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Thomas Gammeltoft-Hansen

*Danish Institute for Human Rights, tgh@humanrights.dk*

James C. Hathaway

*University of Michigan Law School, jch@umich.edu*

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**Non-Refoulement in a World of Cooperative Deterrence**

Thomas Gammeltoft-Hansen\* and James C. Hathaway\*\*

Introduction

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Wealthier states have a near-obsession with migration control, spending billions of dollars each year in the hope of securing their borders.<sup>1</sup> Their objective is not, of course, to prevent the entry of all outsiders. To the contrary, developed states compete to attract those believed to be able to contribute to their well-being through trade, tourism, and the provision of labor.<sup>2</sup> But the uninvited – including most unskilled and humanitarian migrants – are not welcome.

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\* Research Director, Danish Institute for Human Rights, Copenhagen. tgh@humanrights.dk.

\*\* James E. and Sarah A. Degan Professor of Law and Director, Program in Refugee and Asylum Law, University of Michigan Law School, Ann Arbor. jch@umich.edu.

<sup>1</sup> In 2012, the United States spent \$18 billion on border control. Doris Meissner et al., 'Immigration Enforcement in the United States: A formidable machine', Migration Policy Institute, January 2013. Australia had a budget of \$A1.67 billion for the 2013-14 operational year. Australian Customs and Border Protection Service, 'Budget 2013/14', May 2013, p. 101. Combined spending for the 28 EU member states is difficult to compile, but the EU itself has allocated E1.82 billion between 2007 and 2013 through its External Borders Fund. European Commission, 'EU Funding for Home Affairs', April 2011, p. 6.

<sup>2</sup> Ayelet Schachar, 'The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes' (2006) 81 *NYU Law Review* 148-206; Stephen Castles, Hein de Haas and Mark J. Miller, *The Age of Migration: International Population Movements in the Modern World*, 5th edn (New York: Palgrave-Macmillan, 2013).

Many persons seeking opportunity, safety, or some combination of the two will nonetheless feel compelled to vote with their feet, often traveling to precisely those more prosperous and secure states that resist their arrival. The dissonance between their often powerful human needs and desires and generalized policies of migration control has spawned a never-ending race between border authorities and ever more inventive human smugglers: for each loophole closed by officials, two new modes of unauthorized entry seem to emerge.<sup>3</sup> And even if this practical challenge to the developed world's deterrent agenda could somehow be answered, there is a second obstacle to the ideal of watertight border control that is the focus of this article: refugees (and some others) hold a trump card on migration control.<sup>4</sup>

Under international law, refugees are entitled to arrive of their own initiative, may not be penalized for unlawful arrival or presence, and must be protected for the duration of risk in their home country.<sup>5</sup> Indeed, refugee status is not “granted” by states at all, but is rather an

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<sup>3</sup> David Kyle and Rey Koslowski, *Global Human Smuggling: Comparative Perspectives*, 2<sup>nd</sup> ed (Baltimore: Johns Hopkins University Press, 2011) 81ff; Thomas Gammeltoft-Hansen and Ninna Nyberg Sørensen (eds), *The Migration Industry and the Commercialization of International Migration* (London: Routledge, 2012).

<sup>4</sup> Article 33(1) of the 1951 Convention relating to the Status of Refugees codifies the principle of *non-refoulement* pursuant to which states may not return any person – directly or indirectly – to face the risk of being persecuted for a Convention reason: see generally James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge: Cambridge University Press, 2005), at 279-370. Cognate duties of *non-refoulement* arise under some other human rights instruments, including the 1966 International Covenant on Civil and Political Rights, the 1984 Convention Against Torture, the 1989 Convention on the Rights of the Child, the 1989 American Convention on Human Rights and the 1950 European Convention on Human Rights: *id.* at 368-369.

<sup>5</sup> The duty of non-penalization is set by Art. 31 of the Convention relating to the Status of Refugees: see generally James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge: Cambridge University Press, 2005), at pp. 405-412. The right to remain for the duration of risk follows from Art. 33's duty of *non-refoulement*: *supra* note 4. The required protection for the duration of risk need not occur in the country to which the refugee travels, but may be fairly shared among state parties: see James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge: Cambridge University Press, 2014), at pp.30-49.

international status that is simply recognized by them.<sup>6</sup> Because a person is a refugee in consequence of his or her *de facto* circumstances rather than by virtue of any official validation of same, border officials will inevitably be confronted by persons legally entitled to the provisional benefit of the robust duty of *non-refoulement* as soon as they come under that state's jurisdiction. This is, of course, a significant fetter on the permissible scope of migration control efforts.<sup>7</sup>

Most confronting of all for destination states, the process of distinguishing a refugee entitled by law to enter and remain from an ordinary migrant subject to domestic discretionary rules is not straightforward, usually requiring a careful evaluation of the facts of an individual's circumstances in relation to international legal standards. If international law is not to be breached, the non-citizen who either claims asylum or who is recognizable as coming from a refugee-producing situation must thus in practice be temporarily admitted pending an assessment of her status.<sup>8</sup> The net result is that what would arguably be the most efficient means of implementing stringent border controls against the uninvited – a universal policy of immediate turnbacks of unauthorized non-citizens – is legally foreclosed.

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<sup>6</sup> On the declaratory nature of refugee status, see Hathaway, *The Rights of Refugees Under International Law* 158-159; and UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/1P/4/ENG/REV. 3, December 2011, par. 28.

<sup>7</sup> That refugees are swept up in generalized deterrent efforts is patently clear, as has been reported in the case of persons returned by Italy to Libya: *Hirsi Jamaa and Others v. Italy*, European Court of Human Rights, Appl. No. 27765/09, 23 February 2012. Nor is it the case that those deterred and sent back to risky situations can be assumed not to be refugees at all. 94% of asylum claims made in Australia by persons arriving by boat during the short-lived suspension of deterrent efforts from late 2008 until the end of 2010 were found to be genuine: Verity Edwards, 'Boat arrivals almost all get visas', *The Australian*, 25 February 2011, available at [www.theaustralian.com.au/news/nation/boat-arrivals-almost-all-get-visas/story-fn7dlx76-1226011619093](http://www.theaustralian.com.au/news/nation/boat-arrivals-almost-all-get-visas/story-fn7dlx76-1226011619093).

<sup>8</sup> Hathaway, *The Rights of Refugees Under International Law* 158-159.

In theory, the developed world could simply withdraw from the refugee law regime. Whereas the refugee regime once served their interests fairly directly – enabling European states to avoid instability in the wake of mass influxes of refugees across relatively porous borders during the early part of the twentieth century, and later giving an international *imprimatur* to the sheltering of the enemies of these states’ ideological adversaries after the Second World War<sup>9</sup> – such imperatives no longer exist. There are, however, strong if more diffuse reasons for the developed world to remain a part of the refugee regime – for example, the domestic political value of being engaged in a system that systematizes humanitarian benevolence and an understandable reluctance to unpack a complex system of international law that supports broader political and economic agendas of value to the industrialized world.<sup>10</sup> But most fundamentally, wealthier states realize the critical symbolic importance of appearing to remain engaged with the global refugee regime.

Simply put, migratory and other pressures on the developed world are significantly attenuated by the efforts of the less developed states in which the overwhelming majority of the world’s refugees now live.<sup>11</sup> If the global north were to withdraw entirely from refugee law,

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<sup>9</sup> The reasons for the development of the refugee law system are discussed in James C. Hathaway, ‘The Evolution of Refugee Status in International Law: 1920-1950’ (1984) 33 *International and Comparative Law Quarterly* 348-380. See further Atle Grahl-Madsen, ‘The European Tradition of Asylum and the Development of Refugee Law’ (1966) 3 *Journal of Peace Research* 278-288; B. S. Chimni, ‘The Geopolitics of Refugee Studies: A View from the South’, (1998) 11 (4) *Journal of Refugee Studies* 350-374; Matthew J. Gibney and Randall Hansen, ‘Asylum Policy in the West: Past Trends, Future Possibilities’, WIDER Discussion Paper No. 2003/68, September 2003.

<sup>10</sup> Alexander Betts and Jean-Francois Durieux, ‘Convention Plus as a Norm-Setting Exercise’ (2007) *Journal of Refugee Studies* 20 3, 511; Susan Kneebone (ed) *The Refugee Convention 50 Years On: Globalization and International Law* (Aldershot: Ashgate Publishing, 2003); Kazimierz Bem, ‘The Coming of a ‘Blank Cheque’ - Europe, the 1951 Convention and the 1967 Protocol’ (2004) *International Journal of Refugee Law* 16(4), 609-627.

<sup>11</sup> UNHCR, Global Trends 2012: Displacement, The New 21st Century Challenge (2013) 2, available from <http://www.unhcr.org/51bacb0f9.html> at 10 October 2013.

there would be no politically viable basis upon which to insist that poorer countries continue to shoulder their refugee law obligations under the current system of atomized responsibility and fluctuating charity from the wealthier world. And if less developed states were to follow suit and abandon refugee law in the context of continued instability in much of the global south – producing often massive refugee flows – the negative ramifications for both global security and economic well-being could be immense. Indeed, with fewer options to find protection close to home, the logic for refugees of seeking protection farther afield would surely increase – a scenario that wealthier countries do not wish even to contemplate.

In short, refugee law matters to developed states today for a variety of reasons, though none more important than that it conscripts less developed countries to act in ways that provide a critical support to the developed world's migration control project. Critically, this more diffuse rationale for continued engagement with refugee law does not require the same level of hands-on, substantively meaningful implementation of refugee law by powerful states as was once the case. Developed countries today believe that their interests can be achieved by means of *symbolic*, rather than substantive, engagement with refugee law. Whether the goal is to placate domestic humanitarian constituencies, to avoid the unraveling of the international law regime, or to be seen to stand shoulder to shoulder with the poorer states that actually make refugee protection work, optics are at the core of what matters. Powerful states therefore see value in showing their commitment to refugee law but would prefer – to the greatest extent possible – to avoid being subject to its practical strictures. In particular, the developed world does not wish to be faced with the expectation that follows from the duty of *non-refoulement*,

namely that refugees who manage to get to their jurisdiction are entitled to assert protection claims against them.

This seemingly schizophrenic posture has given rise to the politics of *non-entrée*.<sup>12</sup>

Over the last three decades, even as powerful states routinely affirmed their commitment to refugee law,<sup>13</sup> they have worked assiduously to design and implement *non-entrée* policies that seek to keep most refugees from accessing their jurisdiction, and thus being in a position to assert their entitlement to the benefits of refugee law. For many years, visa controls and carrier sanctions have been instituted to prevent even persons fleeing clearly refugee-producing countries from reaching the industrialized world by air.<sup>14</sup> Airports, harbors, coastlines, and islands have moreover been declared to be non-territory for purposes of protection

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<sup>12</sup> This term was first employed in James Hathaway, 'The Emerging Politics of *Non-Entrée*' (1992) 91 *Refugees* 40-41. In essence, it suggests that whereas refugee law is predicated on the duty of *non-refoulement* (that refugees shall not be turned away), the politics of *non-entrée* is based on a commitment to ensuring that refugees shall not be allowed to arrive.

<sup>13</sup> States have regularly proclaimed their continued for the refugee law regime. UN High Commissioner for Refugees (UNHCR), *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, HCR/MMSP/2001/09; UN High Commissioner for Refugees (UNHCR), *Ministerial Communiqué*, 8 December 2011; Erika Feller, 'Asylum, migration and refugee protection: realities, myths and the promise of things to come', (2006) 18 *International Journal of Refugee Law* 509-36.

<sup>14</sup> Frances Nicholson, 'Implementation of the Immigration (Carriers' Liability) Act 1987: Privatising immigration Functions at the Expense of International Obligations' (1997) 46 (3) *International and Comparative Law Quarterly* 586-634; Antonie Cruz, *Shifting Responsibility: Carriers' liability in the Member States of the European Union and North America* (Stoke-on-Trent: Trentham Books Limited, 1995).

responsibilities.<sup>15</sup> And states have resorted to maritime interception on the high seas in a desperate effort to take deterrent action in a place thought not to attract legal liability.<sup>16</sup>

The appeal of such *non-entrée* policies was thought to be the promise of insulating developed countries from *de facto* compliance with the duty of *non-refoulement* even as they left the duty itself intact. *Non-entrée* allows wealthier states to insist upon the importance of refugee protection as a matter of international legal obligation, knowing full well that they themselves will largely be spared its burdens. It enables a pattern of minimalist engagement under which the formal commitment to refugee law can be proclaimed as a matter of principle without risk that the wealthier world will actually be compelled to live up that regime's burdens and responsibilities to any serious extent. *Non-entrée* mechanisms have overall proved highly effective: the developed world today protects less than 20% of the world's refugees<sup>17</sup> and is subject to no binding duty even to share the costs of protection in the less developed world, much less to resettle refugees to their own territories. Whether measured in raw numbers,

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<sup>15</sup> Tugba Basaran, 'Legal Borders in Europe: The Waiting Zone' in Peter Burgess and Serge Gutwirth (eds), *A Threat Against Europe: Security, Migration and Integration* (Brussels: VUB Press, 2011) 63-74; Mark B. Salter, 'Governmentalities of an Airport: Heterotopia and Confession', 1 (1) *International Political Sociology* 2007 49-66; Frances Nicholson, 'Implementation of the Immigration (Carriers' Liability) Act 1987: Privatising immigration Functions at the Expense of International Obligations' 46(3) *International and Comparative Law Quarterly* 1997 586-634.

<sup>16</sup> Stephen H. Legomsky, 'The USA and the Caribbean Interdiction Programme', (2006) 18 (3/4) *International Journal of Refugee Law* 677-696; Susan Kneebone, 'The Pacific plan: the provision of "effective protection"?' (2006) 18 *International Journal of Refugee Law* 696-722; Andreas Fischer-Lescano and Tillman Löhner, 'Border Control at Sea: Requirements Under International Human Rights and Refugee Law' (2009) 21(2) *International Journal of Refugee Law* 256-296.

<sup>17</sup> Volker Türk, "Address to the 60th Meeting of the UNHCR Standing Committee," U.N. Doc. EC/65/SC/CRP.101 (July 1, 2014), at 1.

refugees per capita, or refugees per dollar of GDP,<sup>18</sup> the brutal reality is that the overwhelming majority of today's refugees are in – and will remain in – many of the world's poorest countries.

The politics of *non-entrée* has thus facilitated a fundamentally duplicitous stance on the part of the developed world in which the value of refugee law is fervently proclaimed<sup>19</sup> even as its practical impact is largely avoided. It is one thing to acknowledge that accidents of geography mean that the less developed world is likely to continue to be the first port of call for the majority of the world's refugees. But it is another thing entirely actively to exacerbate that maldistribution of responsibility. The duty to protect refugees – if in fact a general international legal obligation as states have said it is – should be implemented in good faith by all.<sup>20</sup> In our view, it is high time to embark on a more honest discussion about the importance of refugee protection as a shared responsibility, equitably implemented.

Our goal here is to show that principles of international law have developed in ways that will facilitate a successful legal challenge to much of the *non-entrée* infrastructure that has been assembled by powerful states. Specifically, contemporary understandings of jurisdiction, shared responsibility, and aiding or assisting – taken together – can and should be invoked in aid of the dismantling of the *non-entrée* regime. Such legal action will in turn force a

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<sup>18</sup> UN High Commissioner for Refugees (UNHCR), *UNHCR Global Trends 2012: Displacement, The New 21st Century Challenge*, 19 June 2013, available at: <http://www.refworld.org/docid/51c169d84.html>.

<sup>19</sup> See note 13 *supra*.

<sup>20</sup> 1969 Vienna Convention on the Law of Treaties, Art. 31(1).

more honest political conversation about how best to reconceive international refugee protection as a substantively global responsibility.

