Access to Asylum: the Case for a Layered Approach to the Right to Asylum and its Corresponding State Obligations

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Introduction

At a time when record numbers of people are seeking asylum in Europe,[1] and there are more people in need of international protection worldwide than ever before,[2] many of those in need are struggling to reach destinations where they can apply for international protection. News reports are filled with stories of those who cannot access asylum: the men, women and children who die every week in the Mediterranean;[3] those who are left stranded in the Balkans due to border closures;[4] and those whose boats are pushed back to Indonesia by the Australian government.[5] In each of these examples, the inability to access asylum procedures could be alleviated by action (or even inaction) by the relevant states. Despite decades of commitments by states that all individuals have "the right to seek and to enjoy in other countries asylum from persecution", as expressed in Article 14 of the Universal Declaration of Human Rights,[6] this right is too often not accessible to the individuals who wish to claim it.

This thesis starts from the assumption that there is a right to asylum, and this position will be justified in the first chapter of this thesis. Indeed, the right to seek asylum has been expressed several times in international law, including Article 14 of the Universal Declaration of Human Rights[7] and Article 18 of the Charter of Fundamental Rights of the

[1] See European Commission: Eurostat News Release, "Record number of over 1.2 million first time asylum seekers registered in 2015", No. 44/2016, 4 March 2016, available at: http://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/790eba01-381c-4163-bcd2-a54959b99ed6 [last accessed: 4 April 2016].
[2] UNHCR, "Worldwide displacement hits all-time high as war and persecution increase", 18 June 2015, available at: http://www.unhcr.org/558193896.html [last accessed: 6 April 2016]
[3] See e.g. *The Economist*, "Migration to Europe: Death at Sea", 3 September 2015, available at http://www.economist.com/blogs/graphicdetail/2015/09/migration-europe-0 [last accessed: 4 April 2016].
[4] See e.g. *Reuters*, "Spreading across Europe: a fortress of fences", 4 April 2016, available at: http://www.reuters.com/investigates/special-report/migration/#story/38 [last accessed: 6 April 2016].
[5] Human Rights Watch, "World Report 2016: Australia, Events of 2015", available at: https://www.hrw.org/world-report/2016/country-chapters/australia [last accessed: 6 April 2016].
[6] UN General Assembly, *Universal Declaration of Human Rights (UDHR)*, 10 December 1948, 217 A (III), Article 14(1).
[7] UN General Assembly, *Universal Declaration of Human Rights (UDHR)*, 10 December 1948, 217 A (III), Article 14(1).

European Union.[8] The right to access asylum is also indirectly protected through the principle of *non-refoulement*,[9] as expressed in Article 33 of the Geneva Convention on the Status of Refugees[10] and Article 3 of the Convention Against Torture and Other Forms of Inhuman or Degrading Treatment or Punishment.[11] Situations where this right is not accessible will also be explored in this part. Although Australia and the Member states of the European Union acknowledge the existence of this right, realities on the ground show that they actively implement policies which aim to prevent asylum seekers from accessing asylum or refugee determination procedures in their territories. These practices are numerous and affect individuals in need of international protection at every point in their journey: before departure, in transit and upon arrival.

In many situations where states exercise influence over outcomes for asylum seekers, they are not held accountable for the consequences of their actions or for the derogation from their obligations under international law. The second chapter of this thesis will analyse how a failure to clearly define the duty-bearers in international asylum law[12] facilitates the ability of states to ignore or undermine their international obligations. It will mainly focus on the right to asylum through the lens of access to asylum procedures, as the act of lodging an application for asylum is, for most refugees, the first step towards receiving

[8] European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012 C 326/02, Article 18.

[9] Although *non-refoulement* can be respected without any refugee status determination procedure if, for example, a refugee is allowed to stay on a territory without ever having their status assessed by the authorities, such a procedure can be a vital step in assessing the risk of persecution before returning a person to another territory.

[10] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: http://www.refworld.org/docid/3be01b964.html [accessed 21 December 2015].

[11] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations Treaty Series, Vol. 1465, p. 85, Article 3.

[12] Although the author is aware of the distinction between refugee and asylum law – the former dealing with the rules relating to refugee status and procedures and the latter referring to the rules surrounding the right to stay in the territory – the phrase "asylum law" will be used throughout this thesis, but will encompass elements of both refugee and asylum law.

international protection.[13] This work will then draw a parallel between the lack of a clear duty-bearer in asylum law and the shortcomings identified by moral philosopher Onora O'Neill in relation to accountability at the international level, particularly in the area of economic, social and cultural human rights.[14] Her work – though perhaps outdated in its strict division of civil and political (CP) rights and economic, social and cultural (ESC) rights – stresses the importance of identifying the duty-bearer and required action if a right is to have a meaningful corresponding obligation. The lack of both a clear duty bearer and a required action is reflected in international refugee law, and this section will explore ambiguities relating to the parameters of *non-refoulement*, the extent of states' responsibility for the actions of non-state actors, and the meaning of the requirement for international cooperation.

My research shows that the aforementioned contribution of O'Neill should be taken seriously in relation to access to asylum. The third section therefore builds on her work and presents a possible framework to better define the obligations of states towards asylum seekers. The framework – the Maastricht Principles on Economic, Social and Cultural Rights[15] – was developed by international legal experts as a potential means of concretising the obligations of states in the area of ESC rights, but I argue that it can also be applied to define state duties towards those seeking international protection. It is not suggested that the Maastricht Principles provide the optimal solution, but rather that they are a possible

[13] The author notes that there are situations where asylum is granted without the need to apply through an asylum procedure, but for the large majority of asylum seekers, submitting an application is the first step towards identifying the state responsible for providing them with international protection.

[14] See O'Neill, Onora, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning*, (Cambridge, Cambridge University Press: 1996); O'Neill, Onora, *Bounds of Justice*, (Cambridge, Cambridge University Press: 2000); O' Neill, Onora, "The Dark Side of Human Rights", *International Affairs*, Vol. 81, No. 2 (2005), pp. 427-439.

[15] *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, 28 September 2011, Introduction, available at: http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 [last accessed: 16 November 2015].

means of defining the precise duties of states, which could have a positive impact on the ability of refugees to access asylum procedures.

This thesis is a comparative, qualitative study. It is a case study of two jurisdictions – Australia and the European Union – which analyses the differences between these countries both in terms of the legal framework in which they operate and their approaches to asylum and deterrence. The two jurisdictions were chosen due to the different legal frameworks by which they are bound – Australia being bound by universal international treaties and the EU having a more developed legal regime of both universal international law and EU law surrounding the right to access asylum procedures. The thesis demonstrates how the Maastricht Principles can apply in diverse jurisdictions where the right to access asylum procedures are developed to varying degrees. It is a normative work which draws from moral philosophy on international justice and the role of accountability as well as recommendations by third party actors in international relations.

With ever-increasing numbers of individuals unable to access asylum, studies which propose means of holding states to account for actions which undermine their international obligations are needed now more than ever before. However, the area studied is dynamic and changes regularly. This is especially true in the year which I wrote this thesis, from 2015-2016. In order for this work to remain relevant as time passes, I am focussing on the main themes of access to asylum – visa policies, interception at sea, privatisation of border control and carrier sanctions, safe third country assumptions and readmission agreements – as well as including the more recent development of a fence being erected at Hungary's external border. This approach will allow for an insight which is relevant both today and in the future.

My research confronts the gap between what is pledged in international human rights law and what is available to asylum seekers in real life. It explores the following questions: What are states' obligations as a result of the right to asylum? What obstacles prevent those in need of protection from accessing asylum, and how can states be held to account for their failure to meet their international obligations? Is there an approach which could alleviate the problem and better ensure the ability of individuals to claim their right to asylum? The work proposes the Maastricht Principles as a means of concretising the precise state duties which result from the right to asylum and increase state accountability, in order to demonstrate that there exists an alternative approach to state obligations which could ensure that individuals are better able to claim the right to asylum.

Chapter I: The right to access refugee status determination procedures

1.1 The right to access asylum procedures in universal international law and EU law

This section will explore the right to access refugee status determination procedures, identifying the various international and EU instruments which guarantee protection of this right, both explicitly and indirectly.

The existence of a right to seek asylum in international law is not clearly established. The right first appeared in the Universal Declaration of Human Rights (UDHR) in 1948. Article 14(1) states that "everyone has the right to seek and enjoy in other countries asylum from persecution".[16] It is supported by Article 13(2), which declares the right to "leave any country, including his own, and to return to his country".[17] Together, these two provisions indicate that all people should be able to access protection from persecution in other countries, and their ability to access this protection should not be hampered by an inability to leave their country.

However, given the declaratory nature of the UDHR, the rights within it are not legally binding, and the right to seek asylum has not been further codified in international treaty law.[18] Instead, the right to asylum is guaranteed by other legally-binding instruments. The

[16] UN General Assembly, *Universal Declaration of Human Rights (UDHR)*, 10 December 1948, 217 A (III), Article 14(1).
[17] *UDHR*, Article 13(2).
[18] Gammeltoft-Hansen, Thomas, *Access to Asylum*, (Cambridge, Cambridge University Press: 2011), p. 13-14, footnote 6.

most influential of these instruments at the international level is the 1951 Geneva Convention relating to the Status of Refugees[19] (henceforth, "Refugee Convention" or "Geneva Convention") and its 1967 Optional Protocol,[20] which removed the temporal and geographic limitations of the treaty. The Convention and its Protocol are widely recognised, with 145 states having ratified the Convention,[21] and 146 having ratified the Protocol.[22] These texts, which Australia and all EU Member States have ratified, establish the duties states have towards refugees, but do not make reference to refugee status determination procedures or outline state duties in such procedures. However, as Jens Vedsted-Hansen points out, although the Geneva Convention does not refer explicitly to status determination procedures, it still requires states to examine the claims of all asylum applicants in order to determine who is entitled to the rights set out in the text.[23] Because recognising the refugee status of an individual is a declaratory rather than constitutive act – meaning that it recognises that the person already was a refugee rather than them becoming a refugee at the point of recognition – a refugee is entitled to the rights set out in the Geneva Convention whether a state has recognised their status or not. Hence, in order to respect the Convention, a state is obliged to carry out a status determination procedure to determine who is *not* entitled to the rights declared within the treaty.[24]

[19] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, Vol. 189, p. 137, available at: http://www.refworld.org/docid/3be01b964.html [accessed 21 December 2015].
[20] UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, Vol. 606, p. 267, available at: http://www.refworld.org/docid/3ae6b3ae4.html [accessed 21 December 2015].
[21] United Nations Treaty Collection Website, "Status of Convention relating to the Status of Refugees", available at: https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&lang=en [accessed 8 March 2016].
[22] United Nations Treaty Collection Website, "Status of Protocol relating the Status of Refugees", available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en [accessed 8 March 2016].
[23] Vedsted-Hansen, Jens, "The asylum procedures and the assessment of asylum requests", in Chetail, Vincent and Bauloz, Céline (eds.). *Research Handbook on International Law and Migration*, (Cheltenham, Edward Elgar Publishing: 2014), pp. 439-458, at p. 439.
[24] Vedsted-Hansen, Jens, "The asylum procedures and the assessment of asylum requests", pp. 439-440.

This principle of treating all applicants as *presumptive refugees*,[25] also applies in the case of *non-refoulement*, as enshrined in the Geneva Convention. Goodwin-Gill asserts that "the peremptory norm of *non-refoulement* secures admission and, in the individual case, may further raise the presumption that a local durable solution will be forthcoming".[26] The principle of *non-refoulement* prohibits states from returning a person without examining the merits of their claim to a place where they risk being persecuted. According to Goodwin-Gill the principle is "solidly grounded in international human rights and refugee law, in treaty, in doctrine and in customary law".[27] In practice, if a state wishes to return a person, their claim must be examined in order to determine whether they are at risk of *refoulement*. Refugees therefore have the right to access a status determination procedure before being returned. This indirectly-guaranteed right to access asylum procedures does not depend on having arrived in a country by regular means. The Refugee Convention guarantees that refugees who arrive directly from a place where they may face persecution to another territory by irregular means shall not be punished (Article 31), that refugees shall not be expelled from a territory except on the grounds of national security and public order (Article 32), and that refugees shall not be returned to a territory where they face persecution (Article 33).[28]

It should be noted that there is disagreement over whether the right to access asylum procedures which indirectly arises as a result of the guarantees in the Geneva Convention applies only to applicants within a territory or also those beyond its borders. Although Articles 31 and 32 explicitly depend on the refugee being present in the territory, this is not a requirement in Article 33, which states:

[25] Vedsted-Hansen, Jens, "The asylum procedures and the assessment of asylum requests", p. 440.
[26] Goodwin-Gill, Guy S., *The refugee in international law*, (Oxford, Clarendon Press: 1983), p. 119.
[27] Goodwin-Gill, Guy, "The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement", *International Journal of Refugee Law*, Vol. 23, No. 3, pp. 443–457, at p. 444.
[28] UN General Assembly, *Convention Relating to the Status of Refugees*, available at: http://www.refworld.org/docid/3be01b964.html [accessed 21 December 2015].

> No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[29]

The provision does not explicitly refer to the presence of refugees in a territory. Although "expulsion" from a territory suggests the presence of an individual in a territory, "return" does not necessarily have that connotation. Indeed, James C. Hathaway observes that the original purpose of this provision was to prevent states from relying on summary removal (expulsion) or denial of entry (*refoulement*) in order to undermine the protection of refugees.[30] Nevertheless, this point of view is contested, with others asserting that *refoulement* only applies to refugees within a state's territory. This point of view (notably expressed in the US Supreme Court case of *Sale v. Haitian Centers Council Inc.* [31]) will be explored later in Section 2.2.1(i), which deals with the imprecise parameters of the principle of *non-refoulement*. Although some details of *non-refoulement* are contested, it is widely accepted by scholars that the principle has the status of international customary law,[32] and as such, it is considered to be legally binding upon all states.

As outlined in the above paragraphs, the right to access asylum procedures is indirectly protected through the declaratory nature of refugee status and the principle of *non-refoulement*, both of which require that a state examine an asylum claim before it can declare that an individual is not at risk. However, the right to seek asylum, the right to asylum or the right to access asylum procedures are not explicit in any universally-binding international treaty. The controversial nature of these rights is further evident in the result

[29] UN General Assembly, *Convention Relating to the Status of Refugees*, available at: http://www.refworld.org/docid/3be01b964.html [accessed 21 December 2015], Article 33(1).
[30] Hathaway, James C., *The Rights of Refugees under International Law*, (Cambridge, Cambridge University Press: 2005), pp. 315-316.
[31] *United States: Sale v. Haitian Centers Council, Inc.*, 113S.Ct. 2549, 509 U.S. 155 (1993).
[32] Zimmermann, Andreas, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: a Commentary*, (Oxford, Oxford University Press: 2011), p. 1345.

of the 1977 United Nations Conference on Territorial Asylum, where delegates present could not come to an agreement on the details of the proposed text.[33] Disagreements centred on whether there should be a right of states to grant asylum or a right of individuals to receive it, as well as the question of whether a state can refuse asylum based on a prior relationship between the applicant and another state which could grant asylum. Due to these disputes and the resulting failure of the conference, the right to seek asylum at the international level is only protected indirectly through the requirement to examine asylum applications before refusing protection which stems from the Geneva Convention, as outlined above.

However, the right to seek asylum has been recognised under several regional instruments, including the American Convention on Human Rights[34] and the African Charter on Human and Peoples' Rights.[35] In the European context, the right to asylum is protected by Article 18 of the Charter of Fundamental Rights of the European Union. This provision, entitled "Right to asylum", states:

> The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties').[36]

[33] See Hurwitz, Agnès G., *The Collective Responsibility of States to Protect Refugees*, (Oxford, Oxford University Press: 2009), pp. 21-23.
[34] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, available at: http://www.refworld.org/docid/3ae6b36510.html [accessed 21 December 2015], Article 22.
[35] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: http://www.refworld.org/docid/3ae6b3630.html [accessed 21 December 2015], Article 12(3).
[36] European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, Article 18.

The appearance of the right to seek asylum in the Charter of Fundamental Rights of the EU is significant as this Charter is legally binding upon all Member States. According to Article 6(1) of the Treaty on European Union (TEU), '[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union […], which shall have the same legal value as the Treaties'.[37] However, it is debated whether an individual right to seek and be granted asylum is protected under the Charter, and as a result, whether this is a legally binding obligation on EU Member States. The precise meaning of the provision on the right to asylum is contested as it fails to explicitly state the beneficiary of the right. It has therefore been debated whether the "right to asylum" in this instance refers to the right of the individual to be granted asylum, or rather, the right of the state to grant asylum without it being considered an unfriendly act towards the country of origin of the refugee.

