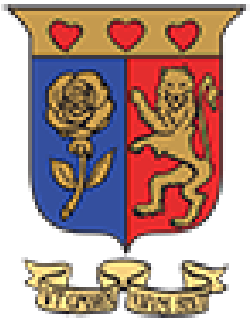

Strathmore University

Law School

OUTSOURCING OBLIGATIONS: AN ANALYSIS OF THE PRINCIPLE OF *NON-REFOULEMENT* WITH REGARD TO THE PRIVATISED PUSHBACKS

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree,

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Prepared under the supervision of

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Dedication

For my fellow Eritrean brothers and sisters who are victims of push-backs and feel like their voices are not only heard but stifled by Governments who fail to consider their desperation when fleeing from persecution and instead return them to the hell they attempted to run away from.

Acknowledgments

I would first like to thank God for providing me with the strength and the grace to soldier through my dissertation. I would also like to thank my supervisor, Mr. Allan Mukuki, to whom I am beholden for all the direction and patience afforded to me throughout my research. I am also appreciative of the support, encouragement and prayers of my ever-present family and friends.

Declaration

I, FENAN ESTIFANOS, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: 30 July 2021 .....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

Mr. Allan Mukuki

Abstract

'*If someone escapes hell how can you grab them back and take them back to hell*?' *-Bemba* [1] *This quote summarises the plight of several refugees that are being forcefully returned to Libya on commercial ships. These forceful returns are at the behest of States, such as Italy and Malta, which are attempting to reduce the inflow of refugees into their countries. These push-backs however have not been attributed to any of these State despite the protection afforded by the non-refoulement obligation. As a result, these privatised push-backs are likely to be adopted by several States if action is not taken against them. By discussing the principle of non-refoulement, this paper presents the extraterritorial notion of the principle which applies to privatised push-backs in the same way it applies to push-backs by the State. Extending this scope and applying the Articles of Responsibility evinces that Italy and Malta should be held responsible for these privatised push-back.*

[1] Bemba is a refugee from Ivory Coast who was interviewed by Human Rights Watch, *No escape from hell: EU policies contribute to abuse of migrants in Libya*, 21 January 2019 https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya# on 4 August 2020.

List of Abbreviation

ECHR	European Convention on human Rights
ECtHR	European Court of Human Rights
EU	European Union
glan	Global Legal Action Network
ICCPR	International Covenant on Civil and Political Rights
PIL	Public International Law
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea

List of Cases

Xhavara and others v Italy and Albania , Application no. 39473/09, Admissibility decision of 11 January 2001, (unreported case).

List of Legal Instruments

1967 Protocol to the Refugee Convention, 31 January 1967, 60 UNTS 267.

Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

Convention against Torture and other Inhuman and Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S 85.

Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 UNTS 45.

Convention Relating to the International Status of Refugees, 28 October 1933, 159 LNTS 199.

Draft articles on state responsibility for internationally wrongful acts, ILC 53rd Report, 2001, UN Doc A/56/10.

European Convention for the protection of Human Rights and fundamental freedoms, 4 November 1950, ETS 5.

Geneva Convention relative to the Protection of Civilians Persons in Time of War, 12 Aug 1949, 75 UNTS 287.

International Convention for the Safety of life at Sea, 25 May 1980, 1184 U.N.T.S 3.

International Convention on Maritime Search and Rescue, 27 April 1979, 1403 UNTS.

International Convention on Salvage, 28 April 1989, 1953 UNTS.

Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V).

The 1951 Convention Relating to the Status of Refugees, 22 April 1954, 189 U.N.T.S 137.

Article 98(1), *United Nations Convention on the Law of the Sea*, 16 November 1994, 1833 U.N.T.S. 397.

Universal Declaration of Human Rights, 217 A (III) (10 December 1948).

Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.

Chapter 1

1.0 Introduction

'You have to understand no one puts their children in a boat unless the water is safer than the land',[2] the words of Warsan Shire illustrate the reality of many refugees who attempting to escape the persecution and torture they face in their home countries make the dreaded journey through the Mediterranean Sea. The situation is further frustrated where once they have made such an attempt, they are denied disembarkation or even worse are pushed-back to the country they are escaping from due to the fear that they might claim asylum.[3]

'Pushbacks are a set of state measures by which refugees and migrants are forced back over a border – generally immediately after they crossed it – without consideration of their individual circumstances and without any possibility to apply for asylum or to put forward arguments against the measures taken…'[4] States have identified ways to circumvent this by outsourcing their obligation to rescue migrant ships to commercial ships that subsequently force back migrants to the countries they have fled from.