To this end, in Part I we describe the politics of *non-entrée* as it emerged, and as it has evolved in practice. Simple modes of *non-entrée* – visa controls, carrier sanctions, and high seas interdiction – have already proved vulnerable to both practical and legal challenge. They have thus largely given way to a range of new cooperation-based policies, described in Part II, the premise of which is to conscript countries of origin and of transit to effect migration control on behalf of the developed world. The overarching logic of this new generation of *non-entrée* policies is to insulate wealthier countries from liability by engaging the sovereignty of another country. Because the actions that prevent refugees and other persons entitled to international protection are undertaken by, or under the jurisdiction of, the authorities of other countries, sponsoring states believe that they can immunize themselves from legal responsibility for the deterrence. The net result is thus that deterrence is achieved even as liability is avoided.

In truth, these new, cooperation-based *non-entrée* policies are rarely as “hands off” as developed states like to suggest. This is because true sub-contracting of deterrence to other countries would mean that the sponsoring countries have less control, and hence reduced assurances of success. To minimize the risk of failure, developed states ordinarily become more directly engaged. We identify a seven-part typology of new generation *non-entrée* practices based on the degree of involvement by, or collaboration with, the sponsoring state or states: reliance on diplomatic relations; the offering of financial incentives; the provision of equipment, machinery, or training; deployment of officials of the sponsoring state; joint or shared

enforcement; assumption of a direct migration control role; and the establishment or assignment of international agencies to effect interception.

In Parts III, IV, and V we examine in detail the tools of public international law that we believe can be asserted to challenge this new generation of cooperation-based *non-entrée* policies.

Part III looks to developments in the law of *jurisdiction*. While once anchored nearly exclusively in notions of territorial control, jurisdiction is now understood also to be established in some situations in which control is taken over persons outside of a state's territory, as well as in some circumstances in which a state exercises public powers outside of its territory. In our view, the territorial, personal, and public powers approaches to jurisdiction combine to force accountability for a significantly more extensive range of *non-entrée* actions than states believe.

Part IV complements the discussion of jurisdiction by examining the important evolution of the law of *shared responsibility* for internationally wrongful acts. The “all or nothing” view under which only one state would be held liable where combined action resulted in a breach of international human rights law has given way to the possibility of shared responsibility – not just where jurisdiction is shared, but also where independent actions combine to produce a common wrong, or where states collaborate to act through a single entity.

Part V moves beyond the issue of shared responsibility to examine the situations in which liability may result from a state *aiding or assisting* another country to breach international law. At least where a state sponsoring *non-entrée* actions is aware that its contributions will lead to a breach of international law, liability may be established even where that state neither has jurisdiction nor takes any direct role in the commission of the wrongful act.

In sum, the trio of developments in relation to jurisdiction, shared responsibility, and aiding or assisting means that states are mistaken in their assumption that international legal obligations – in particular, to respect the duty of *non-refoulement* in regard to refugees – are not enlivened when a state sponsors deterrent actions in some other country. Especially when the sponsoring state or states engage in more activist roles, it is in our view likely that international law as it has evolved now affords the basis for holding them liable for breaching the rules of refugee law they seek to avoid. Law can thus play a critical role in engendering a more forthright conversation among states about the means by which the burdens and responsibilities of refugee protection should be shared out.

#### I. Traditional *non-entrée*: clearly diminished viability

The practice of *non-entrée* – comprising efforts by powerful states to prevent refugees from ever reaching their jurisdiction at which point they become entitled to the benefit of the duty of *non-refoulement* and other rights set by the Refugee Convention – have long been a feature of the refugee protection landscape.

In perhaps the earliest incarnation of *non-entrée*, states subcontracted migration control to transportation companies. From the early 1980s, the combination of visa controls (with a visa not being offered for the purpose of seeking refugee protection) and carrier sanctions (under which those transporting persons without valid visas are subject to significant fines, and even to having aircraft or other vessels impounded) has compelled airlines and other transportation companies to effect migration control at the point of departure.<sup>21</sup> In practice, both the employees of the carriers and the private security firms they engage have come to carry out increasingly elaborate document and immigration checks, thereby denying refugees the right to travel and hence to advance their claims to protection.<sup>22</sup>

A second favored form of *non-entrée* has been to establish so-called “international zones” – particularly in airports – in which some or all of the legal obligations of the territorial state are declared not to apply. Indeed, Australia purported to “excise” more than 3,500 islands from its migration zone in 2001, declaring that it had no protection obligations to any refugee arriving in these parts of its national territory;<sup>23</sup> this policy of excision has now been extended to the entire mainland of Australia.<sup>24</sup> Claiming that the “international zone” is not under the

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<sup>21</sup> Antonio Cruz, *Shifting Responsibility: Carriers' liability in the Member States of the European Union and North America* (Stoke-on-Trent: Trentham Books, 1995); Elspeth Guild, ‘The Border Abroad - Visas and Border Controls’ in K. Groenendijk, et al (eds) *In Search of Europe's Borders* (The Hague: Kluwer Law International, 2002) 87-104.

<sup>22</sup> Frances Nicholson, ‘Implementation of the Immigration (Carriers' Liability) Act 1987: Privatising immigration Functions at the Expense of International Obligations’ (1997) 46 (3) *International and Comparative Law Quarterly* 586-634; Robert McCorquodale and Penelope Simons, ‘Responsibility beyond borders’ (2007) 70 *Modern Law Review* 598–625; Thomas Gammeltoft-Hansen, ‘Private Law Enforcement and Control’ in Gammeltoft-Hansen et al., eds, *The Rights of Others: Essays in honour of Jens Vedsted-Hansen* (Copenhagen: DJØF Publishing, 2013) 517-539.

<sup>23</sup> Migration Amendment (Excision from Migration Zone) Act and the Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001.

<sup>24</sup> Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013.

jurisdiction of the country concerned – as President Putin recently declared when confronted with the presence of whistle-blower Edward Snowden in the “international zone” of Moscow’s Sheremetyevo Airport<sup>25</sup> – governments have asserted that they are at liberty to act without regard to refugee and other human rights obligations.

A third traditional form of *non-entrée* is to effect deterrence on the high seas, an area that is in fact an international zone. In the 1990s, for example, U.S. Coast Guard ships were ordered to stop all persons in flight from the violence and persecution that accompanied the overthrow of the murderous Cedrés dictatorship in Haiti.<sup>26</sup> In the years that followed, more than 50,000 Haitians were interdicted in international waters and returned to Haiti without having had a proper assessment of their claims to be refugees.<sup>27</sup> West African states were among those that followed the American lead, forcibly turning away vessels carrying refugees from their ports.<sup>28</sup>

Over the past two decades, however, these traditional *non-entrée* practices have been successfully challenged, both in practice and as a matter of law.

First, while reliance on the combination of visa controls and carrier sanctions remains common, this approach may now be less capable of deterring refugees than was once the

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<sup>25</sup> *US whistleblower Snowden 'still in Moscow airport'*, BBC News Europe, 26 June 2013.

<sup>26</sup> Executive Order 12,807 (Kennebunkport Order), 57 Fed. Reg. 23, 133 (1992).

<sup>27</sup> Carlos Ortiz Miranda, ‘Haiti and the United States During the 1980s and 1990s: Refugees, Immigration, and Foreign Policy’ (1995) 32 *San Diego Law Review* 673; Hathaway, *The Rights of Refugees Under International Law* 360.

<sup>28</sup> Paul Kuruk ‘Asylum and the Non-Refoulement of Refugees: The case of the missing shipload of Liberian refugees’ (1999) 35 *Stanford Journal of International Law* 313, 315.

case.<sup>29</sup> Refugees arriving in the developed world today commonly rely on organized smuggling and other commercial modes of irregular migration.<sup>30</sup> Smugglers have responded to visa controls and carrier sanctions by adopting increasingly sophisticated technologies to produce travel documents that are difficult to detect.<sup>31</sup> They also secure access for their clients by bribing border officials and regularly adapting travel routes to exploit new opportunities for entry.<sup>32</sup> The vulnerability of the visa control and carrier sanction regime has thus given rise to an unending “cat and mouse game” in which border control must be constantly reinvented to respond to the schemes hatched by imaginative smugglers motivated by extraordinary profits.

Second, the notion that a state can delimit the geographical scope of its territory for purposes of avoiding legal liability – for example, by excision or the declaration of an international zone in an airport – has simply been rejected. Responding to efforts by France to declare Orly Airport an “international zone” in which duties of protection do not apply, the European Court of Human Rights in *Amuur* concluded succinctly that “[d]espite its name, the

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<sup>29</sup> Gammeltoft-Hansen and Sørensen (eds), *The Migration Industry*; Stephen Castles and Mark J. Miller, *The Age of Migration: International Population Movements in the Modern World*, 3rd ed. (New York: Palgrave Macmillan, 2003).

<sup>30</sup> David Kyle and Rey Koslowski, *Global Human Smuggling: Comparative Perspectives*, 2nd ed. (Baltimore: Johns Hopkins University Press, 2011).

<sup>31</sup> Marika McAdam and Sebastian Baumeister, *Migrants smuggling by air*, United Nations Offices on Drugs and Crime (UNODC) Issue Paper (2010); Ulla D. Berg and Carla Tamagno, ‘Migration brokers and document fixers: The making of migrant subjects in urban Peru’ in Gammeltoft-Hansen and Sørensen (eds), *The Migration Industry*, pp. 190-214.

<sup>32</sup> Marika McAdam and Sebastian Baumeister, *Migrants smuggling by air*, United Nations Offices on Drugs and Crime (UNODC) Issue Paper (2010), 13; Rosales Sandoval, ‘Public officials and the migration industry in Guatemala: Greasing the wheels of a corrupt machine’ in Gammeltoft-Hansen and Sørensen (eds), *The Migration Industry*; Jørgen Carling, ‘Migration Control and Migrant Fatalities at the Spanish-African Borders’ (2007) 41(2) *International Migration Review* 316–343; Ko-Lin Chin, ‘The Social Organization of Chinese Human Smuggling’ in Kyle and Koslowski, *Global Human Smuggling : Comparative Perspectives*, 186-203.

international zone does not have extraterritorial status.”<sup>33</sup> More recently, the High Court of Australia struck down a law providing that persons arriving on an “excised” Australian island were precluded from accessing Australian courts and the usual procedures for assessment of refugee status.<sup>34</sup> As these judgments make clear, both the nature of state territory at international law and the overarching duty to meet standards of fairness wherever there is an exercise of state power means that “international zones” are not capable of insulating a state from its legal obligations to protect refugees under its jurisdiction.

Third, there is little support for the view that a state can deter refugees in the international space of the high seas without violating its duties of protection. The outlier case is the 1993 decision of the Supreme Court of the United States in *Sale*<sup>35</sup> in which the Court engaged in highly formalist and decontextualized reasoning to find that a refugee cannot be “returned” by an asylum state to her home country if she has yet to arrive in the asylum state, and that a purely territorial scope for the duty of *non-refoulement* is required by the language of its national security exception.<sup>36</sup> The Court purported to draw on the Convention’s *travaux préparatoires* to justify its reasoning,<sup>37</sup> prompting the American representative to the specialist

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<sup>33</sup> *Amuur v. France*, European Court of Human Rights. Appl. No. 19776/92. 25 June 1996, par. 52.

<sup>34</sup> *Plaintiff M61 and Plaintiff M69 v. Commonwealth of Australia* [2010] HCA 41, 11 November 2010.

<sup>35</sup> *Sale, Acting Commissioner, Immigration and Naturalization Service v. Haitian Center Council*, United States Supreme Court. 113 S.Ct. 2549, 509 US 155.

<sup>36</sup> *Ibid* par. 180, Article 33(2) of the Refugee Convention states: ‘The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.’

<sup>37</sup> *Sale, Acting Commissioner, Immigration and Naturalization Service v. Haitian Center Council*, United States Supreme Court. 113 S.Ct. 2549, 509 US 155, par. 178.

committee that drafted the Refugee Convention to reply that it would be “incredible that states that had agreed not to force any human being back into the hands of his/her oppressors intended to leave themselves – and each other – free to reach out beyond their territory to seize a refugee and to return him/her to the country from which he sought to escape.”<sup>38</sup>

Happily, the U.S. Supreme Court’s approach has not found favor elsewhere. It was rejected by the Inter-American Commission on Human Rights,<sup>39</sup> which adopted the contrary position advanced by the UNHCR in its brief to the U.S. Supreme Court.<sup>40</sup> The English Court of Appeal chose to treat *Sale* as “wrongly decided; it certainly offends one’s sense of fairness.”<sup>41</sup> And in the recent case of *Hirsi*,<sup>42</sup> a Grand Chamber of the European Court of Human Rights determined unanimously that push-backs on the high seas were in breach of regional *non-refoulement* obligations.<sup>43</sup> In a separate opinion, Judge Pinto de Albuquerque pointedly observed that “the United States Supreme Court’s interpretation contradicts the literal and ordinary meaning of Article 33 of the UN Refugee Convention and departs from the common rules of treaty interpretation.”<sup>44</sup>

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<sup>38</sup> Louis Henkin, Notes from the President, (1993) 5 *American Society of International Law Newsletter* 1.

<sup>39</sup> *Haitian Center for Human Rights v. United States* (‘US Interdiction of Haitians on the High Seas’). Inter-American Commission on Human Rights. Case 10.675, Report No. 51/96, Doc. OEA/Ser. L/V/II.95 7 rev. 13 March 1997, par. 156-158.

<sup>40</sup> UNHCR, ‘Brief Amicus Curiae: The Haitian Interdiction Case 1993’ (1994) 6 (1) *International Journal of Refugee Law* 85-102.

<sup>41</sup> *R. (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport*. Court of Appeal. [2003] EWCA Civ 666, 20 May 2003, par. 34; rev’d. on other grounds at [2004] UKHL 55.

<sup>42</sup> *Hirsi Jamaa and Others v. Italy*, European Court of Human Rights, Appl. No. 27765/09. 23 February 2012.

<sup>43</sup> *Ibid* par. 134-5.

<sup>44</sup> Separate opinion of Judge Pinto de Albuquerque to *Hirsi v. Italy*, *ibid* 42, par. 70.

In sum, the classic tools of *non-entrée* no longer provide developed states with an effective and legal means to avoid their obligations under refugee law.

## II. Cooperation-based *non-entrée*: the next generation

With the viability of traditional forms of *non-entrée* compromised, powerful states have embraced a new generation of deterrent regimes intended to overcome many of the weaknesses of the original generation of *non-entrée* practices. The new approaches are predicated on international cooperation, with deterrence occurring in the territory, or under the jurisdiction, of the home state or a transit country. As a practical matter, new forms of *non-entrée* often include action in states of origin or transit designed to disrupt migrant smuggling networks, thereby stymying travel toward the frontiers of developed states. This geographical reorientation is also thought to be legally instrumental. Even as international law has evolved to make clear that liability under the *non-refoulement* norm ensues for actions taken by a state at its own borders and in any other place under its jurisdiction,<sup>45</sup> it is assumed that actions undertaken under the jurisdiction of the authorities of other countries are legally risk-free.<sup>46</sup> With poorer states of origin and transit often willing for economic, political, and other reasons to serve as the gatekeepers to the developed world,<sup>47</sup> developed countries believe that they can insulate

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<sup>45</sup> Gammeltoft-Hansen, *Access to Asylum* 94-99; Hathaway, *The Rights of Refugees Under International Law* 160-173.

<sup>46</sup> Gammeltoft-Hansen, *Access to Asylum* 21 and 126.

