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EXTRATERRITORIAL BORDER CONTROLS AND RESPONSIBILITY TO PROTECT: A VIEW FROM ECRE

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Introduction

Recent times have witnessed a significant decline in the number of persons seeking asylum on the territory of European Union (EU) countries. According to the UNHCR 'Asylum Levels and Trends in Industrialised Countries, 2007', there are now fewer than 223,000 applicants in the 27 Member States per year –in 1992, in contrast, some 700,000 persons applied for protection in the then 15 EU countries. While the number of asylum applications rose last year, this followed the 20-year low reached in 2006. Furthermore, this increase took place despite a number of traditional receiving countries, such as Germany, France and the United Kingdom, registering the lowest numbers in years or even decades.[1] When these trends are observed in the light of Member States' continuous tightening of their border controls, it seems evident that access to the territory and to the asylum procedure is being seriously obstructed in the Union. For the European Council on Refugees and Exiles (ECRE) and its Member Agencies, 68 civil society organisations in 30 countries working together to promote the rights of all individuals seeking protection within Europe, it is clear that the notion of a Common European Asylum System (CEAS) risks becoming meaningless if people who need asylum are *a priory* excluded from access to the EU.

With barely any legal migration routes into the EU from third countries, refugees and migrants are being forced into irregular means of travelling. The response of EU governments to these mixed flows of people has been characterised by an overriding effort to prevent migrants, including persons fleeing persecution, from reaching their frontiers.[2] In pursuing this goal, control policies have also become increasingly sophisticated. The EU borders have been 'de-territorialised' and are now virtual borders, monitored through the use of advanced identification technologies and databases.[3] Border management activities are no longer confined to the physical frontiers of the Member States or to the external borders of the EU; instead, their scope has been extended well beyond these, towards the high seas and into the territory

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[1] UNHCR, 'Asylum Levels and Trends in Industrialised Countries, 2007, Statistical Overview of Asylum Applications Lodged in Europe and Selected Non-European Countries', 18 March 2008, p. 4.

[2] A. Betts, 'Towards a Mediterranean Solution? Implications for the Region of Origin', *International Journal of Refugee Law* (18) 2006-3/4, p. 655.

[3] D. Bigo & E. Guild (eds.), *Controlling Frontiers, Free Movement Into and Within Europe*, Aldershot: Ashgate 2005, pp. 233-263.

of third countries, sometimes in cooperation with those countries' authorities. The ultimate goal is to stem flows at their source, by ensuring that potential asylum seekers do not leave their countries of origin or, if they manage to do so, that they remain as close as possible to the country/region from where they come.[4] This is in contravention with the right to leave one's country under the Universal Declaration of Human Rights,[5] which is central to the right to seek asylum.[6] It also creates the risk of effective *refoulement,* when persons in need of protection are excluded from gaining access to a fair and efficient asylum procedure.

From ECRE, we have insisted that Member States' obligations under international and European refugee and human rights law do not stop at the physical boundaries of the EU: they can be engaged by actions states carry out outside their national and EU borders, directly or through agents.[7] All EU Member States are bound by the 1951 Refugee Convention,[8] as well as by the relevant provisions in the European Convention on Human Rights (ECHR) and other human rights instruments whenever and wherever they exercise migration controls amounting to an exercise of jurisdiction – understood as effective control over an individual or over another state's territory. In what follows I will briefly examine what international law does tell us about the obligations engaged by Member States in conducting extraterritorial migration controls, drawing on the prerequisite that control implies responsibility. I will then refer to interception at sea practices, an area in which the externalisation of migration management, combined with the existence of gaps in international maritime law, has given rise to pressing protection issues.