Although the provision itself is unclear on this issue, Maria-Teresa Gil-Bazo has put forward a convincing argument which claims that it refers to the right of the individual to be granted asylum. In the first place, she points out that the context in which the right appears indicates an individual right, as all the other provisions in the Charter refer to rights of individuals, and no other provision sets out a right of states.[38] Additionally, the drafting history of Article 18 shows that the drafters intended for the right to be granted to individuals, not states, as the debates on the wording of this provision centred on the categories of individuals to be included and whether the right belonged to all individuals or only third country nationals.[39] These factors suggest that under the Charter of Fundamental Rights of the EU, Member States have the obligation to respect the right of individuals to asylum.

[37] European Union, *Consolidated Version of the Treaty on European Union*, 2010 O.J. C 115/13, Article 6(1).
[38] Gil-Bazo, María-Teresa, "The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law", *Refugee Survey Quarterly*, Vol. 27, No. 3 (2008), pp. 33-52, at p. 41.
[39] Gil Bazo, p. 42.

Having clarified the beneficiary of the right, the question still remains as to the content of the right to asylum. Gil-Bazo takes the position that the provision encompasses not only the right to apply for asylum, but also a right to be granted asylum for individuals who meet the relevant criteria. The *travaux préparatoires* show a clear preference for a broad interpretation of the right to asylum, having considered and rejected the restrictive wording of the "right to *seek* asylum" in favour of the more encompassing "right to asylum".[40] It is also notable that at the national level, several Member States consider constitutional asylum as a right to be *granted* asylum.[41] Gil-Bazo posits that the *travaux préparatoires* and the constitutional traditions of Member States reflect a right to asylum in the EU Charter which extends beyond Article 14 of the UDHR and includes not only a right of individuals to seek asylum, but also a right to be granted asylum for individuals who meet the relevant criteria.[42]

In the European context, there is an additional guarantee that EU Member States will recognise the right to apply for asylum and the right of those who fulfil the relevant criteria to be granted asylum from persecution as a result of the 2004 Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (hereafter, the Qualifications Directive), and the corresponding 2011 Recast Qualifications Directive. Article 13 reads,

> Member States shall grant refugee status to a third country national or a stateless person, who qualifies as a refugee in accordance with Chapters II and III.[43]

[40] Gil-Bazo, p. 46.
[41] Gil-Bazo, p. 47.
[42] Gil-Bazo, p. 48.
[43] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection,

This provision clarifies the duties of EU Member States somewhat by making the obligation to grant asylum explicit. The clarity of these provisions is important, as the Qualifications Directive is legally binding upon Member States. However, it should not be seen as a replacement for establishing a right to asylum under the Charter of Fundamental Rights of the EU, as the Directive is not binding on all Member States. Denmark opted out of both the 2004 Directive and the 2011 Recast Directive, which means that these obligations are not binding upon Denmark. Ireland and the United Kingdom have also opted out of the Recast Directive, and therefore these states are bound only by the 2004 Directive.

Because the Qualification Directive does not bind all Member States, it is important that the right to access asylum be protected at a higher level in EU law if it is to be guaranteed in all Member States. It is therefore significant that the Directive also seems to support Gil-Bazo's interpretation of Article 14 of the Charter as guaranteeing an individual right to seek and be granted asylum from persecution. Paragraph 16 of the Preamble of the Qualification Directive reads,

> This Directive *respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union*. In particular this Directive seeks to ensure full respect for human dignity and *the right to asylum of applicants for asylum and their accompanying family members* and to promote the application of Articles 1, 7, 11, 14, 15, 16, 18, 21, 24, 34 and 35 of that Charter, and should therefore be implemented accordingly.[44] (emphasis added)

for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 2011 O.J. L 337/9 [henceforth, Qualification Directive], Article 13.

[44] Qualification Directive, Preamble, para. 16.

The reference to the EU Charter of Fundamental Rights as the only named source of fundamental rights, followed by the reference to a right to asylum (not just to seek, but also to be granted) suggests that the source of this right is the Charter. It therefore seems evident to the drafters of the Qualifications Directive that the Charter of Fundamental Rights does protect an individual right to seek and be granted asylum from persecution.

As this section has outlined, the right to asylum has been recognised to a certain degree in international law. The right to seek asylum is expressed as a fundamental human right in the 1948 Declaration of Human Rights, which Australia and a number of now EU Member States voted in favour of. This shows that the States which we are examining in this thesis considered access to asylum to be a human right from an early stage. However, this right has not since been codified in any universally-binding instrument of international law, making it inherently difficult to assert its existence. Nonetheless, access to asylum or to status determination procedures is indirectly protected through the declaratory nature of refugee status and the principle of *non-refoulement*, both of which require states to assess an application before deeming a person not in need of protection. These principles are protected by the Refugee Convention, which Australia and all EU Member States have endorsed. Therefore, at a minimum, all jurisdictions examined in this work recognise the right of all individuals to have access to a refugee status determination procedure before being denied protection, even if a question remains over whether *refoulement* can be carried out from outside a state's territory.

In addition to these guarantees, there are more explicit recognitions of the right to seek and be granted asylum from persecution at the EU level. These appear at two levels, in the EU Charter of Fundamental Rights and in the Qualification Directive. Although the Charter is somewhat ambiguous, there is sufficient evidence to make a presumption that it goes beyond what exists at the international level in guaranteeing not only a right to seek

asylum, but also the right of those who qualify to be granted asylum. This is supported by the references to the Charter in the preamble of the Qualification Directive. EU Member States are therefore not only bound to provide access to asylum as a result of the UDHR and *non-refoulement* obligations, but also as a result of the EU Charter and Qualification Directive.

As the previous section has demonstrated, there is persuasive evidence supporting the existence of a right to asylum in international law. However, because this right arises indirectly – through the fact that refugee status is declaratory, requiring an assessment of a claim before a state can deny protection, as well as the customary law principle of *non-refoulement* – the existence of this right is not explicitly clear in any legal text. There are many situations where states take actions (or refrain from taking actions) which affect the ability of individuals to access asylum. However, because the right is not explicit, it can be unclear to what extent these actions are legal or illegal. The following section will explore a selection of such situations, and the second chapter will then examine the ambiguities surrounding the legal obligations which stem from the right to asylum.

1.2 State practices which jeopardise the right to access asylum procedures in their territory

Despite the recognition of the right to seek asylum in the Universal Declaration of Human Rights, the customary law status of the principle of *non-refoulement*, and the additional guarantees of the right to seek and be granted asylum under EU law, there are numerous instances in which Australia and the Member States of the European Union have prevented asylum seekers from accessing the asylum procedure in their territory. This section will outline past actions of these states which clearly aimed to prevent access to their asylum procedures. Although each of the sections below could be explored in further detail, due to space constraints, this is not possible in this thesis. Instead, the policy and its impact on

human rights are introduced in order to provide an overview of the diverse ways in which states prevent access to asylum.

1.2.1 Actions by states to prevent access to asylum procedures in their territory

i. En route: interception, death at sea and border fences

One way in which states deflect asylum seekers before they arrive in the territory is by intercepting migrants at sea. The European Agency for the Management of Operational Cooperation at the External Border of the EU - better known as Frontex - was created in order to coordinate the security operations of Member States of the EU at their external borders. The reasons for the creation of Frontex indicate that it aims to prevent migrants from accessing EU territory, thereby restricting the ability of asylum seekers to apply for asylum. According to Sarah Léonard, the creation of Frontex was a reaction to the increasingly negative perception of migration in Europe, aiming to prevent migrants and asylum seekers from reaching EU territory, strengthen the external borders of new EU Member States and combat terrorism.[45] This view is supported by the text of Council Regulation 2004/2007 establishing Frontex as an EU agency. According to this document, the role of Frontex is to:

> (a) coordinate operational cooperation between Member States in the field of management of external borders;
>
> (b) assist Member States on training of national border guards, including the establishment of common training standards;
>
> (c) carry out risk analyses;
>
> (d) follow up on the development of research relevant for the control and surveillance of external borders;

[45] Léonard, Sarah, "EU border security and migration into the European Union: FRONTEX and securitisation through practices", *European Security*, Vol. 19, No. 2 (2010), pp. 231-254, at p. 234.

(e) assist Member States in circumstances requiring increased technical and operational assistance at external borders;

(f) provide Member States with the necessary support in organising joint return operations.[46]

The actions of Frontex, which may be aimed at controlling migration in general, affect asylum seekers who travel in mixed-migration flows. When migration flows are mixed, that is to say that they consist of asylum seekers as well as individuals not in need of international protection, the measures taken to prevent and deter the arrival of irregular migrants in Europe have the same effect on asylum seekers as other types of migrants. Differentiation between the two groups only occurs when an individual crosses the border, which means that asylum seekers might not be recognised as such.[47] Therefore, exclusion measures which do not differentiate between asylum seekers and other migrants can prevent asylum seekers from being able to access asylum procedures. As a result, Frontex practices may fail to respect the principle of *non-refoulement*. Papastavridis points out that persons on vessels intercepted by Frontex are more likely to be returned to their countries of origin where they may face persecution.[48] This approach taken by Frontex does not distinguish between migrants and asylum seekers, and therefore does not ensure that asylum seekers can request the international protection to which they are entitled.

Moreover, many experts argue that EU Member States have failed to give Frontex the appropriate mandate and resources in order to ensure access to asylum by preventing the deaths of migrants at sea. As Frontex was not conceived to have a humanitarian role, the

[46] European Union, Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of Member States of the European Union, O.J. L 349/1, Article 2.

[47] Triandafyllidou, Anna and Dimitriadi, Angeliki, "Deterrence and Protection in the EU's Migration Policy", *The International Spectator*, Vol. 49, No. 4 (2010), pp. 146-162, at p. 149

[48] Papastavridis, Efthymios, "'Fortress Europe' and FRONTEX: Within or Without International Law?", *Nordic Journal of International Law*, Vol. 79, No. 1 (2010), pp. 75-111, at p. 75.

responsibility for rescuing migrants in the Mediterranean fell to the Member States individually. For the year 2013-2014, search and rescue operations were carried out by the Italian Operation Mare Nostrum. According to the Italian Navy, this operation, which was established in order to control migration to Europe, rescued a total of 150,810 migrants.[49] The European Commission contributed €1.8 million from its External Borders Fund to support Mare Nostrum,[50] but this amount was paltry in comparison to the €9.5 million per month required to sustain it.[51] Ultimately, citing a strain on Italian public finances and a lack of support from other European countries, Italy ended Operation Mare Nostrum in 2014. The task was evidently too great for a single Member State, but international support and cooperation was not forthcoming. Even other EU Member States – which have made commitments to protect the right to seek and be granted asylum (Article 14 of the Charter of Fundamental Rights of the EU) – were not willing to contribute to ensure that asylum seekers could survive the hazardous journey to the EU.

Frontex did engage in several operations in the Mediterranean, but these generally focussed on combating illegal migration.[52] Moreover, the contribution of the EU and its Member States falls short of what is needed to prevent the loss of life of asylum seekers and other migrants in the Mediterranean. For example, Operation Triton was established with the aim of supporting Mare Nostrum, and as such, its mandate was much smaller than the Italian operation. In comparison to Mare Nostrum's monthly cost of €9.5 million, Operation Triton

[49] Italian Ministry for Defence, "Mare Nostrum Operation", available at: http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx (last accessed 2 January 2016).
[50] European Commission, Press Release: "Frontex Joint Operation 'Triton' – Concerted efforts to manage migration in the Central Mediterranean", 7 October 2014, available at: http://europa.eu/rapid/press-release_MEMO-14-566_en.htm (last accessed 2 January 2016).
[51] "Tidal Wave: More Horrific Deaths in the Mediterranean", *The Economist*, 5 July 2014, available at: http://www.economist.com/news/europe/21606301-more-horrific-deaths-mediterranean-tidal-wave [last accessed 2 January 2016].
[52] See Operation Hermes (2011), Operation Aeneas (2012), Operation Poseidon Sea (2014).

was given a budget of only €2.9 million per month.[53] Where the Italian Navy operated in international waters up to the Libyan coast, Triton would patrol only 30 nautical miles from Europe, a distance which extends just beyond Italian waters.[54] Nonetheless, when the Italian operation ended, Triton was required to replace it. Although this meant that the search and rescue operations were being carried out by a greater number of states, it also greatly reduced the resources being invested into rescuing asylum seekers and migrants at sea. By allocating fewer resources towards rescue operations, the EU failed to take necessary action which would protect the ability of asylum seekers to survive their journey and gain access to asylum procedures in Europe.

However, it is important to note that the EU's approach seemed to change as it began to realise the important role of its agencies in protecting access to asylum. In May 2015, the European Commission published a communication on a "European Agenda on Migration".[55] Firstly, this agenda identified a new "hotspot" approach to be taken by the EU, which would involve three EU agencies – the European Asylum Support Office (EASO), Frontex and Europol – assisting Member States to identify, register and fingerprint migrants as they arrive.[56] Notably, EASO would assist Member States in processing asylum requests,[57] a step which will better protect access to asylum by providing states with the resources needed to continue processing applications even under great pressure. Secondly, the agenda noted the need to increase the budget of these EU agencies "to restore the level of intervention provided under the former Italian 'Mare

[53] European Commission, Press Release: "Frontex Joint Operation 'Triton' – Concerted efforts to manage migration in the Central Mediterranean", 7 October 2014, available at: http://europa.eu/rapid/press-release_MEMO-14-566_en.htm (last accessed 2 January 2016).
[54] Nielsen, Nikolaj, "Frontex mission to extend just beyond Italian waters", *EUobserver*, Brussels, 7 October 2014, available at: https://euobserver.com/justice/125945 [last accessed: 4 April 2016].
[55] European Commission, "A European Agenda on Migration", COM(2015) 240 final, 13 May 2015.
[56] "A European Agenda on Migration", p. 6.
[57] "A European Agenda on Migration", p. 6.

Nostrum' operation".[58] The Commission therefore published an amendment to the budgets of its Triton and Poseidon Operations, with the aim of tripling their budgets.[59] Finally, and perhaps most importantly, the mandate of Frontex has since been referred to as a "dual role of coordinating operational border support to Member States under pressure, and helping to save the lives of migrants at sea".[60] These changes could result in the EU actively protecting access to asylum, but only if Frontex's interception operations allow individuals the opportunity to apply for asylum.

Like Frontex, the Australian 'Operation Sovereign Borders' (OSB) also implements interception of unauthorised boats of asylum seekers and sometimes tows them back to Indonesian waters.[61] This is problematic as pushbacks to Indonesia risk infringing on the principle of *non-refoulement*, which prohibits states from returning a person without examining the merits of their claim to a place where they risk being persecuted. This principle requires Australia to refrain from any action or omission which might put an asylum seeker at risk of persecution, not only by returning them to their country of origin, but also by sending them to a transit country where they are exposed to harm or to any country which might *refoule* the asylum seeker.[62] As Indonesia has not ratified the Refugee Convention, protection of refugees is not provided for by Indonesian law. Australia therefore has no guarantees that returned asylum seekers will be free from persecution in Indonesia. By sending asylum seekers to a country where there is no legal guarantee of international protection, Australia runs a large risk of breaching the principle of *non-*

[58] "A European Agenda on Migration", p. 3.
[59] European Commission, "Draft Amending Budget No. 5 to the General Budget 2015: Responding to Migratory Pressures", COM(2015) 241 final, 13 May 2015, p. 4.
[60] "A European Agenda on Migration", p. 3.
[61] Chia, Joyce; McAdam, Jane and Purcell, Kate, "Asylum in Australia: 'Operation Sovereign Borders' and International Law", *Australian Year Book of International Law*, Vol. 32, pp. 33-64, at p. 36.
[62] Chia et al., "Asylum in Australia", p. 46.

refoulement, and is guilty of preventing asylum seekers from accessing asylum procedures in its own territory.