<sup>47</sup> Sandra Lavenex, 'Shifting up and out: The foreign policy of European immigration control', (2006) 29 (2) *West European Politics* 329-350; Andrew Geddes, 'Migration as foreign policy? The external dimension of EU action on migration and asylum', SIEPS Report 2009:2, Swedish Institute for European Policy Studies, 2009, 33; Thomas Gammeltoft-Hansen, 'Outsourcing migration management: EU, power, and the external dimension of asylum and immigration policy', DIIS Working Paper 2006/1, Danish Institute for International Studies, 2006; Elizabeth Guild,

themselves from liability for refugee deterrence by having such action take place under the sovereign authority of another country.

One of the first such initiatives was undertaken by the United States in 1997. Its Operation Global Reach provided for the ongoing presence of U.S. immigration officers in several Central American and Caribbean countries to work with local authorities to effect migration control operations.<sup>48</sup> In 2001, Australia's "Pacific Solution" saw that country woo the island state of Nauru with offers of free medical care, educational opportunities, and sports ovals in return for the warehousing in Nauru of migrants intercepted by Australia.<sup>49</sup> That deal was the genesis for outreach to other neighboring states, including Indonesia and Papua New Guinea, intended to prevent boats carrying migrants from traveling towards Australia.<sup>50</sup> And commencing in 2006, Spain and Italy struck deals with African countries to carry out maritime

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'What is a neighbour? Examining the EU neighbourhood policy from the perspective of movement of persons', paper presented at Western NIS Forum for Refugee-Assisting NGOs, Yalta, 1–3 June 2005; J. Niessen and Y. Schibel, 'International migration and relations with third countries: European and US approaches', MPG Occasional Paper, Migration Policy Group, Berlin, May 2004.

<sup>48</sup> Jonathan M. Winer, "Operation Global Reach News Conference", Federal News Service, 19 June 1997; David Kyle and Rey Koslowski, *Global Human Smuggling: Comparative Perspectives* (Baltimore: Johns Hopkins University Press, 2011) 65.

<sup>49</sup> Tara Magner, 'The Less than 'Pacific' Solution for Asylum Seekers in Australia', 16 *International Journal of Refugee Law* (2004) 53-90.

<sup>50</sup> In July 2013 Papua New Guinea (PNG) and Australia signed a bilateral agreement to process and resettle an uncapped number of asylum seekers in PNG, to be funded by Australia but administered by PNG. As well as funding the entire arrangement, Australia announced a suite of additional development assistance programs to the developing state. Regional Resettlement Arrangement between Australia and Papua New Guinea, signed in Brisbane 19 July 2013; Helen Brown, *Indonesia to change visa requirements for Iranians entering the country following request from PM Kevin Rudd*, Australian Broadcasting Commission, 19 July 2013. Available at [www.abc.net.au/news/2013-07-18/indonesia-to-change-visa-requirements-for-iranians/4829434](https://www.abc.net.au/news/2013-07-18/indonesia-to-change-visa-requirements-for-iranians/4829434).

interdiction within their territorial waters.<sup>51</sup> Italy went so far as to promise Libya's Muammar Gaddafi \$5 billion if he would set up radar detection facilities on his country's shores and work with Italy to prevent the departure from Libya of unauthorized migrants.<sup>52</sup>

Indeed, these bilateral and *ad hoc* arrangements have now spawned a series of more comprehensive arrangements. Under the American-led Merida Initiative,<sup>53</sup> the Bali Process financed by Australia,<sup>54</sup> and the European Union's "external dimension,"<sup>55</sup> developed states are crafting regional platforms that embed asylum and migration questions into the mainstream of their foreign policy.

The diversity of the new approaches of cooperation-based *non-entrée* is astonishing, ranging from simple diplomatic agreements to full-scale joint operations to effect

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<sup>51</sup> Aderanti Adepoju et al, 'Europe's Migration Agreements with Migrant-Sending Countries in the Global South: A Critical Review', 48 (3) *International Migration* (2010) 42–75; Philippe Fargues and Christine Fandrich, *Migration after the Arab Spring*, Migration Policy Centre Research Report 2012/09, September 2012; Michela Ceccorulli, 'Securitizing' Migration Crises: The European Union, North Africa and Transatlantic Regional Cooperation' in Lorenzo Fioramonti (ed), *Regions and Crises: New Challenges for Contemporary Regionalisms* (Basingstoke: Palgrave Macmillan, 2012) 126-44; Maarten den Heijer, *Europe and Extraterritorial Asylum* (Oxford: Hart Publishing, 2012) 223-7.

<sup>52</sup> The Treaty on Friendship, Partnership and Cooperation between Italy and Libya was signed on 30 August 2008 and entered into force on 2 March 2009. Cooperation under the treaty was halted in March 2011 following the NATO bombing campaign. See further Human Rights Watch, *Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*, New York, September 2009, 24.

<sup>53</sup> A multi-year agreement between the United States and Central America to combat drug smuggling, transnational crime and illegal. US Department of State, 'The Merida Initiative', Available at: <http://www.state.gov/j/inl/merida>; Isabella A. Vaughne (ed), *The Merida Initiative: U. S. Counterdrug and Anticrime Assistance for Mexico* (New York: Nova Science, 2010).

<sup>54</sup> Susan Kneebone, 'The Bali Process and Global Refugee Policy in the Asia-Pacific Region' (2014) *Journal of Refugee Studies* 27(2).

<sup>55</sup> Tampere European Council, Presidency Conclusions, SI (1999) 800, 15-16 October 1999; Christina Boswell, 'The 'external dimension' of EU immigration and asylum policy' (2003) 79 *International Affairs* 619-638.

migration control. We observe seven main typologies, which may be implemented separately or in tandem.

The first and most basic new form of *non-entrée* relies on *diplomatic relations*. Both sticks (such as withholding development assistance) and carrots (including trade agreements, visa facilitation, and labor immigration quotas) may be provided to states of origin or transit willing to assist in the deterrence of outward migration. The European Union has been especially active in promoting this approach, seeking to negotiate agreements with key Mediterranean and Eastern European states to combat “irregular” migration,<sup>56</sup> including by the establishment or intensification of exit controls.<sup>57</sup> States under consideration for accession to the European Union are moreover required to meet detailed migration control standards set by the European Commission as a condition to move forward in the process of securing actual membership in the Union.<sup>58</sup>

A second new approach to *non-entrée* is to move beyond diplomatic cooperation to provide partner states of origin and transit with *direct financial incentives* to take on migration control responsibilities deemed of value. Under the Mérida Initiative, for example, the United

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<sup>56</sup> Aderanti Adepoju et al, ‘Europe’s Migration Agreements with Migrant-Sending Countries in the Global South: A Critical Review’ 48 (3) *International Migration* (2010) 42–75. Derek Lutterbeck, ‘Policing Migration in the Mediterranean’ (2006) 11(1) *Mediterranean Politics* 59-82. Ivaylo Gatev, ‘Border Security in the Eastern Neighbourhood: Where Biopolitics and Geopolitics Meet’ (2008) 13 *European Affairs Review* 97-116.

<sup>57</sup> Aderanti Adepoju et al, ‘Europe’s Migration Agreements with Migrant-Sending Countries in the Global South: A Critical Review’ 48 (3) *International Migration* (2010) 42–75.

<sup>58</sup> Rosemary Byrne et al, *New Asylum Countries? Migration control and refugee protection in an Enlarged European Union* (The Hague: Kluwer Law International, 2002). As documented by Byrne et al the requirements placed on accession states before the 2004 enlargement in some respects exceeded the obligations placed on existing Member States.

States has since 2008 appropriated some \$2.1 billion to combat drug smuggling and improve border control in Mexico and Central America.<sup>59</sup> Part of this funding has been used to purchase equipment, including helicopters and x-ray scanners,<sup>60</sup> as well as to open new immigration control sites at the border between Mexico and Guatemala.<sup>61</sup> Similarly, in 2003 Spain agreed to provide Morocco with \$390 million in aid and debt relief in return for Moroccan border control efforts.<sup>62</sup> In 2009, Italy pledged \$5 billion to Libya over a 20-year period in exchange for Libya agreeing to take back intercepted refugee and other migrants and to undertake patrols intended to prevent migration towards Europe.<sup>63</sup>

Beyond offering financial incentives, a third variant of the new *non-entrée* is directly to provide *equipment, machinery, and training* to the authorities of the cooperating country. Italy and other European Union countries provided Libya with border control

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<sup>59</sup> US Department of State, 'The Merida Initiative', Available at: <http://www.state.gov/j/inl/merida>. See further Colleen W. Cook and Clare Ribando Seelke, *Mérida Initiative: Proposed U.S. Anticrime and Counterdrug Assistance for Mexico and Central America*, Congressional Research Service, Washington DC, 2008; Clare Ribando Seelke, *Mérida Initiative for Mexico and Central America: Funding and Policy Issues*, Congressional Research Service, Washington DC, 2009.

<sup>60</sup> Clare Ribando Seelke, *Mérida Initiative for Mexico and Central America: Funding and Policy Issues*, Congressional Research Service, Washington DC, 2009, p. 4.

<sup>61</sup> *Ibid*, p. 11.

<sup>62</sup> Liza Schuster, *The Realities of a New Asylum Paradigm*, Centre on Migration, Policy and Society Working Paper No. 20, 2005, 13; Thomas Spijkerboer, 'The Human Cost of Border Control' (2007) 9 *European Journal of Migration and Law* 127-139. As a result of this cooperation Moroccan gendarmes ended up opening fire on migrants trying to climb the border-fence to the Spanish enclaves Ceuta and Melilla killing 11 and wounding many others in September 2005.

<sup>63</sup> Treaty on Friendship, Partnership and Cooperation between Italy and Libya, 30 August 2008, entry into force 2 March 2009. The treaty was ratified by Italy in Law no.7/2009 and published in Official Gazette no. 40 of 18 February 2009. Thomas Gammeltoft-Hansen, 'Outsourcing European Migration Control and the Reach of International Refugee Law' in Paul Minderhoud and Elspeth Guild (eds), *Citizens and Third Country Nationals: Examining Ten Years of the EU's Area of Freedom, Security and Justice*, A Celebration of Ten Years of the European Journal of Migration and Law (The Hague: Brill, 2011).

equipment – including radars, night vision goggles, and patrol boats.<sup>64</sup> European-funded security companies have provided document scanners and thermo-imaging equipment to facilitate immigration control along the border between Russia and the Ukraine.<sup>65</sup> Australia and Indonesia established a joint center to improve border control and law enforcement capability in Jakarta in 2004,<sup>66</sup> Australia also trains Sri Lankan naval officers and has gifted patrol boats and other border control equipment to the country.<sup>67</sup> In 2010, Mexican officials were invited to the United States for a ten-week training program on profiling techniques and the detection of false documents.<sup>68</sup>

A fourth form of collaborative deterrence is actually to *deploy or second immigration officials of the destination country* to work with authorities in the country of origin or transit. For example, the United States maintains immigration officers in 47 foreign

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<sup>64</sup> Martin Lemberg-Pedersen, 'Private Security Companies and the European Borderscapes' in Gammeltoft-Hansen and Sørensen (eds), *The Migration Industry*; Derek Lutterbeck, 'Policing Migration in the Mediterranean' (2006) 11(1) *Mediterranean Politics* 59-82.

<sup>65</sup> Ivaylo Gatev, 'Border Security in the Eastern Neighbourhood: Where Biopolitics and Geopolitics Meet' (2008) 13 *European Affairs Review* 97-116.

<sup>66</sup> Australian Strategic Policy Institute, *A return on investment: The future of police cooperation between Australia and Indonesia*, Special Report, March 2014. The Jakarta Centre for Law Enforcement Cooperation. Information available at [www.jclec.com](http://www.jclec.com).

<sup>67</sup> Human Rights Law Centre, 'Can't flee, can't stay: Australia's interception of Sri Lankan asylum-seekers', March 2014. Available at [http://www.hrlc.org.au/wp-content/uploads/2014/03/HRLC\\_SriLanka\\_Report\\_11March2014.pdf](http://www.hrlc.org.au/wp-content/uploads/2014/03/HRLC_SriLanka_Report_11March2014.pdf).

<sup>68</sup> Immigration and Customs Enforcement (ICE) press release, 'DHS, ICE and Mexico honor graduates of Mexican Customs Investigator Training Program: Mexican Customs officials embrace learning ICE investigative and crime-fighting techniques', 22 October 2010. Available at [www.ice.gov/news/releases/1010/101022northcharleston2.htm](http://www.ice.gov/news/releases/1010/101022northcharleston2.htm). See generally Marc R. Rosenblum, *Obstacles and Opportunities for Regional Cooperation: The US-Mexico Case*, Migration Policy Institute, April 2011.

countries.<sup>69</sup> Australia began posting Airline Immigration Officers (ALOs) in Bangkok in 1990,<sup>70</sup> and by 2013 had an ALO network of 15 offices.<sup>71</sup> In 2004, the European Union established a network of immigration officers drawn from member states to be posted at airports and border crossing points in key states of origin and transit.<sup>72</sup> While both Australia and the European Union are at pains to emphasize that their immigration officers “do not carry out any tasks relating to the sovereignty of States,”<sup>73</sup> in practice the “advice” or “support” of their officers is often decisive for decisions regarding onward travel.<sup>74</sup>

Fifth, a program of *joint or shared enforcement* may be established between the destination country and partner states of origin and/or transit. U.S. immigration officers carried out joint operations with Mexican authorities,<sup>75</sup> leading to some 74,000 apprehensions of U.S.-

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<sup>69</sup> Eleanor Taylor Nicholson, *Cutting Off the Flow: Extraterritorial Controls to Prevent Migration*, Berkeley Law Issues Brief, 2011, 5; US Immigration and Customs Enforcement, *Overview*, <http://www.ice.gov/about/overview/>.

<sup>70</sup> Savitri Taylor, ‘Offshore Barriers to Asylum Seeker Movement: The Exercise of Power Without Responsibility?’ in Jane McAdam (ed), *Forced Migration, Human Rights and Security* (Oxford: Hart Publishing 2008) 93-127 at 95.

<sup>71</sup> Ibid; At 30 June 2013. Department of Immigration and Citizenship, *Annual Report 2012-13*, 302. Available at <http://www.immi.gov.au/about/reports/annual/2012-13/pdf/2012-13-diac-annual-report.pdf>. On the role of ALOs see further Leanne Weber, ‘Policing the virtual border: punitive preemption in Australian offshore migration control’ (2007), 34 *Social Justice*, 77-93.

<sup>72</sup> Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison network.

<sup>73</sup> Council of the European Union, Proposal for a Comprehensive Plan to Combat Illegal Immigration and Trafficking of Human Beings in the European Union, 6621/1/02, 27 February 2002; Australia, Department of Immigration and Border Protection, ‘Combating People Smuggling and Unauthorised Arrivals’, 16 Dec. 2013, available at <https://www.immi.gov.au/managing-australias-borders/border-security/irregular-entry/combat.htm#e>.

<sup>74</sup> Robert McCorquodale and Penelope Simons, ‘Responsibility beyond borders’, (2007) 70 *Modern Law Review* 598–625; Savitri Taylor, ‘Offshore Barriers to Asylum Seeker Movement: The Exercise of Power Without Responsibility?’ in McAdam (ed), *Forced Migration, Human Rights and Security*, 93-127 at 103.

<sup>75</sup> Matthew Coleman, ‘A Geopolitics of Engagement: Neoliberalism, the War on Terrorism, and the Reconfiguration of US Immigration Enforcement’ (2007) 12 *Geopolitics* 607-634.

bound immigrants between 1997 and 2001.<sup>76</sup> Australian officials fund and work closely with their Sri Lankan counterparts to foil human smuggling efforts in the hope of deterring onward movement towards Australia.<sup>77</sup> Since 2010, border guards of 24 European Union states have been deployed to the border between Greece and Turkey to prevent entry into Greece,<sup>78</sup> and thus into the Union's territory. Spain has brought Senegalese and Mauritanian immigration officers onboard vessels engaged in interception of outbound migrants from the territorial waters of those

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<sup>76</sup> Ibid 620.

