

## Research Proposal

# **Closing the Accountability Gap – Human Rights and Extraterritorial Immigration Control**

Fields of Law: Human Rights Law, Public International Law, European Law

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**Table of Contents**

**1. Context..... 3**

**2. Overall Problem..... 5**

**3. State of the Art & Specific Aim ..... 5**

**4. Research Question ..... 7**

**5. Main Research Hypothesis..... 7**

**6. Theoretical Premises ..... 8**

**7. Delimitations ..... 9**

**8. Methodology..... 10**

**9. Research Plan..... 11**

**10. References (Selection) ..... 12**

## 1. Context

Asylum and immigration feature high on the current political agenda of the European Union. Faced with rising numbers of irregular border crossings and fueled by worries over uncontrolled mass immigration in the wake of the Arab Spring and other global conflicts, the European Union and its Member States have pursued various strategies to deal with current migratory “pressures”. Some of them focused on preventative measures addressing the root causes of migration, generally endorsed by EU organs such as the European Commission. Others are of a more repressive character with an emphasis on border control and return, typically preferred by the Member States and the European Council. In this way, European immigration policy represents a field where a multitude of different actors pushes for different policies with the outcomes often being contradictory. The potpourri of different approaches reflects a versatile mix of power relations in the EU’s multi-layered legal fabric. It also reveals the different interests prevailing in the various European fora with electoral pressures being a more prominent factor in institutions dominated by Member State interests.

The high politicization of immigration has generally contributed to a distorted picture of the scale of immigration into Europe. Diffuse public fears about poor masses “flooding” Europe have been heightened by sensational press coverage and policy makers ready to exploit immigration as an easy political target. Despite the fact that the total number of immigrants has been constantly declining for many years and that it is insignificant compared to the migrant population worldwide, this false public perception promoted an increasingly security-driven and control-oriented approach to immigration.

However, this approach has also been subjected to an enormous amount of criticism. Press images of refugees in over-crowded and unseaworthy boats that had been denied access to European territory not only sparked popular fears but also brought up the question of the Union’s responsibility in the matter. After all, so it was held, the protection of human rights and the rule of law were still considered to be the foundational values of the EU. However, reports on the rising death toll in the Mediterranean Sea and the role that the EU border agency FRONTEX allegedly played in this situation seemed to increasingly challenge this self-conception. Not only NGOs advocating for refugee rights<sup>1</sup>, but also UNHCR<sup>2</sup>, members of the European Parliament<sup>3</sup> and the EU’s Fundamental Rights Agency<sup>4</sup> expressed deep

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<sup>1</sup> See, for example, ECRE, ‘Defending Refugees Access to Protection in Europe’ (2007) <http://www.ecre.org/topics/areas-of-work/access-to-europe/95-defending-refugees-access-to-protection-in-europe.html> accessed 24 March 2014; 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’ (2009) <http://www.hrw.org/reports/2009/09/21/pushed-back-pushed-around> accessed 24 March 2014; Refugee Council, ‘Remote Controls: how UK border controls are endangering the lives of refugees’ (2008) [http://www.refugeecouncil.org.uk/assets/0001/7043/Remote\\_Controls.pdf](http://www.refugeecouncil.org.uk/assets/0001/7043/Remote_Controls.pdf) accessed 24 March 2014.

<sup>2</sup> See, for example, UNHCR, ‘UNHCR deeply concerned over returns from Italy to Libya’ (2009) Press release 7 March 2009 <http://www.unhcr.org/4a02d4546.html> accessed 24 March 2014.

<sup>3</sup> Ska Keller, Ulrike Lunacek and Barbara Lochbihler (eds), ‘Ist die Agentur FRONTEX vereinbar mit den Menschenrechten?’ [http://www.barbara-lochbihler.de/cms/upload/PDF\\_2011/Frontex-Studie\\_Maerz2011\\_deutsch\\_final.pdf](http://www.barbara-lochbihler.de/cms/upload/PDF_2011/Frontex-Studie_Maerz2011_deutsch_final.pdf) accessed 24 March 2014.

concerns on the EU's regime of immigration control. Eventually, the European Court of Human Rights confirmed these concerns in its landmark *Hirsi* case<sup>5</sup>, where it found Italy to have violated several key provisions of the European Convention on Human Rights by returning a group of asylum seekers to Libya without prior examination of their protection needs.