I. A Fundamental Principle: The Exercise of Control Implies Responsibility

It is sometimes claimed that states are only responsible for observing international refugee and human rights within their territory, that everything beyond the magic line of the external borders is somehow a 'legal black hole'.[9] The problem is further compounded in the case of the EU which, unlike the Member States, is as such not liable under international law. It is a general tenet of human rights law, however, that wherever there is power

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[4] M. Gil-Bazo, 'The practice of Mediterranean States in the context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited', *International Journal of Refugee Law* (18) 2006, p. 573.
[5] Universal Declaration of Human Rights, 10 December 1948, Article 13 (2).
[6] *Idem*, Article 14.
[7] ECRE, 'Defending Refugees Access to Protection in Europe', December 2007.
[8] The 1951 Convention Relating to the Status of Refugees.
[9] For example, in a press statement issued in September 2005, the German Minister of Interior, Otto Schily claimed that the principle of *non-refoulement* "has no application in the high seas". Quoted in M. Garlick, 'The EU Discussion on Extraterritorial Processing: Solution or Conundrum', *International Journal of Refugee Law* (18) 2006, p. 620.

there should be control of how this power is exercised. As a result, there is a logical and unquestionable link between the exercise of extraterritorial immigration control, and the obligation to assume full responsibility for it. This responsibility is not only moral and political – EU Member States cannot abdicate their principles, values and commitments by doing outside their borders what would not be permissible in their territories – but also legal. Notwithstanding how convenient a presumption of irresponsibility may be to policy-makers keen to rid themselves of their legal duties, a careful examination of both international and European refugee and human rights law evidences that these obligations do not stop at national borders.

The principle of *non-refoulemment*, as enshrined in Article 33(1) of the 1951 Refugee Convention, constitutes the cornerstone of Member States' obligations in the field of refugee protection. It prohibits a states party from returning refugees to countries where they may face persecution. According to the position of UNHCR,[10] scholars[11] and extensive state practice, the obligation of *non-refoulement* does not arise only when a refugee is within or at the borders of a state but also when a refugee is under its effective or *de facto* jurisdiction outside its territory - including in international waters as well as in the territorial waters and the territory of another state. The only geographic restriction placed by Article 33(1) of the 1951 Refugee Convention concerns the country where a refugee cannot be sent *to*, not the place where a refugee is sent *from*. It should also be emphasised that compliance with the *non-refoulement* principle requires an asylum claim to be examined in its substance. [12] In practice, this will usually entail the acting state allowing asylum seekers access to its territory and asylum procedure. When a control operation takes place in the territory of a third country and the EU Member State involved does not exert effective control over the persons concerned, the examination of any asylum claims may take place in that third state only if there are guarantees that the *non-refoulement* principle and other protection standards will be fully ensured.

Furthermore, Member States have responsibilities and can be held accountable under a number of international human rights instruments for actions executed outside their borders. These include the International Covenant on Civil and Political Rights (ICCPR), the UN Convention against Torture (CAT) and the International Convention on the Elimination of all Forms of Racial Discrimination, all of which relate to jurisdiction rather than territory. As the relevant case-law evidences, this also entails instances where states exercise jurisdiction extra-territorially. For instance, the Human Rights

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[10] UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol', January 2007.

[11] J. C. Hathaway, *The Rights of Refugees in International Law*, Cambridge: Cambridge University Press 2005, pp. 335-341; G. Goodwin-Gill & J. Mc Adam, *The Refugee in International Law*, Oxford: Oxford University Press 2007, pp. 244-53.

[12] Alice Edwards, 'Human Rights, Refugees, and the Right "To Enjoy Asylum"', *International Journal of Refugee Law* (17) 2005-2, p. 301.

Committee has taken the position that States can be held accountable for breaches of the ICCPR which are committed on the territory of another state, whether with the acquiescence of the authorities of that state *or in opposition to it.*[13] These instruments have been ratified by all Member States and by many of the countries in which extraterritorial migration controls are carried out, e.g. Mauritania, Morocco, Senegal and Libya. As such, both EU Member States and third countries are bound to respect their provisions when undertaking extraterritorial control measures.

