under the ECHR: avoiding direct human rights violations, establishing systems to prevent breaches, investigating allegations of abuses, holding violators accountable, and compensating victims.[21] Judge Bonello outlined five functions (obligations) of states regarding human rights, as derived from the Convention: *"firstly, not violating (through their agents) human rights; secondly, by having in place systems which prevent breaches of human rights; thirdly, by investigating complaints of human rights abuses; fourthly, by scourging those of their agents who infringe human rights; and, finally, by compensating the victims of breaches of human rights"*.[22] According to Judge Bonello, a state exercises its jurisdiction under Article 1 of the Convention whenever it observes or breaches any of these functions within its authority or control.[23] In other words, effective *jurisdiction* is exercised by the state whenever it fulfils or fails to fulfil any of these functions within its power.[24] Thus, the intensity or directness of the state's authority or control over individuals or territories becomes less significant in determining the exercise of effective jurisdiction. Instead of effective *control*, functional jurisdiction gains prominence, focusing on whether the state's obligations are violated within its authority or control.

[20] ibid.
[21] See concurring opinion of Judge Bonello in Al-Skeini and Others v UK (n 4) paras 10-12.
[22] ibid.
[23] ibid para 11
[24] ibid

Milanovic's analysis adds further nuance to the understanding of extraterritorial jurisdiction. He argues that jurisdiction in human rights law has shifted away from strict territorial concepts toward a focus on the functional and operational capacity of states to affect individual rights.[25] Milanovic contends that extraterritorial human rights obligations arise not solely from control over territory or individuals but from the relationship between the state's actions and their impact on rights.[26]

Giuffré complements this discussion by emphasizing the "obligatory dimension" of jurisdiction in human rights law, which arises when a state exercises de facto authority, not necessarily de jure.[27] She argues that jurisdiction in human rights law reflects a factual notion of state power or authority and underscores that limiting jurisdiction to territorial boundaries undermines the fundamental purpose of human rights treaties. Giuffré suggests that the ECtHR's reliance on "special features" to infer jurisdiction demonstrates an evolving, albeit inconsistent, approach to addressing transboundary violations.[28] This includes recognizing that jurisdiction may arise when states exercise public powers through pre-planned operations or cooperative frameworks that foreseeably impact individuals beyond their borders.

Despite its normative potential, functional jurisdiction remains a contested concept. Critics such as den Heijer and Lawson warn that over-expanding jurisdictional theories could undermine legal clarity and predictability, complicating the attribution of state responsibility.[29] They emphasize the need for a balanced approach that respects the

[25] Milanovic M, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011).
[26] ibid.
[27] Mariagiulia Giuffré, 'A Functional-Impact Model of Jurisdiction: Extraterritoriality before the European Court of Human Rights' (2021) 82 QIL-Questions of International Law 53–80.
[28] ibid.
[29] Maarten den Heijer and Rick Lawson, *Extraterritorial Human Rights and the Concept of 'Jurisdiction'* (2013) 9 Cambridge Studies in International Law and Comparative Law 153–159.

principles of international law while addressing the complexities of modern state actions, especially bearing responsibilities.

This chapter argues that functional jurisdiction offers a supplementary framework for understanding state obligations in scenarios where the territorial and personal models of jurisdiction are insufficient to capture the full scope of influence. By focusing on the relational and operational dimensions of state actions, it provides a means to address human rights obligations and responsibility in the context of externalized migration controls and other extraterritorial practices. However, its application must remain grounded in established legal principles to ensure coherence and predictability in international human rights law.

3.3 Jurisdiction and Interception

As confirmed by case law from ECtHR related to interception of irregular immigrants, exercising authority over areas or individuals beyond a state's territorial jurisdiction constitutes the exercise of extraterritorial jurisdiction at sea. [30] Specifically, in *Hirsi Jamaa v. Italy*, the Court established that intercepted individuals aboard an Italian-flagged vessel were under the effective control of Italian authorities during interception and transfer operations, thereby extending Italy's jurisdiction extraterritorially.[31]

In addition to ECtHR case law, scholars have argued that the concept of functional jurisdiction is relevant in cases involving destination states that intercept migrants or support other states in such operations. This concept has also been echoed in the opinions of ECtHR judges, such as Judge Bonello in *Al-Skeini and Others v United Kingdom* and

[30] Hirsi Jamaa v Italy (n 8).
[31] ibid para 178.

Judge Albuquerque in *Georgia v Russia*.[32] If one accepts the premise that functional jurisdiction arises when a state has the power to observe or violate its obligations regarding human rights, even without direct control,[33] then when destination states fund, train, or equip other states for pullback operations, their influence may establish functional jurisdiction, making them responsible for resulting human rights violations.

3.3.1 Pushback by a destination country

When intercepted irregular immigrants are pushed back beyond national borders, such as on the high seas or within the territorial jurisdiction of another state, the extraterritorial jurisdiction of the intercepting state becomes relevant. An intercepting state exercises power, control, or authority over these individuals, enabling it to observe or violate its obligations under human rights law.[34] Consequently, it is argued here that the state would bear responsibility for any violations arising from its exercise of jurisdiction over intercepted individuals.

The exclusive jurisdiction of the flag state is an important tool for establishing the responsibility of the intercepting state.[35] According to Article 92/1 of UNCLOS and as affirmed in the *Norstar Case*,[36] a ship is subject to the exclusive jurisdiction of the state whose flag it flies on the high seas. This principle was also applied in *Hirsi Jamaa v. Italy*, where the ECtHR found that intercepted individuals remained under the de jure and de

[32] Concurring opinion of Judge Bonello in *Al-Skeini and Others v United Kingdom* App No 55721/07 (ECtHR, 7 July 2011) para 10; Partly dissenting opinion of Judge Pinto de Albuquerque in *Georgia v Russia (II)* App No 38263/08 (ECtHR, 21 January 2021) para 10.
[33] V Moreno-Lax (n 5) 403.
[34] Hirsi Jamaa (n 8) paras 79-81; Kim (n 9), Mariagiulia Giuffré, 'Refugees' Admission and Readmission: International and European Protection Obligations.' in *The Readmission of Asylum Seekers under International Law* (Hart Publishing 2020), 55-56 referring *Sonko v Spain*, Comm no 368/2008 (20 February 2012) UN Doc CAT/C/47/D/368/2008 and *JHA v Spain*, Comm no 323/2007 (21 November 2008) UN Doc CAT/C/41/D/323/2007.
[35] See section 2.3.2.
[36] ibid; United Nations Convention on the Law of the Sea (UNCLOS) (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397, art 92(1); The M/V "Norstar" Case (Panama v Italy) ITLOS Case No 25, Judgment of 10 April 2019, para 218.

facto control of Italian authorities from the time they boarded the Italian-flagged vessel until they were handed over to Libyan authorities.[37] Notably, even if the flag-state principle were not considered in this case, the intercepted individuals were subject to Italy's power and authority through the actions of its armed officials, demonstrating that Italy exercised effective control over these individuals.

Pushbacks by destination states might also occur directly on the territory or waters of a country of origin or transit.[38] In such scenarios, the extraterritorial jurisdiction of the destination state similarly emerges because it exercises public authority over individuals, often with the consent of the host state. Regardless of the operational setting, any use of force or failure to act that deprives intercepted individuals of their rights invokes the extraterritorial jurisdiction of the intercepting state under international law. Consequently, when officials of a pushing state use force or fail to take appropriate actions, leading to the deprivation of the rights of intercepted irregular immigrants, they exercise the extraterritorial jurisdiction of the intercepting state by exerting effective control over those individuals. [39]

[37] Hirsi Jamaa and Others v Italy (n 8) para 81.

[38] See section 2.3.1; Amnesty International, 'Italy Deploying Warships to Police Libyan Waters Will Expose Refugees to Horrific Abuse' (2 August 2017) https://www.amnesty.org/en/latest/news/2017/07/italy-deploying-warships-to-police-libyan-waters-will-expose-refugees-to-horrific-abuse-2/; Euro-Med Human Rights Monitor, 'Italy-Libya Memorandum of Understanding: An Affront to the Fundamental Human Rights of Migrants, Refugees, and Asylum Seekers' (3 February 2023) https://euromedmonitor.org/en/article/5561/Italy-Libya-Memorandum-of-Understanding%3A-An-affront-to-the-fundamental-human-rights-of-migrants%2C-refugees%2C-and-asylum-seekers; Euronews, 'Greek Coast Guard Violates Turkish Waters Pursuing Migrant Boat' (24 September 2024) https://www.euronews.com/my-europe/2024/09/24/greek-coast-guard-violates-turkish-waters-pursuing-migrant-boat all accessed 30 November 2024.

[39] Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context SEUNGHWAN K IM∗ p 68-70; functional jurisdiction highlights how states perform border control functions beyond their territorial limits, implicating their jurisdiction through the exercise of public powers, such as interdiction and cooperative enforcement frameworks in Giuffré (n 27), 55–57; Dissenting opinion of Judges Yudkivska, Wojtyczek, and Chanturia *in Georgia v Russia* App No 38263/08 (ECtHR, 21 January 2021) paras 6–12; HRC recognized that Italy's actions and omissions in coordinating rescue operations at sea created a jurisdictional link due to the foreseeability of harm to individuals in distress, reinforcing functional jurisdiction principles. *AS and Others v Italy* (HRC, 27 January 2021) UN Doc CCPR/C/130/D/3042/2017;

3.3.2 Pullback by a country of origin or transit

In pullback operations conducted by a country of origin or transit, jurisdiction primarily arises from the principle of territoriality. When pullbacks occur within the state's own territory or territorial waters, the state exercises jurisdiction by virtue of its sovereignty over its territory, which entails full authority and control over its territories and people.[40] Similarly, when pullbacks occur beyond national territories, such as on the high seas, the state's extraterritorial jurisdiction can be engaged through effective or functional control over individuals and the areas of operation.

Violations of human and refugee rights frequently occur during pullback operations, which aim to prevent irregular immigrants from reaching their intended destination state. These operations involve an element of externalization of migration control, as they are carried out by countries of origin or transit, often with support from destination states in the form of funding, equipment, and training, or directly by officials of destination states operating within the jurisdiction of the country of origin or transit. The responsibilities of states in these scenarios vary depending on which state conducts the operations and the specific circumstances of their execution, which will be explored in the next section.

3.3.3 Support of Destination states

In scenarios where a destination state supports a country of origin or transit in conducting pullbacks, the destination state does not necessarily exercise direct control or authority over the intercepted individuals or operational areas. This is because the destination state may not conduct the operations itself but merely provide funding, technical equipment, or

[40] "Sovereignty as a concept of international law has three major aspects: external, internal and territorial. The territorial aspect of sovereignty is the authority which a State exercises over all persons and things found on, under or above its territory. In the context of migration, this means the sovereign prerogative of a State to determine which non-nationals should be admitted to its territory" as defined by IOM, Glossary on Migration (International Migration Law Series, 2019) 45, 92.

training to facilitate them. However, under the concept of functional jurisdiction, destination states can still be held responsible if their support significantly influences the operations or individuals involved. This opinion has been articulated by Moreno-Lax's three elements to determine how the functional jurisdiction is exercised in the context of the supporting states.[41] Firstly, this jurisdiction is applied when the support of the destination state influences intercepted individuals *(impact element)*, secondly the supported state is able to influence intercepted individuals with that support of the destination state by using public power behalf of the destination state *(decisive influence element)*, and finally the supporting state is involved in operations in a manner that affects them based on agreements, such as providing information flow *(operative involvement element)*. The functional jurisdiction of the supporting state is thus exercised over intercepted or pulled individuals, holding it accountable for violations of its human rights obligations in those operations.[42] If only operative involvement is absent—such as when the destination state provides only financial or technical assistance without further participation—establishing functional jurisdiction becomes challenging.

3.4 Jurisdiction and EPCs

In cases where destination states, such as Australia or the UK, sign agreements with third countries to send asylum seekers to EPCs, questions arise as to the extraterritorial jurisdiction of externalizing states. Similar to the context of interception at sea, the exercise of jurisdiction in these cases involves assessing effective control, functional jurisdiction, and their implications for the rights of individuals held in such centres. The concept of effective control requires a certain level of authority or power by the externalizing state over the processing centres, or the individuals detained there. While no objective criteria

[41] Moreno-Lax (n 5) 405-413.
[42] ibid 414-415.

define this threshold in international law, international courts and committees have developed interpretive frameworks based on specific cases.[43]

In the most notable example, Australian Navy or Coastguard have intercepted irregular immigrants attempting to arrive by sea beyond territorial waters or on the high seas and subsequently transferred them to centres in PNG or Nauru.[44] The intercepting state exercises public authority, control, and power over both the intercepted individuals and the territories where interception occurs. Therefore, the intercepting state exercises its extraterritorial jurisdiction over both the intercepted individuals and the territories of interception based on the principles of the flag state and effective control. Under the flag state principle in international law, a ship is subject to the exclusive jurisdiction of the state whose flag it flies on the high seas.[45] Thus, this situation mirrors the principles outlined in cases such as *Hirsi Jamaa and Others v Italy*, where the ECtHR affirmed that Italy exercised de facto control over intercepted migrants.[46]

Focusing on jurisdiction in EPCs, the UN Human Rights Committee has determined that Australia exercised effective control over detention and processing centres in Nauru and PNG through their establishment, funding, and operational oversight.[47] Factors such as employing private actors to manage centres, providing essential services, and funding host states to operate the facilities indicate effective control by the externalizing state over both the centres and the individuals detained there. When Australia's agents exert authority over these centres, such as by controlling their operations or managing detainees directly,

---

[43] Kim (n 9) 51-58. Sarah Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' (2009) 20(4) *European Journal of International Law* 1223–1246.
[44] See Australia in 2.4.1.
[45] UNCLOS art 92(1); Chris Whomersley, 'The Principle of Exclusive Flag State Jurisdiction: Is It Fit for Purpose in the Twenty-First Century?' (2020) 5(2) *Asia-Pacific Journal of Ocean Law and Policy* 330–347.
[46] Hirsi Jamaa and Others v Italy (n 8).
[47] UNHCR, 'Australia Should Not Coerce Vulnerable People to Return to Harm' (UNHCR Press Release, 2024) https://www.unhcr.org/au/news/news-releases/australia-should-not-coerce-vulnerable-people-return-harm accessed 18 January 2024.

Australia exercises effective control, thereby giving rise to its extraterritorial jurisdiction. However, when the host state retains autonomy in operational decisions, the jurisdiction shifts to the host state. Responsibility in these cases depends on the degree of authority exercised by the externalizing state.

In situations where the externalizing state provides funding, technical assistance, or equipment without direct involvement, the concept of functional jurisdiction becomes essential. Functional jurisdiction emphasizes the responsibilities of a state when its support significantly influences the management and conditions of EPCs. For instance, if a destination state provides substantial support that enables a host state to manage such centres, this support creates a decisive influence, implicating the destination state in any human rights violations occurring at the centres, even in the absence of direct control.

As introduced above, the practical application of functional jurisdiction often relies on three elements: the impact of the externalizing state's actions on individuals, the decisive influence exerted through support, and operative involvement in the centres' management. For example, the requirement for Australian Border Force approval to access Manus Island processing centres illustrates how externalizing states can remotely exert public power.[48] Similarly, Nauru's frequent consultation with Australian authorities before making policy changes for these centres underscores the decisive influence of externalizing states.[49]

If a destination state exercises effective control in an EPC comparable to its actions within its own territory, it extends its jurisdiction over the individuals within the centre. Both the ECtHR's jurisprudence and recent scholarship highlight that exercising authority and control over individuals (personal jurisdiction), or territories (spatial jurisdiction) is

[48] Jamal Barnes, 'Suffering to Save Lives: Torture, Cruelty, and Moral Disengagement in Australia's Offshore Detention Centres' (Year) 35(4) Journal of Refugee Studies 1508–1529, 1517.
[49] ibid.

necessary to establish extraterritorial jurisdiction. However, the ECtHR has not yet ruled on the extraterritorial jurisdiction of externalizing states operating offshore processing centres, as no ECHR-bound state has adopted practices similar to Australia.[50] Thus, when handling the extraterritorial jurisdiction of externalizing states over such camps, the degree of authority and control becomes pivotal.

The externalizing state's effective control over a processing centre and its detainees is crucial for holding it jointly responsible with the host state for human rights violations. Instead of focusing solely on effective control, however, it is more practical to apply functional jurisdiction when evaluating whether destination states exercise jurisdiction over EPCs. The ambiguity surrounding the threshold for effective control, as highlighted in ECtHR judgments, further supports the reliance on functional jurisdiction. For example, in certain military intervention cases, the ECtHR concluded that the defendant state's actions did not constitute effective control, even though they impacted individuals or territories beyond national borders.[51] Conversely, in cases where state agents' actions established authority and control, the ECtHR attributed extraterritorial jurisdiction to the state.[52]

Since there is no objective framework delineating the boundaries of effective control, judicial discretion plays a crucial role in determining whether a defendant state exercised jurisdiction.[53] Functional jurisdiction shifts the focus from physical control to the outcomes of a state's actions, particularly its ability to fulfil or breach obligations under international law.[54] A destination state that sends asylum seekers to a third country to be detained or held until decisions regarding their refugee claims are made exercises functional jurisdiction

[50] Noting UK and Italy are the closest examples, see section 2.4.1.
[51] Bankovic and Others v. Belgium and Others (n 3); Issa and Others v Turkey App no 31821/96 (ECtHR, 16 November 2004); Behrami and Behrami v France and Saramati v France, Germany, and Norway App nos 71412/01 and 78166/01 (ECtHR, Admissibility Decision, 2 May 2007).
[52] Markovic and Others v. Italy (n 8); Pad and Others v Turkey (n 8).
[53] See Kim and Miller above (n 43).
[54] Moreno-Lax's definition of "contactless control" and analysis of state responsibilities display functional jurisdiction is a key element in Moreno-Lax (n 5).

over the individuals and centres if it has the power to fulfil or breach its obligations under human rights treaties. To determine whether a destination state exercises functional extraterritorial jurisdiction, it is essential to assess whether the state fulfils any of five key functions after transferring asylum seekers, as identified by Moreno-Lax.[55]

Firstly, the actions of the destination state must significantly affect asylum seekers' rights in the centres. In the context of processing centres, transferring individuals with knowledge of unsafe conditions in the centres, as documented in international reports, satisfies the impact element. Without the involvement of the destination state, such rights violations would not occur.

Secondly, the destination state exerts decisive influence when it enables public power to be wielded by third parties, such as private actors or host states, through financial, political, or military support. As articulated above in Australian context, providing funding or training to a host state or private actors to manage the centres establishes this influence, as third parties cannot exercise public power without the externalizing state's support. Further, the ECtHR has held the state accountable for exercising a *decisive influence* over individuals through these third parties.[56] This is based on the understanding that third parties cannot wield *public power* without the support of the sponsoring states.[57]

Thirdly, functional jurisdiction is also established when the destination state is directly involved in operations, such as providing financial resources, equipment, or training for the

[55] Moreno-Lax (n 5) 405-413.
[56] Ivantoc and Others v. Moldova and Russia, App. No. 23687/05 (Nov. 15, 2011); Mozer v. Moldova and Russia, App. No. 11138/10 (Feb. 23, 2016); Turturica and Casian v.Moldova and Russia, Apps. No. 28648/06 and 18832/07 (Aug. 30, 2016); Paduret v. the Republic of Moldova and Russia, App. No. 26626/11 (May 9, 2017); Cotofan v. Moldova and Russia, App. No. 5659/07 (June 18, 2019).
[57] Ilaşcu, App. No. 48787/99 para 392.

centres. This involvement ties the destination state to the conditions and violations occurring within the centres.

When a destination state's actions involve impact, decisive influence, and operative involvement, it exercises functional jurisdiction over asylum seekers and the EPCs where they are detained. The state is therefore responsible for ensuring compliance with its obligations under international law.

A final scenario relating to EPCs should be analysed from the perspective of jurisdiction. Some countries, like the UK or Italy, may plan to send asylum seekers who have already entered their territories illegally to a third country that hosts EPCs.[58] In this case, the jurisdictional issue pertains to the territorial jurisdiction of the sending state because the procedure of transferring asylum seekers to a third country occurs within the sending state's national territory. Therefore, the territorial jurisdiction of the sending state applies to the transferred asylum seekers during the transfer process.

3.5 Jurisdiction and RAs

RAs are key tools in externalized migration control, shifting the responsibility of managing returned individuals to the requested states. This section focuses primarily on the jurisdictional issues arising during the implementation of RAs, particularly the territorial jurisdiction of the requesting state and the functional jurisdiction that may extend over individuals and reception centres in the requested state.

As individuals subjected to RAs are within the territories under the sovereignty of the requesting state during the initial stages of the agreement's implementation, the requesting state exercises its territorial jurisdiction over these individuals. This is because the

[58] See Europe in section 2.4.1.

requesting state makes the return decision, manages the detention process, and oversees the transfer within its national territory. The focus here, however, is on how the requesting state's jurisdiction evolves once the readmitted individuals are transferred to the requested state.

Within the framework of responsibilities for requesting/externalizing states, repatriation centres fall under the territorial jurisdiction of these states because they house individuals pending return based on repatriation decisions. Therefore, both the repatriation centres and the individuals detained there are within the territorial jurisdiction of the requesting/externalizing states that operate these facilities and retain individuals until their return.[59] As a result, the international obligations regarding the rights of returned individuals incumbent upon the externalizing/requesting state are applicable within these repatriation centres to safeguard the rights of detained individuals. Consequently, if the rights are compromised due to the conditions within a repatriation centre situated within its territory, the requesting state bears responsibility for such violations.

When individuals are readmitted by the requested state, they come under the territorial jurisdiction of that state. Reception centres, where individuals are often detained post-transfer, are typically located within the requested state's territory, placing them under its territorial jurisdiction. Nonetheless, the requesting state's involvement, particularly through the provision of financial assistance, equipment, or training, raises questions about whether functional jurisdiction is triggered.[60] This section argues that such involvement does engage the requesting state's functional jurisdiction to ensure the protection of human rights and prevent legal loopholes that could undermine international human rights regimes.

[59] Guy Goodwin-Gill and Jane McAdam, The Refugee in International Law (3rd edn, OUP 2007), 244-53
[60] Moreno-Lax (n 5) 403–404; Giuffré (n 36) 57–59.

If the operation of the reception centre is supported by the requesting state, such as through training for officials of the requested state or the provision of equipment or funds, it is argued that the theory of functional jurisdiction is triggered. This is necessary to ensure that human rights regimes are upheld, preventing a situation where states could circumvent their obligations by outsourcing responsibility to third states. Functional jurisdiction helps close potential accountability gaps, ensuring that states providing support remain responsible for the conditions in reception centres and the treatment of individuals housed there.

The requesting state's exercise of public power over reception centres is facilitated through its financial and operational assistance.[61] For example, when the requested state's ability to operate reception centres relies on funding or training from the requesting state, the latter's involvement becomes integral to the centres' functioning. In particular, the impact element is satisfied when the requesting state's assistance directly enables the requested state to manage reception centres and accommodate returned individuals. For instance, without the financial or logistical support of the requesting state, the requested state might lack the capacity to operate these facilities. Similarly, decisive influence arises because the requesting state's support enables the requested state to exercise public power over reception centres, which would not be possible otherwise.[62] Operative involvement is also evident when the requesting state's actions extend to providing operational guidelines, equipment, or other resources essential to the centres' functioning. Together, these elements establish the functional jurisdiction of the requesting state over the centres and individuals therein.

[61] ibid 59–61.
[62] ibid 42-44.

It is crucial to ensure that functional jurisdiction extends to the requesting state in such contexts to prevent gaps in accountability and the erosion of human rights standards. By invoking functional jurisdiction, states are held accountable for the consequences of their involvement, even when they act indirectly through third states. This approach aligns with international human rights law's objective to ensure comprehensive protection of individuals, regardless of the jurisdictional complexities introduced by externalized migration control methods such as RAs.

3.6 Conclusion

The externalization of migration control raises critical questions about state jurisdiction. Whether through interception at sea, EPCs, or RAs, externalizing states extend migration control beyond their borders, challenging conventional jurisdictional norms under international law. Assessing state responsibility for human and refugee rights violations requires an examination of how and when jurisdiction—territorial or extraterritorial—is exercised, triggering international obligations.

Interception operations illustrate de facto jurisdiction when states exert direct control over individuals at sea, whether through pushbacks or within third-state waters. Functional jurisdiction arises when states influence operations indirectly through training, funding, or logistical support, making them accountable for resultant human rights impacts. Pullbacks, though occurring within third states, still engage externalizing states' obligations where they materially support these operations.

EPCs further complicate jurisdiction. While host states generally exercise territorial jurisdiction, externalizing states retain jurisdiction when they exert authority through direct control (e.g. deploying officials) or indirect means (e.g. funding and operational oversight).

Functional jurisdiction ensures that even financial or logistical support can implicate state responsibility under human rights law.

Similarly, RAs demonstrate how externalizing states remain accountable even after transferring individuals. While the requesting state has territorial jurisdiction before return, it also retains functional jurisdiction when it materially supports reception conditions in the receiving state, ensuring accountability despite outsourcing migration management.

This chapter has shown the importance of dynamic jurisdictional interpretations, particularly functional jurisdiction, in holding externalizing states accountable. By shifting from a purely territorial focus to a relational and operational approach, functional jurisdiction ensures that states cannot evade their obligations through indirect actions. This framework is essential for subsequent discussions on state responsibility and compliance with international human rights and refugee law amid evolving migration control strategies.

4. The Impact of Interception on Human and Refugee Rights

4.1 Introduction

Interception of irregular migrants, including refugees and asylum seekers, is a primary mechanism of externalized migration control. Its overarching aim is to prevent such individuals from reaching the territories of destination states. As argued in Chapter 2, interception is a key method of externalization, restricting asylum applications by stopping irregular migrants before they reach destination borders. While states engaged in externalization retain the sovereign right to regulate border entry, they must uphold the fundamental human and refugee rights of intercepted individuals.

To address potential rights violations, the issue of legal responsibility must be thoroughly examined. Since interceptions frequently occur beyond national borders, the extraterritorial applicability of international legal obligations is crucial. Clarifying international guarantees and protections against such rights erosions requires outlining the legal obligations of *intercepting* or *pushing* states as well as *pulling* states under international human rights and refugee law. When a state violates an extraterritorial legal guarantee, it bears responsibility under the relevant legal framework.

This chapter examines how interception operations impact fundamental human rights, focusing on the right to life, the prohibition of torture and CIDTP, and the right to seek asylum. It begins by analysing the right to life in the context of interception practices, addressing states' positive and negative obligations under international law to prevent loss of life. Particular attention is given to state failures and omissions in SAR operations, which often result in life-threatening conditions when individuals in distress at sea are left unaided. The analysis further explores how violations of non-refoulement during interceptions expose individuals to harm, thereby undermining the right to life. The chapter

then examines the prohibition of torture and CIDTP, assessing how pushbacks, pullbacks, and SAR failures contribute to degrading treatment, including excessive force or neglect. It highlights the heightened risks of CIDTP in extraterritorial contexts where state control extends beyond national borders. Finally, it addresses the right to seek asylum, emphasizing how interception measures obstruct access to international protection. By violating the right to leave and the principle of non-refoulement, these practices create significant barriers to seeking asylum, preventing individuals from reaching safe countries where they can file claims. Through this analysis, the chapter underscores the complex interplay between migration control and states' international obligations, offering insights into the legal tensions inherent in externalized migration policies.

4.2 The Right to Life in the Context of Interception

Interception operations primarily occur in the Aegean and Mediterranean Seas, where Greece, Italy, and Spain play key roles in controlling irregular migration flows.[1] These operations may involve direct interceptions by destination states or joint efforts with transit states. Similar operations take place along the EU's eastern borders, involving both EU and non-EU countries with status agreements, such as Serbia, Croatia, Hungary, Poland, and Bulgaria.[2] Outside Europe, interception is also conducted by destination states like Australia and the USA, either directly or in collaboration with third states.[3]

[1] See the discussion of Europe in section 2.3.1.
[2] UNHCR, *Southeastern Europe Situation Data* https://data.unhcr.org/en/situations/southeasterneurope accessed 31 October 2024; Frontex, 'Operations' https://www.frontex.europa.eu/what-we-do/operations/operations/#:~:text=Frontex%20operations%20support%20EU%20and,as%20well%20as%20international%20airports accessed 10 September 2024; Office for Democratic Institutions and Human Rights, 'Border Police Monitoring in South-eastern Europe New opportunities' (2023) https://www.osce.org/files/f/documents/0/5/556554.pdf accessed 10 September 2024.
[3] See the discussion of Australia and USA in section 2.3.1.

The right to life in international law imposes *erga omnes* obligations on contracting states to protect life within their jurisdiction, including in emergencies or armed conflict.[4] These legal guarantees prohibit violations arising from state actions or omissions.[5] Furthermore, the *jus cogens* status of the right to life—defined by the prohibition on arbitrary deprivation—ensures its universal application, even to states not party to specific conventions.[6] This *jus cogens* character is reinforced by two principles: first, as the most fundamental human right, and second, that life may only be lawfully taken through judicial decisions or the regulated use of force.[7] Arbitrary derogations, such as for genocide, crimes against humanity, or acts of aggression, are strictly prohibited, underscoring its paramount legal standing.

The right to life underpins all other human and refugee rights. Therefore, any erosion of these rights resulting from the interception of irregular migrants, including refugees and asylum seekers, must first be examined in relation to right to life violations. A significant gap exists in the literature concerning the impact of specific migration control methods,

---

[4] A.V. Almeida Ribero, 'Report on the Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief', UN Doc E/CN.4/1987/35 (1987).

[5] International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 6; African Charter on Human and Peoples' Rights (ACHPR) (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, art 4. African Charter on the Rights and Welfare of the Child (ACRWC) (adopted 11 July 1990, entered into force 29 November 1999) art 5. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) (adopted 11 July 2003, entered into force 25 November 2005) art 4; ECHR, art 2; Arab Charter on Human Rights (Arab Charter) (adopted 22 May 2004, entered into force 15 March 2008) arts 5-6; American Declaration of the Rights and Duties of Man (ADRDM) (adopted 2 May 1948) art 1; ACHR, art 4; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará) (adopted 9 June 1994, entered into force 5 March 1995) art 4.

[6] The right to life is a peremptory norm binding all states and entities, prevailing over other treaty or customary norms and prohibiting any derogation except under strictly defined conditions. See, eg, Stuart Casey-Maslen, *The Right to Life under International Law: An Interpretative Manual* (Cambridge University Press 2021) 737; Dire Tladi, 'Fourth Report on Peremptory Norms of General International Law (Jus Cogens)' UN Doc A/CN.4/727 (31 January 2019) para 128; Inter-American Court of Human Rights, *Case of the "Street Children" (Villagrán-Morales et al) v Guatemala (Merits)* (19 November 1999) Series C No 63, para 139; Human Rights Committee, 'General Comment No 29: Article 4: Derogations during a State of Emergency' UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001) para 11; African Commission on Human and Peoples' Rights, 'General Comment on the Right to Life' para 5; Inter-American Commission on Human Rights, *Case 9647* OEA/Ser L/V/II.71, Doc 9 rev 1 (1987) para 169; Karen Parker and Lyn Beth Neylon, 'Jus Cogens: Compelling the Law of Human Rights' (1989) 2 Hastings International and Comparative Law Review 431, 431–432.

[7] Douwe Korff, *The Right to Life: A Guide to the Implementation of Article 2 of the European Convention on Human Rights* (Council of Europe - Human Rights Handbook No 8, November 2006) 59–67, 76–79.

such as vessel interceptions and ineffective SAR operations, on the right to life.[8] While studies, including those by the European Parliament, address the effects of pushbacks and SAR failures,[9] they often lack a comprehensive analysis of the legal obligations of externalising states and their partners.

This section examines how interception operations violate the right to life through state actions or omissions during pushbacks and pullbacks. It assesses states' international responsibilities under legal guarantees, focusing on externalising states such as Italy, Spain, and the USA, alongside third states like Libya, Tunisia, and Mexico, which often conduct operations with external support. The analysis explores state attribution and obligations under international law, as established in UNCLOS, SOLAS, and the SAR Convention.[10] Additionally, it addresses how pushbacks to unsafe territories violate the principle of non-refoulement, a fundamental safeguard of the right to life, with particular attention to its extraterritorial application and customary law status.

[8] Vladislava Stoyanova, 'The Right to Life under the EU Charter and Cooperation with Third States to Combat Human Smuggling' (2020) 21 German Law Journal 436, 437–438; Thomas Spijkerboer, 'Wasted Lives: Borders and the Right to Life of People Crossing Them' (2017) 86 Nordic Journal of International Law 1, 4–5.

[9] David Cantor, Nikolas Feith Tan and others, 'Externalisation, Access to Territorial Asylum, and International Law' (2022) 34(1) International Journal of Refugee Law 120, 136–137; Bill Frelick, Ian M Kysel and Jennifer Podkul, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) 4(4) Journal on Migration and Human Security 190, 198; Violeta Moreno-Lax, Jennifer Allsopp and others, 'The EU Approach on Migration in the Mediterranean' (Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies 2021) 70–90.

[10] United Nations Convention on the Law of the Sea (UNCLOS) (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397; International Convention for the Safety of Life at Sea (SOLAS) International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) Chapter V; International Convention on Maritime Search and Rescue (SAR Convention) International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985).

4.2.1 The Right to Life in the Context of Actions or Omissions of Officials During Interception Activities

Individuals attempting irregular border crossings frequently lose their lives due to state actions during interceptions.[11] Fatalities occur when boats or trucks transporting migrants are intercepted, as they are pushed or pulled back by state officials.[12] This section specifically examines deaths resulting from state failures to uphold their right to life obligations toward individuals under their jurisdiction.

To determine the scope of such violations, this analysis focuses on deaths caused by direct state actions during interceptions, which often constitute right to life violations distinct from non-refoulement and related legal protections. Fatalities may result from deliberate or negligent actions, mistreatment, or omissions by border forces responsible for restricting irregular immigration.

4.2.1.1 Conducts of Officials

Reports from NGOs and human rights organisations document numerous deaths at sea and land borders, often linked to mistreatment by coastguards of intercepting states.[13] These

[11] European Union Agency for Fundamental Rights, 'Fundamental Rights Issues at Land Borders: Summary Report' (2020) https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-land-borders-report_en.pdf accessed 5 June 2022; UNHCR, 'Desperate Journeys: Refugees and Migrants Arriving in Europe and at Europe's Borders' https://www.unhcr.org/desperatejourneys/ accessed 10 June 2022; Migration Data Portal, 'Migrant Deaths and Disappearances' https://www.migrationdataportal.org/themes/migrant-deaths-and-disappearances accessed 15 June 2022; IOM, 'Fatal Journeys: Tracking Lives Lost during Migration' (2014) https://www.iom.int/sites/g/files/tmzbdl486/files/migrated_files/pbn/docs/Fatal-Journeys-Tracking-Lives-Lost-during-Migration-2014.pdf accessed 20 June 2022; Amnesty International, 'Greece: Pushbacks and Violence against Refugees and Migrants Are De Facto Border Policy' (23 June 2021) https://www.amnesty.org/en/latest/press-release/2021/06/greece-pushbacks-and-violence-against-refugees-and-migrants-are-de-facto-border-policy/ accessed 25 June 2022.

[12] ibid.

[13] For extensive documentation, see Lorenzo Tondo, 'Revealed: 2,000 Refugee Deaths Linked to EU Pushbacks' *The Guardian* (5 May 2021) https://www.theguardian.com/global-development/2021/may/05/revealed-2000-refugee-deaths-linked-to-eu-pushbacks accessed 12 October 2021; Human Rights Watch, 'US: Texas Officials Put Migrants in Danger' (20 July 2023) https://www.hrw.org/news/2023/07/20/us-texas-officials-put-migrants-danger accessed 22 November 2021; *The Guardian*, 'Poland-Belarus Border Migrants' Deaths' (31 October 2021) https://www.theguardian.com/world/2021/oct/31/poland-belarus-border-migrants-deaths accessed 10

include torture, sexual assault, police dog attacks, and forced nudity inflicted by coastguards and police during pushback operations, all posing direct or indirect fatal risks.[14] Such violence, occurring beyond destination states' borders, forms part of externalisation practices. Consequently, right to life violations arise when officials' violence directly causes the deaths of those subjected to pushbacks.

Direct actions by intercepting officials—such as shooting at individuals or creating waves to capsize boats—constitute clear right to life violations. Similarly, beating or kicking vulnerable individuals, including children, pregnant women, or those with chronic health conditions, may result in fatalities, amounting to further violations. When an official's action directly causes loss of life, it constitutes a breach of the right to life, particularly when the harm is a direct consequence of deliberate or reckless state actions. Conversely, indirect actions, though not necessarily intended to cause death, may still constitute violations due to their consequences. Whether direct or indirect, such conduct contravenes the state's negative right to life obligations.

November 2021; Oxfam, *'A Dangerous 'Game': The Pushback of Migrants, Including Refugees, at Europe's Borders'* (April 2017) https://www-cdn.oxfam.org/s3fs-public/file_attachments/bp-dangerous-game-pushback-migrants-refugees-060417-en_0.pdf accessed 17 December 2021; Human Rights Watch, ' "We Were Just Animals": Pushbacks of People Seeking Protection in Croatia, Bosnia, and Herzegovina' (3 May 2023); European Council on Refugees and Exiles (ECRE), 'Greece: New Report Confirms the Cycle of Violence and Abuse at Greek Borders' https://ecre.org/greece-new-report-confirms-the-cycle-of-violence-and-abuse-at-greek-borders-as-court-rejects-charges-of-facilitation-of-illegal-entry-for-refugees-more-scrutiny-over-hellenic-coast-guard-role-in-pyl/ accessed 23 October 2021; European Council on Refugees and Exiles (ECRE), 'Greece: Deadly End to 2021, Pushbacks Prevent Arrivals and Drive People Towards More Deadly Routes' https://ecre.org/greece-deadly-end-to-2021-pushbacks-prevent-arrivals-and-drive-people-towards-more-deadly-routes-closed-controlled-camps-again-face-legal-scrutiny-and-criticism/ accessed 28 November 2021; Migration Policy Institute, *Maritime Migration to the United States on the Rise* https://www.migrationpolicy.org/article/maritime-migration-united-states-rise accessed 28 January 2025.

[14] Border Violence Monitoring Network, *Annual Torture Report 2020* https://www.borderviolence.eu/annual-torture-report-2020/ accessed 19 November 2021; ReliefWeb, 'Protecting Rights at Borders: Beaten, Punished, and Pushed Back' https://reliefweb.int/report/world/protecting-rights-borders-beaten-punished-and-pushed-back accessed 15 December 2021; Border Violence Monitoring Network, 'Torture and Cruel, Inhuman, or Degrading Treatment of Refugees and Migrants in Border Zones of the Western Balkans (2023)' https://borderviolence.eu/app/uploads/2023-Torture-Report_BVMN.pdf accessed 15 January 2025.

Officials' omissions also contribute significantly to fatalities. For instance, abandoning boats in distress without essential supplies directly leads to loss of life.[15] Such omissions violate the state's positive obligations under international law to protect life. States must establish effective legal frameworks to prevent right to life violations within their jurisdiction. As outlined in international instruments,[16] these obligations require states to prevent violence by non-state actors and officials and ensure safe conditions free from life-threatening risks.[17] The use of force or failure to assist intercepted individuals in life-threatening situations during pushback operations falls outside the permissible restrictions on the right to life.

Furthermore, UN reports highlight the severity of these violations, noting that interception operations frequently involve life-threatening actions by officials who use excessive force against migrants.[18] Much of the existing literature focuses on how these operations affect the right to seek asylum, often overlooking their impact on the right to life.[19] While the violation of the right to seek asylum is critical and addressed later in this chapter,[20] it is essential not to overlook their impact on the right to life, the foundational nature of the right to life necessitates its prioritisation and protection.

---

[15] Helena Smith, 'Greece Accused of "Shocking" Pushback Against Refugees at Sea' *The Guardian* (26 April 2021) https://www.theguardian.com/world/2021/apr/26/greece-accused-of-shocking-pushback-against-refugees-at-sea accessed 19 October 2021; Human Rights Watch, 'European Court Slams Greece Over Deadly Migrant Pushback' (8 July 2022) https://www.hrw.org/news/2022/07/08/european-court-slams-greece-over-deadly-migrant-pushback accessed 27 December 2021.

[16] See (n 5) above regarding international legal guarantees.

[17] Korff (n 7).

[18] UN General Assembly, 'Pushback Practices and Their Impact on the Human Rights of Migrants and Refugees' UN Doc G21/106/33 (2021) 11; UNICEF, 'Submission to the Office of the High Commissioner for Human Rights on Pushbacks' (2021) 3 para 8; Juan Ernesto Mendez, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2015) UN Doc A/HRC/28/68 https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC_28_68_E.doc accessed 10 March 2021.

[19] Rene Cassin, 'The EU Must Accept Responsibility for the Use of Violence Towards Refugees and Asylum Seekers at Europe's Borders'; Matthew Aulsebrook, Marianne Gruber, and Gabriella Pawson, 'Externalisation at What Cost?' *Forced Migration Review*; Jamal Barnes, 'Torturous Journeys: Cruelty, International Law, and Pushbacks and Pullbacks Over the Mediterranean Sea' (2022) 48 *Review of International Studies* 441.

[20] See section 4.4 below.

Violations of the prohibition on arbitrary deprivation of life, a fundamental state duty, remain particularly concerning. Such breaches occur when officials from intercepting states engage in actions or omissions leading to fatalities. When state officials carry out unlawful interceptions, the intercepting state violates its negative obligation to uphold the right to life. The use of violence against irregular migrants constitutes a breach of the state's negative right to life obligations, while failures to protect the lives of intercepted individuals constitute violations of the state's positive obligations. Thus, officials' omissions in safeguarding intercepted individuals contribute to right to life violations under the state's positive obligations.

4.2.1.2 Case Law on State Responsibilities

While no specific international court case directly addresses the link between right to life violations and state actions during pushbacks, the Legal Centre Lesvos (LCL) brought a case against Greece before the ECtHR, alleging that Greek authorities conducted an illegal pushback against refugees and migrants attempting to travel from Turkey to Italy.[21] According to LCL and migrant testimonies, Greek officers in balaclavas subjected migrants to physical violence before abandoning them in life rafts without seaworthy supplies, leaving them adrift in the Aegean until Turkish fishing vessels intervened.[22] Although LCL argues that Greek officials violated the right to life through actions amounting to collective expulsion,[23] similar allegations from NGOs and individuals describe coastguard brutality, torture, and abandonment in life-threatening conditions, amounting to deliberate endangerment of life. Pushback actions that place irregular

[21] Reliefweb, 'New Case Filed Against Greece in European Court for Massive Pushback Operation of Over 180 Migrants Caught in Storm Near Crete' https://reliefweb.int/report/greece/new-case-filed-against-greece-european-court-massive-pushback-operation-over-180 accessed 10 December 2023.
[22] Legal Centre Lesvos, 'New Case Filed Against Greece in European Court, for Massive Pushback Operation of Over 180 Migrants Caught in Storm Near Crete' https://legalcentrelesvos.org/2021/04/26/new-case-filed-against-greece-in-european-court-for-massive-pushback-operation-of-over-180-migrants-caught-in-storm-near-crete/ accessed 10 December 2023.
[23] ibid para 3.

migrants in mortal danger should therefore be considered right to life violations. Such claims could be brought by both the relatives of deceased individuals and survivors, as violations of the right to bodily integrity. This section argues that right to life claims should not be contingent on death alone, as the deliberate endangerment of life due to official violence is a severe violation of this right.

In Safi and Others v. Greece, the ECtHR established that official omissions can constitute right to life violations during pushbacks.[24] Brought by survivors and the families of 11 deceased individuals, the case concerned the sinking of a migrant boat near a Greek island in the Aegean on 20 January 2014, while being towed by the Greek coastguard.[25] The Court held that Greek officials failed to take reasonable measures to protect life, as required under Article 2 of the ECHR. The rescue coordination centre was not alerted until the boat was partially submerged, and rescue resources were significantly delayed.[26] The ECtHR concluded that these omissions—failing to take sufficient action to save lives during pushbacks—amounted to right to life violations.[27]

This case demonstrates that right to life violations may result not only from direct actions, such as beatings or shootings, but also from failures to act. While official actions that result in fatalities breach a state's negative obligations, omissions leading to death breach positive obligations, such as ensuring adequate personnel and equipment to prevent vessel sinkings. These failures, in this case, can be attributed to Greece under ARSIWA (Article 4), as omissions by state organs resulted in fatalities, rendering Greece responsible for failing to uphold its positive obligations to protect life.[28] The scope of these obligations,

[24] *Safi and Others v Greece* (2022) App no 5418/15, ECtHR.
[25] ibid paras 1-20.
[26] ibid paras 143-5.
[27] ibid paras 149-150.
[28] ibid; ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* (2001) UN Doc A/56/10 (ARSIWA), ch IV, art 4.

particularly in SAR operations, will be further examined in the next section on states' SAR responsibilities.

4.2.1.3 State Responsibilities in the Context of Pushbacks

Erosions of the right to life arise from the excessive use of force or the failure of border forces or coastguards to take necessary action when intercepting migrants beyond national territories. To clarify the international legal guarantees against such violations, it is essential to define the right to life obligations of intercepting states. These obligations derive from international legal guarantees,[29] meaning that when a right to life provision is applicable and breached, the state bears responsibility for violating its international obligations.[30]

If an intercepting state pushes irregular migrants beyond its borders—such as on the high seas or within another state's jurisdiction—its extraterritorial jurisdiction becomes relevant. As discussed in the jurisdiction chapter,[31] when a state exercises power, control, or authority in a way that affects its human rights obligations, or when its officials use force or neglect necessary actions resulting in fatalities, it exerts effective control and functional jurisdiction, triggering extraterritorial human rights obligations.[32] Jurisdiction may also be established through the flag-state principle, as demonstrated in the Norstar case,[33] or through effective and functional control, as clarified in Hirsi Jamaa v. Italy, where Italy's de jure and de facto control over intercepted migrants established jurisdiction.[34] Even when

[29] See above nn 5 and 6, regarding international legal guarantees.
[30] ibid.
[31] See section 3.3 for a detailed discussion.
[32] ibid.
[33] ibid; UNCLOS, art 92(1); *The M/V "Norstar" Case (Panama v Italy)*, ITLOS Case No 25, para 218 https://www.itlos.org/cases/list-of-cases/ accessed 12 November 2021
[34] *Hirsi Jamaa and Others v Italy* (2012) App no 27765/09 ECtHR, para 81. See chapter 3.

flag-state jurisdiction is not invoked, officials exercising effective and functional control establish the state's responsibility.

In addition to jurisdiction, it is necessary to attribute right to life violations to the intercepting state. Officials acting as state agents—including coastguards, police, soldiers, and gendarmes—who use force or fail to provide necessary assistance during interceptions act on behalf of the state. Since these actions or omissions endangering the lives of intercepted individuals are carried out by state-authorised officials, they are attributable to the state as acts of its organs.[35] Thus, to hold intercepting states accountable under international law, both jurisdiction and attribution must be established through officials' actions or omissions.

To determine the applicability of international right to life guarantees, it is essential to interpret relevant legal provisions both grammatically and teleologically. A grammatical interpretation of right to life articles focuses on jurisdictional reach and specific restrictions on the right to life. As outlined in international instruments such as ICCPR (Article 2/1), ECHR (Article 1), the Arab Charter (Article 3/1), and the American Convention (Article 1),[36] contracting states are required to protect the rights and freedoms of individuals within their jurisdiction. From a teleological standpoint, these provisions aim to protect all lives under a contracting state's jurisdiction from arbitrary or unlawful actions.[37] Therefore, actions or omissions by officials that result in fatalities during interceptions constitute violations of the right to life. These obligations apply both territorially and extraterritorially, as established through international and regional court rulings.[38]

[35] ARSIWA art 4.
[36] ICCPR art 2(1); ECHR art 1; Arab Charter, art 3(1);ACHR art 1.
[37] ibid.
[38] See section 3.3.

Accordingly, states party to these conventions are obligated to protect life and refrain from arbitrary deprivation during pushback operations.

While certain restrictions on the right to life—such as capital punishment, self-defence, or preventing escape—[39] may serve as legal defences, they do not apply to migration control or national security operations and do not permit arbitrary deprivation of life.[40] States remain responsible for right to life violations resulting from pushback operations conducted beyond their national territories for the purposes of national security or migration control.

4.2.1.4 State Responsibilities in the Context of Pullbacks

Having examined state responsibilities in the context of pushbacks, it is important to consider similar obligations in pullback operations, which often involve origin, transit, and destination states. These operations constitute an externalisation of migration control, carried out by the country of origin or transit, often with support from destination states in the form of funding, equipment, and training, or in some cases, direct involvement by destination state officials within the origin or transit country. State responsibilities vary depending on the role of the destination state, the location of operations, and whether jurisdiction over intercepted individuals or attribution to the supporting and supported states is established.

When pullback operations are conducted by a country of origin or transit, jurisdiction over intercepted individuals and attribution of actions to the state must be established to apply international right to life guarantees. As discussed in Chapter 3, jurisdiction may be based on territoriality or extraterritorial principles. In cases where a destination state supports a

[39] ICCPR art 6(2); ECHR art 2(2).
[40] ICCPR art 6(1); ECHR art 2(1); Arab Charter art 5(2); ACHR art 4(1).

country of origin or transit in conducting pullbacks, the destination state does not exercise direct control over intercepted individuals or operational areas but may provide funding, equipment, or training. To hold a supporting state responsible for right to life violations by the assisted state, functional jurisdiction is a key factor.[41] If the supporting state's assistance is essential to the execution of the operation, and such support—though not direct—results in the violation of individuals' rights, the supporting state is deemed to exercise functional control over those individuals. This establishes a basis for state responsibility under the theory of functional jurisdiction.

Additionally, ARSIWA (Article 16) states that a supporting state may be held responsible only if its assistance facilitates a known wrongful act by the assisted state.[42] These principles ensure that states supporting pullback operations are held responsible under international law, regardless of the location of operations. Finally, states conducting pullbacks—whether origin or transit countries—which exercise jurisdiction over pulled individuals also bear responsibility for right to life violations by their officials, due to the jus cogens nature of the right to life and binding international legal obligations.[43]

4.2.2 The Right to Life in the Context of SAR Operations During Interception Activities

Failures or omissions in SAR operations represent a significant factor in right to life violations during interception activities. These operations, led by state officials such as border police or coastguards, are intended to rescue individuals in distress at sea, including irregular migrants, refugees, and asylum seekers. However, when SAR activities fail to

[41] Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, *S.S. and Others v. Italy*, and the "Operational Model"' (2020) 21(3) *German Law Journal* 385; See sections 3.2.2 and 3.3 for detailed discussion.
[42] ARSIWA art 16.
[43] See above, nn 5 and 6.

comply with international norms, which establish state obligations,[44] failures or omissions—such as ignoring requests for help—lead to the fatalities of intercepted irregular immigrants. Protecting those in distress at sea constitutes a positive obligation under the right to life, requiring states to take action to safeguard life and prevent its deprivation.

This section examines not only states' negative obligations, which prohibit the deprivation of life through officials' actions or omissions during interceptions, but also their positive obligations. These positive obligations, derived from SAR regulations, establish the responsibilities of intercepting states to prevent right to life violations during operations. The international legal guarantees that protect the right to life in the context of SAR obligations will be examined here to assess state responsibility.

4.2.2.1 Obligations of States on the SAR Operations

States' obligations regarding individuals in distress at sea are governed by three main international law frameworks: UNCLOS. SOLAS and SAR.[45] These conventions require states to respond to distress calls and conduct SAR operations as a positive obligation under the right to life. States that extend control beyond their maritime borders to intercept migrants are likely to encounter individuals in distress at sea. Failure to conduct adequate SAR operations in such cases often results in loss of life. Thus, presenting these obligations is essential to clarify states' right to life responsibilities and international legal safeguards against violations occurring during SAR operations.

Firstly, UNCLOS Article 98(2) obliges coastal states to establish effective SAR services as part of their duty to assist those in distress at sea. This article also encourages agreements

[44] SOLAS ch V; UNCLOS art 98; SAR chs 1–2.
[45] ibid.

with neighbouring states to improve SAR capacity. Under UNCLOS Article 98(1), states are further required to render assistance and rescue those in distress. Coastal states therefore bear positive obligations to develop and strengthen SAR services to protect lives at sea.

Since failure to meet SAR obligations can lead to right to life violations, there is a strong interplay between UNCLOS and international human rights law (IHRL). Even for non-signatories, the duty to render assistance is rooted in customary international law, originating from the High Seas Convention (1958 - Art 12)[46] and the Salvage Convention (1910) as the first instrument regulating the duty to render.[47] International Law Commission (ILC) has underlined that this duty, codified in the 1956 draft articles, [48] holds customary law status.

The duty to render assistance is therefore a long-standing norm recognised in customary international law,[49] aimed at preventing loss of life at sea due to sinking or abandonment. Neglecting this duty results in right to life violations, particularly for states intercepting individuals in distress. All intercepting states, regardless of UNCLOS ratification, must respond to distress calls and take action to rescue individuals at sea. However, as noted in the House of Lords report on UNCLOS: The Law of the Sea in the 21st Century, many states fail to meet their obligations due to increased distress cases, security concerns, and

[46] Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11, art 12.
[47] Convention for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea (signed 23 September 1910) 37 Stat 1658, T.S. No. 576.
[48] International Law Commission, *'Articles concerning the Law of the Sea with Commentaries, Yearbook of the International Law Commission'* (1956) vol 2, 281.
[49] Raul Pedrozo, 'Duty to Render Assistance to Mariners in Distress During Armed Conflict at Sea: A U.S. Perspective' (2018) *International Law Studies* 112, para 4; Richard Barnes, 'The International Law of the Sea and Migration Control' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff 2010) 134; Guy S Goodwin-Gill, *The Refugee in International Law* (Oxford University Press 1996) 278.

migration policies.[50] Furthermore, NGO reports[51] indicate that fatalities frequently occur when states neglect SAR responsibilities, fail to establish SAR services, or ignore distress calls, leading to right to life violations.

Secondly, under SOLAS (Chapter V), shipmasters are required to render assistance to any individual in distress, regardless of nationality, status, or circumstances.[52] SOLAS Regulation 33/1 mandates that shipmasters respond to distress alerts, notify SAR services, and record any failure to respond. Regulation 7 further obligates coastal states to coordinate SAR services and ensure effective distress communication. As Papanicolopulu highlights, the duty to assist individuals in distress has evolved into a customary international norm, applicable to all states, irrespective of treaty participation.[53] Since SOLAS was first adopted in 1914 and has been regularly updated, it reinforces the preservation of life at sea as a fundamental duty of states.[54] Based on these legal provisions, the master of a ship must render assistance to any individual in distress at sea, regardless of nationality or circumstances.[55] The comprehensive nature of SAR obligations reinforces the customary norm of non-discriminatory life-saving efforts. This duty to assist is a positive obligation under customary international law, requiring states to establish SAR services, respond to distress calls, and act to prevent loss of life at sea.

In addition to outright failures to conduct SAR operations, fatalities also occur due to deficiencies or improper methods in SAR responses. Some states fail to provide adequate

---

[50] International Relations and Defence Committee, 'UNCLOS: The Law of the Sea in the 21st Century' (HL 2021–22, 159), 54 para 204.
[51] Migration Policy Institute, 'Criminalization of Rescue Operations in the Mediterranean and the Rising Deaths' https://www.migrationpolicy.org/article/criminalization-rescue-operations-mediterranean-rising-deaths accessed 12 September 2022.
[52] SOLAS ch V, reg 33(1) and reg(7).
[53] Irini Papanicolopulu, 'The Duty to Rescue at Sea, in Peacetime and in War: A General Overview' (2016) 98(2) *International Review of the Red Cross* 491, 501, para 3.
[54] (n 50) 11 para 3.
[55] European Parliament, 'Search and Rescue in the Mediterranean' https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/659442/EPRS_BRI(2021)659442_EN.pdf accessed 10 October 2021, 2.