What follows from these criticisms is that the perhaps most worrying development in recent European immigration policy is its growing *extraterritorialization*. This term describes the attempt of European States to control all stages of the migration route and to ensure that individual migrants remain as close to their country of origin as possible, or in any case outside EU territory. The aim is to not only exercise control once the individual has arrived at the European border but to prevent him or her from setting foot on European soil in the first place.<sup>6</sup>

Both at the European and at the Member State level, policies to carry out immigration control *outside* the EU's territory have been made a top priority over the last years. Recent strategy papers tabled by the European Commission as well as Actions, Conclusions and, in particular, the most recent JHA Program (the Stockholm Programme) adopted by the European Council, all emphasize the need to strengthen the cooperation with countries of origin and transit in the field of immigration control. On the Member State level, this focus on extraterritorial control is evident by the conclusion of bilateral agreements on joint migration "management" with third countries.

These documents provide for various forms of extraterritorial immigration control, most notably the tightening of visa requirements; the posting of immigration liaison officers at foreign ports; the imposition of fines on private carriers transporting improperly documented persons; pre-frontier interception operations in the high seas or on the territory of non-EU member states; and the equipment and training of third state's border guards. Concrete examples include Spain's donation of patrol boats to several western African states; the training of Libyan border guards by the Italian *Guardia di Finanza*; the deployment of UK immigration liaison officers at airports in Kenya, Pakistan and Jordan; and joint missions at sea carried out by a mixed crew of Spanish and Senegalese officers.

The reasons for this policy of extraterritorialization are manifold. First, an obvious advantage for a government that considers immigration to be a problem is that extraterritorializing control reduces public and judicial scrutiny: "[T]he result of a refusal is not a person of uncertain status pursuing appeals, but simply an absence. Someone who did

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<sup>4</sup> Fundamental Rights Agency, 'Fundamental rights at Europe's southern sea borders' [http://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders\\_en.pdf](http://fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders_en.pdf) accessed 24 March 2014.

<sup>5</sup> *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012).

<sup>6</sup> Jorrit Rijpma and Marise Cremona, 'The Extra-Territorialisation of EU Migration Policies and the Rule of Law' (2007) EUI LAW Working Paper 12.

not arrive is ‘out of sight, out of mind’.<sup>7</sup> Second, EU Member States regularly submit that obligations under international refugee and human rights law only apply with regard to persons already present on their territory. Extraterritorializing immigration control, in this view, therefore drastically reduces a state’s obligations towards asylum seekers outside the Union’s borders. Among other aspects such as the possibly greater effectiveness in combatting human trafficking or similar humanitarian considerations, these two aspects seem to be the prime reasons for extraterritorializing immigration control. Taken together, they provide a factual as well as a legal basis for States’ attempts to deconstruct their protection obligations owed to refugees.

## 2. Overall Problem

The extraterritorialization of immigration control is, of course, not a stand-alone development. Rather, it is part of a broader trend to “offshore and outsource”<sup>8</sup> traditional state functions that can also be observed in other domains such as detention, public surveillance and military operations abroad. These developments raise obvious concerns with regard to a State’s accountability for actions carried out extraterritorially or by private actors.

Framed increasingly as a security issue, extraterritorial immigration control raises similar concerns. From a human rights perspective, the key question is whether the extraterritorialization of control implies the extraterritorialization of protection obligations stemming from international refugee and human rights law. Or, more specifically: Which forms of extraterritorial control amount to jurisdiction and thereby trigger the applicability of the European human rights regime? Are there basic rules under international law, such as the principle of *non-refoulement*, that are applicable in any case of extraterritorial immigration control, irrespective of whether or not jurisdiction is exercised? And, in cases where the jurisdiction test fails, may the law on state responsibility come to the rescue? On a more theoretical level it might be asked how the extraterritorialization of functions traditionally considered to be constitutive of modern States reconstructs the concepts of borders and state sovereignty altogether.