<sup>77</sup> Australian Customs and Border Protection Services brief, Attorney-General's meeting with His Excellency Admiral Thisara Samarasinghe. Available at [www.customs.gov.au/webdata/resources/files/2013-003135\\_DocumentsReleased.pdf](http://www.customs.gov.au/webdata/resources/files/2013-003135_DocumentsReleased.pdf); Australian High Commission in Sri Lanka media release, 'Sri Lankan convicted of people smuggling', 14 September 2011; Department of Foreign Affairs and Trade, Australia in the Asian Century Sri Lanka profile. Available at <https://www.dfat.gov.au/publications/asian-century/downloads/sri-lanka.pdf>. Phil Lynch, 'Sri Lanka, human rights and foreign policy in a tweet', *Australian Broadcasting Corporation*, 21 July 2011; Ben Doherty, 'More Sri Lankan navy sailors suspected of people smuggling', *Sydney Morning Herald*, 16 November 2013; ABC News, 'Australia to donate navy boats to Sri Lanka in people smuggling deal', *Australian Broadcasting Corporation*, 17 November 2013. In December 2012, the first Sri Lanka-Australia Joint Working Group on People Smuggling and Transnational Crime was convened. See Department of Immigration and Citizenship, *Annual Report 2012-13*, 10. Available at <http://www.immi.gov.au/about/reports/annual/2012-13/pdf/2012-13-diac-annual-report.pdf>.

<sup>78</sup> Regulation (EC) No 863/2007, Establishing a mechanism for the creation of Rapid Border 78 Intervention Teams, 11 July 2007; Elspeth Guild and Sergio Carrera, Joint Operation RABIT 2010 – FRONTEX Assistance to Greece's Border with Turkey: Revealing the Deficiencies of Europe's Dublin Asylum System, Centre for European Policy Studies, 22 November 2010, available at <http://ceps.be/book/'joint-operation-rabit-2010'---frontex-assistance-greece's-border-turkey-revealing-deficiencies>.

states.<sup>79</sup> Such “ship-rider agreements” have also been entered into between Italy and Albania,<sup>80</sup> and between the United States and the Dominican Republic.<sup>81</sup>

In a sixth and still more intrusive form of *non-entrée*, the destination country may actually take on a *direct migration control role* from within the territory of the cooperating state. In 2001, the United Kingdom introduced a pre-clearance procedure at Prague Airport under which British immigration officers stationed there had the authority to grant or refuse leave to enter the United Kingdom before boarding.<sup>82</sup> As was made clear in evidence considered by the House of Lords, a significant number of Roma seeking recognition of their refugee status were in fact deterred by this procedure.<sup>83</sup> Agreements have also been signed to allow third country authorities onboard European ships to carry out interceptions inside the territorial waters of such

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<sup>79</sup> Frontex, ‘Longest Frontex-coordinated operation – HERA, the Canary Islands’, news release, 19 December 2006, available at <http://frontex.europa.eu>; Sergio Carrera, The EU Border Management Strategy FRONTEX and the Challenges of Irregular Immigration in the Canary Islands, Centre for European Policy Studies (CEPS) Working Document No. 261/March 2007, 21; J. Rijpma, *Building Borders: The Regulatory Framework for the Management of the External Border of the European Union*, Doctoral dissertation, European University Institute, Florence, 2009, 341-2. See further Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2012) 219.

<sup>80</sup> Protocol Between Italy and Albania to Prevent Certain Illegal Acts and Render Humanitarian Assistance to Those Leaving Albania, 2 April, *Gazzetta Ufficiale della Repubblica Italiana*, No. 163, 15 July 1997. See further Guilfoyle, *Shipping Interdiction and the Law of the Sea* 210.

<sup>81</sup> Agreement Between the Government of the United States of America and the Government of the Dominican Republic Concerning Cooperation in Maritime Migration Law Enforcement 2003, KAV 6187; Guilfoyle, *Shipping Interdiction and the Law of the Sea* 196.

<sup>82</sup> *R. (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport*. Court of Appeal, [2003] EWCA Civ 666, 20 May 2003; rev’d. on other grounds at [2004] UKHL 55. See also Andrew Brouwer and Judith Kumin, ‘Interception and Asylum: When Migration Control and Human Rights Collide’, (2003) *Refuge* 21.

<sup>83</sup> *European Roma Rights Centre and others v. Immigration Officer at Prague Airport and another* [2004], UKHL 55, 9 December 2004, pars. 4, 92.

states as Libya, Mauritania, and Senegal.<sup>84</sup> While relevant European Union guidelines make express reference to the importance of respect for the duty of *non-refoulement*,<sup>85</sup> interdicted persons have in practice often been returned without any assessment of their protection needs.<sup>86</sup>

Finally, we are now seeing the emergence of a seventh approach to *non-entrée* in which *international agencies* are tasked by developed states with the responsibility to intercept refugees and other would-be migrants while they are still under the jurisdiction of countries of origin and of transit. The European Union border agency, Frontex, has traditionally served as an umbrella organization to enable member states to carry out joint operations at the external borders of the Union and internationally.<sup>87</sup> The agency has, however, recently been authorized to deploy its own immigration officers to third states, as well as to “initiate and carry out joint operations.”<sup>88</sup> While the agency’s mandate requires it to respect duties under the Refugee Convention, in particular the duty of *non-refoulement*,<sup>89</sup> it is doubtful that as a matter of international law the agency itself can be said to be truly bound by any international human

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<sup>84</sup> Gammeltoft-Hansen, *Access to Asylum* 126; Guilfoyle, *Shipping Interdiction and the Law of the Sea* 218; Jorrit J. Rijpma, ‘Building borders: the regulatory framework for the management of the external border of the European Union’, doctoral dissertation, European University Institute, Florence, 2009.

<sup>85</sup> Council of the European Union, Regulation No 1168/2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, arts 1 and 3(b).

<sup>86</sup> Gammeltoft-Hansen, *Access to Asylum* 126; Guilfoyle, *Shipping Interdiction and the Law of the Sea* 218.

<sup>87</sup> Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 26 October 2004.

<sup>88</sup> Regulation (EU) No 1168/2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 25 October 2011, Art. 3.

<sup>89</sup> *Ibid* Art. 1(2).

rights instrument.<sup>90</sup> As such, the shift in the Frontex mandate raises the specter of a legally unaccountable entity deterring refugee and other migration in foreign space.

To be clear, the seven variants of cooperation-based *non-entrée* identified here are in no sense hermetically sealed options. For example, the Libyan-Italian interdiction scheme included not only financial incentives, but also comprised direct provision of border control equipment and joint enforcement operations in Libyan territorial waters.<sup>91</sup>

The truly pernicious nature of these new forms of *non-entrée* is especially clear when the cooperation is with countries not themselves legally bound to protect refugees. Neither Libya nor Indonesia, for example, is a party to the Refugee Convention.<sup>92</sup> And even when formally bound by refugee law, many of the favored partner states have no national procedure in place to assess refugee status or the *de facto* capacity to or will to ensure respect for refugee

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<sup>90</sup> International refugee law (and most general human rights law) is addressed exclusively to states. Adjudicatory jurisdiction over international organizations thus cannot be established: *Behrami and Behrami v. France and Saramati v. France*, Germany and Norway. European Court of Human Rights. Appl. No. 71412/01 and 78166/01. 2 May 2007 (Admissibility). The planned accession of the European Union to the European Convention on Human Rights may partly remedy this situation.

<sup>91</sup> Thomas Gammeltoft-Hansen, 'Outsourcing European Migration Control and the Reach of International Refugee Law' in Paul Minderhoud and Elspeth Guild (eds), *Citizens and Third Country Nationals: Examining Ten Years of the EU's Area of Freedom, Security and Justice. A Celebration of Ten Years of the European Journal of Migration and Law* (The Hague: Brill, 2011).

<sup>92</sup> UN High Commissioner for Refugees (UNHCR), State Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, as of 1 April 2011. Available at: <http://www.unhcr.org/3b73b0d63.html>.

rights.<sup>93</sup> As such, refugees trapped under the jurisdiction of these states have little or no ability to claim the rights to which they are in principle entitled by international law.

The question to which we now turn is whether the assumptions upon which this new generation of cooperative *non-entrée* mechanisms is based are legally sound. Specifically, we argue that the bedrock principle of public international law that state responsibility follows from jurisdiction can no longer be narrowly understood. While primarily territorial in nature, jurisdiction today can also be established in some situations in which control is taken over persons outside of a state's territory, as well as in some circumstances in which a state exercises public powers outside of its territory. Nor is it the case that only one state can have jurisdiction in a given factual context. To the contrary, principles of shared responsibility provide a critical means by which to hold sponsoring states accountable for many forms of joint or collective conduct at the heart of the new generation of *non-entrée*. And even where there is no jurisdiction – particularized or shared – a more robust understanding of liability for aiding or assisting another country to breach international law is evolving that we believe has the potential to fill at least some of the accountability void that *non-entrée* policies seek to exploit. Taken together, developments in relation to jurisdiction, shared responsibility, and liability for aiding and assisting significantly challenge the legality of many of the new, international cooperation-based deterrent regimes.

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<sup>93</sup> For example, while Libya is not a party to the UN Refugee Convention, it is bound by the 1969 Organization of African Unity Refugee Convention, the International Covenant on Civil and Political Rights and the Convention Against Torture; the non-refoulement principle is moreover formally incorporated in its national law: Article 2, Law 20/1991. Despite these commitments, Libya has yet to implement a functional asylum system, and has a track record of abuse, detention and forced return of refugees. Amnesty International, *Seeking Safety, Finding Fear: Refugee, asylum-seekers and migrants in Libya and Malta*, Reg 01/004/2010, London, December 2010); Human Rights Watch, *Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*, New York, September 2009.

### III. Jurisdiction in evolution

Unlike most other human rights instruments, the rights contained in the 1951 Refugee Convention are not granted *en bloc*, but rather incrementally, requiring states gradually to extend more generous rights as the degree of attachment between the refugee and host state increases.<sup>94</sup> While the majority of rights are explicitly reserved for refugees who are physically present in the territory or who have some higher level of attachment to the host state, a few core rights – including the duty of *non-refoulement* – are intentionally said to apply without territorial or other qualification.<sup>95</sup> The plain language of the Convention thus makes clear that this critical group of baseline rights is not acquired only when a refugee reaches a state party’s territory<sup>96</sup> – this being the requirement to qualify for rights that are acquired at the second level of attachment (“in” or “within” a contracting state’s territory). While at no time did the drafters suggest that state parties were responsible to effectuate refugee rights in the world at large, neither did they purport to exempt states that choose to act beyond their territory from responsibility for the consequences of such actions. In view of this ambiguity – plain language makes clear that some refugee rights are not limited to refugees physically present in a state party’s territory, yet neither are state parties compelled by the treaty to implement rights in the world at large – rules of treaty

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<sup>94</sup> Hathaway, *Rights of Refugees*, pp. 161-63. The notion of “levels of attachment” was approved by the UK Supreme Court in *R. (ST, Eritrea) v. Secretary of State for the Home Department*, [2012] UKSC 12 (Mar. 21, 2012), at [2].

<sup>95</sup> In addition to Art. 33’s protection against *refoulement*, these rights include non-discrimination (Art. 3), property (Art. 13), access to the courts (Art. 16(1)), to benefit from rationing schemes (Art. 20), education (Art. 22), fiscal equality (Art. 29), and ability to apply for a durable status (Art. 34). Hathaway, *The Rights of Refugees*, pp. 160-71.

<sup>96</sup> As noted by the House of Lords, ‘the starting point of the construction exercise must be the text of the Convention itself... because it expresses what the parties to it have agreed’: *Januzi and Hamid v. SSHD*, [2006] UKHL 5 (U.K.H.L., Feb. 15, 2006, per Lord Bingham). See further *Saadi v. United Kingdom*. European Court of Human Rights. Appl. No. 13229/03. 29 January 2008, paras. 61-2; *Golder v. United Kingdom*. European Court of Human Rights. Appl. No. 4451/70. 21 February 1975, par. 29.

interpretation compel the adoption of an understanding of the first, ambiguously framed level of attachment that is in line with the context, object, and purpose of the Refugee Convention.<sup>97</sup>

These considerations lead us to seek guidance in the approach taken by international human rights law – expressly part of the Convention’s context by virtue of its Preamble,<sup>98</sup> and an appropriate touchstone in view of the holdings of leading courts that the object and purpose of refugee law is to provide for the surrogate or substitute protection of human rights.<sup>99</sup> Under international human rights law, the usual baseline position<sup>100</sup> is that rights are owed to anyone “within” or “subject to” a state’s jurisdiction.<sup>101</sup> Adopting the same approach for acquisition of the most basic refugee rights (that is, those that are not qualified by references to physical presence or otherwise) – including, of course, the duty of *non-refoulement*

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<sup>97</sup> 1969 Vienna Convention Relating to the Interpretation of Treaties Art. 33(3)c. As noted by the International Court of Justice, ‘interpretation cannot remain unaffected by subsequent development of law...an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.’ *Namibia (South West Africa) Case*. International Court of Justice. 26 January 1971, p. 31. Both national and international jurisprudence have further emphasised the importance of interpreting the Refugee Convention as a ‘living instrument’ affected by subsequent legal developments. F. Nicholson and V. Türk, ‘Refugee protection in international law: an overview’, in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law* (Cambridge: Cambridge University Press, 2003), pp. 37-38.

<sup>98</sup> See for example *Suresh v Canada*, Canadian Supreme Court, 1 SCR 3, 11 January 2002; Hathaway, *The Rights of Refugees Under International Law* 64.

<sup>99</sup> James C. Hathaway and Michelle Foster, *The Law of Refugee Status*, 2<sup>nd</sup> edition (Cambridge: Cambridge University Press, 2014), at pp. 184-185.

<sup>100</sup> The four Geneva Conventions are exceptional, expressly obligating state parties “to respect and to ensure respect for the present Convention *in all circumstances* (emphasis added)”: [Art.1].

<sup>101</sup> See notably the 1966 International Covenant on Civil and Political Rights, the 1984 Convention Against Torture, the 1989 Convention on the Rights of the Child, the 1989 American Convention on Human Rights and the 1950 European Convention on Human Rights. See further Hathaway, *Rights of Refugees*, pp 64-66; Gammeltoft-Hansen, *Access to Asylum*, pp. 81-93.

– is thus contextually logical as well as purposively sound, a fact recognized by soft law<sup>102</sup> and confirmed by dominant state practice.<sup>103</sup>

In one of the clearest statements of the meaning of jurisdiction in international human rights law, the UN Human Rights Committee determined that the obligation under the Civil and Political Covenant to respect rights “within [a state’s] territory and subject to its jurisdiction” means that

[a] State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of the State Party, even if not situated within the territory of the State Party.<sup>104</sup>

This approach was affirmed as accurate by the International Court of Justice in the seminal *Israeli Wall* decision, which insisted that

... the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory.<sup>105</sup>

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<sup>102</sup> See e.g. UNHCR Executive Committee Conclusion No. 74 (XLV) 1994, para. (g), and No. 97 (LIV) 2003, para. (a).

<sup>103</sup> Hathaway, *Rights of Refugees*, pp 68-74; Gammeltoft-Hansen, *Access to Asylum*, pp. 72-81. The U.S. government represents a notable exception to this position and maintains that Art. 33 of the 1951 Refugee Convention applies strictly territorially. United States Mission to the United Nations and Other International Organizations in Geneva, Observations of the United States on the Advisory Opinion of the UN High Commissioner for Refugees on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol, (28 December 2007).

<sup>104</sup> UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, par. 10.