SAR services on critical migration routes as a deterrence measure to discourage refugees and asylum seekers from reaching their borders.[56] Failures such as inadequate SAR coordination or the criminalisation of NGO-operated SAR missions have been highlighted in a 2021 European Parliament briefing as major concerns.[57] Such omissions, which lead to violations of SAR obligations, result in right to life breaches for individuals in distress at sea.

When a state disregards a distress call or fails to establish SAR services in accordance with UNCLOS, SOLAS, or the SAR Convention, it violates its positive right to life obligations under both treaty-based and customary international law. Whether existing SAR norms sufficiently prevent right to life violations will be examined in the next section, focusing on jurisdictional application and state responsibility.

4.2.2.2 Case Law on State Responsibilities

Revisiting the ECtHR case *Safi and Others v. Greece* from an SAR perspective, this case exemplifies how improper SAR operations can result in right to life violations.[58] The Court found Greece in violation of Article 2 of the ECHR, as the coastguards conducted the SAR operation without proper rescue equipment or additional assistance, despite severe weather conditions.[59] The Court ruled that Greece breached its positive obligations under Article 2

[56] Médecins Sans Frontières, 'Mediterranean Search and Rescue' https://msf.org.uk/issues/mediterranean-search-and-rescue accessed 22 June 2023; ReliefWeb, 'The Criminalization of Search and Rescue Operations in the Mediterranean Has Been Accompanied by Rising Deaths at Sea' (2022) https://reliefweb.int/report/world/criminalization-search-and-rescue-operations-mediterranean-has-been-accompanied-rising accessed 22 June 2023; Amnesty International, 'Europe's Sinking Shame: The Failure to Save Refugees and Migrants at Sea' (2020) https://www.amnesty.eu/news/europes-sinking-shame-the-failure-to-save-refugees-and-migrants-at-sea/ accessed 22 June 2023; ABC News, 'Asylum Seekers Drowning on Our Watch: Background Briefing' (2013) https://www.abc.net.au/listen/programs/backgroundbriefing/asylum-seekers-drowning-on-our-watch/4916110 accessed 22 June 2023.

[57] (n 55) 1.

[58] *Safi and Others v. Greece* (n 24).

[59] European Council, 'Violations of the Convention in a Case Concerning the Sinking of a Migrant Boat (Safi and Others v Greece)' https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7380289-10089391&filename=Judgment%20Safi%20and%20Others%20v.%20Greece%20-%20Sinking%20of%20a%20migrant%20boat.pdf accessed 24 September 2022, 2.

due to omissions in the SAR operation, which led to the boat's sinking.[60] This decision underscores the link between SAR failures and right to life violations, marking a milestone in protecting the lives of irregular migrants in distress.

The ruling establishes that states can be held responsible for right to life violations not only through direct actions but also through omissions, such as failing to provide reasonable assistance to individuals in distress.[61] Similar judgments may emerge from other international courts, such as the International Tribunal for the Law of the Sea (ITLOS), the African Court on Human and Peoples' Rights, or the Inter-American Court of Human Rights, since not only ECHR states but also those bound by UNCLOS, the African Charter, and the American Convention are obliged to conduct SAR operations. These legal frameworks require states to protect lives within their jurisdiction, both by refraining from arbitrary deprivation and by actively safeguarding individuals in distress at sea.

The pending case *S.S. and Others v. Italy* at the ECtHR[62] may become a landmark in refugee law if the Court finds that Italy exercised jurisdiction over the applicants. Such a ruling would imply that support for another state's operations can establish power, control, or authority over individuals affected by those operations. In this case, 17 applicants filed suit against Italy concerning an SAR operation conducted by the Libyan Coast Guard (LYCG) with Italian assistance [63] Allegedly, at least 20 migrants drowned due to a large wave generated by the LYCG's arrival, while others reported beatings and threats before being returned to Libya, where they faced inhuman conditions and torture. [64] The applicants claim that the Italian MRCC (Maritime Rescue Coordination Centre) received the distress call, informed the LYCG, and that the LYCG operated with Italian-supplied

[60] ibid 3-4.
[61] ibid
[62] *S.S. and Others v Italy* (Application no 21660/18) [2019] ECtHR.
[63] (n 66) para 2
[64] ibid

patrol boats and helicopter support. Should the Court recognise Italy's functional jurisdiction, Italy could be held accountable for right to life violations committed by Libyan authorities.

4.2.2.3 States Responsibilities during the SAR Operations

To establish a state's responsibility for failures or omissions in SAR operations that violate the right to life, it is essential to confirm the applicability of relevant legal guarantees. A state conducting SAR operations must first exercise jurisdiction over individuals in distress at sea, which arises when its flag is flown on the ships involved. Under the flag-state principle,[65] this establishes de jure jurisdiction over rescued individuals. Additionally, jurisdiction is confirmed through the effective control exercised by state officials during SAR operations, thereby establishing both de jure and de facto jurisdiction over the individuals.

The actions of officials conducting SAR operations are attributable to the intercepting state, as these officials act as agents of the state. Consequently, any failure or omission during SAR operations is considered the responsibility of the state under international law. Further, the state's obligations are not limited to those explicitly outlined in SAR-specific conventions or human rights treaties. As customary international law, the duty to render assistance at sea imposes universal obligations, requiring states to establish SAR services as a precautionary measure and to respond effectively to distress situations.

Contracting states of instruments such as UNCLOS, SOLAS, and the SAR Convention are explicitly obliged to establish and maintain SAR services, while human rights treaties such as the ICCPR (Article 6) and ECHR (Article 2) reinforce the positive obligation to protect

[65] UNCLOS arts 91, 92(1), 94(1).

life.[66] Together, these obligations constitute robust international legal guarantees against failures or omissions in SAR operations and ensure that states meet the necessary conditions of jurisdiction and attribution when addressing their responsibilities in safeguarding life at sea.

Referring to the concept of *functional jurisdiction*, a state that merely supports another state conducting SAR operations may still be held responsible.[67] For instance, Italy's financial[68] and logistical[69] support, largely provided under the African Fund and governed by the Treaty of Friendship and MoU with Libya, underscores Italy's role.[70] Since the Treaty and MoU explicitly aim to limit migrant arrivals to Italy, the claim that this assistance was intended for another purpose is not credible. Libyan operations, including SAR, would not take place without this support, effectively outsourcing Italy's public

[66] Human Rights Committee, 'General Comment No 36: Article 6 (Right to Life)' CCPR/C/GC/36 (2018) para 30 https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-36-article-6-right-life accessed 21 December 2024 paras 21,63; International Tribunal for the Law of the Sea, 'Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area' (2015) https://www.iflos.org/wp-content/uploads/Presenation-Tomas-Heidar-1.pdf accessed 21 January 2025; UNHCR, 'Rescue at Sea: A Guide to Principles and Practice as Applied to Refugees and Migrants' (2007) https://www.unhcr.org/sites/default/files/legacy-pdf/487b47f12.pdf accessed 21 December 2024; Sarah Joseph, 'Extending the Right to Life Under the ICCPR: General Comment 36' (2019) 19 *Human* Rights Law Review 347, 357.

[67] See section 3.3.

[68] Public International Law & Policy Group, 'SS and Others v Italy: Sharing Responsibility for Migrants' Abuses in Libya' (23 April 2020) https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2020/4/23/ss-and-others-v-italy-sharing-responsibility-for-migrants-abuses-in-libya accessed 10 December 2022, para 3.

[69] Gazzetta Ufficiale, '*Testo del decreto-legge 23 febbraio 2009, n. 11, coordinato con la legge di conversione 23 aprile 2009, n. 38*' https://www.gazzettaufficiale.it/atto/serie_generale/caricaArticolo?art.versione=1&art.idGruppo=1&art.flagTipoArticolo=1&art.codiceRedazionale=009G0015&art.idArticolo=1&art.idSottoArticolo=1&art.idSottoArticolo1=10&art.dataPubblicazioneGazzetta=2009-02-18&art.progressivo=0 accessed 22 September 2022, art 19; Odysseus Network, 'Memorandum of Understanding between the Government of the State of Libya and the Government of the Italian Republic on cooperation in the field of development, combating illegal immigration, human trafficking and fuel smuggling and on reinforcing the border security' (2017) https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf accessed 10 June 2024.

[70] MoU 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 (signed 2 February 2017) <https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf> accessed 10 February 2023; Italian Ministry of Foreign Affairs, 'Director General for Italians Abroad and Migration Policies 4110/47 (28 August 2017)' https://www.asgi.it/wp-content/uploads/2017/11/Allegato_2.pdf accessed 20 September 2023.

power beyond its national jurisdiction. This fulfils both the impact and decisive elements required for establishing jurisdiction.[71]

Given that Italy provides distress location information and stations naval support nearby in cases such as *S.S. and Others v. Italy*, the operative involvement element is also satisfied. This approach aligns with ARSIWA Article 16, which holds an assisting state responsible for wrongful acts when it has knowledge of the violations. Consequently, Italy's assistance reinforces its responsibility for breaches of international law.

4.3 The Right to Life and Refoulement in the Context of Interception

The right to life of intercepted individuals is also endangered by refoulement, which occurs when individuals are pushed back, transferred to unsafe countries, or abandoned at sea. Many of these individuals flee persecution in their countries of origin, and interception operations hinder their escape, as the actions and omissions of intercepting officials may directly result in refoulement.

The concept of a safe country is pivotal in externalised migration controls, particularly in relation to the principle of non-refoulement. An earlier chapter addressed the foundational elements and complexities surrounding safe country designations, including criteria established by international and regional instruments and political inconsistencies across states. Building on this conceptual framework, this section focuses specifically on how safe country designations influence compliance with non-refoulement obligations in the context of interception operations.

The operational application of safe country designations, as defined within the EU and other national frameworks, plays a critical role in determining whether intercepted

[71] See section 3.2 and 3.3.3.

individuals are returned to locations where they may face persecution or serious harm. This section examines these operational impacts and explores the inconsistencies and gaps that persist despite formal safety classifications, highlighting how political interests and bilateral agreements shape safe country determinations. Drawing directly from prior analysis,[72] this discussion contextualises how legal criteria for safe country designations are variably interpreted and applied, potentially compromising the rights and safety of individuals subjected to interception and refoulement practices.

This section will explore the link between refoulement and potential right to life violations in various interception contexts. The principle of non-refoulement will be examined as an international legal guarantee protecting the right to life, assessing its applicability in relation to jurisdiction, attribution, and state obligations. While addressing non-refoulement as a legal safeguard for the right to life, the discussion will assess its applicability in terms of state jurisdiction, attribution of responsibility, and the legal obligations of states.

4.3.1 Refoulement During Pushback Operations

Pushback operations, which involve removing intercepted individuals from a destination state's borders, pose significant right to life risks by leading to refoulement in various scenarios. Intercepted individuals may be returned to their country of origin, a transit country, or a third country, or abandoned at sea after being expelled from the intercepting state's borders. These practices violate the principle of non-refoulement by exposing individuals to life-threatening conditions in countries where their right to life is at risk.

[72] See section 2.2.1 on the safe country concept.

From a teleological perspective, non-refoulement provisions in international law instruments[73] prohibit states from returning individuals to places where their lives would be threatened due to race, religion, nationality, membership of a particular social group, or political opinion. The primary objective of non-refoulement is to protect individuals from persecution, including threats of capital punishment, torture, or inhuman treatment.[74] This principle imposes a positive obligation on states to protect the right to life by ensuring individuals are not returned to places where their lives or freedom would be at risk.

Thus, non-refoulement serves as a core international legal guarantee of the right to life, and violations of this principle may directly endanger an individual's life. A broad interpretation of non-refoulement is essential to recognise that deprivation of life is often a foreseeable consequence of refoulement to unsafe territories. Consequently, international jurisprudence has interpreted non-refoulement expansively to reflect the practical realities of migration control and human rights protection.

The Human Rights Committee's General Comment No. 31 on the ICCPR emphasises that states must not expose individuals to serious rights violations, including threats to life, through direct or indirect actions, even beyond their borders.[75] Similarly, the ECtHR in Hirsi Jamaa v. Italy affirmed that non-refoulement applies extraterritorially when a state

[73] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 33; United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 3; International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3, art 16; ACHR art 22(8); Inter-American Convention to Prevent and Punish Torture (adopted 9 December 1985, entered into force 28 February 1987) OAS Treaty Series No 67, art 13(4); Charter of Fundamental Rights of the European Union (2000) OJ C 364/1, art 19(2); Arab Charter art 28.

[74] ibid; See section 2.2.2 on the principle of non-refoulement; Nanda Oudejans, Conny Rijken, and Annick Pijnenburg, 'Protecting the EU External Borders and the Prohibition of Refoulement' (2018) 19 *Melbourne Journal of International Law* 614, 616 para 4; Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 201–204; James Hathaway, 'Leveraging Asylum' (2010) 45 *Texas International Law Journal* 503, 507–509.

[75] Human Rights Committee, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13.

exercises effective control over individuals, regardless of their location.[76] These interpretations reinforce that non-refoulement is not confined to territorial boundaries but extends to preventing foreseeable harms, such as torture or deprivation of life, resulting from state actions beyond national territories.[77]

A teleological reading of non-refoulement provisions further supports this broader application.[78] The purpose of international refugee and human rights law is to protect individuals from persecution, torture, and death. Restricting non-refoulement to territorial jurisdiction would undermine its fundamental protective function, allowing states to evade responsibility for actions that create life-threatening conditions. Therefore, interpretation should prioritise the intent of these provisions—to prevent states from contributing to human rights violations, whether through territorial or extraterritorial actions.

States engaging in pushback operations must therefore observe the principle of non-refoulement to avoid placing individuals' right to life at risk. Returning individuals to unsafe environments breaches international legal obligations, particularly when such actions foreseeably result in severe harm or death. This expansive interpretation ensures that non-refoulement remains effective in addressing modern migration challenges, while aligning with the broader objectives of human rights law.

4.3.2 Case Law on Refoulement in the context of Pushbacks

Previously discussed in earlier chapters and the pushback analysis above, the ECtHR case Hirsi Jamaa and Others v. Italy is a cornerstone ruling in refugee law,[79] particularly for establishing the extraterritorial jurisdiction of intercepting states under Article 1 of the

[76] See below for detailed discussion.
[77] Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007) 244–53.
[78] ibid 201-11, 244–53; *Hirsi Jamaa and Others v Italy* (n 34), 122–137; 178–181.
[79] ibid *Hirsi Jamaa and Others v Italy*; See sections 2.2.2, 3.2 and 3.3.1.

ECHR. The incident occurred in 2009, 35 nautical miles south of Lampedusa, where Italian Coastguard vessels intercepted three boats carrying Somali and Eritrean migrants en route from Libya to Italy.

Italy argued that it did not exercise "absolute and exclusive control" over the applicants, despite the interception occurring on Italian military ships.[80] It maintained that the vessels were fulfilling a rescue duty under the Montego Bay Convention and were escorting the migrants to a Libyan port[81] rather than exercising jurisdiction over them.[82] However, the ECtHR determined that Italy exercised both exclusive de jure and de facto control over the applicants once they were brought aboard Italian military vessels and held onboard until reaching Libya.[83]

This ruling is significant for two main reasons. First, the ECtHR recognised the jurisdiction of the intercepting state over intercepted individuals under Article 1 of the ECHR. [84] The Court ruled that the events fell under Italy's de jure and de facto jurisdiction in line with Articles 92 and 94 of the Montego Bay Convention, as well as a Resolution by the Parliamentary Assembly of the Council of Europe on interception and rescue operations for irregular migrants.[85]

Second, the ECtHR explicitly recognised a violation of Article 3, which prohibits torture and inhuman or degrading treatment of individuals within jurisdiction of intercepting state.[86] This ruling is particularly relevant to non-refoulement and the right to life. Although the ECHR does not explicitly address non-refoulement, the prohibition of torture (Article 3) implicitly incorporates the principle, much like Article 33 of the RC. In

[80] ibid para 64.
[81] ibid para 65.
[82] ibid.
[83] ibid para 81.
[84] ibid; See sections 3.2 and 3.3.1 for extensive analysis.
[85] ibid 65-66.
[86] ibid para 158.

alignment with these guarantees, I argue that the term "refoulement" encompasses various actions—such as "pushing back, turning away, or repression"—and implies more than a simple "return". By recognising the Article 3 violation, the Court indirectly affirmed a broader interpretation of refoulement.

This interpretation carries significant implications for the right to life. Although the ECtHR did not directly reference Article 2, as no fatalities occurred, Judge Pinto De Albuquerque's concurring opinion alluded to this connection. The Judge argued that upholding non-refoulement is essential to protecting fundamental rights enshrined in the ECHR, including the right to life and the prohibition of torture and ill-treatment.[87]

Given the close link between non-refoulement and the right to life, this analysis argues that the right to life should have been raised in Hirsi Jamaa and Others v. Italy, even without fatalities. Placing lives at risk should be sufficient grounds for invoking Article 2 before the ECtHR. In cases where interception operations endanger fundamental rights, courts should explicitly examine the right to life, particularly when non-refoulement violations indirectly threaten it. As a foundational principle, the right to life must be safeguarded proactively, rather than addressed only after loss of life occurs.

4.3.3 Refoulement During Pullback Operations

Pullback operations, carried out by officials of a transit or origin country to return intercepted individuals to their territory, can pose serious risks to individuals' lives. To determine whether pullback operations constitute refoulement, it is essential to assess

[87] Concurring Opinion of Judge Pinto de Albuquerque, *Hirsi Jamaa and Others v. Italy* (2012) ECtHR 27765/09 paras 59–70.

whether intercepted individuals have entered the jurisdiction of a safe destination country, where the principle of non-refoulement would apply.

If a country of origin or transit intercepts migrants on the high seas and returns them to its own territory, this does not constitute refoulement, as the individuals are returned to an unsafe place without having entered another safe country's jurisdiction. The key factor is not which state carries out the interception but rather which state exercises jurisdiction over the individuals. Non-refoulement applies only when individuals are expelled, returned, or extradited from a safe country to an unsafe one where their life or freedom is at risk.

However, when pullback operations occur beyond the national borders of a country of origin or transit, intercepted individuals may still fall within the extraterritorial jurisdiction of that state. In such cases, the state exercises effective control over the individuals, establishing extraterritorial jurisdiction under the concept of effective control. Additionally, if operations involve ships flying the intercepting state's flag, jurisdiction is also exercised under the flag-state principle.

As a result, intercepted migrants, including refugees and asylum seekers, are returned without having entered the jurisdiction of a safe country. Since they remain under the jurisdiction of the country they seek to leave, the principle of non-refoulement does not apply to the intercepting state. Consequently, pullback operations conducted by origin or transit countries do not trigger non-refoulement obligations, as individuals never enter a jurisdiction where such protections apply.

4.3.4 States Responsibilities on the Right to Life in the Context of Pushbacks

The principle of non-refoulement is a fundamental international legal safeguard against right to life violations that arise when intercepted individuals are returned to unsafe countries. Since interception operations frequently occur beyond national borders—such as on the high seas or in another state's territorial waters—the extraterritorial applicability of non-refoulement must be clarified to define the responsibilities of states engaged in pushback operations. Accordingly, this section examines state responsibility for extraterritorial refoulement, focusing on the jurisdiction of intercepting states and attribution of their actions to determine whether international non-refoulement protections apply in these contexts.

Refoulement is explicitly prohibited under international law. To invoke the applicability of these legal guarantees against a state conducting extraterritorial pushbacks, the intercepting state must exercise jurisdiction over the individuals involved. When state agents, such as coastguards or police, operate on a ship flying the state's flag, jurisdiction is exercised through the flag-state principle. Additionally, when a state exercises effective and/or functional control over individuals during these operations, it establishes de facto jurisdiction, thereby triggering international legal protections against refoulement.

To hold a state responsible for refoulement, its actions must be attributable to the state under international law. According to ARSIWA (Article 4), actions carried out by state agents are considered acts of the state.[88] When pushbacks are conducted by officials on ships flying the state's flag, both jurisdiction and attribution are established. Since these agents exercise governmental authority, the state is responsible for any international

[88] ARSIWA art 4(1).

obligations breached by its coastguards, police, or other officials during pushback operations.

State actions that result in refoulement—such as forcibly returning migrants to unsafe countries or abandoning them in perilous waters—place individuals' lives and freedom at serious risk. International legal guarantees seek to protect individuals within a state's jurisdiction from threats to life or liberty. The RC (Article 33(1)) explicitly prohibits the refoulement of refugees, while other instruments—including the CAT (Article 3), ICPPED (Article 16(1)), and regional frameworks such as the ACHR (Article 28(2)) and ECHR (Article 3)—extend non-refoulement protections to all persons at risk of persecution or harm.[89] Thus, the right not to be refouled applies to all intercepted migrants, including refugees and asylum seekers, under international and regional human rights law.

Given that destination states engaged in externalisation practices, such as Italy, Spain, the USA, and Australia, are parties to these human rights conventions, they are legally bound by non-refoulement. For instance, Italy and Spain are bound by the RC and the ECHR, while the USA and Australia are bound by the ICCPR and the CAT.[90] These obligations underscore their responsibility to uphold the principle of non-refoulement during migration control operations, including pushbacks.

Even if these states were not parties to these treaties, the principle of non-refoulement as a jus cogens norm has achieved customary international law status, binding all states

[89] RC art 33(1); CAT art 3; ICPPED art 16(1); ACHR art 28(2); ECHR art 3.
[90] United Nations, 'International Covenant on Civil and Political Rights (UN Treaty Collection)' https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Lang=en accessed 12 December 2024;
Council of Europe, 'States Parties to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)' https://www.coe.int/en/web/cpt/states accessed 12 December 2024; UNHCR, 'States Parties to the 1951 Convention and its 1967 Protocol' https://www.unhcr.org/uk/media/states-parties-1951-convention-and-its-1967-protocol accessed 28 January 2025.

regardless of treaty ratification.[91] Moreover, these protections apply extraterritorially, obligating intercepting states to respect non-refoulement and prevent right to life violations during pushback operations. A state that exercises extraterritorial jurisdiction over intercepted individuals is therefore responsible for ensuring they are not returned to unsafe countries where their lives may be at risk.

4.4 The Prohibition of Torture and CIDTP in the Context of Interception

Torture, the most severe form of mistreatment, involves the intentional infliction of severe physical or mental pain or suffering by a public official or someone acting in an official capacity, typically to extract information, obtain a confession, or impose punishment on the individual or a third party.[92] This definition, enshrined in the CAT, establishes the intentional nature and specific purposes required to classify an act as torture. Notably, the prohibition of torture is a *jus cogens* norm, meaning it is a peremptory rule of international law from which no derogation is permitted.

To determine which state actions violate the prohibition against torture and CIDTP, it is first necessary to distinguish torture from other forms of mistreatment. Torture is typically an intentional act by officials, causing severe physical or mental pain for purposes such as extracting information, punishing the individual, or intimidating a related party.[93] According to the CAT, torture requires deliberate conduct by a public official or with the official's knowledge, inflicting extreme suffering to extract information, impose punishment, or intimidate. What distinguishes torture from CIDTP is its higher degree of suffering and intent, as well as the involvement of state officials or actors acting with official acquiescence.

[91] See section 2.2.2.
[92] CAT art 1.
[93] ibid.

By contrast, CIDTP refers to acts that do not meet the severity or intent criteria of torture but still inflict significant physical or mental suffering.[94] CIDTP may involve state officials, third parties acting on behalf of the state, or actions carried out with official consent.[95] While not amounting to torture, both torture and CIDTP violate human dignity and harm an individual's physical or mental integrity.

Individuals subjected to externalised migration control measures often experience torture or CIDTP, either directly or indirectly. Such mistreatment is prevalent during maritime interception operations, particularly when boats carrying irregular migrants are intercepted beyond national borders. State officials may engage in inhuman or degrading treatment through actions such as towing or redirecting boats to unsafe countries or leaving them stranded without adequate support, firing warning shots near vessels or creating waves by circling boats. These practices cause significant physical and mental harm, often amounting to CIDTP. Additionally, failures or omissions in SAR operations—such as ignoring distress calls or abandoning individuals at sea—may also breach the prohibition of torture and CIDTP. While force used by officials during interception operations—such as pushing boats back or preventing migrants from reaching destination borders—does not generally meet the legal definition of torture, as it lacks the intent to extract information or impose punishment, it may still constitute CIDTP. Such acts remain prohibited under the CAT, ICCPR, ECHR, and other human rights instruments.

This section examines the scope of the prohibition of torture and CIDTP in interceptions and SAR operations, analysing state responsibilities under human rights instruments, UNCLOS, SOLAS, and SAR conventions, as well as the principle of non-refoulement.

[94] *Ireland v the United Kingdom* (n 95) para 167.
[95] CAT art 16 (1).

4.4.1 The Prohibition of Torture and CIDTP and Actions or Omissions of Officials

Interception operations targeting irregular migrants frequently result in violations of the prohibition of torture and CIDTP by officials of intercepting states.[96] These violations may stem from direct acts, such as the use of disproportionate force, or from omissions, such as the use of inadequate equipment or untrained personnel, creating conditions that amount to CIDTP violations. Given the interconnected nature of actions and omissions by officials, this section examines both together, highlighting their combined role in violations of the prohibition of torture and CIDTP.

To assess the responsibilities of destination states and states outsourcing interception operations, this section separately examines the liabilities of intercepting states whose officials' actions or omissions lead to CIDTP violations during pushback and pullback operations. Pushbacks, conducted by destination states beyond their national borders, and pullbacks, undertaken by origin or transit countries, involve different jurisdictions and responsibilities. As a result, different states are held accountable for CIDTP violations committed by their respective officials.

While CIDTP includes a broad range of mistreatment, it differs from torture in that it lacks the severity or specific intent required for classification as torture.[97] These acts may cause significant pain or suffering without reaching the severity or purpose necessary for classification as torture. CIDTP can be inflicted by state officials or third parties acting with official consent or knowledge.[98] Actions or omissions by intercepting officials, such as disproportionate force or failure to provide proper equipment, may constitute CIDTP

[96] See above, nn 11, 13, 14.
[97] *Ireland v the United Kingdom*, Application no. 5310/ 71 (ECtHR, 18 January 1978), para 167.
[98] CAT art 16(1).

against irregular migrants. Consequently, these acts or omissions violate the prohibition against CIDTP in the context of interception operations.

The right of intercepted irregular migrants to be free from inhuman or degrading treatment is frequently violated in interception operations beyond the intercepting state's borders, whether on land or at sea. During pushbacks, irregular migrants, including refugees and asylum seekers, may be subjected to mistreatment by destination or transit state border forces or by private actors hired by destination states. Such mistreatment often constitutes CIDTP as a direct result of interception efforts. To qualify as CIDTP, individuals must experience inhuman or degrading treatment by destination state agents or outsourced actors, such as officials in transit or origin states funded or trained by the destination state.

Regardless of location, these operations pose a consistent risk of violating the prohibition of CIDTP. This prohibition covers both torture and inhuman or degrading treatment, meaning that all forms of mistreatment during interceptions are examined under this framework.[99] Reports and case law indicate that CIDTP violations occur through two primary means: (1) deliberate acts by officials during pushback or pullback operations, such as using force or creating waves around migrant vessels, which result in physical or mental harm; and (2) omissions by officials, such as failing to provide adequate or appropriate equipment or trained personnel, leading to conditions that compromise physical integrity.

Both pushbacks and pullbacks beyond EU sea and land borders frequently involve CIDTP violations. For example, pushbacks in the Aegean Sea by Greece and land-based

[99] See above, nn 11, 13.
World Organisation Against Torture (OMCT), The Torture Roads: The Cycle of Abuse against People on the Move in Africa https://www.omct.org/site-resources/files/The-Torture-Roads.pdf accessed 22 March 2022, 58–71; Amnesty International, Pushbacks and Rights Violations at Europe's Borders https://www.amnesty.org/en/wp-content/uploads/2022/03/WEBPOL1048702022ENGLISH.pdf accessed 5 July 2022, 17–18, 178–179.

interceptions by Croatia aim to prevent migrants from reaching other EU destinations, such as France, Germany, and the Netherlands. These operations, as part of externalised migration control, often result in CIDTP violations. According to the Border Violence Monitoring Network's 2023 report, 89% of pushbacks by Croatia and 95% by Greece since 2017 involved at least one form of mistreatment classified as torture or CIDTP.[100]

Similarly, pullbacks in North Africa, supported by the EU in Libya, Tunisia, and Niger,[101] frequently lead to torture or CIDTP violations, as migrants face violence, physical and sexual abuse, and medical neglect.[102] As a result, intercepting states breach their negative obligations under international law, which prohibit the use of torture or CIDTP by state officials. Additionally, states violate their positive obligations under the prohibition of torture and CIDTP, as due diligence duties require them to prevent human rights violations, including those caused by omissions during interception operations.[103] Additionally, states violate their positive obligations under the prohibition of torture and CIDTP, as due diligence duties require them to prevent human rights violations, including those caused by omissions during interception operations.[104]

---

[100] See above (n 14), Border Violence Monitoring Network, 'Torture and Cruel, Inhuman, or Degrading Treatment of Refugees and Migrants in Border Zones of the Western Balkans' (2023).
[101] European Commission, Letter to European Parliament on the Situation in Libya (7 November 2023) https://www.statewatch.org/media/4102/eu-com-letter-to-ep-situation-in-libya-7-11-23.pdf accessed 22 June 2024.
[102] Statewatch, 'EU Military Mission Aids Pull-Backs to Libya with No Avenues for Legal Accountability' (2020) https://www.statewatch.org/analyses/2020/eu-military-mission-aids-pull-backs-to-libya-with-no-avenues-for-legal-accountability/ accessed 3 December 2021; Amnesty International, 'Libya: New Evidence Shows Refugees and Migrants Trapped in Horrific Cycle of Abuses' (press release, 2020) https://www.amnesty.org/en/latest/press-release/2020/09/libya-new-evidence-shows-refugees-and-migrants-trapped-in-horrific-cycle-of-abuses/ accessed 15 December 2021; Office of the High Commissioner for Human Rights (OHCHR), 'NGO Submission on Draft General Comment No. 5 on Migrants' Rights under the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families' (2020) https://www.ohchr.org/sites/default/files/Documents/HRBodies/CMW/CFI-GC5-2020/NGOs/gc5-omct-reseau-sos-torture.pdf accessed 28 December 2021.
[103] UNODC, '*Positive and Negative Obligations of the State* https://www.unodc.org/e4j/zh/tip-and-som/module-2/key-issues/positive-and-negative-obligations-of-the-state.html#:~:text=Negative%20obligations%20refers%20to%20a,by%20the%20corresponding%20negative%20obligation accessed 20 September 2021, para 2.
[104] Cathryn Costello and Itamar Mann, 'Border Justice: Migration and Accountability for Human Rights Violations' (2020) 21 *German Law Journal* 311, 315, para 3.

4.4.2 The Prohibition of the Torture and CIDTP and SAR Operations

In the context of interception operations, states, particularly those party to UNCLOS,[105] SOLAS,[106] or the SAR Convention,[107] bear enhanced responsibilities toward individuals in distress at sea, beyond those stemming from treaties focused solely on torture and CIDTP Article 98 of UNCLOS and Chapter 5, Regulation 33 of SOLAS impose a duty on shipmasters to assist and rescue individuals in distress at sea. Additionally, Annex 2.1.10 of the SAR Convention requires contracting states to provide basic medical care and transport to safety.[108] These conventions offer critical legal guarantees for the preservation of life and physical integrity, including for irregular migrants seeking refuge. States that fail to uphold their SAR obligations may be held accountable for violating the prohibition of torture and CIDTP when their neglect or inaction results in harm.

As discussed in the context of right to life, the duty to render assistance to persons in distress at sea holds the status of customary international law.[109] When a state fails to assist intercepted individuals or does not operate adequate SAR services, it risks violating the prohibition of torture and CIDTP. Neglecting SAR obligations may expose people in distress to inhuman or degrading treatment, particularly when failure to respond to distress calls leads to drowning, death, or serious injury. A state's failure to act despite awareness of distress situations not only breaches maritime law but may also constitute torture or CIDTP

[105] UNCLOS art 98.
[106] SOLAS ch V reg 33.
[107] SAR annex 2 para 2.1.10.
[108] UN General Assembly, 'Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea' (12 May 2021) UN Doc A/HRC/47/30, 8, para 50.
[109]VU Amsterdam, 'REMAP Study: First Edition' (27 October 2020) https://research.vu.nl/ws/portalfiles/portal/122515068/REMAP_Study_First_Edition_27_10_2020_final_.pdf accessed [insert date of access], 28,132 para 3; As discussed above in 4.2.1.

violations under human rights law. Coastal states on key migration routes, such as Greece and Italy, have a due diligence obligation to ensure effective SAR operations.[110]

The ECtHR has consistently recognised that state omissions can constitute inhuman or degrading treatment if they foreseeably result in significant harm. In *Safi and Others v. Greece*, the Court ruled that Greek authorities failed to adequately respond to a migrant vessel in distress, leading to unnecessary suffering and a breach of Article 3 of the ECHR, alongside Article 2 on the right to life. Such omissions reflect a lack of due diligence, which requires states to take reasonable measures to prevent foreseeable harm, including torture and CIDTP risks. In maritime interceptions, states are aware of the life-threatening conditions faced by individuals on overcrowded or unseaworthy vessels. By failing to provide timely assistance, states exacerbate these vulnerabilities, creating conditions tantamount to inhuman or degrading treatment.

Beyond state failures in SAR obligations, the criminalisation of SAR activities by NGOs and private actors can also lead to torture and CIDTP violations. Countries in Southern Europe, including Italy, Malta, and Greece, have increasingly criminalised NGO-led SAR operations[111] to limit migration flows to the EU [112] as a tool of migration control and securitization of seas.[113] Since rescued individuals are typically brought to European ports, states have sought to curb arrivals by framing NGO-led SAR efforts as facilitating

[110] Refugee Law Initiative, 'RLI Analytical Paper' https://rli.sas.ac.uk/sites/default/files/uploads/RLI%20Analytical%20Paper.pdf accessed 21 January 2022, 16 para 2.
[111] Sergio Carrera, Vicki Squire, Jennifer Allsopp, and Lina Vosyliūtė, 'Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants: 2018 Update' (2018), 69, 72, 107.
[112] Eugenio Cusumano and Matteo Villa, 'From "Angels" to "Vice Smugglers": The Criminalization of Sea Rescue NGOs in Italy' (2020) 26 European Journal on Criminal Policy and Research 447; İdil Atak and James Simeon (eds), The Criminalization of Migration (Springer 2018).
[113] Gaetana Ciliberto, 'Libya's Pull-Backs of Boat Migrants: Can Italy Be Held Accountable for Violations of International Law?' (2018) 4(2) The Italian Law Journal 489, 493.

irregular migration.[114] Criminalising SAR operations obstructs the duty to assist persons in distress, violating states' positive obligations regarding SAR and human rights law.

Criminalisation of SAR undermines fundamental legal protections. Coastal states restrict port access for NGO rescue vessels, revoke the flags of ships engaged in SAR, and impose legal penalties on organisations assisting migrants.[115] However, the duty to render assistance applies universally, extending not only to states but also to all shipmasters.[116] Preventing NGOs from conducting life-saving operations creates conditions that violate the prohibition of torture and CIDTP, as migrants who cannot be rescued face inhuman and degrading treatment, including drowning, injury, and extreme physical suffering.

The case of *Hirsi Jamaa and Others v. Italy* exemplifies the severe consequences of failing to provide SAR assistance to irregular migrants.[117] While the ECtHR ruling was based on Article 3 of the ECHR, violations of the prohibition of torture may also be grounded in states' failure to fulfil SAR obligations under the SAR Convention. Italy, as a party to this convention, was required to ensure intercepted individuals were transferred to a place of safety, free from torture or inhuman or degrading treatment. The maritime conventions mandate the protection of individuals in distress at sea serve as essential safeguards against torture and CIDTP, complementing human rights instruments prohibiting such

[114] Italian Court of Cassation, decision to seize the vessel *Iuventa* belonging to the German NGO Jugend Rettet (24 April 2018); ECRE, 'Italy's Supreme Court Rejects Appeal Against the Seizure of NGO Rescue Vessel the Iuventa' (27 April 2018) https://ecre.org/italys-supreme-court-rejects-appeal-against-the-seizure-of-ngo-rescue-vessel-the-iuventa/ accessed 27 March 2024; judicial decision to release the vessel belonging to the Spanish NGO Proactiva Open Arms (16 April 2018); ECRE, 'Proactiva Rescue Ship Released, Crew Members Remain Under Investigation' (20 April 2018) https://ecre.org/proactiva-rescue-ship-released-by-italian-authorities-crew-members-remain-under-investigation/ accessed 14 March 2024; Elisabetta Nicosia, 'Massive Immigration Flows Management in Italy between the Fight against Illegal Immigration and Human Rights Protection' (2014) 5 Questions of International Law 24, 35–38.
[115] ibid 496; Doctors Without Borders, 'Mediterranean: MSF Protests Decision to Revoke Registration for Rescue Ship Aquarius' (23 September 2018) https://www.doctorswithoutborders.org/latest/mediterranean-msf-protests-decision-revoke-registration-rescue-ship-aquarius accessed 14 March 2024.
[116] UNCLOS art 98(1); SAR annex 2 para 2.1.10.
[117] *Hirsi Jamaa and Others v Italy* (n 34) para 9-17,102.

mistreatment. States must fulfil their obligations under both maritime law and human rights law to prevent foreseeable harm during SAR and interception operations.

4.4.3 The Prohibition of the Torture and CIDTP and Refoulement

Indirect violations of the prohibition of torture and CIDTP are often examined through the lens of the principle of non-refoulement,[118] which is explicitly enshrined in Article 33(1) of the RC. As a cornerstone of legal protections for refugees, non-refoulement prohibits states from returning individuals to places where they face torture, ill-treatment, or persecution. Beyond the RC, this principle is codified in multiple international and regional human rights instruments, applying not only to refugees and irregular migrants but to all individuals under a state's jurisdiction.[119]

The close connection between non-refoulement and the prohibition of torture imposes significant legal obligations on states engaged in interception operations. Violating non-refoulement during interceptions often leads to indirect violations of the prohibition of torture, even if the state is a party to treaties prohibiting torture. The risk of torture violations depends on the approach adopted by the intercepting state when handling intercepted individuals.

---

[118] Andreas Fischer-Lescano, Tillmann Löhr, and Timo Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21 International Journal of Refugee Law 256, 285; Kathryn Greenman, 'A Castle Built on Sand? Article 3 ECHR and the Source of Risk in Non-Refoulement Obligations in International Law' (2015) 27(2) International Journal of Refugee Law 264; Júlia Mink, 'EU Asylum Law and Human Rights Protection: Revisiting the Principle of Non-refoulement and the Prohibition of Torture and Other Forms of Ill-treatment' (2012) 14 *European Journal of Migration and Law* 119.

[119] CAT art 3; UNGA, 'International Convention for the Protection of All Persons from Enforced Disappearance' (adopted 12 January 2007, entry into force 23 December 2010) UN Doc A/RES/61/177 art 16;
1969 American Convention on Human Rights (American Convention) (adopted 22 November 1969, entered into force 18 July 1978) art 22(8); 1985 Inter-American Convention to Prevent and Punish Torture art 13(4), 2000 Charter of Fundamental Rights of the European Union art 19(2), Arab Charter art 28

The first method involves bringing intercepted migrants into the intercepting state's territory for refugee status determination or deporting them to their country of origin, a transit country, or a third state without proper assessment. If deportation occurs without ensuring the receiving country meets non-refoulement protections, the prohibition of torture is at risk. Once individuals enter a state's territorial area, territorial jurisdiction applies, triggering full legal competence under the sovereignty principle.[120] Additionally, when individuals board vessels flagged by the intercepting state, jurisdiction applies under the flag-state principle. Once jurisdiction—de facto or de jure—is established, the state is obligated to protect individuals from refoulement[121] and violating this obligation constitutes an indirect breach of the prohibition of torture.

The ECtHR case Hirsi Jamaa and Others v. Italy (2012) exemplifies this. The Court ruled that Italy violated Article 3 of the ECHR (prohibition of torture and CIDTP) by intercepting migrants at sea, transferring them to a ship under Italian jurisdiction, and returning them to Libya without processing their asylum claims. The Court found that Italy's actions exposed the migrants to the risk of ill-treatment in Libya, breaching the principle of non-refoulement and, indirectly, the prohibition of torture and CIDTP.[122] Similar violations have been documented at land borders, such as at the Poland-Belarus border, where migrants are returned to Belarus without adequate protection, subjecting them to inhuman or degrading treatment.[123]

The second method involves towing or redirecting intercepted migrants to a departure country or a third state under bilateral agreements. During such operations, the intercepting state exerts effective control over individuals, creating de facto jurisdiction through

[120] See section 3.3.2.
[121] ibid.
[122] *Hirsi Jamaa and Others v Italy* (n 34) para 75-80.
[123] *A.B. and Others v Poland* App no. 42907/17 (ECHR, 30 June 2022); *A.I. and Others v Poland* App no. 39028/17 (ECHR, 30 June 2022); *D.A. and Others v Poland* App no. 51246/17 (ECHR, 8 July 2021)

physical power or authority. If migrants are transported on state-flagged vessels, de jure jurisdiction also applies. The intercepting state therefore bears responsibility for ensuring the basic human rights of those under its jurisdiction. Non-refoulement violations occur when migrants are returned to states where their life or freedom is at risk due to race, religion, nationality, political opinion, or membership in a social group.[124] While these actions do not directly transfer migrants to third-state authorities, they forcibly return individuals to the same unsafe conditions they fled or to third states experiencing poverty, violence, or conflict.

Pushback operations frequently leave intercepted migrants stranded at sea or in unsafe conditions, heightening the risk of torture and CIDTP. As a result, intercepting states are accountable for indirect violations of both non-refoulement and the prohibition of torture and CIDTP, as their actions fail to uphold fundamental protections under customary and treaty law. These protections prohibit returning individuals to countries where they face persecution and guarantee bodily integrity against threats or harm.

4.4.4 State Responsibilities on The Prohibition of Torture and CIDTP

To determine the international responsibility of intercepting states for violations of the prohibition of torture and CIDTP, it is essential to examine the relevant legal guarantees protecting intercepted irregular migrants, refugees, and potential asylum seekers. These guarantees apply when intercepting states exercise jurisdiction over individuals and when state actions or omissions result in torture or CIDTP violations. This section assesses the legal responsibilities of intercepting states by interpreting international legal guarantees both grammatically and teleologically.

[124] See examples above, nn 11, 13, and 14.

International human rights conventions universally prohibit torture and CIDTP as violations of human dignity, obliging states to prevent and eliminate such mistreatment within their jurisdiction. Global instruments—including the UDHR, the ICCPR, the CAT, the Convention on the Rights of the Child (CRC), and the UN Convention on the Rights of Persons with Disabilities (CRPD)—establish core obligations to prevent torture and degrading treatment.

Article 5 of the UDHR and Article 7 of the ICCPR affirm that everyone has the right to be free from torture and CIDTP. These protections apply without restriction, and human rights instruments explicitly state that all individuals within a party state's jurisdiction enjoy these rights regardless of race, sex, language, religion, or other status.[125] Consequently, states are responsible not only for the rights of their citizens but for the rights of all individuals under their jurisdiction, extending their protective obligations beyond national borders.

The CAT provides the most comprehensive framework for the prohibition of torture, imposing specific obligations on states that go beyond those found in other human rights instruments. It requires states to incorporate torture prohibitions into domestic criminal law,[126] establish jurisdiction over acts of torture,[127] and cooperate on extradition to prevent torture and CIDTP globally.[128] Importantly, Article 3 of CAT enshrines the principle of non-refoulement, protecting refugees, asylum seekers, and migrants from being returned to places where they may face torture. Unlike other human rights instruments, CAT is the only convention besides the RC (Article 33) that explicitly prohibits refoulement. Article 3 of CAT uses the broader term "person" rather than limiting protections to refugees or asylum seekers, thereby extending non-refoulement obligations to all individuals under the

[125] UDHR art 2; ICCPR art 2.
[126] CAT art 4.
[127] ibid art 5.
[128] ibid art 6-8.

jurisdiction of contracting states who might face torture if returned. This broad scope ensures that citizens, foreign nationals, and all categories of migrants are protected.

Beyond international conventions, regional human rights instruments also prohibit torture and CIDTP, including ECHR (Article 3), ACHR (Article 5), and the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Article 4). Together, these international and regional instruments impose binding obligations on states party to these treaties, requiring them to prevent torture and mistreatment against all individuals within their jurisdiction, regardless of citizenship or residency status.

However, compliance with human rights treaties is not the sole legal basis for the prohibition of torture in international law. The prohibition of torture and CIDTP has attained the status of customary international law, meaning that all states are bound by it regardless of convention ratification.[129] Furthermore, its *jus cogens* status establishes it as a peremptory norm from which no derogation is permitted. This imposes universal obligations on all states to implement administrative and legal measures to prevent torture within their jurisdiction.

Additionally, the prohibition of torture and CIDTP holds an *erga omnes* character,[130] meaning that all states have a collective duty to uphold it. This allows universal jurisdiction, permitting states to prosecute torture and CIDTP violations even when they occur outside their territory. Under these principles, individuals have the right to seek protection from torture and CIDTP from any state exercising de jure or de facto

[129] Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Judgment) [1970] ICJ Rep 3, para 33; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85; Human Rights Committee, General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) (1992) UN Doc CCPR/C/21/Rev.1/Add.13; Méndez (n 18); *Prosecutor v Furundžija* (Judgment) ICTY-95-17/1-T (10 December 1998) paras 144–146.

[130] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, arts 146–147; Rome Statute of the International Criminal Court (adopted 17 July 1998) A/CONF.183/9, arts 7–8.

jurisdiction over them, irrespective of whether that state is a party to specific human rights instruments.

Thus, externalised migration control measures, including interception operations that result in torture or ill-treatment, have no legal basis under international law. States cannot justify such violations on the grounds of sovereign rights, national security, or migration control, as the prohibition of torture and CIDTP is absolute. Regardless of policy objectives, intercepting states remain fully responsible for preventing and addressing torture and CIDTP violations against irregular migrants under their jurisdiction.

4.5 The Right to Seek Asylum in the Context of Interception

The right to seek asylum is a fundamental international legal protection for individuals fleeing persecution in their countries of origin. Those with a well-founded fear of persecution—on the grounds of race, religion, nationality, membership of a particular social group, or political opinion—exercise this right by leaving their country of origin and seeking international protection in a safe country, as enshrined in the RC (Article 1(A)(2)).[131] However, the ability to exercise this right is increasingly obstructed by state policies invoking sovereignty to control border access and determine asylum eligibility within their territories. These restrictive measures, often implemented through interception operations, prevent individuals from accessing asylum procedures, raising significant legal concerns under international law.[132]

A major obstacle to the right to seek asylum arises from violations of the right to leave, as origin, transit, and destination countries impose measures restricting irregular migration

[131] RC art 1(A)(2).
[132] Organization of African Unity, Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45, art 2(1); ADRDM art 22(7).

flows. The right to leave, enshrined in multiple international instruments,[133] and is intrinsically linked to the ability to seek asylum. While this right is primarily exercised at the point of departure, it is often undermined by origin countries enforcing policies that prevent migration, sometimes to support destination states' externalised migration control strategies. Scholars such as Grahl-Madsen argue that the right to seek asylum may, in certain cases, be asserted against origin countries when they prevent individuals from leaving areas where persecution occurs.[134] Hence, the first section will examine how interception measures threaten the right to leave and, consequently, the right to seek asylum.

Secondly, the right to seek asylum is further compromised when interception operations push individuals back to places where they face threats to life, freedom, or protection from torture and inhuman treatment, violating the principle of non-refoulement. Refoulement not only undermines the prohibition of torture but also creates significant barriers for individuals seeking asylum, as it prevents them from reaching safety and engaging with asylum procedures. Pushbacks and pullbacks have increasingly been used to block access to asylum systems, preventing individuals from submitting claims or securing legal protection. The second sub-section will examine how interception measures affect the right to seek asylum by assessing their relationship with non-refoulement and the broader impact of interceptive migration controls on asylum access.

4.5.1 The Right to Seek Asylum and The Right to Leave

Intercepted refugees and asylum seekers face serious threats to their right to seek asylum due to interception operations designed to obstruct or deter them from reaching destination countries. Individuals fleeing persecution often attempt to cross into destination states

[133]. See below (n 143), regarding legal guarantees on the right to leave.
[134] Atle Grahl-Madsen, *The Status of Refugees in International Law* (Sijthoff 1972) 2.

irregularly, only to encounter external migration controls that prevent them from reaching national borders. Pre-arrival interception has become a central tactic of external migration control, carried out either directly by destination states or indirectly through origin or transit countries, often with logistical or financial support from the destination state. These measures include: (1) pushbacks, where destination states forcibly return intercepted individuals to departure points or third countries with which they have agreements to detain refugees[135] and (2) pullbacks, where transit or origin countries—often with destination state support—intercept and return migrants to their jurisdiction,[136] constituting an extension of external migration control.[137]

These interception measures severely compromise the right to seek asylum, particularly through pushbacks and pullbacks, which block asylum seekers from leaving territories where they face persecution. The connection between the right to leave and the right to seek asylum is crucial: leaving one's country, including a country of persecution, is the first step in exercising the right to request asylum elsewhere. the RC (Article 1(A)(2)) requires an individual to be outside their country of origin to qualify for refugee status based on

[135] EU-Turkey Statement (2016) https://apnews.com/article/44abb9c1fa1f2c7a8385167770bb5379 accessed 12 July 2024; Italy-Libya MoU (2017) https://www.thetimes.co.uk/article/giorgia-meloni-albania-italy-immigration-migrant-centre-2j6p3b3l2 accessed 15 July 2024; Malta Declaration (2017) https://www.thetimes.co.uk/article/giorgia-meloni-albania-italy-immigration-migrant-centre-2j6p3b3l2 accessed 18 July 2024; EU Emergency Trust Fund for Africa https://www.thetimes.co.uk/article/giorgia-meloni-albania-italy-immigration-migrant-centre-2j6p3b3l2 accessed 22 July 2024; Migrant Protection Protocols (2019) https://www.reuters.com/world/europe/greece-denies-report-us-plan-refer-migrants-resettlement-2024-05-31/ accessed 28 July 2024; U.S.-Mexico Joint Declaration (2019) https://www.reuters.com/world/europe/greece-denies-report-us-plan-refer-migrants-resettlement-2024-05-31/ accessed 30 July 2024; Australia-Malaysia Arrangement (2011) https://www.thetimes.co.uk/article/giorgia-meloni-albania-italy-immigration-migrant-centre-2j6p3b3l2 accessed 3 August 2024; Australia-Nauru and Australia-Papua New Guinea Agreements (2012) https://www.thetimes.co.uk/article/giorgia-meloni-albania-italy-immigration-migrant-centre-2j6p3b3l2 accessed 7 August 2024; Cambodia Agreement (2014) https://www.thetimes.co.uk/article/giorgia-meloni-albania-italy-immigration-migrant-centre-2j6p3b3l2 accessed 10 August 2024.

[136] EU Emergency Trust Fund for Africa, 'Support EU on Migration in Libya' https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-03/EUTF_libya_en.pdf accessed 16 May 2023; U.S. Department of State, 'U.S.-Mexico Joint Declaration' (7 June 2019) https://www.state.gov/u-s-mexico-joint-declaration/ accessed 2 April 2023; U.S. Department of Homeland Security, 'Migrant Protection Protocols' (24 January 2019) https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols accessed 2 April 2023.

[137] James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2021) 390; UNHCR, *Report on Means to Address the Human Rights Impact of Pushbacks of Migrants at Land and Sea* (2021) para 67 https://www.ohchr.org/en/special-procedures/sr-migrants/report-means-address-human-rights-impact-pushbacks-migrants-land-and-sea accessed 28 May 2022.

persecution.[138] Crossing the border of one's country of origin is therefore a fundamental condition for securing international protection.

However, interception measures restrict this right by obstructing individuals' ability to leave and, in turn, invoke the right to seek asylum. While contexts differ, such as in the Mediterranean, where migrants are not necessarily prevented from leaving their country of origin but are blocked from reaching destination states, both pushbacks and pullbacks still undermine access to asylum. While Pullback operations forcibly return migrants to their departure country, effectively trapping them in places where they may face persecution, pushback operations redirect migrants away from destination states to third countries or unsafe territories, depriving them of the opportunity to apply for asylum.

These practices not only violate the right to leave but also create significant legal and physical barriers to accessing asylum procedures. The erosion of the right to leave further undermines the right to seek asylum, as this fundamental right is based on the principle that no state should have "ownership" over its citizens or residents.[139] By restricting departure, interception operations effectively block access to international protection, contravening core refugee and human rights principles.

4.5.1.1 International Legal Guarantees of the Right to Leave During Interception Activities

International human rights instruments to which intercepting states are party provide critical legal guarantees against violations of intercepted migrants' right to leave, a right closely linked to the right to seek asylum. UDHR (Article 13(2)) explicitly affirms that everyone has the right to leave any country, including their own. [140] The UDHR's Preamble

[138] RC arts 1(2) and 33(1).
[139] Grahl-Madsen (N 136) 26.
[140] UDHR article 14(2).

clarifies that "everyone" refers to all individuals under a state's jurisdiction. While non-binding, the UDHR has significantly influenced binding international and regional treaties, making it a key reference in recognising the right to leave.

Binding international treaties further reinforce this right., including ICCPR (Article 12(2)), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) (Article 8), and Convention on the Rights of the Child (CRC) (Article 10(1)), as well as regional instruments like ACHPR (Article 12(2)) and ACHR (Article 22(2)).[141] Among these, ICCPR Article 12(2) is particularly significant as it applies to all persons under a state's jurisdiction, regardless of their legal status. Unlike Article 12(1), which pertains to the freedom of movement within a state's territory, Article 12(2) grants the right to leave to "everyone," regardless of their legal or residency status, thereby including irregular migrants within its scope.[142]

While ICMW and CRC apply to specific groups, they align with ICCPR protections, reaffirming that all individuals under a state's jurisdiction—regardless of legal status—have the right to leave, subject only to lawful restrictions. Consequently, these provisions bind states, including those conducting interception operations, to respect the right to leave for all individuals, including irregular migrants seeking asylum. This also ensures that denial of the right to leave does not obstruct access to asylum.

Interception operations that prevent migrants from leaving can therefore constitute violations of the right to leave. States party to these treaties are obligated to respect the right of individuals under their jurisdiction to depart from their territory. When interception

[141] ICCPR art 12(2); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), adopted 18 December 1990, entered into force 1 July 2004, UNTS 2220, art 8; Convention on the Rights of the Child (CRC), adopted 20 November 1989, entered into force 2 September 1990, UNTS 1577, art 10(1); African Charter art 12(2); ACHR art 22(2).
[142] ibid.

measures involve the use of force or other restrictive methods to prevent irregular migrants from departing, states breach their international obligations.

This is particularly relevant in the context of externalised migration control, where interception measures often obstruct asylum access, indirectly violating the right to seek asylum. The binding nature of international and regional human rights norms ensures that they serve as key safeguards against both direct violations of the right to leave and indirect infringements on the right to seek asylum.

4.5.1.2 Pullbacks and The Right to Seek Asylum in the context of The Right to Leave

As discussed above, origin and transit countries frequently conduct pullback operations to prevent irregular migrants from reaching externalising destination states, such as Italy, Spain, the USA, and Australia. With financial, logistical, and operational support from these destination states—including funding, training, and equipment—[143] pullbacks have become a key tactic in interception operations, effectively stopping migrants before they reach destination state borders. By explicitly blocking migrants from leaving the jurisdiction of origin or transit countries, pullback operations directly infringe upon the right to leave and indirectly obstruct the right to seek asylum.

The practice of pulling back migrants and preventing their departure is widely regarded in international legal scholarship as incompatible with the right to leave any country,

[143] Médecins Sans Frontières, 'Italy-Libya Agreement: Five Years of EU-Sponsored Abuse in Libya and the Central Mediterranean' (2023) https://www.msf.org/italy-libya-agreement-five-years-eu-sponsored-abuse-libya-and-central-mediterranean accessed 27 April 2023; Amnesty International, 'Libya: Renewal of Migration Deal Confirms Italy's Complicity in Torture of Migrants and Refugees' (2020) https://www.amnesty.org/en/latest/news/2020/01/libya-renewal-of-migration-deal-confirms-italys-complicity-in-torture-of-migrants-and-refugees/ accessed 27 April 2023; Emilie McDonnell, 'Challenging Externalisation Through the Lens of the Human Right to Leave' (2024) 71 Netherlands International Law Review 119.

including one's own, as enshrined in Article 12(2) of the ICCPR.[144] Scholars such as Markard and Farahat highlight the right to leave violations inherent in pullback operations, particularly those involving disembarkations in unsafe North African countries.[145] In this context, Markard and Farahat specifically focus on SAR-based pullbacks, noting that when intercepted migrants are returned to unsafe locations, their right to leave is violated.[146] However, pullbacks occurring outside the SAR context also infringe upon the right to leave, as they prevent individuals from departing origin or transit areas altogether, irrespective of safety conditions.