These privatised push-backs have been on a rise since 2018.[5] This is based on the policies being implemented by these EU coastal States. These privatised pushback operations are violations of *non-refoulement* especially when the migrants are being sent to an unsafe third country. These violations need to be attributed to the States that enabled them. Attributing this conduct

[2] Shire W, 'Home', in Alessandro Triulzi and Robert Mackenzie (eds) *Long Journeys. African Migrants on the Road*, Brill, Leiden, 2013, xi.
[3] Kanade M, 'Don't ask me who I am: The deaf ear and blind eye of maritime law on disembarkation of refugees and asylum-seekers rescued at sea' 16 *ISIL Yearbook on International Humanitarian and Refugee Law*, 2016-2017, 2.
[4] ECCHR Glossary, https://www.ecchr.eu/en/glossary/push-back/ on 4 August 2020.
[5] Kingsley P, 'Privatised pushbacks: How merchant ships guard Europe'New York Times, 20 March 2020, https://www.nytimes.com/2020/03/20/world/europe/mediterranean-libya-migrants-europe.html on 4 August 2020.

to States has been identified by this study and therefore there is a need to analyse the obligation preferred by the non-refoulement principle, the extraterritorial application of this principle and conclusively whether States can be held responsible for these acts.

1.1 Background to the study

The heart tugging words by Bemba epitomize the dire situation being faced by very many refugees who after being rescued on the high seas, are returned to the country they escaped from. These refugees attempt the traumatic journey, that is crossing the Mediterranean Sea, in an attempt not only to flea persecution but to also receive refugee in a country where their rights and freedoms will be respected. This however is not the reality for many as their boats are intercepted and returned to Libya. The worst part of all this, is that once they are returned to Libya, these migrants are faced with grievous violations at the hands of government authorities and smugglers who run the detention centres.[6] These egregious actions are referred to as push-backs which have become more notorious since their privatisations.

Prior to privatisation, the push-backs would be carried out by the coastal authorities of a State. An example of one such operation was in 2009 when Italian Coast Guard intercepted a migrant ship of the coast of Lampedusa and returned the migrant to Libya.[7] This resulted in a group of eleven Somali and thirteen Eritrean nationals bringing a suit against the State of Italy on the 29 May 2009.[8] The ECtHR, in addressing this suit, in *Hirsi Jamaa and Others v Italy (Hirsi*

[6] An example of such a story is that of Steven, a twenty year old South Sudanese, who describes being beaten and shot after being returned to Libya by a commercial ship- read in Kingsley P, 'Privatised pushbacks: How merchant ships guard Europe' New York Times, 20 March 2020, https://www.nytimes.com/2020/03/20/world/europe/mediterranean-libya-migrants-europe.html on 4 August 2020.

[7] Mallia P, '*Hirsi Jamaa and Others v Italy:* Implications for the intervention on the High Seas. Where does Malta stand?' The People for Change Foundation, 2012, 4- http://www.pfcmalta.org/uploads/1/2/1/7/12174934/hirsi_working_paper.pdf on 27 July 2020.

[8] *Hirsi Jamaa and Others v Italy*, ECtHR Judgement of 23 February 2012, paras. 1, 9, 10.

Jamaa) held that the actions by the Italian Authorities was a violation of the principle on *non-refoulement* and as a result established the extraterritorial application of this principle.[9] In attempting to establish what enabled the push-back of the migrants by the Italian coast guard, some authors have attributed it to the bilateral agreement between Italy and Libya.[10] The bilateral agreement referred to here is the *Treaty of Friendship, Partnership and Cooperation and the Implementation Protocol,* which was entered into to ensure joint maritime patrols and the repatriation of irregular immigrants in an attempt to combat human trafficking.[11]

The practice of repatriating refugees changed after the *Hirsi Jamaa* decision by the ECtHR. In fact, Italy proceeded to change tact in 2013 when they introduced the Mare Nostrum Operation where they intercepted and rescued about 150,000 refugees over a period of ten months.[12] This operation was launched on 18 October 2013 with the aim of safeguarding human life while at sea.[13] The end of this operation on the 31st of October 2014 coincided with the ushering in of a new operation just like the Mare Nostrum Operation.[14] Despite this onset, the trend where refugees where intercepted and brought to Europe for a second chance at life was discontinued.