## 3. State of the Art & Specific Aim

There is a rich body of literature dealing with these latter, more theoretical issues of the status of international law in times of globalization, examining for example the changing nature of state sovereignty or borders.<sup>9</sup> Second, there is a wealth of academic work on the

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<sup>7</sup> Gina Clayton, ‘The UK and Extraterritorial Immigration Control: Entry clearance and Juxtaposed Control’ in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial immigration control: Legal challenges* (Martinus Nijhoff Publishers 2010) 397.

<sup>8</sup> Thomas Gammeltoft-Hansen, *Access to Asylum. International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2011).

<sup>9</sup> For our purposes, see especially Thomas Gammeltoft-Hansen and Rebecca Adler-Nissen, ‘An Introduction to Sovereignty Games’ in Rebecca Adler-Nissen and Thomas Gammeltoft-Hansen (eds), *Sovereignty games: Instrumentalizing state sovereignty in Europe and beyond* (Palgrave Macmillan 2008); Elspeth Guild, *Moving*

extraterritorial application of human rights law.<sup>10</sup> Third, there is no shortage of research that deals with recent developments in EU immigration policy and its growing extraterritorial focus, often including an analysis of the institutional factors shaping the field.<sup>11</sup>

There are, however, substantially fewer accounts that combine the theoretical and the empirical level and apply legal obligations deriving from international refugee and human rights law to the case of European immigration control. Among them, there are even less that address the specific challenges posed by its extraterritorialized forms.<sup>12</sup> And while the extraterritorial reach of refugee and human rights law has been mostly supported by those few scholars who actually examined the issue, the legal concepts that support this view received surprisingly little attention. Very few academics have undertaken a systematical analysis of the concept of extraterritorial jurisdiction or based their analysis on the law of state responsibility. Existing research therefore has not given sufficient attention to the questions of how far jurisdiction may stretch, in which specific scenarios it is triggered and if there is such thing as joint jurisdiction. As regards state responsibility, application of this branch of law to the context of extraterritorial immigration control seems to have been even less explored.<sup>13</sup>

Furthermore, while interceptions at sea have attracted a great deal of scholarly attention, the human rights implications of less spectacular – but potentially much more far-reaching – control measures such the work of immigration liaison officers abroad or the technical support and funding of third states' control operations remain largely under-researched.

Lastly, despite the growing criticism by scholars on how extraterritorializing immigration control endangers migrants' rights and the principle of *non-refoulement*, their echo in practice remains very limited. This is, among more persistent political-institutional factors, at least partly due to the lack of clear rules on extraterritorial obligations. Abstract legal norms

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*the Borders of Europe*. Inaugural lecture (University of Nijmegen 2001); Elspeth Guild and Didier Bigo, 'The Transformation of European Border Controls' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial immigration control: Legal challenges* (Martinus Nijhoff Publishers 2010); Alexander Betts, *Forced Migration and Global Politics* (John Wiley & Sons 2009).

<sup>10</sup> Marko Milanovic, *Extraterritorial application of human rights treaties: Law, principles and policy* (Oxford University Press 2011); Mark Gibney and Sigrun Skogly (eds), *Universal human rights and extraterritorial obligations* (University of Pennsylvania Press 2010).