Similarly, Moreno-Lax and Giuffré link pullback operations to violations of the right to seek asylum, emphasising that preventing departure obstructs access to international protection.[147] Scholarly analyses underscore the interconnectedness between the right to leave and the right to seek asylum. Moreno-Lax, Giuffré,[148] and Hannum[149] argue that violations of the right to leave inherently impede the right to seek asylum, as individuals cannot reach safe destinations to claim protection when they are prevented from departing unsafe territories.

This dynamic is particularly evident in the external migration control strategies of the EU and the USA, where destination states finance, train, and equip neighbouring countries to conduct pullback operations, effectively ensuring that migrants are blocked from reaching their borders. By obstructing the right to leave, pullbacks function as barriers to the right to seek asylum, ultimately denying access to international protection. The objective of these

[144] Nora Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27 European Journal of International Law 591, 596–597; Violeta Moreno-Lax and Mariagiulia Giuffré, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' (2019) 14–18; Anuscheh Farahat and Nora Markard, 'Places of Safety in the Mediterranean: The EU's Policy of Outsourcing Responsibility' (2020) 42–44.
[145] ibid Anuscheh Farahat and Nora Markard 36-46.
[146] ibid 42-44.
[147] Moreno-Lax and Mariagiulia Giuffré (n 146) 12-18.
[148] ibid 18; Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and the Right to Seek Asylum* (Oxford University Press 2017) ch 9.
[149] Hurst Hannum, *The Right to Leave and Return in International Law* (Martinus Nijhoff 1987) 50.

operations is not merely to assist transit or origin states but to prevent migrants from reaching destinations where they intend to apply for asylum. As a result, pullbacks impose significant barriers to the right to seek and enjoy asylum, as they effectively nullify the right to leave for those subjected to these interception measures.

4.5.1.3 State Responsibilities on the Right to Leave and Pullbacks

To protect the right of intercepted irregular migrants to seek and enjoy asylum, states conducting pullback operations must uphold the right to leave. Pullbacks effectively circumvent the right of migrants to leave any country, including their own, thereby preventing them from seeking asylum elsewhere. Under international human rights law, states are obligated to respect the right to leave for all individuals within their jurisdiction, regardless of nationality or legal status.[150] Ensuring the right to leave is therefore a prerequisite to upholding the right to seek asylum.

While states party to human rights instruments are required to respect the right to leave, it is necessary to consider whether pullbacks constitute a permissible restriction under international law.[151] International human rights treaties, including the ICCPR,[152] allow states to impose restrictions for specific reasons, such as national security, public order, public health, or morals. These restrictions, however, must meet the principles of legality, necessity, and proportionality.[153]

---

[150] ICCPR art 12(2).
[151] ICCPR art 12(3); *Miazdzyk v Poland* (Application no 23592/07) ECHR 2012; Council of Europe, 'The Right to Leave a Country' (2013) https://rm.coe.int/the-right-to-leave-a-country-issue-paper-published-by-the-council-of-e/16806da510 accessed 22 April 2023.
[152] ibid; RC 33(2); SAR and SOLAS as discussed in right to life also provide crucial obligations to protect safety and health however does not specify any overrule or exceptions against right to leave.
[153] Jamal Barnes, 'Torturous Journeys: Cruelty, International Law, and Pushbacks and Pullbacks Over the Mediterranean Sea' (2022) 48 Review of International Studies 441, 445; European Council on Refugees and Exiles (ECRE), 'Operation Sophia: EU Officials Aware Naval Military Mission Made Crossing the Med More Dangerous' https://ecre.org/operation-sophia-eu-officials-aware-naval-military-mission-made-crossing-the-med-more-dangerous/ accessed 22 June 2024.

One argument is that states may use to justify pullbacks is that they are intended to protect migrants from dangerous journeys.[154] Framing pullbacks as a positive duty, states might argue that such measures are necessary to reduce deaths at sea or prevent human trafficking. Under this reasoning, pullbacks could be viewed as part of a state's responsibility to safeguard public safety. However, for this justification to hold, states must demonstrate that the restriction is lawful, necessary, and proportionate to the risk it seeks to mitigate. Simply blocking departures without offering safe and legal alternatives does not satisfy human rights obligations and may, in fact, expose migrants to greater harm.

A second argument is that states may invoke national security or public order to justify restricting the right to leave in cases of irregular migration. Unregulated migration flows can raise challenges, such as human trafficking or concerns over border control, which states may argue impact security and public order. For instance, the EU, through Frontex, has cited public order concerns in coordinating pullback operations with third countries such as Libya, to reduce irregular migration.[155] EU legal frameworks, including the Schengen Borders Code, regulate border control measures that intersect with pullback operations. However, these measures must still comply with international legal standards, including the right to leave and access asylum.[156] If pullbacks are implemented as lawful restrictions—for example, under national security, public order, or public health justifications—states may argue that they establish a legal basis for such actions and are therefore not in violation of international law.

---

[154] ibid.
[155] Human Rights Watch, 'Airborne Complicity: How Frontex Aerial Surveillance Enables Abuse' https://www.hrw.org/video-photos/interactive/2022/12/08/airborne-complicity-frontex-aerial-surveillance-enables-abuse accessed 28 April 2024.
[156] European Union, *Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the Rules Governing the Movement of Persons Across Borders* (Schengen Borders Code) [2016] OJ L 77/1.

While lawful restrictions on the right to leave may be justified in certain cases, pullbacks must be explicitly prescribed by law, proportionate to the threat, and implemented transparently. Unauthorized or disproportionate pullbacks constitute arbitrary restrictions, violating both the right to leave and the right to seek asylum. As discussed in Chapter 3, state responsibility arises from territorial jurisdiction when operations occur within the territory or territorial waters of an origin or transit country. However, when pullbacks take place on the high seas, states exercising effective control over intercepted individuals assume de facto jurisdiction, making them internationally accountable.

When externalizing destination states support pullback operations, their level of control over individuals determines their responsibility. Providing funding, equipment, or logistical support without direct authority over intercepted individuals may not establish direct legal responsibility. However, when destination states exercise authority—through command structures, operational coordination, or direct participation—they assume de facto jurisdiction through effective control, making them jointly responsible alongside the state conducting the pullbacks. Destination states can avoid direct liability only if they do not exercise functional control over individuals. Otherwise, their involvement renders them legally complicit in violating the right to leave and the right to seek asylum.

4.5.1.4 Pushbacks and The Right to Seek Asylum in the context of The Right to Leave

Like pullbacks, pushback operations are a key tactic of externalised migration control that significantly impact the rights of irregular migrants. Pushbacks not only obstruct the right to leave but also hinder access to destination countries where migrants can seek asylum. Although some migrants may have successfully left their countries of origin, pushbacks prevent them from fully exercising the right to leave in its broader sense—escaping persecution and reaching a safe country to request protection.

The right to leave, enshrined in the ICCPR (Article 12(2)), is intended to ensure that individuals can flee unsafe conditions and seek safety elsewhere. However, this right is only meaningful if migrants can access a safe country where they can request asylum. Pushbacks distort this right by forcibly returning or preventing migrants from reaching a jurisdiction where they can claim asylum, thereby undermining both the right to leave and the right to seek asylum. For instance, joint Frontex operations beyond EU borders frequently prevent migrants from departing transit countries like Libya or Tunisia, blocking their access to European borders where they could file asylum claims.[157] These operations may involve both pullbacks and pushbacks. The overarching goal of such measures is to obstruct irregular migration and externalize border control, often at the expense of fundamental human rights.

Unlike pullbacks, which are conducted by origin or transit states with support from externalising destination states, pushbacks are direct actions by destination countries to keep irregular migrants away from their territories. These operations create significant barriers for irregular migrants and potential asylum seekers, particularly those fleeing persecution or conflict, as they prevent access to asylum procedures in safe countries.

The impact of pushbacks on the right to leave is often overlooked in international legal literature, as the focus tends to be on pullbacks conducted by transit or origin states.[158] However, the combined effects of pushbacks and pullbacks, while procedurally different, lead to similar violations of both the right to leave and the right to seek asylum. Pushbacks physically prevent migrants from leaving unsafe conditions to reach safe territories, while pullbacks force them to return to countries where they are at risk. Ultimately, both

[157] Ska Keller, Ulrike Lunacek, Barbara Lochbihler, and Hélène Flautre, 'Frontex Agency: Which Guarantees for Human Rights?' (2011) http://migreurop.org/IMG/pdf/Frontex-PE-Mig-ENG.pdf accessed 10 April 2023.
[158] Violeta Moreno-Lax and Martin Lemberg-Pedersen, 'Border-induced Displacement: The Ethical and Legal Implications of Distance-creation through Externalization' (2019) QIL 5, 6–10; Annick Pijnenburg, 'From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?' (2018) European Journal of Migration and Law; Markard, (n 146) 591.

practices result in intercepted migrants being denied access to safety and protection, undermining the broader objectives of international human rights law.

4.5.1.5 State Responsibilities on the Right to Leave and Pushbacks

As analysed until this point, pushbacks create significant barriers to irregular migrants' right to leave by preventing them from fully exercising this right. Regardless of where pushbacks occur, destination states exercise effective control over intercepted individuals, thereby retaining international human rights obligations.

While destination states engage in pushbacks beyond their territorial waters, cannot evade their international responsibilities by externalising border control. Extraterritorial enforcement does not absolve destination states of their duty to uphold human rights obligations, particularly where they exercise effective control over migrants.[159] As signatories to international human rights treaties protecting the right to leave, these states remain bound by their commitments, even when conducting pushback operations in international waters or third-state jurisdictions.

To determine whether pushbacks violate the right to leave, it is necessary to assess whether intercepted migrants are genuinely prevented from exercising this right. The ICCPR (Article 12(2)) guarantees individuals the ability to leave one country and access safety in another.[160] However, pushbacks obstruct this process by blocking migrants from reaching safe territories where they could seek asylum. While states have the right to control entry

[159] See sections 3.2 and 3.3 for analysis.
[160] ICCPR art 12(2); McDonnell (n 145).

to their borders, this authority—rooted in sovereignty and customary international law—must be exercised in compliance with international obligations.[161]

State sovereignty grants countries the authority to regulate borders and decide who may enter their territory. Instruments like the ICCPR (Article 12(4))[162] and the RC (Articles 31(2) and 32(3))[163] implicitly acknowledge this right. The ICCPR, for instance, upholds a citizen's right to return to their country, indirectly implying the right of a state to regulate the entry of non-citizens.[164] UNCLOS also recognises the sovereignty of coastal states over their territorial seas, affirming that states have the right to regulate access to their jurisdiction.[165] Regional agreements, such as the Schengen Borders Code, explicitly provide European states with tools to manage their external borders against irregular migration flows.[166] Additionally, UNCLOS(Article 25) allows coastal states to regulate access to their territorial seas to prevent "non-innocent" passage.[167] However, these provisions do not justify extending state control beyond territorial limits to conduct pushbacks on the high seas or in third-state jurisdictions. Pushbacks that obstruct migrants from leaving unsafe territories directly contradict international legal principles protecting the right to leave and the right to seek asylum.

States conducting pushbacks also have an obligation to uphold the right to seek asylum. This includes informing intercepted migrants of their right to request asylum and providing

---

[161] Richard Perruchoud, 'State Sovereignty and Freedom of Movement' in Brian Opeskin, Richard Perruchoud, and Jillyanne Redpath-Cross (eds), Foundations of International Migration Law (Cambridge University Press 2012) 123–151, 125.
[162] ICCPR art 12(4).
[163] RC arts 31(2) ad 32(3).
[164] ICCPR.
[165] UNCLOS art 2.
[166] *Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders (Schengen Agreement)* (signed 14 June 1985, entered into force 26 March 1995) arts 2 and 5; Schengen Borders Code (n 158) arts 2,13 and 20 regionally ensure the right of states to control their external borders against non-citizens without documents.
[167] ibid art 25.

an opportunity to do so.[168] Failing to offer such information, particularly during pushback operations, violates states' obligations under conventions like the RC and the ICCPR. The absence of procedural guarantees during pushbacks exacerbates the risk of refoulement, leaving migrants without access to protection mechanisms and exposing them to further harm.

The right to leave must be protected even when states exercise border control beyond their territorial seas.[169] Pushbacks conducted on the high seas or within third-country jurisdictions, such as those coordinated by Frontex in the Mediterranean, extend the state's authority beyond its territorial jurisdiction. While states may lawfully regulate entry within their territorial boundaries, conducting pushbacks extraterritorially undermines the very purpose of the right to leave, which is to enable individuals to escape persecution and seek safety elsewhere. As such, pushback operations that prevent access to asylum systems are inconsistent with states' international obligations, particularly when they result in collective expulsions and refoulement.

4.5.2 The Right to Seek Asylum and Refoulement

A major obstacle for irregular migrants seeking asylum is the risk of refoulement resulting from interception operations. These operations often aim to return intercepted individuals to their country of origin or transit or abandon them in situations of uncertainty, exposing them to serious risks. As a result, interception practices frequently violate the principle of non-refoulement, as they return individuals to places where their lives or freedom are at risk. Many intercepted migrants are fleeing persecution, and by obstructing their ability to seek safety, interception operations create significant barriers to the right to seek asylum.

[168] ECHR art 5; ACHR art 7; ACHPR art 6; ICCPR art 9.
[169] See section 3.2.

Interception measures that result in refoulement—whether by returning migrants to unsafe countries or leaving them in perilous conditions—jeopardise the right to seek asylum. Both pushbacks and pullbacks amplify the risk of refoulement and undermine access to international protection mechanisms. This subchapter explores how pushback and pullback operations violate the principle of non-refoulement, thereby obstructing the right to seek asylum.

The principle of non-refoulement, widely recognized as a cornerstone of international refugee and human rights law as a *jus cogens* norm,[170] serves as a critical guarantee for the right to seek asylum, ensuring that individuals fleeing persecution are not returned to harm. This interdependence underscores the need for states to comply with non-refoulement obligations when engaging in pushback or pullback operations. The section will examine how these operations violate the principle of non-refoulement and, in doing so, obstruct the right to seek asylum.

4.5.2.1 Pullbacks and The Right to Seek Asylum in the Context of Refoulement

The traditional understanding of refoulement—focused on expulsion, return, or extradition to unsafe territories—often emphasizes pushbacks. However, pullbacks share the same objective: preventing individuals from reaching territories where they can seek protection. Determining whether pullbacks constitute refoulement requires assessing whether intercepted individuals are returned to safety or prevented from reaching a safe country where they could invoke international protections.

If a country of origin or transit intercepts migrants on the high seas and returns them to its own territory, this does not strictly constitute refoulement, as individuals are returned to the same unsafe place without reaching the jurisdiction of a safe country. Since non-

[170] See section 2.2.2.

refoulement applies when an individual is within a safe state's jurisdiction, it does not apply in this scenario. The key factor in applying non-refoulement to pullbacks is the jurisdictional link between the intercepting state and the intercepted individuals.

Pullback operations beyond territorial waters may still engage non-refoulement if the intercepting state exercises extraterritorial jurisdiction, such as by deploying vessels that fly its flag. Under flag-state jurisdiction, a state's legal authority extends extraterritorially, triggering international obligations, including non-refoulement. However, if intercepted individuals remain within the jurisdiction of a transit or origin country, even during extraterritorial pullbacks, non-refoulement may not apply, as they have not yet reached a safe state's jurisdiction.

Pullbacks conducted within the territorial waters or land of a transit or origin country primarily serve to prevent departure, rather than expel individuals to unsafe territories. In such cases, migrants remain under the territorial jurisdiction of the intercepting state, meaning the primary impact is restricting departure. This differs from pushbacks, which involve forcible redirection to unsafe territories, often in clear violation of non-refoulement.

As long as pullbacks remain within the jurisdiction of the departure state and only prevent departure, they do not trigger non-refoulement protections. While they may violate the right to leave, they do not amount to refoulement under international law, as they do not return individuals to persecution or harm.

Although pullbacks may not strictly violate non-refoulement, they significantly impact migrants' safety and access to protection. By blocking departures from unsafe territories, they prevent access to asylum systems in destination states, raising broader legal concerns. Even if non-refoulement does not formally apply, its underlying purpose—to prevent harm

and persecution—should guide state actions. States engaging in or supporting pullbacks must ensure they do not facilitate rights violations by trapping individuals in unsafe environments without asylum access.

4.5.2.2 Pushbacks and The Right to Seek Asylum in the Context of Refoulement

Pushback operations—where intercepted individuals are forcibly returned to their country of origin, transit, or a third state, or abandoned in dangerous waters—pose a serious threat to the right to seek asylum by violating the principle of non-refoulement. These practices obstruct asylum seekers from reaching safe territories where they can claim asylum, thereby undermining their right to territorial asylum.[171] The principle of non-refoulement, as a cornerstone of international refugee and human rights law, is a critical safeguard against persecution and an essential guarantee for enabling the right to seek asylum as rejecting asylum seekers at borders and returning them to unsafe places violates both non-refoulement and their right to protection.[172]

When pushbacks result in refoulement, they breach both the principle of non-refoulement and the right to seek asylum. Refoulement occurs when individuals are returned to places where their life or freedom would be endangered, or abandoned at sea without protection, it becomes essential to examine these actions under the principle of non-refoulement.[173] This principle, enshrined in RC (Article 33(1)), prohibits states from expelling or returning individuals to territories where they face persecution. It is further supported by provisions in regional and human rights treaties, including Articles 4 and 19 of the Charter of

[171] Alice Edwards, 'Human Rights, Refugees and the Right to "Enjoy" Asylum' (2005) 17 International Journal of Refugee Law 297, 301, para 2; Guy S Goodwin-Gill, 'The 1967 Declaration on Territorial Asylum' United Nations Audiovisual Library of International Law (2012) https://legal.un.org/avl/pdf/ha/dta/dta_e.pdf accessed 15 May 2023, 3 para 1.
[172] Frances Nicholson and Judith Kumin, 'A Guide to International Refugee Protection and Building State Asylum Systems' (Inter-Parliamentary Union and UNHCR, 2017) 28.
[173] RC art 33(1); CAT Article 3; ECHR Article 3; ICPPED (Article 16) as well as at the regional level, American Convention art 22(8), Inter-American Convention to Prevent and Punish Torture art 13(4), Charter of Fundamental Rights of the European Union art 19(2), Arab Charter article 28.

Fundamental Rights of the EU, ECHR (Article 3), and various UN human rights conventions.[174] The primary aim of non-refoulement is to safeguard life and freedom, imposing a positive duty on states to ensure individuals are not subjected to harm or persecution.[175] Pushbacks that violate this principle directly undermine the right to seek asylum, as they prevent individuals from accessing international protection mechanisms.

Scholars such as Ralph Janik argue that non-refoulement functions as a "de facto right to asylum", given its universal acceptance and binding status under international law.[176] While the right to seek asylum is not explicitly enshrined in most treaties—apart from the UDHR(Article 14) —non-refoulement serves as a crucial legal pathway to asylum by prohibiting forced returns to unsafe territories.

As a *jus cogens* norm and a binding principle of customary international law,[177] non-refoulement obligates states to refrain from actions that expose individuals to threats to life or freedom. This principle is a gateway to international protection, ensuring that individuals fleeing persecution can reach safe countries where their asylum claims can be assessed.[178] In this regard, the international law consensus holds that pushbacks conflict with the non-refoulement principle,[179] impeding the right of refugees and irregular

---

[174] See section 2.2.2 and non-refoulement discussion above in 4.2.3 and 4.3.3.
[175] Oudejans et al (n 75) 616 para 4.
[176] Ralph R A Janik, 'The Right to Asylum in International Law: One Step Forward, Two Steps Back?' (2017) Social Science Research Network 20 https://ssrn.com accessed 22 April 2023.
[177] Jean Allain, 'The Jus Cogens Nature of Non-Refoulement' (2001) 13 International Journal of Refugee Law 533; Guy S Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement' (2011) 23 International Journal of Refugee Law 443, 444.
[178] Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2011) 94.
[179] Ekin Deniz Uzun, 'Pushback of Refugees Under International Law: A Conceptual Analysis' (2022) 71 Annales de la Faculté de Droit d'Istanbul 497, 508 para 2; D W Greig, 'The Protection of Refugees and Customary International Law' (1980) 8 Australian Year Book of International Law 108, 131 para 3; UN High Commissioner for Refugees (UNHCR), 'UNHCR's Intervention before the Constitutional Court of Ecuador in the Framework of Public Unconstitutionality Action No. 0014-19 (Ministerial Agreements and Requirements for Access to the Territory of Venezuelans in Ecuador)' (published on 6 June 2019), 2 para 3; Council of Europe Commissioner for Human Rights, 'The Right to Leave a Country' (October 2013) https://rm.coe.int/the-right-to-leave-a-country-issue-paper-published-by-the-council-of-e/16806da510#:~:text=The%20right%20to%20leave%20any,rights%20recognised%20in%20the%20present accessed 20 May 2023, 59 para 4.

migrants to seek asylum by preventing their entry into safe territories.[180] These actions not only disregard states' obligations to respect the right to seek asylum but also hinder the initial step in the asylum process—reaching a safe territory. [181]

Therefore, states conducting pushbacks must adopt a broad interpretation of the principle of non-refoulement to ensure compliance with international obligations. This involves focusing not only on the formal territorial aspects of asylum claims but also on the practical outcomes of their actions. While international conventions on non-refoulement do not explicitly state that contracting states must not expel individuals within their territories, the key focus must be on the effects of state actions. Pushbacks that result in refoulement violate both non-refoulement protections and the right to seek asylum, breaching fundamental international legal obligations.

4.5.2.3 State Responsibilities in the Context of Pushbacks

To delineate the legal protections for intercepted and refouled irregular migrants seeking asylum, it is essential to examine the principle of non-refoulement as a cornerstone of international obligations. Established as a customary international law norm and consistent state practice, non-refoulement binds all states, including those not party to specific treaties.[182] This principle ensures that individuals fleeing persecution—who meet the RC's definition of "refugee" even before formal recognition by a destination state —[183] are protected from return to places where their life or freedom would be at risk. Consequently,

[180] Safinaz Jadali, 'Criminalization and Accountability for Refoulement: A Path to Improve International Asylum Protection Regime' (2018–2019) 18 ISIL Yearbook of International Human and Refugee Law 278, 287–290; Beyza Özturanli Şanda and Nasıh Sarp Ergüven, 'A Consideration on Legality of Border Barriers: The Principle of Non-Refoulement and Its Extra-Territorial Effect' (2019) 68(4) Ankara Üniversitesi Hukuk Fakültesi Dergisi 893–912, 900, para 2.
[181] Nicholson and Kumin (n 174).
[182] See section on refoulement in 2.2.2.
[183] RC art 1.

non-refoulement safeguards irregular migrants who may qualify as refugees due to their need for international protection based on the RC art 1.[184]

The principle of non-refoulement is enshrined in several international conventions and regional human rights instruments, extending protections beyond refugee status broadening its application across jurisdictions.[185] During pushback operations, states exercising effective control over intercepted individuals are bound by both customary international law and treaty obligations. Effective control, whether through direct interception or cooperation with transit countries, provides a legal basis for holding externalizing states accountable for actions that result in refoulement. Interception on flagged vessels extends de jure jurisdiction, while operational control over transit zones may establish de facto jurisdiction, reinforcing states' legal responsibilities.

The ECtHR has repeatedly clarified states' obligations under the principle of non-refoulement and their broader responsibilities to uphold the right to seek asylum. In *Hirsi Jamaa and Others v. Italy* (2012),[186] the ECtHR found Italy in violation of its obligations by intercepting migrants on the high seas and returning them to Libya, where they faced a high risk of ill-treatment and lacked access to asylum procedures. The Court also ruled a violation of Article 13 (the right to an effective remedy) for Italy's failure to provide the intercepted migrants with access to asylum procedures or a mechanism to challenge their return. In his concurring opinion, Judge Pinto de Albuquerque underscored the essential connection between non-refoulement and the right to seek asylum, emphasizing that Article 13 plays a critical role in ensuring procedural safeguards for asylum seekers and protecting their fundamental rights. This reasoning was further elaborated in a recent case *M.A. and Z.R. v. Cyprus* (2024), where the ECtHR addressed Cyprus's interception and

[184] ibid.
[185] See section on refoulement in 2.2.2.
[186] *Hirsi Jamaa and Others v. Italy* (n 34).

return of two Syrian nationals without allowing them to disembark and file asylum claims.[187] The Court ruled that Cyprus violated both Article 3 (prohibition of inhuman or degrading treatment) and Article 13, highlighting the lack of an effective remedy for the applicants to challenge their return or assert their asylum claims.[188] The judgment reaffirmed that procedural safeguards, including access to asylum processes, are integral to upholding the right to seek asylum and preventing refoulement.

Pushbacks that return individuals to countries where they face risks of torture, persecution, or inhuman treatment directly violate non-refoulement and undermine the right to seek asylum. States conducting pushbacks must adopt safeguards, including individualized risk assessments and adherence to procedural protections, to ensure compliance with their international obligations. By engaging in pushbacks without these legal guarantees, states fail to uphold the protections guaranteed under the RC, CAT, ICPPED, and regional human rights instruments. Effective control during interception, whether through flagged vessels or operational zones, reinforces state jurisdiction and responsibility, requiring compliance with non-refoulement principles to protect the lives and freedoms of intercepted migrants.

4.6 Conclusion

This chapter has critically analysed the legal complexities and human rights implications of interception practices, including pushbacks and pullbacks. Often justified under border management, national security, or public order, these practices frequently result in fundamental rights violations for individuals seeking international protection.

The chapter highlighted how interception practices threaten the right to life, particularly in extraterritorial contexts. Failures in SAR operations and excessive or negligent use of force

[187] *M.A. and Z.R. v. Cyprus* (Application no. 39090/20) ECtHR 2024.
[188] ibid paras 80-91.

lead to preventable fatalities. States bear positive obligations to protect life and negative obligations to prevent harm under the ICCPR, ECHR, and SAR conventions. Effective control exercised during interception expands jurisdiction, obligating states to uphold human rights standards beyond their borders.

The prohibition of torture and CIDTP is also compromised, as intercepted individuals frequently endure inhumane treatment, abandonment at sea, and forced returns to unsafe states. These practices breach extraterritorial obligations, as established in ECtHR jurisprudence, including Hirsi Jamaa v. Italy. The chapter underscored the need for lawful SAR operations and border management measures that respect human dignity during interceptions.

Additionally, the chapter examined the right to seek asylum, the right to leave, and the principle of non-refoulement. Pushbacks and pullbacks prevent access to asylum systems, obstructing individuals from reaching safe territories to claim protection. The analysis reaffirmed that non-refoulement is a binding obligation under both treaty and customary international law, applying extraterritorially, including in high-seas operations or within third-state jurisdictions.

While the legal framework provides clarity, this chapter demonstrated that many interception practices remain incompatible with international law. Returning individuals to unsafe states, abandoning them at sea, or outsourcing migration control to countries with poor human rights records violates non-refoulement, the right to life, freedom from torture and CIDTP, and the right to seek asylum.

States cannot evade responsibility by citing national security or sovereignty to justify extraterritorial interdictions. Whether through direct pushbacks involving effective control beyond national borders or indirect pullbacks through third-party cooperation, violations of

non-derogable rights—including the right to life, prohibition of torture, and non-refoulement—are impermissible. Jus cogens obligations remain binding in all circumstances.

Likewise, national security concerns and sovereign entry control cannot justify interdictions that obstruct the right to seek asylum. Pushbacks and pullbacks prevent asylum seekers from having their claims assessed, violating the right to an effective remedy and non-refoulement, rendering asylum protections meaningless in practice.

To comply with international human rights law, interception operations must prioritize fundamental rights. Safe and legal pathways for international protection should be established to prevent dangerous crossings and SAR failures. Collective expulsions must be prohibited, with individualized risk assessments replacing mass returns to ensure fair asylum processing. Enhanced monitoring and oversight are essential to prevent externalized migration control violations, and migration agreements with third countries must align with international human rights standards.

By implementing these measures, interception operations can transition from deterrence tools to mechanisms that uphold fundamental rights. This recalibration is essential to preserving the integrity of the international protection regime, ensuring that state sovereignty does not override universal human rights obligations.

5. The Impact of Extraterritorial Processing Centres on Human and Refugee Rights

5.1 Introduction

The extraterritorial processing of asylum claims represents a significant shift in migration control policies, whereby states manage asylum applications outside their own territorial boundaries to curb irregular immigration. This shift often encompasses the establishment of offshore detention centres, interception and redirection of refugees including potential asylum seekers at sea, and agreements with third countries to house asylum seekers temporarily. While such strategies are frequently defended as essential for maintaining border security, they have increasingly been criticised for fostering environments that disregard fundamental human rights obligations, especially concerning the rights to life, to be free from torture and CIDTP, and to seek asylum.

The implementation of extraterritorial asylum processing poses serious questions about the responsibility of states under international human rights and refugee law. Such processing raises critical concerns about the legal obligations of both the externalising states, which undertake these measures, and the host states, which facilitate them by allowing such activities within their jurisdictions. This chapter examines the extent to which extraterritorial detention and asylum processing compromise fundamental human and refugee rights, analysing the specific conditions and practices that contribute to documented abuses. Further, it assesses the legal frameworks applicable to these practices, particularly exploring how international human rights instruments—such as ICCPR, the ECHR, and the CAT—shape state responsibilities in these contexts. Additionally, the chapter considers the implications of relevant regional instruments, including the EU

Directives, particularly given the role of European states in funding and supporting processing centres in third countries.

Focusing first on the right to life, this analysis addresses how conditions within EPCs threaten life and wellbeing, exposing asylum seekers to hazardous living conditions and prolonged detention in isolated or insecure locations. Illustrative cases, such as Australia's 'Pacific Solution' and the proposed UK-Rwanda agreement, underscore the consequences of these processing models. The cases reveal instances where insufficient healthcare, inadequate living conditions, and a lack of basic security measures have exposed individuals to severe physical and mental harm. These examples highlight ongoing risks of refoulement within extraterritorial processes, underscoring how these systems may return asylum seekers to environments where their lives are endangered, in direct contravention of customary international law and treaty obligations under the RC.

Building on the discussion of extraterritorial detention and asylum practices, this section explores how conditions in these centres give rise to torture and CIDTP, focusing on both direct actions and state omissions. Examples include Australia's centres in Nauru and PNG, proposed models like the UK-Rwanda agreement and the Italy-Albania plan, and EU-supported detention facilities in Libya. While Libya's centres are not formally asylum processing facilities, they reflect similar externalization strategies and amplify the risks of rights violations due to inadequate oversight.[1] These practices raise critical concerns about states' compliance with their international obligations under instruments such as the CAT and ICCPR, particularly their positive duties to prevent torture and CIDTP for individuals under their jurisdiction or effective control. Legal precedents and international reports

[1] European Union External Action, 'European Neighbourhood Policy' https://www.eeas.europa.eu/eeas/european-neighbourhood-policy_en#:~:text=The%20European%20Neighbourhood%20Policy%20(ENP,their%20mutual%20benefit%20and%20interest accessed 2 December 2022; See section 2.4.2 for further discussion of the analogy between Libya's centres and Italy's extraterritorial facilities under the European Neighbourhood Policy (ENP), as well as the comparison to Australia's externalization of migration responsibilities.

further highlight the need for responsibility in addressing the conditions in these centres and their impact on individuals' fundamental rights.

Lastly, the chapter addresses how detention, which is a common practice during extraterritorial processing, obstructs access to asylum procedures, particularly through the criminalisation of asylum seekers, severe restrictions on movement, and enforced isolation that together violate the right to seek asylum. Reflecting on legal scholarship and the RC, this part elucidates how Australia's detention model and similar European efforts systematically curtail rights to liberty and the freedom to leave. In doing so, it brings into focus the ways externalisation undermines asylum seekers' access to protection and safe territory, rendering the right to asylum unattainable.

By evaluating these issues within the frameworks of international and regional human rights law, this chapter offers a distinctive contribution by critically examining the intersection of extraterritorial processing and state responsibility through the lens of shared and overlapping responsibilities. Unlike existing literature, which often focuses mostly on the externalizing state's obligations,[2] this chapter advances the debate by integrating an analysis of host state liabilities under international law. Furthermore, it introduces a nuanced exploration of how jurisdictional principles, such as 'effective control' and 'functional jurisdiction,' can extend responsibility for rights violations beyond territorial limits, providing a clearer roadmap for addressing legal ambiguities in cases of extraterritorial human rights breaches.

[2] Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and the Right to Seek Asylum* (Oxford University Press 2017), Thomas Gammeltoft-Hansen and Nikolas H. Tan, *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021); Thomas Gammeltoft-Hansen and Nikolas H. Tan, *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021); Guy S. Goodwin-Gill, 'Is Europe Living Up to Its Obligations to Refugees?' (2004); María-Teresa Gil-Bazo, 'The Protection of Refugees under the Common European Asylum System' (2007); Ruben Zaiotti, *Externalizing Migration Management: Europe, North America and the Spread of 'Remote Control' Practices* (Routledge 2016); Lisa Jane Archbold, 'Offshore Processing of Asylum Seekers – Is Australia Complying With Its International Legal Obligations?' (2015) 15(1) QUT Law Review 137.

Additionally, this chapter contributes to emerging discussions on the erosion of the right to seek asylum by linking state practices of detention and transfer to systemic violations of non-refoulement obligations, as well as the broader implications for customary international law. In doing so, it not only highlights gaps in enforcement mechanisms but also proposes frameworks for reconciling migration control measures with foundational human rights principles. In this way, it underscores the critical need for strengthened responsibility frameworks to prevent extraterritorial asylum practices from undermining human dignity and international legal norms.

5.2 The Right to Life in the Context of Extraterritorial Processing Centres

Conditions in EPCs for asylum seekers have long raised concerns about fundamental human and refugee rights violations. The right to life is frequently among the violated rights. Accessing the centres to inspect conditions is easier within national borders but more complex in extraterritorial areas.[3] This analysis draws upon consistent reports from major human rights organizations, such as Amnesty International, Human Rights Watch, and UNHCR, which have documented inadequate healthcare, overcrowding, and unsafe conditions in centres like those in Nauru, Manus Island, and Libya.[4] These findings are

[3] Jamal Barnes, 'Suffering to Save Lives: Torture, Cruelty, and Moral Disengagement in Australia's Offshore Detention Centres' (Year) 35(4) Journal of Refugee Studies 1508–1529, 1520.

[4] Human Rights Watch, 'Australia: Appalling Abuse, Neglect of Refugees on Nauru' (2 August 2016) https://www.hrw.org/news/2016/08/02/australia-appalling-abuse-neglect-refugees-nauru accessed 3 March 2022; Refugee Action Coalition, 'Manus and Nauru' https://www.refugeeaction.org.au/?page_id=4528 accessed 3 March 2022; Amnesty International, 'Island Of Despair: Australia's "Processing" Of Refugees On Nauru' (2017) https://www.amnesty.org.uk/files/2017-05/island-of-despair.pdf?VersionId=w9buloG35mAnrmNFY4CPDknjA9m2oMom accessed 20 July 2023; Australian Human Rights Commission, 'Inspections of Australia's Immigration Detention Facilities 2019 Report' https://humanrights.gov.au/sites/default/files/document/publication/ahrc_immigration_detention_inspections_2019_.pdf accessed 20 July 2023; Australian Senate, 'Taking Responsibility: Conditions and Circumstances at Australia's Regional Processing Centre in Nauru. Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru' (2015) Commonwealth of Australia https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Final_Report accessed 20 July 2023; Amnesty International, 'This Is Breaking People: Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New

corroborated by UN agency reports, such as those from the Office of the High Commissioner for Human Rights (OHCHR), which have flagged systemic concerns regarding the treatment of asylum seekers in EPCs.[5]

The right to life is fundamentally endangered in EPCs due to poor living standards, inadequate medical facilities, and the use of force by officials, which collectively create conditions that can lead to fatalities.[6] Direct actions or omissions, such as neglecting medical care or inflicting violence, further exacerbate these risks.[7] This section examines the ways in which these centres compromise the right to life, highlighting states' positive obligations to ensure humane conditions and their responsibilities under international law. Additionally, it considers how the transfer of intercepted individuals to such centres, combined with prolonged detention, can violate the principle of non-refoulement and, by extension, the right to life.

Guinea' (2021) 38-43 https://www.amnesty.org/en/wp-content/uploads/2021/06/asa120022013en.pdf accessed 20 July 2023.
Amnesty International, 'Libya: Annual Report 2023' https://www.amnesty.org/en/location/middle-east-and-north-africa/north-africa/libya/report-libya/#:~:text=Detainees%20were%20held%20in%20conditions,and%20denial%20of%20family%20visits accessed 30 July 2024; Human Rights Watch, 'No Escape from Hell: EU Policies Contribute to Abuse of Migrants in Libya' (21 January 2019) https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya accessed 30 July 2024.

[5] United Nations Human Rights Office of the High Commissioner (OHCHR), 'Libya: UN Human Rights Report Details Violations of Migrants' Rights Amid Crisis' (27 October 2022) https://www.ohchr.org/en/press-releases/2022/10/libya-un-human-rights-report-details-violations-migrants-rights-amid accessed 30 July 2024; UN Human Rights Council, '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) UN Doc A/HRC/35/25/Add.4 https://www.ohchr.org/en/documents/comments-state/report-special-rapporteur-human-rights-migrants-his-mission-australia-and accessed 30 July 2024.

[6] ibid; See above (n 4).

[7] ibid.

5.2.1 The Right to Life in the Context of Conditions in Extraterritorial Processing Centres

Academic discussions often focus on the legality of EPCs in terms of liberty, security, fair trial, entry rights, and the prohibition of torture or CIDTP.[8] This section shifts to the right to life of individuals held in these centres, referencing Article 2 and 3 of the ECHR, Articles 3 and 5 of the UDHR, Articles 4 and 5 of the ACHR, Article 6 and 7 of the ICCPR and Article 3 of the CAT.[9] This section considers torture, cruel, and inhuman treatment as risks to life, as such treatment can result in death and states must protect lives within their jurisdiction and provide humane living conditions, avoiding CIDTP, which is a fundamental obligation regarding the right to life.[10]

5.2.1.1 Reported Physical Conditions in the Centres

EPCs, such as those in Manus, Nauru, and PNG, are often characterized by substandard conditions that raise serious concerns about the right to life.[11] Reports from international organizations, including Amnesty International and Human Rights Watch, document inadequate healthcare, overcrowding, insufficient sanitation, and instances of abuse by guards and other detainees.[12] In Manus and Nauru, these conditions have been linked to

---

[8] John von Doussa, 'Human Rights and Offshore Processing' (2007) 9 UTS L Rev 41; Lester, Eve, 'The Right to Liberty' (ANU College of Law Research Paper No 21.35); Peter Billings (ed.), Crimmigration in Australia (Springer, 2019); See section 2.4.2.

[9] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, arts 2 and 3; Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 3 and 5; Organisation of American States American Convention on Human Rights "Pact of San Jose, Costa Rico" (adopted 22 November 1969 entered into force 18 July 1978) OASTS No. 36 arts 4 and 5; UNGA, 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (adopted 10 December 1984, entered into force 26 June 1987) UN Doc A/RES/44/144 art 3; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) arts 6 and 7.

[10] ibid.

[11] See Australia in section 2.4.1.2.

[12] Eoin Blackwell, 'Death in offshore detention: predictable and preventable' The Conversation (26 April 2016) <https://theconversation.com/death-in-offshore-detention-predictable-and-preventable-58398> accessed 19 March 2022; Ben Doherty et al, 'Deaths in offshore detention: the faces of the people who have died in Australia's care' The Guardian (19 June 2018) <https://www.theguardian.com/australia-news/ng-

deaths, suicides, and severe mental health crises among asylum seekers as well as lack of timely and adequate medical care.[13]

Similar issues are reported in detention centres funded or supported by European states. In Libya, for example, detention centres have been described as 'inhumane' by the Office of the High Commissioner for Human Rights (OHCHR), with overcrowded cells, lack of food and medical care, and reports of physical abuse and sexual violence. In Greece, a notable case is *M.S.S. v. Belgium and Greece*,[14] where asylum seekers returned to Greece from Belgium under the Dublin Regulations[15] were detained in camps while awaiting refugee claims decisions. The applicants argued that the conditions in these camps were inhumane, describing overcrowded quarters, restrictions on using the toilet alone, and being forced to sleep on unclean beds or the floor.[16] There were also allegations of police brutality within the centres.[17] Reports from various international organizations, including the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the Council of Europe Commissioner for Human Rights, and Amnesty International, supported the applicants' claims by highlighting inadequate access to food, sanitary facilities, and sufficient space for a healthy and dignified life.[18] Likewise, The ECtHR has continued to uphold similar decisions in subsequent cases, such as, *HA.A. v. Greece* and *S.Z. v. Greece*[19] in 2016 and 2018 respectively. Although these cases pertained to violations occurring in detention centres within national borders rather than EPCs, they

interactive/2018/jun/20/deaths-in-offshore-detention-the-faces-of-the-people-who-have-died-in-australias-care> accessed 10 March 2022

[13] See section 5.2.1.3 below.

[14] *M.S.S. v. Belgium and Greece*, Application no. 30696/09 (ECtHR, 21 January 2011).

[15] Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities [1990] OJ C254/1 (Dublin Regulation).

[16] *M.S.S. v. Belgium and Greece* (n 14) para 34.

[17] ibid para 164.

[18] ibid para 159-170.

[19] Ha.A v. Greece, Application no. 58387/11 (ECtHR, 21 April 2016); S.Z. v. Greece, Application no. 66702/13 (ECtHR, 21 June 2018).

serve as relevant precedents for understanding similar instances occurring beyond national borders.

Across all these regions, recurring patterns of inadequate healthcare, insufficient food and water, overcrowding, and violence—whether perpetrated or tolerated by officials—demonstrate systemic failures to uphold the right to life. These conditions create an environment where deaths, whether by neglect or suicide, become foreseeable, highlighting the need for states to fulfil their positive obligations to ensure humane living standards in detention facilities.

5.2.1.2 Violence against Detainees

Violence against individuals held in processing centres is rife, with numerous reports documenting physical abuse that, in some cases, has led to the death of asylum seekers. If the act results in the deaths of asylum seekers and refugees in processing centres, it indicates a failure to observe proportionality.[20] This means that the disproportionality must be considered when applying exceptions s on the right to life, such as through shooting, beating, or using tear gas and water cannons to quell a riot or mass protest.[21] When the limit is exceeded in restricting the right to life, it signifies a breach of the state's negative obligation to uphold this right.

[20] Human Rights Committee, 'General Comment No 35: Article 9 (Liberty and Security of Person)' (112th session, 16 December 2014) UN Doc CCPR/C/GC/35, [18], citing Human Rights Committee, 'Views: Communication No 560/1993' (59th session, 30 April 1997) UN Doc CCPR/C/59/D/560/1993, [9.3]–[9.4] ('*A v Australia*').

[21] United Nations, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990) Principle 9; *Nachova and Others v. Bulgaria*, 39 EHRR 37, App nos 43577/98 and 43579/98 (ECtHR, 6 July 2005), This case involved the killing of two Roma men by military police. The ECtHR held that the force used was disproportionate and violated Article 2 of the European Convention on Human Rights (the right to life).

As an example of the use of disproportionate force against detainees, which constitutes a violation of the right to life, the murder of Reza Barati is a significant case.[22] Conflict and tension between asylum seekers and indigenous people on the islands where detention centres are located are well-documented challenges in Australia's camps.[23] This hostile environment not only makes life unbearable for asylum seekers and refugees but also puts their lives at risk. The murder of Reza Barati serves as a tragic example of this problem on the islands. He was killed in 2014, at the Manus Island processing centre by at least two security guards from PNG while several local G4S staff members were attacking asylum seekers with guns, sticks, and rocks.[24] Although these actions by PNG officials and private actors employed by detention centres like G4S may be classified as attempts to quell a riot, it is essential to address the erosion of the right to life in such cases.

On the other hand, human rights instruments to which Australia or PNG is a party, such as the UDHR and the ICCPR, do not specifically permit exceptions on the right to life for this purpose. Even when countries like Australia use violence to maintain public peace and security within EPCs, they must ensure that the right to life is not disproportionately restricted, as with all human rights.[25] It is crucial to maintain a balance between the level of justifiability of the exceptions and the benefits derived from it. The right to life shall not be completely abolished as a consequence of actions leading to its exceptions. Therefore, governments and private actors employed by governments must consider proportionality when using violence to quell riots or mass protests.

---

[22] Amy Nethery and Rosa Holman, 'Secrecy and Human Rights Abuse in Australia's Offshore Immigration Detention Centres' (2016) 20(7) The International Journal of Human Rights 1018, 1025.
[23] Human Rights Watch (n 4); Refugee Action Coalition, 'Manus and Nauru' https://www.refugeeaction.org.au/?page_id=4528 accessed 03 March 2022
[24] ibid; Doherty et al (n 12).
[25] Jan Sieckmann, 'Proportionality as a Universal Human Rights Principle' in David Duarte and Jorge Silva Sampaio (eds), *Proportionality in Law* (Springer, Cham 2018) 3–11; Luka Anđelković, 'The Elements of Proportionality as a Principle of Human Rights Limitations' (2017) 15(3) Facta Universitatis, Series: Law and Politics 235, 235–244.

It is essential not to differentiate between physical attacks and verbal assaults from the ill-treatment and torture that can lead individuals to their demise. Even if these assaults do not directly result in loss of life, they can inflict severe mental illness on asylum seekers and refugees, especially when compounded by inappropriate and inadequate medical care in detention centres. Mental illnesses can, in turn, lead to self-harm and suicides among individuals held there. For instance, according to the 2020-2021 Annual Report of the Australia Department of Home Affairs, there were 195 cases of self-harm in the relevant financial year, highlighting the serious mental health issues faced by detainees.[26] Self-harm and suicide as consequences of these mental health problems cannot be separated from the right to life. The Federal Court of Australia has recognized the importance of modern and adequate healthcare as a precondition for the right to life, as evidenced by its decision to transfer a teenage girl with mental health problems from Nauru to Australia to receive appropriate standard healthcare.[27]

5.2.1.3 Lack of Adequate Healthcare

Providing adequate healthcare and living conditions conducive to dignified life for apprehended asylum seekers in processing centres is thus a primary responsibility of states hosting or operating such facilities. Failure to do so amounts to intentional cruelty and inhuman treatment by states, deliberately violating the right to life through negligence. Ensuring proper healthcare and a dignified living environment for detained asylum seekers in detention centres is a fundamental duty of the states managing these facilities. Failure to

[26] Australian Government Department of Home Affairs, 'Home Affairs Annual Report 2020-21' (30 June 2021) https://www.homeaffairs.gov.au/reports-and-pubs/Annualreports/home-affairs-annual-report-2020-21.pdf accessed on 10 March 2022 139.
[27] *FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection* [2018] FCA 63 (9 February 2018) http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2018/63.html?context=1;query=FRX17%20v%20Minister%20for%20Immigration%20and%20Border%20Protection%20;mask_path= accessed on 23 March 2022.

do so effectively subjects these individuals to cruel and inhuman treatment, constituting a deliberate infringement of their right to life through state negligence.[28]

An important case highlighting the consequences of inadequate medical care is that of Hamid Khazaei[29], a refugee who lost his life at the age of 24 in an extraterritorial detention centre in PNG.[30] The case demonstrates the dire conditions in these centres and how they can undermine the right to life. Despite suffering from flu-like symptoms and a treatable skin lesion on his leg, Mr. Khazaei was not transferred to a full-fledged hospital in Australia. Instead, he was treated at a clinic within the detention centre, and his condition worsened, necessitating transfer to a hospital without an intensive care unit in Port Moresby.[31] Ultimately, he was transferred to Mater Hospital in Brisbane, where he passed away within ten days.

The Coroners Court of Queensland[32] found that Mr. Khazaei's preventable death was a result of the inadequate medical care provided to him and issued recommendations to the Australian Government, including the establishment of an intensive care unit near the detention centres, improvements to clinical processes and instituting independent judicial investigations into the deaths of asylum seekers.[33] However, it did not directly address any international conventions, violations of international law or specific human rights law. As a domestic court ruling, the Coroners Court of Queensland's decision is factually significant

---

[28] Royal Australasian College of Physicians (RACP), 'Submission to the Inquiry into Nauru and Manus Island' (Senator Louise Pratt, 2017) https://www.racp.edu.au/docs/default-source/advocacy-library/pa-sl-senator-l-pratt-racp-submission-to-inquiry-into-nauru-and-manus-island.pdf?sfvrsn=d830361a_16 accessed 23 March 2022.
[29] See Blackwell and Doherty et al(n 12); Law Council of Australia, 'Policy Statement: Principles Applying to the Detention of Asylum Seekers' (22 June 2013) https://lawcouncil.au/publicassets/1d6c7bd7-e1d6-e611-80d2-005056be66b1/130622-Policy-Statement-Principles-Applying-to-the-Detention-of-Asylum-Seekers.pdf accessed 30 July 2024.
[30] Go To Court Pty, 'Hamid Khazaei's Death Was Preventable' (*Go To Court,* 1 August 2018) <https://www.gotocourt.com.au/legal-news/hamid-khazaei-death-preventable/> accessed 10 March 2022
[31] ibid.
[32] Coroners Court, 'Inquest into the death of Hamid KHAZAEI' [2018] 1 Qd R <https://www.courts.qld.gov.au/__data/assets/pdf_file/0005/577607/cif-khazaei-h-20180730.pdf> accessed 02 March 2022.
[33] ibid 118-126.

in demonstrating how conditions in extraterritorial centres can lead to loss of life. It underscores the potential violations of international legal guarantees concerning the right to life and adequate medical care, as outlined in instruments such as the ICCPR and UNCAT. These international frameworks emphasize the state's obligation to ensure the health and well-being of individuals in their custody, including refugees and asylum seekers.

Living in such conditions, exposed to high temperatures without proper attire, shelter, or protection from the sun's harmful rays, can cause significant harm to refugees' health, including skin damage.[34] This case illustrates the severe consequences of inadequate care and living conditions in the centres and the urgent need for reforms to uphold the rights and safety of those detained.

Compelling individuals to reside in a centre lacking full-fledged healthcare facilities, adequate shelter, food, or protection from weather conditions can lead to violations of their right to life. Therefore, subjecting individuals to such inhumane living conditions should not only be viewed as violations of the right to be free from CIDTP but also as jeopardizing their right to life. When inhumane living conditions lead to erosion of the right to be free from CIDTP, the result can tragically be the loss of human lives.

5.2.1.4 State Responsibilities on the Right Life under Conditions of Extraterritorial Processing Centres

To establish responsibility for human rights violations in EPCs (EPCs) and extraterritorial detention centres, attribution must be determined by linking the actions to the externalizing state. Under international law, states are responsible for the conduct of their de jure and de

[34] Amnesty International (n 4) 38-43.

facto organs,[35] as established in ARSIWA Article 4. This principle applies regardless of whether the actions are legislative, executive, judicial, or administrative in nature. When an organ of the externalizing state operates within an EPC—such as police officers, coastguards, or healthcare personnel—their conduct is attributable to that state. For example, when the Australian Federal Police and the Australian Defence Force are deployed in Australian-run EPCs in Nauru or PNG, their actions are legally attributed to Australia.

The principle of attribution also extends to private actors exercising governmental authority on behalf of the state under ARSIWA Article 5. For a private entity's conduct to be attributable, it must be employed in accordance with the state's laws and must exercise governmental functions. [36] The interpretation of "governmental authority" is significant, as the concept remains ambiguous in international law. In Rendell-Baker v Kohn, the US Supreme Court held that a private actor fulfils the definition of a "public function" if it carries out duties traditionally and exclusively performed by the state.[37] Applying this to EPCs, when private actors manage functions such as security enforcement, asylum claim processing, or detainee transfers, they are performing public functions that traditionally fall within the prerogative of the state. Where an externalizing state delegates these public functions to a private actor, the conduct of the private actor remains attributable to the state.

Responsibility may also arise when the host state, rather than private actors, directly operates EPCs on behalf of the externalizing state. This occurs when the host state

[35] Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2011) 71; International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (ARSIWA) (2001) art 4.
[36] ibid Heijer 74; ibid ARSIWA art 5; Nicola Jägers, *Corporate Human Rights Obligations: In Search of Accountability* (Intersentia 2002) 250; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 239.
[37] Rendell-Baker v Kohn (1982) 457 US 830 at 842.

constructs, manages, or enforces detention measures in EPCs at the request of the externalizing state. ARSIWA Article 47 establishes that where two states act jointly in wrongful conduct, responsibility arises for both.[38] For instance, when Nauru's government constructs and operates EPCs funded by Australia, both Australia and Nauru may bear responsibility. The host state, by virtue of its territorial jurisdiction, is responsible for violations occurring within these centres. However, where the externalizing state exercises effective control over the facilities,[39] its responsibility extends to violations concerning the right to life, as outlined in ARSIWA Articles 16 and 17. [40] This shared responsibility is evident in cases where inhumane conditions have led to detainee deaths in Australian-run centres in PNG.[41] While two PNG nationals were convicted for murder in these facilities, [42] this does not absolve Australia of its obligations. Australia, by funding and overseeing these facilities, remains responsible for ensuring human rights compliance. Similarly, in the proposed Italy-Albania model, Italy's role in running the centres creates a comparable legal framework of responsibility.

A state party to human rights instruments such as the ICCPR (Article 6), ECHR (Article 2), or ACHR (Article 4) is obligated to ensure humane and adequate living conditions for individuals within its jurisdiction.[43] Even where a state is not a party to such treaties, it remains bound by customary international law regarding the right to life. The scope of this right encompasses both negative obligations, such as the prohibition against unlawful deprivation of life, and positive obligations, which require states to take proactive measures to protect individuals. These obligations include providing adequate shelter and medical care, preventing conditions that could lead to loss of life, and protecting detainees

[38] Den Heijer (n 35) 95.
[39] See sections 3.2.1 and 3.4.
[40] ARSIWA arts 16 and 17.
[41] See section 3.4.
[42] See above, nn 22-24.
[43] ICCPR art 6; ECHR art 2; ACHR art 4.

from inhumane or degrading treatment. National security and migration control do not override the right to life. Even where measures are taken to suppress violent uprisings or riots, states must adhere to the principles of proportionality and necessity to avoid liability.

Unlike the Australia model and the proposed Italy-Albania plan, in European-supported centre-running schemes such as Italy-Libya, intercepted irregular migrants are held in EPCs funded by European states but operated by the host country. This distinction is particularly evident in Libya, where European states do not exercise direct control over detention centres. Rather, European states provide financial assistance, equipment, and training to the host state to combat irregular migration. They do not establish, operate, or directly manage asylum processes in these centres.

The legal responsibility of EU member states for human rights violations in detention centres in neighbouring states, such as Libya, is governed by ARSIWA Article 16.[44] For an assisting state to be held responsible for wrongful acts committed by the host state, four key elements must be established: material aid, mental intent, causal relation, and the nature of the act. While EU states provide material assistance through funding, training, and equipment, this alone does not establish full responsibility. The mental element requires that an assisting state act with knowledge and intent to facilitate wrongful acts. While the EU and its member states are aware of human rights violations in Libyan detention centres, knowledge of potential misuse is insufficient unless accompanied by a deliberate intent to facilitate these violations. This principle is supported by the ILC Commentary on ARSIWA Article 16, which states that mere knowledge of possible wrongful use does not meet the threshold for attribution.[45] In addition, the causal link between assistance and human rights violations remains indirect. The direct perpetrators of

[44] ARSIWA art 16.
[45] ibid.

human rights abuses in Libya are Libyan authorities, not European states, and while European support enables these actions, it does not directly cause them. Without a clear, direct link between the assistance provided and the resulting human rights violations, attribution under ARSIWA remains limited. While the material element of responsibility may be satisfied, the mental intent and causal connection do not meet the necessary threshold for full legal responsibility.