Another method of blocking or restricting access to asylum and asylum procedures is to build fences in order to prevent asylum seekers (as well as other types of migrants) from crossing borders into a territory where they would otherwise have the right to seek asylum regardless of whether the border crossing was done in a regular or irregular manner. This approach was taken by the Hungarian Government in September 2015, when it amended the Act on Asylum[63] in order to introduce barbed wire fences at the border with Serbia. According to a comment on the amendment by the Hungarian Helsinki Committee, the legislation allows for the rejection of applications from asylum seekers who have travelled through a safe third country,[64] [65] a category which includes Serbia, despite the UNHCR's position that Serbia is not a safe country for asylum seekers.[66] Crossing the fenced border in an irregular manner was made a criminal offence, punishable by up to three years' imprisonment, and border crossings are henceforth only allowed at the designated "transit zones". This policy – which includes erecting barbed-wire fences, limiting border crossings and implementing accelerated asylum determination procedures with restrictive criteria at the border – has the clear intention of preventing asylum seekers from accessing asylum in Hungary. The measures also have the side-effect of deflecting individuals wishing to seek asylum in the EU towards the border between Serbia and Croatia.

The Hungarian policy has been widely criticised and its legality questioned by various

[63] Hungary: *Act LXXX of 2007 on Asylum (2015)*, 1 January 2008, available at: http://www.refworld.org/docid/4979cc072.html [last accessed 28 March 2016]
[64] Hungarian Helsinki Committee, "Building a legal fence: Changes to Hungarian asylum law jeopardise access to protection in Hungary", 7 August 2015, pp. 1-2, available at: http://helsinki.hu/wp-content/uploads/HHC-HU-asylum-law-amendment-2015-August-info-note.pdf [last accessed: 28 March 2016].
[65] The concept of safe third countries will be further explored in Section 1.2.3(i) below.
[66] UNHCR, "Serbia as a Country of Asylum: Observations on the Situation of Asylum-Seekers and Beneficiaries of International Protection in Serbia", August 2012, available at: http://www.unhcr.rs/media/UNHCRSerbiaCountryofAsylumScreen.pdf [last accessed: 28 March 2016].

academics, human rights advocates and policymakers. Boldizsár Nagy comments that it is not clear whether those "coming directly" to Hungary to seek refuge are exempt from criminal charges for crossing the border, as is required by Article 31 of the Geneva Convention, and there has not yet been a court decision to clarify this.[67] The UN's High Commissioner for Refugees at the time, Antonio Guterres, also reiterated that "it is not a crime to cross a border to seek asylum".[68] The European Commission was also concerned with the compatibility of the Hungarian policy with EU law – notably the EU asylum and borders acquis and the Charter of Fundamental Rights of the EU – and Directors-General from DG Migration and Home Affairs and DG Justice and Consumers wrote a joint 12-page letter to the Hungarian Permanent Representative to the European Union outlining their concerns.[69] The Directors-General highlighted their worry that criminal sanctions might be in violation of Article 31 of the Geneva Convention which requires that states do not impose sanctions on asylum seekers for illegally crossing the border (the Directors-General did not mention the requirement that the asylum seekers come directly from a territory where their life or freedom is threatened).[70] They also asked for clarification on which border crossings were closed, stressing that access to the asylum procedure is hampered when border infrastructure, including fences, create a situation where asylum seekers are not able to safely and easily reach a crossing point and submit their asylum application.[71]

Moreover, often those who access the asylum procedure are not likely to get a fair

[67] Nagy, Boldizsár, "Parallel realities: refugees seeking asylum in Europe and Hungary's reaction", *EU Immigration and Asylum Law and Policy Blog*, 4 November 2015, available at: http://eumigrationlawblog.eu/parallel-realities-refugees-seeking-asylum-in-europe-and-hungarys-reaction/ [last accessed: 23 March 2016].
[68] United Nations High Commissioner for Refugees, Press Release: "UNHCR urges Europe to change course on refugee crisis", 16 September 2015, available at: http://www.unhcr.org/55f9a70a6.html [last accessed: 26 March 2016].
[69] European Commission, Ref. Ares(2015)4109816, 6 October 2015, available at: http://www.statewatch.org/news/2015/oct/eu-com-letter-hungary.pdf [last accessed: 28 March 2016].
[70] European Commission, Ref. Ares(2015)4109816, p. 7.
[71] European Commission, Ref. Ares(2015)4109816, p. 10.

assessment of their case. Nagy observes that the refugee status determination procedure carried out in border zones does not allow applicants proper access to legal assistance and legal remedies.[72] Indeed, he declares that the Hungarian policy of assessing applications at the border treats the transit zone as an area which is outside of the Hungarian territory, an approach which was found to be illegal in the *Amuur v. France* case of the European Court of Human Rights.[73] The Hungarian Helsinki Committee has stressed that allowing the examiners of asylum applications to refuse applicants who have travelled through a safe third country, while including Serbia on the list of safe third countries, will result in a "quasi-automatic rejection at first glance of 99% of asylum claims" (the rate of applicants who seek asylum in Hungary after travelling through Serbia).[74] Human Rights Watch has equally highlighted that the new measures make it "nearly impossible for asylum seekers to get protection in Hungary", thereby violating the country's international obligations.[75]

The Hungarian measures clearly have the effect of not only restricting access to the asylum procedure, but also inhibiting access to international protection in Hungary. The abovementioned interventions by academics, activists and policymakers indicate a general consensus that building a fence and restricting border crossings are very likely to prevent access to the asylum procedure and therefore access to asylum in that territory. In this instance, it is not that the state obligations are uncertain, but rather that the state has carried out measures which are likely to restrict access to asylum without being transparent on the

[72] Nagy, Boldizsár, "Parallel realities: refugees seeking asylum in Europe and Hungary's reaction", *EU Immigration and Asylum Law and Policy Blog*, 4 November 2015, available at: http://eumigrationlawblog.eu/parallel-realities-refugees-seeking-asylum-in-europe-and-hungarys-reaction/ [last accessed: 23 March 2016].
[73] European Court of Human Rights, *Amuur v. France*, Application no. 19776/92, Judgment of 26 June 1996.
[74] Hungarian Helsinki Committee, "Building a legal fence: Changes to Hungarian asylum law jeopardise access to protection in Hungary", 7 August 2015, pp. 1-2, available at: http://helsinki.hu/wp-content/uploads/HHC-HU-asylum-law-amendment-2015-August-info-note.pdf [last accessed: 28 March 2016].
[75] Human Rights Watch, "Hungary: New Border Regime Threatens Asylum Seekers", 19 September 2015, available at: https://www.hrw.org/news/2015/09/19/hungary-new-border-regime-threatens-asylum-seekers [last accessed: 23 March 2016].

precise actions it has taken. This results in a lack of clarity on whether the policy respects international and European law.

ii. In the country of origin: visa requirements

Visa requirements are a further mechanism used by states to prevent asylum seekers from accessing their territory. These are implemented by European Union countries as well as Australia. Although there are many practical reasons to use visas, such as controlling irregular migration and ensuring security, they also serve the purpose of preventing those in need of international protection from seeking asylum, as access to asylum procedures is only available once the individual is present in the country. Indeed, in some cases, the prevention of access to asylum is deliberate. The United Kingdom, for example, has used visa policy to stem the flow of asylum seekers. In 1985, the UK government explicitly stated that the introduction of visas for Sri Lankans was in response to the arrival of Tamil asylum applicants. The UK subsequently introduced visas after a rise in asylum applications from Turkey in 1989, Yugoslavia in 1992, Colombia in 1997, Slovakia in 1998 and Zimbabwe in 2002.[76] In such cases, the introduction of visa requirements is a concerted effort to prevent those in need of international protection from accessing asylum procedures which they might otherwise be able to access.

However, even if the introduction of new visa requirements aims to prevent those in need of international protection from accessing asylum procedures, it is not clear whether they run afoul of the Geneva Convention. Virginie Guiraudon refers to the externalisation of

[76] Ryan, Bernard, "Extraterritorial Immigration Control: What Role for Legal Guarantees?", in Ryan, Bernard and Mitsilegas, Valsamis, *Extraterritorial Immigration Control*, (Leiden, Martinus Nijhoff Publishers: 2010), p. 9.

immigration control as "short-circuiting judicial constraints on migration control",[77] as there are fewer legal requirements for immigration control which happens beyond the state's borders. In the context of visa requirements hindering access to asylum, this description is particularly apt, as such measures take advantage of the Geneva Convention definition of a refugee, which states that the individual must be outside their country of origin in order to be classified as a refugee. As a result, access to asylum procedures can be denied to individuals who remain in their country of origin, and so, denying visas is not considered to be in breach of the Refugee Convention. However, such policies may still be challenged, as they could render the right to leave one's country – as expressed in Article 13.2 of the Universal Declaration of Human Rights, Article 12(2) of the International Covenant on Civil and Political Rights and Article 2 of Protocol no. 4 of the European Convention on Human Rights – inaccessible to those who may need it most. For this reason, visa requirements represent a mechanism which has human rights implications, even if it does not necessarily breach the Geneva Convention.

1.2.2 Actions by third parties: Privatised migration control and carrier sanctions

Just as there are situations where states' actions may obstruct access to asylum procedures, there are also instances where third parties hinder the ability of asylum seekers to access the asylum process. The common practice of privatising border control enables such situations. In order to avoid direct contact between state agents on the territory and the asylum seeker – at which point the asylum seeker may be considered to be under the jurisdiction of the state and obligations of *non-refoulement* may therefore be engaged – states commonly offload the examination of visas to private actors such as passenger

[77] Guiraudon, Virginie, "Before the EU Border: Remote Control of the 'Huddled Masses'", in Groenendijk, Kees; Guild, Elspeth and Minderhoud, Paul (eds.), *In Search of Europe's Borders*, (The Hague, Kluwer Law International: 2002), p. 194.

airlines. Because it is not well established whether international human rights law is binding on private actors, there remains little guidance on the legitimacy of such practices.

Countries incentivise the cooperation of these third parties by implementing carrier sanctions for actors which allow individuals to travel without a valid visa. One example of this practice can be seen in the EU. Carrier sanctions were introduced at the common European level in Council Directive 2001/51/EC of 28 June 2001which supplements Article 26 of the 1985 Schengen Convention.[78] Air carriers are required to ensure that travellers are in possession of the correct documents, and are responsible for their return if not. Airline companies that transport foreigners not in possession of valid travel documents can be subject to a fine of between €3,000 and €5,000 per undocumented individual.[79] Most businesses - motivated by economics and not human rights - have taken advanced security measures in order to avoid the fines, such as hiring former border personnel and receiving training by national immigration authorities.[80] This practice ensures that asylum seekers are denied the opportunity to meet a country official and declare their wish to apply for asylum. Because it is still contested whether and to what extent private actors are bound by international human rights law, it is difficult to establish whether these measures are in violation of human rights standards.

1.2.3 Actions which shift responsibility for examining asylum applications to third countries

States also avoid their responsibility to allow access to their asylum procedures by offloading the responsibility of analysing applications to another country. This practice

[78] Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, 2001 O.J. L187/45.
[79] Council Directive 2001/51/EC of 28 June 2001, Article 4.
[80] Gammeltoft-Hansen, Thomas and Gammeltoft-Hansen, Hans, "The Right to Seek – Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU", *European Journal of Migration and Law*, Vol. 10, No. 4 (2008), p. 450.

raises questions not only about its legality under international refugee law but also regarding whether the asylum seekers concerned have sufficient safeguards against *refoulement*. As outlined in the examples below, there is evidence to suggest that when a state refuses to analyse an asylum claim by asserting that the claim is the responsibility of another state, there is a risk that the asylum seeker will not receive an internationally acceptable standard of protection.

i. Safe third country concepts

The concept of safe third countries is used by states to declare that an asylum application is not its responsibility because an asylum seeker has a certain relationship with another country. Safe third countries are countries other than the asylum seeker's country of origin or the country in which they are applying for asylum where it can be considered the applicant is not at risk of persecution. These concepts exist in both Australian and EU law.

In the European context, the concept of safe third countries is codified in Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013[81] (henceforth, Procedures Directive), which is the recast of the earlier Council Directive 2005/85/EC of 1 December 2005.[82] The recast Procedures Directive defines a safe third country as a country outside of the EU in which:

a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;

b) there is no risk of serious harm as defined in Directive 2011/95/EU;

c) the principle of *non-refoulement* in accordance with the Geneva Convention is respected;

[81] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 2013 O.J. L180/60.
[82] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, 2005 O.J. L326/13.

d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and

e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.[83]

The Directive provides for the possibility to reject an asylum claim on the basis that there is another country which could be considered the first country of asylum, or if the asylum seeker has a sufficient link with a state on the examining country's list of "safe third countries".[84] EU law therefore allows Member States to refuse an application if it can be processed elsewhere.

Cathryn Costello points out that the safety of third countries is evaluated by a general assessment which lacks a case-by-case analysis of individual safety.[85] Indeed, the recast Procedures Directive seems to acknowledge the need to consider the safety of the individual being returned on a case-by-case basis in addition to the safety of the particular third country. Article 38(2) provides,

> [T]he application of the safe third country concept shall be subject to rules laid down in national law, including […] (b) rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology *shall include case-by-case consideration of the safety of the country for a particular applicant* and/or national designation of countries considered to be generally safe.[86] [emphasis added]

[83] Directive 2013/32/EU, Article 38(1).
[84] Peers, *EU Justice and Home Affairs*, p. 349.
[85] Costello, Cathryn, "Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored", *Human Rights Law Review*, Vol. 12, No. 2 (2012) p. 311.
[86] Directive 2013/32/EU, Article 38(2).

However, the fact that the clause following this requirement contains "and/or" indicates that a case-by-case examination can be substituted with a national designation of countries considered to be generally safe, which amounts to a reduction of protection.

In Australia, the concept stems from Section 36(3) of the *Migration Act 1958*, which states that:

> Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.[87]

The safe third country concept has further developed through the case law of the Australian Courts, in *Minister for Immigration and Multicultural Affairs v Thiyagarajah* [88] and other cases.[89] In *Patto v.Minister for Immigration* (2000), the circumstances in which an individual may be returned to a third country in which they have stopped or stayed over for a time without risking *refoulement* were outlined as follows:

> 1. …where the person has a right of residence in that country and is not subject to Convention harms therein.
>
> 2. …whether or not the person has right of residence in that country, if that country is a party to the Convention and can be expected to honour its obligations thereunder.

[87] Australia: *Act No. 62 of 1958, Migration Act 1958 - Volume 1* [Australia], 8 October 1958.
[88] Australia: *Minister for Immigration and Multicultural Affairs v Thiyagarajah*, (1997) 80 FCR 543.
[89] See *Rajendran v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 526; *Minister for Immigration and Multicultural Affairs v Gnanapiragasam* (1998) 88 FCR 1; *Al-Zafiry v Minister for Immigration and Multicultural Affairs* (1999) 58 ALD 663; *Minister for Immigration and Multicultural Affairs v Al-Sallal* (1999) 94 FCR 549; *Patto v Minister for Immigration and Multicultural Affairs* (2000) 106 FCR 119; *Al-Rahal v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 73.

> 3. …notwithstanding that the person has no right of residence in that country and that the country is not a party to the Convention, provided that it can be expected, nevertheless, to afford the person claiming asylum effective protection against threats to his life or freedom for a Convention reason.[90]

In Australian law, therefore, it is not necessary that a state be party to the Refugee Convention provided it can offer effective protection. This may be a tactical step, as many of Australia's neighbours have not signed or ratified the Convention. Nonetheless, it means that Australian law offers asylum seekers less safeguards against *refoulement* than its EU counterpart.

Moreover, the legality of safe third country concepts is questionable. The 1951 Convention on the Status of Refugees sets out only two possibilities for denying refugee status on the basis of being capable of seeking it elsewhere: if the refugee has access to protection from a UN agency other than UNHCR, or if she has the equivalent protection of a national in a country of former residence.[91] Following from this, Hathaway and Foster contend that there is no basis in international law, other than these two exceptions, for denying refugee status solely based on the possibility of seeking protection elsewhere.[92] Rejecting an asylum seeker because they are the responsibility of a safe third country could therefore be in contravention to international law.

As noted above, removing an asylum seeker based on safe third country concepts requires the strong safeguard of a case-by-case analysis of the safety for the individual. States which do not ensure this safeguard risk *refoulement* of the asylum seeker and therefore do not respect their right to access the asylum procedure.