<sup>105</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*. International Court of Justice. General List No. 131. 9 July 2004, par. 109. See also *Democratic Republic of Congo v. Uganda*, [2005] ICJ Rep 168, at [216], finding that international human rights law is “applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.”

Some confusion was, however, sewn by the subsequent decision of the European Court of Human Rights in *Bankovic*.<sup>106</sup> Invoking general principles of international law<sup>107</sup> to interpret the scope of jurisdiction for purposes of entitlement to human rights protection, the Court determined that extensions beyond territorial jurisdiction<sup>108</sup> are “... exceptional and requir[e] special justification in the particular circumstances of each case.”<sup>109</sup> Finding no such special justification to exist in regard to the bombing of Yugoslavia by NATO states, the Court ruled that the states conducting the bombing had no jurisdiction over the civilians killed, and thus did not breach the European Convention despite effecting their deaths.

In recent years, however, the open-ended language about the meaning of jurisdiction adopted in the *Bankovic* decision has been built upon in a way that brings European regional human rights law to a position on the meaning of jurisdiction that is substantially in line with that adopted by the UN Human Rights Committee and affirmed by the International Court of Justice.<sup>110</sup> As the critical 2011 ruling in *Al-Skeini* makes clear, while the concept of

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<sup>106</sup> *Bankovic and Others v. Belgium and Others Application No. 52207/99*, 12 December 2001.

<sup>107</sup> *Ibid.*, at para. 59. As a matter of public international law, a state’s jurisdiction normally denotes its entitlement to prescribe and enforce its domestic laws, and the notion of jurisdiction has therefore – at least in regard to enforcement – traditionally been linked to state territory: Simma, Bruno, and Andreas Th. Müller. 2012. Exercise and limits of jurisdiction. In *The Cambridge Companion to International Law*, edited by J. Crawford and M. Koskenniemi. Cambridge: Cambridge University Press. 134-57 at 135; Lowe, Vaughan. 2006. Jurisdiction. In *International Law, 2nd edition*, edited by M. D. Evans. Oxford: Oxford University Press. 335-360 at 338.

<sup>108</sup> As pointed out by the International Court of Justice, ‘while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory.’ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion. International Court of Justice, 9 July 2004, para. 109.

<sup>109</sup> *Bankovic and Others v. Belgium and Others*. European Court of Human Rights. Appl. No. 5207/99. 12 December 2001, par. 61. This has since been reiterated in several judgments, see e.g. *Al-Skeini and Others v. United Kingdom*. European Court of Human Rights. Appl. No. 55721/07. 7 July 2011, par. 131

<sup>110</sup> *Supra*

jurisdiction remains in evolution, states today exercise human rights jurisdiction beyond their territory in an increasing number of situations.<sup>111</sup>

The first such situation is where a state exercises effective control over some or all of the territory of another country, most notably by way of military occupation.<sup>112</sup> The jurisdictional obligations of the occupying state stem from *de facto* control alone<sup>113</sup> – lawfulness is not required.<sup>114</sup> What matters is that the state is adjudged to exercise overall control of a defined territory for some period of time, and to the exclusion of the territorial state.<sup>115</sup> For example, the International Court of Justice held in its *Wall* opinion that Israel’s human rights obligations apply to “all conduct by the State party’s authorities or agents in [the Occupied] territories that affect the enjoyment of rights... and fall within the ambit of State responsibility of

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<sup>111</sup> *Al-Skeini and Others v. United Kingdom*. European Court of Human Rights. Appl. No. 55721/07. 7 July 2011

<sup>112</sup> *Bankovic and Others v. Belgium and Others*. European Court of Human Rights. Appl. No. 52207/99. 12 December 2001, par. 71. Other cases involving effective control over territory include *Loizidou v. Turkey*. European Court of Human Rights. Appl. No. 15318/89. 18 December 1996; *Coard et al. v United States*. Inter-American Commission on Human Rights. Case 10.951. 29 September 1999; *Salas and Others v. the United States* (‘*US military intervention in Panama*’). Inter-American Commission for Human Rights. Case No. 10.573, Report No. 31/93, Annual Report IACHR 1993, 312. 14 October 1993; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*. International Court of Justice. General List No. 131. 9 July 2004, par. 102-114.

<sup>113</sup> Dinstein, Yoram. 2009. *The International Law of Belligerent Occupation*. Cambridge: Cambridge University Press, p. 35.

<sup>114</sup> As is also the case under the Fourth Geneva Convention, the lawfulness of such military operations is in principle irrelevant to the obligations imposed on the occupying power. Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Art. 2. This was specifically confirmed in *Hirsi*, noting that ‘responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory’. *Hirsi Jamaa and Others v. Italy*. European Court of Human Rights. Appl. No. 27765/09. 23 February 2012, par. 73.

<sup>115</sup> Dinstein, *International Law of Belligerent Occupation*, pp. 38-9.

Israel under the principles of public international law.”<sup>116</sup> Much the same result was reached by the European Court of Human Rights in *Cyprus v. Turkey*, finding that responsibility followed not simply because relevant actions had been taken by government agents, but more generally from the fact of a relevant act or omission having taken place within an area of effective control.<sup>117</sup>

This first, control-based extension of the notion of the traditional territorial view of jurisdiction is, however, likely of little immediate value in contesting the new generation of cooperation-based *non-entrée* practices. Not only has the case law thus far focused only on obligations arising from military occupation, but to date there is no instance of *non-entrée* having been implemented by way of the transfer of durable and exclusive control over territory.<sup>118</sup> In contrast, we see real potential in two other developments in the law of jurisdiction: jurisdiction based on the exercise of *authority over individuals*, for example by way of arrest or detention; and jurisdiction established by the exercise abroad of *public powers* abroad as a matter of treaty or other agreement.

#### *A. Jurisdiction based on authority over individuals*

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<sup>116</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*. International Court of Justice. General List No. 131. 9 July 2004, par. 110.

<sup>117</sup> *Cyprus v. Turkey*. European Court of Human Rights. Appl. No. 25781/94. 10 May 2001, par. 77.

<sup>118</sup> The closest approximation may be the agreement under which the United Kingdom is allowed to enforce its national immigration law within designated areas of the French ports of Dunkirk, Boulogne and Calais. At the international level, the juxtaposed control scheme is provided for by the Touquet treaty, which was signed on 4 February 2003, and given domestic effect by the Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls). Similar control arrangements have been made to give access to United Kingdom immigration officers to perform migration control at Eurostar stations in France and Belgium.

Short of exercising territorial control, “a State may also be held accountable for violation of... rights and freedoms of persons who are in the territory of another State but who are found to be under the former State’s authority and control through its agents operating – whether lawfully or unlawfully – in the latter State.”<sup>119</sup> States have, for example, been found to have jurisdiction over individuals within their embassy or consulate, or who are onboard craft or vessels registered in their country, or which are flying their flag.<sup>120</sup> It is also acknowledged that a state has jurisdiction over individuals held on its military bases, detention centers or other closed facilities controlled by the extraterritorially acting state.<sup>121</sup>

Such findings are, at one level, unsurprising: they simply mirror the traditional approach in public international law to the scope of enforcement jurisdiction. But the European Court of Human Rights has gone farther, finding human rights jurisdiction to be established even by the simple act of boarding a migrant vessel, the emphasis being placed in such cases on the *de*

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<sup>119</sup> *Issa and Others v. Turkey*. European Court of Human Rights. Appl. No. 31821/96. 16 November 2004, par. 71.

<sup>120</sup> *Bankovic and Others v. Belgium and Others*. European Court of Human Rights. Appl. No. 52207/99. 12 December 2001, par. 73, and *Medvedyev and Others v. France*. European Court of Human Rights. Appl. No. 3394/03. 29 March 2010, par. 65. See in general *X. v. Federal Republic of Germany*. European Commission on Human Rights. Appl. No. 1611/62. 25. September 1965; *X v. United Kingdom*. European Commission of Human Rights. Appl. No. 7547/76. 15 December 1977; *W.M. v. Denmark*. European Commission of Human Rights. Appl. No. 17393/90. 14 October 1992; *W. v. Ireland*. European Court of Human Rights. Appl. No. 9360/81. 28 February 1983; *Al-Saadoon and Mufdhi v. United Kingdom*. European Court of Human Rights. Appl. No. 61498/08. 30 June 2009 (adm); *Al-Jedda v. United Kingdom*. European Court of Human Rights. Appl. No. 27021/08. 7 July 2011; *J.H.A v. Spain*. Committee Against Torture. CAT/C/41/D/323/2007. 21 November 2007.

<sup>121</sup> *Al-Saadoon and Mufdhi v. United Kingdom*. European Court of Human Rights. Appl. No. 61498/08. 30 June 2009 (adm). See further the House of Lords decision in *Al-Skeini and others v. Secretary of State for Defence*. House of Lords. UKHL 26. 13 June 2006 and *Hess v. the United Kingdom*, European Commission of Human Rights, Appl. No. 6231/73, 28 May 1975, Decisions & Reports vol. 2, p. 72.

*facto* control exercised over the individuals concerned.<sup>122</sup> This focus on the exercise of control as a means of establishing human rights jurisdiction can perhaps be seen most clearly in cases involving state agents forcibly apprehending and transporting an individual to their state's territory.<sup>123</sup> Courts have emphasized that the logic of finding jurisdiction in such a situation is the importance of avoiding a human rights vacuum, since it would be “unconscionable...to permit a State party to perpetrate violations of [human rights] in the territory of another State, which violations it could not perpetrate within its own territory.”<sup>124</sup> Thus, as observed in *Al-Skeini*, jurisdiction may arise solely from “the exercise of physical power and control over the person in question.”<sup>125</sup>

Applying this understanding of jurisdiction to the context of *non-entrée* policies, jurisdiction is established when refugees are intercepted and their movements controlled by state

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<sup>122</sup> *Al-Skeini and Others v. United Kingdom*. European Court of Human Rights. Appl. No. 55721/07. 7 July 2011, par. 136; *Medvedyev and Others v. France*. European Court of Human Rights. Appl. No. 3394/03. 29 March 2010, par. 65.

<sup>123</sup> See e.g. *López Burgos v. Uruguay*. Human Rights Committee. UN Doc. A/36/40. 6 June 1979; *Lilian Celiberti de Casariego v. Uruguay*. Human Rights Committee. UN Doc. CCPR/C/OP/1. 29 July 1981; *Freda v Italy*. European Commission on Human Rights. 8916/80. 7 October 1980; *Reinette v. France*. European Court of Human Rights. Appl. No. 14009/88. 2 October 1989; *Stocke v. Germany*. European Court of Human Rights. Series A, No. 199. 19 March 1991; *Ramírez Sánchez v France*. European Commission of Human Rights. Appl. No. 28780/95. 24 June 1996; *Öcalan v. Turkey*. European Court of Human Rights. Appl. no. 46221/99. 12 March 2003.

<sup>124</sup> *López Burgos v. Uruguay*. Human Rights Committee. UN Doc. A/36/40. 6 June 1979, par. 12.3; *Issa and Others v. Turkey*. European Court of Human Rights. Appl. No. 31821/96. 16 November 2004, par. 71.

<sup>125</sup> *Al-Skeini and Others v. United Kingdom*. European Court of Human Rights. Appl. No. 55721/07. 7 July 2011, par. 136. Most cases to date have involved situations of full physical custody by way of arrest or kidnapping. In *Al-Saadoon*, for example, the Court emphasized “the total and exclusive” control exercised by the United Kingdom over the military bases in Iraq: *Al-Saadoon and Mufdhi v. United Kingdom*. European Court of Human Rights. Appl. No. 61498/08. 30 June 2009, par. 88.

agents acting outside their country.<sup>126</sup> A Grand Chamber of the European Court of Human Rights ruled in *Hirsi* that Italy had jurisdiction over migrants turned back on the high seas under the auspices of its cooperation agreement with Libya, and that characterizing such interception as a “rescue operation[] on the high seas”<sup>127</sup> was legally irrelevant:

The Court observes that in the instant case the events took place entirely on board ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel. In the Court’s opinion, in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities. Speculation as to the nature and purpose of the intervention of the Italian ships on the high seas would not lead the Court to any other conclusion.<sup>128</sup>

Given the lack of protection for refugees in Libya and the risk of persecution in the applicants’ countries of origin (Eritrea and Somalia), the Court found Italy in breach of its human rights obligations, including the duty of *non-refoulement*.<sup>129</sup>

Indeed, jurisdiction may continue where interception leads to the transfer of refugee claimants to a detention or similar facility located outside the territory of the intercepting

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<sup>126</sup> See e.g. *Ramirez Sánchez v France*. European Commission of Human Rights. Appl. No. 28780/95. 24 June 1996; *Öcalan v. Turkey*. European Court of Human Rights. Appl. no. 46221/99. 12 March 2003; *López Burgos v. Uruguay*. Human Rights Committee. UN Doc. A/36/40. 6 June 1979; *Lilian Celiberti de Casariego v. Uruguay*. Human Rights Committee. UN Doc. CCPR/C/OP/1. 29 July 1981.

<sup>127</sup> *Hirsi Jamaa and Others v. Italy*. European Court of Human Rights. Appl. No. 27765/09. 23 February 2012, par. 79.

<sup>128</sup> *Hirsi Jamaa and Others v. Italy*. European Court of Human Rights. Appl. No. 27765/09. 23 February 2012, par. 81.

<sup>129</sup> *Hirsi Jamaa and Others v. Italy*. European Court of Human Rights. Appl. No. 27765/09. 23 February 2012, paras. 122-38, 146-158 and 183-86.

state.<sup>130</sup> In the *Marine I* case,<sup>131</sup> the Committee Against Torture was called upon to consider Spain's human rights liability stemming from the rescue of some 369 Asians and Africans in waters off the West African coast. After boarding the *Marine I* to provide emergency health care, Spanish authorities towed the vessel to the Mauritanian port of Nouadhibou where the passengers were disembarked and placed at a former fishing plant under Spanish authority. Most were repatriated, though 23 persons who resisted repatriation remained at the fishing plant guarded by Spanish security forces for five months under conditions alleged to be rights-violative.<sup>132</sup> The Committee Against Torture concluded that Spain exercised jurisdiction both during the interception and throughout the detention in Mauritania noting that

... jurisdiction must also include situations where a State party exercises, directly or indirectly, *de facto* or *de jure* control over persons in detention... In the present case, ... the State party maintained control over all persons on board the *Marine I* from the time the vessel was rescued and throughout the identification and repatriation process that took place at Nouadhibou. In particular, the State party exercised, by virtue of a diplomatic agreement concluded with Mauritania, constant *de facto* control over the alleged victims during their detention in Nouadhibou. Consequently, the Committee considers that the alleged victims are subject to Spanish jurisdiction insofar as the complaint that forms the subject of the present communication is concerned.<sup>133</sup>

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<sup>130</sup> *Al-Saadoon and Mufdhi v. United Kingdom*. European Court of Human Rights. Appl. No. 61498/08. 30 June 2009, par. 88.

<sup>131</sup> *J.H.A v. Spain*. Committee Against Torture. CAT/C/41/D/323/2007. 21 November 2007.

<sup>132</sup> Ten of the 23 were eventually granted access to Spain and Portugal and the final thirteen returned to Pakistan.

<sup>133</sup> *J.H.A v. Spain*. Committee Against Torture. CAT/C/41/D/323/2007. 21 November 2007, Par. 8(2). The case was however declared inadmissible as the complainant was not expressly authorised to act on behalf of the victims.