Attribution of responsibility in extraterritorial detention and processing schemes depends on the level of control exercised by the externalizing state. The stronger the nexus between the externalizing state and the actions committed in EPCs, the greater the likelihood of legal responsibility under international law. Where an externalizing state establishes, funds, and directly controls the centres, such as Australia in Nauru and PNG or Italy in Albania, it bears full responsibility for human rights violations. In contrast, where an externalizing state merely funds or supports host state detention practices, such as EU assistance to Libya, legal attribution is more complex and depends on proving intent, direct causation, and the nature of the assistance provided.

5.2.2 The Right to Life and Refoulement in Extraterritorial Processing Centres

Transferring irregular immigrants, including asylum seekers, to a third country with EPCs by the destination state may pose a risk to their right to life. This risk arises if the third/host country is unsafe for the transferred individuals. Therefore, it is crucial to revisit the principle of non-refoulement to understand how the right to life can be endangered by such transfers.

The principle of non-refoulement obligates states not to return a person to territories where there is a risk of persecution against life or freedom of the transferred person.[46] When externalizing migration controls through interception or EPCs, the states must ensure that it does not violate its obligations under the RC, including the principle of non-refoulement.[47]As explored in chapter 2.4.2 both direct and chain/indirect refoulement[48] violate the principle non-refoulement through transfers to EPCs. Lauterpacht and Bethlehem in their opinion highlight that transferring individuals to a STC with EPCs may not necessarily violate non-refoulement per RC assuming the removal conducts a thorough assessment to ensure that the third country is genuinely safe.[49] An externalizing state may pursue a lawful migration policy without violating the principle of non-refoulement by transferring irregular migrants, whose entry it refuses under its sovereign right to control its borders, to a STC where their lives and freedoms are protected. However, the assessment of this 'safe country' must be conducted on the basis of objective criteria, taking into account all potential human rights violations in a comprehensive manner. Within this framework, both direct and indirect (chain) risks of refoulement must also be thoroughly evaluated. HRC General Comment No. 31 also reiterates that states must not expose individuals to real risks of irreparable harm, such as arbitrary deprivation of life, torture, or CIDTP.[50] A country where individuals are subjected to torture or CIDTP cannot be deemed

[46] Convention Relating to the Status of Refugees (RC) (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 33(1); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 3; ECHR art 3; International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3, art 16; American Convention on Human Rights (ACHR) (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, art 22(8); Inter-American Convention to Prevent and Punish Torture (adopted 9 December 1985, entered into force 28 February 1987) OAS Treaty Series No 67, art 13(4); Charter of Fundamental Rights of the European Union (CFR) [2000] OJ C364/1, art 19(2); Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) art 28.
[47] ibid RC.
[48] See section 2.2.2.
[49] RC art 33(1); Sir Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion' (UNHCR 2003) 122; See section 2.2.2.
[50] UN Human Rights Committee (HRC), 'General Comment No. 31 [80] on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13

a safe country and sending individuals to such a country constitutes direct refoulement.[51] However, if there are no such risks in the country to which individuals are sent, but there is a failure to adhere to other legal guarantees, such as the prohibition of non-refoulement, a risk of chain refoulement may still arise.[52]

A country failing to provide effective protections in line with the RC and other relevant international instruments should not qualify as a STC. Transfers to such countries, coupled with detention in EPCs, amount to refoulement. Conversely, mere formal adherence to international human rights and refugee law instruments does not automatically render a country safe. For instance, when Australia implemented the Pacific Solution, sending asylum seekers to EPCs in PNG and Nauru, it did so despite PNG being a party to the RC with reservations [53] and Nauru not being a party to the Convention at all.[54] Similarly, Rwanda, with which the UK signed a MoU for the transfer of asylum seekers, is a party to the RC.[55] Yet, concerns about Rwanda's ability to provide effective protections highlight the inadequacy of mere formal adherence to international obligations.

In other words, compliance with both the RC and its protocol, as well as other international and regional human rights instruments regulating the principle of non-refoulement and effective protections for refugees, should be evaluated to determine whether a country qualifies as a STC. This is because a country that fails to comply with international and regional human rights instruments to which it is a party may pose a risk of persecution to individuals within its jurisdiction. Despite theoretically being party to those human rights

[51] See section 2.2.1.
[52] ibid.
[53] UNHCR, 'States Parties, Including Reservations and Declarations, to the 1951 Refugee Convention' https://www.unhcr.org/media/states-parties-including-reservations-and-declarations-1951-refugee-convention accessed 17 November 2022: The Government of Papua New Guinea in accordance with article 42 paragraph 1 of the Convention makes reservation with respect to the provisions contained in articles 17 (1), 21, 22 (1), 26, 31, 32 and 34 of the Convention and does not accept the obligations stipulated in these articles.
[54] ibid Nauru's Accession on the RC 28 Jun 2011.
[55] ibid Rwanda's Accession on the RC and its protocol 3 Jan 1980.

instruments, the government might not provide practical and effective protection to refugees within its jurisdiction, thereby creating "well-founded" fears of persecution based on factors such as race, religion, nationality, membership of a particular social group, or political opinion.

Such cases underscore the critical distinction between theoretical and practical compliance with international legal obligations. The example of the UK Home Office granting refugee status to four Rwandans due to fears of persecution by the Rwandan regime illustrates the risks of transferring individuals to countries with questionable human rights records.[56] While Rwanda is officially recognised as a STC by the UK government, [57] this acknowledgment of persecution by the same regime underscores the lack of effective protection. Thus, practical enforcement of international obligations—not just formal commitments—is essential to determine whether a country can be genuinely considered safe. The determination of a STC must include an evaluation of humane living conditions. In the 21st century, persecution extends beyond the narrowly defined threats outlined in the RC to encompass severe deprivation of basic needs such as shelter, healthcare, and food. Transferring individuals to a third country where they endure inhumane living conditions constitutes another form of persecution, particularly as irregular migrants often qualify as members of a particular social group under the RC. These living conditions reinforce the need for a holistic approach when evaluating safety.

[56] See section 2.4.1.3 on UK-Rwanda plan; Amnesty International, 'Rwanda 2023' (2023) https://www.amnesty.org/en/location/africa/east-africa-the-horn-and-great-lakes/rwanda/report-rwanda/ accessed 17 November 2024; US Department of State, *2022 Country Reports on Human Rights Practices: Rwanda* (2023) https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/rwanda/ accessed 17 November 2024.
[57] ibid; Safety of Rwanda (Asylum and Immigration) Act 2024 (c. 8); The Guardian, 'Revealed: UK Granted Asylum to Rwandan Refugees While Arguing Country Was Safe' (27 January 2024) https://www.theguardian.com/world/2024/jan/27/revealed-uk-granted-asylum-to-rwandan-refugees-while-arguing-country-was-safe accessed 17 November 2024.

Further, violations of non-refoulement, such as sending individuals to unsafe third countries, can result in potential violations of their right to life. When asylum seekers are sent to an unsafe third country, their lives are vulnerable to persecution, potentially leading to fatalities. The HRC's opinion in the Teitiota case[58] and the ECHR's decisions[59] on refoulement, torture, and death highlight that returning individuals to places where they may face serious harm could potentially violate the right to life.

5.2.2.1 State Responsibilities against Refoulement in the Context of Extraterritorial Processing Centres

To fully comprehend the international legal guarantees against violations of the right to life in extraterritorial processing centres, it is necessary to assess how jurisdiction, attribution, and obligations under international law are applied in practice. Previous chapters have established the foundational principles of non-refoulement and jurisdictional responsibilities. This section builds on that foundation by examining how these principles are operationalized in the context of EPCs and what patterns of violations reveal about systemic shortcomings in state responsibility.

Externalising states exercise jurisdiction when they intercept asylum seekers, whether on the high seas or within their territories, and transfer them to third-country processing centres based on exercising effective control over transferred irregular immigrants. In such cases, their obligations under the principle of non-refoulement remain intact. [60] As the previously discussed Hirsi Jamaa v. Italy judgment illustrates, jurisdiction extends beyond territorial boundaries to situations where states exercise effective control or public

[58] *Ioane Teitiota v New Zealand*, Communication No 2728/2016, UN Human Rights Committee (24 October 2019) UN Doc CCPR/C/127/D/2728/2016, Although UNHCR has upheld the case, it acknowledged the potential for climate change to impact the right to life under ICCPR.
[59] *Al-Skeini and Others v United Kingdom*, App no 55721/07 (ECtHR, 7 July 2011); *Hirsi Jamaa and Others v Italy*, App no 27765/09 (ECtHR, 23 February 2012). Both decisions have indicated that refoulement may lead to serious harm and fatalities.
[60] See section 2.2.2.

authority over individuals. This principle applies equally to interceptions by entities such as the Australian Navy, which transfers individuals to centres in PNG or Nauru, and to territorial transfers within state borders, as proposed in agreements such as those between the UK and Rwanda.[61] Thus, externalising states bear primary responsibility for ensuring that their actions, whether through direct transfers or outsourcing to private actors, do not violate the principle of non-refoulement or endanger the right to life of asylum seekers.

This attribution is based on the principle established in international law, as outlined in the Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA), which govern international customary law norms. According to the ARSIWA (Article 4), an act of an organ of the state is considered an act of that state itself. [62] Consequently, when these agents act on behalf of the state, their conduct is imputed to the state itself, which remains accountable for ensuring compliance with international obligations. Similarly, when private actors are authorised by the state to perform transfers, their actions are also attributable to the state under ARSIWA, Article 5.[63] Even though these actors are not formal organs of the state, they are empowered by law to exercise governmental authority. Such delegation of authority renders the externalising state responsible for the actions of private actors conducting transfers.

The interconnectedness of non-refoulement and the right to life highlights distinct yet overlapping state obligations. Non-refoulement serves to shield individuals from risks of persecution or harm that may result in the loss of life, while the right to life imposes a broader obligation on states to actively protect individuals within their jurisdiction. Together, these principles underscore the need for externalising states to ensure that their migration policies align with international legal standards. The attribution of responsibility

[61] See section 3.4.
[62] ARSIWA art 4(1).
[63] ARSIWA art 5.

under ARSIWA reinforces this requirement, clarifying that states cannot evade responsibility by outsourcing asylum processing to private actors or relying on third-country agreements.

Looking from a jurisdictional point of view,[64] the externalising state bears the legal responsibility for adhering to international obligations related to the principle of non-refoulement throughout the transfer process based on international human rights instruments and customary law prohibiting refoulement as a legal guarantee to protect the right to life.[65] This analysis demonstrates that externalising states bear a dual responsibility: first, to uphold the principle of non-refoulement by ensuring transfers occur only to safe locations, and second, to guarantee that conditions in centres meet the minimum standards required to protect life and dignity. As this discussion reveals, violations of these obligations are not isolated incidents but reflect systemic gaps in the implementation of international human rights norms.

5.3 The Prohibition of Torture and CIDTP in the Context of Extraterritorial Processing Centres

Transferring intercepted irregular migrants to third countries for asylum processing jeopardises the prohibition against torture and CIDTP. Detaining asylum seekers in extraterritorial centres poses a risk of violating these prohibitions due to both the actions of officials and the inadequate conditions within the centres. This sub-chapter examines how the prohibition against torture and CIDTP is undermined by the mental and physical mistreatment of detainees, stemming from both officials' conduct and substandard conditions in the centres.

[64] See section 3.4.
[65] See section 2.2.2.

In recent decades, deterrence-based migration control policies include interception operations designed to prevent migrants from reaching destination states altogether. Increasingly, interception operations rely on EPCs located in third countries, either through agreements permitting destination states to operate centres within another state's jurisdiction,[66] or by enabling third states to intercept and detain individuals on behalf of destination states within their own jurisdiction.[67] This method paves the way for refoulement by sending individuals to places where their right not to be subjected to torture and ill-treatment would be violated.

5.3.1 The Prohibition of Torture and CIDTP in the Context of Actions or Omissions of Officials

Officials' treatment of detainees in EPCs is a primary reason for violations of the prohibition of torture and CIDTP. Extraterritorial centres in Nauru and PNG, established by agreements with Australia, and EU-supported centres in neighbouring countries, face allegations of torture violations. Ill-treatment by officials includes violence and physical or

[66] MoU 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 (signed 6 August 2013) https://www.dfat.gov.au/geo/papua-new-guinea/memorandum-of-understanding-between-the-government-of-the-independent-state-of-papua-new-guinea-and-the-government-of-austr accessed 12 February 2023; MoU between the Republic of Nauru and the Commonwealth of Australia, relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues (signed 29 August 2012) https://www.dfat.gov.au/geo/nauru/memorandum-of-understanding-between-the-republic-of-nauru-and-the-commonwealth-of-australia-relating-to-the-transfer-to-and accessed 12 February 2023; Parliament of Australia, 'Australia's offshore processing of asylum seekers in Nauru and PNG: a quick guide to statistics and resources' (2016) <https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/4129606/upload_binary/4129606.pdf;fileType=application/pdf> accessed 10 February 2023.

[67] *Joint Valletta Action Plan* (adopted at the Valletta Summit on Migration, Valletta, 11–12 November 2015) https://www.consilium.europa.eu/media/21839/action_plan_en.pdf accessed 19 February 2023; European Commission, 'EU Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa: Strategic Orientation Document' (2015) https://ec.europa.eu/trustfundforafrica/sites/default/files/eutf_noa_report_3.pdf accessed 19 February 2023; MoU 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 (signed 2 February 2017) <https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf> accessed 10 February 2023;

sexual abuse of detained irregular immigrants, including asylum seekers.[68] These ill-treatments fall into two categories: torture/punishment and inhuman, degrading acts.

Firstly, official actions in EPCs often fall within the scope of practices prohibited under international law, particularly the prohibition of torture and CIDTP. Torture, as defined by the ECtHR, involves 'deliberate inhuman treatment causing very serious and cruel suffering,' whether inflicted by state officials or private individuals acting with the consent of state agents.[69] Other acts attributing to inhuman, degrading, or cruel acts include insults, humiliation, or the infliction of mental or physical violence, particularly in detention settings where power dynamics between detainees and officials amplify vulnerability. . Unlike torture, inhuman treatment can occur without the specific intent to inflict pain.[70] The distinction lies in the purpose behind the treatment, but all forms of ill-treatment—whether classified as torture or CIDTP—violate fundamental international legal norms and state obligations under instruments such as the CAT, ICCPR, and ECHR.

To put forward a set of examples, the Amnesty International report (Island of Despair)[71] revealed police brutality in Australia's offshore detention camp in Nauru. Detainees faced physical assault by the Nauruan Police Force[72] and were forced to sign pre-written false documents.[73] These ill-treatments are considered violations of the prohibition of torture, even without the purpose of obtaining information or confessions. They also resemble in

[68] See above (n 4); NGOs from Australia, the USA (Indiana), and Thailand (Bangkok), 'Australia Violates the Torture Convention – A Joint Submission' (2016) https://mckinneylaw.iu.edu/human-rights/AustraliaUNConvAgainstInhumanDegradingTreat.pdf accessed 20 August 2024, 46 and 50 Australian Human Rights Commission, *Inspection of Christmas Island Immigration Detention Centre: Report (2018)* (2018) https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/australian-human-rights-commission-inspection-1 accessed 29 January 2023, 13; Department of Immigration and Border Protection, 'Review into the Events of 16-18 February 2014 at the Manus Regional Processing Centre' (Robert Cornall AO, 2014) https://www.homeaffairs.gov.au/reports-and-pubs/files/review-robert-cornall.pdf accessed 20 August 2024.
[69] ECHR art 3; CAT art 1; *Ireland v. the United Kingdom* App no 5310/71 (ECtHR, 18 January 1978)
[70] ibid.
[71] See above (n 4), Amnesty International, 'Island Of Despair: Australia's "Processing" Of Refugees On Nauru'.
[72] ibid 40.
[73] ibid.

nature to the report of violence by guards, including beatings, whippings, and electric shock in EU-supported immigration detention centres in Libya.[74] For ill-treatment to be considered torture, it must include a specific purpose, such as obtaining information or confessions.[75] Police misconduct in Nauru aimed to inflict physical pain and/or humiliate victims psychologically, categorizing it as CIDTP.[76]

Omissions by officials in extraterritorial detention/processing centres can result in serious violations of the prohibition of torture and CIDTP, highlighting systemic gaps in the management and oversight of these facilities. Such omissions, including failures to ensure adequate security measures or provide timely medical care, expose detainees to physical harm and psychological suffering. For example, the reported case of a gay man being raped and attacked in Nauru illustrates how insufficient protection by security forces can leave asylum seekers vulnerable to violence by local communities and other detainees.[77] This underscores a broader failure to meet states' positive obligations to safeguard individuals under their jurisdiction.

The relevance of these omissions extends beyond individual cases, reflecting a pattern across extraterritorial detention/processing centres where states externalise migration control. These centres are often located in politically unstable or resource-limited host states, which lack the capacity or willingness to ensure the safety and well-being of detainees. The recurring failure to provide basic protections—whether from local community violence or inadequate healthcare—points to a systemic issue: externalisation inherently involves the delegation of responsibilities to contexts where oversight is weak

[74] See above (n 4), Human Rights Watch, 'No Escape from Hell: EU Policies Contribute to Abuse of Migrants in Libya'.
[75] CAT art 1.
[76] See above (n 4), Amnesty International (2019) and Human Rights Watch (2020) (n 4).
[77] Human Rights Law Centre, Refugee Council of Australia, and Kaldor Centre for International Refugee Law, ‘Submission to the Committee Against Torture’ (3 October 2022) https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/20221003_HRLC_RCOA_Kaldor_Centre_Submission_Committee_Against_Torture.pdf accessed 30 July 2024, 4.

and human rights guarantees are insufficient. These omissions are significant for understanding the broader implications of externalisation. By outsourcing detention/processing to third countries, externalising states not only create conditions conducive to violations but also distance themselves from responsibility. Such practices risk undermining international human rights norms, as they allow externalising states to circumvent their obligations while leaving asylum seekers in precarious and unsafe conditions. Omissions in security and care within these centres are not isolated incidents but emblematic of the structural flaws inherent in externalisation. To prevent further violations, states must establish robust mechanisms for oversight, monitoring, and accountability, ensuring that their delegation of responsibilities does not absolve them of their positive obligations to uphold the prohibition of torture and CIDTP.

5.3.2 The Prohibition of Torture and CIDTP in the Context of Conditions in Extraterritorial Processing Centres

Centres lacking appropriate conditions for a humane life subject refugees and asylum seekers to cruel, degrading, or inhuman treatment, as discussed in the context of right to life, often have poor and harsh conditions, such as overcrowded and unsanitary living areas, poor quality food and water, and inadequate healthcare,[78] constituting potential inhumane and degrading treatment. Thus, these conditions lead to physical or mental harm. There are examples of people suffering poisoning or severe infections due to poor quality food and water.[79] Additionally, these conditions can cause trauma, especially in children and women, due to overcrowded areas, lack of privacy, and inadequate health equipment.[80]

[78] Human Rights Watch, 'No Escape from Hell: EU Policies Contribute to Abuse of Migrants in Libya' (n 2).
[79] ibid.
[80] ibid.

Accordingly, violations of the prohibition of torture or CIDTP occur in centres where states fail to provide adequate and necessary living conditions.

Inhuman living conditions in extraterritorial detention centres are highlighted in international human rights reports. Inadequate medical care is a significant issue for refugees in detention centres, as noted in these reports. Amnesty International's medical records and testimonies revealed that refugees lack access to proper treatments and medications.[81] Depriving refugees of medical care or forcing them to receive improper care erodes basic human rights, including the prohibition of torture or CIDTP. Preventing appropriate medical care leaves people in inhuman and degrading conditions, potentially leading to death.

The prohibition of torture and CIDTP is not limited to intentional actions causing physical or mental pain. Negligence, such as not providing medical care, proper living areas, and food, also violates the prohibition of torture or CIDTP by humiliating and disregarding human dignity, causing physical and psychological pain. Not only negligence of duty, such as failure to provide appropriate medical care to detained refugees, but also the living conditions in which refugees are forced to live constitute inhuman and degrading treatments. When these conditions are applied by officials or with their knowledge to obtain information or confessions, it leads to torture. Inhuman living conditions, resulting from state negligence, which humiliate and degrade without seeking information or confessions, violate the prohibition of CIDTP.

The Australian Human Rights Commission's report, The Forgotten Children, disclosed miserable conditions in Nauru centres.[82] People lived in tents with 12-15 families under

[81] Amnesty International, 'Island Of Despair: Australia's "Processing" Of Refugees On Nauru' (n 4) para 25.
[82] Australian Human Rights Commission (AHRC), 'The Forgotten Children: National Inquiry into Children in Immigration Detention 2014' (November 2014)

40-45 degrees Celsius without air conditioning, adequate water, or privacy.[83] These conditions are far below the average necessary for maintaining life in compliance with human health and dignity. Similarly, Amnesty International's report, No One Will Look for You,[84] highlighted inhuman and degrading treatments in Libyan immigration detention centres. In addition to raping, robbing, and shooting refugees by guards, lack of food and water and overcrowded cells also violate the prohibition of torture and CIDTP.[85] In parallel, living in inhumane conditions causes physical and mental harm, similar to physical violence. In both cases, the victim is subjected to physical and/or mental harms and feels inhuman. Moreover, if confessions or information are requested, victims are forced to provide it. For these reasons, inhumane, harsh conditions in these centres constitute torture or CIDTP based on the purpose of exposing individuals to these conditions.

UN authorities did not remain silent on torture and ill-treatment in Australian-operated EPCs. The Special Rapporteur on torture, Juan E. Méndez, investigated allegations of CAT violations for the Human Rights Council.[86] The investigation (Case No. AUS 1/2014) examined detention conditions, child detention, and increasing violence at Regional Processing Centres. The Australian government failed to provide proper conditions and stop violence, violating asylum seekers' rights under articles 1 and 16 of the CAT.[87] Another significant finding concerned allegations of ill-treatment against two asylum seekers at Manus Island detention centres.[88] The investigation concluded that the rights of

---

https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf accessed 20 March 2023.

[83] ibid 40.

[84] Amnesty International, ‘ ”No One Will Look For You” Forcibly Returned From Sea To Abusive Detention In Libya’ <https://www.amnesty.org.uk/files/2021-07/Libya%20report.pdf?VersionId=JhaTG5VuSUpzbdNpAFUPULNNAuuXnEKX> accessed 10 February 2023.

[85] ibid 40-41.

[86] Juan E Méndez, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (A/HRC/28/68/Add.1).

[87] ibid 7 para 19.

[88] ibid 8 para 20.

the two complainants to be free from torture, inhuman, or degrading treatment, were violated.[89] Hence, the OHCHR report showed that both direct violence and negligence causing physical and mental suffering violate CAT articles. Since violations of international human rights provisions continue in extraterritorial detention centres, the legal liability of states operating, managing, or funding these centres needs to be addressed concerning states' authority, control, or influence over the centres. in the upcoming section.

5.3.3 The Prohibition of Torture and CIDTP and Refoulement

As per introduced earlier, by exercising de facto jurisdiction over intercepted individuals during their transfer, Australia remains bound by its obligations under international law to prevent their exposure to harm.[90] This principle, establishing that a state exercises jurisdiction over individuals it intercepts and transfers, even when this occurs beyond its territorial borders. In such scenarios, the transferring state must ensure that the third country is genuinely safe, a requirement that includes adequate protections against torture and CIDTP.

In addition to direct refoulement, indirect refoulement represents a significant but often overlooked concern in the context of EPCs. Indirect refoulement may occur when individuals held in these centres are expelled or transferred onward by either the destination or host state to unsafe locations. For instance, should the host state expel migrants whose asylum claims are rejected or incomplete, it risks returning them to conditions of persecution or harm in their country of origin or another unsafe territory. Such instances are difficult to track due to the lack of transparency surrounding these processes and the unregulated nature of expulsions of irregular migrants. The UK-Rwanda agreement and Italy’s proposed plan with Albania raise concerns about the potential for

[89] ibid para 26.
[90] See section 3.4.

such scenarios, given that these agreements do not guarantee robust oversight mechanisms to prevent onward refoulement. [91]

The legal obligations of host states are particularly relevant here. As states with territorial jurisdiction over detention centres, host states are bound to uphold the principle of non-refoulement under the CAT, ICCPR, and other human rights treaties. Even if these states are not directly responsible for the initial transfer of individuals, their role in detaining and potentially expelling asylum seekers creates a significant risk of indirect refoulement. This is especially pertinent in cases where host states do not provide sufficient legal safeguards or oversight to prevent onward transfers to unsafe territories. While concrete examples are difficult to identify due to the opacity of such practices, the potential for violations remains a critical concern that warrants closer examination and monitoring.

Indirect refoulement may also implicate the externalising state, particularly when it retains significant influence over the operations of the detention centres. For example, Australia's financial and administrative control over centres in Nauru and PNG demonstrates how an externalising state can exercise effective control over the conditions and decisions affecting detainees. If individuals are expelled or transferred onward to unsafe territories from these centres, Australia could be held responsible for contributing to violations of the principle of non-refoulement under ARSIWA. [92] The shared control of these centres thus creates a complex web of responsibilities, where both the host and externalising states must ensure compliance with their international obligations.

---

[91] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the Provision of an Asylum Partnership to Strengthen Shared International Commitments on the Protection of Refugees and Migrants (UK-Rwanda Agreement) [2024] UKTS 20; MoU between the Government of the Italian Republic and the Council of Ministers of the Republic of Albania on the Establishment of Reception Centres for Migrants Rescued at Sea (Italy-Albania Agreement) (signed 6 November 2023).

[92] ARSIWA art 16.

The interplay between the principle of non-refoulement and the prohibition of torture and CIDTP highlights the dual obligations of states operating within extraterritorial arrangements. While direct transfers to unsafe third countries violate non-refoulement outright, the failure to prevent indirect refoulement further exacerbates the risks faced by detainees. This is particularly troubling in the context of agreements like the Italy-Albania plan, where assurances about conditions and safeguards in the host country have been called into question. [93] These cases underscore the systemic flaws inherent in externalisation, which often rely on delegating responsibilities to third parties while distancing the externalising state from direct responsibility.

A notable illustration of these risks can be seen in the UK-Rwanda plan, where—prior to its repeal by the new government—the UK Supreme Court in *R (AAA and Others) v Secretary of State* affirmed that the transfer of refugees to EPCs could lead to violations of the principle of non-refoulement and the prohibition of torture and CIDTP, highlighting critical concerns about the operationalisation of EPCs. [94]

To address these challenges, states must take proactive steps to ensure that extraterritorial arrangements do not facilitate violations of the principle of non-refoulement. This includes conducting rigorous assessments of host states' capacities to protect asylum seekers, establishing robust mechanisms to monitor and prevent indirect refoulement, and ensuring that international human rights standards are consistently upheld. The risks associated with indirect refoulement highlight the urgent need for enhanced responsibility and oversight in the operation of extraterritorial detention centres, as the lives and dignity of asylum seekers remain at stake.

[93] See above (n 91) Italy-Albania agreement.
[94] *R (AAA and Others) v Secretary of State for the Home Department* [2023] UKSC 55, [42].

5.3.4 State Responsibilities on The Prohibition of Torture and CIDTP

To thoroughly explore the international legal guarantees surrounding the prohibition of torture and CIDTP, it is essential to clarify the concepts of international obligations, as well as the principle of jurisdiction and attribution, which play a pivotal role in determining these obligations.

The externalising state's obligations do not end with the act of transfer. For instance, if individuals suffer torture or CIDTP in the detention centre due to acts of Australian agents or policies, Australia will retain responsibility under international law as acts of agents are attributed to that state.[95] As argued in jurisdiction analysis and above in the right to life, extraterritorial jurisdiction arises when an externalizing state exercises public authority or power causing effective control over individuals or territories outside its borders.[96] This principle underscores that states cannot evade their obligations under international human rights law simply by outsourcing detention or migration control to third countries. When the externalising state exercises authority or control over individuals in detention/asylum processing centres—whether through direct involvement of its agents or through administrative and financial oversight—effective control and, by extension, jurisdiction are established.[97] These triggers obligations under international human rights treaties such as the ICCPR and CAT to prevent torture and CIDTP, regardless of the location of the individuals involved.

Additionally, if violations occur without direct externalizing states' (like Australia) control, the jurisdiction and corresponding obligations shift to the host state, which holds territorial jurisdiction over the detention centre. Thus, determining jurisdiction based on functional

[95] ARSIWA art 4.
[96] See sections 3.2.1 and 3.4.
[97] ibid.

control is pivotal in attributing responsibility for violations of the prohibition of torture and CIDTP. Accordingly, negligence or acts by host states can also implicate externalising states if a causal link exists between their actions and the resulting violations. For example, if Australia, as an externalising state, retains significant influence over detention centres through funding or policy directives, it can share responsibility with the host state for any failures to meet international standards. Also, if the host state acts under the directives of Australian officials, such actions are attributed to Australia.[98] This raises the issue of shared responsibility where multiple states exercise control over the same situation. [99] Particularly in the context of extraterritorial detention/processing centres, externalising and host states often operate in overlapping capacities.

Therefore, legal responsibility of externalizing states exercising jurisdiction over people during transfers to EPCs and keeping asylum seekers there depend on attribution of acts causing violations of the prohibition of torture and CIDTP. As discussed above in the context of states' responsibilities regarding the right to life, the actions of the externalizing state's own organs, private firms, and host state officials exercising the externalizing state's authority during transfers or while holding individuals in these centres are attributed to the externalizing state.[100] Therefore, the externalizing state is responsible for violations of the prohibition of torture and CIDTP that occur during transfers or in the existing centres. However, as discussed in the context of states' responsibilities regarding the right to life and as outlined in the responsibility of EU states, an externalizing state cannot be held responsible due to the lack of attribution if it merely provides material support and does not establish or manage a centre that facilitates acts of torture and ill-treatment.

[98] ARSIWA 16.
[99] ibid.
[100] ARSIWA 4-6.

States under responsibility are held responsible for acts of torture and CIDTP due to the provisions outlined in the international human rights instruments they have signed, as well as the jus cogens nature of the prohibition of torture.[101] Not only international regulations explicitly prohibiting torture and CIDTP, but also those enshrining non-refoulement, along with the customary law character of this principle, serve as an international legal guarantee for refugees including asylum seekers held in these centres. This is because one of the primaries aims of this principle is to protect individuals from torture and CIDTP. International legal guarantees protecting the prohibition of torture and CIDTP are absolute rights under international law, and since no exceptions are allowed, reasons such as protecting national security or controlling irregular migration do not constitute exceptions. Therefore, this does not render this externalization method that violates this prohibition lawful. Nevertheless, if irregular immigrants including refugees and potential asylum seekers are sent to a centre established in a safe country in a way that does not violate this prohibition, and if the conditions in the centre do not subject individuals to ill-treatment or torture, this method may be considered lawful. However, in such a case, it is necessary to examine whether other fundamental human and refugee rights, such as the right to seek asylum, are violated when assessing the lawfulness of the method.

5.4 The Right to Seek Asylum in the Context of Extraterritorial Processing Centres

The externalised asylum process, which extends the destination state's jurisdiction to a third country, has significant implications for the right to seek asylum. This process typically involves interception or detention, followed by the transfer of asylum seekers to

[101] International Law Commission, 'Draft Articles on the Responsibility of International Organizations with Commentaries, Yearbook of the International Law Commission' (United Nations 2011), commentary to Article 26; Erika de Wet, 'Jus Cogens and Obligations Erga Omnes' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013).

offshore centres for assessment by the receiving/host state. [102] Such systems, established through bilateral agreements or memoranda of understanding between transferring and receiving states, often complicate or undermine the ability of irregular immigrants to seek asylum in the destination state.[103] The transfer of refugees to third countries may frustrate their right to seek asylum, particularly when these individuals are prevented from reaching the safe destination, they initially sought to escape persecution.

It is important to acknowledge, however, that the extent to which externalisation impacts the right to seek asylum varies depending on the conditions in the receiving state. If the receiving state is a safe country that provides robust protection, the externalisation process may not inherently violate the right to seek asylum. Conversely, when refugees are transferred to countries where protection standards are inadequate, significant human rights concerns arise. This discussion connects to the broader concept of a safe country, explored earlier in the thesis, which underscores the necessity of ensuring that receiving states meet the requisite criteria for safety and protection under international law.[104]

Holding irregular immigrants including refugees and asylum seekers in centres within the receiving state until their asylum or protection requests are decided raises additional concerns. While this practice does not inherently violate rights, it may do so under certain conditions—such as when individuals are subjected to prolonged detention or denied access to adequate legal procedures. The rights at risk include the right to leave any

[102] David James Cantor et al, 'Externalised Border Controls' (2022) 34(1) International Journal of Refugee Law 120, 141.
[103] See above (n 66); Australia–Malaysia Asylum Seeker Transfer Agreement (27 July 2011):This agreement was struck down by the Australian High Court and never entered into operation; Treaty between the United States of America and Cuba (29 May 1934) art 3; See above (n 91) United Kingdom and Rwanda.
[104] See section 2.2.1 regarding safe country.

country, the right not to be subjected to refoulement, and the right not to be penalised for irregular entry or residence.[105]

Transferring asylum seekers to extraterritorial detention/processing centres and holding them there thus risks violating these fundamental rights, directly impacting their ability to seek asylum.[106] Such practices highlight the tension between states' efforts to externalise migration control and their obligations under international law to protect asylum seekers. This section examines the specific ways in which externalisation impacts the right to seek asylum and evaluates the available international legal guarantees designed to prevent such rights violations.

5.4.1 The Right to Seek Asylum and The Right to Leave in Extraterritorial Processing Centres

First, we will explore how the right to leave is violated for transferred and detained irregular immigrants through extraterritorial asylum processing. The externalized asylum process, from intercepting immigrants and detaining them in extraterritorial centres to their asylum decision, affects the right to leave.[107] Externalizing states prevent irregular immigrants from entering by frustrating their right to leave.

---

[105] Dallal E. Stevens, 'The Law's Approach to Detention of Asylum Seekers: Help or Hindrance?' (2010); Jelena Ristik, 'The Right to Asylum and the Principle of Non-Refoulement Under the European Convention on Human Rights' (2017) European Scientific Journal, ESJ 13, 108; Joanna Kuruçaylıoğlu, 'The Principle of Non-Refoulement within the Deportation Procedure' (2021) Studia Administracyjne.

[106] Emilie McDonnell, 'Challenging Externalisation Through the Lens of the Human Right to Leave' (2021) 33(4) IJRL 715, 731; IACHR, 'IACHR Urges Honduras and Guatemala to Guarantee the Rights of People in the Migrant and Refugee Caravan' (Press Release 37/19, 19 February 2019) https://www.oas.org/en/iachr/media_center/PReleases/2019/037.asp accessed 4 March 2024; Hurst Hannum, *The Right to Leave and Return in International Law and Practice* (Martinus Nijhoff 1987) 50; Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 384; Elspeth Guild, *The Right to Leave a Country* (Issue Paper, Council of Europe Commissioner for Human Rights 2013) 25–26; Nikolas Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27 EJIL 591, 595–96; Moreno-Lax (n 2), 348–54; Violeta Moreno-Lax, 'Intersectionality, Forced Migration, and the Jus-Generation of the Right to Flee: Theorising a Composite Entitlement to Leave to Escape Irreversible Harm' in Başak Çalı, Ledi Bianku, and Iulia Motoc (eds), *Migration and the European Convention on Human Rights* (OUP 2021) 43–83.

[107] ibid.

Violations of the right to seek asylum can begin even during interdiction of refugees[108] before the detention nor the transfer. Interception being discussed in the previous chapter, this sub-heading will specifically discuss if violations of the right to leave lead to breaches of the right to seek asylum in other countries as a direct result of holding individuals in an extraterritorial detention centres. Holding refugees in centres and not allowing them to leave until their asylum requests are decided significantly threatens the right to leave. Transferred refugees face an indefinite process until granted asylum or agreeing to voluntary return.[109] Throughout this process, refugees are unable to leave as officials or private companies control exits.[110] These measures in extraterritorial centres infringe on the right to leave, leading to violations of the right to seek asylum.

According to international human rights law, the right to asylum comprises two rights: the right to leave any country, including one's own, and the right to seek and enjoy asylum from persecution in other countries.[111] These rights are recognized under instruments such as the UDHR (Article 14) and the ICCPR (Article 12).[112] In order to seek asylum in other countries, refugees must have the opportunity to exercise the right to apply for asylum. However, before that, the right to leave must first be made available to refugees by states due to its nature. Therefore, states aiming to reduce asylum requests hinder refugees from entering their territories to prevent them from applying. As a result, this chain of association leads to holding refugees in extraterritorial centres, preventing them from reaching the destination state to apply for asylum.

---

[108] See section 4.4.
[109] Tristan G Creek, 'Starving for Freedom: An Exploration of Australian Government Policies, Human Rights Obligations and Righting the Wrong for Those Seeking Asylum' (2014) 18 *The International Journal of Human Rights* 479-507, 487-488.
[110] Amnesty International, 'Island Of Despair: Australia's "Processing" Of Refugees On Nauru' (n 4);
[111] UDHR art 14 states 'Everyone has the right to seek and to enjoy in other countries asylum from persecution.'; ICCPR art 12(2) states 'Everyone shall be free to leave any country, including his own; Ekin Deniz Uzun, 'Pushback of Refugees Under International Law: A Conceptual Analysis' (2022) 39(48) Annales de la Faculté de Droit d'Istanbul 498, 505.
[112] ibid.

McDonnell reiterated the link between the right to leave and the right to seek asylum in Australia's case.[113] Holding refugees in extraterritorial centres frustrates the right to leave and the right to seek asylum, as indefinite detention obstructs reaching the destination country. Thus, violations of the right to leave and the right to apply, which constitute the right to seek asylum, are evident as a result of this type of externalization of migration controls.

Restrictions on the freedom of movement of refugees at extraterritorial detention centres became the subject of the Namah v. Pato case held by the Supreme Court of PNG regarding the right to liberty.[114] The opposition leader argued that holding people in Manus Island camp violated the right to personal liberty in PNG's constitution.[115] The case focused on the bilateral agreements signed between PNG and Australia, which aimed to transfer intercepted refugees from Australia to Manus Island until a decision was made on their asylum requests for resettlement in PNG.[116] The Regional Resettlement Arrangement and MoU formed the legal basis for holding transferred refugees in extraterritorial centres under the Pacific Solution. Therefore, a verdict against the agreement and memorandum, including a provision against the constitution of PNG, would eliminate the legal basis for the detention centre.

In the end, the Supreme Court ruled that the bilateral agreement, the legal basis for Manus Island detention centre, violated the refugees' right to liberty. Despite being a domestic court, the Supreme Court's ruling marked a turning point for the right to liberty of refugees in extraterritorial centres. The ruling also influenced scholars like Tan and Gammeltoft-Hansen on the link between violations of the right to leave and the right to seek asylum in

---

[113] McDonnell (n 106).
[114] Supreme Court of Papua New Guinea, *Namah v. Pato* (SC1497, 26 April 2016) http://www.paclii.org/pg/cases/PGSC/2016/13.html accessed 30 June 2024, arts 72 and 108.
[115] ibid; Nikolas Feith Tan and Thomas Gammeltoft-Hansen, 'A Topographical Approach to Accountability for Human Rights Violations in Migration Control' (2020) 21(3) *German Law Journal* 335, 349.
[116] See above (n 66).

extraterritorial centres.[117] Although the verdict focused on the right to liberty rather than the right to leave or the right to seek asylum, it provides an opportunity to discuss violations of the right to seek asylum due to the right to leave. The right to leave is part of the freedom of movement guaranteed under personal liberty in international law.[118] In the context, I argue the right to personal liberty includes the right to leave, allowing free movement. Consequently, violations of refugees' personal liberty at extraterritorial centres, by frustrating free movement, result in violations of the right to leave. Additionally, holding a person in a centre, breaching their right to leave, prevents them from reaching a destination to seek asylum. The right of held refugees to seek asylum in other countries, which is dependent on the rights constituting freedom of movement, is violated by the prevention of these rights at extraterritorial refugee detention centres.

5.4.1.1 Responsibilities of States on The Right to Leave Any Country to Protect the Right to Seek Asylum

When interception operations and transfers occur under the effective control of intercepting states or on vessels flying their flag, the intercepting state exercises jurisdiction over intercepted migrants.[119] This jurisdiction extends to decisions that may violate their right to leave any country, particularly when migrants are transferred to extraterritorial detention centres. The applicability of international legal guarantees on the right to leave depends on jurisdiction, as states are obligated to protect human rights within their jurisdiction.[120]

The status of transferred individuals is critical in determining the application of legal protections on the right to leave. Those transferred to extraterritorial detention centres are typically third-country nationals classified as irregular migrants. ICCPR Article 12(2),

[117] Nikolas Feith Tan and Thomas Gammeltoft-Hansen (n 115).
[118] ICCPR art 9, ECHR art 5, ACHR art 7, ACHPR art 6.
[119] See section 3.3.
[120] ECHR art 1; ICCPR art 12(1)

ECHR Protocol 4 Article 2(2), ACHPR Article 12(2), and ACHR Article 22(2) affirm that the right to leave applies regardless of citizenship or legal status, provided the transferring state exercises jurisdiction over them.[121] This means that individuals intercepted and transferred to extraterritorial locations to prevent their entry into a destination state still retain the right to leave any country, including their own. The status of detainees as asylum-seekers further reinforces the application of legal protections on the right to leave. Confining asylum-seekers in offshore processing centres—where their movement is severely restricted except in emergencies—amounts to a direct interference with their right to leave.[122]

For these guarantees to be enforceable, it must be established whether such transfers actively prevent individuals from leaving a country. If migrants have already departed from their country of origin before being intercepted, their act of leaving has been completed before the intercepting state's intervention. In such cases, the applicability of international guarantees on the right to leave may be contested. However, interpreting the right to leave exclusively as the physical act of crossing a border fails to capture its broader purpose, which is inherently linked to the right to seek asylum.

The Human Rights Committee's General Comment No. 27 on ICCPR Article 12 emphasizes that the right to leave is indispensable for the realization of other rights, particularly in cases where individuals are fleeing persecution or severe rights violations. [123] Scholars such as McDonnell[124] and Moreno-Lax[125] argue that restricting migrants in

[121] ICCPR art 12(2); ECHR art 2(2); ACHPR art 12(2); ACHR art 22(2); Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel 2005)
[122] See above (n 4), Amnesty International's "Island of Despair: Australia's 'Processing' of Refugees on Nauru"; Human Rights Watch's "Australia: Appalling Abuse, Neglect of Refugees on Nauru".
[123] HRC, General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/ Rev.1/Add.9, para 8
[124] Emilie McDonnell, 'Challenging Externalisation Through the Lens of the Human Right to Leave' (2024) 71 Netherlands International Law Review 119–154.
[125] Moreno-Lax (n 2).

extraterritorial locations where they cannot continue their journey effectively renders the right to leave meaningless. The ability to leave must include the opportunity to seek asylum in a country that ensures genuine protection.

Transferring intercepted migrants to extraterritorial detention centres, where they face indefinite detention or severe restrictions on their movement, constitutes a violation of the right to leave. These restrictions, combined with the absence of lawful pathways to asylum, directly interfere with this right. The Human Rights Committee, in GC No. 27, has stressed that the right to leave must be interpreted in a way that enables individuals to seek asylum without arbitrary restrictions. The detention of asylum-seekers in extraterritorial centres raises serious concerns regarding state compliance with these obligations.

Jurisdiction over individuals in EPCs can be established through two models: territorial jurisdiction exercised by the host state and personal jurisdiction exercised by the destination state. Territorial jurisdiction applies when the host state authorizes and operates such centres within its borders, making it responsible for ensuring compliance with human rights standards, including the right to leave.[126] Personal jurisdiction arises when the destination state exerts authority or effective control over the detention centres or individuals held there. This occurs when private contractors or destination state officials manage these facilities,[127] as in the case of Australia's offshore detention centres.

Destination states establish jurisdiction over extraterritorial detention centres when they exercise public powers or physical control over detained individuals.[128] Employing private actors to administer these centres or funding their operation amounts to an exercise of

[126] See section 3.2.
[127] ibid for personal jurisdiction.
[128] Elspeth Guild and Vladislava Stoyanova, *The Human Right to Leave Any Country: A Right to Be Delivered* (Brill 2020) 4 para 2.

jurisdiction.[129] Even when states delegate authority to private actors, these entities function as agents of the state, meaning their actions can be attributed to the destination state under international law. When a host state permits a destination state to establish and operate detention centres within its territory, public power is effectively transferred, reinforcing the externalizing state's jurisdiction over detained individuals.

Legal exceptions to the right to leave must be explicitly defined in international law and justified on recognized grounds such as national security, public order, or public health.[130] While states may invoke these justifications to restrict irregular migration,[131] such measures must be enforced by law and proportionate to their stated objectives. During the COVID-19 pandemic, for example, migration restrictions were framed as public health measures.[132] However, Heijer argues that preventing irregular migration alone is insufficient to justify a broad restriction on the right to leave,[133] unless such measures explicitly serve a lawful objective under human rights law.[134]

Proportionality is a crucial principle when assessing restrictions on the right to leave. Any measures taken to prevent irregular migration must balance state interests—such as public

---

[129] Committee Against Torture, Concluding Observations on the Fourth and Fifth Periodic Reports of Australia (26 November 2014) UN Doc CAT/C/AUS/CO/4-5, para 17;
Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Australia (9 November 2017) UN Doc CCPR/C/AUS/CO/6, para 35.
[130] ICCPR arts 3, 12 (2); Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 16 September 1963, entered into force 2 May 1968) ETS 46, arts 2(2),3; ACHPR arts 3,12(2); ACHR arts 3, 22(2).
[131] Department of Immigration and Citizenship, 'Response to the Australian Human Rights Commission Report on the Use of Community Arrangements for Asylum Seekers, Refugees and Stateless Persons Who Have Arrived to Australia by Boat' (2012) https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/diac-response-australian-human-rights-commission accessed 20 August 2024; Human Rights Committee, 'Views: Communication No 2094/2011, 108th session' UN Doc CCPR/C/108/D/2094/2011 (28 October 2013) ('*FKAG et al v Australia*') [6.1]–[6.7]; Human Rights Committee, 'Views: Communication No 2094/2011 & Communication No 2136/2012, 108th session, UN Doc CCPR/C/108/D/2094/2011 & CCPR/C/108/D/2136/2012' (28 October 2013) (*'MMM et al v Australia*') [6.1]–[6.7]; *Ferrer-Mazorra et al v United States* (Merits) (IACHR Report No 51/01, Case 9903, 4 April 2001) [88]–[96]; US Code of Federal Regulations, 8 CFR § 212.5.
[132] European Union Agency for Fundamental Rights, *Fundamental Rights of Refugees, Asylum Applicants and Migrants at European Borders* (2020) https://fra.europa.eu/en/publication/2020/fundamental-rights-refugees-asylum-applicants-and-migrants-european-borders accessed 15 September 2022.
[133] Den Heijer (n 35) 163
[134] ICCPR art 12(3); Ophelia Field, 'Alternatives to Detention of Asylum Seekers and Refugees' (Legal and Protection Policy Research Series, UNHCR 2006) 10-11.

order and security—against the impact on individual rights.[135] The large-scale interception and transfer of asylum-seekers to extraterritorial detention centres, without an individualized assessment, violates this principle. Guild and Stoyanova argue that such collective measures are inherently disproportionate, as they fail to consider the specific circumstances of the individuals affected, many of whom are fleeing persecution.[136]

In addition to these concerns, the indefinite detention of migrants in extraterritorial centres under restrictive conditions further undermines the principle of proportionality. Restricting individuals' ability to leave a country or seek asylum must be justified by law and necessary to achieve a legitimate aim. However, transferring people to extraterritorial locations specifically to prevent them from reaching safety undermines this justification.[137] Host states also bear responsibility in this context, as they act on behalf of externalizing states in implementing these restrictive measures. Where host states prevent individuals from leaving without a legitimate legal basis, they become complicit in violations of the right to leave. In such cases, the restrictions serve the interests of the destination state's externalization policies, rather than the public order or national security of the host state, making them both disproportionate and unlawful.

Legal guarantees protecting the right to leave any country are essential to safeguarding the right to seek asylum. When destination and host states implement measures that violate these guarantees, they undermine the broader framework of international refugee protection. To ensure compliance with these obligations, states must balance migration control objectives with the principles of proportionality, legality, and accountability,

[135] HRC No. 27 para 14; Guild and Stoyanova (n 110) 9; Daniel Ghezelbash, "International Law." *Refuge Lost: Asylum Law in an Interdependent World*. Cambridge: Cambridge University Press, 2018. 133–166. Page 133-134 Print. Cambridge Asylum and Migration Studies citing UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum seekers and Alternatives to Detention (2012) [34].
[136] ibid Guild and Stoyanova 14.
[137] Ghezelbash (n 135) 134.

ensuring that asylum-seekers held in extraterritorial detention are not deprived of their fundamental rights.

5.4.2 The Right to Seek Asylum and The Prohibition of Criminalization in Extraterritorial Processing Centres

The criminalization of irregular immigrants by keeping them at extraterritorial detention centres further infringes upon the right to seek asylum, compounding restrictions on freedom of movement. Destination states manage irregular immigrants by externalizing the asylum process, detaining refugees in these centres until their asylum requests are decided. While these states may not directly impose criminal penalties for irregular border crossings, the act of transferring asylum seekers to extraterritorial detention centres effectively prevents them from exercising their right to seek asylum. This indirect criminalization occurs by treating the act of seeking protection as a behaviour warranting punitive measures, such as detention or restriction of movement.

The primary objective of externalizing asylum processes is to deter irregular immigrants from reaching the destination state's territory where they could submit asylum applications.[138] This externalization process functions as a form of punishment against individuals attempting to exercise their international rights, including the right to seek asylum. This view reflects my position, as it stems from the structural consequences of externalization. By transferring asylum seekers to third countries, destination states not only remove individuals from the procedural guarantees available within their territorial borders but also subject them to restrictive environments where their movement is curtailed, and access to legal support is limited. These actions create a punitive context, discouraging individuals from pursuing their claims or even reaching safe destinations.

[138] Thomas Gammeltoft-Hansen and Nikolas Feith Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy' (2017) Journal on Migration and Human Security 5, 28, 31.

Although the act of crossing borders irregularly is not penalized explicitly, the treatment of asylum seekers in these centres demonstrates an intent to restrict their access to fundamental rights and protections, which amounts to an indirect criminalization of their efforts to seek refuge.

The EU Agency for Fundamental Rights (FRA) highlights the connection between the criminalization of irregular immigrants and the obstruction of the right to asylum.[139] The FRA underscores that custodial penalties should not be imposed on irregular immigrants or refugees fleeing countries where their life or freedom is at risk, as this violates Article 18 of the EU Charter of Fundamental Rights.[140] Although the FRA primarily addresses domestic detention, its conclusions are equally applicable to extraterritorial detention centres, which impose similar restrictions on liberty and obstruct the right to seek asylum.

Thus, violations of the right to liberty in these centres directly impact the right to seek asylum in the same way violations of right to leave do as articulated above. Arbitrary detention of intercepted refugees in extraterritorial centres, without adherence to international legal standards, violates the right to liberty[141] and subsequently the right to seek asylum.[142] Azadeh Dastyari and Asher Hirsch argue that such confinement aims to immobilize irregular immigrants, preventing them from accessing safe territories or

[139] European Union Agency for Fundamental Rights, 'Criminalisation of Migrants in an Irregular Situation and of Persons Engaging with Them' (2014) https://fra.europa.eu/sites/default/files/fra_uploads/fra-2014-criminalisation-of-migrants-1_en.pdf accessed 20 June 2023.
[140] ibid page 15.
[141] Ghezelbash (n 134) 134; Violeta Moreno-Lax, 'The Interdiction of Asylum Seekers at Sea: Law and (Mal)practice in Europe and Australia' (2017) Policy Brief 4, Kaldor Centre for International Refugee Law, 10 para 4; ICCPR art 9; ECHR art 5; ACHR art 7; ACHPR art 6.
[142] Goodwin and McAdam (n 105) 358-384; Ophelia Field with the assistance of Alice Edwards, 'Alternatives to Detention of Asylum Seekers and Refugees' (UNHCR Legal and Protection Policy Research Series, Research Paper No 11, April 2006) https://www.refworld.org/docid/4472e8b84.html accessed 19 June 2024; Alice Edwards, 'Back to Basics: The Right to Liberty and Security of Person and "Alternatives to Detention" of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants' (UNHCR Legal and Protection Policy Research Series, Division of International Protection, Research Paper No 17, April 2011) PPLA/2011/01.Rev.1 https://www.refworld.org/docid/4dc935fd2.html accessed 20 June 2024.

obtaining fair judicial review.[143] This immobilization keeps refugees from reaching destination countries and limits their ability to request asylum. An asylum seeker prevented from fully arriving in the destination country does not automatically have the right to request asylum there, and their access to judicial review is limited.[144]

5.4.2.1 Responsibilities of States on The Prohibition of Criminalization to Protect the Right to Seek Asylum

The prohibition of criminalizing irregular migration, as articulated in Article 31(1) of the RC, remains a cornerstone of international legal protections for the right to seek asylum.[145] Destination states exercising jurisdiction during the interception and transfer of irregular immigrants to extraterritorial detention centres bear primary responsibility for ensuring compliance with these provisions. Jurisdiction is often established through effective control, as seen in practices like Australia's, where private actors are employed to administer detention centres with funding and oversight from the destination state.[146]

The responsibility of host states differs from that of destination states under Article 31(1). While host states may not directly criminalize refugees for irregular entry, they share responsibility when they permit the establishment and administration of detention centres within their territory. Under Article 16 of the ARSIWA, host states can be held responsible for aiding or assisting destination states in committing wrongful acts.[147] This occurs when host states knowingly enable detention centres that impose punitive measures on asylum seekers. Whether these centres are run by private actors, the destination state, or host state

[143] ibid Field and Edwards. Azadeh Dastyari and Asher Hirsch, 'The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy' (2019) 19 Human Rights Law Review 435, 444 para 4.
[144] ibid; Anne McNevin, 'Border Policing and Sovereign Terrain: The Spatial Framing of Unwanted Migration in Melbourne and Australia' (2010) 7(3) Globalizations 407, 413 para 4.
[145] RC 31(1).
[146] See above (n 4), Amnesty International, 'Island Of Despair: Australia's "Processing" Of Refugees On Nauru', 9-14;
[147] ARSIWA art 16.

officials,[148] the complicity of host states reinforces their responsibility for violations of international legal guarantees.

To invoke Article 31(1), specific conditions must be met. Refugees must come directly from a country where their life or freedom was threatened, and the state must evaluate the reasons for their departure to distinguish refugees from other migrants e.g. economic migrants. Additionally, individuals must promptly inform authorities of their presence and the reasons for their irregular entry to benefit from these protections. For instance, under the UK's proposed asylum policy, refugees who have already entered the destination state's territory clearly meet these conditions, establishing the destination state's obligations under Article 31(1). [149]

The punitive nature of extraterritorial detention centres makes them incompatible with Article 31(1).[150] These centres often replicate prison-like conditions, [151] with asylum seekers subjected to prolonged confinement, restricted movement, and denial of rights granted to domestic detainees, such as family visits or conditional release. Such practices amount to punishment for irregular entry or presence, contravening the RC.

Not all asylum seekers in extraterritorial detention centres qualify for protection under Article 31(1). Refugees who do not come directly from a country of persecution or fail to meet the procedural requirements for notifying authorities may lose these protections. However, other legal safeguards, such as the right to leave any country (ICCPR Article 12) or the principle of non-refoulement, remain applicable. These protections highlight the

[148] See above (n 4), Amnesty International, 'Island Of Despair: Australia's "Processing" Of Refugees On Nauru', 9-14.
[149] See chapter 2.3.1; UK Government, 'UK-Rwanda Treaty: Provision of an Asylum Partnership' https://www.gov.uk/government/publications/uk-rwanda-treaty-provision-of-an-asylum-partnership/uk-rwanda-treaty-provision-of-an-asylum-partnership-accessible#part-2--relocation-arrangements accessed 02 June 2024
[150] RC art 31(1);
[151] ibid; Human Rights Watch, 'Greece: Inhumane Conditions at Land Border' (27 July 2018) https://www.hrw.org/news/2018/07/27/greece-inhumane-conditions-land-border accessed 15 August 2023.

broader framework of international obligations that states must uphold, even when Article 31(1) does not apply.