[9] *Hirsi Jamaa and Others v Italy*, ECtHR.

[10] Mallia P, '*Hirsi Jamaa and Others v Italy:* Implications for the intervention on the High Seas. Where does Malta stand?' The People for Change Foundation, 2012, 4- http://www.pfcmalta.org/uploads/1/2/1/7/12174934/hirsi_working_paper.pdf on 27 July 2020.

[11] Mallia P, '*Hirsi Jamaa and Others v Italy:* Implications for the intervention on the High Seas. Where does Malta stand?' The People for Change Foundation, 2012, 4- http://www.pfcmalta.org/uploads/1/2/1/7/12174934/hirsi_working_paper.pdf on 27 July 2020.

[12] International Organization for Migration, *IOM applauds Italy's life-saving Mare Nostrum Operation: 'Not a migrant pull factor'*, https://missingmigrants.iom.int/iom-applauds-italy's-life-saving-mare-nostrum-operation-'not-migrant-pull-factor' on 5 September 2020.

[13] Marina Militare, *Mare Nostrum Operation*, https://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx on 5 September 2020.

[14] Marina Militare, *Mare Nostrum Operation*, https://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx on 5 September 2020.

This is evinced by the increase in privatised push-backs, where about 1800 migrants have been returned to Libya on commercial ships since 2018.[15]

This increase can be attributed to the cooperation between Italy and Libya. In 2017, Italy and Libya signed a *Memorandum of Understanding* (MOU).[16] At the center of this MOU was the objective to stem the inflow of illegal migrants.[17] This objective though not explicitly stated can be identified in the provisions of the MOU. For instance, Article 1 of the MOU states that one of the key commitments between the two countries is to resume their partnership with regard to security and irregular migration according to past bilateral agreements, that is the *Treaty of Friendship, Partnership and Cooperation* and the *Implementation Protocol.*[18] Furthermore, Article 2 of the MOU provides that Italy will finance; the southern land border control, any pertinent adjustments to the local reception centres, the supply of medicine and equipment to ensure the health requirements of the migrants detained there are met and the training of Libya personnel working in such centres on how to deal with clandestine migration and human trafficking.[19] These provisions cumulatively highlight an attempt to make Libya a

[15] Kingsley P, 'Privatised pushbacks: How merchant ships guard Europe' New York Times, 20 March 2020, https://www.nytimes.com/2020/03/20/world/europe/mediterranean-libya-migrants-europe.html on 4 August 2020.

[16] *Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic*, 2 February 2017, https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf on 5 August 2020.

[17] Forensic Oceanography, *The Nivin case: Migrants' resistance to Italy's strategy of privatised push-backs*, December 2018, 19.

[18] Palm A, 'The Italy-Libya memorandum of understanding: The baseline of a policy approach aimed at closing all doors to Europe' Instituto Affari Internazionali, 2 Oct 2017,https://eumigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/ on 3 January 2020.

[19] Palm A, 'The Italy-Libya memorandum of understanding: The baseline of a policy approach aimed at closing all doors to Europe' Instituto Affari Internazionali, 2 Oct 2017,https://eumigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/ on 3 January 2020.

haven for refugees while ignoring the reality of human rights violations present and prevalent in Libya.

This agreement was adapted by the EU the very next day after it was entered into.[20] The EU passed it as the *Malta Declaration*.[21] In addition to this, the MOU was renewed on 2 November 2019. [22] This study asserts that the agreement and the declaration led to an increase in privatised push-backs because these policies enabled EU coastal States to institute a strict "closed port" policy which led to the outsourcing of their obligations to Libya, and where the Libyan Coast Guard was unable to carry out the interception these States would call upon merchant ships to carry out the push-backs.[23] This dissertation shall establish this by analyzing two instances of privatised push-backs. These instances being the Nivin case and the privatised push-backs ordered by Malta.