It is also beyond doubt that the obligations stemming from the ECHR are not limited to the territory of a state: the wording of the ECHR,[14] as well as the established jurisprudence of the European Court of Human Rights (ECtHR) recognise that states are accountable for the effects of any act carried out within their jurisdiction, even if such effects take place outside their territory.[15] In particular, the ECHR's scope of application covers the territory of a state party, including its borders and transit zones, as well as wherever, outside its territory, a state party exercises jurisdiction.[16] In the latter case, jurisdiction can consist of either the exercise of effective control over an individual, or effective control over another state's territory.[17] The only case on the exercise of extraterritorial immigration control that the ECtHR has examined so far concerns an operation of interception at sea, conducted by a State party (Italy) in international waters and in the territorial waters of another State party (Albania), during which a collision between an Italian military ship and an unseaworthy vessel caused the deaths of 58 migrants.[18] While the ECtHR held this case inadmissible on the grounds of non-exhaustion of domestic remedies, it did recognise that Italy was exercising jurisdiction and that if the case had progressed to a consideration of its merits there would have been an argument under Article 2 of the ECHR (the right to life).

I am not suggesting that all extra-territorial measures of migration control, in all circumstances, amount to a violation of the ECHR. These measures will certainly engage the ECHR, however, when they reach the threshold of constituting effective control either over an individual or a place. This test has to be satisfied in each individual case. Although the jurisprudence set out

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[13] Human Rights Committee, *Lopez Burgos v. Uruguay*, 29 July 1981.

[14] 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention' (Article 1 – Obligation to respect human rights).

[15] See, for instance, ECtHR 12 March 2003, no. 462211/99 (*Ocalan v. Turkey*), applying to Turkish activities in Kenya, and ECtHR 16 November 2004, no. 31821/96 (*Issa v. Turkey)* applying to Turkish activities in Iraq.

[16] See respectively ECtHR 25 June 1996, no. 17/1995/523/609 (*Amuur v. France*), ECtHR 18 December 1996, no. 15318/89 (*Loizidou v. Turkey*).

[17] See respectively *Ocalan v. Turkey*; ECtHR 8 July 2004, no. 48787/99 (*Ilascu and others v Moldova and Russia*).

[18] ECtHR 11 January 2001 (*Xhavara and fifteen v. Italy and Albania)*, admissibility decision (in French only).

above is specific to the ECtHR, the principles to determine jurisdiction laid down may be considered as a benchmark to evaluate the existence of an exercise of effective control under other international instruments, including the 1951 Refugee Convention. In this respect, two issues deserve particular attention. The first refers to the nature and the extent of the powers that are exercised by the authorities of the Member States. Naturally, there may be a difference between cases where EU States exercise full immigration powers and instances where they merely take on an advisory capacity. While the presumption of an exercise of jurisdiction will obviously be very high when Member States act directly to prevent the onwards movement of refugees towards the EU, they may also incur responsibility by merely aiding another state or private party in carrying out a wrongful act under international law. A second issue concerns possible overlaps with the jurisdiction of a third state in cases where control is carried out on the territory or in the territorial waters of non-EU countries. The jurisprudence of the ECtHR clearly indicates that party States are, under certain circumstances, liable even when acting inside another state's territorial jurisdiction. This does not mean that the intercepting states will, in all instances, have to grant refugees access to their territories, but it does mean that the acting state must ensure that refugees do not face *refoulement* or so-called "chain *refoulement*"' through any third state to they are returned.

II. Interception at Sea: A Grey Area?

While there is still limited empirical evidence available, existing research shows that a sizeable proportion of those persons attempting to reach the EU's southern border by sea are likely to be refugees, fleeing from instability, conflict and human rights abuses in their countries of origin.[19] Sailing across the waters of the Mediterranean and East Atlantic is often the last and most perilous part of their journey in search for protection, during which travel conditions can be extremely life threatening. Paradoxically, the prevailing public discourse tends to invert this risk in addressing migration by sea as a menace to the security of the receiving society, rather than from the perspective of the people whose lives are actually in jeopardy.[20] Migrants are described as a "tide", "wave", etc, threatening to "flood" the country of destination, even if it is actually them who are "at the mercy of tides, waves, shipwreck and drowning".[21] Such discursive construction of migration by sea as a threat challenges the humanitarian values underpinning the international maritime regime.[22]

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[19] See A. Betts, 'Towards a Mediterranean Solution? Implications for the Region of Origin', *International Journal of Refugee Law* (18) 2006-3/4, pp. 656-659; S. Kneebone, C. McDowell, G. Morrell, 'A Mediterranean Solution? Chances of Success', *International Journal of Refugee Law* (18) 2006-3/4, pp. 492-493.