Ultimately, the externalization of asylum processes through detention in extraterritorial centres raises significant concerns under Article 31(1) of the RC. By deterring asylum seekers from accessing safe territories and subjecting them to punitive conditions, destination states breach their obligations under international law. Host states, by facilitating these practices, also share responsibility for violations of the prohibition of criminalization. Ensuring compliance with these international protections is critical to safeguarding the right to seek asylum and preventing the erosion of refugee rights.

According to the RC(Article 31(2)), individuals who have committed serious crimes or acts contrary to the principles of the United Nations are exempted. However, apart from these exceptions, it is not lawful under the RC to send individuals to EPCs for reasons such as national security, public order, or migration control. However, at the same time, states have the right, based on their sovereignty, to admit or refuse any individual into their country, and international law has not imposed an obligation on states to guarantee asylum to individuals.[152] On the other hand, states cannot, solely based on their authority, remove irregular migrants from their borders and detain them in EPCs until their asylum claims are processed. This amounts to a form of punishment, as it denies individuals the right to freely seek asylum in both the current country and in any other country, along with other financial and procedural rights related to that.

[152] María-Teresa Gil-Bazo and Elspeth Guild, 'The Right to Asylum' in Cathryn Costello, Michelle Foster, and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (OUP 2021) 867, 872-3.

5.4.3 The Right to Seek Asylum and Refoulement in Extraterritorial Processing Centres

The right of refugees detained in extraterritorial detention centres to seek asylum is violated because destination states do not comply with their international obligations under the principle of non-refoulement. Just as violations of the principle of non-refoulement arise from interception operations discussed in the previous chapter,[153] these violations must also be addressed in the context of transferring intercepted refugees to extraterritorial detention camps. During interception operations, particularly pushbacks, refoulement occurs when intercepted refugees are forced away from the external national borders of destination countries and towards the territorial areas of their countries of origin or transit. However, in interception operations aimed at transferring refugees to extraterritorial detention camps, refoulement directly results from transferring refugees to places where the conditions pose a threat to their life and freedom.[154] When the conditions outlined in international law provisions on non-refoulement are not met, the right to seek asylum of transferred irregular immigrants is also violated due to the breach of the right not to be refouled.[155]

The principle of non-refoulement serves as a guarantee against restrictions on freedoms, including freedom of movement, as mentioned in the RC(Article 33(1)). Detaining transferred irregular immigrants in EPCs constitutes a violation of freedom of movement, as detained refugees cannot leave the host country until a decision is made about their

[153] See sections 4.2.3, 4.3.3 and 4.4.2.
[154] Jenny Poon, 'Non-Refoulement Obligations in Offshore Detention Facilities' (E-International Relations, 16 October 2018) para 6 https://www.e-ir.info/2018/10/16/non-refoulement-obligations-in-offshore-detention-facilities/ accessed 20 August 2024; UNHCR, 'Guideline 8: Conditions of Detention Must Be Humane and Dignified' in *Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) https://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html accessed 20 August 2024.
[155] See section 2.2.2.

asylum requests or voluntary resettlement. Thus, violating the principle of non-refoulement by transferring refugees to extraterritorial detention centres[156] also eliminates a legal guarantee for the freedom of movement of transferred detainees/refugees. As a result, the right to seek asylum is threatened by the violation of the legal guarantee of freedom of movement, which is protected by the principle of non-refoulement, as the right to seek asylum can only be exercised within the territory of the destination state. Consequently, the principle of non-refoulement serves not only as a legal guarantee for freedom of movement but also as a counterpart to the right to seek asylum.

5.4.3.1 Responsibilities of States on The Right not to be Refouled to Protect the Right to Seek Asylum

The prohibition of refoulement is a cornerstone of international law and serves as a key legal guarantee to protect the right to seek asylum.[157] This guarantee applies to refugees who are under the jurisdiction of a state, either through territorial control or effective control over individuals, as discussed in Chapter 3. Non-refoulement applies to refugees as defined by the RC (Article 1(A)(2)), which includes individuals outside their country of nationality who have a well-founded fear of persecution for one of the reasons listed above. Importantly, the protection afforded by Article 33(1) is not conditional upon formal recognition of refugee status by administrative processes. Instead, it applies to anyone who meets the definition of a refugee, regardless of whether this status has been officially determined. Scholars and international jurisprudence consistently interpret non-refoulement as extending to individuals whose refugee status has not yet been adjudicated,

[156] Gursimran Kaur Bakshi, Australia's Pacific solution for asylum-seekers neglects human dignity para 6 https://blogs.lse.ac.uk/socialpolicy/2020/09/01/australias-pacific-solution-for-asylum-seekers-neglects-human-dignity/

[157] See section 2.2.2 and 4.4.2 regarding discussion of right to seek asylum and principle of non-refoulement in the context of interception.

emphasizing the need to safeguard those fleeing persecution from being returned to harm.[158]

The prohibition of refoulement applies when destination states transfer intercepted irregular immigrants to EPCs, particularly if these centres fail to provide adequate safeguards against threats to life or freedom. The destination state exercises jurisdiction over these individuals at the moment of interception, either through territorial jurisdiction or by exercising effective control over them, thereby triggering the state's obligations under Article 33(1) of the RC.

Additionally, Article 3 of the CAT complements the RC by prohibiting the return of any individual to a country where there are substantial grounds to believe they would face torture. [159] Unlike Article 33(1), Article 3 of the CAT is not limited to individuals meeting the definition of a refugee and protects anyone at risk of torture. This distinction underscores the broader applicability of non-refoulement under the CAT, particularly in cases where harsh conditions in extraterritorial detention centres may amount to torture or inhuman treatment. [160]

For non-refoulement obligations to apply, it must be demonstrated that individuals transferred to extraterritorial detention centres face risks of persecution, torture, or other ill-treatment. The conditions and treatment in these centres are therefore critical to determining whether transfers constitute refoulement. As discussed in 5.2 and 5.3, inadequate healthcare, overcrowded living conditions, and restrictive environments in extraterritorial detention centres amount to inhuman or degrading treatment under Article 7

[158] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007) 201–210; María-Teresa Gil-Bazo, 'Refugee Protection under International Human Rights Law: From Non-Refoulement to Residence and Citizenship' (2015) 34 Refugee Survey Quarterly, 25–30; Thomas Gammeltoft-Hansen, *Access to Asylum: Refugee Protection and the Reach of the Non-Refoulement Principle* (Cambridge University Press 2011) 55-70.
[159] CAT art 3.
[160] See above (n 4).

of the ICCPR and Article 3 of the ECHR. [161] Additionally, if such conditions are used intentionally to punish individuals for irregular migration, they qualify as torture under Article 1 of the CAT. [162]

While the primary responsibility for refoulement lies with the destination state transferring individuals to extraterritorial detention centres, host states may also bear responsibility under international law. Host states facilitate the externalization of asylum processes by providing territories for the establishment and operation of these centres.[163] Under ARISWA (Article 16), host states can be held responsible for aiding or assisting destination states in committing internationally wrongful acts, including violations of non-refoulement.[164]

The host state's role is particularly relevant when it knowingly allows its territory to be used for detention centres where refugees and asylum seekers are subjected to inhuman or degrading treatment. Such assistance satisfies the criteria of Article 16 of ARSIWA if it is demonstrated that, [165] the host state provides assistance with knowledge of the wrongful act (i.e., refoulement); or the act would not have occurred without the host state's support, such as permitting the construction and operation of detention centres within its territory. Moreover, if host states themselves transfer detainees from these centres to other unsafe locations, they may commit direct acts of refoulement.[166] These actions reinforce the

[161] ICCPR art 7; ECHR art 3; see above 5.2.2 and 5.3.3.
[162] CAT art 1(1).
[163] Kaldor Centre for International Refugee Law, 'Offshore Processing: An Overview' https://www.kaldorcentre.unsw.edu.au/publication/offshore-processing-overview accessed 7 June 2022; Parliament of Australia Department of Parliamentary Services, 'The "Pacific Solution" Revisited: A Statistical Guide to the Asylum Seeker Caseloads on Nauru and Manus Island' https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1893669/upload_binary/1893669.pdf;fileType=application/pdf accessed 10 June 2022.
[164] ARSIWA art 16/b.
[165] ARSIWA art 16/a.
[166] ARSIWA 16.

shared responsibility of host and destination states in ensuring compliance with the prohibition of refoulement.

The principle of non-refoulement is widely recognized as a norm of customary international law, binding all states irrespective of their treaty obligations.[167] This status underscores its universal applicability, including to states that are not parties to the RC or the CAT. Destination states that transfer irregular immigrants to extraterritorial detention centres with conditions amounting to torture or inhuman treatment violate this principle, regardless of their treaty commitments. Similarly, host states permitting such practices may also breach their obligations under customary international law.

While states may claim that transferring irregular immigrants to extraterritorial centres serves legitimate objectives, such as managing migration, protecting n national security or public order, these measures must be balanced against the fundamental rights of individuals, including the right not to be refouled. Based on the exceptions in the RC(Article 33(2)) and the CAT (Article 3), an individual who poses a threat to public order and national security may be subject to refoulement. However, the principle of proportionality, discussed earlier, also plays a crucial role in assessing whether the actions of destination states comply with non-refoulement obligations. Moreover, it must be clearly evaluated in accordance with the law whether the individual to be subjected to refoulement genuinely poses a threat to public order and national security, and a legal decision should be made by establishing a proportionality between the potential danger resulting from refoulement and the threat posed by the individual if not returned. However,

[167] Guy S Goodwin-Gill, Jane McAdam, and Emma Dunlop, *The Refugee in International Law* (4th edn, OUP 2021) 300–306, citing Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, Ministerial Meeting of States Parties, UN Doc HCR/MMSP/2001/09 (16 January 2002) para 4 https://www.unhcr.org/sites/default/files/legacy-pdf/419c74d64.pdf accessed 29 July 2024.

when irregular immigrants are sent to such centres, they are often intercepted before reaching the destination country without such an evaluation being conducted.

The prohibition of refoulement is an essential safeguard for the right to seek asylum and imposes obligations on both destination and host states. Destination states bear primary responsibility for ensuring that transfers to extraterritorial detention centres do not expose individuals to risks of persecution, torture, or inhuman treatment. Host states, as assisting states in alignment with the attribution of ARSIWA(Article 16), share responsibility when they knowingly permit such practices within their territories.[168] Ensuring compliance with non-refoulement requires states to prioritize the rights of individuals over migration control objectives, aligning their practices with international human rights standards.

5.5 Conclusion

The findings in this chapter highlight a fundamental erosion of human and refugee rights resulting from the establishment and operation of EPCs. While some detainees are granted asylum or resettlement, many face delays, restricted judicial review, violence, and psychological harm due to their uncertain status. This raises concerns over whether EPCs genuinely uphold fair asylum procedures or function primarily as punitive deterrents. Despite their stated aim of migration control, these centres frequently fail to meet minimum protections under international human rights and refugee law, particularly regarding the right to life, freedom from torture and CIDTP, and the right to seek asylum.

This chapter first examined EPC conditions and their impact on the right to life. Inadequate healthcare, substandard conditions, and violence by officials directly endanger detainees' lives. Under ICCPR Article 6 and ECHR Article 2, states operating or funding EPCs must

[168] ARSIWA art 16.

ensure individuals under their jurisdiction are not arbitrarily deprived of life. Failure to meet basic health, security, and welfare standards constitutes a breach of positive and negative obligations to protect life.

The chapter also addressed torture and CIDTP in EPCs, where indefinite detention, poor conditions, and acts of violence are prevalent. Such practices violate CAT, ICCPR, and ECHR obligations. States funding or managing EPCs cannot evade responsibility simply because these centres are offshore. Under functional jurisdiction, they remain accountable when they exercise control or significant influence over detainees and centre operations. The CAT mandates proactive measures to prevent conditions that cause severe suffering, extending to monitoring private contractors and host authorities.

Additionally, EPCs obstruct the right to seek asylum by restricting access to destination states' asylum systems, undermining the RC. The principle of non-refoulement, enshrined in RC Article 33(1) and CAT Article 3, prohibits transfers to unsafe territories. As a customary norm, it binds all states, requiring them to ensure transfers only to genuinely safe locations. Moreover, using EPCs as punitive measures for irregular entry violates RC Article 33, further restricting asylum rights.

The chapter also examined the role of host states in enabling EPCs. By providing territory or operational support, host states facilitate externalization of asylum responsibilities. Under ARSIWA (Articles 16 and 17), host states may be held responsible if they aid or assist in internationally wrongful acts, such as facilitating inhuman treatment or refoulement.

Although states justify EPCs on national security, public order, or anti-trafficking grounds, these do not override non-derogable rights like the right to life, prohibition of torture, and non-refoulement. Since non-refoulement also safeguards the right to seek asylum, any

restrictions on asylum access are precluded by its absolute nature. Even if conditions in EPCs improved, forcibly transferring and detaining individuals without consent would still restrict their ability to seek asylum elsewhere, posing ongoing risks.

Overall, this chapter demonstrates that EPCs fundamentally compromise human rights standards, exposing asylum seekers to harm while shifting the burden of migration management to third countries. These practices depart from international human rights and refugee law, making both externalizing and host states accountable.

In conclusion, stronger accountability mechanisms are urgently needed to address the human rights violations inherent in EPCs. As states expand externalization practices, they must align their actions with treaty and customary law obligations, particularly regarding the right to life, prohibition of torture and CIDTP, and right to seek asylum. Enhanced scrutiny, transparency, and adherence to legal standards are essential to preserving the international refugee protection framework and preventing further erosion of fundamental rights.

6. The Impact of Readmission Agreements on Fundamental Human and Refugee Rights

6.1 Introduction

RAs have long played a pivotal role in migration governance,[1] but their significance and complexity have intensified since the 2015 European migration crisis. Originally devised to facilitate the return of irregular migrants, RAs have evolved into instruments of externalized migration control, raising critical questions about their compatibility with international human rights and refugee law. Central to this chapter is the inquiry: To what extent are states responsible for fulfilling their obligations under international law in the context of RAs, and how do these agreements contribute to the erosion of legal guarantees concerning fundamental rights?

This chapter examines the erosion of legal guarantees surrounding three interdependent rights, as explored in previous chapters: the right to life, the prohibition of CIDTP, and the right to seek asylum. These rights not only form the cornerstone of international and regional legal frameworks but also serve as critical benchmarks for evaluating state responsibility in the design and implementation of RAs. At the heart of this analysis lies the principle of non-refoulement, the violation of which often triggers cascading breaches of other rights, including exposure to life-threatening conditions, arbitrary detention, and inadequate asylum procedures.

[1] See section 2.4.1; Nils Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights* (Martinus Nijhoff 2009) ch 1.

RAs, by shifting the burden of migration management to third countries, rely on politically motivated designations of safe countries criticised by academia[2] and expedited return mechanisms.[3] These practices frequently undermine procedural safeguards, leading to systemic violations such as chain refoulement, poor detention conditions, and the absence of meaningful oversight. This chapter explores how these systemic risks render RAs incompatible with states' obligations under key international and regional legal instruments. It argues that the erosion of legal guarantees through RAs arises from the prioritization of operational efficiency over substantive safeguards. By uncovering systemic deficiencies in the design and execution of RAs, this analysis highlights the urgent need for states to realign their migration practices with international human rights obligations.

6.2 The Right to Life in the Context of Readmission Agreements

The implementation of RAs raises significant concerns about the violation of fundamental human rights. While much of the legal literature has focused on breaches of the principle of non-refoulement and the right to seek asylum, particularly in relation to torture and CIDTP, there has been relatively limited exploration of how violations of non-refoulement contribute to infringements on the right to life for readmitted individuals.[4]

---

[2] G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 392-407; Cathryn Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?' (2005) 7(1) *European Journal of Migration and Law* 35-70; Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection, and the Common Market of Deflection* (Kluwer Law International 2000) 182-211; María-Teresa Gil-Bazo, 'The Practice of Mediterranean States in the Context of the European Union's Justice and Home Affairs External Dimension: The Safe Third Country Concept Revisited' (2006) 18(3-4) *International Journal of Refugee Law* 571-600;

[3] Stephen H. Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15(4) *International Journal of Refugee Law* 567-677; See sections 2.2.1 and 2.4.

[4] Juan Ruiz Ramos, 'The Right to Life of Migrants and Refugees under Article 2 ECHR: Outside, Inside and Along the Way' in David Moya and Georgios Milios (eds), *Aliens Before the European Court of Human Rights: Ensuring Minimum Standards of Human Rights Protection* (Brill 2021), 17-24; Mariagiulia Giuffré, *The Readmission of Asylum Seekers under International Law* (Hart Publishing, 2020) 315-317.

This section investigates the risks to the right to life in the context of RAs, particularly when individuals are returned to countries lacking adequate conditions to support a healthy and safe existence. The principle of non-refoulement does not merely prohibit returns to countries with poor living conditions or general hardship; it extends to cases where individuals face a substantial risk of persecution. Analysing the right to life in this context requires examining two critical stages of the readmission process: the treatment of irregular immigrants including refugees and potential asylum seekers prior to their return to their country of origin or a third country, and their treatment after readmission.

During the readmission process, the right to life may be jeopardized by inhumane, inadequate, and improper conditions in repatriation and reception centres, which often lack the necessary resources to guarantee basic safety and dignity. Additionally, in the receiving country, insufficient safeguards can expose returnees to broader risks, including inadequate healthcare, substandard living conditions, and the absence of effective protections against persecution. These systemic deficiencies underscore the urgent need to address how RAs contribute to violations of the right to life, particularly when the agreements prioritize operational efficiency over the safety and dignity of individuals.

6.2.1 The Right to Life in Repatriation and Reception Centres

Repatriation centres, also known as pre-removal centres, and reception centres are integral to the implementation of RAs. These facilities often serve multifunctional roles and frequently operate outside the explicit provisions of these agreements, complicating questions of state responsibility. In the EU, hotspots such as Lampedusa and Lesvos function as both detention and reception centres for irregular migrants and as repatriation hubs for individuals deemed to be staying illegally. Outside the EU, similar centres in

Turkey and Libya are used to detain irregular migrants, either as temporary reception points or for onward repatriation to their countries of origin.[5]

Although these centres are often portrayed as facilities for processing asylum claims and providing temporary shelter, their operations frequently extend far beyond these stated purposes. These centres are instrumental in facilitating the logistical and administrative processes required for the implementation of RAs, even when such functions are not explicitly outlined in the agreements.[6] For instance, detainees awaiting deportation are often held to complete procedural steps such as identity verification and travel documentation issuance. Similarly, reception centres in requested states act as primary holding facilities for individuals returned under RAs, underscoring their dual role in asylum management and migration control. This multifunctionality blurs the lines between reception and repatriation, complicating the assessment of state responsibility for the conditions within these centres. The critical issue is not their administrative designation but whether the transfer of individuals between a repatriation centre in the requesting country and a reception centre in the requested country results in life-threatening conditions.

---

[5] Human Rights Watch, 'Greece: Dire Conditions for Asylum Seekers on Lesbos' (21 November 2018) https://www.hrw.org/news/2018/11/21/greece-dire-conditions-asylum-seekers-lesbos accessed 5 July 2024; Chatham House, 'Lesvos: How EU Asylum Policy Created a Refugee Prison in Paradise' (5 July 2022) https://www.chathamhouse.org/2022/07/lesvos-how-eu-asylum-policy-created-refugee-prison-paradise accessed 12 July 2024; Orçun Ulusoy and Hemme Battjes, 'Returned and Lost: What Happens After Readmission to Turkey?' (Oxford Law Faculty, 19 October 2017) https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/10/returned-and-lost accessed 18 July 2024; Médecins Sans Frontières, '"You're Going to Die Here": Abuse in Libyan Detention Centers' (6 December 2023) https://www.doctorswithoutborders.org/latest/youre-going-die-here-abuse-libyan-detention-centers accessed 23 July 2024; Amnesty International, 'Libya: Horrific Violations in Detention Highlight Europe's Shameful Role in Forced Returns' (15 July 2021) https://www.amnesty.org/en/latest/press-release/2021/07/libya-horrific-violations-in-detention-highlight-europes-shameful-role-in-forced-returns/ accessed 29 July 2024.

[6] Most of the readmission agreements -formal or informal- do not have a specific clauses on centres, see a list in European Migration Network, 'Bilateral Readmission Agreements: Practical Implementation and Use' (European Commission, October 2022) https://home-affairs.ec.europa.eu/system/files/2022-10/EMN_INFORM_bilateral_readmission.pdf accessed 29 June 2024; See Italy-Albania for an exception in 5.3.

Reports from international organizations consistently highlight that these centres often fail to meet minimum standards under international law.[7] In the EU, for example, severe overcrowding, inadequate facilities, and insufficient medical care in repatriation and reception centres pose significant risks to the right to life. The Lampedusa reception centre in Italy, designed for approximately 400 individuals, frequently houses far more than its capacity. In mid-September 2023, the centre sheltered around 7,000 migrants, creating dire conditions with insufficient food, water, and sanitation.[8] Similarly, in June 2023, the centre housed 1,300 migrants, three times its intended capacity, further straining resources and infrastructure.[9]

In Greece, the Moria Reception and Identification Centre on Lesvos has also been the site of fatal incidents. A report by CPT Aegean Migrant Solidarity documented multiple deaths between 2016 and 2020 due to inadequate living conditions and insufficient medical care.[10] In one particularly tragic incident in January 2020, a 31-year-old man with known mental

[7] United Nation Migration Agency International Organization of Migration, 'IOM's Policy On The Full Spectrum Of Return, Readmission And Reintegration' https://www.iom.int/sites/g/files/tmzbdl486/files/documents/ioms-policy-full-spectrum-of-return-readmission-and-reintegration.pdf accessed 1 March 2022; United Nation Migration Agency International Organization of Migration, 'Migrant Returns And Reception Assistance In Haiti | Air & Sea | 2021 Summary' [2021] https://haiti.iom.int/sites/g/files/tmzbdl1091/files/documents/factsheet-migrant-returns-and-reception-assistance-in-haiti-2021-summary_0.pdf accessed 1 March 2022; UNHCR 'The 10-Point Plan in action: Chapter 4, Reception arrangements' (2021) <https://www.unhcr.org/protection/migration/50a4c0e79/10-point-plan-action-chapter-4-reception-arrangements.html> accessed 1 March 2022; UN High Commissioner for Refugees (UNHCR), 'UNHCR Position on the Designations of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea' (September 2020) https://www.refworld.org/docid/5f1edee24.html> accessed 23 March 2022

[8] Al Jazeera, 'On Lampedusa, the Lucky Few Who Made It Across the Med Live in Misery' (Al Jazeera, 28 September 2023) <https://www.aljazeera.com/features/2023/9/28/on-lampedusa-the-lucky-few-who-made-it-across-the-med-live-in-misery> accessed 3 July 2024.

[9] Euronews, '1300 Migrants Overcrowd Lampedusa Reception Centre Designed for 400' (Euronews, 19 June 2023) <https://www.euronews.com/2023/06/19/1300-migrants-overcrowd-lampedusa-reception-centre-designed-for-400> accessed 5 June 2024.

[10] Christian Peacemaker Teams, 'Deadly End' (Christian Peacemaker Teams, 29 September 2023) <https://cpt.org/2023/09/29/deadly-end> accessed 12 July 2024.

health issues died in solitary confinement within the Pre-Removal Detention Centre (PRO.KE.K.A.) in Moria, highlighting severe neglect and mistreatment of detainees.[11]

Conditions in requested countries such as Libya are equally concerning.[12] Reception centres there often fail to provide humane and adequate living conditions for readmitted individuals. Financial, political, and social challenges in these countries exacerbate precarious conditions, jeopardizing the right to life and human dignity. European destination countries increasingly rely on Eastern European and North African states as their "open prison countries," mirroring practices in EPCs such as Australia's use of Nauru.[13]

These examples illustrate that such centres often subject migrants and asylum seekers to life-threatening conditions, particularly when facilities operate far beyond their intended capacities. Overcrowding, inadequate access to basic necessities, and insufficient medical care create environments where the right to life is at significant risk. Therefore, it is imperative for both requesting and requested states to ensure that the operation of these

[11] Border Monitoring, 'Cruel Detention Policies in Greece on the Rise: Death in Moria Prison Shows the Violence of Migrant Incarceration System in the European Hotspots' (Border Monitoring, 18 January 2020) <https://dm-aegean.bordermonitoring.eu/2020/01/18/cruel-detention-policies-in-greece-on-the-rise-death-in-moria-prison-shows-the-violence-of-migrant-incarceration-system-in-the-european-hotspots/> accessed 25 June 2024; Human Rights Watch, 'Greece: Inhumane Conditions at Land Border' https://www.hrw.org/news/2018/07/27/greece-inhumane-conditions-land-border accessed 15 August 2023;

[12] Human Rights Watch, *"No Escape from Hell": EU Policies Contribute to Abuse of Migrants in Libya* (21 January 2019) https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya accessed 17 December 2024. Office of the High Commissioner for Human Rights (OHCHR), *Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya* (2018); Human Rights Watch, *"No Escape from Hell": EU Policies Contribute to Abuse of Migrants in Libya* (21 January 2019); Office of the High Commissioner for Human Rights (OHCHR), *Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya* (2018); Human Rights Watch, *"No Escape from Hell": EU Policies Contribute to Abuse of Migrants in Libya* (21 January 2019) https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya accessed 17 December 2024; Amnesty International, 'Libya: New Evidence Shows Refugees and Migrants Trapped in Horrific Cycle of Abuses' (28 September 2020) https://www.amnesty.org/en/latest/press-release/2020/09/libya-new-evidence-shows-refugees-and-migrants-trapped-in-horrific-cycle-of-abuses/ accessed 17 December 2024.

[13] See sections 2.4.1.2 and 5.2.1.

centres does not subject individuals to life-threatening conditions, in line with their positive obligations under international human rights law.[14]

States have positive obligations under international human rights law to ensure the operation of these centres does not expose individuals to such risks. This includes providing adequate resources to guarantee humane living conditions, sufficient healthcare, and safe shelters. When states detain individuals in these centres, they must meet these obligations to protect the right to life and ensure compliance with their international legal responsibilities.

6.2.2 State Responsibilities against Conditions of Centres

To establish state responsibility for violations of the right to life arising from inhumane or inadequate conditions in repatriation and reception centres, it is essential to distinguish between the roles and obligations of requesting states and requested states tasked with managing these centres. This distinction is critical, as jurisdictional and operational responsibilities differ, depending on territorial jurisdiction, effective control and attribution under international law.

6.2.2.1 Obligations and Responsibilities of Requesting (Externalizing) States

Repatriation centres fall under the national territorial jurisdiction of requesting states, as these centres house individuals pending their return under repatriation decisions. Consequently, individuals detained in such centres are under the territorial jurisdiction of the requesting state.[15] Since these facilities are administered by agencies of the requesting state, the conditions within them and the treatment of detainees are attributable to the

[14] See for reference, *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* (Application no. 47848/08) ECHR 17 July 201 para 130.
[15] See section 3.5.

requesting state.[16] Accordingly, requesting states bear international positive obligations to safeguard the right to life in these centres. These obligations include ensuring humane living conditions, providing adequate healthcare, and protecting detainees from life-threatening harm. If these standards are not met, the requesting state is fully responsible for violations.

In contrast, requesting states generally do not exercise direct public power, control or authority over reception centres located in requested states. Once individuals are readmitted to the requested state, they fall under the territorial jurisdiction of that state. As such, the positive obligations of requesting states regarding the right to life do not extend to individuals housed in reception centres.

However, if a requesting state provides support, such as funding, training, or equipment, for the operation of reception centres in requested states, exercising effective control or functional jurisdiction may apply under Article 16 and 17 of the ARSIWA based on the impact of control as discussed in jurisdiction chapter.[17] If the assistance and influence of the requesting state directly affect the management and operation of the centres in the requested country, then it can be held accountable based on effective control. However, if this influence is limited to providing financial support and does not directly affect the establishment and management of a centre there, then the discussion of functional impact begins. This could result in attribution of responsibility to the requesting state based on functional jurisdiction if its assistance contributes to inhumane conditions in the reception centres, such as failing to fulfil its positive obligations when it has the opportunity to do so. The requesting state's assistance, such as financial or logistical support, play a decisive role in maintaining centres that fail to meet minimum international standards. Without

[16] ibid; International Law Commission, 'Responsibility of States for Internationally Wrongful Acts 2001' art 4.
[17] ibid arts 16 and 17.

RAs, such assistance would not exist, directly linking the requesting state to harmful conditions. In cases where the requesting state has decisive influence or operative involvement over the operation of reception centres, it may share responsibility. Nevertheless, for responsibility under ARSIWA, the requested state must commit an internationally wrongful act, such as failing to ensure humane conditions.[18] Additionally, the requesting state must have knowledge that its support would contribute to such violations.[19] If the requesting state lacks explicit knowledge or its involvement is indirect, assigning responsibility becomes legally complex and less straightforward.

6.2.2.2 Obligations and Responsibilities of Requested States

Reception centres fall squarely under the national territorial jurisdiction and effective control of requested states. Once individuals are readmitted to a requested state, they are housed in reception centres located within that state's national territory, pending resettlement or further migration decisions. The actions of agents operating these centres, acting on behalf of the requested state, are attributable to the requested state under Article 4 of ARSIWA.

As such, requested states bear international positive obligations to protect the right to life of individuals detained in their reception centres. These obligations include ensuring humane living conditions, providing adequate medical care, and safeguarding individuals from life-threatening harm. Failure to meet these obligations constitutes a breach of the right to life, for which the requested state bears full responsibility under international law.

Both requesting and requested states are bound by international legal frameworks to uphold the right to life in repatriation and reception centres. Instruments such as the

[18] ibid ARSIWA arts 16 and 17.
[19] ibid art 16/a.

ICCPR (Article 6), ECHR (Article 2), ACHR (Article 4), ACHPR (Article 4), and the American Declaration of the Rights and Duties of Man (Article 1) impose positive obligations on states to guarantee humane conditions for detained individuals.

Failures by either requesting or requested states to fulfil these obligations result in breaches of international human rights law, with profound consequences for the individuals detained in these centres. The interplay of jurisdiction and responsibility between the two states underscores the importance of clear compliance with international legal standards, particularly in the context of RAs.

6.2.3 The Right to Life and Refoulement in the Context of RAs

The prohibition of refoulement is intrinsically linked to the prevention of arbitrary deprivation of life, serving as a fundamental safeguard against life-threatening conditions.[20] It obliges states not to return individuals to countries where their lives are at risk, whether due to persecution, generalised violence, or other severe threats. In the context of RAs, which facilitate the transfer of individuals between states, violations of the right to life occur when individuals are returned to countries that cannot guarantee their safety.

The universality of the principle of non-refoulement[21] ensures that individuals unlawfully residing in a requesting state can invoke it as a legal safeguard against threats to their life or freedom in the requested state. During the execution of RAs, individuals remain under the territorial jurisdiction of the requesting state, reinforcing that state's obligation to

[20] Seline Trevisanut, 'The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection' (2008) 12 Max Planck Yearbook of United Nations Law 205, 212-4.
[21] ibid; See also chapter 2.2.1; Giuffré (n 4) 37-41; Gil-Bazo (n 6) 46;

uphold non-refoulement.[22] This principle requires states to ensure that return processes do not expose individuals to life-threatening risks, as mandated by international refugee law and human rights law.[23] As Trevisanut highlights, the RC not only prohibits refoulement but also establishes a broader obligation to prevent arbitrary deprivation of life.[24]

Additional protections are enshrined in other international and regional instruments, such as CAT (Article 3), ECHR (Article 3), ACHR (Articles 22(8) and 33), and ACHPR (Article 12(3)), which prohibit torture and inhuman or degrading treatment.[25] These provisions indirectly safeguard the right to life by preventing individuals from being returned to environments where their lives or fundamental rights are at risk. This chapter builds on these frameworks, arguing that the prohibition of torture and CIDTP inherently extends to the protection of the right to life.

Beyond international obligations, the EU and its Member States have developed domestic and regional frameworks that incorporate the safe country concept, which influences the interpretation of non-refoulement.[26] The safe country concept allows Member States to

[22] Giuffré (n 4) 121-127; Mariagiulia Giuffré and Violeta Moreno-Lax, 'The Rise of Consensual Containment: From Contactless Control to Contactless Responsibility for Migratory Flows' in Satvinder Singh Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar Publishing 2019) 82; See section 3.5.

[23] Coleman's analysis reveals that even if readmission agreements serve as procedural tools, they do not override international obligations like non-refoulement in Coleman (n 1) 305-315; Legomsky (n 3) 17; ibid Giuffré 182-184; ibid Giuffré and Moreno-Lax 91-97; María-Teresa Gil-Bazo, 'The Safe Third Country Concept in International Agreements on Refugee Protection: Assessing State Practice' (2015) 33(1) NQHR 42,54; see section 2.2.2.

[24] Trevisanut (n 20).

[25] United Nations General Assembly, 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 3; European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art 3; American Convention on Human Rights (ACHR) (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, arts 22(8) and 33; African Charter on Human and Peoples' Rights (ACHPR) (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, art 12(3).

[26] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (Asylum Procedures Directive / APD) [2013] OJ L180/60, arts 36–38; Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive / RD) [2008] OJ L348/98, arts 5 and 9; Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management (Asylum and Migration Management Regulation) COM(2020) 610 final, arts 8 and 9; Also see section 2.2.1.

return asylum seekers to countries presumed capable of providing effective protection in accordance with international human rights standards. However, this presumption is problematic. For example, the EU-Turkey Statement highlights the systemic risks of such agreements.[27] Turkey's geographical limitation under the RC restricts full refugee protection to Europeans, leaving non-European asylum seekers—particularly those from Syria, Afghanistan, and Iraq—at significant risk of direct refoulement and chain refoulement to unsafe countries.[28] This cyclical pattern of transfers repeatedly exposes refugees to persecution and harm, fundamentally undermining the principle of non-refoulement.[29]

RAs, by facilitating the transfer of individuals from one state to another, often operate under the assumption that the requested state is capable of guaranteeing adequate protection. Yet, this assumption is rarely substantiated. As Giuffré notes, RAs frequently omit explicit provisions safeguarding refugees, heightening the risk of individuals being sent to unsafe environments under the guise of safety.[30] While such practices may prioritise

---

[27] Council of the European Union, 'EU-Turkey Statement' (Press Release, 18 March 2016) https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/ accessed 17 December 2022.

[28] Giuffré (n 4) 169-171; Emanuela Roman, Theodore Baird, and Talia Radcliffe, 'Why Turkey Is Not a "Safe Country"' (Statewatch, 18 February 2016) https://www.statewatch.org/analyses/2016/why-turkey-is-not-a-safe-country/ accessed 12 October 2023; Dogus Simsek, 'Turkey as a "Safe Third Country"? The Impacts of the EU–Turkey Statement on Syrian Refugees in Turkey' (2017) 22 *Perceptions* 161; María-Teresa Gil-Bazo (n 6) 57; Human Rights Watch, *EU: Turkey Mass-Return Deal Threatens Rights* (2018) https://www.hrw.org/news/2018/03/20/eu-turkey-mass-return-deal-threatens-rights accessed 15 October 2024; Meltem Ineli-Ciger and Orçun Ulusoy, 'A Short-Sighted and One-Sided Deal: Why the EU-Turkey Statement Should Never Serve as a Blueprint' in Sergio Carrera and Andrew Geddes (eds), *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees: International Experiences on Containment and Mobility and their Impacts on Trust and Rights* (European University Institute 2021) 111–125; Thomas Spijkerboer and Maarten den Heijer, 'Is the EU-Turkey Refugee and Migration Deal a Treaty?' (2016) *EU Law Analysis* Blog, 7 April 2016; Asylum Information Database (AIDA), *Country Report: Turkey - 2023 Update* (2024) https://asylumineurope.org/wp-content/uploads/2024/08/AIDA-TR_2023-Update.pdf accessed 20 September 2024.

[29] Violeta Moreno-Lax, 'The Legality of the "Safe Third Country" Notion Contested: Insights from the Law of Treaties' in Guy S Goodwin-Gill and Philippe Weckel (eds), *Migration and Refugee Protection in the 21st Century: International Legal Aspects* (Martinus Nijhoff 2015) 667, 673–74; Giuffré and Moreno-Lax (n 22); Zeynep Sahin-Mencutek and Anna Triandafyllidou, 'Coerced Return: Formal Policies, Informal Practices and Migrants' Navigation' (2024) *Journal of Ethnic and Migration Studies* https://doi.org/10.1080/1369183X.2024.2371209 accessed 18 Jan 2024.
Jari Pirjola, 'Out of Sight, Out of Mind: Post-return Monitoring – A Missing Link in the International Protection of Refugees?' (2019) 38 Refugee Survey Quarterly 363;

[30] Giuffré (n 4) 150-154, 170, 180-185;

procedural efficiency, they often neglect the substantive conditions in requested states, where individuals may face persecution, violence, or denial of basic rights. Hence, states must ensure that these agreements are consistent with their obligations under international human rights law, particularly the duty to uphold the right to life and prevent refoulement.

While non-refoulement remains the primary legal framework for assessing RAs, it is vital to recognize that violations of this principle often lead to breaches of the right to life. Individuals returned to countries with high levels of persecution, violence, or life-threatening conditions are particularly vulnerable. Many transit countries involved in RAs fail to meet the protection standards mandated by international law, increasing the risk of refoulement for returnees.[31] This highlights the centrality of the right to life in evaluating the readmission process, requiring states to scrutinize RAs not only for procedural compliance but also for their broader human rights implications.

6.2.4 Case Law in the context of Right to Life

In the context of RAs, when the requesting state exercises control over the return process—such as directing or supervising the transfer of returnees—it assumes responsibility for ensuring compliance with the principle of non-refoulement.[32] This obligation was firmly established in the landmark case of *M.S.S. v. Belgium and Greece*, where the ECtHR held Belgium responsible not only for transferring asylum seekers to Greece but also for contributing to conditions that resulted in violations of Article 3 of the ECHR.[33] The judgment is pivotal in demonstrating that states cannot rely solely on the formal designation of a receiving state as "safe"; they must thoroughly consider the actual

[31] Mariagiulia Giuffré, Chiara Denaro, and Fatma Raach, 'Questioning the Role of Tunisia as a "Safe Country of Origin" and a "Safe Third Country"' (2023) *Journal of Migration Studies*; ASILE, *Tunisia Country Report* (2022) https://www.asileproject.eu/wp-content/uploads/2022/08/D5.2_WP5-Tunisia-Country-Report-Final.pdf accessed 17 December 2024. See above Turkey (n 28).
[32] Giuffré and Moreno-Lax (n 22).
[33] *M.S.S. v Belgium and Greece* (Application No. 30696/09) ECHR 21 January 2011, paras 247-266.

conditions in the receiving country. This underscores that the responsibility for safeguarding life and well-being extends beyond the procedural act of return, emphasizing the substantive conditions to which individuals are returned. While the judgment primarily strengthened Article 3 protections against ill-treatment, it fell short of explicitly linking non-refoulement to the right to life under Article 2 of the ECHR.

Subsequent rulings have highlighted the importance of extending non-refoulement protections to encompass the right to life, especially where indirect or less immediate threats arise from readmission.[34] While primarily discussed within the context of jurisdiction and interception previously,[35] the return at issue in *Hirsi Jamaa v. Italy* stemmed from a bilateral agreement between Italy and Libya, mirroring the methodology of a RA. The Court found Italy in breach of non-refoulement for returning asylum seekers to Libya without conducting proper assessments, exposing them to a real risk of ill-treatment.[36] Judge Pinto de Albuquerque, in a concurring opinion, argued that non-refoulement protections should explicitly extend to Article 2, ensuring the right to life is safeguarded, particularly when individuals face indirect threats as a result of their return.[37]

Similarly, *F.G. v. Sweden* demonstrates the life-threatening risks of expulsion decisions when proper risk assessments are not conducted. [38] Although the case did not directly involve an RA, its principles are analogously relevant. The Court emphasized that inadequate evaluations of the receiving country's conditions can expose individuals to life-threatening harm. These cases collectively underscore the need for stronger conceptual and

---

[34] *F.G. v Sweden* (Application No. 43611/11) ECHR 23 March 2016; *Hirsi Jamaa and Others v. Italy* (Application No. 27765/09) ECHR 23 February 2012*; Sharifi and Others v Italy and Greece* (Application No. 16643/09) ECHR 21 October 2014.
[35] See chapters 3 and 4 regarding analysis of *Hirsi Jamaa and Others v. Italy*;
[36] *Hirsi Jamaa and Others v. Italy* (n 34) paras 139-158.
[37] '*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' in Concurring Opinion of Judge Pinto de Albuquerque, *Hirsi Jamaa and Others v Italy*, ECtHR, Application no. 27765/09 (23 February 2012);
[38] *F.G. v Sweden* (n 34) paras 150-158.

legal connections between non-refoulement and Article 2 protections, particularly in the context of RAs where returns frequently involve countries with inadequate human rights guarantees.

Building on these judicial findings, academic critiques highlight systemic flaws in the reliance on presumptions of safety in RAs. Legomsky critiques this reliance as often unfounded, noting that many receiving states lack the resources or political will to meet international protection standards.[39] Costello similarly warns of the grave consequences of procedural failures within asylum systems, arguing that such errors can lead to direct violations of the right to life.[40] These critiques align with judicial findings that underscore the life-threatening risks inherent in RAs, particularly when robust risk evaluations are absent.

6.2.5 State Responsibilities on Right to Life under Refoulement

To assess state responsibility under RAs, it is crucial to examine how jurisdiction and the attribution of conduct function under international law. The requesting state retains jurisdiction over individuals throughout the return process, including detention in pre-removal centres, transportation, and transfer, until the individual is handed over to the requested state. As such, any actions taken by state agents—such as law enforcement or immigration officials—during this process are attributable to the requesting state.[41]

The implementation of RAs involves actions by agents of the requesting state, including members of the judiciary, police, and civil officials, who make and enforce return

[39] Legomsky (n 3) 17.
[40] Costello (n 2).
[41] Giuffré and Moreno-Lax (n 22) 100-106, Julia Kienast, Nikolas Feith Tan, and Jens Vedsted-Hansen, 'EU Third Country Arrangements: Human Rights Compatibility and Attribution of Responsibility' in Sergio Carrera Nunez, Eleni Karageorgiou, Gamze Ovacik, and Nikolas Feith Tan (eds), *Global Asylum Governance and the European Union's Role: Rights and Responsibility in the Implementation of the United Nations Global Compact on Refugees* (Brill 2024) 275.

decisions. Since these agents act on behalf of the state, their conduct is attributed to the requesting state under international law.[42] Consequently, the requesting state bears the responsibility for ensuring that the principle of non-refoulement is upheld during the readmission process, safeguarding individuals under its jurisdiction from being returned to environments where their life or freedom is at risk.

Attribution under the International Law Commission's Articles on State Responsibility (ARSIWA) is critical in this context. Article 16 establishes that a state may bear responsibility if it aids or assists another state in committing internationally wrongful acts, provided the assisting state has knowledge of the circumstances and the act would be wrongful if carried out by the assisting state itself.[43] Similarly, Article 17 extends responsibility to situations where a state directs or controls another state's actions that lead to returns without adequate risk assessments, resulting in harm to returnees.[44] This applies to situations where requested states knowingly readmission of individuals to countries where systemic failures endanger their right to life.[45] Thus, the requested state, by allowing these individuals to be sent to it and accepting them into its territory where their life and freedom could be threatened, is responsible under ARSIWA Articles 16 and 17.

The principles outlined in ARSIWA align with the case law such as *M.S.S. v. Belgium and Greece*,[46] where the ECtHR held both states responsible for exposing individuals to inhumane and life-threatening conditions. Belgium was found liable for transferring asylum seekers to Greece without considering the actual living conditions, thus violating

---

[42] ARSIWA art 4.
[43] ibid art 16.
[44] ibid art 17; Giuffré (n 4) 51; Orçun Ulusoy and Hemme Battjes, *Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement*, VU Migration Law Series No. 15 (2017) https://rechten.vu.nl/en/Images/UlusoyBattjes_Migration_Law_Series_No_15_tcm248-861076.pdf accessed 16 September 2019, 23-24; UN Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (CCPR/C/21/Rev.1/Add.13, 26 May 2004); Soering v United Kingdom, ECtHR, Application no. 14038/88 (7 July 1989); El-Masri v The Former Yugoslav Republic of Macedonia, ECtHR, Application no. 39630/09 (13 December 2012).
[45] ibid.
[46] *M.S.S. v Belgium and Greece* (n 33).

non-refoulement obligations. The Court emphasised that deporting individuals to locations with unsafe conditions constitutes a violation of Article 3 of the ECHR, which prohibits inhuman or degrading treatment, and indirectly jeopardises the right to life. However, since Greece has opened its territory for the return of these individuals, it should be held responsible as a state assisting Belgium in refoulement. Thus, it is insufficient to hold Greece responsible solely for violating Article 3 due to poor conditions in its territory. The analysis in this section highlights that a violation of Article 2 could also result from the refoulement breach and expands discussions on Article 3 in cases where there are risks to physical integrity. This case illustrates that states cannot absolve themselves of responsibility by relying solely on formal safe country designations. Instead, they must ensure that substantive conditions in the receiving state comply with international human rights standards. Deportations that expose individuals to life-threatening harm, even indirectly, infringe upon both non-refoulement obligations and the right to life.

6.3 The Prohibition of Torture and CIDTP in the Context of Readmission Agreements

The implementation of RAs often raises significant concerns regarding violations of the prohibition of torture and other forms of CIDTP. These concerns are particularly acute when RAs result in refoulement, exposing individuals to substantial risks in receiving states. The international legal framework provides robust protections against torture and CIDTP, closely intertwined with the principle of non-refoulement,[47] yet the application of RAs frequently undermines these safeguards, posing complex questions of state responsibility.

[47] See section 2.2.2.

The primary objective of RAs is to facilitate the return of irregular migrants from destination states to their countries of origin or transit. However, this process often leads to heightened risks of torture and CIDTP, both during the return process and upon arrival in the receiving state. These risks are particularly pronounced in cases of forced returns, where individuals are denied access to procedural safeguards that might otherwise protect them from harm. Under international law, states are obligated to ensure protection from torture and CIDTP at all stages of the return process as highlighted above.

To start with, the conditions in repatriation and reception centres facilitated for RAs impact the rights of returned irregular immigrants not to be subjected to torture or CIDTP. Containing numbers of irregular immigrants in destination countries through RAs gives rise to violations of the prohibition of torture and CIDTP, both during and after the implementation of agreements. During the implementation of RAs, forced return and detention draw attention to violations of the prohibition of torture and other mistreatments or punishments. The refoulement of irregular immigrants, particularly in relation to the prohibition of torture, needs to be addressed concerning the notion of a safe country.

6.3.1 The Prohibition of Torture and CIDTP and Refoulement

Several international legal instruments explicitly prohibit torture and CIDTP and impose absolute obligations on states to prevent such violations, particularly in the context of forced returns. Key provisions such as ECHR (Article 3), CAT (Articles 2 and 16), and ICCPR (Article 7) underscore the non-derogable nature of these obligations.[48] Additionally, the RC (Article 33) prohibits refoulement, ensuring that individuals are not

[48] ECHR art 3; CAT arts 2 and 16; ICCPR art 7.

returned to territories where their lives or freedoms would be threatened due to persecution, torture, or other mistreatment.[49]

The principle of non-refoulement forms the cornerstone of these protections, applying universally and regardless of whether refoulement occurs directly or indirectly.[50] This includes situations where individuals are returned to states that subsequently deport them to unsafe territories (e.g. chain refoulement). To comply with this principle, the safe country concept is central in determining whether the requested state receiving readmitted individuals can adequately protect them from harm.

In the context of RAs, the designations of SCO and STC often play a decisive role in assessing compliance with the prohibition of refoulement. The SCO concept assumes that individuals returned to their country of nationality or habitual residence will not face persecution or violations of their fundamental rights, such as threats to life or freedom, based on factors such as race, religion, nationality, membership in a particular social group, or political opinion.[51] Similarly, the STC concept allows states to transfer individuals to transit countries on the presumption that these states can provide adequate protection or the opportunity to seek asylum.[52]

While the APD provides a framework for defining safe countries, the practical application of these designations often falls short.[53] The EU's definitions, though refined through successive reforms,[54] remain supranational in scope and have limited correspondence with

[49] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150 (RC) art 33.
[50] See section 2.2.1.
[51] RC art 1(A)(2).
[52] Nina A Abell, 'The Compatibility of Readmission Agreements with the 1951 Convention relating to the Status of Refugees' (1999) 11(1) IJRL 60; Goodwin-Gill and McAdam (n 2) 390-407.
[53] See requirements in APD in 2.2.1.
[54] ibid, eg New Pact on Migration and Asylum.

broader international legal standards.[55] As a result, states may rely on presumptions of safety that fail to reflect the realities of conditions in receiving states.

For instance, Turkey's application of a geographical limitation under the RC excludes non-European asylum seekers, such as Syrians and Afghans, from full refugee protections.[56] This exclusion leaves returnees at risk of refoulement or inadequate protections, as Turkey's asylum system often fails to meet international standards. Similarly, chain refoulement remains a critical concern.[57] Even when requested states have ratified international agreements, they may lack effective mechanisms to prevent onward deportation of returnees to unsafe environments. This highlights a fundamental gap between formal commitments to international conventions and the practical guarantees necessary to uphold the principle of non-refoulement.

As these challenges illustrate, the notion of a safe country must go beyond nominal adherence to international conventions. States must also meet their obligations in practice, protecting both citizens and non-citizens within their jurisdiction from persecution, torture, or inhuman and degrading treatment. The failure to ensure these protections fundamentally undermines the principle of non-refoulement and increases the vulnerability of returnees to human rights abuses. Consequently, implementation of RAs must prioritize guarantees that prevent refoulement and protect against violations of the prohibition of torture and CIDTP. Without these safeguards, the presumption of safety in receiving states becomes an empty standard, eroding the legal and moral commitments enshrined in international and regional human rights frameworks.

[55] See section 2.2.1 for a more detailed discussion of the EU's safe country framework; See section 7.2 its operational challenges in readmission agreement.
[56] See above nn 27-28.
[57] ibid; Sahin-Mencutek and Triandafyllidou (n 29).

6.3.2 Inhumane Detention and the Prohibition of Torture and CIDTP

Detention practices associated with RAs frequently raise significant concerns regarding violations of the prohibition of torture and CIDTP, as well as the right to liberty. These issues are addressed by key international instruments, including ECHR (Articles 3 and 5) and ICCPR(Articles 7 and 9).[58] The UNHCR Detention Guidelines emphasise that detention should only be used as a last resort, subject to strict standards of necessity, proportionality, and reasonableness.[59] However, in the context of RAs, detention often becomes a routine part of the return process, rather than an exceptional measure, leading to systemic risks of ill-treatment.

The RD presents voluntary departure as the preferred method of return but permits detention and coercive measures to ensure compliance with return decisions.[60] These measures include detaining individuals, using physical force, and imposing entry bans across the Schengen Area.[61] While the directive outlines safeguards to prevent abuses,[62] its implementation often reveals significant gaps. For the purpose of public order and national security, states have the right to expel individuals who enter their territory through unlawful means or enter lawfully but subsequently remain in violation of the law, based on

[58] ICCPR art 9; ECHR art 5; Alice Edwards, 'Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants' https://www.unhcr.org/media/no-17-back-basics-right-liberty-and-security-person-and-alternatives-detention-refugees accessed 30 September 2023 19, 11-12;

[59] The detention of asylum seekers or refugees must meet strict standards of necessity, reasonableness, and proportionality to comply with refugee and human rights law and should only be used as a last resort, in Goodwin and McAdam (n 1) 365, 462-465 and UNHCR, Detention Guidelines*: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) https://www.unhcr.org/media/unhcr-detention-guidelines accessed 24 September 2024, see sections 2.4.2 and 4.4.1 and 5.4.1

[59] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)), art 13(2); ICCPR art 12(1); International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD), art 5(d)(ii); ECHR art 2(2).

[60] See nn 27 and 28.

[61] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L77/1.

[62] RD.

their sovereign rights.[63] However, during the process of expulsion from their territory, to ensure its legality and legitimacy, the prohibition of torture and ill-treatment, as well as the right to a fair trial, must not be disregarded. Moreover, the principles of proportionality and legality must also be considered.[64] Detention is routinely employed not as a last resort but as a standard administrative procedure, raising concerns about arbitrariness due to insufficient judicial oversight and procedural safeguards.[65] Furthermore, the directive mandates that detention must be proportionate and limited to the shortest possible duration. However, reports suggest that detention is frequently prolonged without sufficient justification. Entry bans, ostensibly intended to ensure compliance, operate as punitive measures, contradicting the principles of necessity and proportionality and undermining the voluntary nature of returns. These coercive practices demonstrate that returns under RAs often constitute forced migrations, creating direct links to violations of the prohibition of torture and CIDTP.

Forced returns under RAs contribute to broader patterns of state-led forced migration, where individuals are deported without their consent or without compliance with international human rights standards. For instance, the use of coercive measures by both Frontex and EU Member States during forced returns raises significant concerns regarding necessity, proportionality, and compliance with international law.[66] Both the requesting and

[63] See section 5.4.1.1 for discussion on proportionality.
[64] ibid.
[65] See above (n 12) for examples in Libya.
[66] Forced Return Monitoring Systems Reports in European Union Agency for Fundamental Rights, *Irregular Migration, Return and Immigration Detention* (FRA) https://fra.europa.eu/en/themes/irregular-migration-return-and-immigration-detention; Frontex, *Observations to Return Operations Conducted (2017-2023) by the Fundamental Rights Officer*. https://www.frontex.europa.eu/fundamental-rights/fundamental-rights-at-frontex/pool-of-forced-return-monitors/; International Centre for Migration Policy Development, *Forced Return Monitoring III: Final Publication* (ICMPD 2023) https://www.icmpd.org/content/download/56831/file/FReM%20III_Final%20Publication_Quart_WEB.pdf accessed 12 February 2024.

requested states frequently detain and forcibly return individuals without regard for international protections. [67]

Detainees are often pressured into providing voluntary consent for deportation,[68] a practice that contravenes the principle of free and informed consent under international law. [69] The absence of individual risk assessments further exacerbates these issues, as migrants are returned to states without adequate evaluations of whether the receiving country can guarantee their safety or protect them from ill-treatment. This lack of procedural safeguards directly violates the prohibition of refoulement, exposing returnees to conditions that infringe on their fundamental rights. Case law highlights, in *Hirsi Jamaa and Others v. Italy* (2012), the Court condemned the interception and return of individuals to Libya without procedural safeguards, exposing them to arbitrary detention and inhumane treatment.[70] These cases underscore the systemic failures in the implementation of RAs, where detention practices frequently breach international legal standards.

The imposition of entry bans as part of the return process further illustrates the punitive nature of forced returns under RAs.[71] Such bans prevent returnees from entering any Schengen Area country, effectively penalising them for their irregular migration status. This approach undermines the principle of voluntary return, which aims to promote

---

[67] ibid; See above (n 28) regarding Turkey; See above (n 12) regarding Libya; Giuffré et al (n 31); European Commission, 'Sixth Report on the Progress made in the implementation of the EU-Turkey Statement' COM(2017) 323 final <https://eur-lex.europa.eu/resource.html?uri=cellar:2663f6e3-50fe-11e7-a5ca-01aa75ed71a1.0001.02/DOC_1&format=PDF> accessed 21 July 2024; European Union Agency for Asylum, *Turkey: Content of Protection. Country Information Pack* (August 2019) 29–30, 52–53 <https://rsaegean.org/en/the-easo-report-onturkey> accessed 21 September 2022; The ECtHR has repeatedly found Turkey in violation of art 3 due to the detention of refugees in the Turkish territory. See eg *Abdolkhani and Karimnia v Turkey* App No 30471/08 (ECtHR, 22 September 2009); *Ghorbanov v Turkey* App No 28127/09 (ECtHR, 3 December 2013); *GB v Turkey* App No 4633/15 (ECtHR, 17 October 2019).
[68] Sahin-Mencutek and Triandafyllidou (n 29) 10-11.
[69] ibid.
[70] *Hirsi Jamaa and Others v Italy* (n 34).
[71] Giuffré (n 4) 169. Cathryn Costello, 'Human Rights and the Elusive Universal Subject: Immigration Detention under International Human Rights and EU Law' (2012) 19(1) Indiana Journal of Global Legal Studies 257; Violeta Moreno-Lax, 'The Right to Seek Asylum in the European Union and the Criminalization of Irregular Migration' (2008) 10 *European Journal of Migration and Law* 379.

peaceful reintegration rather than impose punitive measures. By prioritising coercive practices and entry restrictions, RAs erode the rights of migrants and asylum seekers, contravening international protections against torture and CIDTP. Aligning RA practices with international standards requires states to ensure that detention is genuinely a last resort,[72] accompanied by robust procedural safeguards, individual risk assessments, and effective monitoring mechanisms to prevent violations of the prohibition of torture and CIDTP.