[90] Australia: *Patto v Minister for Immigration & Multicultural Affairs* [2000] FCA 1554, para. 37.
[91] Hathaway, James C. And Foster, Michelle, *The Law of Refugee Status,* (Cambridge, Cambridge University Press: 2014) p. 32.
[92] Hathaway and Foster, *The Law of Refugee Status,* p. 33.

ii. Readmission agreements

In addition to safe third country concepts, there are other examples of regular, institutionalised cooperation with external states which may put refugees at risk. One such measure is the use of readmission agreements. The European Migration Network defines these as:

> [agreements] between the EU and/or a Member State with a third country, [generally] on the basis of reciprocity, establishing rapid and effective procedures for the identification and safe and orderly return of persons who do not, or no longer, fulfil the conditions for entry to, presence in, or residence on the territories of the third country or one of the Member States of the European Union, and to facilitate the transit of such persons in a spirit of cooperation.[93]

These agreements are used in parallel by the European Union and its Member States as a tool to address the issue of irregular immigration. These agreements stipulate the procedures to be used in the return of migrants illegally present in the EU. The agreements are based on reciprocity, meaning that the terms apply equally to the return of irregular migrants both to and from the signatory countries. However, the actual application of these readmission agreements is more one-sided, with EU countries returning non-EU migrants much more often, and the receiving, non-EU country bearing the cost of the return.[94]

For the EU, the benefit of such agreements is clear, as they allow for a more efficient and reliable system for removing irregular migrants from EU territory. However, this arrangement at its core does not benefit the receiving countries. As mentioned, the costs of readmission are largely borne by the receiving state. Often, they must support the returned

[93] Karunaratne, Chandana and Abayasekara, Ashani, *Managed Migration: Review of Readmission Agreements and a Case Study of Sri Lanka*, (Colombo, Institute of Policy Studies for Sri Lanka: 2012), p. 10.
[94] Karunaratne et al., p. 10.

migrants through psychological counselling, financial support, and training programmes in order to facilitate their re-entering the labour market.[95] As the weight of the obligations of these agreements rests squarely on the receiving country, the EU offers incentives in order to encourage third countries to enter into such arrangements. These benefits take the form of compensatory measures, including trade concessions, access to a regional trading bloc, increased quotas for economic migrants, development aid and the facilitation of entry visas for citizens of that country.[96]

Readmission agreements open up the possibility of human rights abuses of asylum seekers, as they might not be identified as asylum seekers upon entry into a country and may be therefore treated as undocumented migrants. Signatories of readmission agreements must commit to respecting the Geneva Convention relating to the Status of Refugees and its protocol, the International Convention on Civil and Political Rights, the United Nations Convention Against Torture and, in the case of EU Member States, the EU Charter of Fundamental Rights. Yet on the contrary, readmission agreements have often been criticised for the lack of transparency, notably in the process of removing the migrants.[97]

As outlined above, there are numerous state practices which can amount to violation of the right to access asylum procedures. The following chapters will explore why this right is not well respected by states, and will propose a mechanism to better ensure its protection.

[95]Karunaratne et al., p. 10.
[96]Karunaratne et al., p. 18-19.
[97]Karunaratne et al., p. 20.

Chapter II: Factors contributing to uncertain obligations

The previous chapter dealt with the recognition of the right to asylum to varying degrees in international and European law and state practices which prevent access to asylum procedures. This gap between the rights set out in international law and their protection in practice is not exclusive to the right to asylum. Similar difficulties have existed in other areas of human rights, and philosopher Onora O'Neill has analysed the possible reasons some rights are more difficult to ensure than others.[98] This chapter will outline her theory and its applicability to the right to seek asylum in an attempt to provide a possible solution which could reduce the inconsistencies between law and practice.

2.1 O'Neill and Imperfect Rights

O'Neill discussed the difficulty in ensuring the protection of economic, social and cultural (ESC) rights, identifying problems in the structure of the right which make it difficult to identify the corresponding obligations and ensure they are met. Her analysis, although perhaps outdated in its strict division of ESC rights and civil and political (CP) rights, could contribute to an understanding of how better to ensure states meet their obligations to provide access to asylum.

2.1.1 Imperfect obligations

O'Neill observes that the international human rights regimes identifies many abstract universal rights to goods and services, but is vague about the allocation of corresponding obligations which are necessary in order for these rights to be realised.[99] She proposes that

[98] See O'Neill, Onora, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning*, (Cambridge, Cambridge University Press: 1996); O'Neill, Onora, *Bounds of Justice*, (Cambridge, Cambridge University Press: 2000); O' Neill, Onora, "The Dark Side of Human Rights", *International Affairs*, Vol. 81, No. 2 (2005), pp. 427-439.
[99] O'Neill, "The Dark Side of Human Rights", p. 428.

the different characteristics of various types of rights directly affect the clarity of the corresponding duties, and that some rights are harder to enforce as the duty-bearer and the required action are not easily identified.

For O'Neill, the distinction between liberty and welfare rights is key.[100] For example, she claims that there is no problem in allocating obligations in the case of universal liberty rights, as all actors are obliged to respect them.[101] It is clear when an actor violates a liberty right even if the obligation has not been allocated to a specific party, but a violation of a welfare right is not apparent unless the duty bearer has been identified and the obligation allocated.[102] One reason for this is that there are a number of non-state actors whose actions are necessary in order for welfare rights to be respected. The right to food requires the action of farmers, and the right to health, physicians, yet these are private actors who are not legally bound by an international human rights treaty ratified by states. Therefore, according to O'Neill, welfare rights will inevitably lead to uncertainty unless the corresponding obligations and the duty bearers are well defined.[103]

O'Neill's argument is based on an assumption which conceptualises liberty and welfare rights as resulting in perfect and imperfect duties, respectively. Liberty rights create perfect duties as the action (or inaction) is identified, the duty bearer is apparent and the beneficiary is identified. Welfare rights, on the other hand, correspond to imperfect duties because the exact duty bearer, beneficiary and required action are not necessarily specified.[104] O'Neill conceptualises universal liberty rights as requiring duty-bearers to refrain from doing something – otherwise known as negative rights – and universal welfare

[100] O'Neill, "The Dark Side of Human Rights", pp. 427-428.
[101] O'Neill, "The Dark Side of Human Rights", p. 432.
[102] O'Neill, "The Dark Side of Human Rights", p. 428.
[103] O'Neill, "The Dark Side of Human Rights", pp. 428-429.
[104] Kuosmanen, Jaakko, "Perfecting Imperfect Duties: The Institutionalisation of a Universal Right to Asylum", *The Journal of Political Philosophy*, Vol. 21, No. 1 (2013), pp. 26-28.

rights as requiring the provision of goods and services – also called positive rights. She believes that only liberty rights are 'claimable' as both the duty bearer and the required performance are identifiable. Conversely, universal welfare rights are perceived to be unclaimable as the right-holder cannot identify which actor should have taken which action without institutions being put in place and relationships clearly defined.[105] In other words, O'Neill's theory is that the claimability, and therefore legitimacy, of a right depends on whether it is perfect or imperfect in nature.

The reference to institutions and the definition of relationships indicates why welfare rights can work well at a national level, where funding and distribution of welfare is coordinated by the government. In this realm, individuals can easily identify what their entitlements are and which actor owes it to them. In theory, then, a perfecting institution which defines relationships and obligations at the international level could help to ensure the protection of otherwise abstract rights.

2.1.2 A note on the categorisation of human rights

O'Neill's theory that the right to goods and services is not claimable is based on a conception of rights which does not accurately correspond to reality. According to O'Neill, liberty rights protect people from the state and are perceived as "freedoms from". Welfare rights, on the other hand, are realised through the state, and are perceived as "rights to".[106] As a result, she argues that the duty bearer and their respective obligations are more evident in the former, and more difficult to attribute in relation to the latter. However, O'Neill's use of this rather out-dated distinction fails to hold up under scrutiny. Below I will explain the traditional conceptions of CP and ESC rights, and then propose why this understanding is

[105] O'Neill, Onora, *Bounds of Justice* (Cambridge, Cambridge University Press: 2000), p. 105.
[106] For a detailed treatise on positive and negative rights, see: Berlin, Isaiah "Two Concepts of Liberty" in Berlin, Isaiah, *Four Essays on Liberty*, (Oxford, Oxford University Press: 1969).

not an accurate way of perceiving rights in the real world.

Civil liberties – including the right to life, the prohibition of torture, the prohibition of slavery, freedom of expression, freedom of religion and freedom of assembly, among others – aim to protect the individual or group against the state. They are often categorised as negative rights, meaning that they require the state to refrain from taking actions which violate them. In theory, if the state is required not to take action, then ensuring protection of these rights should not cost money to the state. Political rights ensure that the individual has access to the public decision-making process. They include the right to vote, the right to run for office, freedom of association and the right to assemble. This type of right is often conceived of as imposing mainly negative duties, and therefore being close in nature to civil liberties. Indeed, these two categories have frequently been grouped together in international treaties, notably within the International Covenant on Civil and Political Rights. The idea that CP rights impose only negative duties on the state, regardless of its accuracy, has been important in the conceptualisation of this type of right by academics, including O'Neill.

In contrast to CP rights, ESC rights are traditionally seen to embody the material claims an individual has against the state. These are claims on certain goods and services rather than protection or participation in decision-making. They require positive action by society, including the provision of healthcare, education and social security. For those who cannot provide basic subsistence for themselves, ESC rights require that the state provide food, clothing and housing. They also encompass the right to marry, the protection of the family, the right to work and to social welfare in case of unemployment. Such rights are moral claims against society at large, as it is the responsibility of the entire society to ensure the

economic security of the most dependent and helpless members.[107] Because ESC rights are perceived as imposing positive duties, and requiring states and societies to take actions which may be costly, it is often seen to be more difficult to ensure their protection than it would be to protect negative rights.

According to O'Neill, the requirement for positive action in relation to ESC rights, combined with a failure to explicitly specify the actor responsible or the required action means that these rights are not claimable. However, O'Neill's dependence on this traditional conception of rights is misleading. Although CP rights are purely negative in theory, Shue argues that in order to ensure their protection, states must take the positive action of setting up protective institutions.[108] In relation to civil liberties, although "freedom from" seems to suggest a role of inaction on the part of the state, this is only true in a pre-institutional utopia. In reality, these rights can only be protected if there is an enforcement mechanism in existence and an avenue to access a remedy. As Osiatynski points out, even a freedom such as the right to make contracts, which seems to imply total inaction on the part of the state, is meaningless without a state-run court of law in which to enforce contracts between individuals.[109] He further emphasises the importance of conceiving the "right to assemble", rather than "freedom of assembly", because it implies not only the negative duty of states to refrain from preventing or obstructing assemblies, but also imposes positive obligations on the state to provide public space and protect various political gatherings.[110] To take O'Neill's distinction of liberty versus the provision of goods and services, even CP rights require the state to provide services such as a police force, civil and criminal courts and regular elections. All rights require some action on the part of the state, and for this reason, O'Neill's strict division of CP and ESC rights is superficial and simplistic.

[107] Osiatynski, *Human Rights and their Limits*, (Cambridge, Cambridge University Press: 2009), p. 110.
[108] Shue, Henry, *Basic Rights* (Princeton, Princeton University Press: 1996), p. 39.
[109] Osiatynski, *Human Rights and Their Limits*, p. 115.
[110] Osiatynski, Wiktor, *Human Rights and their Limits*, p. 109.

Secondly, O'Neill's argument that ESC rights are unclaimable dismisses the legitimacy of this group of rights based solely on the difficulties involved in their protection. Freeman comments on the failure of the international community to implement ESC rights, claiming in the defence of ESC rights that "a law is not a bad law just because it is imperfectly implemented".[111] Equally, it is important to note that although ESC rights create imperfect duties, this does not mean that these rights must remain unfulfilled. Kuosmanen highlights that O'Neill's conception of universal welfare rights does not necessarily undermine their legitimacy, but rather it indicates the need for an international 'perfecting' institution which identifies relationships and holds duty-bearers to account. He stresses that such institutions need not necessarily be equivalent to mediating institutions in welfare states.[112] Rather, he suggests that there are other ways to determine the duty-bearer and the required action.[113] Duty-bearers are identified when 'special relationships' form, for example, when an asylum seeker arrives in a state which has the capacity to offer international protection.[114] The act of seeking asylum could therefore be a 'perfecting' mechanism which identifies the duty-bearer and the required action.

Despite the significant disagreement with O'Neill's arguments on the legitimacy of ESC rights, her theory raises an important point. O'Neill's work has identified a problem with the allocation of duties in the area of ESC rights, leading to their unfulfillment in certain situations. This is an important observation which is applicable not only to the welfare rights identified in her work, but also to any right which does not have clear corresponding duty-bearers and obligations. The following section will outline the ambiguities relating to the obligations generated by right to seek asylum, highlighting the applicability of O'Neill's

[111]Freeman, Michael, "Conclusion: Reflections on the Theory and Practice of Economic and Social Rights", in Minkler, Lanse (Ed.), *The State of Economic and Social Human Rights*, (Cambridge, Cambridge University Press: 2013), p. 365.
[112]Kuosmanen, "Perfecting Imperfect Duties", p. 33.
[113]Kuosmanen, "Perfecting Imperfect Duties", p. 34.
[114]Kuosmanen, "Perfecting Imperfect Duties", p. 34.

theory on the allocation of duties to this area of human rights.

2.2 Ambiguity surrounding right to seek asylum

As the first chapter outlined, the right to seek asylum is established in international law. However, despite the evidence to support this, states engage in policies which actively aim to prevent access to their asylum procedures. Although there is evidence that the right exists, it seems to lack a clear corresponding obligation and duty bearer. This chapter will highlight the uncertainties and ambiguities stemming from the right to seek asylum in the areas of *non-refoulement*, extraterritorial jurisdiction, third party actors and international burden-sharing.

2.2.1 Ambiguity surrounding state actions to prevent access to their territory

i. Obligations of non-refoulement

The rights of refugees as defined in the Refugee Convention accrue at various stages of the refugee's presence, leading to ambiguity surrounding the *non-refoulement* obligations of states towards refugees who have not yet accessed their asylum procedure. This question directly affects situations of interception and death at sea, as described in Section 1.2.1, part (i). For example, freedom of religion is owed by states "to refugees within their territory".[115] Freedom of association is owed by states to all refugees "lawfully staying in their territory".[116] In contrast, a refugee has the right to access courts "on the territory of all Contracting States",[117] and presence or lawfulness of stay is not a necessary condition. Similarly, the most significant provision for this work – that on *non-refoulement*, which indirectly protects access to asylum processes by prohibiting the removal of a refugee –

[115] *Convention Relating to the Status of Refugees*, Article 4.
[116] *Convention Relating to the Status of Refugees*, Article 15.
[117] *Convention Relating to the Status of Refugees*, Article 16.

does not explicitly state whether it applies only to refugees lawfully present or staying in a territory, or whether it protects refugees beyond the territory of a state.

Article 33(1) requires states to refrain from returning a refugee "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened".[118] However, there remains debate over the geographical application of this provision. Some argue that the provision should be interpreted restrictively, protecting only refugees within a given territory.[119] This was the approach taken by the United States Supreme Court in *Sale v. Haitian Centers Council, Inc.* involving the interdiction of Haitian refugees.[120] The Supreme Court concluded that Article 33(2) sheds light on Article 33(1), as it specifies that the provision does not protect "refugees whom there are reasonable grounds for regarding as a danger to the security of *the country in which he is [located]*" [emphasis added]. This geographic criterion is deemed to also apply to Article 33(1), as if it did not, it would create an anomaly whereby dangerous aliens on the high seas would be protected by Article 33(1), but dangerous aliens on the territory would not be.[121] The United States has since maintained its position that the provision only applies to refugees within its own territory.[122]

Others argue that the use of the phrase "in any manner whatsoever" in Article 33 (1) strongly suggests that the provision also applies to the refusal of entry of refugees at the

[118] *Convention Relating to the Status of Refugees*, Article 33.
[119] See eg. Robinson, Nehemiah, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation – A Commentary*, (New York, Institute for Jewish Affairs: 1953); Grahl-Madsen, Atle, *Commentary on the Refugee Convention 1951 Articles 2-11, 13-37*, (Geneva, Division of International Protection of the United Nations High Commissioner for Refugees: 1963 (republished 1997))
[120] *United States: Sale v. Haitian Centers Council, Inc.*, 113S.Ct. 2549, 509 U.S. 155 (1993).
[121] *United States: Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), p. 20.
[122] See US Mission to the United Nations and other international organisations 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.

border of a territory.[123] It could also be argued that the protection should extend to any refugee under the jurisdiction of a state (i.e. within the effective control of a state whether within or beyond its borders). Gammeltoft-Hansen points out the legitimacy of this position, as the principle of *non-refoulement* has been incorporated into universal and regional human rights instruments which apply even where a state is exercising its jurisdiction extraterritorially.[124] Either of these approaches would be a more extensive interpretation than that of the US Supreme Court in *Sale*.