[20] M. Pugh, 'Drowning not Waving: Boat People and Humanitarianism at Sea', *Journal of Refugee Studies* (17) 2004, p. 55.

[21] *Idem,* pp. 54-55.

[22] *Ibid.*

Member States' governments have responded to arrivals in the southern border by engaging in a range of interception at sea measures, including activities to prevent the departure of boats or ships on dry land or in the proximity of the coast; diversion; and visiting/boarding of vessels, sometimes in cooperation with African countries. Whether these forms of interception are lawful according to international human rights and refugee law depends on the law applicable to the stretch of sea where interception takes place, or on the consent of the third country for interception on its territory or territorial waters. The issue is further compounded, however, due to the participation of the European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX), which is supporting Member States' border control operations in international waters and the waters of non-EU countries. Moreover, within this context the enforcement of interception often overlaps with the obligation to render assistance to persons and ships in distress at sea wherever they are encountered.[23] EU Member states also have the obligation to coordinate search and rescue operations of vessels in distress within a determined area along their coasts – the so-called search and rescue (SAR) region.[24] On the other hand, the obligation to rescue can be used as a pretext to undertake interception.

At ECRE, we strongly believe that the fundamental principle that control implies responsibility also applies to interception measures: any such operation engages the obligations of the Member State/s involved under refugee and human rights law whenever the control exercised over the persons on board amounts to jurisdiction. Pushing back a boat in international waters or transferring it to a coastal state, including a non-EU country, will usually meet this threshold. Under these circumstances, all persons on board intending to apply for asylum should be brought to the EU territory. What happens when, although involving a Member State, interception takes place in the waters of the territory of a third country? ECRE would stress that, even when they do not exercise jurisdiction, EU countries should ensure that the obligations flowing from the 1951 Refugee Convention and international human rights law are fully respected. Therefore, prior to engaging in interception activities Member States should obtain guarantees from the third country that, *inter alia*, disembarkation will be allowed, refugees will not face a risk of chain *refoulement* and that adequate reception facilities will be available, including the necessary medical treatment. Furthermore, any processing of asylum seekers should take place on dry land after disembarkation and not on board of boats to minimise the

[23] This is an obligation under international customary law, which is also codified in the Montego Bay Convention, the International Convention for the Safety of Life at Sea (SOLAS) of 1974 and in the Search and Rescue Convention (SAR Convention) of 1979.

[24]However, not all European countries have ratified the amendments to the SAR and SOLAS Conventions (Finland, Malta, Norway). For clarity, the SAR region does not necessarily coincide with the territorial sea or the contiguous zone.

trauma of rescued asylum seekers and prevent any possible procedural injustices.[25]

In relation to interception at sea practices, disembarkation constitutes a particularly pressing issue, partly due to existing gaps in the international maritime regime. While the law of the sea is clear as regards to who is responsible for rescuing persons in distress, it does not set out which State should allow for the disembarkation of the individuals rescued. Here, the accepted maritime rule is that those persons are to be taken to a place of safety, which in turn has been interpreted to mean the next port of call –not necessarily the nearest or the most convenient.[26] The impact that this ambiguity has had in practical terms is related with the absence of effective EU responsibility sharing mechanisms. The fact is that, due to their geographical location, some Member States face a much greater number of arrivals than others. As a result, their governments have become increasingly unwilling to fulfil their international obligations, including that of rescuing persons in danger at sea, as well as to authorise the disembarkation of those rescued by others. The dramatic case of the 27 men who were left hanging onto a tuna net for three days in the Mediterranean while Malta refused to rescue them, just one of many crises in recent years, demonstrates the extent to which the lack of responsibility-sharing is putting lives at risk.[27] While clearly the EU needs to devise ways to share the responsibility for hosting refugees more fairly between the EU partners,[28] to date Member States have showed political willingness to cooperate only in terms of strengthening their border controls.