6.3.3 The Prohibition of Torture and CIDTP in the Context of Conditions of Repatriation and Reception Centres

The implementation of RAs poses significant risks to the prohibition of torture and CIDTP due to the conditions in pre-removal/repatriation and reception centres. These facilities, located in both requesting and requested states, serve as primary detention points during and after the readmission process. While their stated purpose is administrative—facilitating removal or processing—operational realities frequently result in systemic violations of detainees' fundamental rights.

The reliance on pre-removal detention centres under RAs frequently places individuals at risk of torture and CIDTP. Returnees often face precarious living conditions, including inadequate shelter, lack of basic necessities, and exposure to violence or persecution in the receiving state. [73] The use of physical force during deportation procedures further exacerbates these risks, creating conditions that amount to inhuman or degrading treatment. For example, detention centres associated with RAs in Libya, Tunisia, and

[72] Goodwin-Gill and McAdam (n 2) 365, 462-465; See further analysis on detention chapter 2.4.2, 4.4.1 and 5.4.1; UN Human Rights Council Working Group on Arbitrary Detention, 'Revised Deliberation No. 5 on deprivation of liberty of migrants' (7 February 2018) https://www.ohchr.org/sites/default/files/Documents/Issues/Detention/RevisedDeliberation_AdvanceEditedVersion.pdf accessed 10 October 2023, 2 para 12.
[73] See 6.2.1 for examples.

Morocco have been widely criticised for inhumane conditions. In Libya, returnees face arbitrary detention, forced labour, and torture in notorious facilities.[74] In Tunisia, prolonged detention exposes individuals to physical abuse and a lack of basic necessities,[75] while in Morocco, detention practices targeting sub-Saharan migrants often result in physical abuse and denial of legal assistance.[76] These systemic failures highlight the risks of CIDTP when detention is used as a coercive tool to expedite returns.

As previously discussed in the context of the right to life, conditions in these centres often fail to meet minimum standards of human dignity. Overcrowding, inadequate access to food, medical care, hygienic facilities, and the absence of psychological support create environments that lead to severe physical and mental suffering.[77] Such conditions constitute inhuman or degrading treatment, and, in cases where they are imposed deliberately—for example, as punishment or to extract information—they may amount to torture.[78] When these substandard conditions are inflicted with the intent to punish, intimidate, or coerce, the severity can meet the threshold for torture under international law. Even in the absence of intent, the humiliating and degrading nature of such conditions

---

[74] See Libya (n 12).
[75] Giuffré et al (n 31); Amnesty International, 'Tunisia: Repressive Crackdown on Civil Society Organizations Following Months of Escalating Violence Against Migrants and Refugees' (15 May 2024) https://www.amnesty.org/en/latest/news/2024/05/tunisia-repressive-crackdown-on-civil-society-organizations-following-months-of-escalating-violence-against-migrants-and-refugees/ accessed 24 December 2024; Amnesty International, 'Joint Statement: Tunisia Is Not a Place of Safety for People Rescued at Sea' (5 October 2024) https://www.amnesty.org/en/latest/news/2024/10/joint-statement-tunisia-is-not-a-place-of-safety-for-people-rescued-at-sea/ accessed 25 December 2024.
[76] US Department of State, *Morocco 2021 Human Rights Report* (2021) 28–30 https://ma.usembassy.gov/wp-content/uploads/sites/153/313615_MOROCCO-2021-HUMAN-RIGHTS-REPORT.pdf accessed 17 December 2024; Amnesty International, 'Morocco and Western Sahara: Human Rights Report' https://www.amnesty.org/en/location/middle-east-and-north-africa/north-africa/morocco-and-western-sahara/report-morocco-and-western-sahara/ accessed 17 December 2024; Human Rights Watch, *Abused and Expelled: Ill-Treatment of Sub-Saharan African Migrants in Morocco* (10 February 2014) https://www.hrw.org/report/2014/02/10/abused-and-expelled/ill-treatment-sub-saharan-african-migrants-morocco accessed 17 December 2024; Amnesty International, *Spain and Morocco: Failure to Protect the Rights of Migrants - Ceuta and Melilla One Year On* (2006) 18–19 https://www.amnesty.org/en/wp-content/uploads/2021/08/eur410092006en.pdf accessed 17 December 2024.
[77] See section 6.2.1,eg nn 8-12;Asylum Information Database, 'Detention Conditions - Greece' <https://asylumineurope.org/reports/country/greece/detention-asylum-seekers/detention-conditions/> accessed 21 July 2024; Asylum Information Database, 'Place of Detention - Italy' <https://asylumineurope.org/reports/country/italy/detention-asylum-seekers/detention-conditions/place-detention/> accessed 21 July 2024.
[78] ibid.

still violates the prohibition of CIDTP.[79] UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) and the UNHCR Detention Guidelines,[80] set clear standards for detention facilities, underscoring the need for adequate living conditions to uphold detainees' rights. Failure to adhere to these standards in repatriation and reception centres contributes directly to violations of the prohibition of CIDTP.

The excessive use of force is a recurring issue, particularly during efforts to maintain control or prevent escape as exemplified.[81] Even without the intent to extract information, such actions can have a punitive and degrading intent, violating the prohibition of CIDTP. The use of violence during deportation or reception worsens the precarious situation of individuals subject to RAs. Detainees frequently suffer cumulative harm due to poor detention conditions combined with mistreatment by officials, heightening the risk of violations of their fundamental rights.

For the EU context under the CEAS,[82] Member States are required to ensure dignified reception conditions for returnees, particularly in detention facilities, including access to housing, healthcare, and social services, as outlined in the Reception Conditions Directive .[83] However, the implementation of these standards remains uneven, particularly in frontline states, where systemic failures often lead to overcrowded facilities, insufficient medical care, and denial of essential services.[84] These deficiencies, even absent overt

[79] European University Institute, 'Module 5: The Implementation of the Common European Asylum System' (2019) <https://cjc.eui.eu/wp-content/uploads/2019/03/D1.1.e-Module-5.pdf> accessed 30 June 2024, 12 para 3.
[80] United Nations Office on Drugs and Crime, 'United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)' (United Nations, 2015) <https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf> accessed 21 July 2024; UNHCR, 'Detention Guidelines' (UNHCR, 2012) <https://www.unhcr.org/media/unhcr-detention-guidelines> accessed 21 December 2024.
[81] See (n 66) for examples on excessive use of force during detention for the purpose of forced returns.
[82] APD; RD.
[83] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96; To be repealed by Directive (EU) 2024/1346 of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2024] OJ L231/1.
[84] See MSS v Greece and Belgium and J.A. and Others.

violence, may amount to CIDTP, especially for vulnerable groups such as children, women, and individuals with disabilities.

6.3.4 Case Law in the context of Prohibition of Torture and CIDTP

Judicial outcomes concerning RAs offer critical insights into state responsibility, particularly under the principles of non-refoulement and the conditions of detention. Both ECtHR and the CJEU have consistently affirmed that states have a duty to avoid refoulement, including chain refoulement through secondary expulsion.[85] Both courts have held that the first expelling state is responsible for conducting a risk assessment to ensure that the receiving state will not expose returnees to risks of ill-treatment or refoulement.

In *Hirsi Jamaa and Others v. Italy*, the ECtHR condemned Italy for intercepting and returning migrants to Libya under an RA without conducting individualized assessments. Libya's systemic failure to provide adequate protections—marked by arbitrary detention, abuse, and degrading treatment—highlighted the dangers of presuming safety without robust safeguards. The Court found Italy in violation of Article 3 ECHR, reinforcing that states cannot outsource their responsibilities by designating unsafe third countries as safe.[86]

Similarly, *J.A. and Others v. Italy* exposed the systemic risks associated with RAs. The ECtHR found Italy in violation of Article 3 and Article 5 ECHR —including overcrowding and insufficient medical care— for returning asylum seekers to Tunisia, where the asylum system was inadequate and failed to prevent onward deportations to unsafe third countries.[87] Additionally, the Court criticized Italy's detention of migrants at the

[85] *Hirsi Jamaa and Others v Italy* (n 34)*, Sharifi and Others v Italy and Greece* (n 34)*; Ilias and Ahmed v Hungary*, ECtHR, Application no. 47287/15 (14 March 2017); *Singh and Others v Belgium*, ECtHR, Application no. 33210/11 (2 January 2013); *M.S.S. v Belgium and Greece* (n 33); *Joined cases of N.S. v United Kingdom and M.E. v Ireland*, CJEU, Cases C-411/10 and C-493/10 (21 December 2011).
[86] ibid *Hirsi Jamaa and Others v Italy*.
[87] *J.A. and Others v. Italy App no 21329/18 (ECtHR, 30 March 2023)* paras 58-67, 79-99.

Lampedusa hotspot without legal basis or judicial review, deeming it arbitrary and inhumane. However, the ruling fell short of addressing the broader systemic risks posed by RAs, leaving gaps in legal protections.

A.E. and Others v. Italy reinforces the findings of Hirsi Jamaa, particularly in relation to Libya. In this case, the Court found that Libya could not be considered a STC, emphasizing the presence of torture, inhumane detention conditions, and systemic abuse. The Court's clear stance contrasts with its approach in cases involving Turkey and Tunisia, exposing inconsistencies in how it assesses third-country safety under RAs.

Despite these strong rulings, the ECtHR has shown reluctance to address chain refoulement in cases such as *M.S. v. Slovakia and Ukraine* and *Ilias and Ahmed v. Hungary*. In *M.S. v. Slovakia and Ukraine*, Slovakia returned a Chechen national to Ukraine, where the applicant faced risks of onward deportation to Russia. Despite clear indications of systemic refoulement, the Court narrowly focused on procedural safeguards in Ukraine rather than addressing the broader implications of chain refoulement under RAs. Similarly, in *Ilias and Ahmed v. Hungary*, the ECtHR criticized procedural deficiencies in Hungary's return of asylum seekers to Serbia, but refrained from examining how RAs exacerbate systemic refoulement risks. Cases such as *Ilias and Ahmed v. Hungary* and Hirsi Jamaa illustrate the consequences of inadequate living standards in requested states. In Ilias and Ahmed, the ECtHR condemned Hungarian transit zones for failing to provide access to adequate housing and basic necessities, while Hirsi Jamaa confirmed that poor reception conditions in Libya amounted to degrading treatment.

In *J.R. and Others v. Greece*, the ECtHR adopted a more lenient approach. Despite concerns about Turkey's capacity to provide adequate protections under the EU-Turkey

Statement, [88] the Court found no violation of Article 3 ECHR,[89] contrasting with its more critical stance in cases involving Libya or Tunisia. This divergence highlights an inconsistent judicial approach to assessing third-country safety and underscores the need for a more coherent legal framework for evaluating the systemic risks of RAs.

The case of *M.S.S. v. Belgium and Greece* as discussed above remains a cornerstone ruling on shared responsibility in asylum cases and aligns closely with *H.T. v. Germany and Greece*, reinforcing that both requesting and requested states share liability when systemic failures lead to violations of fundamental rights. The recent case of *H.T. v. Germany and Greece* is particularly significant, as it directly implicates the EU-Turkey Statement and exposes violations by both requesting and requested states.[90] The applicant, a Syrian asylum seeker, was initially registered in Greece before traveling to Germany, where he submitted a subsequent asylum application. Germany attempted to transfer the applicant back to Greece under the Dublin Regulation, despite well-documented evidence of Greece's systemic deficiencies in its reception and asylum system.[91]

The ECtHR found both Germany and Greece in violation of Article 3 ECHR, citing Greece's inhumane detention conditions and its failure to prevent onward deportations to Turkey, where the applicant faced risks of chain refoulement to Syria.[92] The Court highlighted severe overcrowding, unsanitary conditions, and inadequate access to healthcare in Greek detention centres.[93] However, the Court did not directly address the role of the EU-Turkey Statement in exacerbating these systemic failures. By designating

[88] See the geographical limitations of Turkey above (n 28).
[89] *J.R. and Others v Greece*, ECtHR, Application no. 22696/16 (25 January 2018); Vedsted-Hansen, 'Reception Conditions as Human Rights: Pan-European Standard or Systemic Deficiencies?' in Vincent Chetail, Philippe de Bruycker, and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Brill/Nijhoff 2016) 317.
[90] *H.T. v. Germany and Greece,* ECtHR, Application No. 13337/19 (15 October 2024).
[91] ibid paras 11-16.
[92] ibid paras 50-55.
[93] ibid 30-35.

Turkey as a STC without ensuring compliance with international protection standards and the risk of chain refoulement, the EU and its Member States contributed to violations of fundamental rights. The H.T. ruling reinforces that designating a country as safe does not absolve states of their obligation to ensure returnees are not exposed to torture, CIDTP, or other human rights violations.

The ECtHR's inconsistent application of non-refoulement and Article 3 ECHR in cases involving RAs reflects broader gaps in judicial scrutiny. While cases like Hirsi Jamaa and *A.E. v. Italy* strongly condemned returns to unsafe countries, judgments such as *J.R. and Others v. Greece* and *M.S. v. Slovakia and Ukraine* illustrate a more lenient approach, particularly when the receiving country is Turkey or an EU Member State. These inconsistencies underscore the need for a more coherent judicial framework to address the structural weaknesses of RAs and their impact on the prohibition of torture and CIDTP. The failure to scrutinize how RAs perpetuate violations of Article 3 ECHR has allowed systemic risks to persist, undermining the protective purpose of international human rights law.

6.3.5 State Responsibilities on the Prohibition of Torture and CIDTP

RAs inherently raise significant risks of violations of the prohibition of torture and CIDTP due to their implementation processes, including forced returns, inadequate detention conditions, and systemic refoulement practices. These agreements operate at the intersection of state sovereignty, migration control, and international human rights law, creating complex challenges for responsibility and compliance with international legal standards.

States are obligated under various international instruments[94] to prevent torture, CIDTP, and refoulement at all stages of the return process. These obligations require that individuals are not subjected to ill-treatment or transferred to territories where they face substantial risks of harm. The territorial jurisdiction of the requesting state extends over individuals held in pre-removal detention centres and during transportation to the requested state.[95] Jurisdiction also applies to maritime interception operations or high-seas transfers conducted under a state's flag jurisdiction. [96] The attribution of conduct to the requesting state includes detention in repatriation centres, transportation, and forced returns.

When return processes lack procedural safeguards, involve coercive measures, or result in transfers to unsafe countries, these actions constitute wrongful acts under international law.[97] Returning individuals to conditions where they face torture or CIDTP violates provisions enshrined in the ICCPR, ECHR, CAT, and the RC. Such violations often stem from systemic failures, including inadequate risk assessments, insufficient procedural oversight, and the use of coercion in the return process. The ECtHR has addressed these issues in landmark cases as exemplified above. These cases emphasize the obligation of states to ensure compliance with the principle of non-refoulement and to prevent CIDTP during return processes.

Detention conditions in pre-removal and reception centres remain a critical concern under RAs. Migrants are often held in overcrowded, unsanitary, and degrading environments,

---

[94] UDHR art 5; ICCPR art 7; CAT arts 2 and 16, and ECHR art 3.
[95] James Crawford, Brownlie's Principles of Public International Law, 9th ed (Oxford University Press 2019) 700; See chapter 3.5.
[96] ibid Crawford 543-557, 700, 703; John Mansell, Flag State Responsibility: Historical Development and Contemporary Issues (2009) 13-23, 53-69.
[97] Legomsky (n 3) 567; Giuffré and Moreno-Lax (n 22) 100-106; David Weissbrodt and Isabel Hortreiter, 'The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties' (1999) 5 *Buffalo Human Rights Law Review* 1,8 citing *Mutombo v. Switzerland*, Committee Against Torture, Communication No. 13/1993, U.N. Doc. A/49/44, 45:"The Committee Against Torture has concluded that the principle of non-refoulement under Article 3 applies not only to direct expulsion, return, or extradition, but also to indirect transfer to a third country from which the individual might be returned to a country where s/he would be in danger of being subjected to torture".

both in the requesting state's pre-removal facilities and the requested state's reception centres. These conditions frequently fall below international standards, violating the prohibition of CIDTP. States have positive obligations under CAT (Articles 2/1 and 16/1), [98] ICCPR (Article 2/1), and ECHR (Article 1) [99] to prevent ill-treatment in detention, ensure access to medical care, and maintain basic standards of hygiene and dignity. When detention conditions amount to CIDTP, these obligations are directly engaged. The territorial jurisdiction of the requesting state applies to individuals detained in pre-removal facilities, while the requested state assumes jurisdiction once individuals are readmitted to reception centres. In both scenarios, states are obligated to ensure that conditions meet international standards. Failures to meet these standards constitute violations of positive obligations under international law.

The implementation of RAs also establishes a framework for responsibility of requested states. While the requesting state is responsible for its actions during the return process, the requested state assumes responsibility once individuals are readmitted and detained within its territory. Under the ARSIWA, states can also be held liable for aiding or assisting wrongful acts. Article 16 and 17 of ARSIWA explicitly provide that a requested state bears legal responsibility if it knowingly accepts returnees who face substantial risks of torture or CIDTP.[100] For instance, if a requested state transfers individuals to a third country where these risks persist, the requesting state becomes complicit in chain refoulement. Furthermore, a requested state accepting returnees under conditions that violate international obligations can be held liable for aiding the requesting state in committing such violations because it becomes complicit in direct refoulement and violations of the prohibition of torture and CIDTP that the requesting makes.

[98] CAT arts 2/1 and 16/1.
[99] ICCPR art 2(1); ECHR art 1.
[100] ibid arts 16-17; Kienast et al (n 41).

RAs inherently pose significant risks to the prohibition of torture, CIDTP, and refoulement, particularly when states fail to uphold their obligations under international law. The textual interpretation of international instruments underscores the importance of strict compliance with the prohibition of torture and CIDTP. Jurisdiction and attribution principles establish clear responsibilities for both requesting and requested states. Requesting states are responsible for detention, transportation, and return decisions, while requested states are accountable for ensuring reception conditions comply with international standards and preventing onward deportations. Both states must ensure that their actions align with the principles of non-refoulement and the prohibition of CIDTP, as emphasized in international and regional human rights frameworks.

6.4 The Right to Seek Asylum in the Context of Readmission Agreements

RAs can significantly undermine the right to seek asylum, protected by a set of international instruments,[101] with violations occurring at various stages of the readmission process. This right ensures that individuals fleeing persecution or serious harm can access protection,[102] and it is closely linked to the principle of non-refoulement, which prohibits the return of individuals to territories where they face substantial risks of harm.[103] However, violations of this right frequently occur during the implementation of RAs, exposing returnees to systemic risks of refoulement and denial of access to asylum procedures.

RAs often prioritize administrative efficiency over the protection of human rights, creating obstacles for individuals attempting to access asylum mechanisms. Practices such as the

[101] UDHR art 14; RC art 1 and 33, ICCPR art 12: ACHR art 22; ACHPR) art 12; Charter of Fundamental Rights of the European Union art 18.
[102] Thomas Gammeltoft-Hansen and Nikolas Feith Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy' (2017) 5(1) *Journal on Migration and Human Security* 28, 30.
[103] See section 2.2.1.

failure to provide procedural safeguards, the denial of access to asylum systems, or subjecting individuals to refoulement illustrate how RAs undermine this fundamental right. The right to seek asylum is not an isolated concept but operates within a broader framework of fundamental rights, including the right to liberty and the prohibition of refoulement, both of which serve as essential guarantees for its effective exercise. Upholding this right requires states to adhere to international obligations that emphasize fairness, transparency, and accessibility throughout the return and migration process.

While RAs are ostensibly designed to facilitate the return of individuals staying illegally, their implementation often reflects systemic disregard for legal guarantees tied to human rights. In practice, the lack of proper assessments and the failure to ensure access to asylum procedures at critical stages of detention and transportation fundamentally erode the right to seek asylum. This neglect not only violates international obligations but also undermines the principles of fairness and non-discrimination, which are integral to the asylum process.

The following sections will explore how the implementation of RAs impacts the right to seek asylum, focusing on specific stages of the return process, including detention and transportation, and the procedural safeguards required to ensure compliance with international legal standards.

6.4.1 Obligations on The Right to Seek Asylum and Refoulement

As discussed in relation to other rights, applying the principle of non-refoulement as an obligation under the RC presents challenges.[104] States are obligated to ensure compliance with this principle, particularly in the context of RAs, where asylum seekers may be returned to countries lacking effective protection frameworks[105] —such as the right not to

[104] See above in chapter 6.2.1; RC art 33.
[105] See (n 28) for Turkey; See (n 12) for Libya.

be penalized for illegal entry or presence or the right to seek asylum—resulting in erosions of human rights.[106] The European Union's Asylum Acquis, including the APD and the RD[107] mandates that Member States adhere to strict procedural guarantees during asylum and return processes. Without access to fair asylum procedures and protection from refoulement, individuals cannot effectively exercise their right to seek international protection.

Specifically, the APD within the EU sets minimum standards to ensure that individuals have the opportunity to apply for asylum and receive a fair hearing before any decision to return is made. However, when RAs are implemented without proper oversight, individuals may be returned without having their asylum claims heard, thereby violating their right to seek asylum. This lack of effective oversight creates systemic barriers to protection and significantly increases the risk of refoulement.

6.4.2 Right to Seek Asylum and Refoulement

Goodwin-Gill and McAdam argue that the principle of non-refoulement serves as an implicit recognition of the right to seek asylum.[108] This principle ensures that individuals cannot be returned to territories where they would face persecution or serious harm, thus safeguarding their ability to access international protection. As a cornerstone of international refugee law, non-refoulement imposes an obligation on states to provide refugees and asylum seekers with meaningful access to asylum procedures and protection from refoulement.

[106] Cathryn Costello (n 71) 257–303; Violeta Moreno-Lax (n 71) 379–407.
[107] APD ensures that asylum seekers have access to fair and effective asylum procedures, while the RD establishes common standards for the return of individuals whose asylum applications have been rejected.
[108] Goodwin and McAdam (n 1) 201-232;

The right to seek asylum can be severely undermined when irregular migrants are returned to requested states that fail to comply with international refugee and human rights law or lack domestic refugee protection frameworks.[109] Since RAs primarily facilitate the return of migrants to countries of transit or origin, the requesting state risks violating the principle of non-refoulement if it returns an individual escaping persecution to a requested state that lacks adequate protection mechanisms. In such cases, the requesting state neglects its obligation to ensure that the right to seek asylum can be exercised effectively in the requested state, further weakening international protections.

Scholars have raised significant concerns regarding the STC concept as applied under RAs, highlighting its impact on fairness, legality, and access to protection. [110] Legomsky notes that STC policies lead to inequitable responsibility-sharing, allowing developed destination countries to shift the burden of asylum protection onto transit states. These transit states often lack the resources, institutional capacity, or political will to provide effective protection, leaving refugees trapped in cycles of "orbiting" between countries without substantive access to asylum procedures.[111] This "revolving door" effect forces refugees into repeated border-crossing attempts, where they are continuously returned without receiving protection under international law.[112] Chain refoulement becomes a recurring issue, particularly when transit countries lack the capacity to prevent onward deportation.[113] For example, Turkey's designation as an STC under Greece's

[109] Legomsky Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection, 15 INT'L J. REFUGEE L. 567, 573 (2003). U.N. High Comm'r for Refugees, UNHCR's Views on the Concept of Effective Protection as it Relates to Malaysia (Mar. 31, 2005), available at http://www.unhcr.org.au/pdfs/Malaysia.pdf
[110] See section 2.2.2; See inconsistencies in section 7.2.
[111] ibid.
[112] Pirjola and Sahin-Mencutek and Triandafyllidou (n 29).
[113] Coleman (n 1); Giuffré (n 4); See section 2.2.1 for further analysis.

implementation of RAs has been widely criticized for failing to provide adequate protections and restricting asylum access for non-European refugees.[114]

Giuffré observes that the STC concept enables states to deny access to effective asylum procedures for individuals who transited through another safe country before reaching their intended destination.[115] Refugees, under this policy framework, are expected to request asylum in the first country deemed safe, yet the transfer of responsibility to another state lacks a firm basis in general international law.[116] Consequently, the EU and its Member States commonly use RAs to secure cooperation in readmitting third-country nationals,[117] yet these agreements often prioritize operational efficiency over substantive protection. Forced or involuntary returns under RAs frequently expose individuals to detention, mistreatment, or onward deportation to unsafe environments.[118] When migrants are returned to transit countries like Turkey or Tunisia without adequate risk assessments, they face arbitrary detention and onward deportation to countries where their safety cannot be guaranteed. This creates a cycle of human rights violations, systematically denying returnees access to asylum protections.[119]

Central to the implementation of RAs is the obligation to conduct individualized assessments, ensuring that the specific circumstances of each applicant are thoroughly examined before any return decision is made. However, RAs often bypass these protections by facilitating accelerated returns and relying on blanket presumptions of

[114] See (n 28) for Turkey.
[115] Giuffré (n 4) 131–188.
[116] See section 2.2.1.
[117] See section 2.4.1, eg third and fourth generation agreements.
[118] European Parliamentary Research Service, *Understanding EU Action on Migration* (2019) PE 637.901 https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637901/EPRS_BRI(2019)637901_EN.pdf accessed 05 May 2022, 2; European Parliamentary Research Service, *EU External Migration Policy and the Protection of Human Rights* (2019) PE 631.727 https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS_STU(2019)631727_EN.pdf accessed 05 May 2022. 1-3.
[119] Violeta Moreno-Lax (n 29) 673–74; Pirjola (n 29); Sahin-Mencutek and Triandafyllidou (n 29).

safety.[120] Critics of the European Asylum Acquis note that while its streamlined procedures aim to increase efficiency, they risk prioritizing expedience over fairness, leaving asylum seekers vulnerable to chain refoulement.[121] When individuals are returned to countries lacking robust refugee protection systems, the likelihood of onward deportation increases, effectively bypassing the protections enshrined under the non-refoulement principle.[122] These procedural failures reflect the broader structural flaws of RAs and their impact on the rights of refugees and asylum seekers.

The principle of non-refoulement is defined in the RC (Article 33/1) as prohibiting the return of individuals to territories where their life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion. The act of returning an individual to a country where such threats exist constitutes a violation of this principle. Moreover, the requesting state that initiates such returns is directly responsible for enabling chain refoulement when the requested state lacks adequate protection systems.

Chain refoulement occurs when the requested state deports returnees to unsafe environments, perpetuating violations of the right to seek asylum. This cycle is exacerbated by systemic gaps in legal and institutional protections within transit countries. Giuffré's critique of detention practices and the lack of access to effective remedies underscores these failings.[123] Without adequate procedural safeguards, returnees are unable to challenge their detention, seek legal remedies, or access asylum systems, further amplifying their vulnerabilities.[124] This lack of access to legal remedies contravenes international legal

[120] Giuffré (n 4); Gil-Bazo (n 6); Moreno-Lax (15).
[121] Olivia Sundberg Diez, 'Diminishing Safeguards, Increasing Returns: Non-Refoulement Gaps in the EU Return and Readmission System' (2019) 54 *Forced Migration Review* 5, 9; ibid Giuffré 179-187.
[122] ibid.
[123] ibid Giuffré 94-107;
[124] ibid; Costello (n 71) 257–303.

standards, including the right to liberty and the right to leave, leaving detained individuals at heightened risk of further violations.

Without legal representation or knowledge of their rights, detainees are often unable to exercise their right to seek asylum effectively. These procedural deficiencies undermine fundamental human rights protections and demonstrate the urgent need for states to implement adequate safeguards within detention and readmission processes. Strengthening procedural oversight mechanisms is essential to prevent chain refoulement, ensure access to asylum procedures, and uphold international obligations under refugee and human rights law.

6.4.3 Case Law in the Context of Right to Seek Asylum

The ECtHR has consistently emphasized that states must provide every individual with a genuine opportunity to present their case, challenge their return before an independent authority and essentially right to effective remedy. These judicial decisions highlight the importance of procedural safeguards, individualized assessments, and the broader implications of non-refoulement and the right to an effective remedy obligations under international law.

In *M.S.S. v. Belgium and Greece*, the ECtHR ruled that the transfer of an asylum seeker under the Dublin II Regulation violated the principle of non-refoulement and the right to an effective remedy.[125] The Court found that both Belgium and Greece failed to protect the applicant from inhuman and degrading treatment in Greece, where systemic deficiencies in the asylum system posed substantial risks to returnees. This landmark case established a critical legal precedent for addressing potential chain refoulement in readmission

[125] *M.S.S. v Belgium and Greece* (n 33) paras 283-322 and 385-97.

practices.[126] The Court further elaborated on the risks of inadequate procedural safeguards in *Hirsi Jamaa and Others v. Italy*. Here, Italy's interception and return of migrants to Libya without conducting individual assessments was deemed a violation of non-refoulement and violation of right to effective remedy.[127] By ruling that these practices breached international refugee law, the judgment reinforced the link between individualized assessments and the protection of asylum seekers' rights. In *H.T. v. Germany and Greece*, procedural deficiencies in the implementation of RAs were brought into sharp focus. The applicant's immediate removal by German authorities, coupled with his subsequent detention in Greece without access to effective legal remedies, violated his right to seek asylum. The Court emphasized the need for accessible procedural safeguards and adequate legal remedies to uphold asylum seekers' rights under EU law.[128]

Further case law highlights the systemic deficiencies of RAs and their implications for asylum seekers, particularly in relation to procedural safeguards and the safe country concept. The judgment in *M.A. v. Belgium* underscored the necessity of individualized assessments in asylum cases, criticizing the blanket presumptions of safety that undermine procedural fairness and deny asylum seekers a meaningful opportunity to present their claims.[129] The lack of effective procedural safeguards is further evident in *Sharifi and Others v. Italy and Greece*, where the ECtHR condemned the systemic violations resulting from the absence of adequate legal remedies for returnees.[130] The Court highlighted how procedural deficiencies under RAs allow rights violations to persist, leaving asylum seekers without recourse to challenge their return. This theme is reinforced in *J.A. and Others v. Italy*, where the ECtHR found that degrading detention conditions and the denial

[126] ibid.
[127] *Hirsi Jamaa v. Italy* (n 34) 146-147 and 196-207.
[128] *H.T. v. Germany and Greece* (n 90) paras 72–85.
[129] *M.A. v. Belgium* App no 19656/18 (ECtHR, 27 October 2020) para 103-110.
[130] *Sharifi and Others v. Italy and Greece* (n 34) paras 210–225.

of judicial review compounded the systemic barriers asylum seekers face.[131] Together, these cases demonstrate how inadequate safeguards in RA implementation perpetuate violations of the right to seek asylum and the principle of non-refoulement. The 2024 CJEU decision on Turkey's STC designation addressed some of these systemic barriers to asylum access, clarifying that suspended readmissions cannot justify rejecting or indefinitely delaying asylum applications.[132] However, the reliance on Turkey as an STC, despite its operational shortcomings, reveals broader structural flaws in the EU's migration governance.[133] Procedural shortcuts and politically motivated safe country designations frequently compromise asylum seekers' rights, perpetuating violations of non-refoulement and undermining their ability to seek international protection.

6.4.4 State Responsibilities on the Right to Seek Asylum

As discussed in earlier and throughout this analysis, the principle of non-refoulement principle is deeply embedded in in international instruments.[134] In the context of RAs, compliance with non-refoulement is essential to upholding the right to seek asylum.

Requesting states that facilitate returns without ensuring the safety and protection of returnees in requested states violate their obligations under international law. This is particularly evident when returnees are sent to states lacking adequate refugee protection systems or those with systemic barriers to asylum access, exposing individuals to refoulement or onward deportation. The reliance on presumptive safety designations, such as the STC concept, often bypasses individual risk assessments, further undermining the right to seek asylum.[135] Transit countries like Turkey and Tunisia, frequently designated as

[131] *J.A. and Others v. Italy* (n 87) paras 95–102.
[132] Court of Justice of the European Union, case C-134/23 Request for a preliminary ruling from the Symvoulio tis Epikrateias. [2024] ECLI:EU:C:2024:134.
[133] See above (n 28) for Turkey.
[134] See sections 2.2.2, 4.4.2 and 5.4.3.
[135] See section 2.2.2; See inconsistencies in section 7.2.

safe third countries, are particularly strained by RAs, despite systemic deficiencies in their asylum systems. Cases such as *Sharifi and Others v. Italy and Greece* and the *2024 CJEU* ruling on Turkey's STC designation highlight the dangers of procedural shortcuts and politically motivated safety designations.[136] Overall, ECtHR has emphasized the need for effective procedural safeguards to ensure compliance with non-refoulement obligations. These rulings demonstrate how such practices often violate non-refoulement obligations and obstruct asylum seekers' access to protection.

The implementation of RAs further complicates state responsibilities under non-refoulement, as the requesting state's jurisdiction extends over individuals throughout the return process, from detention in pre-removal centres to their transportation to the requested state.[137] These actions fall within the national territorial and operational control of the requesting state, obliging it to ensure individuals are not exposed to risks of harm. Additionally, the conduct of state officials during return procedures—including detaining individuals, managing transportation, and coordinating readmissions—directly links non-refoulement violations to the requesting state. Thus, requesting states must implement robust procedural safeguards during the return process. This includes conducting individualized risk assessments, providing access to legal remedies, and ensuring full compliance with international and regional obligations. Requested states also bear significant obligations to ensure that individuals readmitted under RAs are not subjected to onward deportation or violations of their fundamental rights.[138] The ECtHR has repeatedly emphasized the obligation of states to provide access to effective remedies and asylum procedures, regardless of an individual's legal status.

[136] *Sharifi and Others v. Italy and Greece* (n 34)*; 2024 CJEU* (n 132).
[137] See section 3.5.
[138] Giuffré and Moreno-Lax (n 22).

When returnees are sent to requested states that are not party to international refugee law instruments or lack domestic refugee protections, the risks of refoulement become particularly acute. These violations contravene the RC(Article 33(1)) and broader international and regional legal frameworks. The risks posed by non-compliance with non-refoulement norms in the context of RAs are compounded by procedural deficiencies. The absence of individualized risk assessments, reliance on blanket safety presumptions, and prioritization of administrative efficiency over fairness perpetuate violations of non-refoulement obligations. These failures erode the right to seek asylum and undermine the broader international refugee protection framework. Thus, as explained in detail above, the requesting state is responsible for violating the right to seek asylum by infringing upon the right to an effective remedy due to refoulement. The requested state is held responsible within the scope of ARSIWA 16 and 17 for assisting the requesting state in this refoulement process by opening its territory to the repatriated persons.

6.4.5 The Right to Seek Asylum and the Right to Liberty

As discussed earlier, irregular migrants, including asylum seekers detained in repatriation centres,[139] often experience conditions that restrict their liberty. The intersection between the right to liberty and the right to seek asylum raises significant concerns, as detention frequently prevents individuals from accessing asylum procedures or challenging their return effectively. Under international law, detention must be authorized by law, non-arbitrary, and subject to judicial oversight.[140] It must also satisfy the tests of

[139] Gregor Noll, 'Rejected asylum seekers: the problem of return' in New Issues in Refugee Research https://www.unhcr.org/sites/default/files/legacy-pdf/3ae6a0cd0.pdf accessed 30 September 2023, 26.
[140] Edwards (n 58) 19.

reasonableness, necessity, and proportionality, [141] and should be the last resort.[142] However, detention practices in return centres often fail to meet these criteria. Individuals are frequently detained without judicial oversight, for indefinite periods, and under inhumane conditions through return process in the context of RAs.[143]

Despite the RC(Article 31/1)'s prohibition of the penalization of refugees for illegal entry or presence, detention is often used as an administrative tool to manage migration, rather than as a last resort. Detention under RAs further erodes the right to seek asylum by limiting individuals' ability to file claims or appeal rejections. Without access to effective legal remedies, detainees are unable to challenge their return or exercise their right to seek protection. In *J.A. and Others v. Italy*, the ECtHR found that degrading detention conditions at the Lampedusa hotspot, combined with denial of legal counsel and judicial review, violated the right to liberty and prevented applicants from pursuing asylum claims.

The relationship between the right to liberty and the right to seek asylum is further strained when individuals are returned to requested states lacking effective refugee protection frameworks. The detention of irregular migrants prior to transfer often results in systemic violations of their rights. Detainees are not only deprived of their liberty but also denied access to information regarding their right to seek asylum, fair trial, and appeal procedures. Such practices contravene international obligations and contribute to the erosion of both liberty and asylum protections. In *Sharifi and Others v. Italy and Greece*, the ECtHR

[141] UN Human Rights Council Working Group on Arbitrary Detention, 'Report of the Working Group on Arbitrary Detention : United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court' 6 July 2015 A/HRC/30/37 https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/30/37 accessed 10.10.2023 para 43; ibid para 61;
[142] Sahin-Mencutek and Triandafyllidou (n 29); See sections 6.4.2 and 6.4.3, see further analysis on detention in 2.4.2. and 4.4.1 and 5.4.1.
[143] See sections 6.4.2 and 6.4.3 above.

highlighted systemic failures under RAs, particularly the lack of effective remedies and denial of access to asylum procedures, compounding fundamental rights violations.[144]

Another scenario arises when irregular migrants are detained in one country, effectively preventing them from seeking asylum elsewhere. While M.S.S. and H.T. do not explicitly address this issue, they highlight the failure of the first country of asylum to provide effective remedies.[145] When individuals are subjected to prolonged detention without procedural safeguards, their freedom of movement is restricted, ultimately blocking access to asylum in another state.

In such cases,[146] the requesting state fails to meet its obligations under the principle of non-refoulement and the right to liberty, exposing individuals to further harm. Detention in return centres for extended periods without judicial review raises serious concerns regarding proportionality and necessity, making such detention arbitrary under international law. The intersection of the right to liberty and the right to seek asylum remains a critical concern under RAs. Prolonged detention not only deprives individuals of their freedom but also obstructs their access to protection mechanisms.[147] Requesting states must ensure that detention is used sparingly, proportionately, and as a last resort. They must also guarantee access to legal remedies, provide clear information on asylum rights, and facilitate the opportunity to file or appeal asylum claims. Without these safeguards, the implementation of RAs will continue to undermine both liberty and asylum protections, placing vulnerable individuals at further risk of harm.

[144] *Sharifi and Others v. Italy and Greece* (n 34).
[145] *M.S.S. v Belgium and Greece* (n 33) and *H.T. v. Germany and Greece* (n 90).
[146] ibid.
[147] Edwards (n 58).

6.4.6 State Responsibilities on the Right to Liberty and the Right to Seek Asylum

Requesting states, which initiate the return process under RAs, bear primary responsibility for ensuring that detention practices and return procedures comply with international standards. Requesting states must ensure that any deprivation of liberty complies with procedural safeguards and is not used as a punitive measure against irregular migrants or asylum seekers. Their jurisdiction is exercised over individuals detained in return centres and during transportation to the requested state.[148] Actions such as detention, transportation, and readmission are directly attributable to the requesting state, making it responsible for any violations of fundamental rights.[149] Requesting states must also address systemic barriers to asylum access, including inadequate legal frameworks and delays in processing claims.

Requested states, which receive individuals under RAs, also bear responsibility for ensuring that returnees are not subjected to arbitrary detention avoiding onward deportation and inhuman treatment.[150] Procedural deficiencies and inadequate refugee protection frameworks further undermine asylum seekers' rights, reinforcing the obligations of requested states to uphold fundamental protections.

To meet these responsibilities, both requesting and requested states must ensure individualized risk assessments, judicial review of detention decisions, and access to legal remedies throughout the return process. As exemplified above in various cases, the lack of these safeguards leads to systemic violations of the right to liberty and the right to seek asylum. The failure to provide legal representation and meaningful access to asylum

[148] See section 3.2.1 and 3.5.
[149] ibid.
[150] Giuffré (n 4) 55-56, 59, 162-163.

mechanisms deprives individuals of the ability to challenge detention or appeal their return, leaving them vulnerable to harm.

Requested states must also address systemic barriers to asylum access, including inadequate legal frameworks and procedural deficiencies. The reliance on STC designations often exacerbates these barriers, as transit countries frequently lack the resources or political will to provide meaningful protections.[151] The 2024 CJEU decision on Turkey's designation as an STC clarified that such designations cannot justify procedural shortcuts or indefinite delays in asylum applications.[152] Procedural failures in requested states not only violate the principle of non-refoulement, the right to an effective remedy or the right to liberty but also undermine the ability of returnees to seek protection in compliance with international law.

The Articles 16 and 17 of the Responsibility of States for Internationally Wrongful Acts (ARSIWA) provide a framework for assessing state responsibility in the context of RAs. When requested states fail to prevent arbitrary detention or ensure access to asylum procedures because of violation of the right to liberty at centres in requested states, requesting states can be held responsible under ARSIWA for breaching international obligations.[153] Since requesting states that knowingly send returnees without ensuring their protection can be complicit in violations of the right to liberty and the right to seek asylum because of the arbitrary detention in the requested states.[154] The responsibility of requesting states in implementing RAs in compliance with international law is evident in these failures as the requested states can build and run relevant centres by aid and support of requesting states to implement RAs.

[151] See academic analysis (n 2).
[152] 2024 CJEU ruling (n 132).
[153] ARSIWA arts 16 and 17.
[154] ibid.

In conclusion, state responsibilities under RAs are grounded in jurisdiction, attribution, and compliance with international human rights and refugee law. Requesting and requested states must prioritize procedural safeguards, judicial oversight, and individualized assessments to prevent violations of the right to liberty and the right to seek asylum. Without these measures, RAs will continue to undermine fundamental protections, leaving vulnerable individuals at risk of further harm.

6.5 Conclusion

This chapter has critically examined the systemic risks posed by RAs in relation to fundamental rights and state responsibilities under international and regional law. It has demonstrated how RAs undermine the right to life, the prohibition of torture and CIDTP, the right to seek asylum, and non-refoulement, particularly through deficient procedural safeguards, governance failures, and the prioritization of administrative efficiency over legal protections. By engaging with jurisprudence, academic critique, and empirical analysis, this chapter directly responds to the research questions, arguing that RAs, as currently implemented, violate international legal obligations and systematically erode fundamental rights.

A key finding is that the right to life is at risk when RAs transfer individuals to countries lacking adequate protection. Presumptions of safety—whether from safe country lists or discretionary state designations—often disregard on-the-ground realities, exposing returnees to life-threatening conditions. The failure to ensure adequate living conditions, healthcare, and protection from persecution leads to foreseeable violations. Weak oversight and monitoring further exacerbate these risks, as returnees lack avenues to challenge returns or report post-return mistreatment.

The prohibition of torture and CIDTP is similarly undermined when RAs involve countries with systemic human rights abuses. The return of individuals to detention facilities in states with documented records of torture and inhumane conditions raises serious legal concerns. Lack of individualized assessments and access to remedies results in individuals being detained in degrading conditions, physically abused, or forcibly expelled to unsafe third countries. The absence of post-return monitoring allows widespread violations to persist without accountability.

RAs also obstruct the right to seek asylum, both directly and indirectly. They enable expedited removals, limit procedural safeguards, and rely on flawed SCO/STC designations. These misapplications frequently lead to returns to states where individuals cannot meaningfully seek protection. Additionally, detention under RAs prevents asylum seekers from applying for protection, appealing return decisions, or accessing legal representation, leading to a systemic denial of asylum protections.

Despite non-refoulement being a binding legal obligation, RAs often fail to provide effective safeguards. As demonstrated, lack of individualized risk assessments, reliance on administrative discretion, and absence of legal remedies expose returnees to life-threatening conditions, arbitrary detention, and inhumane treatment, violating the core principles of international refugee protection. These failures engage state responsibility under international law, requiring states to ensure returns do not expose individuals to foreseeable harm.

This chapter contributes to legal and academic discourse on migration governance, arguing that RAs function as tools of externalization at the expense of fundamental rights. While existing literature focuses on non-refoulement and procedural deficiencies, this chapter has highlighted the interdependence between the right to seek asylum, non-refoulement, and

the right to liberty, emphasizing how detention obstructs asylum access and fuels systemic violations. By centring state responsibility and procedural safeguards, the chapter challenges reformist approaches, arguing that RAs require fundamental reassessment rather than procedural adjustments.

Although states have sovereign authority to remove individuals without legal status, as discussed in Chapters 4 and 5, justifications based on national security or public order cannot override non-derogable rights such as the right to life, prohibition of torture, and non-refoulement. Transfers should occur only to genuinely safe countries, where fundamental rights will be upheld. However, safe country designations must adhere to objective legal criteria, ensuring that states do not violate international obligations, subject individuals to persecution, or deny them dignified living conditions. Political or financial considerations should not dictate these designations.

Furthermore, the requested country must not only respect the right to seek asylum but also effectively implement international refugee law within its domestic framework. Only under such conditions could externalization avoid violating international law. However, systemic implementation failures within RAs prevent their legality and expose individuals to multiple rights violations. Forcible transfers and detention during readmission and return procedures pose ongoing risks, particularly when detention lacks legal basis, necessity, or proportionality. These deficiencies also make it harder to hold both requesting and requested states accountable for violations.

The next chapter (Chapter 7) will focus on the EU-specific context, assessing how European legislative frameworks and governance mechanisms impact the effectiveness and legality of RAs. It will examine whether EU policies exacerbate the erosion of legal guarantees and how legislative scrutiny, judicial oversight, and responsibility-sharing

influence RA implementation. Given the EU's reliance on informal agreements and STC arrangements, the upcoming analysis will evaluate whether these practices further weaken asylum protections and contribute to broader governance failures.

Ultimately, this chapter has demonstrated that without substantial legal and institutional reforms, RAs will continue to restrict, rather than facilitate, access to asylum. However, with rigorous oversight, harmonized procedural standards, and stronger legal protections, states could reorient RAs to align migration governance with fundamental rights, ensuring compliance with international legal standards and obligations.

7. The EU Readmission Agreements

7.1 Introduction

RAs have become central instruments of the EU's migration governance, facilitating the return of irregular migrants to third countries. While initially conceived as administrative tools, their implementation has raised critical concerns regarding non-refoulement, the right to seek asylum, and procedural safeguards. As demonstrated in the previous chapter, RAs structurally undermine fundamental rights by prioritizing administrative efficiency over substantive protections, particularly when externalizing migration control to countries of origin or transit or a third country with inadequate legal frameworks. [1]

This chapter moves beyond the general discussion of RAs and critically examines whether structural and policy-specific features of the EU RAs further accelerate the erosion of legal guarantees, exacerbating risks to asylum seekers and returnees. Unlike Chapter 6, which assessed systemic risks within RAs broadly, this chapter interrogates the EU's distinct legal and institutional framework, evaluating whether EURAs, in their design and implementation, create additional vulnerabilities beyond those already inherent in readmission policies. Central to this analysis is the question of whether the EU's approach to migration governance amplifies legal ambiguities, weakens safeguards, and entrenches responsibility-shifting at the expense of fundamental rights.

A primary area of concern is the EU's heavy reliance on STC designations, which are frequently applied without ensuring substantive protection for returnees.[2] The

[1] Mariagiulia Giuffré and Violeta Moreno-Lax, 'The Rise of Consensual Containment: From Contactless Control to Contactless Responsibility for Migratory Flows' in Satvinder Singh Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar Publishing 2019) 82.
[2] See section 2.2.1; G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 392-407; Cathryn Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?' (2005) 7(1) European

operationalization of STC classifications under EURAs—particularly through agreements such as the EU-Turkey Statement, the Italy-Libya Memorandum, and bilateral arrangements with Tunisia and Morocco—exposes serious deficiencies in procedural fairness, responsibility-sharing, and asylum access.[3] While the CEAS – repealed by New Pact on Migration and Asylum-[4] theoretically have established minimum safeguards, its fragmented application across Member States leads to disparities in RA implementation and enforcement, often to the detriment of returnees' rights.

Compounding these risks is the EU's increasing reliance on informal readmission arrangements, including MoUs and political declarations, which operate outside formal EU legal frameworks. These non-binding mechanisms circumvent parliamentary scrutiny, weaken judicial oversight, and diminish transparency and accountability, raising concerns about the extent to which EURAs conform to international human rights obligations. Similarly, non-affection clauses—intended to safeguard fundamental rights—often lack enforceability, further limiting access to effective remedies for returnees.

Additionally, the chapter examines the EU's institutional mechanisms for monitoring compliance with fundamental rights in return operations. Despite the RD outlining procedural safeguards, there remain significant gaps in post-return oversight, allowing potential violations—such as chain refoulement, arbitrary detention, and mistreatment of

---

Journal of Migration and Law 35; Mariagiulia Giuffré, *The Readmission of Asylum Seekers under International Law* (Hart Publishing 2020) 131–188. Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection, and the Common Market of Deflection* (Kluwer Law International 2000) 182-211; María-Teresa Gil-Bazo, 'The Practice of Mediterranean States in the Context of the European Union's Justice and Home Affairs External Dimension: The Safe Third Country Concept Revisited' (2006) 18(3-4) International Journal of Refugee Law 571-600; Stephen H. Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15(4) International Journal of Refugee Law 567.

[3] ibid Legomsky.

[4] European Commission, 'Common European Asylum System (CEAS)' https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system_en accessed 17 December 2024; European Commission, 'Pact on Migration and Asylum' https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en accessed 17 December 2024.

returnees—to persist without responsibility. The EU's reluctance to establish independent monitoring mechanisms raises questions about its commitment to ensuring that EURAs align with human rights law rather than merely serving as tools for externalized migration control.

By analysing these structural issues, this chapter evaluates whether EURAs not only perpetuate but actively intensify the erosion of legal guarantees in comparison to general RA frameworks. The chapter concludes by exploring potential reforms, emphasizing the need for harmonized procedural standards, strengthened monitoring mechanisms, and greater institutional responsibility to mitigate the risks posed by EURAs. Without these reforms, EURAs will continue to function as instruments that entrench legal uncertainty, diminish responsibility-sharing, and weaken the EU's commitment to fundamental rights protections.

7.2 EU Specific Issues

While the principles of non-refoulement, the right to life, the prohibition of torture and CIDTP, and the right to seek asylum are central to international and EU law, visible violations within the EU context remain limited. This is largely due to gaps in judicial scrutiny, limited transparency in readmission processes, and significant barriers preventing individuals from accessing redress mechanisms. These challenges are further compounded by the EU's heavy reliance on RAs as a key tool in its migration management strategy, creating complex layers of responsibility-sharing between Member States and third countries.

In bilateral arrangements, the divergence between the legal criteria for STC and SCO designations and their operational realities becomes particularly stark. The EU-Turkey

Statement[5] and the EU-Tunisia Partnership[6] are central examples. While these agreements incentivize returns through financial or political arrangements, systemic deficiencies in Turkey's and Tunisia's asylum systems undermine their designations as safe countries. Turkey, designated as a STC by Greece for non-European refugees, has been criticized for inadequate protections and risks of onward deportation to unsafe environments.[7] Greek national courts in particular have grappled with Turkey's designation as a STC, specifically following Ministerial Decision 42799/2021.[8] Despite Turkey's suspension of readmissions in 2020,[9] conflicting Greek rulings on this designation highlight procedural and substantive

[5] Council of the European Union, 'EU-Turkey Statement' (Press Release, 18 March 2016) https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/ accessed 17 December 2022; Emanuela Roman, Theodore Baird, and Talia Radcliffe, 'Why Turkey Is Not a "Safe Country"' (Statewatch, 18 February 2016) https://www.statewatch.org/analyses/2016/why-turkey-is-not-a-safe-country/ accessed 12 October 2023; Dogus Simsek, 'Turkey as a "Safe Third Country"? The Impacts of the EU–Turkey Statement on Syrian Refugees in Turkey' (2017) 22 *Perceptions* 161; María-Teresa Gil-Bazo (n 6) 57; Human Rights Watch, *EU: Turkey Mass-Return Deal Threatens Rights* (2018) https://www.hrw.org/news/2018/03/20/eu-turkey-mass-return-deal-threatens-rights accessed 15 October 2024; Meltem Ineli-Ciger and Orçun Ulusoy, 'A Short-Sighted and One-Sided Deal: Why the EU-Turkey Statement Should Never Serve as a Blueprint' in Sergio Carrera and Andrew Geddes (eds), *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees: International Experiences on Containment and Mobility and their Impacts on Trust and Rights* (European University Institute 2021) 111–125; Thomas Spijkerboer and Maarten den Heijer, 'Is the EU-Turkey Refugee and Migration Deal a Treaty?' (2016) *EU Law Analysis* Blog, 7 April 2016; Asylum Information Database (AIDA), *Country Report: Turkey - 2023 Update* (2024) https://asylumineurope.org/wp-content/uploads/2024/08/AIDA-TR_2023-Update.pdf accessed 20 September 2024.

[6] Mariagiulia Giuffré, Chiara Denaro, and Fatma Raach, 'Questioning the Role of Tunisia as a "Safe Country of Origin" and a "Safe Third Country"' (2023) *Journal of Migration Studies*; ASILE, *Tunisia Country Report* (2022) https://www.asileproject.eu/wp-content/uploads/2022/08/D5.2_WP5-Tunisia-Country-Report-Final.pdf accessed 17 December 2024; Amnesty International, 'Tunisia: Repressive Crackdown on Civil Society Organizations Following Months of Escalating Violence Against Migrants and Refugees' (15 May 2024) https://www.amnesty.org/en/latest/news/2024/05/tunisia-repressive-crackdown-on-civil-society-organizations-following-months-of-escalating-violence-against-migrants-and-refugees/ accessed 24 December 2024; Amnesty International, 'Joint Statement: Tunisia Is Not a Place of Safety for People Rescued at Sea' (5 October 2024) https://www.amnesty.org/en/latest/news/2024/10/joint-statement-tunisia-is-not-a-place-of-safety-for-people-rescued-at-sea/ accessed 25 December 2024.

[7] see above (n 5) Turkey.

[8] Joint Ministerial Decision 42799/2021, Government Gazette B' 2425, 7 June 2021 (Greece) which designated Turkey as a "safe third country" for certain asylum seekers; Greece, Independent Appeals Committee, Applicant v Regional Asylum Office of Lesbos, No 300763/2023, 12 June 2023 (ruling that Türkiye did not qualify as a safe third country for an Afghan father and child due to lack of access to health care, education, employment, and family reunification prospects); Greece, Administrative Court [Διοικητικό Πρωτοδικείο], Applicant v Police Directorate of Xanthi, AP309/2023, 16 June 2023 (annulling the return of an Afghan national due to Türkiye's suspension of readmissions in 2020 and Afghanistan returns in 2021, with an order for release); Greece, Independent Appeals Committee, Applicant v Independent Asylum Unit of Xanthi, No 312252/2023, 16 June 2023 (ruling that Türkiye could not be considered a safe third country for an Afghan applicant not entering Greek territory via eastern Aegean islands, noting Türkiye's unilateral suspension of readmissions in 2020).