Beyond its value as a clear affirmation that an intercepting state retains jurisdiction even when its control over persons is exercised on the territory of another country, the *Marine I* case makes a more general point: namely, that jurisdiction can be established under the control or authority principle where detention is effected on an indirect basis:

... [T]he jurisdiction of a State party refers to any territory in which it exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control, in accordance with international law. In particular... such jurisdiction must also include situations where a State party exercises, directly or indirectly, *de facto* or *de jure* control over persons in detention.<sup>134</sup>

It follows that a country exercises jurisdiction over refugees when its vessels block or “escort” a ship carrying refugees, since those refugees are indirectly detained (that is, “confine[d] within a narrowly bounded or restricted location”<sup>135</sup>). At least where the blocking or escorting is more than momentary – as will be the case for reasons of efficacy in most *non-entrée* scenarios – there is little doubt that control over the human beings onboard is as real in such cases as it is when freedom of movement is constrained by the act of actually boarding.<sup>136</sup> Indeed, in *Xhavara*, the European Court of Human Rights found human rights jurisdiction to exist when an Italian navy ship seeking to deter migrants on the high seas collided with another vessel, leading to 58

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<sup>134</sup> *J.H.A v. Spain*. Committee Against Torture. CAT/C/41/D/323/2007. 21 November 2007, Para. 8(2).

<sup>135</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, at Guideline 1.

<sup>136</sup> The Inter-American Commission on Human Rights has similarly determined that the shooting down of an aircraft in international airspace near Cuba’s borders was sufficient to trigger Cuba’s human rights jurisdiction: *Armando Alejandro Jr. and Others v. Cuba* (‘*Brothers to the Rescue*’), Inter-American Commission for Human Rights, Case 11.589, 29 September 1999, par. 25.

deaths<sup>137</sup> – a poignant example of the salience of the Committee Against Torture’s insistence that “indirect” control may be just as effective as direct control.<sup>138</sup>

In sum, it is clear that territorial control – while sufficient – is no longer required to establish human rights jurisdiction. Jurisdiction also exists where refugees are intercepted and their movements controlled by state agents acting outside their country’s territory, including when those agents continue to exercise control over them in a detention facility in another country. There is also human rights jurisdiction where extraterritorial control is indirect, as in the case of blockades and forcibly escorting of vessels carrying asylum seekers on the high seas. In each of these ways, the modern understanding of human rights jurisdiction is clearly a powerful means to challenge the common assumption underlying *non-entrée* policies that core refugee protection responsibilities apply rarely, if ever, outside their own territory.

### *B. Exercise of public powers*

Jurisdiction will most readily be established on the basis of either territorial or personal control. As explained in the preceding subsection, the personal control jurisprudence is

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<sup>137</sup> *Xhavara and fifteen v. Italy and Albania*, European Court of Human Rights. Appl. No. 39473/98. 11 January 2001 (Admissibility).

<sup>138</sup> Indeed, a number of recent cases suggest that human rights jurisdiction may be established even when there is no evidence of ongoing direct or indirect control. Contrary to the view taken in *Bankovic*, recent decisions suggest that human rights jurisdiction may be established on the basis of what amounts to the effects of rights-violative conduct lacking any element of durable control. See eg. *Georgia Andreou v. Turkey*. European Court of Human Rights. Appl. No. 45653/99. 3 June 2008 (Admissibility), p. 11; *Isaak and Others v. Turkey*. European Court of Human Rights. Appl. No. 44587/98. 28 September 2006 (admissibility); *Solomou v. Turkey*. European Court of Human Rights. Appl. No. 36832/97. 24 June 2008 (merits); *Pad and Others v. Turkey*. European Court of Human Rights. Appl. No. 60167/00. 28 June 2007.

an especially valuable means of challenging some critical forms of cooperation-based *non-entrée* under which the role of the extraterritorial state in interdiction or enforcement can be characterized as amounting to *de facto* control over the refugees themselves. But what if the degree of control exercised by the sponsoring state falls short of what is required to establish jurisdiction under the personal control approach? In particular, what if *non-entrée* is implemented by proxy, for example where the sponsoring state deploys officials to work with authorities in a country of origin or transit to advise them on how best to block refugee departures?

Recent case law suggests that in addition to the territorial and personal control bases for establishing jurisdiction, states may also be found to have jurisdiction where they exercise *public powers* abroad. In *Al-Skeini*, the key question was whether the United Kingdom had jurisdiction over civilians killed in the course of security operations by British soldiers in Basrah.<sup>139</sup> Rather than determining the issue of responsibility simply by reference to either territorial or personal control, the European Court of Human Rights instead observed that

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

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<sup>139</sup> *Al-Skeini and Others v. United Kingdom*. European Court of Human Rights. Appl. No. 55721/07. 7 July 2011, paras. 102, 130-150.

to it rather than to the territorial State...<sup>140</sup>

In other words, where states are *entitled* to exercise public powers abroad, jurisdiction for human rights purposes will follow under certain circumstances. Three requirements must be met.

First, the legal authority of the extraterritorial state to act must be established in “accordance with custom, treaty or other agreement.”<sup>141</sup> Excluded therefore are situations such as an unlawful invasion in which public powers are effectively usurped by the foreign state. This constraint is, however, unlikely to be of any real moment in relation to cooperation-based *non-entrée* policies, routinely implemented through interstate arrangements. Because some “other agreement” falling short of custom or treaty suffices, even relatively informal agreements – memoranda of understanding, an exchange of letters – are enough to show the requisite consent. Indeed, even the absence of an effective government in the territorial state with which agreement may be reached is not necessarily fatal, since the facts of *Al-Skeini* itself suggest that the legal basis for the exercise of public powers may be derived from international legal authorization, eg. in the form of a UN resolution.<sup>142</sup>

Second, the activities undertaken must be fairly characterized as a “public power normally to be exercised by that Government.”<sup>143</sup> The notion of public power is not well-defined

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<sup>140</sup> Ibid., par. 135.

<sup>141</sup> Ibid., par. 135.

<sup>142</sup> Ibid., par. 144.

<sup>143</sup> Ibid., par. 135.

in international law, and may thus give rise to disagreement in some cases. But since the court in *Al-Skeini* made clear that “public powers” include not just security or civil administration, but also executive and judicial functions,<sup>144</sup> there can be little doubt that the exercise of migration control – being a core law enforcement task and exclusive sovereign prerogative – constitutes a public power.<sup>145</sup>

Third, the breach of human rights resulting from the exercise of public powers must be attributable to the extraterritorially acting state, rather than to the territorial state.<sup>146</sup> The real link required is, of course, readily established where the sponsoring state has actually deployed officers or vessels engaged directly in enforcement. But under general principles of international law conduct is also attributable to a sponsoring state where private actors or third state authorities act under the direction and control of the sponsoring state,<sup>147</sup> or where effective control is retained over officials otherwise carrying out migration control as part of an

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<sup>144</sup> Ibid., paras. 135, 143-48.

<sup>145</sup> As Emmerich de Vattel notes in the *Law of Nations*, every sovereign nation retains the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions or to admit them only in such cases or upon such conditions as it may see fit to prescribe. E. de Vattel, *The Law of Nations* (Philadelphia: T. & J.W. Johnson & Co., 1883), bk. 2, par. 94, 100. This is fully consistent with current state practice. See e.g. *European Roma Rights Centre and others v. Immigration Officer at Prague Airport and another*. House of Lords. UKHL 55. 9 December 2004, par. 45; *Sale, Acting Cmmr, Immigration and Naturalization Service v. Haitian Center Council*. United States Supreme Court. 509 U.S. 155 at 199.

<sup>146</sup> *Al-Skeini*, par. 135.

<sup>147</sup> 2001 ILC Articles on the Responsibility of States for International Wrongful Acts, Art. 8 and 17 respectively. *Case concerning military and paramilitary activities in and against Nicaragua*. International Court of Justice. ICJ Reports 1986. 27 June 1986. For a general discussion of the relevant test for attributing non-state and third state conduct, see James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013), pp. 126-32, 146-61.

international organization.<sup>148</sup>

Given the consonance between the three requirements for jurisdiction based on the exercise of public powers and the nature of many cooperation-based *non-entrée* practices, this emerging line of jurisprudence is an important addition to the more established approaches grounded in territorial or personal control. Even where there is no territorial or personal control, the fact that the sponsoring state can be said to exercise migration control functions beyond its borders – an increasingly common phenomenon – will often suffice to establish jurisdiction despite formal assertions to the contrary.

Under EU law, for example, the RABIT (“rapid border intervention teams”) Regulation posits that any responsibility stemming from operations conducted by the EU border control agency, Frontex, with partner states rests solely with the partner states.<sup>149</sup> Yet in substance, the Regulation undoubtedly establishes a clear entitlement of officials of EU states seconded to Frontex to exercise public powers in that they not only work in their national uniforms, but “shall have the capacity to perform all tasks and exercise all powers for border checks or border surveillance” in line with the Schengen Borders Code.<sup>150</sup> Although formally required to patrol only in the company of an officer of the host country and to act only on the

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<sup>148</sup> ILC Draft Articles on the Responsibility of International Organisations, Art. 7; *Al-Jedda v. United Kingdom*. European Court of Human Rights. Appl. No. 27021/08. 7 July 2011, par. 80. Crawford, *State Responsibility*, pp. 422-34.

<sup>149</sup> Regulation (EC) No 863/2007, Establishing a mechanism for the creation of Rapid Border Intervention Teams, 11 July 2007, Art. 10.

<sup>150</sup> *Ibid.*, Art. 6(3).

instructions of the host state, Frontex officers deployed to Greece have in practice independently carried out patrols and intercepted and interviewed refugees and other migrants.<sup>151</sup> Despite Greece's theoretical responsibility to decide the issue of return or admission to an asylum procedure, there is little doubt that in practice the dysfunctional Greek asylum system – determined by both the European Court of Human Rights and European Court of Justice to fall below even minimal international standards of efficacy<sup>152</sup> – relies significantly on the efforts of officials from other EU states. In these circumstances, the public powers approach to jurisdiction affords a sound basis to argue that these other states may exercise jurisdiction by their deterrent actions, and should therefore be held accountable for any breach of refugee or other international law following from that exercise of public powers.

To be clear, we do not argue that liability for breach of human rights law ought to hinge exclusively on the permissibility of a state's actions.<sup>153</sup> But it is important not to conflate

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<sup>151</sup> Human Rights Watch, 'The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece', 21 September 2011.

<sup>152</sup> *MSS v. Belgium and Greece*. European Court of Human Rights. Appl. No. 30696/09. 21 January 2011. *N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, C-411/10 and C-493/10, European Union: Court of Justice of the European Union, 21 December 2011. See further Human Rights Watch, 'The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece', 21 September 2011. In June 2014, the Committee of Ministers decided to continue supervision of Greece based on a finding that the asylum system is still not fully compliant with the European Convention of Human Rights. Council of Europe, Committee of Ministers, *Decision in Case 4 against Belgium and Greece (M.S.S.)*. 1201<sup>st</sup> Meeting, 5 June 2014.

<sup>153</sup> Milanovic has championed the view that "consent or the sovereignty of the territorial state more generally should be entirely irrelevant for the issue of extraterritorial application [of human rights]": Marko Milanovic, '*Al-Skeini and Al-Jedda in Strasbourg*' (2012) 23 *European Journal of International Law* 121-139 at 132. Or as Scheinin puts it, 'facticity creates normativity', Martin Scheinin, 'Extraterritorial effect of the International Covenant on Civil and Political Rights', in Fons Coomans and Menno T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2004), pp. 73-82 at 75. It is well-established that extraterritorial jurisdiction may be triggered solely based on the degree of de facto control. See e.g. *López Burgos v. Uruguay*. Human Rights Committee. UN Doc. A/36/40. 6 June 1979, par. 12.3 and the separate opinion by Christian Tomuschat and *Öcalan v. Turkey*. European Court of Human Rights. Appl. no. 46221/99. 12 March 2003. See further Martin Heijer, *Europe*

this position with the view that the exercise of public powers should not be seen to be an *additional* basis to find jurisdiction (beyond territory and personal authority). Our argument is in no way that human rights responsibility should be limited by formal notions of sovereignty, but rather that legal entitlement to act extraterritorially as a matter of public international law fairly defines *a* (not “the”) circumstance in which jurisdiction exists, and that accountability for human rights violations is enhanced by acknowledging this additional basis to hold states responsible for breach of relevant norms.

The continued alignment of human rights law and public international law more generally on the issue of jurisdiction is in our view not only doctrinally sound – international human rights law is, after all, a subset of public international law – but is also strategically wise.<sup>154</sup> The interaction between the two bodies of law has often been quite positive,<sup>155</sup> affirming for example that jurisdiction may flow from either *de facto* or *de jure* control.<sup>156</sup> And the human

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*and Extraterritorial Asylum* (Oxford: Hart, 2012), p. 33.

<sup>154</sup> We suspect that the antagonism towards reliance on a public powers approach to jurisdiction stems less from its substance than from the fact that it is a notion grounded in public international law more generally. In the aftermath of what many scholars understandably believed to be the wrong-headed approach to jurisdiction taken in *Bankovic* – an approach allegedly grounded in public international law – we see an unhealthy willingness to throw the proverbial baby out with the bathwater. Put simply, it does not follow that because *Bankovic* was arguably an incorrect decision on jurisdiction grounded in public international law that any approach to jurisdiction grounded in public international law should be regarded with skepticism.

<sup>155</sup> Loukis Loucaides, 'Determining the Extra-territorial Effect of the European Convention: Facts, Jurisprudence and the Bankovic Case' (2006) 4 *European Human Rights Law Review* 391-407 at 393-94; Hugh King, 'The Extraterritorial Human Rights Obligations of States' (2009) 9 *Human Rights Law Review* 521-556.

<sup>156</sup> *J.H.A v. Spain*. Committee Against Torture. CAT/C/41/D/323/2007. 21 November 2007, par. 8(2), *cited above*. *Bankovic and Others v. Belgium and Others*. European Court of Human Rights. Appl. No. 52207/99. 12 December 2001, par. 73, and *Medvedyev and Others v. France*. European Court of Human Rights. Appl. No. 3394/03. 29 March 2010, par. 65. The Inter-American Commission for Human Rights has similarly distinguished between 'jurisdiction' and 'de facto jurisdiction'. *Armando Alejandro Jr. and Others v. Cuba ("Brothers to the Rescue")*. Inter-American Commission for Human Rights. Case 11.589, Report No. 86/99, Annual Report IACHR 1999, 586. 29 September 1999, par. 23, fn 14, citing Theodor Meron, 'Extraterritoriality of Human Rights Treaties' (1995) 89 *American Journal of International Law* 78-82 at 81. *Hirsi*, par. 80, citing *Medvedyev*.

rights value of the public powers approach to jurisdiction is clear not only from the result in *Al-Skeini*<sup>157</sup> itself, but also, for example, from such decisions as *X and Y v. Switzerland*<sup>158</sup> (in which an immigrant denied entry into Liechtenstein was held to be subject to Swiss jurisdiction because Switzerland legislated on immigration matters for both territories) and *J.H.A. v. Spain*<sup>159</sup> (in which Spain was found to have retained jurisdiction during the period the migrants were detained in Nouadhibou “by virtue of a diplomatic agreement concluded with Mauritania”).

We thus believe that reliance on the public powers approach to the definition of *an additional* basis of jurisdiction has the potential to serve as an important tool in the fight against cooperative variants of *non-entrée*, allowing liability to be imposed in a number of circumstances that arguably fall outside either the territorial or the personal mode of jurisdiction. Where there is an agreement to deploy liaison officers or provide other forms of support that in substance result in the exercise of effective control by the sponsoring state, jurisdiction – and hence liability – is established.

#### IV. Shared jurisdiction

To this point we have established that responsibility for *refoulement* follows from jurisdiction and that jurisdiction can be established when states exercise effective control over

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<sup>157</sup> *Al-Skeini and Others v. United Kingdom*. European Court of Human Rights. Appl. No. 55721/07. 7 July 2011, par. 135.