The Nivin case is a complaint submitted by the Global Legal Action Network (glan), to the Human Rights Committee, who seek to establish that Italy and other States have violated their international obligations by returning refugees to Libya on merchant ships.[24] A Spanish surveillance aircraft spotted a migrant ship carrying ninety-three migrants.[25] On spotting this migrant ship, the surveillance aircraft informed both the Italian and Libyan Coast Guards to

[20] Council of the European Union, *Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route*, 3 February 2017.
[21] Council of the European Union, *Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route*, 3 February 2017.
[22] ANSA, 'Italy renews Libya cooperation deal, pledges to 'improve it'' Infomigrants, 1 November 2019 https://www.infomigrants.net/en/post/20536/italy-renews-libya-cooperation-deal-pledges-to-improve-it on 6 August 2020.
[23] Forensic Oceanography, *The Nivin case: Migrants' resistance to Italy's strategy of privatised push-backs*, December 2018, 16.
[24] Global Legal Action Network, *Complaint filed with UN body over Italy's role in privatised push-backs to Libya resulting in migrant abuse*, 18 December 2019.
[25] Heller C, 'Privatised push-back of the Nivin' Forensic Oceanography, 18 December 2019', https://forensic-architecture.org/investigation/nivin on 4 August 2020.

pull back the ship.[26] The Libyan Coast guard was unable to coordinate the repatriation and therefore the Italian Coast Guard instructed the Nivin, a commercial ship flying the Panamanian flag, to intercept the ship and return the migrants to Libya. [27]

When this interception was carried out, the migrants were informed that they were being taken to Italy however they soon realised that they had been lied to and were instead being taken to Libya. [28] On realizing this, they locked themselves up in the holding of the ship to avoid being forced to interact with the Libyan authorities. [29] When they refused to disembark, the Libyan Security Forces resorted to the use of tear gas, rubber bullets and live bullets to forcefully debark them from the ship. [30]

In a different effort to prevent migrants from getting to Malta, the Maltese authorities enlisted merchant ships to intercept the migrants and return them to Libya.[31] On the 12th of April 2020, the Maltese authority dispatched three commercial ships, *Dar Al Salam 1*, the *Salve Regina* and the *Tremar*, to forcefully return migrants to Libya.[32] Mr. Neville Gafa, a former Maltese official, recounted that he was enlisted by the government on the same night to ensure that these boats had safe passage to Libya.[33] The spokesperson for the United Nations Human

[26] Heller C, 'Privatised push-back of the Nivin' Forensic Oceanography, 18 December 2019', https://forensic-architecture.org/investigation/nivin on 4 August 2020.
[27] Heller C, 'Privatised push-back of the Nivin' Forensic Oceanography, 18 December 2019', https://forensic-architecture.org/investigation/nivin on 4 August 2020.
[28] Forensic Oceanography, *The Nivin case: Migrants' resistance to Italy's strategy of privatised push-backs*, December 2018, 11.
[29] Forensic Oceanography, *The Nivin case: Migrants' resistance to Italy's strategy of privatised push-backs*, December 2018, 11.
[30] Global Legal Action Network, *Complaint filed with UN body over Italy's role in privatised push-backs to Libya resulting in migrant abuse*, 18 December 2019.
[31] 'UN Rights Office Concerned Over Migrant Boat Pushbacks in the Mediterranean' United Nations News, 8 May 2020, https://news.un.org/en/story/2020/05/1063592 on 5 August 2020.
[32] Kingsley P, Willis H, 'Latest tactic to push migrants from Europe? A private, clandestine fleet' New York Times, 30 April 2020, https://www.nytimes.com/2020/04/30/world/europe/migrants-malta.html on 4 August 2020.
[33] Kingsley P, Willis H, 'Latest tactic to push migrants from Europe? A private, clandestine fleet' New York Times, 30 April 2020, https://www.nytimes.com/2020/04/30/world/europe/migrants-malta.html on 4 August 2020.

Rights High Commissioner, Rupert Colville, in response to this operation recognised that the restriction of humanitarian search and rescue vessels from carrying out SAR operations that on the Central Mediterranean area due to policies put in place by States to prevent the spread of the virus has enabled such inhumane operations.[34]

These agreements and arrangements are carried out despite the fact that these EU States are aware of the atrocious situations facing migrants that are detained in Libya. In November 2017, Dimistri Avramopoulos, the EU migration Commissioner said, "We are all conscious of the appalling and degrading conditions in which some migrants are held in Libya…".[35] The risks the migrants face once returned to Libya are they are placed in detention camps where they are susceptible to being trafficked, being tortured, the women and children are likely to be sexually violated and during this pandemic they are likely to contract COVID-19.[36]

These privatised practices have resulted in the reduction of the number of migrants reaching Italy and Malta however this is not a celebratory fact as the number of people drowning in comparison to those trying to cross has increased.[37] Furthermore, the refoulement of the migrants and refugees has resulted in their rights and freedoms being violated. The questions that arise from this include: are these operations considered violations of the principle of *non-refoulement*? Can states such as Italy and Malta be held responsible for these violations?