[9] Meltem Ineli-Ciger and Özgenur Yigit, Country Fiche Turkey (ASILE, 2020) https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche_Turkey_Final_Pub.pdf accessed 20 December 2024.

concerns. These disputes culminated in the Greek Council of State referring questions to the CJEU in 2023. In its 2024 judgment, the CJEU clarified that while a Member State could designate a third country as safe despite suspended readmissions, such designations must not lead to inadmissible applications or unjustified delays.[10]

Similarly, Tunisia's designation as a STC and SCO by Italy has been challenged due to reports of arbitrary detention, risk of mistreatment and the deportation of sub-Saharan migrants without adequate safeguards.[11] These cases highlight how STC designations often obscure systemic failures, exposing returnees to significant risks of refoulement and human rights violations. The Italy-Libya MoU presents an even starker example. Libya, not being a party to the RC, has no effective obligations to uphold refugee rights.[12] Reports from Amnesty International and Human Rights Watch document systemic abuses in Libyan detention centres, including substandard conditions, torture, and forced labour—all of which constitute violations of non-refoulement obligations.[13]

Additionally, through initiatives like the Global Approach to Migration and Mobility (GAMM), Khartoum Process and the EU Trust Fund for Africa, the EU builds up cooperation with African states such as Gambia, Ghana, Mali, Niger, Nigeria, Senegal, and

[10] Court of Justice of the European Union, case C-134/23 Request for a preliminary ruling from the Symvoulio tis Epikrateias. [2024] ECLI:EU:C:2024:134.
[11] See Tunisia (n 6).
[12] *Hirsi Jamaa and Others v. Italy* (Application No. 27765/09) ECHR 23 February 2012 para 125 and 128: The ECtHR case established that states cannot circumvent non-refoulement obligations through bilateral agreements or informal practices;
[13]Human Rights Watch, *"No Escape from Hell": EU Policies Contribute to Abuse of Migrants in Libya* (21 January 2019) https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya accessed 17 December 2024. Office of the High Commissioner for Human Rights (OHCHR), *Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya* (2018); Human Rights Watch, *"No Escape from Hell": EU Policies Contribute to Abuse of Migrants in Libya* (21 January 2019); Office of the High Commissioner for Human Rights (OHCHR), *Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya* (2018); Human Rights Watch, *"No Escape from Hell": EU Policies Contribute to Abuse of Migrants in Libya* (21 January 2019) https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya accessed 17 December 2024; Amnesty International, 'Libya: New Evidence Shows Refugees and Migrants Trapped in Horrific Cycle of Abuses' (28 September 2020) https://www.amnesty.org/en/latest/press-release/2020/09/libya-new-evidence-shows-refugees-and-migrants-trapped-in-horrific-cycle-of-abuses/ accessed 17 December 2024.;

Sudan to curb irregular migration.[14] However, these efforts highlight significant gaps in the capacity of some -if not all- of these states to uphold protections required under international law. Reports of arbitrary detention and ill-treatment of migrants underscore the risks of outsourcing migration control to countries with poor human rights records, further exacerbating these concerns.[15]

The effectiveness of non-affection clauses, intended to safeguard compliance with international human rights standards, is similarly limited. Their lack of enforceability renders them symbolic rather than actionable, particularly in addressing chain refoulement, arbitrary detention, and degrading treatment. Furthermore, the absence of robust monitoring mechanisms, particularly in the post-return phase, exacerbates these risks, leaving returnees without adequate oversight or protection.

Inconsistencies in safe country designations among EU Member States further illustrate these challenges. Hungary's reliance on Serbia, despite deficiencies in its asylum system and reliance on informal deportation agreements,[16] and Spain's agreements with Morocco,

---

[14] European Commission, "Khartoum Process" (European Commission) https://ec.europa.eu/home-affairs/pages/khartoum-process_en accessed 15 August 2024; European Commission, "EU Emergency Trust Fund for Africa" (European Commission) https://ec.europa.eu/trustfundforafrica/index_en accessed 15 August 2024; European Commission, 'EU Actions to Address Migration: MEMO/15/4832' (European Commission, 15 December 2015) https://ec.europa.eu/commission/presscorner/api/files/document/print/en/memo_15_4832/MEMO_15_4832_EN.pdf accessed 15 August 2024; Jean-Baptiste Jeangène Vilmer, 'European Union-African Cooperation: The Externalisation of Europe's Migration Policies' (Robert Schuman Foundation, 2022) https://server.www.robert-schuman.eu/storage/en/doc/questions-d-europe/qe-472-en.pdf accessed 17 December 2024.

[15] Human Rights Watch, "They Forced Us Onto Trucks Like Animals: Cameroon's Mass Forced Return and Abuse of Nigerian Refugees" (27 September 2017); https://www.hrw.org/report/2017/09/27/they-forced-us-trucks-animals/cameroons-mass-forced-return-and-abuse-nigerian accessed 17 December 2024; Human Rights Watch, *"We Have No Orders to Save You": State Participation and Abuses in Sudan's Crackdown on Migrants* (19 June 2017) https://www.hrw.org/report/2017/06/19/we-have-no-orders-save-you/state-participation-and-abuses-sudans-crackdown accessed 17 December 2024; Bachirou Ayouba Tinni and Abdoulaye Hamadou, 'The Outsourcing of European Migration and Asylum Policy in Niger' in Sergio Carrera Nunez, Eleni Karageorgiou, Gamze Ovacik, and Nikolas Feith Tan (eds), *Global Asylum Governance and the European Union's Role: Rights and Responsibility in the Implementation of the United Nations Global Compact on Refugees* (Brill 2024) 181

[16] Human Rights Watch, 'Serbia: Police Abusing Migrants, Asylum Seekers' (15 April 2015) https://www.hrw.org/news/2015/04/15/serbia-police-abusing-migrants-asylum-seekers accessed 17 December 2024; ASILE, *Country Report: Serbia* (2024) 22–34 https://www.asileproject.eu/wp-content/uploads/2024/03/Country-Report_Serbia.pdf accessed 17 December 2024; US Department of State,

where systemic abuses are well-documented, highlight the fragmented nature of these designations.[17] These inconsistencies reveal the absence of harmonized criteria and contribute to human rights violations, particularly when individuals are returned to countries without effective protection frameworks.

The Dublin Regulation, which assigns responsibility for asylum claims to the first Member State of entry, has long been criticized for perpetuating refoulement risks and placing disproportionate burdens on frontline states.[18] While the 2024 AMMR is replacing the Dublin III Regulation and introduced more equitable burden-sharing mechanisms, the core principle of assigning responsibility based on the first country of entry remains largely intact. This continuation leaves many systemic issues unresolved, particularly for Member States like Greece and Italy, which face high volumes of asylum claims.

Serbia 2018 Human Rights Report (2019) 16–19 https://www.state.gov/wp-content/uploads/2019/03/SERBIA-2018-HUMAN-RIGHTS-REPORT.pdf accessed 17 December 2024; AIDA, *Country Report: Serbia 2023 Update* (2024) https://asylumineurope.org/wp-content/uploads/2024/08/AIDA-SR_2023-Update.pdf accessed 17 December 2024. Olga Djurovic and Rados Djurovic, 'EU Cooperation with Serbia for Externalization of Asylum' in Sergio Carrera Nunez, Eleni Karageorgiou, Gamze Ovacik, and Nikolas Feith Tan (eds), *Global Asylum Governance and the European Union's Role: Rights and Responsibility in the Implementation of the United Nations Global Compact on Refugees* (Brill 2024) 203.

[17] US Department of State, *Morocco 2021 Human Rights Report* (2021) 28–30 https://ma.usembassy.gov/wp-content/uploads/sites/153/313615_MOROCCO-2021-HUMAN-RIGHTS-REPORT.pdf accessed 17 December 2024; Amnesty International, 'Morocco and Western Sahara: Human Rights Report' https://www.amnesty.org/en/location/middle-east-and-north-africa/north-africa/morocco-and-western-sahara/report-morocco-and-western-sahara/ accessed 17 December 2024; Human Rights Watch, *Abused and Expelled: Ill-Treatment of Sub-Saharan African Migrants in Morocco* (10 February 2014) https://www.hrw.org/report/2014/02/10/abused-and-expelled/ill-treatment-sub-saharan-african-migrants-morocco accessed 17 December 2024; Amnesty International, *Spain and Morocco: Failure to Protect the Rights of Migrants - Ceuta and Melilla One Year On* (2006) 18–19 https://www.amnesty.org/en/wp-content/uploads/2021/08/eur410092006en.pdf accessed 17 December 2024.

[18] Eleni Karageorgiou, 'The Distribution of Asylum Responsibilities in the EU: Dublin, Partnerships with Third Countries and the Question of Solidarity' (2019) 88 Nordic Journal of International Law 315, 351-354; European Council on Refugees and Exiles (ECRE), Policy Note #16: Making Asylum Numbers Count – Why Europe Needs Clear and Comprehensive Statistics on Refugee Protection (November 2018) https://www.ecre.org/wp-content/uploads/2018/11/Policy-Note-16.pdf accessed 15 October 2024; European Parliamentary Research Service (EPRS), Dublin Reform: Reshaping the CEAS (March 2017) https://www.statewatch.org/media/documents/news/2017/mar/ep-eprs-dublin-reform.pdf accessed 15 October 2024; Elspeth Guild et al., Enhancing the Common European Asylum System and Alternatives to Dublin, PE 519.234 (European Parliament, 2015); Francesco Maiani, The Reform of the Dublin III Regulation, PE 571.360 (European Parliament, 2016).

Concerns about the adequacy of reception conditions and procedural safeguards under the Dublin framework have increasingly led to judicial interventions. Both the CJEU and national courts in Member States have suspended transfers to countries like Greece and Hungary due to systemic deficiencies.[19] For instance, German administrative courts have blocked transfers to Greece, citing ongoing failures in its asylum system, while Austrian courts have halted returns to Hungary, highlighting its inadequate protections and problematic designation of Serbia as a STC.[20]

The ECtHR has also provided critical rulings that underscore the risks inherent in the Dublin system. In *M.S.S. v. Belgium and Greece* (2011), the Court held that Belgium violated the principle of non-refoulement by returning an asylum seeker to Greece under the Dublin II Regulation. The ruling emphasized that states cannot rely solely on formal designations of safety and must conduct thorough, individualized assessments of actual risks in receiving countries.[21] Similarly, in *Sharifi and Others v. Italy and Greece*, the ECtHR found that the summary return of asylum seekers from Italy to Greece, without conducting individual assessments, violated Articles 3 and 13 of the ECHR. The judgment highlighted how deficiencies in Greece's asylum system, coupled with Italy's failure to evaluate applicants' circumstances, facilitated chain refoulement.[22] More recently, in *H.T. v. Germany and Greece*,[23] the ECtHR addressed the risks of transferring asylum seekers between Member States without proper individualized assessments. In that case, the

[19] See for example, Jawo v Bundesrepublik Deutschland (C-163/17, CJEU, 19 March 2019) (ruling that Dublin transfers should not occur if reception conditions in the destination country expose the applicant to inhuman or degrading treatment); Regional Administrative Court of Arnsberg (Germany), Decision No. 5 K 2134/19.A, 20 June 2019 (suspending the transfer of an Uzbek applicant to Hungary due to inadequate reception conditions and potential risks of refoulement); Regional Administrative Court of Freiburg (Germany), Decision No. A 5 K 1461/20, 12 September 2020 (annulling a transfer to Croatia due to risks of denial of substantive examination of asylum claims); Supreme Administrative Court of Austria (VwGH), Judgment No. Ra 2018/18/0324, 24 January 2019 (ruling on the legality of Dublin transfers to Greece with reference to the European Commission's recommendations and reception conditions).
[20] ibid.
[21] *M.S.S. v Belgium and Greece* (Application No. 30696/09) ECHR 21 January 2011.
[22] *Sharifi and Others v Italy and Greece* (Application No. 16643/09) ECHR 21 October 2014.
[23] *H.T. v. Germany and Greece,* ECtHR, Application No. 13337/19

applicant's return to Greece exposed him to inhumane treatment, demonstrating how administrative arrangements under the Dublin framework can inadvertently perpetuate chain refoulement.

The challenges posed by the Dublin framework are further compounded by the RD, which governs the return of irregular migrants within the EU. While the directive prioritizes voluntary returns,[24] an inherent safeguard against forced returns,[25] includes safeguards such as non-refoulement assessments and procedural guarantees[26] and is recognized by the IOM[27] and other bodies[28] for promoting good practices, its practical application often falls short of these standards. Critics argue that both the directive's implementation through

[24] European Parliamentary Research Service, *Understanding EU Action on Migration* (2019) PE 637.901 https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637901/EPRS_BRI(2019)637901_EN.pdf accessed 05 May 2022, 2; European Parliamentary Research Service, *EU External Migration Policy and the Protection of Human Rights* (2019) PE 631.727 https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS_STU(2019)631727_EN.pdf accessed 05 May 2022. 1-3.

[25] Goodwin-Gill and McAdam (n 2) 496.

[26] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive / RD) [2008] OJ L348/98, arts 5, 6, 8(6), 9, 10, 14, 16, and 17; Further supported by Council of Europe, Twenty Guidelines on Forced Return (2005) https://www.coe.int/t/dg3/migration/archives/source/malagaregconf/20_guidelines_forced_return_en.pdf accessed 29 September 2024.

[27] European Commission, *Evaluation on the application of the Return Directive (2008/115/EC)* (Publications Office of the European Union, 2021) https://op.europa.eu/en/publication-detail/-/publication/2d7caada-14ed-448a-a3d2-4a0c54272043/language-en accessed 18 July 2023; IOM, *Return and Reintegration of Migrants: Forced Return* (IOM, 2023) https://emm.iom.int/handbooks/return-and-reintegration-migrants/forced-return-0 accessed 17 June 2024.

[28] Giuffré (n 2) 150-154; Izabella Majcher and Tineke Strik, 'Legislating without Evidence: The Recast of the EU Return Directive' (2021) 23(2) *European Journal of Migration and Law* 103-126; Madalina Bianca Moraru, 'EU Return Directive: A Cause for Shame or an Unexpectedly Protective Framework?' in Evangelia (Lilian) Tsourdi (ed), *Research Handbook on EU Migration and Asylum Law* (1st edn, Edward Elgar Publishing 2022) 435-454;

RAs[29] and the proposed recast raise significant concerns, [30] particularly as overwhelmed frontline states like Greece and Italy frequently resort to expedited returns that bypass individualized assessments.

Although the AMMR introduces a solidarity mechanism to address the imbalances created by the Dublin framework, concerns persist about its ability to reconcile operational efficiency with human rights obligations. While the AMMR aims to alleviate the disproportionate burdens placed on frontline states, it retains structural flaws that prioritize administrative goals over fundamental protections, leaving the risks of chain refoulement and procedural failures unresolved. Reforms under the New Pact on Migration and Asylum, seek to harmonize return procedures and strengthen safeguards.[31] However, scholars and NGOs have criticized the Pact's emphasis on efficiency, which risks exacerbating rights violations, including chain refoulement and prolonged detention without adequate oversight.[32] An essential requirement of the directive is the establishment

[29] ibid Giuffré 182-184; European Union Agency for Fundamental Rights, *The Recast Return Directive and its Fundamental Rights Implications: FRA Opinion 1/2019* (Vienna, 2019) 41-42; see European Council of Refugees and Exiles (ECRE) and Amnesty International views in European Parliamentary Research Service, *Understanding EU Action on Migration* (2019) PE 637.901 https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637901/EPRS_BRI(2019)637901_EN.pdf accessed 12 June 2022; European Parliament, *Proposal for a Recast of the Return Directive* (Legislative Train, 2023) https://www.europarl.europa.eu/legislative-train/theme-promoting-our-european-way-of-life/file-proposal-for-a-recast-of-the-return-directive?sid=8401 accessed 12 June 2022; European Council on Refugees and Exiles (ECRE), *Border Procedures: Not a Panacea. ECRE's Assessment of Proposals for Increasing or Mandatory Use of Border Procedures* (Brussels, 2019) https://www.ecre.org/wp-content/uploads/2019/07/Policy-Note-21.pdf accessed 13 June 2024

[30] A proposed recast is introduced in 2018 to streamline return processes and improve return efficiency across the EU, see in European Commission, *Managing Migration: Possible Areas for Advancement at the June European Council* (Brussels, 2018) 3; ibid European Parliament; Commission Recommendation on making returns more effective and a Return Handbook to be used by member states' authorities in European Commission, *Communication on a More Effective Return Policy in the European Union & A Renewed Action Plan* (European Commission, 2017); Effective rates were 36.6%(2017), 45.8%(2016), 36.4%(2015) and 36.6%(2014) in European Commission, *Managing Migration in All Its Aspects: Commission Note Ahead of the June European Council 2018* (European Commission, 2018) 7; See also Sergio Carrera, *Implementation of EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights* (Springer Briefs in Law, 2016) 58-9; Natasja Reslow, 'Not Everything That Counts Can Be Counted: Assessing "Success" of EU External Migration Policy' (2017) 55(6) *International Migration* 156, 156-69; European Commission, *Proposal for a Recast of the Return Directive* (European Commission, 2018).

[31] New Pact (n 4).

[32] Theodora Gazi, 'The New Pact on Migration and Asylum: Supporting or Constraining Rights of Vulnerable Groups?' (2021) 6 European Papers 167; Francesca Ippolito and Samantha Velluti, 'The Recast Process of the EU Asylum System: A Balancing Act Between Efficiency and Fairness' (2011) 30 Refugee Survey Quarterly 24; EuroMed Rights, 'A "Fresh Start" for Human Rights Violations: Analysis of the New EU Pact on

of a monitoring system for forced returns.[33] Frontex, tasked with supporting return monitoring,[34] and EU countries have developed mechanisms to enable monitoring. However, these efforts have faced criticism for their lack of independence, inadequate resources, and limited authority to address violations effectively. Moreover, the absence of systematic post-return monitoring creates significant responsibility gaps for requesting states. These challenges are further compounded by the lack of an enforceable monitoring clause within RAs, leaving crucial aspects of oversight unaddressed.

In summary, the EU's reliance on RAs, combined with the shortcomings of existing and proposed legal frameworks, exposes systemic deficiencies in its migration governance. These include inadequate monitoring mechanisms, procedural inconsistencies, and limited responsibility, which undermine the protection of fundamental rights. The following sections delve deeper into these issues, exploring the role of informal agreements, non-affection clauses, and operational weaknesses in perpetuating rights violations within the EU's RA framework.

Migration and Asylum' (October 2020) https://www.euromedrights.org/publication/new-eu-pact-on-migration-and-asylum/ accessed 3 November 2024; European Policy Centre, 'The New Pact on Migration and Asylum: How to Get the Balance Right?' (27 October 2020) https://www.epc.eu/en/Publications/The-New-Pact-on-Migration-and-Asylum~59419c accessed 12 November 2024; Nikolaj Nielsen, 'New EU Migration Pact Risks Leaving Thousands in Limbo' EUobserver (3 November 2023) https://euobserver.com/migration/158061 accessed 2 January 2025; Oxfam Ireland, 'Why the EU Pact on Migration and Asylum Fails to Deliver Solidarity' (Oxfam Blog, 25 September 2020) https://www.oxfamireland.org/node/1306 accessed 6 December 2024; Elspeth Guild and Cathryn Costello, 'The Impact of the 2024 CEAS Reform on the EU's Return System: Amending the Return Directive through the Backdoor' (EU Migration Law Blog, 1 November 2023) https://eumigrationlawblog.eu/the-impact-of-the-2024-ceas-reform-on-the-eus-return-system-amending-the-return-directive-through-the-backdoor/ accessed 18 December 2024; Amnesty International, 'Comments on the Recast Return Directive' (November 2018) https://www.amnesty.eu/wp-content/uploads/2018/11/AI_comments_recast_return_directive.pdf accessed 10 January 2025; Statewatch, 'A Revamped Returns Directive: Enforcement Versus Rights' (June 2020) https://www.statewatch.org/deportation-union-rights-accountability-and-the-eu-s-push-to-increase-forced-removals/deportations-at-the-heart-of-eu-migration-policy/a-revamped-returns-directive-enforcement-versus-rights/ accessed 22 November 2024; Filippo Scuto, 'Solidarity in the Common Asylum System and the Control of Illegal Immigration: A Critique of the New EU Migration Pact' (14 January 2021) https://bridgenetwork.eu/2021/01/14/solidarity-in-the-common-asylum-system-and-the-control-of-illegal-immigration-a-critique-of-the-new-eu-migration-pact/ accessed 29 December 2024. (n 75)

[33] Return Directive (n 26) art 8(6).

[34] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard [2016] OJ L251/1, art 29.

7.2.1 The Rise of Informal Readmission Practices

The evolution of RAs within the EU reflects broader shifts in migration governance, particularly in response to the challenges posed by irregular migration. As discussed in Chapter 2, early RAs were formal instruments designed to facilitate the return of individuals without legal grounds to remain in a country.[35] These agreements emphasized legal precision, reciprocity, and adherence to parliamentary oversight. However, in the aftermath of the 2015 migration crisis, the EU's approach shifted dramatically toward informalisation—[36] a trend characterized by the growing reliance on non-legally binding arrangements such as joint statements, MoUs, and standard operating procedures (SOPs) or even verbal arrangements.

This informalisation represents the fourth generation of RAs,[37] characterized by flexibility and expediency at the cost of transparency and compliance with international human rights standards. One of the earliest and most notable examples is the EU-Turkey Statement, which was framed as a non-binding political agreement, bypassing the formal treaty-

[35] See section 2.4.1.
[36] Frontex, *Risk Analysis for 2018* (2018) https://www.frontex.europa.eu/assets/Publications/Risk_Analysis/Risk_Analysis/Risk_Analysis_for_2018.pdf accessed 10 April 2022; European Commission, *Communication from the Commission to the European Parliament and the Council on Establishing a New Partnership Framework with Third Countries under the European Agenda on Migration* COM(2016) 385 final https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016DC0385 accessed 08 April 2022; European Commission, 'Humane and Effective Return and Readmission Policy' (Migration and Home Affairs, 2024) https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return/humane-and-effective-return-and-readmission-policy_en accessed 08 June 2024; Elspeth Guild and Sergio Carrera, 'Rethinking Asylum Distribution in the EU: Shall We Start with the Facts?' (2016) CEPS Commentary; Jean-Pierre Cassarino and Mariagiulia Giuffré, 'Finding Its Place in Africa: Why Has the EU Opted for Flexible Arrangements on Readmission?' FMU Policy Brief no. 01/2017, 3; European Commission, 'Humane and Effective Return and Readmission Policy' https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return/humane-and-effective-return-and-readmission-policy_en accessed 12 March 2022; Jean-Pierre Cassarino, 'Informalizing EU Readmission Policy' in Ariadna Ripoll Servent and Florian Trauner (eds), *The Routledge Handbook of Justice and Home Affairs Research* (Routledge 2018) 83–98; Olivia Sundberg Diez, 'Diminishing Safeguards, Increasing Returns: Non-Refoulement Gaps in the EU Return and Readmission System' (2019) 54 *Forced Migration Review* 5; Costello (n 2); Juan Santos Vara and Laura Pascual Matellán, 'The Informalization of EU Return Policy: A Change of Paradigm in Migration Cooperation with Third Countries?' in Eva Kassoti and Narin Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (TMC Asser Press 2022) 37; See below *M.A. v Belgium* (n 43) para 48: there seem to be no written agreement but verbal diplomatic arrangement.
[37] See section 2.4.1.

making process and avoiding scrutiny by the European Parliament and national legislatures. Scholars describe this shift as a prioritization of "structured practical cooperation" without the procedural rigor of formal agreements.[38]

Between 2015 and 2024, the EU concluded over a dozen informal arrangements with third countries, compared to just one formal agreement during the same period.[39] These include agreements[40] such as the Joint Way Forward with Afghanistan (2016), the EU-Bangladesh Standard Operating Procedures (2017), the EU-Ethiopia Admission Procedures (2018), the EU-Tunisia Partnership (2023), and the EU-Lebanon Migration Deal (2024). Bilateral arrangements, such as those between Italy and Algeria (2024), Italy and Sudan (2016), and Cyprus and Lebanon (2020), further reflect this strategic pivot. While these agreements leverage EU incentives such as financial aid or visa liberalization to secure cooperation, they are often negotiated under asymmetrical power dynamics with transit or refugee-producing states, raising significant concerns about compliance with human rights standards.

Unlike formal RAs, which require parliamentary approval and are subject to rigorous scrutiny,[41] informal agreements evade traditional mechanisms of responsibility and accountability. [42] Their non-binding nature allows for ambiguous commitments, often

[38] Guild and Carrera (n 36).
[39] ibid (n 36) 3; European Commission, (n 36); Diez (n 36) 5; Costello (n 2); Cassarino (n 36).
[40] Jean-Pierre Cassarino, 'Database of Readmission Agreements' https://www.jeanpierrecassarino.com/datasets/ accessed 22 June 2024; see above (n 14) for African countries; see below (n 53); European Migration Network, 'Bilateral Readmission Agreements: Practical Implementation and Use' (European Commission, October 2022) https://home-affairs.ec.europa.eu/system/files/2022-10/EMN_INFORM_bilateral_readmission.pdf accessed 15 December 2024.
[41] Caterina Molinari, 'The EU and its Perilous Journey through the Migration Crisis: Informalisation of the EU Return Policy and Rule of Law Concerns' (2019) *European Law Review* (forthcoming) 14; Violeta Moreno-Lax, 'The Migration Partnership Framework and the EU–Turkey Deal: Lessons for the Global Compact on Migration Process?' in Thomas Gammeltoft-Hansen and others, *What Is a Compact? Migrants' Rights and State Responsibilities Regarding the Design of the UN Global Compact for Safe, Orderly and Regular Migration* (Raoul Wallenberg Institute 2017) 28.
[42] Diez (n 36) 5, 7; Giuffré (n 2) 160-171. Jean-Pierre Cassarino, 'Informalizing EU Readmission Policy' in Ariadna Ripoll Servent and Florian Trauner (eds), *The Routledge Handbook of Justice and Home Affairs Research* (Routledge 2018) 83–98.

framed in terms of "intent" rather than enforceable obligations. For example, phrases such as "will cooperate" or "agree to facilitate" are commonly used, creating legal uncertainty and complicating compliance monitoring.[43] Moreover, these agreements frequently lack the transparency necessary to evaluate their impact on human rights protections, as their texts are rarely published or accessible to the public. [44]

Additionally, scholars critique the EU's increasing reliance on informal RAs,[45] which often bypass formal legal safeguards required by international law. These agreements facilitate swift returns without proper assessments of the risks faced by the individual in the requested state. This practice exposes requesting states to potential legal challenges for violating non-refoulement obligations, as seen in the *A.E. and Others v. Italy* and *MA v. Belgium*,[46] and the right to an effective remedy, which prevent enjoying the right to seek asylum by readmitted irregular immigrants. Due to these informal agreements, holding requesting states responsible for human rights violations creates legal grey areas in terms of traceability and accountability.

7.2.1.1 Blurred Responsibilities and Strategic Avoidance of EU

The informalisation of RAs complicates the allocation of responsibilities between the EU and its Member States. While these agreements often involve substantial EU institutional support and coordination, they are framed as bilateral arrangements to shield the EU from direct legal responsibility. This strategic "non-use of the EU," as described by scholars like

[43] See a framework MoM example in European Commission, 'Proposal for a Council Decision on the Conclusion, on Behalf of the European Union, of the Partnership Agreement Between the European Union and its Member States, of the One Part, and the Members of the Organisation of African, Caribbean and Pacific States, of the Other Part' COM(2023) 791 final https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52023PC0791 accessed 08 January 2025.
[44] Giuffré (n 2) 160-171; Casseriono (n 36); Vara et al (n 36).
[45] ibid.
[46] *A.E. and Others v. Italy* App no 18911/17 (ECtHR, 22 September 2022); *M.A. v. Belgium* App no 19656/18 (ECtHR, 27 October 2020).

Slominski and Florian,[47] enables Member States to benefit from EU funding and operational support while circumventing parliamentary and judicial oversight. Although these agreements rely on EU resources and coordination, their informal status obscures authorship and responsibility.[48]

The EU-Turkey Statement, classified as a non-binding political agreement by the CJEU in 2017, exemplifies this dynamic.[49] The Court ruled that the Statement did not constitute an EU-level treaty, effectively excluding it from judicial scrutiny under EU law.[50] Similarly, the Italy-Libya Memorandum, though supported by the EU and endorsed in the Malta Declaration,[51] is framed as a bilateral agreement, allowing both parties to sidestep responsibility for the documented human rights abuses it facilitates. This reliance on informal and soft law instruments blurs the lines of responsibility-sharing and complicates compliance with international obligations.

7.2.1.2 Risks of Human Rights Violations

The growing reliance on informal agreements has heightened the risk of human rights violations, particularly concerning non-refoulement and protections against CIDTP, the right to liberty, the right to an effective remedy and the right to seek asylum. Informal arrangements often involve cooperation with states lacking robust asylum systems or implicated in systemic human rights abuses as exemplified while discussing rights.[52]

---

[47] Slominski, Peter and Trauner, Florian (2018), "How do Member States Return Unwanted Migrants? The Strategic (non-)use of 'Europe' during the Migration Crisis", *Journal of Common Market Studies*, Vol. 56, Issue 1 pp. 101-118.
[48] Ineli-Ciger and Ulusoy (n 5) 114-115.
[49] CJEU, Orders of the General Court, *N.F., N.G. and N.M. v European Council*, 28 February 2017, T 192/16, T-193/16, and T-257/16.
[50] ibid.
[51] European Council, *Malta Declaration by the Members of the European Council on the External Aspects of Migration: Addressing the Central Mediterranean Route* (3 February 2017) https://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration accessed 10 July 2024
[52] See nn 5,6,13 for Turkey, Tunisia and Libya respectively.

The Joint Way Forward with Afghanistan (2016), for instance, facilitated the return of thousands of Afghan nationals during a period of escalating violence and widespread reports of inadequate reception conditions.[53] The EU-Turkey Statement, as discussed extensively above, has similarly drawn criticism for its impact on asylum access, particularly for non-European refugees. The agreement has been implicated in disabling pathways to refuge and asylum for vulnerable groups, thereby exacerbating risks of refoulement.[54]

The Italy-Libya Memorandum provides a stark illustration of the dangers of informalisation.[55] Returns to Libya under this agreement have been linked to severe violations, including arbitrary detention, torture, and forced labour in detention centres often controlled by non-state actors such as militias. Reports have documented widespread abuses faced by migrants in Libyan facilities, underscoring the inability of informal agreements to ensure compliance with international human rights standards.[56]

Other examples, such as the EU-Tunisia Partnership (2023) and Spain's bilateral arrangements with Morocco, highlight the prioritization of operational efficiency over human rights protections. The partnership with Tunisia has been heavily criticized due to its limited capacity to protect asylum seekers and its record of deporting migrants to unsafe regions in sub-Saharan Africa.[57] Similarly, Spain's agreements with Morocco, aimed at

---

[53] Joint Way Forward on Migration Issues between Afghanistan and the EU (2 October 2016) https://www.eeas.europa.eu/sites/default/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf accessed 20 March 2024; Amnesty International, 'European Governments Return Nearly 10,000 Afghans to Risk of Death and Torture' (5 October 2017) https://www.amnesty.org/en/latest/press-release/2017/10/european-governments-return-nearly-10000-afghans-to-risk-of-death-and-torture/ accessed 15 May 2023); See further analysis in Eleonora Frasca and Emanuela Roman, 'The Informalisation of EU Readmission Policy: Eclipsing Human Rights Protection Under the Shadow of Informality and Conditionality' (2020) 22 *International Community Law Review* 940, 952–953).

[54] See above (n 5) for Turkey.

[55] MoU 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 (signed 2 February 2017) <https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf> accessed 10 February 2023.

[56] See above (n 13) for Libya.

[57] See above (n 6) for Tunisia.

managing migration flows, have been criticized for inadequate procedural safeguards and the absence of mechanisms to assess the risks faced by returnees.[58]

7.2.1.3 Informalisation as a Broader Trend

The informalisation of RAs reflects a broader shift in EU migration governance, prioritizing operational expediency over legal responsibility. These agreements often bypass traditional mechanisms of oversight, such as parliamentary scrutiny and judicial review, creating a parallel system of migration control that operates outside established legal frameworks. This trend challenges the EU's commitment to the rule of law, as it enables migration policies that avoid responsibility for human rights protections.

Recent agreements, such as the EU-Tunisia Partnership and the migration deal with Lebanon, exemplify this ongoing trend.[59] Despite growing concerns over their human rights implications, the EU continues to prioritize informal arrangements to expedite returns. However, the trade-offs involved—emphasizing return efficiency while neglecting robust human rights safeguards—have produced limited tangible benefits. Studies indicate that effective return rates have stagnated, even as informal agreements proliferate with neighbouring countries and African states.[60]

Furthermore, the EU considers the New Pact on Migration and Asylum a pivotal tool for external cooperation, explicitly naming Tunisia, Egypt, Mauritania and other states as key partners in managing migration.[61] This approach underscores a continued focus on

---

[58] See above (n 17) for Morocco.
[59] See above (n 40) for recent agreements.
[60] European Court of Auditors, *EU Readmission Cooperation with Third Countries* (Special Report 17/2021) 11–12 <https://www.eca.europa.eu/Lists/ECADocuments/SR21_17/SR_Readmission-cooperation_EN.pdf> accessed 31 August 2022; Diez (n 36) 6; Eurostat, 'Returns of Irregular Migrants - Quarterly Statistics: Types of Returns and Assistance Received' https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Returns_of_irregular_migrants_-_quarterly_statistics#Types_of_returns_and_assistance_received accessed 11 February 2024.
[61] New Pact (n 4).

practices of forced returns, readmissions, and externalized border control in cooperation with third-party states. In EU's words "The comprehensive partnerships are complemented by the "whole-of-the-route approach" covering all aspects, from dealing with the root causes of irregular migration to cooperation on other aspects of migration and border management and border (Action Plans on Central Mediterranean, Western Balkans, Western Mediterranean and the Atlantic, Eastern Mediterranean routes)."[62] However, such practices have consistently resulted in documented human rights violations, including arbitrary detention, torture, and chain refoulement as discussed through this thesis.[63] By outsourcing migration responsibilities to countries with inadequate human rights records, the EU leaves fundamental state responsibilities under international law in limbo. This raises profound concerns about the erosion of responsibility against international and regional obligations and the enduring gap between the EU's migration policies and its human rights commitments. This raises critical questions about whether the compromises made at the expense of human rights have achieved meaningful or sustainable outcomes. As the EU's reliance on informalisation continues, the tension between operational expediency and fundamental rights remains a pressing concern for migration governance.

7.2.2 Non-Affection Clauses

Non-affection clauses in RAs are intended to safeguard states' obligations under international human rights,[64] affirming that these agreements should not undermine fundamental principles such as non-refoulement, the right to life, and the prohibition of torture and CIDTP. These clauses aim to reconcile bilateral agreements with multilateral treaties, including the RC, the ICCPR, and CAT.[65] However, in practice, their effectiveness

[62] ibid.
[63] See chapter 4 for violations related to cooperation on interception, see above 6.2 for violations related to readmission agreements.
[64] Ineli-Ciger and Ulusoy (n 5); Giuffré (n 4) 148, 155-159.
[65] See chapter 6.

is undermined by their declaratory nature, lack of enforcement mechanisms, and the prioritisation of migration control over human rights protections.

The limitations of non-affection clauses become particularly evident in cases involving STC designations. For instance, in *Ilias and Ahmed v. Hungary*, ECtHR failed to address the procedural deficiencies in Hungary's RA with Serbia.[66] The judgment in *H.T. v. Germany and Greece* further highlights these shortcomings. Despite the inclusion of non-affection clauses in administrative arrangements under Dublin Regulation or references to these clauses in EU-Turkey Statement, the applicant's rights under Articles 3 and 5 of the ECHR were violated. [67] These cases demonstrate the symbolic rather than actionable nature of non-affection clauses when they lack mechanisms for enforceable safeguards, monitoring compliance or bearing responsibility.

7.2.2.1 The Declaratory Nature of Non-Affection Clauses, Their Enforceability and Burden Sharing

Since 2005, non-affection clauses have been routinely incorporated into EURAs[68] and they are typically drafted as broad affirmations of compliance with international human rights obligations. For instance, they often include commitments to uphold non-refoulement or protect asylum seekers' rights without detailing the specific measures required to achieve these goals.[69]

---

[66] *Ilias and Ahmed v. Hungary* App no 47287/15 (ECtHR, 21 November 2019) paras 141–144.
[67] *H.T.* (n 23) paras 119-21 and 143-50; See below (n 74) for the *only* non-affection clause in EU-Turkey Statement.
[68] Nils Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights* (Martinus Nijhoff 2009) 104-105.
[69] While the exact wording can vary, a typical non-affection clause in EU readmission agreements states: "This Agreement shall be without prejudice to the rights, obligations and responsibilities of the Union, the Member States and [third country] arising from international law and, in particular, from:

- the Convention of 28 July 1951 on the Status of Refugees as amended by the Protocol of 31 January 1967;
- the international conventions determining the State responsible for examining applications for asylum lodged;

Coleman argues this lack of specificity renders non-affection clauses more symbolic than actionable failing to offer concrete legal mechanisms to enforce compliance.[70] Thus, this symbolic nature arises from the structural limitations of these clauses. By avoiding explicit guidelines on how states should operationalize their commitments, non-affection clauses provide insufficient guidance on state responsibilities, particularly in the context of readmitted individuals and receiving states. For example, these clauses rarely include practical measures for ensuring compliance by both requesting and receiving states, such as risk assessments, protections for vulnerable groups, or post-return monitoring mechanisms. Moreover, as noted by Coleman, bilateral agreements differ in structure and often lack adequate procedural safeguards, resulting in the return of third-country nationals, including asylum seekers, without proper risk assessments.[71]

For example, the EU-Turkey Statement formally declared respect for international law but failed to prevent systemic violations.[72] Similarly, the Italy-Libya cooperation referred to a respectful approach to human rights[73] but enabled returns to Tunisia, where returnees were subjected to torture, arbitrary detention, and forced labour. The ECtHR's rulings in relation to these agreements confirmed that the violations did happen while these non-affection clauses were "in effect" as part of RAs, which does not go beyond the soft law.

- the European Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms;
- the Convention of 10 December 1984 against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;
- international conventions on extradition and transit;
- multilateral international conventions and agreements on the readmission of foreign nationals."

[70] Coleman (n 70).
[71] ibid 306.
[72] EU-Turkey Statement (n 5): "This will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement. It will be a temporary and extraordinary measure which is necessary to end the human suffering and restore public order."
[73] (n 55) art 5: "The Parties commit to interpret and apply the present Memorandum in respect of the international obligations and the human rights agreements of which the two Countries are part of."

In its essence, critical limitation of non-affection clauses lies in their lack of enforceability. While they express a commitment to human rights, they do not provide clear mechanisms for monitoring compliance or avenues for legal recourse. This gap allows states to prioritize migration control objectives at the expense of fundamental rights. In various cases before the ECtHR, asylum seekers forcibly returned under RAs faced detention, failure to effective remedy or access asylum or onward deportation without adequate risk assessments or procedural safeguards, underscoring the practical ineffectiveness of non-affection clauses.

Non-affection clauses also fail to provide guidance on state responsibilities, particularly concerning the rights of readmitted individuals and the obligations of both requesting and receiving states. This omission undermines the principle of burden-sharing between requesting and receiving states[74] and disproportionately affects receiving states, many of which lack the institutional capacity to uphold human rights standards. As a result, returnees are often exposed to heightened risks of persecution, ill-treatment, and chain refoulement.

7.2.2.2 Legal Conflicts and the Vienna Convention on the Law of Treaties (VCLT)

The ineffectiveness of non-affection clauses raises critical questions about their compatibility with international legal obligations. The Vienna Convention on the Law of Treaties (VCLT) establishes that bilateral or informal agreements must not undermine the protections enshrined in multilateral treaties. Article 41 VCLT prohibits modifications to treaty obligations that conflict with fundamental principles, such as the prohibition of refoulement and the right to life. Similarly, Article 34 VCLT stipulates that treaties cannot

[74] Giuffré (n 4) 155-161.

impose obligations on third states without their consent, a principle frequently violated in the context of RAs involving third countries.[75]

Agreements with Libya and Tunisia illustrates these conflicts, despite nominal commitments to respect human rights, its implementation facilitated widespread abuses, including torture and arbitrary detention.[76] Article 26 VCLT, which requires treaties to be performed in good faith, reinforces states' obligations to ensure that RAs do not result in violations of international human rights law. However, the inclusion of non-affection clauses alone cannot absolve states of responsibility when their actions expose returnees to harm.

7.2.2.3 Scholarly Critiques and Judicial Implications

Judicial decisions and scholar opinions have consistently showed the limited effectiveness of non-affection clauses, emphasizing their inability to provide meaningful protections without concrete procedural measures.[77] In *H.T. v. Germany and Greece*, *J.A. and Others v. Italy, A.E. and Others v. Italy*, *Ilias and Ahmed v. Hungary*, and *J.R. and Others v. Greece*,[78] the ECtHR identified violations of the rights of irregular immigrants, despite the inclusion of human rights commitments and references to international instruments in the respective bilateral agreements. Although the Court has not explicitly addressed non-affection clauses, its judgments indicate that, in the absence of enforceable procedures, these clauses fail to prevent violations of fundamental rights. The rulings reflect the

[75] Vienna Convention on the Law of Treaties (VCLT) 1969, Article 34: "A treaty does not create either obligations or rights for a third State without its consent."
[76] See above (n 13) for Libya; See above (n 6) for Tunisia.
[77] See below nn 79-88; Bouteillet Paquet, 'Passing the Buck: A Critical Analysis of the Readmission Policy Implemented by the European Union and Its Member States' (2003) 5 *European Journal of Migration and Law* 361–370.
[78] *H.T. v. Germany and Greece* (n 23); *J.A. and Others v. Italy* App no 21329/18 (ECtHR, 30 March 2023); *A.E. and Others v. Italy* (n 46)*, Ilias and Ahmed v. Hungary*; *J.R. and Others v. Greece*; See section 6.3.4 and 6.4.3 for analysis on case laws.

inherent weakness of non-affection clauses when they lack mechanisms for assessing individual risks or ensuring compliance.

Scholars such as Giuffré and Moreno-Lax argue that non-affection clauses often fail to create binding obligations or responsibility mechanisms, leaving gaps in the protection of returnees. Giuffré specifically critiques the widespread reliance on these clauses, noting that they frequently lack the specificity required to operationalize commitments to human rights standards.[79] Article 41 of the VCLT allows for modifications between parties to a multilateral treaty, provided these modifications do not affect the rights of other parties or conflict with the treaty's object and purpose.[80] However, in the context of RAs, particularly informal ones, this balance is difficult to maintain. Bilateral agreements often prioritise swift returns and migration management over human rights compliance, which further complicates this issue. For example, non-affection clauses rarely address the practical measures needed to prevent chain refoulement, where individuals are returned to transit countries that subsequently deport them to unsafe territories.

Another significant argument is advanced by Giuffre and Moreno-Lax, who emphasize through a case[81] “that it is not open to a Contracting State to enter into an agreement with another State which conflicts with its obligations under the ECHR."[82] This principle is particularly compelling in situations where "the nature of the right not to be subject to grave and irreversible harm is at stake."[83] Such reasoning emphasizes the primacy of international obligations within the hierarchy of legal norms, affirming their supremacy over conflicting agreements.

[79] Giuffré (n 2) 155-157.
[80] ibid. VCLT (n 75).
[81] ibid; ECtHR, Al-Saadoon v. UK, Appl. 61498/08, 2 March 2010, para. 138.
[82] Giuffré and Moreno-Lax (n 1) 105.
[83] ibid.

Moreover, as Giuffré and Coleman note, the limitations of non-affection clauses are often not rooted in their textual content but in their practical application.[84] While the text of these agreements may not directly conflict with human rights standards, their implementation frequently leads to violations due to the lack of procedural safeguards, independent monitoring, and judicial oversight. This disconnect highlights the need for RAs to move beyond symbolic commitments and incorporate enforceable mechanisms that ensure compliance with international obligations. [85]

Non-affection clauses are intended to reconcile migration governance with human rights obligations, but their declaratory nature, lack of enforcement mechanisms, and limited oversight render them largely ineffective. To ensure compliance with international legal obligations under the VCLT, RC, and other treaties, RAs must incorporate robust procedural safeguards, independent monitoring, and judicial accountability. Without these measures, non-affection clauses will remain symbolic commitments, unable to prevent violations such as refoulement, arbitrary detention, and inhumane treatment.

7.2.3 Monitoring Provisions

Monitoring provisions within RAs -usually present in formal agreements- are designed to monitor the effectiveness of the implementation of the agreement rather than monitoring the compliance to international obligations.[86] In this context, considerate is argued here that effective monitoring should be comprehensive and encompass all stages of the returnee's return process, from pre-return detention and preparation to the return operation itself and post-return conditions in the receiving country. However, existing frameworks

[84] ibid.
[85] Coleman (n 70) 306-310.
[86] European Commission, 'Readmission agreements' https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:l33105 accessed 17 December 2024; European Commission, 'Readmission agreements between the EU and certain non-EU countries' https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:l14163 accessed 17 December 2024.

have faced widespread criticism for their failure to adequately protect individuals from risks of persecution or harm.[87] Between 2017 and 2024, only a small fraction of returnees from the EU were effectively monitored,[88] exposing systemic flaws in the current framework. Insufficient oversight, inadequate structures, and limited independence have left many returnees unprotected during and after their return. These deficiencies undermine fundamental rights and cast doubt on the credibility of RAs as tools for responsible migration governance.

7.2.3.1 Limited Data and Transparency

A major challenge in monitoring provisions is the lack of comprehensive and disaggregated data on return operations. Statistical reports often fail to differentiate between irregular migrants and refugees including asylum seekers, treating individuals as mere deportation cases without considering the rights and protections afforded under international instruments like the RC.[89] This absence of granular data obscures the vulnerabilities of returnees and hampers efforts to assess compliance with non-refoulement obligations, particularly concerning risks of torture or CIDTP.

Reports from the EU Fundamental Rights Agency (FRA) highlight the absence of systematic follow-up on the treatment of returnees post-repatriation.[90] While Frontex and

[87] Costello (n 2).
[88] See Forced Return Monitoring Systems Reports in European Union Agency for Fundamental Rights, *Irregular Migration, Return and Immigration Detention* (FRA) https://fra.europa.eu/en/themes/irregular-migration-return-and-immigration-detention; Frontex, *Observations to Return Operations Conducted (2017-2024) by the Fundamental Rights Officer*. https://www.frontex.europa.eu/fundamental-rights/fundamental-rights-at-frontex/pool-of-forced-return-monitors/; International Centre for Migration Policy Development, *Forced Return Monitoring III: Final Publication* (ICMPD 2023) https://www.icmpd.org/content/download/56831/file/FReM%20III_Final%20Publication_Quart_WEB.pdf accessed 12 February 2024.
[89] IOM, *Return Migration* (Migration Data Portal) https://www.migrationdataportal.org/themes/return-migration accessed 11 February 2022
[90] European Union Agency for Fundamental Rights, *The Recast Return Directive and its Fundamental Rights Implications: FRA Opinion 1/2019* (Vienna, 2019) 41-42; Forced Return Monitoring Systems Reports (2019); Eurostat, *Returns of Irregular Migrants - Quarterly Statistics: Types of Returns and Assistance Received* (Eurostat, 2023) https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Returns_of_irregular_migrants_-_quarterly_statistics#Types_of_returns_and_assistance_received accessed 11 February 2022.

Member States may oversee the physical return process, they often fail to ensure that returnees are treated in accordance with human rights standards upon arrival in the receiving country. Furthermore, many Member States do not publicly disclose the outcomes of returns or differentiate between voluntary and involuntary repatriations, [91] further complicating attribution of responsibility. Ratifying human rights conventions alone is insufficient; states must actively implement and monitor protections on the ground.[92]

7.2.3.2 Structural Deficiencies in Monitoring Mechanisms

The RD mandates the establishment of effective monitoring systems, with Article 8(6) assigning Frontex a central role in overseeing compliance.[93] Frontex employed a Fundamental Rights Officer (FRO) and designated return monitors to ensure adherence to fundamental rights during return operations. However, these mechanisms are hindered by structural weaknesses.

The FRO lacks the authority to suspend return operations even in cases of serious violations, and the complaints mechanism is under-resourced, lacks transparency, and is perceived as insufficiently independent due to Frontex's current structure.[94] Furthermore, Frontex's dual mandate to facilitate border security while safeguarding fundamental rights creates an inherent conflict of interest, prioritizing operational efficiency over the protection of returnees.

Proposed changes under the New Pact aim to strengthen monitoring mechanisms, including Frontex's role in overseeing return operations. However, critics argue that the

[91] ibid; European Court of Auditors (n 60);
[92] Giuffré and Moreno-Lax (n 1) 102.
[93] RD art 8(6).
[94] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard [2016] OJ L251/1, art 29 .

emphasis on return efficiency risks undermining the quality and scope of monitoring, perpetuating the responsibility gaps these reforms seek to address.[95]

7.2.3.3 Absence of Post-Return Monitoring

One of the most critical deficiencies in current frameworks is the lack of systematic post-return monitoring. While the RD provides oversight during return operations, mechanisms to track returnees' treatment in receiving countries remain notably absent.[96] This gap leaves potential violations—including torture, inhumane treatment, and chain refoulement—untracked and unaddressed.[97]

Reports from Amnesty International and the FRA highlight the dangers posed by this oversight gap. Under the EU-Turkey Statement, for example, asylum seekers returned to Turkey faced detention and onward deportation to unsafe countries such as Syria.[98] Similarly, returns facilitated by the Italy-Libya MoU (2017) exposed returnees to torture, forced labour, and degrading conditions in Libyan detention centres.[99] Comparable risks have been documented in Tunisia and Morocco, where returnees frequently report arbitrary detention, denial of asylum procedures, and substandard living conditions.

The absence of post-return monitoring also increases the risk of chain refoulement, where individuals are sent to third countries that, in turn, deport them to unsafe destinations.[100] In

---

[95] (n 32);
[96] See above nn 91 and 92.
[97] Giuffré et al (n 6); Zeynep Sahin-Mencutek and Anna Triandafyllidou, 'Coerced Return: Formal Policies, Informal Practices and Migrants' Navigation' (2024) Journal of Ethnic and Migration Studies ; Jari Pirjola, 'Out of Sight, Out of Mind: Post-return Monitoring – A Missing Link in the International Protection of Refugees?' (2019) 38 Refugee Survey Quarterly 363.
[98] ibid.
[99] See above (n 13) for Libya.
[100] ibid; UNHCR, *Somali Post-Return Monitoring Snapshot* https://reporting.unhcr.org/somali-post-return-monitoring-snapshot accessed 07 March 2022; Diane Taylor, 'Foreign Office Admits It Doesn't Know Fate of DRC Returnees' *The Guardian* (London, 14 March 2019) https://www.theguardian.com accessed 15 September 2024; Charity Ahumuza Onyoin, 'A Grim Return: Post-Deportation Risks in Uganda' (2017) *Forced Migration Review*, Issue 54, 6; Susanne Jaspars and Margie Buchanan-Smith, 'Darfuri Migration from Sudan to Europe: From Displacement to Despair' (2018); Mencutek and Triandafyllidou (n 101); Pirjola (n 101).

response, the European Parliament has called for stronger safeguards, including improved post-return monitoring mechanisms and the inclusion of suspensive clauses in RAs to halt returns when fundamental rights violations are detected.[101] Without these safeguards, individuals returned are referred "lost" and “invisible’ with no tracking of their treatment during and after deportation.[102]

7.2.3.4 Challenges of Independent Oversight

Effective monitoring requires impartiality and independence, yet existing mechanisms are often controlled by the same states conducting the returns, creating an inherent conflict of interest. While some Member States involve national human rights institutions (NHRIs) or civil society organisations in monitoring, their participation is often constrained by limited access to detention facilities and return operations, insufficient resources to conduct thorough investigations, and a lack of legal authority to enforce recommendations.[103] Without clear oversight of conditions in the destination country, individuals may face persecution, violence, or inhuman treatment upon return[104] further exposing them to torture or CIDTP.[105]

---

[101] European Parliament, *European Parliament Resolution of 25 October 2016 on Human Rights and Migration in Third Countries* (2015/2316(INI), 25 October 2016). https://www.refworld.org/legal/resolution/ep/2016/en/113580 accessed 28 October 2024.
[102] Orçun Ulusoy and Hemme Battjes, *Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement*, VU Migration Law Series No. 15 (2017) https://rechten.vu.nl/en/Images/UlusoyBattjes_Migration_Law_Series_No_15_tcm248-861076.pdf accessed 14 September 2024, 23-24; Giuffré (n 4).
[103] European Parliament, *European Parliament Resolution of 25 October 2016 on Human Rights and Migration in Third Countries* (2015/2316(INI), 25 October 2016); European Parliamentary Research Service, *The Cost of Non-Europe in Asylum Policy* (Brussels, 2018) 34; European Council on Refugees and Exiles, *Return: No Safety in Numbers* (Brussels, 2017) 4; Jill Alpes, Charlotte Blondel, Nausicaa Preiss, and Meritxell Sayos Monras, 'Post-Deportation Risks for Failed Asylum Seekers' (2017) *Post-Deportation Risks and Monitoring* (Forced Migration Review) 54, 54-57;European Commission, *Evaluation of EU Readmission Agreements* (Brussels, 2011) 9-14; European Parliament, *Resolution on Human Rights and Migration in Third Countries* (TA(2016)0404, 2016) paras 10-11, 84; European Council on Refugees and Exiles (ECRE), *Policy Note: The EU Pact on Migration and Asylum: A Look at Readmissions* (Policy Note 42, December 2022) https://ecre.org/wp-content/uploads/2022/12/Policy-Note-42.pdf accessed 24 September 2024
[104] ibid.
[105] Diez (n 36); Giuffré (n 4) 171-173; Giuffré and Moreno-Lax (n 1) 96-97.

A set of cases (ECtHR) exemplified the consequences and none of them are detected or reported at the time of return practices. [106] Returned countries exposed the individuals to degrading detention conditions and inadequate asylum procedures, violating Articles 3 and 13 ECHR. The ECtHR emphasized the need for continuous monitoring to protect the essential human rights and prevent states from becoming complicit in life-threatening violations. [107] Beyond adjudicated cases, numerous instances remain outside judicial oversight, where refugees and migrants are forcibly returned under RAs without sufficient risk assessments. Amnesty International reports that European governments returned nearly 10,000 Afghans to Afghanistan despite escalating violence and persecution in the region.[108] A similar pattern emerges in the case of Turkey's deportations to Syria, where Syrians faced torture, forced conscription, and inhumane treatment, violating the principle of non-refoulement.[109] The examples extend to Libya as well, where returnees under EU-backed agreements are trapped in militia-controlled detention centres.[110]

In summary, monitoring provisions on RAs can play a critical role for ensuring RAs comply with international human rights standards. Addressing these shortcomings requires the establishment of independent monitoring bodies, robust post-return mechanisms, and greater transparency in the collection and publication of return data. Without these reforms, RAs will continue to facilitate violations of fundamental rights, compromising the safety, dignity, and protection of returnees.

[106] *M.S.S. v Belgium and Greece* (n 21); *Sharifi and Others v. Italy and Greece* (22); Ilias and Ahmed v. Hungary, App. No. 47287/15 (ECtHR, 2019), paras. 132–134; *A.E. and Others v. Italy*(n 46); *H.T. v. Germany and Greece* (n 23); *M.A. v Belgium* (n 46).
[107] ibid; Gil-Bazo (n 6).
[108] See above (n 53) for Afghanistan.
[109] See above (n 5) for Turkey.
[110] See above (n 15) for Libya.

7.3 Proposed Pathways for Reform

Inconsistencies in STC designations among EU Member States heighten refoulement risks. Greece's reliance on Turkey, Hungary's on Serbia, and Spain's on Morocco expose systemic gaps in procedural fairness. A harmonized, evidence-based approach to STC designations, uniformly applied across Member States, is essential to mitigate these risks. The 2024 CJEU ruling provides a blueprint, stressing the need for operational assessments that align with human rights obligations. Further reforms under the New Pact may be required to ensure STC decisions are substantively and evidence-driven.

Structural inconsistencies in RAs also demand reform. Informal agreements like the EU-Turkey Statement and Italy-Libya Memorandum undermine legal obligations by circumventing judicial and parliamentary scrutiny. Formalizing these agreements through legislative approval would enhance legal clarity and ensure binding human rights commitments for both returning and receiving states. The New Pact presents an opportunity to streamline asylum and return procedures while reinforcing monitoring mechanisms. However, the Pact's emphasis on return efficiency has drawn criticism for potentially exacerbating human rights violations, making balanced implementation crucial.