An alternative and even more extensive interpretation of the scope of Article 33 is that the provision applies to all refugees regardless of their location or relationship with a state. This was the approach taken by Lauterpacht and Bethlehem in an opinion prepared for the UNHCR, which contended that as *non-refoulement* constitutes a principle of customary international law, it is binding upon all states regardless of where their action takes place.[125] It is also the view espoused by Goodwin-Gill and McAdam, who, focussing on the language of Article 33(1), stress that it does not explicitly define where a refugee must be in order to benefit from the protection of *non-refoulement*, but rather prohibits *refoulement* "in any manner whatsoever".[126] These different interpretations of Article 33 of the Refugee Convention lead to debate surrounding the geographical scope of a state's obligations towards asylum seekers.

[123] See e.g. Weis, Paul, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by the Late Dr. Paul Weis*, (Cambridge, Cambridge University Press: 1995), p. 341; Sinha, S. Prakash, *Asylum in International Law*, (The Hague, Martinus Nijhoff: 1971), p. 111.

[124] Gammeltoft-Hansen, Thomas, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control*, (Cambridge, Cambridge University Press: 2011), p. 46 and pp. 81-93.

[125] Lauterpacht, Elihu and Bethlehem, Daniel, "The scope and content of the principle of *non-refoulement*: opinion" in Feller, Erika; Türk, Volker and Nicholson, Frances (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, (Cambridge, Cambridge University Press: 2003), p. 149.

[126] Goodwin-Gill, Guy and McAdam, Jane, *The Refugee in International Law*, (Oxford, Oxford University Press: 2007), p. 246.

In the context of other international treaties, such uncertainties are often mediated by an official interpretive body. Within the UN system, the human rights treaty bodies provide interpretation of the content their respective treaties through what are known as "General Comments". For example, the Human Rights Committee offers interpretation of the International Covenant on Civil and Political Rights, (ICCPR)[127] and the UN Committee on Economic, Social and Cultural Rights interprets the International Covenant on Economic, Social and Cultural Rights (ICESCR).[128] However, the Refugee Convention lacks an equivalent authoritative body to interpret state obligations. In addition, unlike other international treaties, there is no body responsible for ensuring consistent interpretation of the Refugee Convention, nor is there a supervisory body to hold states accountable for upholding their obligations.[129]

The UNHCR has made efforts to clarify the obligations on states, with the Executive Committee elaborating on the requirements of the principle of *non-refoulement*. It reiterated that *non-refoulement* applies to refugees regardless of whether they have been formally granted refugee status.[130] The Executive Committee also stressed that states must provide asylum seekers with access to fair and effective procedures for determining their status, and must not refuse refugees entry at frontiers without first determining their status and protection needs.[131] However, the mandate of the United Nations High Commissioner for Refugees does not include the ability to authoritatively declare the meaning of the

[127] United Nations General Assembly, *International Covenant on Civil and Political Rights*, Article 28.
[128] United Nations Office for the High Commissioner for Human Rights, *Economic and Social Council resolution 1985/17*, available at: ap.ohchr.org/documents/E/ECOSOC/resolutions/E-RES-1985-17.doc [last accessed: 4 April 2016].
[129] Hathaway, James C.; North, Anthony M. and Pobjoy, Jason, "Supervising the Refugee Convention", *Journal of Refugee Studies*, Vol. 26, No. 3, p. 323.
[130] UNHCR EXCOM Conclusion No. 82, "Safeguarding Asylum", 17 October 1997, para. (d)(i), available at: http://www.unhcr.org/3ae68c958.html [last accessed: 4 April 2016].
[131] UNHCR EXCOM Conclusion No. 82, "Safeguarding Asylum", 17 October 1997, paras. (d)(ii) and (iii).

Convention or decide on breaches thereof.[132] As such, its conclusions are not binding upon states parties. Because of the absence of any authoritative interpretative body, the scope of state obligations in relation to the right to *non-refoulement* remains unclear.

ii. Obligations of non-refoulement of persons within their country of origin

In addition to the above concerns surrounding the scope of state duties in relation to the principle of *non-refoulement*, there is the additional concern regarding migration control within the country of origin. This question is important in the case of visa requirements, as described in Section 1.2.1, part (ii). The principle of *non-refoulement* as expressed in the Refugee Convention guarantees that no state shall return a refugee to a territory in which they are at risk of persecution. However, as described earlier, the definition of a refugee under the Refugee Convention requires the individual to be outside their country of nationality.[133] As a result, those in need of international protection but who have not left their country of origin are not protected by the Convention's guarantee of *non-refoulement*. Therefore, operations in the country of origin – for example, visa applications, examinations by air carriers or interception carried out in foreign waters – are not bound by Article 33 of the Refugee Convention.

However, individuals in need of international protection who remain in their country of origin are not without protection. The principle of *non-refoulement* is expressed in other instruments of international law, where it is not accompanied by the requirement that the individual is outside their country of nationality. Some such instruments include the Convention Against Torture,[134] the Convention on the Rights of the Child,[135] the OAU

[132] Hathaway et al., "Supervising the Refugee Convention", p. 324.
[133] *Refugee Convention*, Article 1.
[134] United Nations General Assebly, *Convention Against Tortureand Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations Treaty Series, vol. 1465, p. 85, Article 3.

Convention on Refugees,[136] the American Convention on Human Rights,[137] and the European Convention on Human Rights. [138]Although the International Covenant on Civil and Political Rights (ICCPR)[139] does not explicitly guarantee *non-refoulement,* the Human Rights Council has interpreted Article 7 to mean that "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*".[140]

Although this appears to require a crossing of borders, a reading of the full text of the Covenant indicates otherwise. The International Covenant on Civil and Political Rights (ICCPR) states in Article 2 (1) that:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory *and subject to its jurisdiction* the rights recognized in the present Covenant...[141] [emphasis added].

This reference to jurisdiction creates ambiguity as to the scope of states' obligations towards those outside their borders, including individuals in need of international protection who have not yet left their country of origin.

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[135] United Nations General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, Articles 2(1) and 37.

[136] Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, United Nations, Treaty Series, vol. 1001, p. 4, Article II(3).

[137] Organization of American States, *American Convention on Human Rights, "Pact of San Jose, Costa Rica"*, 22 November 1969, Articles 1(1) and 22(8).

[138] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Article 3.

[139] United Nations General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: http://www.refworld.org/docid/3ae6b3aa0.html [accessed 15 November 2015]

[140] Human Rights Committee, *General Comment to Article 7 20/44*, p. 9.

[141] United Nations General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: http://www.refworld.org/docid/3ae6b3aa0.html [accessed 15 November 2015]

The meaning of the word "jurisdiction" has been examined by various international tribunals. In the first place, it is debated whether the phrase "within its territory and subject to its jurisdiction" should be read cumulatively or disjunctively. A cumulative reading would interpret the phrase as requiring an individual to fulfil both elements – i.e. individuals must be within the territory *and* subject to the jurisdiction – thereby excluding the possibility of obligations towards those outside of the state.[142] A disjunctive reading, on the other hand, interprets the phrase to include any individual who meets either of the criteria – i.e. all individuals within a state's territory *and* all individuals within its jurisdiction.[143] This latter reading has been supported by both the Human Rights Committee[144]and the International Court of Justice.[145] However, the debate does create uncertainty about whether Article 2(1) creates obligations of *non-refoulement* towards individuals in need of international protection who remain in their country of origin.

An overview of international tribunals does help to illuminate the matter, although conflicting outcomes in the judgments mean that some uncertainty remains. There are several instances where extraterritorial obligations have been established in international courts, resulting in two prevailing situations entailing extraterritorial state responsibility. Firstly, states can be held responsible for the actions of their own agents in the territory of

[142] See Noll, Gregor, "Seeking asylum at embassies: a right to enter under international law?", *International Journal of Refugee Law*, Vol. 17, No. 3(2005), pp. 542-573, at pp. 557-564; Noll, Gregor, *Negotiating Asylum:The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, (The Hague, Martinus Nijhoff: 2000), p. 440; Amerasinghe,Chittharanjan F., *Local Remedies in International Law*, (Cambridge, Cambridge University Press: 1990), pp. 147-149.

[143] See Hathaway, James, *The Rights of Refugees under International Law*, (Cambridge, Cambridge University Press: 2005), p. 165; McGoldrick, Dominic, "Extraterritorial effect of the International Covenant on Civil and Political Rights" in Coomans, Fons and Kamminga, Menno T. (eds.), *Extraterritorial Application of Human Rights Treaties*, (Antwerp, Intersentia: 2004), pp. 41-72 at p. 48; Meron, Theodor, "Extraterritoriality of human rights treaties", *American Journal of International Law*, Vol. 89, No. 1 (1995), pp. 78-82, at p. 80; Nowak, Manfred, *UN Covenant on Civil and Political Rights: CCPR Commentary*, (Kehl am Rhein, Engel: 1993), p. 41.

[144] Human Rights Committee, *General Commment No. 31*, UN Doc. HRI/GEN/1/Rev. 7, 12 May 2004, p. 192.

[145] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory*, 9 July 2004, para. 109.

another state. This principle was important in establishing Uruguay's responsibility in the case of *Lopez Burgos v. Uruguay*, involving a man who was kidnapped by Uruguayan security and intelligence forces in Argentina. The Human Rights Committee declared that:

> Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction", but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State…[146]

Secondly, extraterritorial jurisdiction may be established where a state exercises "effective control" over an area outside its borders. The case of *Loizidou v. Turkey* before the European Court of Human Rights dealt with property rights in Turkish-occupied Cyprus. The Court concluded that:

> Bearing in mind the object and purpose of the Convention, the 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. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.[147]

As a result of these cases, it is widely accepted that a state's jurisdiction encompasses effective control over an individual and in some situations, actions by state agents outside the territory.

However, much ambiguity remains in relation to the extraterritorial legal obligations of states, as is evident in the mixed outcomes in the case law of the European Court of Human

[146] United Nations Human Rights Committee, *Lopez Burgos v. Uruguay*, Communication No. 52/1979, para. 12.3.
[147] European Court of Human Rights, *Loizidou v. Turkey (Preliminary Objections)*, Application No. 15318/89, para. 62.

Rights (ECtHR) relating to Article 1, which refers to the jurisdiction of states parties to the Convention. An early Article 1 case was the aforementioned *Loizidou v. Turkey*. In this case, the Court decided that Turkey had duties towards individuals outside its national territory when it exercised control over an area as a result of a military action.[148]

In the case of *Bankovic and others v. Belgium and others*, the opposite decision was taken. The applicants claimed that their human rights had been violated by a number of states when the NATO coalition bombed a television tower in the Former Yugoslavia, resulting in a number of civilian deaths and casualties. However, the Court decided that the application was inadmissible. Its decision outlined that heinous acts by a state outside its territory are not enough to raise obligations under the Convention. In addition, there must be another pre-existing relationship to create a "jurisdictional link" between the state and the individual.[149]

Although it is possible that a military occupation, which was present in *Loizidou* but not *Bankovic*, is the basis for the pre-existing "jurisdictional link", this was not the argument put forward by the Court. Instead, it distinguished *Bankovic* from the previous judgment in *Loizidou*, by claiming that Turkey was required to ensure the Convention was upheld in the territory of states parties to the Convention, whereas the Former Republic of Yugoslavia "clearly does not fall within this legal space", further asserting that the Convention "was not designed to be applied throughout the world, even in respect of the conduct of Contracting States."[150]

[148] European Court of Human Rights, *Loizidou v. Turkey (Preliminary Objections)*, Application no. 15318/89, Judgment of 23 March 1995, para. 62.
[149] Roxstrom, Erik; Mark, Gibney and Einarsen, Terje, "The NATO bombing case (*Bankovic et al. v. Belgium et al.*) and the limits of Western human rights protection", *Boston University International Law Journal*, Vol. 23, No. 1 (Spring 2005), p. 60.
[150] European Court of Human Rights, *Bankovic and others v. Belgium and others*, Application no. 52207/99, Judgment of 12 December 2001, para. 80.

The uncertainty surrounding the external dimensions of the ECHR has continued after the *Bankovic* case. The Court's position that the Convention only protects individuals within the "legal space" of the contracting parties was abandoned in a subsequent decision by the Court. In *Al-Skeini and others v. the United Kingdom*, the UK was found to be in violation of the Convention as a result of actions taken by its military personnel in Iraq, a territory not within the "legal space" of the Convention. The result of these conflicting judgments is that the Strasbourg Court has failed to provide a definitive ruling on when extraterritorial jurisdiction applies, and has therefore perpetuated disagreement on this issue.

However, Langford et al. point out that even if jurisdiction is established, there still remains uncertainty over what obligations this would entail. While the UN Committee on Economic, Social and Cultural Rights has defined jurisdiction to include all territories where a state has geographical, functional or personal jurisdiction as well as territories where a state has de facto control, it has not addressed whether jurisdiction is relevant in a situation where a state has the means to address a violation or act in a way that would prevent or avoid a violation.[151] Therefore, states' legal obligations beyond their own borders, including duties of *non-refoulement* of individuals in their country of origin, remain ambiguous.

2.2.2 Ambiguity surrounding the responsibility of states for the actions of non-state actors

[151] Langford, Malcolm and Coomans, Fons, "Extraterritorial Duties in International Law", in Langford, Malcolm; Vandenhole, Wouter; Scheinin, Martin and van Genugten, Willem (eds.) Global Justice, State Duties: the Extraterritorial Scope of Economic, Social and Cultural Rights in International Law, (Cambridge, Cambridge University Press: 2013), p. 61.

Although international law requires that states ensure asylum seekers have access to an asylum process, there remain situations where third parties hinder the ability of asylum seekers to access the asylum process. Some such situations were outlined in Section 1.2.2. The common practice of privatising border control enables such situations. In order to avoid direct communication with the asylum seeker – at which point obligations of *non-refoulement* may be raised – states commonly offload the examination of visas to private actors such as airlines. Because it is not well established whether international human rights law is binding on private actors, there remains little guidance on the legitimacy of such practices.

Nonetheless, there has been criticism of these practices and their failure to take into account protection concerns. The UNHCR voiced concerns about air carrier sanctions placing the important responsibility of determining protection needs into the hands of individuals who are

> (a) unauthorised to make asylum determinations on behalf of States,
>
> (b) thoroughly untrained in the nuances and procedures of refugee and asylum principles, and
>
> (c) motivated by economic rather than humanitarian considerations.[152]

Similarly, the Parliamentary Assembly of the Council of Europe expressed its concern that carrier sanctions "undermine the basic principles of refugee protection and the right of refugees to claim asylum, while placing a considerable legal, administrative and financial burden upon carriers and moving the responsibility away from immigration officers".[153]

[152] UNHCR, "Position on Conventions Recently Concluded in Europe (Dublin and Schengen Conventions), 16 August 1991, available at: http://www.unhcr.org/43662e942.html [last accessed: 4 April 2016].
[153] Council of Europe Parliamentary Assembly, Recommendation 1163 on the arrival of asylum seekers at European Airports, 23 September 1991, para. 10.

In addition to such criticism, it has been asserted that under international law, states could be held accountable in some instances for the actions of private actors carrying out typically government functions. Although private conduct is not typically attributable to a state, there are circumstances where a state can be held accountable for the actions of third parties. For example, the International Law Commission's Articles on State Responsibility, which are widely considered to constitute customary international law,[154] outline that state responsibility arises when actors are empowered to exercise elements of governmental authority[155] and where states instruct private third parties to act or direct or control their conduct.[156] However, because visa requirements are perfectly legal, it is difficult to say that their enforcement by third parties is illegal. The obligations of states in relation to privatised migration controls are therefore ambiguous, which therefore leads to uncertainty surrounding whether and to what extent states are responsible for ensuring third parties do not obstruct access to asylum.

2.2.3 Ambiguity surrounding the need for international cooperation

There remains uncertainty regarding the extent to which states must cooperate at a transnational level. This question directly engages states which shift their responsibilities for analysing asylum applications to other states, either through safe third country concepts or readmission agreements, as described in Section 1.2.3. As outlined earlier, the geographic scope of the obligations created by the Refugee Convention is not clear. Some

[154] Lauterpacht, Elihu and Bethlehem, Daniel, "The scope and content of the principle of *non-refoulement*: opinion" in Feller, Erika; Türk, Volker and Nicholson, Frances (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, (Cambridge, Cambridge University Press: 2003), p. 108; McCorquodale, Robert and Simons, Penelope, "Responsibility beyond borders", *Modern Law Review,* Vol. 70, No. 4, pp. 598-625, at p. 601.