<sup>11</sup> Steve Peers, *EU justice and home affairs law* (3<sup>rd</sup> edn Oxford University Press 2011); Christina Boswell, 'The "External Dimension" of EU Immigration and Asylum Policy' (2003) 79 *International Affairs* 619; Madeline Garlick, 'The EU Discussions on Extraterritorial Processing: Solution or Conundrum?' (2006) 18 *International Journal of Refugee Law* 601; Sandra Lavenex, 'Shifting up and out: The foreign policy of European immigration control' (2006) 29 *West European Politics* 329; Christian Kaunert and Sarah Léonard, 'The European Union Asylum Policy after the Treaty of Lisbon and the Stockholm Programme: Towards Supranational Governance in a Common Area of Protection?' (2012) 31 *Refugee Survey Quarterly* 1; Christian Kaunert and Sarah Léonard, 'The development of the EU asylum policy: venue-shopping in perspective' (2012) *Journal of European Public Policy* 1.

<sup>12</sup> With the two monographs by Thomas Gammeltoft-Hansen (*supra* n 8) and Maarten Den Heijer, the volume edited by Bernard Ryan and Valsamis Mitsilegas and the article by Jorrit Rijpma and Marise Cremona being notable exceptions: cf. Maarten Den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012); Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial immigration control: Legal challenges* (Martinus Nijhoff Publishers 2010).

<sup>13</sup> While there is one recent monograph on the complicity provision in the Articles on State Responsibility, it does not cover the case of EU immigration control: Helmut Philipp Aust, *Complicity and the law of state responsibility* (Cambridge University Press 2011).

triggered by extraterritorial immigration control are far from having been translated into clear cut obligations. There is therefore an urgent need to identify the practical scenarios of extraterritorial immigration control and carve out the specific legal obligations owed by the EU in these various situations.

In sum, there seems to be ample need for a comprehensive study on how the alleged accountability gap in EU extraterritorial immigration control can be closed by drawing on an analysis of extraterritorial jurisdiction and the law of state responsibility.

The proposed research therefore has two broad aims. The first is to provide a conceptual framework of the legal responsibilities arising from extraterritorial immigration control. In order to do so, the law applicable in a specific situation of immigration control will be identified. This will require a classification of control measures and a thorough analysis of the concept of extraterritorial jurisdiction as it has been developed by human rights bodies. Thereafter, the question of responsibility can be addressed. Here, the law of state responsibility will serve as the major reference.

Second, the proposed thesis more generally aims at contributing to a better understanding of the complex interplay of multiple actors and legal regimes in cases of extraterritorial immigration control. At present, the ambiguity and seeming contradictions between legal norms in the field of extraterritorial immigration control allow States to exploit purported gaps in the international protection regime. There is thus an eminent need to clarify the relationship between international refugee law, international and European human rights law, the law of state responsibility, the law of the sea and certain branches of European Union law.

#### **4. Research Question**

Given the gaps in current research identified above, the main research question of the proposed thesis can be formulated as follows:

*In what ways can the concept of extraterritorial jurisdiction and the law of state responsibility serve to establish the link between practices of extraterritorial immigration control employed by the European Union's Member States and their substantive obligations under international refugee and human rights law?*

#### **5. Main Research Hypothesis**

- Jurisdiction is engaged by all current forms of extraterritorial immigration control as soon as one accepts a functional approach to jurisdiction. In this sense, a State's effective factual control over a person becomes the decisive criterion, irrespective of where the control measure takes place or which staff is used.
- In cases, where the jurisdictional link is still found to be too weak, the complicity provision in Article 16 of the Articles on State Responsibility prevents a State from evading protection obligations arising from immigration control. Article 8 of the Articles

on State Responsibility has the same effect in cases where immigration control is contracted out to private actors.

## 6. Theoretical Premises

First, the proposed study is based on the assumption that law and politics are mutually constitutive fields. It is therefore interested in the political and institutional factors governing and constraining, indeed *constituting*, EU immigration law. This applies to intra-EU dynamics, with normative conflicts arising from rivaling supranational and intergovernmental structures, but also to external power relations that dominate the EU's negotiations with countries of origin and transit.

This position is of course diametrically opposed to the positivist school of law that assumes that law can be viewed separately from politics. This assumption rests on the normative basis that law *should* be separate from politics or, at least, from certain popular politics. While this might be desirable, ignoring that law is nothing but a product of a momentary political compromise at a specific time and place in history, i.e. a specific historic constellation of interests poured into a structure and that it is thus *made* and not a *given*, risk an overly fatalist position.