Non-affection clauses must evolve from symbolic safeguards into enforceable provisions. They should explicitly prohibit returns violating non-refoulement, the right to life, or the prohibition of torture. Their effectiveness hinges on binding obligations and judicial review. Under Article 41 of the VCLT, RAs must not undermine treaties such as the RC, ICCPR, and ECHR. States must integrate procedural safeguards and independent monitoring mechanisms, with regular reporting on returns and violations to enhance transparency and compliance.

The absence of post-return monitoring is a critical gap, leaving returnees vulnerable to refoulement and abuse. Independent bodies, including NGOs, international organizations, and human rights institutions, must oversee return processes and conduct follow-up assessments to prevent persecution, detention, or onward deportation. Transparency is essential—monitoring bodies should publish reports detailing return operations and identified violations, with mechanisms to enforce corrective measures. Non-compliance should trigger the suspension of return operations until safeguards are restored.

Reforming the implementation of RAs is essential to balancing migration control with human rights protection. Strengthening legal safeguards, formalizing agreements, enhancing non-affection clauses, and instituting robust monitoring would reduce refoulement risks and uphold international obligations. These reforms are vital to ensuring RAs serve as responsible governance tools rather than mechanisms for systemic rights violations.

7.4 Conclusion

This chapter has critically assessed how EURAs accelerate the erosion of legal guarantees, compounding the human rights risks identified in the previous chapter on RAs. By relying on SCO/STC designations, informal agreements, and weak safeguards, EURAs exacerbate legal ambiguities, procedural deficiencies, and inadequate monitoring mechanisms.

A key finding is that the SCO/STC framework remains a major source of rights violations. Intended to ensure returnees are sent to safe countries, these designations often ignore real conditions, exposing individuals to chain refoulement, arbitrary detention, and inhumane treatment. Without harmonized criteria and rigorous assessments, such classifications circumvent non-refoulement obligations and undermine asylum rights.

EURAs further weaken non-refoulement protections by institutionalizing procedural shortcuts that prioritize return efficiency over individual rights. Presumptions of safety, expedited returns, and the absence of individualized risk assessments facilitate transfers to unsafe countries, violating fundamental safeguards.

Detention practices under EURAs also raise concerns, as they often fail to comply with international standards. The coercive use of detention, inadequate judicial oversight, and lack of alternatives systematically restrict asylum access. Returnees are frequently deprived of legal remedies, preventing appeals or protection claims, thereby violating ECHR, RC, and ICCPR safeguards. Despite their intended role in preserving international obligations, non-affection clauses remain largely ineffective. Their declaratory nature allows states to evade responsibility, as seen in the EU-Turkey Statement and Italy-Libya MoU, where such clauses function as symbolic commitments rather than enforceable safeguards. The absence of post-return monitoring remains a critical deficiency. Self-reporting and diplomatic assurances have proven insufficient to ensure compliance with human rights protections. This chapter has argued for independent oversight mechanisms, involving NGOs, international organizations, and human rights institutions, to provide effective accountability.

In response to these shortcomings, this chapter has proposed structural reforms to align EURAs with international legal standards. Harmonized STC criteria, strengthened procedural safeguards (including individualized risk assessments and suspensive appeals), and reformed detention practices are essential. Moreover, binding non-affection clauses and greater legislative scrutiny over informal agreements would enhance democratic oversight and legal responsibility.

This chapter has demonstrated that EURAs not only perpetuate but intensify the erosion of legal guarantees. Unlike broader RAs, which already present systemic risks, EURAs embed restrictive migration control measures within EU legal and institutional structures while bypassing oversight through informal agreements. This analysis contributes to legal discourse by highlighting how EURAs institutionalize the tension between migration management and human rights, reinforcing the urgent need for reform.

Without substantive changes, EURAs will continue to facilitate rather than prevent rights violations. However, through harmonized legal frameworks, strengthened safeguards, and independent oversight, the EU can transform EURAs into mechanisms of responsible migration governance rather than instruments of legal circumvention.

8. General Conclusion

This thesis demonstrates that externalization practices fundamentally undermine the international legal guarantees afforded to irregular immigrants including refugees and potential asylum seekers. By critically examining state responsibility through the lens of interception operations, EPCs and RAs, this study highlights the creation of responsibility gaps that challenge the efficacy of human rights protections. It provides a nuanced and holistic framework for understanding how states' obligations extend to extraterritorial actions under principles of effective control and functional jurisdiction, offering actionable insights into reforming international and regional frameworks. The findings reveal that states often use externalization to evade direct responsibility by exploiting jurisdictional ambiguities. This thesis emphasizes that such practices systematically erode the rights to life, freedom from torture and CIDTP, and access to asylum, requiring immediate legal responses.

8.1 Seeking Answers to Research Questions

The central aim of this thesis was to interrogate the relationship between externalization practices and the international legal guarantees afforded to irregular immigrants including refugees and potential asylum seekers. In particular, the study sought to assess whether and to what extent destination states can be held responsible for human rights violations resulting from extraterritorial migration control measures. Central to this inquiry was an evaluation of three key rights: the right to life, the protection against torture and CIDTP, and the right to seek asylum. These rights, enshrined in international legal instruments such as the ICCPR, ECHR, ACHR, ACHPR and the RC, form the core of the legal protections that externalization measures threaten to undermine.

This thesis sought to bridge the gap between theory and practice by addressing several interconnected research questions. First, it asked whether states engaging in externalization could be held responsible for rights violations occurring beyond their borders and, if so, under what legal frameworks. Second, it examined how specific externalization practices—interception, EPCs, and RAs—interact with existing human rights obligations and whether these interactions cause responsibility complexities and human rights violations under international law. Finally, the thesis explored the broader implications of externalization for the international legal system, asking whether these practices create a responsibility gap that undermines the universality of human rights protections.

The analysis revealed that externalization practices not only challenge traditional notions of state sovereignty and jurisdiction but also expose significant weaknesses in the enforcement of international legal standards. By relocating migration control measures beyond their borders, states exploit jurisdictional ambiguities to distance themselves from responsibility. This thesis argues, however, that states cannot avoid responsibility for human rights violations simply by outsourcing migration control. Instead, it contends that states' obligations under international law extend to any situation where they exercise effective control or functional jurisdiction over individuals or specific actions and operations, regardless of geographic location.

The findings underscore the need for a nuanced understanding of how extraterritorial actions intersect with international legal guarantees. While externalization may serve the immediate interests of destination states by reducing irregular migration, it often does so at the expense of the most vulnerable individuals, undermining their fundamental rights. By critically evaluating the legal, theoretical, and practical dimensions of these practices, this thesis provides a framework for understanding the responsibilities of states engaged in

externalization and highlights the urgent need for legal reforms to address the gaps in responsibility.

8.2 Rights Erosion and Jurisdictional Gaps in Migration Control

This thesis provides a comprehensive analysis of the mechanisms of migration control externalization and their implications for international legal guarantees. By dissecting the practices of interception, EPCs, and RAs, the study demonstrates how these methods collectively challenge the efficacy of human rights protections. However, traditional jurisdictional concepts often fail to account for the extraterritorial nature of these practices, creating significant gaps in enforcement and responsibility. This thesis argues for the adoption of effective control or functional jurisdiction as a more robust framework to address these challenges.

8.3 Externalization Practices and Erosion of International Protections

Chapters 2 and 3 lay the groundwork by analysing how externalization operates as a migration control strategy and how it aims to circumvent the establishment of externalizing states' jurisdiction and, consequently, their responsibility under international law. The study highlights that externalization methods—including interception, EPCs, and RAs—are employed by states to shift responsibilities for migration management to third-party actors or external locations. This geographical and operational shift enables states to avoid direct responsibility while still exercising substantial control over migrant flows. Such practices undermine the universality of human rights frameworks enshrined in instruments like the ICCPR, ECHR, and CAT by exploiting the limitations of traditional territorial jurisdiction.

Through an analysis of the theoretical debates surrounding externalization, including distinctions between externalization and the external dimension, the thesis demonstrates that these practices reveal critical gaps in the international legal order. The lack of clear mechanisms to hold states responsible for extraterritorial actions has allowed externalization to operate in a legal grey area, where human rights protections are compromised, and refugees' access to justice is severely limited. The adoption of functional jurisdiction is argued as essential to addressing these gaps, particularly in cases where states exercise substantial control over individuals or processes beyond their borders.

This thesis emphasizes that without functional jurisdiction, externalization practices will continue to undermine the fundamental rights of refugees and asylum seekers, including the right to life, freedom from CIDTP, and the right to seek asylum. To bridge this gap, international law must adapt to the realities of modern migration control by establishing clearer mechanisms to attribute responsibility for extraterritorial actions.

8.3.1 Interception Operations and Human Rights Violations

In Chapter 4, the thesis provides an in-depth analysis of interception practices and their implications for fundamental human and refugee rights. Interception, often carried out through pushback and pullback operations, aims to deter and prevent irregular migrants, including potential asylum seekers and refugees, from reaching destination countries. These practices, as illustrated through case law and state practices, directly threaten the right to life, the prohibition of torture and CIDTP, and the principle of non-refoulement, while also infringing upon the right to seek asylum.

Interception frequently involves the use of violence, sometimes resulting in fatalities, and deprives migrants of legal recourse by preventing access to safe territories where they

could seek protection. These actions create life-threatening conditions, particularly when states fail to fulfil obligations under international maritime law, such as SAR duties outlined in UNCLOS, SOLAS, and the SAR Convention. Abandoning migrants in distress or forcibly returning them to unsafe territories constitutes a breach of states' positive obligations under the ICCPR and CAT, compounding the vulnerabilities of those intercepted.

Destination states often justify interception as an exercise of sovereignty. However, this thesis challenges these justifications, arguing that states engaging in interception have a binding obligation to uphold the fundamental rights of individuals under their effective control. International jurisprudence, particularly the ECtHR ruling in *Hirsi Jamaa v. Italy*, confirms that the exercise of authority by state agents beyond national borders can give rise to jurisdiction and responsibility under international law. This includes ensuring compliance with the right to life, the prohibition of CIDTP, and the right to seek asylum.

The concept of functional jurisdiction is pivotal in addressing responsibility gaps in interception practices. Unlike direct physical control, functional jurisdiction applies where a causal link exists between a state's actions—or omissions—and resulting rights violations. For example, a state providing logistical or operational support to another state conducting interceptions may still bear responsibility if such actions lead to breaches of fundamental rights. This framework ensures that responsibility is not negated by the extraterritorial nature of these operations, reinforcing that all actions or omissions by state officials or agents must adhere to international legal guarantees.

By situating interception within the broader framework of extraterritorial jurisdiction, this thesis demonstrates that states cannot evade their responsibilities simply by outsourcing operations or conducting them beyond their borders. The legal principles of effective

control and functional jurisdiction establish that states remain responsible for upholding the rights to life, freedom from CIDTP, and access to asylum, regardless of the location or method of interception. These findings underscore the importance of ensuring that interception practices comply with international human rights law, safeguarding the dignity and safety of those affected.

8.3.2 Extraterritorial Processing Centres and State Responsibility

Chapter 5 examines EPCs, a particularly contentious aspect of migration control externalization. These centres, located in third countries, are established to house asylum seekers while their claims are processed. Notable examples include Australia's Pacific Solution and proposals by Italy and the UK to establish offshore centres in Albania and Rwanda, respectively. The analysis reveals that conditions within these centres often violate fundamental rights, including the right to life, the prohibition of torture and CIDTP, and the right to fair asylum procedures.

The study highlights that individuals held in these centres are frequently exposed to harsh physical and mental conditions, limited access to healthcare, instances of violence, and deprivation of liberty. These systemic issues not only exacerbate the risks faced by asylum seekers but also undermine international legal guarantees, particularly the principles of non-refoulement and access to protection. The placement of individuals in environments where their safety and well-being cannot be adequately safeguarded reflects a failure by destination states to meet their obligations under the RC, ICCPR, and CAT.

A key argument advanced by this thesis is that EPCs enable destination states to reduce their domestic responsibilities for asylum processing while avoiding direct responsibility for rights violations. This displacement of responsibility is often justified by claims that jurisdiction over these centres lies with the host states. However, the principle of effective

control, as recognised in international jurisprudence, refutes this argument by establishing that states funding, overseeing, or managing these centres retain responsibility for ensuring compliance with fundamental human rights standards.

The findings demonstrate that states exercising significant control over the operation, funding, or management of these centres cannot evade responsibility for systemic rights abuses occurring within them. Key cases and analyses show that poor living conditions, inadequate healthcare, and the use of force in these centres directly contravene the right to life and the prohibition of torture and CIDTP, as outlined in the ICCPR, CAT, and regional instruments such as the ECHR. Furthermore, restrictions on movement and limited access to fair asylum procedures erode the right to seek asylum, a cornerstone of the RC.

This thesis underscores the importance of stronger international and regional oversight mechanisms to prevent systemic abuses in EPCs. Destination states should enforce compliance with international legal standards surrounding human and refugee rights, as the extraterritorial nature of these centres does not diminish their obligations to protect the human rights of individuals under their de facto jurisdiction. The principle of effective control reinforces that states bear responsibility for any violations arising from their involvement in these centres, whether directly or through third-party arrangements. By recognising and addressing these responsibility gaps, the international community can ensure that extraterritorial practices do not undermine the rights and dignity of asylum seekers.

8.3.3 Readmission Agreements and State Responsibility

In Chapter 6, the thesis explores RAs as a central mechanism in the externalisation of migration control. These agreements enable destination states to facilitate the return of migrants to third countries or countries of origin or transit. While ostensibly intended to

streamline returns, RAs often raise significant human rights concerns, particularly regarding the principle of non-refoulement, a cornerstone of international refugee law. The study highlights the risks of direct or chain refoulement, where individuals are transferred to countries lacking adequate human rights protections and may subsequently be deported to even more dangerous environments.

The implementation of RAs frequently prioritises efficiency over the protection of individual rights. A recurring issue is the lack of individualised assessments to evaluate the risks faced by returnees. Without these procedural safeguards, RAs expose individuals to environments where their right to life, freedom from torture and CIDTP, and access to asylum are compromised.

Destination states frequently attempt to absolve themselves of responsibility by outsourcing returns to third countries. However, this thesis underscores that state responsibility is not extinguished by such outsourcing. The principle of effective control affirms that states exercising de facto control over the process—through agreements, funding, or operational influence—retain obligations to uphold human rights standards. This responsibility is especially acute when receiving countries lack robust asylum systems or have documented records of human rights abuses, as highlighted in *Hirsi Jamaa v. Italy* and other jurisprudence.

The findings reveal that without rigorous oversight, RAs often function as tools for circumventing international obligations. To address these shortcomings, this thesis calls for reforms to harmonise safety criteria and strengthen responsibility mechanisms in regional and international frameworks. Such reforms are essential to closing the responsibility gaps that currently enable systemic rights violations under the guise of migration management.

8.3.3.1 EURAs: Intensifying Human Rights Erosion

Chapter 7 expands on the discussion of RAs by critically examining the role of EURAs in accelerating the erosion of human rights. These agreements, central to the EU's migration governance, are marked by systemic flaws, including the prioritisation of operational efficiency over substantive protections for returnees. EURAs often rely on politically motivated designations of safe countries, overlooking evidence of human rights violations in receiving states and undermining procedural safeguards.

The chapter highlights that EURAs exacerbate the risks of non-refoulement, particularly when Member States implement them inconsistently or fail to conduct individualised risk assessments. Case studies, such as the EU-Turkey Statement, illustrate how these agreements expose migrants and asylum seekers to unsafe conditions, detention, and even onward deportation to dangerous regions, creating a cycle of refoulement. The lack of effective monitoring mechanisms further compounds these issues, allowing systemic rights violations to persist without responsibility.

Moreover, the thesis critiques the EU's reliance on informal agreements and the STC concept, which often fails to ensure meaningful access to asylum procedures or adequate human rights protections. These practices disproportionately burden frontline states, such as Italy and Greece, and amplify inequalities within the CEAS, as discussed in Chapter 7.

To address these deficiencies, Chapter 7 advocates for enhanced post-return monitoring systems and the establishment of uniform standards for safe country designations across EU Member States. These measures are vital to ensuring that EURAs do not continue to undermine international obligations, particularly the principles of non-refoulement, the right to life, and access to fair asylum procedures.

8.4 Re-assessing the Paradigm of Externalization

A central theme of this thesis is the multidimensional nature of externalization, where states seek to secure their borders and manage migration flows while ostensibly adhering to international human rights obligations. The findings illustrate that externalization practices inherently challenge the balance between these two objectives. On the one hand, externalization provides states with tools to deter irregular migration and reduce the administrative and political burden of managing asylum claims domestically. On the other hand, these measures frequently result in systemic violations of fundamental human rights, exposing the fragile nature of international legal guarantees in extraterritorial contexts.

8.4.1 Security Rationales and Human Rights Violations

States engaging in externalization often justify their actions on the grounds of national security, economic stability, and the need to combat irregular migration. These justifications resonate with domestic political audiences, particularly in regions experiencing heightened migration pressures. However, the thesis demonstrates that the pursuit of these objectives often comes at a significant human cost. For example, interception practices are framed as necessary to protect territorial sovereignty, yet they leave migrants stranded in life-threatening situations or forcibly returned to unsafe environments. Similarly, EPCs and RAs are portrayed as efficient solutions to migration management but frequently result in conditions that violate the rights to life, freedom from torture and CIDTP, and access to asylum.

The findings reveal that externalization measures disproportionately affect the most vulnerable individuals, including those fleeing war, persecution, and serious human right violations. By shifting migration control responsibilities to third countries or offshore locations, destination states create legal and procedural barriers that hinder access to

protection. This not only exacerbates the precarity of migrants' situations but also undermines the principles of universality and indivisibility that underpin international human rights law.

8.4.2 The Responsibility Gap

A significant insight of this thesis is the creation of a responsibility gap in the context of externalization. By outsourcing migration control to third-party actors or relocating it to extraterritorial locations, destination states exploit jurisdictional ambiguities to distance themselves from responsibility. This gap is particularly evident in practices such as RAs, where states rely on the compliance of receiving countries to uphold human rights standards. As the findings demonstrate, these arrangements often lack adequate oversight, leading to direct or chain refoulement and other rights violations.

The principle of effective control and functional control, as developed in international jurisprudence, provides a crucial framework for addressing this responsibility gap. This thesis argues that states exercising de facto effective control or functional power over individuals or processes—whether through financial support, operational oversight, or policy directives—retain their human rights obligations under international law. For example, states funding or managing EPCs must ensure that these facilities comply with international standards, as their involvement constitutes a form of effective control. Similarly, states supporting third countries in interception operations or readmission processes cannot evade responsibility for resulting violations.

8.4.3 Implications for International Legal Frameworks

The paradigm of externalization underscores the limitations of existing international legal frameworks in addressing the complexities of modern migration control. Instruments such

as the ICCPR, ECHR, and RC are designed to protect individuals within clearly defined territorial boundaries. However, externalization practices deliberately blur these boundaries, creating challenges for the enforcement of human rights obligations. To address these challenges, the thesis calls for reforms that expand the scope of state responsibility to include extraterritorial actions where effective control or functional jurisdiction is exercised.

8.4.4 Revisiting the concept of 'safe country'

The findings also call for a re-evaluation of the STC and SCO or SFC concepts, which underpin many externalization practices. As currently applied, this concept often fails to ensure the safety and protection of returnees, undermining the principle of non-refoulement. This thesis argues that international and regional frameworks must adopt more rigorous standards for determining the safety country, including comprehensive assessments of their human rights records and the availability of asylum procedures. Without such reforms, the reliance on STCs and SCOs or SFCs risks legitimising practices that erode access to protection for vulnerable individuals.

8.4.5 The Ethical Dimension

Beyond its legal implications, the paradigm of externalisation raises profound ethical questions about the responsibilities of states in a globalised world. The findings of this thesis challenge the notion that migration control can be pursued in isolation from broader human rights considerations. By prioritising security objectives over the protection of vulnerable individuals, states risk eroding the moral foundations of the international legal system. This thesis calls for a more balanced approach that recognises the interconnectedness of security and human rights, ensuring that migration management does not come at the expense of fundamental human dignity.

8.5 Academic Contributions

This thesis advances critical debates on state sovereignty, jurisdiction, and responsibility. By engaging with the legal, theoretical, and practical dimensions of externalization, it addresses gaps in understanding state obligations under international law while offering actionable insights for reform.

One of the primary contributions of this thesis lies in its challenge to traditional conceptions of jurisdiction and state responsibility. By exploring the extraterritorial dimensions of migration control, particularly in jurisdiction chapter, the study demonstrates that jurisdiction is not confined to territorial boundaries but extends to any situation where states exercise effective control or functional jurisdiction. This insight is particularly valuable in addressing the responsibility gaps created by externalization practices, as detailed in chapters engaging externalization methods where states operate beyond their borders to avoid responsibility for rights violations. For instance, the examination of key case of *Hirsi Jamaa v Others v. Italy* illustrates how jurisdiction can be established when states exercise de facto control during interception operations.

This thesis also critiques the concept of safe country and its application within regional and international legal frameworks. By highlighting the inconsistency and inadequacy of criteria used to designate third countries as safe," the study contributes to a growing body of scholarship that calls for a more nuanced and rights-based approach to assessing safety. The critique is grounded in the principle of non-refoulement, which remains a cornerstone of international refugee law but is increasingly undermined by externalisation practices, as demonstrated in the evaluation of EURAs.

Through detailed analyses of externalization methods, this thesis expands the academic discourse on state responsibility in migration control. It bridges the gap between theory and

practice by applying established legal principles, such as effective control and functional jurisdiction, to contemporary migration challenges. The examination of EPCs, particularly in the context of Australia's Pacific Solution and the proposed UK-Rwanda agreement, highlights the responsibility of destination states under international law for rights violations occurring in third-country facilities.

The findings also highlight the interplay between sovereignty and human rights, offering a fresh perspective on how these two principles can coexist in migration management. This thesis argues that sovereignty should not be used as a shield to deflect responsibility but as a framework within which states must fulfil their international obligations. For example, discussion on EPCs address how the principle of effective control refutes claims that destination states lack responsibility for the conditions in extraterritorial centres. This balanced approach contributes to ongoing debates about the limits of state power in a globalised world and underscores the need for reforms to ensure that sovereignty and human rights are not viewed as opposing forces but as mutually reinforcing principles.

8.6 Policy Contributions

This thesis offers practical recommendations to enhance migration governance, particularly in addressing the human rights risks associated with externalization practices. The findings highlight the need for robust oversight mechanisms, harmonised standards, and stronger responsibility frameworks to ensure compliance with international human rights obligations. Externalization, while presented as a solution to domestic political and administrative burdens, often creates gaps in responsibility and exacerbates human rights violations. Addressing these gaps requires systemic reform.

One of the central recommendations is the establishment of independent monitoring bodies to oversee migration control practices, particularly interception operations and

extraterritorial processing centres. Such bodies would ensure compliance with international maritime law, including the UNCLOS, SOLAS, and SAR Convention, and would be responsible for conducting regular inspections of detention centres to prevent systemic rights violations. Transparency and public reporting mechanisms are equally critical for ensuring responsibility, particularly in extraterritorial contexts where oversight is often weakest.

The thesis also emphasises the need for significant reforms in the design and implementation of RAs. Many RAs currently lack safeguards against chain refoulement and fail to ensure individualised risk assessments for returnees. Harmonising standards for designating STC is crucial, with assessments that evaluate human rights records, asylum procedures, and protections against persecution. Without such safeguards, RAs remain instruments of convenience rather than tools that align with international obligations, exposing individuals to unsafe and inhumane conditions.

As the CEAS transitions to the New Pact on Migration and Asylum, this thesis identifies critical areas for reform within regional frameworks. More rigorous criteria for safe country designations must be adopted, ensuring they account for asylum systems, human rights conditions, and procedural fairness in the designated states. Post-return monitoring systems must also be strengthened to track the treatment of individuals returned under RAs, ensuring their rights are upheld in compliance with international legal standards. Without these measures, the New Pact risks replicating the systemic gaps and inequities that have long plagued the CEAS.

A balanced approach to migration governance is essential to reconcile states' security objectives with their human rights obligations. This thesis advocates for a migration paradigm rooted in the universality and indivisibility of human rights. Such an approach

safeguards the dignity of migrants and asylum seekers while ensuring that migration management upholds the integrity of international legal standards. Regional protection frameworks that provide safe and legal pathways to asylum are necessary to reduce reliance on externalisation practices. Equitable burden-sharing mechanisms are equally critical, particularly for frontline states like Greece and Italy, which disproportionately bear the impact of migration flows. Technology and data analytics, if deployed responsibly, offer potential for improving the efficiency of asylum procedures without undermining fundamental rights.

These recommendations collectively aim to reform migration governance, aligning it with the principles of responsibility, transparency, and human rights protection. They highlight the need for international cooperation and rigorous oversight to ensure that externalisation does not erode the foundational values of the global human rights regime.

8.6. Future Research Directions: Addressing the Human Rights Impact of Externalization

This thesis has shed light on the complex interplay between externalization of migration control and international human rights law, providing a foundation for future research to build upon. While it addresses significant gaps in understanding state responsibility and the legal implications of externalization practices, it also identifies areas requiring deeper investigation. Future research should aim to advance theoretical, empirical, and practical knowledge of externalization, exploring its broader impacts on migrants, asylum seekers, and the international legal order.

One critical avenue for research is the lived experiences of migrants and asylum seekers subjected to externalization practices. While this thesis focuses primarily on legal frameworks and state responsibilities, understanding the human impact of externalization

is vital for shaping effective policies. Qualitative methodologies, such as interviews and ethnographic fieldwork, could document the physical, psychological, and social consequences of practices like interception, detention in EPCs, and forced returns under RAs. These findings would humanise the issues at stake, complementing legal analyses and highlighting the urgency of reform.

Regional and international legal frameworks often fall short in addressing the complexities of externalization. Future studies should critically evaluate the effectiveness of these frameworks in holding states responsible for extraterritorial actions. For instance, research could examine enforcement mechanisms within the APD, the RD and the Dublin Regulation, and AMMR and Asylum Procedures Regulation moving forward with the New Pact on Migration and Asylum to identify gaps and propose reforms. Comparative analyses of externalization practices in regions such as North America, Europe, and the Asia-Pacific would also offer valuable insights into the similarities, differences, and potential best practices across legal and policy responses.

The role of non-state actors in externalization practices is another pressing area for investigation. Private security companies, international organisations, and NGOs often play critical roles in implementing externalization measures, such as managing detention centres or conducting SAR operations. Future research should examine the extent to which these actors contribute to or mitigate human rights violations and explore their legal and ethical responsibilities under international law. Issues of transparency, responsibility, and the potential for abuse in state-private partnerships warrant particular attention.

Externalization practices also have profound implications for the interpretation and application of international human rights norms. Research could explore how these practices influence principles such as non-refoulement, effective control, and

extraterritorial jurisdiction. For instance, scholars could examine whether the widespread use of externalisation undermines the universality of human rights by creating exceptions for migration control. Longitudinal studies could assess the cumulative impact of externalisation on the global human rights regime, focusing on trends in state behaviour, judicial decisions, and international cooperation. Such research would help determine whether externalisation represents a temporary shift or a permanent restructuring of migration governance.

Finally, alternative models for managing migration merit further exploration. Research could investigate innovative approaches to burden-sharing, regional cooperation, and humanitarian resettlement that balance security concerns with human rights protections. Studies could also assess the feasibility of regional protection frameworks that provide safe and legal pathways for migrants and asylum seekers. Leveraging technology and data analytics to enhance migration management without compromising human rights is another area ripe for investigation, offering practical solutions that align with international legal standards while addressing the legitimate concerns of destination states.

Future research on these dimensions would not only deepen understanding but also shape the policies and frameworks necessary to address the challenges posed by externalisation. By integrating legal, ethical, and human perspectives, it would contribute to a more just and equitable approach to migration governance.

8.7 Concluding Remarks

This thesis has illuminated the intricate interplay between migration control externalisation and international human rights law, demonstrating how externalisation practices exploit jurisdictional gaps, erode fundamental protections, and challenge the universality of human rights. While it has critically assessed the legal, theoretical, and practical dimensions of

these practices, it also underscores the urgent need for collective responsibility and systemic reform.

Externalisation represents not just a shift in migration governance but a test of the resilience of the international human rights framework. It calls into question the foundational principle that rights are universal, indivisible, and owed to all individuals, irrespective of borders. By circumventing obligations through outsourcing and jurisdictional ambiguities, states risk creating a dangerous precedent, undermining the very essence of international law as a safeguard against arbitrariness and abuse. As this thesis argues, sovereignty must not serve as a veil to deflect responsibility but as a platform for upholding responsibility in an interconnected world.

Looking ahead, the true measure of progress will lie in the ability of states, international institutions, and civil society to recalibrate migration governance in alignment with the principles of fairness, justice, and human dignity. This requires not only the reform of regional and international legal frameworks but also the development of innovative, rights-respecting approaches to migration management. A global commitment to ensuring that human rights remain a boundaryless guarantee is imperative for countering the systemic failures and inequities perpetuated by externalisation.

In the end, the strength of the international legal system will be judged not by the ease with which states can avoid their obligations but by their willingness to honour them in the most challenging of circumstances. If the principle of non-refoulement is the cornerstone of refugee law, then the unyielding responsibility of states must serve as its foundation. This thesis calls for a reinvigoration of this responsibility—rooted in effective control, functional jurisdiction, and the enduring promise of universality—ensuring that migration

governance does not undermine, but rather reaffirms, the integrity of human rights as the highest legal and moral standard.

Bibliography

Primary Sources

Cases

- A.B. and Others v Poland, App no 42907/17 (ECtHR, 30 June 2022)
- A.E. and Others v Italy, Application No 18911/17 (ECtHR, 22 September 2022)
- A.I. and Others v Poland, App no 39028/17 (ECtHR, 30 June 2022)
- Abdolkhani and Karimnia v Turkey, Application No 30471/08 (ECtHR, 22 September 2009)
- Al-Jedda v United Kingdom App no 27021/08 (ECtHR, 7 July 2011)
- Al-Saadoon and Others v United Kingdom App no 61498/08 (ECtHR, 2 March 2010)
- Al-Saadoon v UK, Application No 61498/08 (ECtHR, 2 March 2010)
- Al-Skeini and Others v United Kingdom App no 55721/07 (ECtHR, 7 July 2011)
- Bankovic and Others v Belgium and Others App no 52207/99 (ECtHR, 12 December 2001)
- Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Judgment) [1970] ICJ Rep 3
- Case of the â€œStreet Childrenâ€□ (VillagrÃ¡n-Morales et al) v Guatemala (Merits) (19 November 1999) Series C No 63
- Centre for Legal Resources on behalf of Valentin CÃ¢mpeanu v Romania, Application no 47848/08 (ECtHR, 17 July 2014) para 130
- Cotofan v Moldova and Russia App no 5659/07 (ECtHR, 18 June 2019)

- Court of Justice of the European Union, Case C-134/23, Request for a preliminary ruling from the Symvoulio tis Epikrateias [2024] ECLI:EU:C:2024:134
- D.A. and Others v Poland, App no 51246/17 (ECtHR, 8 July 2021)
- El-Masri v The Former Yugoslav Republic of Macedonia, Application no 39630/09 (ECtHR, 13 December 2012)
- F.G. v Sweden, Application No 43611/11 (ECtHR, 23 March 2016)
- GB v Turkey, Application No 4633/15 (ECtHR, 17 October 2019)
- Georgia v Russia (II) App no 38263/08 (ECtHR, 21 January 2021)
- Ghorbanov v Turkey, Application No 28127/09 (ECtHR, 3 December 2013)
- H.T. v Germany and Greece, Application No 13337/19 (ECtHR, 15 October 2024) paras 11-16, 50-55
- Hirsi Jamaa and Others v Italy (2012) 55 EHRR 21
- Hirsi Jamaa and Others v Italy (2012) App no 27765/09 ECtHR
- Hirsi Jamaa and Others v Italy, Application No 27765/09 (ECtHR, 23 February 2012) paras 125, 128, 139-158
- IlaÅŸcu and Others v Moldova and Russia App no 48787/99 (ECtHR, 8 July 2004)
- Ilias and Ahmed v Hungary, Application No 47287/15 (ECtHR, 14 March 2017)
- Ilich Sanchez Ramirez v France App no 59450/00 (ECtHR, 4 July 2006)
- Ireland v the United Kingdom, Application no. 5310/71 (ECtHR, 18 January 1978)
- Ivantoc and Others v Moldova and Russia App no 23687/05 (ECtHR, 15 November 2011)
- J.A. and Others v Italy, Application No 21329/18 (ECtHR, 30 March 2023) paras 58-67, 79-99
- J.R. and Others v Greece, Application No 22696/16 (ECtHR, 25 January 2018)

- JHA v Spain Comm no 323/2007 (UN Doc CAT/C/41/D/323/2007, 21 November 2008)
- Jawo v Bundesrepublik Deutschland, C-163/17, CJEU, 19 March 2019
- Joined cases of N.S. v United Kingdom and M.E. v Ireland, CJEU, Cases C-411/10 and C-493/10 (21 December 2011)
- Loizidou v Turkey (Preliminary Objections) App no 15318/89 (ECtHR, 23 March 1995)
- M.A. v Belgium, Application No 19656/18 (ECtHR, 27 October 2020) paras 103-110
- M.S.S. v Belgium and Greece [GC] (Application No. 30696/09, ECtHR, 21 January 2011) paras 247-266
- Markovic and Others v Italy App no 1398/03 (ECtHR, 14 December 2006)
- Medvedyev and Others v France App no 3394/03 (ECtHR, 29 March 2010)
- Mozer v Moldova and Russia App no 11138/10 (ECtHR, 23 February 2016)
- Öcalan v Turkey App no 46221/99 (ECtHR, 12 May 2005)
- Pad and Others v Turkey App no 60167/00 (ECtHR, 28 June 2007)
- Paduret v the Republic of Moldova and Russia App no 26626/11 (ECtHR, 9 May 2017)
- Prosecutor v FurundÅ¾ija (Judgment) ICTY-95-17/1-T (10 December 1998)
- R (AAA and Others v Secretary of State for the Home Department) [2023] UKSC 55
- R (European Roma Rights Centre and Others) v Immigration Officer at Prague Airport [2004] UKHL 55
- S.S. and Others v Italy App no 21660/18 (ECtHR, 17 March 2021)
- Safi and Others v Greece (2022) App no 5418/15, ECtHR

- Sharifi and Others v Italy and Greece, Application No 16643/09 (ECtHR, 21 October 2014)
- Singh and Others v Belgium, Application No 33210/11 (ECtHR, 2 January 2013)
- Soering v United Kingdom, Application no 14038/88 (ECtHR, 7 July 1989)
- Sonko v Spain Comm no 368/2008 (UN Doc CAT/C/47/D/368/2008, 20 February 2012)
- Turturica and Casian v Moldova and Russia Apps no 28648/06 and 18832/07 (ECtHR, 30 August 2016)

International and Regional Conventions

- African Charter on Human and Peoples' Rights (ACHPR) (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217
- American Convention on Human Rights (ACHR) (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123
- American Declaration of the Rights and Duties of Man (ADRDM) (adopted 2 May 1948)
- Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008)
- Cartagena Declaration on Refugees (adopted 22 November 1984)
- Charter of Fundamental Rights of the European Union (2000) OJ C 364/1
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85

- Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45
- Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (RC)
- Convention on the High Seas (opened for signature 29 April 1958, entered into force 30 September 1962) 450 UNTS 11
- European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)
- Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287
- Inter-American Convention on Human Rights (ACHR) (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123
- Inter-American Convention to Prevent and Punish Torture (adopted 9 December 1985, entered into force 28 February 1987) OAS Treaty Series No 67
- International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3
- International Convention for the Safety of Life at Sea (SOLAS) (adopted 1 November 1974, entered into force 25 May 1980)
- International Convention on Maritime Search and Rescue (SAR Convention) (adopted 27 April 1979, entered into force 22 June 1985)
- International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

- Protocol Against the Smuggling of Migrants by Land, Sea and Air Supplementing the Convention Against Transnational Organized Crime (opened for signature 12 December 2000, entered into force 28 January 2008) 40 ILM 384 (2001)
- Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267
- Rome Statute of the International Criminal Court (adopted 17 July 1998) A/CONF.183/9
- United Nations Convention on the Law of the Sea (UNCLOS) (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397
- Universal Declaration of Human Rights (UDHR) (adopted 10 December 1948)
- Vienna Convention on the Law of Treaties (VCLT) (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

Legislations

European Legislations

- Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (Asylum Procedures Directive / APD) [2013] OJ L180/60.

- Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive / RD) [2008] OJ L348/98.

- Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31.

- Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard [2019] OJ L295/1.

- Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L77/1.

- Regulation (EU) 2024/1351 of the European Parliament and of the Council of 20 June 2024 on asylum and migration management [2024] OJ L183/1.

National Legislation

- Migration Act 1958 (Cth) s 91D (Australia).
- 8 United States Code (USC) Section 1158 (United States).

State Agreements & Treaties

- Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (Safe Third Country Agreement) (signed 5 December 2002, entered into force 29 December 2004) 2354 UNTS 175.

- Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the Provision of an Asylum Partnership to Strengthen Shared International Commitments on the Protection of Refugees and Migrants (UK-Rwanda Agreement) [2024] UKTS 20.

- Australia-Nauru and Australia-Papua New Guinea Agreements (2012) https://www.thetimes.co.uk/article/giorgia-meloni-albania-italy-immigration-migrant-centre-2j6p3b3l2 accessed 7 August 2024.

- EU-Turkey Statement (2016) https://apnews.com/article/44abb9c1fa1f2c7a8385167770bb5379 accessed 12 July 2024.

- European Commission, EU Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa: Strategic Orientation Document (2015) https://ec.europa.eu/trustfundforafrica/sites/default/files/eutf_noa_report_3.pdf accessed 19 February 2023.

- Haiti-United States: Agreement to Stop Clandestine Migration of Residents of Haiti to the United States (23 September 1981) No. 277.

- Italy-Libya Memorandum of Understanding (2017) https://www.thetimes.co.uk/article/giorgia-meloni-albania-italy-immigration-migrant-centre-2j6p3b3l2 accessed 15 July 2024.

- Italy-Albania Agreement: Memorandum of Understanding between the Government of the Italian Republic and the Council of Ministers of the Republic of Albania on the Establishment of Reception Centres for Migrants Rescued at Sea (signed 6 November 2023).

- Joint Valletta Action Plan (adopted at the Valletta Summit on Migration, Valletta, 11–12 November 2015) https://www.consilium.europa.eu/media/21839/action_plan_en.pdf accessed 19 February 2023.

- Memorandum of Understanding between the Government of the State of Libya and the Government of the Italian Republic on Cooperation in the Field of Development, Combating Illegal Immigration, Human Trafficking and Fuel Smuggling and on Reinforcing the Border Security (2017).

- 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 (signed 2 February 2017) https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf accessed 10 February 2023.

European Union Treaties

- European Parliament, ‘Santa Maria da Feira European Council: 19 and 20 June 2000 Conclusions of the Presidency’ (European Parliament) https://www.europarl.europa.eu/summits/fei1_en.htm accessed 30 July 2024.

- European Parliament, ‘Tampere European Council: 15 and 16 October 1999 Conclusions of the Presidency’ (European Parliament) https://www.europarl.europa.eu/summits/fei1_en.htm accessed 30 July 2024.

- Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (signed 2 October 1997, entered into force 1 May 1999) [1997] OJ C340/1.

- Treaty on European Union (Maastricht Treaty) (signed 7 February 1992, entered into force 1 November 1993) [1992] OJ C191/1.

- Seville European Council Conclusions on Migration Policy (Seville Summit, 21–22 June 2002) Presidency Conclusions, SN 200/1/02 REV 1.

Secondary Sources

Journal Articles

- Agnese Pacciardi and Joakim Berndtsson, ‘EU Border Externalisation and Security Outsourcing: Exploring the Migration Industry in Libya’ (2022) 48(17) Journal of Ethnic and Migration Studies 4010.

- A.I. Duffy, ‘Expulsion to Face Torture? Non-Refoulement in International Law’ (2008) 20(3) International Journal of Refugee Law 373 https://doi.org/10.1093/ijrl/een022 accessed [insert date].

- Andreas Fischer-Lescano, Tillmann Löhr, and Timo Tohidipur, ‘Border Controls at Sea: Requirements under International Human Rights and Refugee Law’ (2009) 21 International Journal of Refugee Law 256.

- Bill Frelick, Ian M Kysel and Jennifer Podkul, ‘The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants’ (2016) 4(4) Journal on Migration and Human Security 190.

- Dallal E Stevens, ‘The Law’s Approach to Detention of Asylum Seekers: Help or Hindrance?’ (2010).

- Daniel Klerman, ‘Rethinking Personal Jurisdiction’ (2014) 6(2) Journal of Legal Analysis 245.

- David Cantor, Nikolas Feith Tan and others, ‘Externalisation, Access to Territorial Asylum, and International Law’ (2022) 34(1) International Journal of Refugee Law 120.

- David Weissbrodt and Isabel Hortreiter, 'The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties' (1999) 5 Buffalo Human Rights Law Review 1, 8.

- Eleni Karageorgiou, ‘The Distribution of Asylum Responsibilities in the EU: Dublin, Partnerships with Third Countries and the Question of Solidarity’ (2019) 88 Nordic Journal of International Law 315, 351-354.

- Emilie McDonnell, ‘Challenging Externalisation Through the Lens of the Human Right to Leave’ (2024) 71 Netherlands International Law Review 119–154.

- Eugenio Cusumano and Matteo Villa, ‘From “Angels” to “Vice Smugglers”: The Criminalization of Sea Rescue NGOs in Italy’ (2020) 26 European Journal on Criminal Policy and Research 447.

- Florian Trauner and Imke Kruse, ‘EC Visa Facilitation and Readmission Agreements: A New Standard EU Foreign Policy Tool?’ (2008) 10 European Journal of Migration and Law 411.

- Frank McNamara, ‘Member State Responsibility for Migration Control within Third States – Externalisation Revisited’ (2017) 15(3) European Journal of Migration and Law 319.

- Gaetana Ciliberto, ‘Libya’s Pull-Backs of Boat Migrants: Can Italy Be Held Accountable for Violations of International Law?’ (2018) 4(2) The Italian Law Journal 489.

- Hélène Lambert, ‘“Safe Third Country” in the European Union: An Evolving Concept in International Law and Implications for the UK’ (2012) 26(4) Journal of Immigration Asylum and Nationality Law 336.

- Jamal Barnes, ‘Suffering to Save Lives: Torture, Cruelty, and Moral Disengagement in Australia’s Offshore Detention Centres’ (2024) 35(4) Journal of Refugee Studies 1508.

- Jamal Barnes, ‘Torturous Journeys: Cruelty, International Law, and Pushbacks and Pullbacks Over the Mediterranean Sea’ (2022) 48 Review of International Studies 441.

- Jari Pirjola, ‘Out of Sight, Out of Mind: Post-return Monitoring – A Missing Link in the International Protection of Refugees?’ (2019) 38 Refugee Survey Quarterly 363.

- Jelena Ristik, ‘The Right to Asylum and the Principle of Non-Refoulement Under the European Convention on Human Rights’ (2017) European Scientific Journal, ESJ 13.

- Karen Parker and Lyn Beth Neylon, ‘Jus Cogens: Compelling the Law of Human Rights’ (1989) 2 Hastings International and Comparative Law Review 431.

- Kathryn Greenman, ‘A Castle Built on Sand? Article 3 ECHR and the Source of Risk in Non-Refoulement Obligations in International Law’ (2015) 27(2) International Journal of Refugee Law 264.

- Maarten den Heijer and Rick Lawson, ‘Extraterritorial Human Rights and the Concept of ‘Jurisdiction’’ (2013) 9 Cambridge Studies in International Law and Comparative Law 153.

- Mariagiulia Giuffré, ‘Readmission Agreements and Refugee Rights: From a Critique to a Proposal’ (2013) 32(3) Refugee Survey Quarterly 79.

- Natalie Klein, ‘Assessing Australia’s Push Back the Boats Policy under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants’ (2014) 15 Melbourne Journal of International Law 414.

- Nanda Oudejans, Conny Rijken, and Annick Pijnenburg, ‘Protecting the EU External Borders and the Prohibition of Refoulement’ (2018) 19 Melbourne Journal of International Law 614.

- Nikolas Feith Tan and Thomas Gammeltoft-Hansen, ‘A Topographical Approach to Accountability for Human Rights Violations in Migration Control’ (2020) 21(3) German Law Journal 335.

- Olivia Sundberg Diez, ‘Diminishing Safeguards, Increasing Returns: Non-Refoulement Gaps in the EU Return and Readmission System’ (2019) 54 Forced Migration Review 5, 9.

- Penelope Mathew, ‘Australian Refugee Protection in the Wake of the Tampa’ (2002) 96 AJIL 661.

- Sarah Miller, ‘Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention’ (2009) 20(4) European Journal of International Law 1223.

- Seunghwan Kim, ‘Non-Refoulement and Extraterritorial Jurisdiction’ (2017) 30 Leiden Journal of International Law 49.

- Seline Trevisanut, ‘The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection’ (2008) 12 Max Planck Yearbook of United Nations Law 205, 212-4.

- Shiri Pasternak, ‘Jurisdiction’ in Mariana Valverde (ed), Routledge Handbook of Law and Society (Routledge 2015).

- Thomas Gammeltoft-Hansen and Nikolas Feith Tan, ‘The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy’ (2017) 5(1) Journal on Migration and Human Security 28, 30.

- Thomas Spijkerboer, ‘Wasted Lives: Borders and the Right to Life of People Crossing Them’ (2017) 86 Nordic Journal of International Law 1.

- Violeta Moreno-Lax, ‘Externalisation of Migration Controls: A Taxonomy of Practices and Legal Consequences’ (2023) 8(2) European Papers 655.

- Violeta Moreno-Lax, ‘The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the “Operational Model”’ (2020) 21(3) German Law Journal 385.

- Vladislava Stoyanova, ‘The Right to Life under the EU Charter and Cooperation with Third States to Combat Human Smuggling’ (2020) 21 German Law Journal 436.

- Vito Todeschini, ‘The Externalisation of Migration Control: An Assessment of the European Union’s Policy in the Light of the Charter of Fundamental Rights’ (2016) 18(3) European Journal of Migration and Law 395.

Books and Book Chapters

- Alejandro E Camacho and Robert L Glicksman, ‘Substantive and Functional Jurisdiction’ in Reorganizing Government: A Functional and Dimensional Framework (NYU Press 2019).

- Atle Grahl-Madsen, The Status of Refugees in International Law (Sijthoff 1972).

- Bachirou Ayouba Tinni and Abdoulaye Hamadou, ‘The Outsourcing of European Migration and Asylum Policy in Niger’ in Sergio Carrera Nunez, Eleni Karageorgiou, Gamze Ovacik, and Nikolas Feith Tan (eds), Global Asylum Governance and the European Union’s Role: Rights and Responsibility in the Implementation of the United Nations Global Compact on Refugees (Brill 2024) 181.

- Douwe Korff, The Right to Life: A Guide to the Implementation of Article 2 of the European Convention on Human Rights (Council of Europe - Human Rights Handbook No 8, November 2006).

- Elspeth Guild, The Right to Leave a Country (Issue Paper, Council of Europe Commissioner for Human Rights 2013).

- Gregor Noll, Negotiating Asylum: The EU Acquis, Extraterritorial Protection, and the Common Market of Deflection (Kluwer Law International 2000).

- Guy S Goodwin-Gill and Jane McAdam, The Refugee in International Law (3rd edn, Oxford University Press 2007).

- Hurst Hannum, The Right to Leave and Return in International Law and Practice (Martinus Nijhoff 1987).

- James C Hathaway, The Rights of Refugees under International Law (Cambridge University Press).

- James Crawford, Brownlie's Principles of Public International Law (9th edn, Oxford University Press 2019) 543-557, 700, 703.

- Jean-Pierre Cassarino, ‘Informalizing EU Readmission Policy’ in Ariadna Ripoll Servent and Florian Trauner (eds), The Routledge Handbook of Justice and Home Affairs Research (Routledge 2018) 83–98.

- Johan G Lammers, Pollution of International Watercourses: A Search for Substantive Rules and Principles of Law (Brill 1984).

- John Mansell, Flag State Responsibility: Historical Development and Contemporary Issues (Springer 2009) 13-23, 53-69.

- Mariagiulia Giuffré, The Readmission of Asylum Seekers under International Law (Hart Publishing 2020) 121-127, 131–188.

- Mariagiulia Giuffré and Violeta Moreno-Lax, ‘The Rise of Consensual Containment: From Contactless Control to Contactless Responsibility for Migratory Flows’ in Satvinder Singh Juss (ed), Research Handbook on International Refugee Law (Edward Elgar Publishing 2019) 82.

- María-Teresa Gil-Bazo, ‘The Safe Third Country Concept in International Agreements on Refugee Protection: Assessing State Practice’ (2015) 33(1) Netherlands Quarterly of Human Rights 42, 54.

- Marco Milanovic, Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy (OUP 2011).

- Nikolas Markard, ‘The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries’ (2016) 27 EJIL 591.

- Sergio Carrera, Implementation of EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights (Springer Briefs in Law 2016) 58-59.

- Stuart Casey-Maslen, The Right to Life under International Law: An Interpretative Manual (Cambridge University Press 2021).

- Thierry Balzacq, ‘The Frontiers of Governance: Understanding the External Dimension of EU Justice and Home Affairs’ in Thierry Balzacq (ed), The External Dimension of EU Justice and Home Affairs: Governance, Neighbours, Security (Palgrave Macmillan 2009).

- Tugba Basaran, Security, Law and Borders (Routledge 2011).

- Violeta Moreno-Lax, The Architecture of Functional Jurisdiction: Public Powers and Migration Control (OUP 2021).

- Violeta Moreno-Lax, ‘Intersectionality, Forced Migration, and the Jus-Generation of the Right to Flee: Theorising a Composite Entitlement to Leave to Escape Irreversible Harm’ in Başak Çalı, Ledi Bianku, and Iulia Motoc (eds), Migration and the European Convention on Human Rights (OUP 2021).

- Violeta Moreno-Lax, ‘The Legality of the “Safe Third Country” Notion Contested: Insights from the Law of Treaties’ in Guy S Goodwin-Gill and Philippe Weckel (eds), Migration and Refugee Protection in the 21st Century: International Legal Aspects (Martinus Nijhoff 2015) 667, 673–74.

News Articles, Online Articles and Blog Posts

- Andrew Bolt, ‘Our Sense of Unity Lost to the New Tribes Dividing Us’ Herald Sun (3 August 2019) https://www.heraldsun.com.au/news/opinion/andrew-bolt/andrew-bolt-our-sense-of-unity-lost-to-the-new-tribes-dividing-us/news-story/d156abe8d811b5ceaf3a464bad41f8ee accessed 11 August 2022.

- BBC News, ‘Rwanda Plan: UK Supreme Court Rules Rwanda Is Not a Safe Country for Asylum Seekers’ (14 December 2024) https://www.bbc.com/news/articles/cz9dn8erg3zo accessed 27 December 2024.

- Christian Peacemaker Teams, ‘Deadly End’ (29 September 2023) https://cpt.org/2023/09/29/deadly-end accessed 12 July 2024.

- Dr Jeff Crisp, ‘What is Externalization and Why is it a Threat to Refugees?’ Chatham House (14 October 2020) https://www.chathamhouse.org/2020/10/what-externalization-and-why-it-threat-refugees accessed 18 June 2024.

- Euronews, ‘1300 Migrants Overcrowd Lampedusa Reception Centre Designed for 400’ (19 June 2023) https://www.euronews.com/2023/06/19/1300-migrants-overcrowd-lampedusa-reception-centre-designed-for-400 accessed 5 June 2024.

- Helena Smith, ‘Greece Accused of "Shocking" Pushback Against Refugees at Sea’ The Guardian (26 April 2021) https://www.theguardian.com/world/2021/apr/26/greece-accused-of-shocking-pushback-against-refugees-at-sea accessed 19 October 2021.

- Jo Becker, ‘The Global Machine Behind the Rise of Far-Right Nationalism’ The New York Times (10 August 2019) https://www.nytimes.com/2019/08/10/world/europe/sweden-immigration-nationalism.html accessed 17 December 2024.

- Lorenzo Tondo, ‘Revealed: 2,000 Refugee Deaths Linked to EU Pushbacks’ The Guardian (5 May 2021) https://www.theguardian.com/global-development/2021/may/05/revealed-2000-refugee-deaths-linked-to-eu-pushbacks accessed 12 October 2021.

- Oxfam, ‘A Dangerous "Game": The Pushback of Migrants, Including Refugees, at Europe’s Borders’ (April 2017) https://www-cdn.oxfam.org/s3fs-

public/file_attachments/bp-dangerous-game-pushback-migrants-refugees-060417-en_0.pdf accessed 17 December 2021.

- The Guardian, ‘Poland-Belarus Border Migrants’ Deaths’ (31 October 2021) https://www.theguardian.com/world/2021/oct/31/poland-belarus-border-migrants-deaths accessed 10 November 2021.

- Tristan G Creek, ‘Starving for Freedom: An Exploration of Australian Government Policies, Human Rights Obligations and Righting the Wrong for Those Seeking Asylum’ (2014) 18 The International Journal of Human Rights 479.

- UNHCR, ‘Australia Should Not Coerce Vulnerable People to Return to Harm’ (UNHCR Press Release, 2024) https://www.unhcr.org/au/news/news-releases/australia-should-not-coerce-vulnerable-people-return-harm accessed 18 January 2024.

Reports and Policy Papers

- Amnesty International, ‘Italy Deploying Warships to Police Libyan Waters Will Expose Refugees to Horrific Abuse’ (2 August 2017) https://www.amnesty.org/en/latest/news/2017/07/italy-deploying-warships-to-police-libyan-waters-will-expose-refugees-to-horrific-abuse-2/ accessed 30 November 2024.

- Amnesty International, ‘No One Will Look for You: Forcibly Returned from Sea to Abusive Detention in Libya’ (2021) https://www.amnesty.org.uk/files/2021-07/Libya%20report.pdf accessed 10 February 2023.

- ASILE, Country Report: Serbia (2024) 22–34 https://www.asileproject.eu/wp-content/uploads/2024/03/Country-Report_Serbia.pdf accessed 17 December 2024.

- Border Monitoring, 'Cruel Detention Policies in Greece on the Rise: Death in Moria Prison Shows the Violence of Migrant Incarceration System in the European Hotspots' (18 January 2020) https://dm-aegean.bordermonitoring.eu/2020/01/18/cruel-detention-policies-in-greece-on-the-rise-death-in-moria-prison-shows-the-violence-of-migrant-incarceration-system-in-the-european-hotspots/ accessed 25 June 2024.

- European Commission, 'EU Emergency Trust Fund for Africa' https://ec.europa.eu/trustfundforafrica/index_en accessed 15 August 2024.

- European Commission, 'Khartoum Process' https://ec.europa.eu/home-affairs/pages/khartoum-process_en accessed 15 August 2024.

- European Court of Auditors, EU Readmission Cooperation with Third Countries (Special Report 17/2021) https://www.eca.europa.eu/Lists/ECADocuments/SR21_17/SR_Readmission-cooperation_EN.pdf accessed 31 August 2022.

- European Parliamentary Research Service, Understanding EU Action on Migration (2019) PE 637.901 https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637901/EPRS_BRI(2019)637901_EN.pdf accessed 5 May 2022.

- Médecins Sans Frontières, 'Italy-Libya Agreement: Five Years of EU-Sponsored Abuse in Libya and the Central Mediterranean' https://www.msf.org/italy-libya-agreement-five-years-eu-sponsored-abuse-libya-and-central-mediterranean accessed 30 June 2024.

- Parliament of Australia, Australia's Offshore Processing of Asylum Seekers in Nauru and PNG: A Quick Guide to Statistics and Resources (2016)

https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/4129606/upload_binary/4129606.pdf accessed 10 February 2023.

- United Nations High Commissioner for Refugees (UNHCR), ‘States Parties to the 1951 Convention and Its 1967 Protocol’ (2023) https://www.unhcr.org/uk/media/states-parties-1951-convention-and-its-1967-protocol accessed 16 July 2024.