<sup>158</sup> *X and Y v. Switzerland*. European Commission of Human Rights. Appl. No. 7289/75 and 7349/76. 14 July 1977.

<sup>159</sup> *J.H.A. v. Spain*. Committee Against Torture. CAT/C/41/D/323/2007. 21 November 2007, par. 8(2), *cited above*.

territory, authority over individuals, or public powers under international law. But what of the situation in which more than one state can be said to have jurisdiction and hence incur human rights responsibility? Effective control over territory is normally exclusive, but neither authority over individuals nor the exercise of public powers necessarily preempts the simultaneous jurisdiction of a territorial or cooperating state. Can the state acting extraterritorially be held to exercise jurisdiction in the case of such non-exclusivity?

The traditional view in human rights law was that jurisdiction was an all or nothing proposition.<sup>160</sup> Since jurisdiction was the basis for responsibility, it followed that shared responsibility for the breach of human rights obligations would be implausible. Under this classic approach, the developments in the law of jurisdiction set out in Part III would have had little practical value in contesting cooperation-based forms of *non-entrée*, as the jurisdiction of the territorial state would ordinarily have been thought to trump a more diffuse form of jurisdiction.<sup>161</sup>

Modern understandings of jurisdiction under human rights law have, however, largely rejected this “all or nothing” view and come more closely into line with the dominant position in public international law that two or more states responsible for the same internationally wrongful act can both be held individually liable on the basis of their own

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<sup>160</sup> In *Ilse Hess v. United Kingdom* the European Commission thus refused to single out the responsibility of the United Kingdom as one of the four powers exercising authority over the Spandau Prison in Berlin. *Ilse Hess v. United Kingdom*. European Commission of Human Rights. Appl. No. 6231/73. 2 DR (1975-76) 72.

<sup>161</sup> Gammeltoft-Hansen, *Access to Asylum*, pp. 145-49.

conduct and international obligations.<sup>162</sup> In other words, the fact that several states have jurisdiction does not diminish the individual responsibility of any particular state.<sup>163</sup> This bedrock principle of public international law can be seen, for example, in the reasoning of the International Court of Justice in the *Certain Phosphate Lands* case.<sup>164</sup> The Court there rejected the Australian argument that a finding of individuated liability against it was foreclosed by the fact that its trusteeship of Nauru was shared with New Zealand and the United Kingdom:

Australia has raised the question whether the liability of the three States would be “joint and several” (*solidaire*), so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority, and not merely a one-third or some other proportionate share. This ... is independent of the question whether Australia can be sued alone. The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible in *limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States. It cannot be denied that Australia had obligations under

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<sup>162</sup> ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001), Art. 47; James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013), pp. 333-34. Nollkaemper, André, and Dov Jacobs. 2011. Shared Responsibility in International Law: A Concept Paper. ACIL Research Paper No 2011-07 (SHARES Series). Amsterdam: University of Amsterdam, p. 15. There were limited historical examples of two or more states sharing territorial jurisdiction, eg. condominium or trusteeships. See eg. Turpin, James. 2002. *The Jurisdictional Art of Separation: the role of jurisdiction in the management of territorial and self-determination disputes - mixed jurisdiction in the Anglo-French condominium of the new Hebrides 1906-1980*. PhD dissertation. Florence: European University Institute; Nollkaemper, André. 2011. Issues of Shared Responsibility before the International Court of Justice. ACIL Research Paper No 2011-01 (SHARES Series). Amsterdam: University of Amsterdam; Crawford, *State Responsibility*, pp. 325-28.

<sup>163</sup> ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 47(1). James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013), pp. 334-35. See generally V. Lowe, ‘Jurisdiction’, in M. D. Evans (ed.), *International Law, 2nd edition* (Oxford: Oxford University Press, 2006), pp. 335-360; F. Berman, ‘Jurisdiction: The State’, in P. Capps, M. D. Evans and S. Konstadinidis (eds.), *Asserting Jurisdiction* (Portland: Hart Publishing, 2003), pp. 2-15; R. T. Ford, ‘Law’s Territory (A History of Jurisdiction)’ (1999) 97 *Michigan Law Review* 843-930; J. G. Ruggie, ‘Territoriality and Beyond: Problematizing Modernity in International Relations’ (1993) 47 *International Organization* 139-174 at 151; Gammeltoft-Hansen, *Access to Asylum*, ch. 4.5.

<sup>164</sup> *Certain Phosphate Lands in Nauru* (Nauru v. Australia), *Preliminary Objections*. International Court of Justice, 26 June 1992; *East Timor (Portugal v. Australia)*. International Court of Justice. ICJ Reports 1995. 30 June 1995; *Corfu Channel Case*. International Court of Justice. ICJ Reports 1949. 9 April 1949.

the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia.<sup>165</sup>

In line with this approach, the human rights cases of *Al-Skeini* and *Hirsi* expressly rejected an “all or nothing” approach, finding that “rights can be divided and tailored.”<sup>166</sup> Thus, for example, in *Ilascu* the European Court of Human Rights held that both Moldova and Russia had exercised jurisdiction – Russia due to its decisive influence over the local Transnistrian regime, Moldova through its *de jure* sovereignty over the area – and held that simultaneous yet differentiated human rights responsibility followed.<sup>167</sup> The same principle has been found to apply where distinct actions by more than one state result in a common harm, as is clear from the ruling in *M.S.S. v. Belgium and Greece* determining that Belgium was in breach for returning the applicant to Greece contrary to the duty of *non-refoulement*, even as it found that Greece was itself liable for the failure to establish adequate asylum procedures and to avoid the ill-treatment of those seeking its protection.<sup>168</sup>

Importantly, particularized liability may ensue even when not all of the states exercising jurisdiction are bound by the same international legal obligations. In *Al-Skeini*, the United Kingdom was held responsible under the European Convention on Human Rights even

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<sup>165</sup> *Certain Phosphate Lands in Nauru* (Nauru v. Australia), *Preliminary Objections*. International Court of Justice, 26 June 1992, par. 48.

<sup>166</sup> *Al-Skeini*, par. 137; *Hirsi*, par. 74.

<sup>167</sup> *Ilascu and Others v. Moldova and Russia*. European Court of Human Rights. Appl. No. 48787/99 . 8 July 2004. See also *Drozd and Janousek v. France and Spain*. European Court of Human Rights. Appl. No. 12747/87. 26 June 1992, paras. 91-96.

<sup>168</sup> *M.S.S. v. Belgium and Greece*. European Court of Human Rights. Appl. No. 30696/09. 21 January 2011.

though it shared its jurisdiction in Iraq with the United States and other non-party states making up the Coalition Provisional Authority following the removal of the Ba'ath regime.<sup>169</sup> Similarly, the active assistance of Kenyan authorities in the arrest of the PKK leader in Nairobi was considered in *Öcalan*, yet this did not detract from a finding of Turkish jurisdiction for purposes of the European Convention once Turkish authorities took him into custody.<sup>170</sup> Under this understanding, the fact that a partner state is not a party to the Refugee Convention (as is frequently the case under cooperation-based forms of *non-entrée*) is no bar to finding the sponsoring state party exercising jurisdiction to be liable.

Nor does it matter whether shared jurisdiction exists directly among the states in question or is achieved by the delegation of authority to an agency or organ.<sup>171</sup> In *T.I. v. United Kingdom*, the European Court of Human Rights determined that

[w]here States establish international organizations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.<sup>172</sup>

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<sup>169</sup> *Al-Skeini*, paras. 144-50.

<sup>170</sup> *Öcalan v. Turkey*. European Court of Human Rights. Appl. no. 46221/99. 12 March 2003, par. 93.

<sup>171</sup> ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Art. 47 and comments p. 125. This is corroborated by the ILC Draft Articles on the Responsibility of International Organizations, UN Doc. A/66/10 (2011), Arts. 58-62 and commentaries pp. 89-90. See more generally James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013), pp. 343-54.

<sup>172</sup> *T.I. v. United Kingdom*. European Court of Human Rights. Appl. No. 43844/98. 7 March 2000 (Admissibility), p. 15.

Because legal liability is not avoided when authority is delegated to an international organization,<sup>173</sup> patrols conducted under the auspices of such entities as the European Union's Frontex agency may still engage the liability of each participating state whose officials or agents have taken part in an action that gives rise to jurisdiction, and which leads to *refoulement* or another human rights breach. As much is impliedly recognized by the regulation defining the authority of Frontex, which provides that “[t]he responsibility for the control and surveillance of external borders lies with the Member States.”<sup>174</sup>

In sum, evolution of the notion of shared jurisdiction allowing more than one state to be held liable for a given breach of human rights as a function of its own actions, whatever the liability of other states, is an important bulwark against cooperation-based forms of *non-entrée* that purport to leave partner states holding the ball for the *refoulement* of refugees. As the European Court of Human Rights noted succinctly in *Xhavara*, the “Italian-Albanian Agreement cannot, by itself, engage the responsibility of [Albania] under the Convention for any action taken by Italian authorities in the implementation of this agreement.”<sup>175</sup>

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<sup>173</sup> *Matthews v. United Kingdom*. European Court of Human Rights. Appl. No. 24883/94. 19 February 1999, par. 32; *Beer and Regan v. Germany*. European Court of Human Rights. Appl. No. 28934/95. 18 February 1999; *Bosphorus Hava Yollari Turizm v. Ticaret Anonim Şirketi v. Ireland*. European Court of Human Rights. Appl. No. 45036/98. 30 June 2005. Schutter, Olivier De. 2010. *International Human Rights Law*. Cambridge: Cambridge University Press, 216-38; Sarooshi, Dan. 2005, p. 64 *International Organizations and their Exercise of Sovereign Power*. Oxford: Oxford University Press. State responsibility for acts committed by states acting under the authority of the UN Security Council remains a special case, see *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*. European Court of Human Rights. Appl. No. 71412/01 and 78166/01. 2 May 2007.

<sup>174</sup> Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJ*, 2004, L349/1

<sup>175</sup> *Xhavara and fifteen v. Italy and Albania*. European Court of Human Rights. Appl. No. 39473/98. 11 January 2001 (admissibility), p. 4 (authors' own translation of the French text). The European Court of Human Rights further considered the impact of bilateral agreements in *Al-Saadoon and Mufdhi*, in which the United Kingdom argued that since United Kingdom forces operated in Iraq subject to a memorandum of understanding establishing Iraqi overall jurisdiction, the United Kingdom was under a legal obligation to transfer the applicants over to the Iraqi authorities

## V. Aiding or assisting

To this point we have shown that many contemporary *non-entrée* practices can be successfully challenged by reliance on developments in the law of jurisdiction, especially when coupled with an appreciation that shared responsibility in law may exist where more than one state has jurisdiction in a given context. But, what of the situation where the involvement of the sponsoring state falls short of establishing jurisdiction, even under one of the expanded notions of jurisdiction described in Part III?<sup>176</sup> For example, states are clearly not exercising jurisdiction when they provide only training or material assistance to a partner state. Even when immigration officers or other officials are posted to another country as advisers, there will be no exercise of jurisdiction unless the authorities of the territorial state can be shown to act under the direction and control of the sponsoring state. Because there is no jurisdiction, does it follow that the sponsoring country bears no legal responsibility for ensuing harms?

Perhaps not. There is an emerging consensus that international law will hold states

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despite a known risk that this might subject the applicants to the death penalty. Recalling the *Soering* principle that such a transfer would constitute *refoulement*, the Court held that ‘a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of the Contracting Party’s “jurisdiction” from scrutiny under the Convention.’ *Al-Saadoon and Mufdhi v. United Kingdom*. European Court of Human Rights. Appl. No. 61498/08. 2 March 2010, par. 128

<sup>176</sup> We use the term "shared responsibility" in this paper to indicate a situation in which more than one state has simultaneous jurisdiction. We note, however, that the term as employed by others may also include aiding or assisting of the kind considered in this section: See e.g. André Nollkaemper and Dov Jacobs. 2011. *Shared Responsibility in International Law: A Concept Paper*. ACIL Research Paper No 2011-07 (SHARES Series). Amsterdam: University of Amsterdam.

responsible for aiding or assisting another state's wrongful conduct.<sup>177</sup> This understanding is most clearly set out in Art. 16 of the International Law Commission's Articles on State

Responsibility:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.<sup>178</sup>

The ILC Articles are not, of course, formally binding. Art. 16 has, however, garnered wide support as a matter of state practice and *opinio juris*.<sup>179</sup> In the *Bosnian Genocide*

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<sup>177</sup> Quigley, John. 1986. Complicity in International Law: A New Direction in the Law of State Responsibility. *British Yearbook of International Law* 57:77-131; Gibney, Mark, et al. 1999. Transnational State Responsibility for Violations of Human Rights. *Harvard Human Rights Journal* 12:267-296; Lowe, Vaughan. 2002. Responsibility for the Conduct of Other States. *Journal of International Law and Diplomacy* 101:1-15; Button, Jillian. 2007. Spirited Away (Into a Legal Black Hole?); The challenge of invoking state responsibility for extraordinary rendition. *Florida Journal of International Law* 19 (3):531-67; Nolte, Gregor, and Helmut Philipp Aust. 2009. Equivocal Helpers - Complicit States, Mixed Messages and International Law. *International & Comparative Law Quarterly* 58:1-30; Aust, Helmut Philipp. 2011. *Complicity and the Law of State Responsibility*. Cambridge: Cambridge University Press; James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013).

<sup>178</sup> ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001). Earlier drafts of the ILC Articles equally referred to 'complicity' and 'accessory' responsibility, 'aid and assistance' was eventually chosen as a more neutral-sounding term. Nolte, Gregor, and Helmut Philipp Aust. 2009. Equivocal Helpers - Complicit States, Mixed Messages and International Law. *International & Comparative Law Quarterly* 58:1-30 at 5. As Milanovic has pointed out, 'aid and assistance' may be perhaps best be thought of as a particular kind of complicity, involving a degree of material assistance beyond mere instigation. Milanovic, Marko. 2007. State Responsibility for Genocide: A Follow-Up. *European Journal of International Law* 18 (4):669-694 at 682. For an overview of the drafting history of Art. 16, see Aust, Helmut Philipp. 2011. *Complicity and the Law of State Responsibility*. Cambridge: Cambridge University Press, pp. 100-103.

<sup>179</sup> For a recent attempt to provide an overview in this area, see Aust, *Complicity*, pp. 107-191. As Aust concludes, 'the number of positive statements available allows us to ascribe the necessary element of *opinio juris* to the practice we have assembled to a degree that is seldom available in international law...[N]ot only can we point to a significant amount of practice here, but we can underline its legal significance with the amount of support Article 16 ASR has found in the deliberations of States in the United Nations.' *Ibid.*, p. 186. For further support see Quigley, John. 1986. Complicity in international law: A new direction in the law of State responsibility. *British Yearbook of International Law* 57:77-97; Nolte, Gregor, and Helmut Philipp Aust. 2009. Equivocal Helpers - Complicit States, Mixed Messages and International Law. *International & Comparative Law Quarterly* 58:1-30 at 7-10; d'Aspremont, Jean. 2009. Rebellion and State Responsibility: Wrongdoing by democratically elected insurgents. *International & Comparative Law Quarterly* 58:427-42 at 432. Other scholars have remained more cautious, see e.g. Lowe, Vaughan. 2002. Responsibility for the Conduct of Other States. *Journal of International Law and Diplomacy* 101:1-15.

case, the International Court of Justice drew on Art. 16, noting that it considered the article to be an expression of customary international law.<sup>180</sup> The Venice Commission of the Council of Europe similarly referred to Art. 16 as applicable to European states contributing to instances of *refoulement* and other human rights abuses in the context of the US-led extraordinary rendition program,<sup>181</sup> as did Judge Albuquerque in his separate opinion to the *Hirsi* case.<sup>182</sup> This approach is very much in line with the general view of the European Court of Human Rights that international human rights law is to be interpreted taking into account the law on state responsibility:

Principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law.<sup>183</sup>

Art. 16 regrettably does not tell us specifically what counts as aiding or assisting another state to breach its international legal obligations. The commentary notes that the assistance need not be essential to performing the illegal act, so long as it contributes

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<sup>180</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. International Court of Justice. 26 February 2007, par. 420.