[155] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10) , Chapter IV.E.1, Article 5.

[156] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10) , Chapter IV.E.1, Article 8.

provisions clearly apply only to refugees present in the territory,[157] refugees lawfully present[158] or lawfully staying in the country,[159] whereas others have no explicit geographic limitations.[160] However, in contrast to often territorially-bound provisions, the Preamble suggests that the obligations assumed by states parties need not be restricted to the confines of their own territory. In the Preamble, states parties acknowledge that the refugee problem "of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation".[161] The recognition of this indicates that separate action by individual states will not provide a satisfactory solution to refugee protection. Additionally, it has been argued that the lack of burden-sharing in the international regime could create an incentive for overburdened states to neglect their obligations towards refugees.[162] If the Refugee Convention were to address the issue of secondary responsibility when a state fails to meet its obligations, the rights of refugees in such a situation could be better guaranteed.[163]

This gap between the need for a coordinated approach and the reality of state duties mainly applying within their own territory has been termed the "territorial paradigm" of state duty.[164] The phrase "territorial paradigm" refers to the designation of duties to individual states, rather than requiring a group approach. Field points out that there remains a gap between what international treaties require states to do and the reality of international protection for refugees. One problem with the current refugee regime is that it often

[157] See *Refugee Convention*, Articles 4, 27, 31.
[158] See *Refugee Convention*, Articles 18, 26, 32.
[159] See *Refugee Convention*, Articles 15, 17, 19, 21, 23, 24, 28.
[160] See *Refugee Convention*, Articles 13, 20, 22, 33(1).
[161] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: http://www.refworld.org/docid/3be01b964.html [accessed 8 August 2015].
[162] Field, Jeannie Rose C., "Bridging the Gap between Refugee Rights and Reality: a Proposal for Developing International Duties in the Refugee Context", *International Journal of Refugee Law*, Vol. 22, No. 4 (2010), pp. 512-557., p. 514.
[163] Field, "Bridging the Gap", p. 515.
[164] Field, "Bridging the Gap", pp. 512-557.

assumes state duty on the basis of territory, whereas the flow of refugees is inherently transnational in nature. If states are only responsible for the problems within their own borders, certain transnational issues which require multilateral action will not be addressed.[165] In this respect, what should be an international regime of protection for refugees requires little more than a commitment to address refugee issues within a state's own borders. As a result, any problem which requires international assistance is unlikely to be resolved as no other state is required to take action.[166] Because treaties often refer to the need for international cooperation, but fail to mandate this in their provisions, there remains ambiguity in international law over the extent of state obligations to cooperate internationally in order to ensure access to asylum.

The above sections outline the various ambiguities surrounding the obligations which stem from the right to seek asylum. These ambiguities relate directly to the situations described in Section 1.2, where state practices hinder the ability of asylum seekers to access asylum processes. In the first place, the lack of clarity regarding the geographic scope of the principle of *non-refoulement* and the extraterritorial jurisdiction of states mean that it is not evident *to whom* a state owes these duties. Furthermore, the ambiguity surrounding whether a state is responsible for actions by third parties which prevent individuals from accessing asylum creates uncertainty as to *who* bears duties to asylum seekers. Finally, the uncertainty surrounding the need for international cooperation means that it is not clear *what action* is necessary in order for states to fulfil their obligations. The right to seek asylum is therefore an imperfect right, which must be perfected if it is to be guaranteed in practice rather than in the abstract. The work of O'Neill suggests that if the right to seek asylum were perfected – by clarifying the duty bearers and required action – it would be better guaranteed to those in need of protection.

[165] Field, "Bridging the Gap", p. 513.
[166] Field, "Bridging the Gap", p. 514.

Chapter III: Addressing uncertain obligations: the layered approach

The previous chapter highlighted the importance of identifying duty-bearers and the required action in order to better protect imperfect human rights. It argued that the work of O'Neill is important as it identifies a reason for the difficulty in attributing duties, namely the imperfect nature of some rights. Moreover, her work is relevant to the right to seek asylum, as this is an imperfect right whose obligations are unclear and difficult to attribute. The resulting conclusion is that a perfecting mechanism could help to attribute state duties to ensure access to asylum for refugees outside their own asylum procedures. This chapter will propose a layered approach to human rights as a possible means to more clearly attribute obligations for protecting human rights.

3.1 The role of layered approaches to human rights obligations

The previous chapter demonstrated that it is difficult to attribute duties in relation to the right to seek asylum due to several ambiguities surrounding a state's obligations. This is closely related to the debate on whether states have legally-binding extraterritorial human rights obligations. Disagreements are rife on this issue, with various states taking very different stances. Many Western States argue that their extraterritorial duties as established under international law are not legally binding, whereas other states and scholars contest that they are. One such example is the case of Sweden, a country which is generous in terms of foreign development aid. Despite being an important contributor to the implementation of ESC rights outside its border, when the Swedish government discussed this topic with the then-UN Special Rapporteur on the right to health, Paul Hunt, the government rejected the idea that Sweden had a legal obligation to provide international assistance. Hunt noted that other high-income states share Sweden's position, but middle-

income and low-income countries take the opposite view.[167] The difference of opinion, therefore, is based on how much one has, and consequently, how much one expects to give or receive.

Wealthy states like Sweden argue that ESC obligations are morally, not legally, binding. This highlights an important point. Legal human rights obligations have generally been seen as "either-or", with states being held either entirely responsible or not at all.[168] It is understandable, therefore, that wealthy states wish to avoid being held entirely responsible for the protection of human rights in other countries. Establishing such an obligation would result in the loss of sovereignty when a state decides to what extent it should ensure the rights of non-citizens.

The issue which is contested in this instance is whether there is, as Gibney puts it, a "diagonal relationship" between a state and citizens of another country.[169] Gibney points out that this question might not be as important if each state fulfilled its human rights obligations towards its own citizens. However, in the real world, there are states which fail to respect human rights, and situations where jurisdiction is contested, such as on the high seas or at the border between two states. As a result, many individuals would be left without protection if other states were not obliged to secure their rights. This indicates that a so-called "diagonal relationship" between states and citizens of other countries is necessary to some degree.

In contrast to the strict division of liberty and welfare rights employed by O'Neill, Waldron proposes a more nuanced way of perceiving rights. His theory focuses on the protection of

[167] Gibney, Mark, "Establishing a Social and International Order for the Realization of Human Rights", in Minkler, Lanse (Ed.), *The State of Economic and Social Human Rights: an Overview*, (Cambridge: Cambridge University Press, 2013), p. 252.
[168] Gibney, "Establishing a Social and International Order for the Realisation of Human Rights", p. 260.
[169] Gibney, "Establishing a Social and International Order for the Realisation of Human Rights", p. 253.

human rights in real life as opposed to their existence in theory. He suggests that instead of dividing up duties based on the form of the right, and perceiving each right as correlating to a single duty, we ought to view each right "as generating waves of duties, some of them duties of omission, some of them duties of commission, some of them too complicated to fit easily under either heading".[170] For this reason, a more nuanced, or 'layered' approach could help to establish the legal obligations of states towards persons outside their border without holding them entirely to account for all human rights violations abroad. This could be a way to avoid the hostility of Western states to accept a degree of legally-binding extraterritorial obligations.

Such 'layered' approaches to state obligations have already been influential. One prominent example is the principle of Responsibility to Protect (R2P). This principle divides responsibilities between states so that each state has the primary responsibility to protect persons within their borders against genocide, war crimes, ethnic cleansing and crimes against humanity, and has the secondary responsibility to ask for assistance if it lacks the resources to ensure this. If a state fails to meet its obligations, the rest of the international community must assume the third level of responsibility by stepping in and taking measures to ensure the protection of human rights abroad. Such a framework means that there are three distinct layers of duty, with a range of possible responses.[171]

This approach, which departs from the idea of responsibility as "either-or", was embraced by the international community, with the UN Security Council invoking R2P as a justification for intervening in Cote d'Ivoire in 2004 and Libya in 2011.[172] It has since been subject to criticism, with the BRICS countries – Brazil, Russia, India, China and South

[170] Waldron, Jeremy, *Liberal Rights* (Cambridge: Cambridge University Press, 1993), p. 25.
[171] Evans, Gareth, "Responding to Mass Atrocity Crimes: The Responsibility to Protect (R2P) after Libya and Syria", Public lecture at the Central European University School of Public Policy, Budapest, 24 October 2012, http://www.gevans.org/speeches/speech496.html, [last accessed 25 October 2015].
[172] Evans, Gareth, "Responding to Mass Atrocity".

Africa – claiming that NATO's intervention in Libya went beyond its mandate of civilian protection by supporting regime change. Nevertheless, the alternative proposed by Brazil, "Responsibility while Protecting", merely refines the details of such an intervention, advocating for increased monitoring and assessment of the mandate.[173] It maintains the layers of responsibility established in the R2P framework, highlighting the value of such an approach in comparison to an "either-or" conception of responsibility.

The layered approach therefore provides a nuanced way of perceiving state obligations. This could counteract the hostility states have towards accepting legally-binding duties to those in other countries, which seems to stem from a fear of being held accountable for all human rights abuses abroad. A layered approach finds a middle ground for states caught in a debate over whether they have binding duties towards individuals outside their borders.

3.2 The *Respect, Protect, Fulfil* framework of the Maastricht Principles

Another example of a layered approach to human rights obligations is the 'Maastricht Guidelines', which were adopted by a group of experts to define in more detail the extraterritorial economic, social and cultural obligations of states. The guidelines identify extraterritorial obligations as "a missing link in the universal human rights protection system".[174] The Principles are influential as they create layers of duty, through their *respect, protect, fulfil* framework.

The first obligation is to respect the ESC rights of all people within and outside of their territory. This requires states to refrain from conduct which would limit rights outside their territory, or which would indirectly impair rights, by hindering another actor's ability to

[173] Evans, Gareth, "Responding to Mass Atrocity".

[174] *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, 28 September 2011, Introduction, available at: http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 [last accessed: 16 November 2015].

respect rights. This element of the *respect, protect, fulfil* framework deals with negative rights – i.e. the responsibility of states to *refrain* from violating rights – and is unequivocal in its ban on any action which hinders the enjoyment or exercise of rights of any person, anywhere. Thus, the first level of the *respect, protect, fulfil* framework is an absolute obligation to avoid conduct which has the effect of impairing rights outside one's territory.

The second element of the framework is to protect the rights of people within and outside of their territory. This requires states to ensure that non-state actors – such as private persons or corporations – do not impair the rights of any person, anywhere in the world. This layer of the framework is not as absolute as the first. States cannot foresee and prevent every action taken by third parties and so their obligation in this area is to take the necessary measures to regulate third party conduct as far as possible. States are responsible for the actions of third parties who are nationals of the state, of businesses which are domiciled in the state or have substantial business activities there, and any other situation where there is a 'reasonable link' between a state and actions which affect rights.[175]

The final component in the framework is the duty to fulfil rights. This requires states to take steps individually and in cooperation with each other to "create an international enabling environment conducive to the universal fulfilment of economic, social and cultural rights". Furthermore, the Maastricht Principles address the imperfect nature of positive rights by explicitly requiring states to coordinate with each other and allocate responsibilities in order to achieve the universal fulfilment of rights.[176] Allocation of responsibility, therefore, becomes one of the corresponding obligations to an imperfect right. Through this framework, coordination and allocation of responsibilities are perceived

[175] Salomon, Margot E. and Seiderman, Ian, "Human Rights for a Globalized World: The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights", *Global Policy*, Vol. 3, No. 4 (November 2012), p. 460.
[176] Maastricht Principles, para. 30.

not as necessary preconditions for the fulfilment of rights without which imperfect rights remain "unclaimable" (as O'Neill portrays them), but as a constitutive element of states' obligations to protect rights.

The Maastricht Principles have had an impact at the international level. The principles are particularly influential as the experts involved in their production are drawn from various fields, countries and backgrounds, and their expertise in human rights lends legitimacy to their recommendations. Notably, the contributors include former and current Special Rapporteurs of the United Nations Human Rights Council, as well as former and current members of regional human rights bodies and international treaty bodies.[177] The influence of the principles on international law is evident, as they have been employed by the United Nations Committee on Economic, Social and Cultural Rights to concretise certain indistinct obligations.[178] The use of *respect, protect, fulfil* as a guiding principle can be seen in the concluding observations of the fifth periodic report of Norway by the United Nations Committee on Economic, Social and Cultural Rights. In this report, the Committee recommends that Norway take policy measures to prevent human rights violations in other countries by corporations whose main offices are based in Norway.[179] This statement by one of the most prominent authoritative bodies for the interpretation of ESC rights indicates the increasing recognition of the principle that states have legal human rights obligations outside their borders.

[177] Maastricht Principles, Introductory sections, p. 4.
[178] See Committee on Economic, Social and Cultural Rights, "Concluding observations on the fifth periodic report of Norway", E/C.12/NOR/CO/5, Adopted by the Committee at its fifty-first session (4–29 November 2013).
[179] Committee on Economic, Social and Cultural Rights, "Concluding observations on the fifth periodic report of Norway", E/C.12/NOR/CO/5, Adopted by the Committee at its fifty-first session (4–29 November 2013), para. 6.

3.3 Maastricht Principles and the right to seek asylum.

Although the Maastricht Principles were developed in the area of ESC rights, their application could be expanded beyond this category of rights. The *respect, protect, fulfil* framework is ideal for identifying state obligations in relation to other areas of human rights, but has not yet been applied to clarify ambiguities relating to the right to seek asylum. One notable aspect of the Maastricht Principles is that in contrast to O'Neill, they do not distinguish between perfect and imperfect duties. From the outset, the principles include both acts and omissions of a State (i.e. positive and negative duties).[180] As a result, although the Maastricht Principles explicitly relate to ESC rights, they can be applied to other types of human rights.

The applicability of the principles beyond ESC rights is supported by the text of the guidelines themselves. Article 3 states that:

> All States have obligations to respect, protect and fulfil human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially.[181]

The guidelines further emphasise the interdependent nature of rights, stating in Article 5 that:

> All human rights are universal, indivisible, interdependent, interrelated and of equal importance. The present Principles elaborate extraterritorial obligations in relation to economic, social and cultural rights, *without excluding their applicability to other human rights, including civil and political rights*.[182] [emphasis added]

[180] Maastricht Principles, para. 8.
[181] Maastricht Principles, para. 3.
[182] Maastricht Principles, para. 5.

For this reason, the principles can be used to clarify the extraterritorial obligations of states in all areas of human rights. They could, therefore, provide a new perspective on the ambiguous obligations relating to the right to seek asylum, and clarity in this area could make it more difficult for states and third parties to prevent individuals from accessing asylum.

The following section will examine the author's interpretation of some possible conclusions which could result if the Maastricht Principles were used as a guiding framework for clarifying the uncertain obligations surrounding the right to seek asylum.

3.3.1 "Respect": Responsibility for actions by states to prevent access to their territory

The obligation to respect the human rights of those outside a state's borders means that states must take no action which impedes the enjoyment of human rights. In the area of asylum, this would mean that states must take no action which prevents or hinders individuals from accessing its asylum procedure and submitting an application for asylum. However, as we saw in Section 1.2.1, states often use measures which aim to prevent the arrival of asylum seekers or migrants in general, including pre-arrival mechanisms (such as visa requirements), actions en route (such as interception at sea or failing to take action to prevent death at sea) and actions at the border (such as building fences).

Section 2.2.1 described how ambiguities surrounding the obligations of *non-refoulement* of refugees and those still within their countries of origin lead to difficulties in enforcing this principle through international law. However, the duty to respect human rights extraterritorially, as required by the first layer of the Maastricht Principles, could help to "perfect" this right by identifying the duty bearer and required action.

i. En-route: interception and death at sea

Athough the duty of *non-refoulement* is universally acknowledged by states, as Section 2.2.1 outlined, there remain ambiguities about the geographical scope of states' obligations. Debates persist as to whether *non-refoulement* applies within the territory, at the border, under the jurisdiction of a state, or to all refugees regardless of their location.

The Maastricht Principles could be used to clarify states' obligations in this area. According to the first layer, *states must take no action which impedes upon the enjoyment of human rights extraterritorially*. This principle sheds some light on states' obligations in situations of interception and death at sea.