Second, it is assumed that the concept of extraterritorial jurisdiction and the law of state responsibility are contested to such an extent because they touch upon arguably the most central notion of international law: the principle of sovereignty. This also points to a more general contradiction in international law, namely the one between sovereignty and territorial jurisdiction on the one hand and the universality of human rights on the other.

Third, contrary to many governments' concerns and a whole body of literature on the "demise" of the nation state<sup>14</sup>, it is submitted here that state sovereignty is not generally waning in the light of globalization and universalistic trends of the law trying to keep up with it. Instead, sovereignty seems to have become a more nuanced concept that is used creatively today.<sup>15</sup> Notwithstanding objections that sovereignty as it is commonly understood – as a combination of internal authority, recognition by other states, autonomy in decision-making and control of transborder flows – has rarely ever been achieved by states<sup>16</sup>, it is held here that the concept becomes increasingly useful for States eager to avoid protection responsibilities. This idea has been called the "instrumentalization" of sovereignty. This term describes attempts of EU Member States to strategically use sovereign norms to deconstruct their obligations, for instance by taking on board African officers during sea operations and claiming that the operation takes place under their effective command, triggering their home state's jurisdiction. On the other hand, third countries increasingly "commercialize" their

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<sup>14</sup> Among many, see Susan Strange, *The Retreat of the State. The Diffusion of Power in the World Economy* (Cambridge University Press 1996).

<sup>15</sup> Cf. Gammeltoft-Hansen and Adler-Nissen, *supra* n 9, 3.

<sup>16</sup> Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press 2001).



sovereignty, i.e. strategically trade and commodify their sovereign prerogatives and territories in exchange for financial or political benefits.<sup>17</sup>

Fourth, the present thesis takes a critical stance towards the increasing securitization of immigration control. Apart from obvious protection concerns, the increasing dominance of security interests in this field leads to a distorted picture of the extent of immigration into Europe. This, in turn, serves to legitimize increased border controls and strengthens public belief in their necessity. While this may be useful for policy makers eager to uphold a “narrative of control”<sup>18</sup>, it is important to challenge the *doxa* that governments actually possess this capacity to regulate and control or that they are able to “open[...] or clos[e] the locks at will”<sup>19</sup>. More generally, as we are reminded by *Guild* and *Bigo*, the

“relationship between borders and control is not a ‘given’. It cannot be naturalized. It depends on the historical trajectory of the Western States [...], of the way they have considered that a frontier needs to be a thin line of defense, and a line of differentiation.”<sup>20</sup>

A fifth premise of the proposed study is that mixed migration flows are now the standard case of migratory movements. As refugees do not travel separately but among other migrants seeking a better future in Europe, it becomes more difficult for them to make their asylum claims heard. They encounter the same border controls as other migrants and often face serious barriers to protection. This is in particular due the unwillingness of many governments to acknowledge that refugees are among those travelling irregularly. The statement by FRONTEX’ executive director Ilkka Laitinen is symptomatic in this regard: “Flüchtlinge? [...] Das sind keine Flüchtlinge, sondern illegale Migranten.”<sup>21</sup> This view is, of course, fundamentally at odds with the principle that the determination of refugee status is only declaratory. As Judge Pinto de Albuquerque in the *Hirsi* case put it: “A person does not become a refugee because of recognition, but is recognised because he or she is a refugee.”<sup>22</sup>

Lastly, and related to the above argument, the proposed thesis avoids the use of the term “illegal migrant”. This is because (a) it is legally imprecise as only a certain act, not a person is normally considered to be illegal, (b) it blurs the fact that refugees are mostly forced to resort to irregular means of travelling as legal ways are increasingly made unavailable to them and (c) “illegality” is normally associated with criminal acts, which crossing a border irregularly is undoubtedly not.

## 7. Delimitations

First, the proposed research only deals with extraterritorial situations. Therefore, wider issues of immigration control that become relevant once an individual is on the EU’s territory, such as readmission and return, are not covered.