<sup>181</sup> Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoner, *European Commission for Democracy through Law (Venice Commission)*, Opinion no. 363 / 2005, 17 March 2006, paras. 44-45.

<sup>182</sup> Separate opinion by Judge Pinto de Albuquerque in *Hirsi Jamaa and Others v. Italy*. European Court of Human Rights. Appl. No. 27765/09. 23 February 2012, p. 80

<sup>183</sup> *Bankovic and Others v. Belgium, and Others*. European Court of Human Rights. Appl. No. 52207/99. 12 December 2001, par. 57. Indeed, Art. 5 of the International Law Commissions parallel Draft Articles on the Responsibility of International Organizations was recently applied by the European Court of Human Rights in *Al-Jedda* to determine the question of attribution between the United Kingdom and the United Nations. *Al-Jedda v. United Kingdom*. European Court of Human Rights. Appl. No. 27021/08. 7 July 2011, par. 84

significantly thereto<sup>184</sup> – suggesting at the very least that action beyond mere instigation is required.<sup>185</sup> But state responsibility does arise where a state provides “material aid to a State that uses the aid to commit human rights violations.”<sup>186</sup> The International Court of Justice thus sensibly determined in the *Bosnian Genocide* case that the supply of weapons, military equipment and financial resources amounted to “aid and assistance” by the Federal Republic of Yugoslavia to the army of Republika Srpska.<sup>187</sup>

In line with these understandings, we believe that a state which takes steps such as providing maritime patrol vessels or border control equipment, which seconds border officials, or which shares relevant intelligence or directly funds migration control efforts that assist another country to breach its *non-refoulement* or other protection obligations is taking action that can fairly be characterized as within the ambit of aiding or assisting. We would distinguish such actions from, for example, merely applying diplomatic pressure to introduce or enforce exit migration controls or to sign readmission agreements which – while undoubtedly creating a climate within which rights breaches may occur – are simply too remote from such harms to be deemed aiding or assisting the commission of a wrongful act.<sup>188</sup> Nor do we believe that a pure

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<sup>184</sup> Commentary to the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 16, par. 5.

<sup>185</sup> Crawford, *State Responsibility*, p. 403; Aust, *Complicity*, p 209; Milanovic, ‘State Responsibility’, 682.

<sup>186</sup> Commentary to the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 16, par. 9.

<sup>187</sup> *Genocide* case, paras. 239-241, 422. This is equally supported by state practice. *ILC Commentary*, Art. 16, par. 7. See further Nolte and Aust, *Complicit States*, pp. 7-8.

<sup>188</sup> See *inter alia* R. Byrne, G. Noll, and J. Vedsted-Hansen (eds.), *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union* (The Hague: Kluwer Law International, 2002), p. 16.

act of omission, for example failing to step in to prevent an instance of *refoulement* by another state, rises to the level of aiding or assisting that country to breach its obligations.<sup>189</sup>

Even where the state sponsoring *non-entrée* takes more direct forms of action, Art. 16 provides that the assisting state must have “knowledge of the circumstances of the internationally wrongful act.”<sup>190</sup> Indeed, the commentary goes farther, suggesting both an intention and a consummation requirement, namely that aid or assistance must be given “with a view to facilitating the internationally wrongful act, and must actually do so.”<sup>191</sup> It follows that liability should not follow where aid or assistance given in good faith is subsequently misused by another country – for example, a state providing development aid is not responsible if, unbeknownst to it, that aid is used to implement border controls that lead to the *refoulement* of refugees.

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<sup>189</sup> *Genocide* case, paras. 222-3; Crawford, *State Responsibility*, pp. 403-5.

<sup>190</sup> Commentary to the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 16.

<sup>191</sup> *ILC Commentary*, Art. 16, par. 5. The interpretation of this requirement has been an issue of some contestation both within and outside the ILC. On the one hand, it could be taken to imply that the assisting state must share the wrongful intent of the principal state, effectively narrowing the scope of application. Nolte, *Complicity*, pp. 230-49; Milanovic, Marko. 2007. State Responsibility for Genocide: A Follow-Up. *European Journal of International Law* 18 (4):669-694 at 682-84; Nolte and Aust, *Complicit States*, pp. 14-15. The International Court of Justice raised this question in the *Genocide* case, but ultimately left it unanswered: ‘Before the Court turns to an examination of the facts, one further comment is required. It concerns the link between the specific intent (*dolus specialis*) which characterizes the crime of genocide and the motives which inspire the actions of an accomplice (meaning a person providing aid or assistance to the direct perpetrators of the crime): the question arises whether complicity presupposes that the accomplice shares the specific intent (*dolus specialis*) of the principal perpetrator. But whatever the reply to this question, there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (*dolus specialis*) of the principal perpetrator. If that condition is not fulfilled, that is sufficient to exclude categorization as complicity. The Court will thus first consider whether this latter condition is met in the present case. It is only if it replies to that question of fact in the affirmative that it will need to determine the legal point referred to above.’ *Genocide* case, par. 421.

It is otherwise, however, where the sponsoring state has at least constructive knowledge that its contributions will aid or assist another country to breach its obligations and chooses to aid or assist notwithstanding such constructive knowledge. For example, in *Hirsi* Italy argued that it reasonably considered Libya to be a “safe host country” based on its ratification of several human rights treaties and the African Union’s regional refugee treaty, coupled with the express stipulation in the Italian-Libyan agreement requiring Libya to comply with international human rights law.<sup>192</sup> Relying on these formal commitments, Italy argued that it “had no reason to believe that Libya would evade its commitments.”<sup>193</sup> This argument was, however, soundly rejected by the Court:

... [T]he Court is bound to observe that the existence of domestic laws and the ratification of international treaties guaranteeing respect for fundamental rights are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities...

The Court notes again that [this] situation was well-known and easy to verify on the basis of multiple sources. It therefore considers that when the applicants were removed, the Italian authorities knew or should have known that, as irregular migrants, they would be exposed in Libya to treatment in breach of the Convention and that they would not be given any kind of protection in that country.<sup>194</sup>

The Court’s approach aligns neatly with the general refusal of courts to countenance wilful

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<sup>192</sup> *Hirsi Jamaa and Others v. Italy*. European Court of Human Rights. Appl. No. 27765/09. 23 February 2012, par. 97.

<sup>193</sup> *Ibid.*, paras 97-98.

<sup>194</sup> *Ibid.*, paras 128, 131.

blindness to readily ascertainable facts.<sup>195</sup>

Beyond the requirement of knowledge, liability for aiding or assisting can be imposed only where the act “would be internationally wrongful” if committed by both the principal state actor and the state said to be aiding or assisting that country.<sup>196</sup> The starting point is therefore to ascertain that the conduct in question is in breach of an international obligation of the principal state – not a minor matter when, as is often the case, *non-entrée* cooperation is undertaken with a state that is not bound by the Refugee Convention or Protocol, including such key partner states as Libya, Indonesia, and Malaysia.<sup>197</sup> Some would no doubt locate the required unlawfulness in the alleged existence of a customary legal duty of *non-refoulement*.<sup>198</sup> In our view, the better approach would be to draw on Crawford’s view that Art. 16(b) “merely requires that the conduct in question would have been internationally wrongful if committed by the assisting state and says nothing about the identity of norms or sources”<sup>199</sup> – thus opening the possibility of liability for aiding or assisting where the act in question is unlawful for both the

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<sup>195</sup> See, *inter alia*, Aust, *Complicity*, pp. 244-49; Brownlie, Ian. 1983. *State Responsibility*. System of the Law of Nations, Part 1. Oxford: Clarendon Press, p. 12. This would align the knowledge requirement for complicity with that ordinarily applied in the context of *non-refoulement*. But see Crawford, *State Responsibility*, p. 406.

<sup>196</sup> This is a reflection of the *pacta terti* principle that no state is bound by the obligations of another state *vis-à-vis* third states. 1969 Vienna Convention Relating to the Interpretation of Treaties Arts. 34 and 35.

<sup>197</sup> Cf. Thomas Gammeltoft-Hansen, 'The Externalisation of European Migration Control and the Reach of International Refugee Law', in Elspeth Guild and Paul Minderhoud (eds.), *The First Decade of EU Migration and Asylum Law* (Leiden: Martinus Nijhoff Publishers, 2012), pp. 273-98.

<sup>198</sup> But see James Hathaway, “Leveraging Asylum.” *Texas International Law Journal* 45 (3):503-36, arguing that the relatively consistent state practice required for a customary norm of *non-refoulement* to come into being does not in fact exist.

<sup>199</sup> Crawford, *State Responsibility*, p. 410.

principal and sponsoring states, albeit on the basis of distinct legal norms.<sup>200</sup> Many partner states not bound by the Refugee Convention or Protocol are nonetheless parties to other human rights instruments that contain a cognate duty of *non-refoulement* (though the scope of same may not in all cases be identical)<sup>201</sup> – thus providing the required basis for a finding of international wrongfulness. For example, Libya and Indonesia have both ratified the International Covenant on Civil and Political Rights (which has been interpreted to impose a duty of *non-refoulement* at least in cases involving risk of the breach of Arts. 6 and 7<sup>202</sup>) as well as the Convention Against Torture (which proscribes return to torture in Art. 3<sup>203</sup>). Indeed, it may even be that it would be “internationally wrongful” for a partner state to breach the terms of an international *non-entrée* cooperation agreements – which often condition such cooperation on respect for refugee and other rights.

It remains, however, that the scope of the duty not to aid or assist another country to breach international law is not yet as fully developed in international human rights law as are the evolutions in regard to both jurisdiction and shared responsibility described in Parts III and IV. There is nonetheless little doubt that a general rule of state responsibility for complicity or “aiding and assisting” is now accepted as a matter of principle even as its contours await full

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<sup>200</sup> Notably, the International Court of Justice, when considering that Art. 16 could be applied analogous to state complicity under the Genocide Convention, did not consider the equal obligations requirement to be essential since the Bosnian Serb forces committing the genocide did not constitute a state. *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. International Court of Justice. 26 February 2007.

<sup>201</sup> *Supra*, fns. 4, 93.

<sup>202</sup> Human Rights Committee, General Comment to Art. 7 20/44, par. 9.

<sup>203</sup> Brian Gorlick, ‘The Convention and the Committee against Torture: A Complementary Protection Regime for Refugees’ (1999) *International Journal of Refugee Law* 11(3), 479-495.

elucidation.<sup>204</sup> States that believe that the more diffuse forms of *non-entrée* involving no exercise of jurisdiction are thus necessarily immune from legal liability are thus proceeding with false confidence.

### Conclusions

We have argued here that developed states have what might charitably be called a schizophrenic attitude towards international refugee law. On the one hand, wealthier states no longer garner the sorts of direct benefit from the refugee law regime that they did in its early years – when it assisted them to cope with mass influxes or to vindicate strategic political values by “admitting the enemies of their enemies.” But powerful states still wish to be seen to be committed to the refugee law regime, most importantly in our view because staying involved with refugee law is critical to being seen to stand in solidarity with states of the less developed world where most refugees now stay. If the developed world were to withdraw entirely from refugee law, the poorer states that today do the lion’s share of work under the regime might well follow suit – with deleterious consequences for both interstate security and economic well-being, and a near certainty that more refugees would be compelled to seek protection in the developed world.

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<sup>204</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. International Court of Justice. 26 February 2007, par. 173; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*. International Court of Justice. General List No. 131. 9 July 2004, par. 146; Quigley, John. 1986. Complicity in international law: A new direction in the law of State responsibility. *British Yearbook of International Law* 57:77-97; Nolte, Gregor, and Helmut Philipp Aust. 2009. Equivocal Helpers - Complicit States, Mixed Messages and International Law. *International & Comparative Law Quarterly* 58:1-30; d'Aspremont, Jean. 2009. Rebellion and State Responsibility: Wrongdoing by democratically elected insurgents. *International & Comparative Law Quarterly* 58:427-42 at 432; Aust, *Complicity*, p. 191.

The result of this schizophrenia has been the politics of *non-entrée*, comprising efforts to keep refugees away from wealthy states without formally resiling from treaty obligations. As the early generation of *non-entrée* practices – visa controls and carrier sanctions, the establishment of “international zones,” and high seas deterrence – has proved increasingly vulnerable to practical and legal challenges, new forms of *non-entrée* predicated on interstate cooperation have emerged in which deterrence is carried out by the authorities of the home or a transit state, or at least in their territory. As we have shown, this new generation of *non-entrée* comprises a range of practices from simple diplomatic agreements to full-scale joint migration control operations. The critical question we address here is whether such cooperation-based mechanisms of *non-entrée* are – as developed states seem to believe – capable of insulating them from legal liability in ways that the first generation of *non-entrée* strategies were not.

We believe that three evolving areas of international law – jurisdiction, shared responsibility, and liability for aiding or assisting – are likely to stymie many if not all of the new forms of *non-entrée*. The fact that jurisdiction, and hence liability, is now understood to flow not just from territory, but also from authority over individuals in areas beyond a state’s jurisdiction and indeed from the exercise of public powers abroad, has dramatically expanded the scope of accountability for core refugee law and related human rights obligations. Nor are we any longer hampered by the view that only one state may be held liable for the violation of human rights to which more than one country contributed: to the contrary, the “all or nothing” optic has now given way to the view that particularized liability may ensue, and may ensue even when not all states concerned are bound by the same obligations. And even when no case can be made for the exercise of jurisdiction under even its modern incarnations, the emerging law on

liability for aiding or assisting another state to breach its duties under international law has enormous potential to close the accountability gaps that the new generation of *non-entrée* practices seek to exploit.

Perhaps most intriguing, it seems clear that these contemporary understandings of jurisdiction, shared responsibility, and liability for aiding or assisting are most likely to be effective in contesting precisely the variants of the new *non-entrée* that appeal most to developed countries. While legal liability is least clear where the sponsoring state engages in only diplomatic outreach, the provision of financial incentives, or training of personnel or provision of equipment, these options are increasingly viewed by developed countries as unattractive given the inherent uncertainties about whether there will be a solid and dependable deterrent return. The inclination to become more directly involved in order to achieve more control and thereby to increase the likelihood of efficacy thus often pushes states to the more interventionist end of the spectrum of contemporary *non-entrée*. Yet it is when a state's own personnel are deployed in aid of deterrence abroad or where joint or shared enforcement is established that legal liability becomes most clear.

Powerful states are thus faced with a trade-off between the efficiency of *non-entrée* mechanisms and the ability to avoid responsibility under international refugee law. If, as we believe probable, the preference for more rather than less control persists, legal challenges are likely to prove successful. Law will thus be in a position to serve a critical role in provoking a frank conversation about how to replace the duplicitous politics of *non-entrée* with a system predicated on the meaningful sharing of the burdens and responsibilities of refugee protection

around the world.<sup>205</sup> Because it would be *protection* rather than *unlawful deterrence* that is being shared under such a regime, no issue of illegality would arise. Such a system could deliver to powerful states the manageability they so keenly seek, but do so in a way that ensures – rather than avoids – the needs and legitimate aspirations of both refugees and the poorer states that host them.

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<sup>205</sup> See in particular J. Hathaway and R. A. Neve, ‘Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection’, *Harvard Human Rights Journal*, vol. 10 (Spring 1997), 155–169, 173–187.