Let us first consider interception at sea. This analysis applies equally to the EU, Australia and any other state, provided the interception can be attributed to the state. In the case of the EU, Frontex acts on behalf of EU Member States, therefore its actions can be attributed to Member States.

If an intercepting state fails to distinguish between irregular migrants and asylum seekers during interception operations, it risks returning individuals to a location without providing them with the opportunity to seek asylum. This action of interception, is therefore likely to prevent access to asylum, unless the location to which they are returned is one which can provide a satisfactory level of protection. According to the Maastricht Principles, this can be categorised as an action which limits or indirectly impairs rights, which would be a failure by the state to uphold their obligation to 'respect' the rights of refugees.

The Maastricht Principles therefore bring some clarity to this issue. They suggest that in order to carry out the legitimate objective of controlling borders while respecting human rights obligations, states should be sure that those carrying out interceptions distinguish between migrants and asylum seekers when carrying out interceptions and returns, and allow those identified as asylum seekers to have access to a status determination procedure.

When it comes to death at sea, the question is somewhat more difficult. Because the provision requires states "to refrain from conduct which nullifies or impairs the enjoyment and exercise of […] rights",[183] one could interpret it as applying only to the action, and not the inaction of states. On the other hand, it also demands that states "take action, separately and jointly through international cooperation to respect the […] rights of persons within their territories and extraterritorially".[184] This provision certainly has a positive element, and seems to require that action be taken to ensure that rights are available to individuals everywhere, including those travelling by sea. Certainly, a case could be made that EU Member States have the responsibility to pool their resources and provide protection to those at sea so as to ensure they have access to asylum procedures.

As outlined above, the obligation to "protect" as expressed in the Maastricht Principles could be a useful tool to clarify state responsibilities when it comes to their actions, and even perhaps their inactions, which prevent asylum seekers from accessing procedures in their territory. Although the Principles do not provide a definitive answer, they give an indication of what type of action international human rights experts expect from states.

ii. In the country of origin: visa policies

As we have seen in Section 2.2.2, with regard to visa policies, the state's legal obligation towards a would-be asylum seeker is uncertain. *Non-refoulement* as laid out in the Refugee Convention only applies to those outside their country of origin, and those who remain within their country must therefore rely on this principle as expressed in other international treaties. For this reason the question of jurisdiction comes into play. Debates ensue about whether the phrase "within its territory and subject to its jurisdiction" should be read cumulatively or disjunctively, and the precedent in European and international law is not

[183] *Maastricht Principles*, para. 20.
[184] *Maastricht Principles*, para. 19.

consistent. Moreover, there is further uncertainty about whether jurisdiction would require states to act in a way that would prevent a violation if they have the means to do so. These inconsistencies make it difficult to establish whether states should be held responsible for preventing access to their asylum systems by denying a visa to a person in need of international protection.

The Maastricht Principles could provide a tool for clarifying states' duties in this area. The first layer of the Principles requires that *states take no action which inhibits the enjoyment of human rights extraterritorially*. This principle can illuminate state obligations when it deals with individuals in need of international protection who remain in their country of origin.

Viewed against this standard, as visa requirements are introduced by the state, they can be attributed to the state. The act of denying a visa certainly could limit the ability of an individual in need of international protection to apply for asylum in another country. It is difficult to assert a right to *non-refoulement* because of the debates surrounding the precise definition of this principle and whether this encompasses those within their country of origin. Nonetheless, the right to leave one's country provides an important complement to the principle of *non-refoulement*.[185] The action of refusing a visa in some cases will impair the enjoyment of the right to leave one's country, if there is no viable alternative way to leave. In these cases, denial of a visa must be considered to be in breach of a state's international obligations.

This is not to say that pre-arrival mechanisms are in breach of refugee rights. On the contrary, they could be employed while still respecting the right to access asylum procedures. For example, the states which make up the Schengen Area (Norway,

[185] As expressed in Article 12(2) of the *International Covenant on Civil and Political Rights*, which states: "Everyone shall be free to leave any country, including his own."

Switzerland, Iceland and all EU Member States except Ireland, the United Kingdom, Cyprus, Croatia, Bulgaria and Romania) recognise the right to appeal against refused visas. A similar system could be used to ensure that individuals are not refused a visa solely as a means to avoid the state's responsibility to provide international protection. This could create a situation where visa requirements do not prevent or hinder an individual's ability to access the asylum process, and where states would therefore comply with the duty to 'respect' the human rights of refugees.

3.3.2 "Protect": Responsibility of states for actions by third parties

The obligation to 'protect' human rights externally requires states to ensure, as far as possible, that third party actors do not take any action which infringes upon the enjoyment of human rights. In the area of asylum, this implies that states must take all necessary action to ensure that no private actors prevent access to asylum procedures.

As we saw in Section 2.2.2, it is unclear whether states have responsibility for migration controls carried out by third parties outside their border. However, the Maastricht Principles could contribute to a clearer understanding of the extent of state responsibility for non-state actors. The second layer of the Maastricht Principles requires that states "must take necessary measures to ensure that non-State actors which they are in a position to regulate […] do not nullify or impair the enjoyment of […] rights".[186]

States should therefore bring in measures, whether administrative, legislative, investigative, adjudicatory or other,[187] to prevent third parties from obstructing access to asylum. However, the use of carrier sanctions is in complete conflict with this requirement. When carrier sanctions are put in place by states, far from preventing obstructions to asylum, they instead *force* third parties to inhibit access to the asylum system. For this reason, states

[186] *Maastricht Principles*, para. 24.
[187] *Maastricht Principles*, para. 24.

which employ carrier sanctions are not only failing to ensure protection, but they are actively violating the requirement to 'protect' human rights according to the Maastricht Principles.

It is conceivable then, that the Principles would demand that states lift carrier sanctions in order to ensure third parties do not prevent access to asylum. Such an approach is not unprecedented, and there are already a number of situations where carrier sanctions are waived if the undocumented individual is recognised as a refugee upon arrival.[188] However, with this approach, there remains a risk that carriers will be fined for transporting asylum seekers whose applications are rejected, and it is most likely that companies would err on the side of caution by refusing to transport any individual whose arrival may incur a fine. This approach therefore hinders access to asylum. A more complex system would be required to prevent illegal migration while ensuring that third parties protect access to asylum. Following the Maastricht Principle, states would carry out a preliminary assessment of potential passengers in order to approve those who have a legitimate claim while ensuring that no fine will be imposed for individuals who are eventually denied asylum. In any case, it is clear that in order to ensure that third parties protect access to asylum, a more carefully designed mechanism is needed than the system of carrier sanctions or waiving sanctions in the case of those who are eventually recognised as refugees. On this issue, I find that the Maastricht Principles could be instrumental in improving access to asylum.

3.3.3 "Fulfil": Responsibility to cooperate with third countries

As established in Section 2.2.3, current international treaties foster ambiguity regarding the need for international cooperation, as their provisions generally mandate actions by states

[188] Gammeltoft-Hansen, *Access to Asylum*, pp. 166-167.

individually. This leaves questions surrounding the extent to which states must share the burden of refugee protection, with many states shifting their burdens by returning asylum seekers to third countries, as we saw in Section 1.2.3.

The Maastricht Principles could clarify these uncertainties. The third layer of duty requires states to "take deliberate, concrete and targeted steps, separately and jointly through international cooperation, to create an international enabling environment conducive to the universal fulfilment of […] rights".[189] The amount states are expected to contribute is defined as "the maximum of available resources".[190]

In the area of asylum, this would imply that states have the obligation to take action to eventually achieve universal availability of international protection to those who need it. In circumstances where states offload their responsibilities to third countries through safe third country concepts and readmission agreements they would clearly be undermining this principle. Sending asylum seekers to overburdened states or states without the resources and capacity to ensure a satisfactory standard of protection can only serve to worsen the problem and directly flouts their responsibility to create an "environment conducive to the universal fulfilment of […] rights". Instead, states should take steps to improve protection in countries where asylum protection is not at an internationally acceptable standard, and should avoid any measures which worsen protection extraterritorially.

The EU has engaged in improving refugee protection abroad to some extent. Through its Regional Protection Programmes (RPP), it has taken steps to improve the protection capacities of third countries by supporting their asylum authorities in order to improve access to asylum procedures in these countries. As of January 2015, RPPs have been developed in Eastern Europe, the African Great Lakes Region, the Horn of Africa and

[189] *Maastricht Principles*, para. 29.
[190] *Maastricht Principles*, para. 31.

North Africa, and a Regional Development and Protection Programme was established in the Middle East.[191] This is precisely the type of activity required by the obligation to 'fulfil'. However, Gammeltoft-Hansen points out that the expenditure on such programmes is much less than the EU spends on controlling migration from third countries.[192] This would indicate that the EU falls short of the requirement to invest the "maximum of available resources".

This third element of the *respect, protect, fulfil* framework may be the most contentious among states. As is evidenced by Sweden's insistence that its contributions to extraterritorial rights protection are a matter of moral obligation, wealthy states are often unwilling to commit to a legal obligation to give financial support to protect rights abroad. The duty to fulfil the right to seek asylum beyond one's borders by contributing maximum available resources could therefore cause states to oppose the *respect, protect, fulfil* framework as a legitimate means of establishing state obligations.

However, what is notable about the obligation to 'fulfil' rights in the area of refugee law is that measures to improve access to asylum abroad – taken in order to 'fulfil' refugee rights – can indirectly help states to better meet the first requirement of the Maastricht Principles, namely the duty to 'respect' refugee rights. As was demonstrated in previously, the failure to 'respect' the rights of refugees outside a state's territory is often related to the possibility that their practices may result in returning a refugee to a place where they risk persecution, thereby breaching the principle of *non-refoulement*. Evidently, returning asylum seekers to another country may put them at risk if that country does not maintain satisfactory

[191] European Council on Refugees and Exiles, "Regional Protection Programmes: an effective policy tool?", January 2015, p. 2, available at: ecre.org/component/downloads/downloads/982.html [last accessed 4 April 2016].

[192] Gammeltoft-Hansen, Thomas and Gammeltoft-Hansen, Hans, "The Right to Seek – Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU", *European Journal of Migration and Law*, Vol. 10, No. 4 (2008), p. 457.

standards in its asylum procedures. The duty to 'fulfil', however, could encourage states to invest in the protection available to refugees in third countries. If this investment led to improved protection conditions for refugees in third countries, states would be able to return more asylum seekers to these countries without risking *refoulement*. For this reason, the responsibility to 'fulfil' the rights of refugees – that is, to take steps to ensure standards are met outside one's territory – can have a direct impact upon the state's duty to 'respect'. This link could encourage states to carry out their positive extraterritorial duties in order to reduce the risk of *refoulement* of individuals within their territory.

3.3.4 Shortcomings of the Maastricht Principles

Despite the potential of the Maastricht Principles to clarify the ambiguous obligations of states in relation to the right to asylum, there remain some concerns as to the extent of their impact. As Vandenhole points out, the legal status of the principles remains vague.[193] The drafters assert that they are "[d]rawn from international law",[194] but this is a weak claim in comparison to their predecessor, the Limburg Principles, which were said by participants to reflect the state of international law at that time.[195] The text does little to clarify exactly which instruments of international law are the basis for establishing extraterritorial obligations,[196] referring only to the "[e]conomic, social and cultural rights and the corresponding territorial and extraterritorial obligations [that] are contained in the sources

[193] Vandenhole, Wouter, "Beyond Territoriality: The Maastricht Principles on extra-territorial obligations in the area of economic, social and cultural rights", *Netherlands Quarterly of Human Rights*, Vol. 29, No. 4 (2011), pp. 429-433, at p. 432.
[194] *Maastricht Principles*, Preamble.
[195] UN Commission on Human Rights, *Note verbale dated 86/12/05 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ("Limburg Principles")*, 8 January 1987, E/CN.4/1987/17, Introduction, para. iii.
[196] Vandenhole, "Beyond Territoriality", p. 432.

of international human rights law".[197] The above factors could serve to weaken the legitimacy of the principles.

Perhaps the greatest obstacle to the use of the Maastricht Principles in order to clarify states' obligations towards refugees is the opposition by states and other actors to their legitimacy. The above weaknesses as well as the large financial demands concerning the duty to fulfil could result in strong opposition by states. However, it has been asserted that scholarly engagement with these principles is vital, as it will contribute to their salience and increase their credibility and influence in the future.[198]

[197] *Maastricht Principles*, Principle 6.
[198] Vandenhole, "Beyond Territoriality", p. 433.

Conclusion

Although the right to seek asylum is generally acknowledged in international law, various migration policies employed by the EU and Australia at present prevent asylum seekers from accessing this right in their territories. This thesis proposes that the prevalence of such policies is due to the imperfect nature of state obligations in relation to the right to seek asylum. Whether we look at *non-refoulement* of refugees or individuals within their country of origin, visa policies, actions of third parties, safe third country concepts or readmission agreements, there are a number of ambiguities surrounding the corresponding state obligations. The examples listed above are not exhaustive, and merely serve to demonstrate some of the ways in which states prevent access to asylum.

Without a clear understanding of states' obligations, it is extremely difficult to hold them to account for preventing access to asylum. In this respect, O'Neill's theory on imperfect duties is useful, as it implies that identifying the duty bearers and the required action in these areas could serve to concretise imperfect state obligations. The Maastricht Principles provide an excellent framework for identifying state obligations towards those outside their asylum procedures, and should therefore be used as a means to better ensure states protect the right to seek asylum.

The duty to "respect" clarifies state responsibility for their actions outside their borders. Interception at sea has been perceived by some as being beyond the scope of duties of *non-refoulement*, but the Maastricht Principles suggest that states are responsible for all actions which impede the enjoyment of rights, and must therefore respect *non-refoulement* regardless of the location of the refugee. Visa requirements are also ambiguous at present, but the Maastricht Principles – if implemented – would reaffirm the obligation of states to prevent individuals from leaving their country.

The duty to "protect" sheds light on state responsibility for actions of third parties. Privatised migration management and carrier sanctions ensure that individuals cannot reach agents of other countries in order to apply for asylum. However, the Maastricht Principles would require states to take measures to ensure that third parties whom they are able to influence do not prevent access to asylum. As carrier sanctions encourage third parties to refuse travel to those in need of protection, they are certainly in breach of obligations.

Finally, the duty to "fulfil" indicates the need for states to contribute to improving asylum in other countries. Rather than shifting the burden to third countries through safe third country concepts and readmission agreements, they must instead take actions which improve protection abroad. This includes avoiding the transfer of responsibilities to countries unable to provide an acceptable standard of protection, as well as investing in the improvement of facilities abroad.

As the above assertions show, the Maastricht Principles can contribute greatly to clarifying ambiguous or debated areas of asylum law and practice. Although they have their shortcomings, they are a good starting point for advancing our understanding of state obligations in relation to imperfect duties. This work demonstrates their applicability to a wide variety of practices and a range of jurisdictions. The examples used within this work are not exhaustive. They serve as a first analysis of how these expert guidelines can be transposed from their initial area of ESC rights to apply to the right to seek asylum.

The principles should be taken as a serious means of clarifying obligations, and an important tool in improving state accountability. As current state practice shows, there is a vast gulf between what is guaranteed to those in need of international protection in theory and what they can actually access in practice. If this gap could be shortened by defining state obligations more clearly, an increased number of refugees would be able to access the

protection they need. Identifying state obligations should therefore be the priority of activists in this area. The implementation of the *respect, protect, fulfil* framework could be a first step towards improving access to asylum in practice.

Bibliography

Legislation and other legal documents

Council of Europe Parliamentary Assembly, Recommendation 1163 on the arrival of asylum seekers at European Airports, 23 September 1991.

Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950.

European Commission, "A European Agenda on Migration", COM(2015) 240 final, 13 May 2015.

European Commission, "Draft Amending Budget No. 5 to the General Budget 2015: Responding to Migratory Pressures", COM(2015) 241 final, 13 May 2015.

European Commission, Ref. Ares(2015)4109816, 6 October 2015, available at: http://www.statewatch.org/news/2015/oct/eu-com-letter-hungary.pdf [last accessed: 28 March 2016].

European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012 C 326/02.

European Union, *Consolidated Version of the Treaty on European Union*, 2010 O.J. C 115/13.

European Union, *Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985*, 2001 O.J. L187/45.

European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status*, 2005 O.J. L326/13.

European Union, *Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of Member States of the European Union*, O.J. L 349/1.

European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 2011 O.J. L 337/9 [henceforth, Qualification Directive].

European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 2013 O.J. L180/60.