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<sup>17</sup> Gammeltoft-Hansen, *supra* n 8.

<sup>18</sup> Guild and Bigo, *supra* n 9.

<sup>19</sup> *ibid* 261.

<sup>20</sup> *ibid* 258-259.

<sup>21</sup> Paul Flückinger, “Frontex ist ein Sündenbock” *Der Standard* (Vienna, 21 December 2006) <http://derstandard.at/2703700> accessed 24 March 2014.

<sup>22</sup> *Hirsi Jamaa and Others v Italy*, *supra* n 5.

Second, the proposed study will not provide a detailed account of the asylum *acquis* in the EU. In a way, it is not concerned with asylum at all, i.e. with issues such as qualification determinants, reception standards or legal aid. This applies not only to asylum within the EU but also to forms of extraterritorial asylum. Therefore, the issues of extraterritorial processing, regional protection programs and diplomatic asylum fall outside its scope. Rather than examining material aspects of asylum in Europe, it deals with the question of *access* to asylum.

Third, the study focuses on basic protection norms and in particular the principle of *non-refoulement*. Related rights, such as the right to leave and the right to seek asylum, will also play a certain role. However, it will not provide an analysis of the much broader range of human rights claimable by asylum seekers at the European border.

Fourth, the proposed research will not concern itself with the issue of justiciability of individual rights. Practical obstacles to enforce one's rights such as lack of information or lack of legal aid are largely left out of the picture. Instead, the primary question will be geared towards the scope of the applicable law and the responsible actor.

## 8. Methodology

Primarily, the research question formulated above requires an interpretation of the law of state responsibility, in particular Articles 8 and 16 of the Articles on State Responsibility. As regards the concept of extraterritorial jurisdiction, the analysis will firstly rely on a *textual interpretation* of the most relevant provisions of international treaties such as the ECHR, the CFR and the CRSR. Secondly, the large body of the ECtHR's *case law* on the issue will be examined.<sup>23</sup> Occasional reference will also be made to the case law of national courts.<sup>24</sup> Thirdly, the proposed research will give extensive consideration to *state practice* as it is documented by various UN reports, NGO fact finding missions and similar sources.

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<sup>23</sup> In particular, *Loizidou v Turkey*, App no 15318/89 (ECtHR, 23 March 1995); *Bankovic and Others v Belgium and Others* App no 52207/99 (ECtHR, 21 December 2001), *Ilascu and Others v Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004), *Al-Skeini and Others v the United Kingdom* App no 55721/07 (ECtHR, 7 July 2011).

<sup>24</sup> *Sale v Haitian Centers Council*, US Supreme Court 509 US 155 (21 June 1993), *European Roma Rights Centre and Others v Immigration Officer at Prague Airport and Another*, United Kingdom House of Lords (9 December 2004).

## 9. Research Plan

<b>Time Span</b>	<b>Objective</b>
09/2012	PhD Training School on Asylum & Migration, AHRI/COST Conference “Empower Human Rights”, Vienna
10/2012 – 6/2013	Completion of mandatory PhD classes
4/12/2012	Presentation: The Extraterritorial Application of the Return Directive, Seminar Der Raum der Freiheit, der Sicherheit und des Rechts ( <i>Stern/Lachmayer</i> )
18/1/2013	Presentation: The Scope of the European Convention on Human Rights, Seminar Judikaturanalyse ( <i>Thienel</i> )
14/5/2013	Presentation: The Principle of <i>Non-Refoulement</i> & Extraterritorial Immigration Control, Seminar EU – External and Internal Security ( <i>Reinisch/Fink</i> )
3/2013 – 5/2013	Exposé
13/6/2013	Presentation of the Research Project, University of Vienna
7/2013- 2/2015	Writing Process
Ongoing and 3/2015-4/2015	Discussion with Colleagues & Supervisors, Revision
5/2015	Proof-Reading
6/2015	Handing in of the Thesis

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