Finally, from ECRE we observe with intense concern the increasingly important role that FRONTEX is playing in the management of the external borders, not the least as regards interception at sea. As a matter of principle, we question whether FRONTEX can be involved in interception and diversion operations beyond the EU borders. As a EU agency, the legal basis for FRONTEX activities derives from its founding Regulation,[29] which does not authorise the agency to coordinate actual operations in a third country's territorial waters. An assessment of FRONTEX activity reports also reveals an ethos in which preventing as many people as possible from entering the EU is the principal indicator of success;[30] for ECRE, in contrast, it is a serious reason to believe that the principle of *non-refoulement* may be violated.

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[25] See e.g. C. Baillet, 'The Tampa Case and its Impact on Burden-Sharing at Sea', *Human Rights Quarterly* (25) 2003, p. 759.
[26] Pugh 2004, *supra* note 20, p. 61.
[27] See e.g. CIR, 'Report Regarding Recent Search and Rescue in the Mediterranean', July 2007.
[28] ECRE, 'The Way Forward: Europe's Role in the Global Refugee Protection System-An Agenda for Change', April 2006
[29] 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 the Member States of the European Union, OJ L 349 of 25.11.2004.
[30] See e.g. FRONTEX, 'Annual Report 2006', 2007, pp. 8, 13.

Does FRONTEX know how many of the people intercepted during its operations had protection concerns? Were any able to access an asylum procedure, and where? What has happened to them since? Let me make myself clear. I do not wish to overstate the role of FRONTEX: Member States are signatories to international conventions, maintain full command during operations and therefore have the primary responsibility towards refugees. However, the critical role of FRONTEX in determining how operations are carried out also means it cannot be devoid of all responsibilities for ensuring that these are respectful of human rights, including those of refugees.

Conclusion

Europe has a long-standing commitment in the field of asylum and human rights. In over fifty years of application of the 1951 Refugee Convention and of the ECHR, it has built a solid system to ensure that all those who come under the jurisdiction of European States can enjoy fundamental rights and liberties, are protected against any violations of those rights, and can hold States accountable before the courts in that respect. Through the process of European integration, the EU has explicitly endorsed the values of the ECHR; in fact, human rights and humanitarian principles are considered the foundation of the Union, and their respect is a condition for new membership.[31] Over the years, the EU has also progressively increased its activities to safeguard human rights, which has led to the adoption of the EU Charter of Fundamental Rights in 2000 and the establishment of the Fundamental Rights Agency in 2007.

It is therefore not consistent with this approach for the EU to act as if human rights and humanitarian principles stopped at its physical borders. Here, ECRE's line of argument echoes the Conclusions of the Tampere European Council, which in 1999 established that:

> 1.From its very beginning European integration has been firmly rooted in a shared commitment to freedom based on human rights, democratic institutions and the rule of law. (…) 3. This freedom should not, however, be regarded as the exclusive preserve of the Union's own citizens. Its very existence acts as a draw to many others world-wide who cannot enjoy the freedom Union citizens take for granted. *It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory.*[32]

Refugee protection is now back in the common agenda for cooperation, as the EU is set to start the review of its core asylum instruments. At ECRE we hope that this legislative programme will address the significant flaws of the existing asylum *acquis* and promote the creation of a CEAS which is really inclusive. Nevertheless, the quality of the protection afforded by EU asylum

[31] Treaty of the European Union (year of enactment?), Articles 6 and 49.
[32] Council Presidency Conclusions, 15/16 October 1999, paras. 1,3. Emphasis added.

law will lose part of its relevance if the persons to whom such legislation applies are excluded from ever reaching Member States' territories. Current asylum trends reveal to what extent it has become difficult for refugees to overcome the arsenal of controls deployed at the EU borders. That these controls are often conducted beyond the EU physical frontiers cannot legitimise governments to evade their obligations concerning people fleeing persecution. Both the European Union and the Member States should recognise that the power to prevent access to the territory carries with it the responsibility to protect those in need.