Hungary, *Act LXXX of 2007 on Asylum (2015)*, 1 January 2008, available at: http://www.refworld.org/docid/4979cc072.html [last accessed 28 March 2016].

Italian Ministry for Defence, "Mare Nostrum Operation", available at: http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx (last accessed 2 January 2016).

Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, 28 September 2011, available at: http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 [last accessed: 16 November 2015].

Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, United Nations, Treaty Series, vol. 1001.

Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: http://www.refworld.org/docid/3ae6b3630.html [accessed 21 December 2015].

Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, available at: http://www.refworld.org/docid/3ae6b36510.html [accessed 21 December 2015].

See Committee on Economic, Social and Cultural Rights, "Concluding observations on the fifth periodic report of Norway", E/C.12/NOR/CO/5, Adopted by the Committee at its fifty-first session (4–29 November 2013).

UN Commission on Human Rights, *Note verbale dated 86/12/05 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ("Limburg Principles")*, 8 January 1987, E/CN.4/1987/17.

UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations Treaty Series, Vol. 1465.

UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: http://www.refworld.org/docid/3be01b964.html [accessed 21 December 2015].

UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, Vol. 606, p. 267, available at: http://www.refworld.org/docid/3ae6b3ae4.html [accessed 21 December 2015].

UN General Assembly, *Universal Declaration of Human Rights (UDHR)*, 10 December 1948, 217 A (III).

United Nations Committee on Economic, Social and Cultural Rights, "Concluding observations on the fifth periodic report of Norway", E/C.12/NOR/CO/5, Adopted by the Committee at its fifty-first session (4–29 November 2013).

United Nations General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577.

United Nations General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: http://www.refworld.org/docid/3ae6b3aa0.html [accessed 15 November 2015].

United Nations Human Rights Committee, *General Comment to Article 7 20/44*.

United Nations Human Rights Committee, *General Commment No. 31*, UN Doc. HRI/GEN/1/Rev. 7, 12 May 2004.

United Nations Treaty Collection Website, "Status of Convention relating to the Status of Refugees", available at: https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&lang=en [accessed 8 March 2016].

United Nations Treaty Collection Website, "Status of Protocol relating the Status of Refugees", available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en [accessed 8 March 2016].

US Mission to the United Nations and other international organisations 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.

Case law

Australia: *Act No. 62 of 1958, Migration Act 1958 - Volume 1* [Australia],8 October 1958.

Australia: *Al-Rahal v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 73.

Australia: *Al-Zafiry v Minister for Immigration and Multicultural Affairs* (1999) 58 ALD 663.

Australia: *Minister for Immigration and Multicultural Affairs v Al-Sallal* (1999) 94 FCR 549.

Australia: *Minister for Immigration and Multicultural Affairs v Gnanapiragasam* (1998) 88 FCR 1.

Australia: *Minister for Immigration and Multicultural Affairs v Thiyagarajah*, (1997) 80 FCR 543.

Australia: *Patto v Minister for Immigration & Multicultural Affairs* [2000] FCA 1554.

Australia: *Patto v Minister for Immigration and Multicultural Affairs* (2000) 106 FCR 119.

Australia: *Rajendran v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 526.

European Court of Human Rights, *Amuur v. France*, Application no. 19776/92, Judgment of 26 June 1996.

European Court of Human Rights, *Bankovic and others v. Belgium and others*, Application no. 52207/99, Judgment of 12 December 2001.

European Court of Human Rights, *Loizidou v. Turkey (Preliminary Objections)*, Application no. 15318/89, Judgment of 23 March 1995.

International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory*, 9 July 2004, para. 109.

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

United Nations Human Rights Committee, *Lopez Burgos v. Uruguay*, Communication No. 52/1979.

United States: *Sale v. Haitian Centers Council, Inc.*, 113S.Ct. 2549, 509 U.S. 155 (1993).

Books, book chapters and journal articles

Amerasinghe, Chittharanjan F., *Local Remedies in International Law*, (Cambridge, Cambridge University Press: 1990), pp. 147-149.

Berlin, Isaiah "Two Concepts of Liberty" in Berlin, Isaiah, *Four Essays on Liberty*, (Oxford, Oxford University Press: 1969).

Chia, Joyce; McAdam, Jane and Purcell, Kate, "Asylum in Australia: 'Operation Sovereign Borders' and International Law", *Australian Year Book of International Law*, Vol. 32, pp. 33-64.

Costello, Cathryn, "Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored", *Human Rights Law Review*, Vol. 12, No. 2 (2012) pp. 287-339.

Field, Jeannie Rose C., "Bridging the Gap between Refugee Rights and Reality: a Proposal for Developing International Duties in the Refugee Context", *International Journal of Refugee Law*, Vol. 22, No. 4 (2010), pp. 512-557.

Freeman, Michael, "Conclusion: Reflections on the Theory and Practice of Economic and Social Rights", in Minkler, Lanse (Ed.), *The State of Economic and Social Human Rights*, (Cambridge, Cambridge University Press: 2013).

Gammeltoft-Hansen, Thomas and Gammeltoft-Hansen, Hans, "The Right to Seek – Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU", *European Journal of Migration and Law*, Vol. 10, No. 4 (2008), pp. 439-459.

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

Gibney, Mark, "Establishing a Social and International Order for the Realization of Human Rights", in Minkler, Lanse (Ed.), *The State of Economic and Social Human Rights: an Overview*, (Cambridge: Cambridge University Press, 2013).

Gil-Bazo, María-Teresa, "The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law", *Refugee Survey Quarterly*, Vol. 27, No. 3 (2008), pp. 33-52.

Goodwin-Gill, Guy and McAdam, Jane, *The Refugee in International Law*, (Oxford, Oxford University Press: 2007).

Goodwin-Gill, Guy S., *The refugee in international law*, (Oxford, Clarendon Press: 1983).

Goodwin-Gill, Guy, "The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement", *International Journal of Refugee Law*, Vol. 23, No. 3, pp. 443–457.

Grahl-Madsen, Atle, *Commentary on the Refugee Convention 1951 Articles 2-11, 13-37*, (Geneva, Division of International Protection of the United Nations High Commissioner for Refugees: 1963 (republished 1997)).

Guiraudon, Virginie, "Before the EU Border: Remote Control of the 'Huddled Masses'", in Groenendijk, Kees; Guild, Elspeth and Minderhoud, Paul (eds.), *In Search of Europe's Borders*, (The Hague, Kluwer Law International: 2002).

Hathaway, James C. And Foster, Michelle, *The Law of Refugee Status*, (Cambridge, Cambridge University Press: 2014).

Hathaway, James C., *The Rights of Refugees under International Law*, (Cambridge, Cambridge University Press: 2005).

Hathaway, James C.; North, Anthony M. and Pobjoy, Jason, "Supervising the Refugee Convention", *Journal of Refugee Studies*, Vol. 26, No. 3, pp. 323-326.

Hurwitz, Agnès G., *The Collective Responsibility of States to Protect Refugees*, (Oxford, Oxford University Press: 2009).

Karunaratne, Chandana and Abayasekara, Ashani, *Managed Migration: Review of Readmission Agreements and a Case Study of Sri Lanka*, (Colombo, Institute of Policy Studies for Sri Lanka: 2012).

Kuosmanen, Jaakko, "Perfecting Imperfect Duties: The Institutionalisation of a Universal Right to Asylum", *The Journal of Political Philosophy*, Vol. 21, No. 1 (2013), pp. 26-28.

Langford, Malcolm and Coomans, Fons, "Extraterritorial Duties in International Law", in Langford, Malcolm; Vandenhole, Wouter; Scheinin, Martin and van Genugten, Willem (eds.) *Global Justice, State Duties: the Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, (Cambridge, Cambridge University Press: 2013).

Lauterpacht, Elihu and Bethlehem, Daniel, "The scope and content of the principle of *non-refoulement*: opinion" in Feller, Erika; Türk, Volker and Nicholson, Frances (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, (Cambridge, Cambridge University Press: 2003).

Léonard, Sarah, "EU border security and migration into the European Union: FRONTEX and securitisation through practices", *European Security*, Vol. 19, No. 2 (2010), pp. 231-254.

McCorquodale, Robert and Simons, Penelope, "Responsibility beyond borders", *Modern Law Review*, Vol. 70, No. 4, pp. 598-625.

McGoldrick, Dominic, "Extraterritorial effect of the International Covenant on Civil and Political Rights" in Coomans, Fons and Kamminga, Menno T. (eds.), *Extraterritorial Application of Human Rights Treaties*, (Antwerp, Intersentia: 2004).

Meron, Theodor, "Extraterritoriality of human rights treaties", *American Journal of International Law*, Vol. 89, No. 1 (1995), pp. 78-82.

Noll, Gregor, "Seeking asylum at embassies: a right to enter under international law?", *International Journal of Refugee Law*, Vol. 17, No. 3(2005), pp. 542-573.

Noll, Gregor, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, (The Hague, Martinus Nijhoff: 2000).

Nowak, Manfred, *UN Covenant on Civil and Political Rights: CCPR Commentary*, (Kehl am Rhein, Engel: 1993).

O'Neill, Onora, "The Dark Side of Human Rights", *International Affairs*, Vol. 81, No. 2 (2005), pp. 427-439.

O'Neill, Onora, *Bounds of Justice* (Cambridge, Cambridge University Press: 2000).

O'Neill, Onora, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning*, (Cambridge, Cambridge University Press: 1996).

Osiatynski, Wiktor, *Human Rights and their Limits*, (Cambridge, Cambridge University Press: 2009).

Papastavridis, Efthymios, "'Fortress Europe' and FRONTEX: Within or Without International Law?", *Nordic Journal of International Law*, Vol. 79, No. 1 (2010), pp. 75-111.

Robinson, Nehemiah, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation – A Commentary*, (New York, Institute for Jewish Affairs: 1953).

Roxstrom, Erik; Mark, Gibney and Einarsen, Terje, "The NATO bombing case (*Bankovic et al. v. Belgium et al.*) and the limits of Western human rights protection", *Boston University International Law Journal*, Vol. 23, No. 1 (Spring 2005), pp. 55-136.

Ryan, Bernard, "Extraterritorial Immigration Control: What Role for Legal Guarantees?", in Ryan, Bernard and Mitsilegas, Valsamis, *Extraterritorial Immigration Control*, (Leiden, Martinus Nijhoff Publishers: 2010).

Salomon, Margot E. and Seiderman, Ian, "Human Rights for a Globalized World: The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights", *Global Policy*, Vol. 3, No. 4 (November 2012), pp. 458-462.

Shue, Henry, *Basic Rights* (Princeton, Princeton University Press: 1996).

Sinha, S. Prakash, *Asylum in International Law*, (The Hague, Martinus Nijhoff: 1971).

Triandafyllidou, Anna and Dimitriadi, Angeliki, "Deterrence and Protection in the EU's Migration Policy", *The International Spectator*, Vol. 49, No. 4 (2010), pp. 146-162.

Vandenhole, Wouter, "Beyond Territoriality: The Maastricht Principles on extra-territorial obligations in the area of economic, social and cultural rights", *Netherlands Quarterly of Human Rights*, Vol. 29, No. 4(2011), pp. 429-433.

Vedsted-Hansen, Jens, "The asylum procedures and the assessment of asylum requests", in Chetail, Vincent and Bauloz, Céline (eds.). *Research Handbook on International Law and Migration*, (Cheltenham, Edward Elgar Publishing: 2014), pp. 439-458.

Waldron, Jeremy, *Liberal Rights* (Cambridge: Cambridge University Press, 1993).

Weis, Paul, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by the Late Dr. Paul Weis*, (Cambridge, Cambridge University Press: 1995).

Zimmermann, Andreas, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: a Commentary*, (Oxford, Oxford University Press: 2011).

Online sources

European Commission: Eurostat News Release, "Record number of over 1.2 million first time asylum seekers registered in 2015", No. 44/2016, 4 March 2016, available at: http://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/790eba01-381c-4163-bcd2-a54959b99ed6 [last accessed: 4 April 2016].

European Commission, Press Release: "Frontex Joint Operation 'Triton' – Concerted efforts to manage migration in the Central Mediterranean", 7 October 2014, available at: http://europa.eu/rapid/press-release_MEMO-14-566_en.htm [last accessed 2 January 2016].

European Commission, Press Release: "Frontex Joint Operation 'Triton' – Concerted efforts to manage migration in the Central Mediterranean", 7 October 2014, available at: http://europa.eu/rapid/press-release_MEMO-14-566_en.htm [last accessed 2 January 2016].

European Council on Refugees and Exiles, "Regional Protection Programmes: an effective policy tool?", January 2015, available at: ecre.org/component/downloads/downloads/982.html [last accessed 4 April 2016].

Evans, Gareth, "Responding to Mass Atrocity Crimes: The Responsibility to Protect (R2P) after Libya and Syria", Public lecture at the Central European University School of Public Policy, Budapest, 24 October 2012, http://www.gevans.org/speeches/speech496.html, [last accessed 25 October 2015].

Human Rights Watch, "Hungary: New Border Regime Threatens Asylum Seekers", 19 September 2015, available at: https://www.hrw.org/news/2015/09/19/hungary-new-border-regime-threatens-asylum-seekers [last accessed: 23 March 2016].

Hungarian Helsinki Committee, "Building a legal fence: Changes to Hungarian asylum law jeopardise access to protection in Hungary", 7 August 2015, pp. 1-2, available at: http://helsinki.hu/wp-content/uploads/HHC-HU-asylum-law-amendment-2015-August-info-note.pdf [last accessed: 28 March 2016].

Hungarian Helsinki Committee, "Building a legal fence: Changes to Hungarian asylum law jeopardise access to protection in Hungary", 7 August 2015, pp. 1-2, available at: http://helsinki.hu/wp-content/uploads/HHC-HU-asylum-law-amendment-2015-August-info-note.pdf [last accessed: 28 March 2016].

Nagy, Boldizsár, "Parallel realities: refugees seeking asylum in Europe and Hungary's reaction", *EU Immigration and Asylum Law and Policy Blog*, 4 November 2015, available at: http://eumigrationlawblog.eu/parallel-realities-refugees-seeking-asylum-in-europe-and-hungarys-reaction/ [last accessed: 23 March 2016].

Nielsen, Nikolaj, "Frontex mission to extend just beyond Italian waters", *EUobserver*, Brussels, 7 October 2014, available at: https://euobserver.com/justice/125945 [last accessed: 4 April 2016].

Reuters, "Spreading across Europe: a fortress of fences", 4 April 2016, available at: http://www.reuters.com/investigates/special-report/migration/#story/38 [last accessed: 6 April 2016].

The Economist, "Migration to Europe: Death at Sea", 3 September 2015, available at http://www.economist.com/blogs/graphicdetail/2015/09/migration-europe-0 [last accessed: 4 April 2016].

The Economist, "Tidal Wave: More Horrific Deaths in the Mediterranean", 5 July 2014, available at: http://www.economist.com/news/europe/21606301-more-horrific-deaths-mediterranean-tidal-wave [last accessed: 2 January 2016].

UNHCR EXCOM Conclusion No. 82, "Safeguarding Asylum", 17 October 1997, available at: http://www.unhcr.org/3ae68c958.html [last accessed: 4 April 2016].

UNHCR, "Position on Conventions Recently Concluded in Europe (Dublin and Schengen Conventions)", 16 August 1991, available at: http://www.unhcr.org/43662e942.html [last accessed: 4 April 2016].

UNHCR, "Serbia as a Country of Asylum: Observations on the Situation of Asylum-Seekers and Beneficiaries of International Protection in Serbia", August 2012, available at: http://www.unhcr.rs/media/UNHCRSerbiaCountryofAsylumScreen.pdf [last accessed: 28 March 2016].

United Nations High Commissioner for Refugees, Press Release: "UNHCR urges Europe to change course on refugee crisis", 16 September 2015, available at: http://www.unhcr.org/55f9a70a6.html [last accessed: 26 March 2016].

United Nations High Commissioner for Refugees, "Worldwide displacement hits all-time high as war and persecution increase", 18 June 2015, available at: http://www.unhcr.org/558193896.html [last accessed: 6 April 2016]

United Nations Office for the High Commissioner for Human Rights, *Economic and Social Council resolution 1985/17*, available at: ap.ohchr.org/documents/E/ECOSOC/resolutions/E-RES-1985-17.doc [last accessed: 4 April 2016].

Human Rights Watch, “World Report 2016: Australia, Events of 2015”, available at: https://www.hrw.org/world-report/2016/country-chapters/australia [last accessed: 6 April 2016].