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[34] 'UN Rights Office Concerned Over Migrant Boat Pushbacks in the Mediterranean' United Nations News, 8 May 2020, https://news.un.org/en/story/2020/05/1063592 on 5 August 2020.

[35] Human Rights Watch, *No escape from hell: EU policies contribute to abuse of migrants in Libya*, 21 January 2019 https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya# on 4 August 2020.

[36] 'UN Rights Office Concerned Over Migrant Boat Pushbacks in the Mediterranean' United Nations News, 8 May 2020, https://news.un.org/en/story/2020/05/1063592 on 5 August 2020.

[37] Kingsley P, 'Privatised pushbacks: How merchant ships guard Europe' New York Times, 20 March 2020, https://www.nytimes.com/2020/03/20/world/europe/mediterranean-libya-migrants-europe.html on 4 August 2020.

This dissertation in attempting to answer these questions will analyse the principle of *non-refoulement* and the extraterritorial application of the principle. This is imperative to establishing whether the principle of *non-refoulement* can be applied to privatised push-backs. This study shall then address whether the privatised push-backs can be attributed to Italy and Malta.

1.2 Statement of the problem

Article 33 of the *1951 Convention Relating to the Status of Refugees (Refugee Convention)* prohibits States from expelling or returning (*refouler*) a refugee in any manner to the territories where their life would be threatened.[38] This provision establishes the *non-refoulement* obligation. Furthermore, the use of the phrase "in any manner whatsoever" highlights that the application of the obligation is not limited geographically.[39] This was the judicial reasoning of the ECtHR in *Hirsi Jamaa and others v Italy (Hirsi Jamaa),* where the court held that the push-backs of migrants and refugees by State authorities is an extraterritorial violation of the principle of *non-refoulement*. [40]

Post *Hirsi Jamaa*, the States on the EU coast (that is Italy and Malta) had to find other means by which they could reduce the number of migrants and refugees entering their territories. It is as a result of this intention that these States begun instructing and directing commercial ships to push-back refugees to Libya. This was supported by the *MOU* and the *Malta Declaration* which enabled these States to close their ports hence outsourcing their *non-refoulement* obligations to private entities. These States that attempt to circumvent their non-refoulement

[38] Article 33, *The 1951 Convention Relating to the Status of Refugees*, 22 April 1954, 189 U.N.T.S 137.
[39] Goodwin-Gill G S and McAdam J, *The refugee in international law*, Oxford University Press, Oxford, 2007, 246; Lauterpacht E and Bethlehem D, 'The scope and content of the principle of non-refoulement: Opinion', in Feller E, Türk V and Nicholson E (eds) *Refugee protection in international law: UNHCR's global consultations on international protection,* Cambridge University Press, Cambridge, 2003, para. 67.
[40] *Hirsi Jamaa and Others v Italy,* ECtHR.

obligation need to be held responsible before privatised push-backs become a popular trend amongst States. This would be a very dangerous reality for refugees and migrants who are pushed-back to the dangerous situations they were trying to escape.

In response to this problem, this study proposes to investigate the avenue by which States, that are enabling privatised push-backs, can be held responsible. This will be addressed first, by looking into whether the extraterritorial scope of the *non-refoulement* principle can be applied to privatised push-backs. After which, this dissertation will analyse the *Articles on Responsibility of States for Internationally Wrongful Acts (Articles on Responsibility)* in order to ascertain the link that will enable the attribution of the *non-refoulement* breach to the States.

1.3 Statement of Aim and Objectives

The **aim** of the study is to investigate whether states that instruct and order merchant ships to repatriate migrants back to Libya are responsible for the violation of the principle of *non-refoulement*.

The specific **objectives** of this study are:

1 To examine the principle of *non-refoulement* and whether it protects refugees and migrants that have been returned to Libya by commercial ships.
2 To analyse the extraterritorial scope of the principle and whether it extends to privatised push-backs.
3 To assess the liability of European Union Coastal States, under the doctrine of State responsibility, that have contracted out of their *non-refoulement* obligation.

1.4 Research Questions

1 Does the principle of *non-refoulement* protect refugees that have been pushed back by private ships?

2 Does the extraterritorial application of the principle extend to privatised push-backs?

3 Can States be held responsible for the violation of the principle resulting from the privatised push-backs?

1.5 Research Hypothesis

This study shall test the following hypotheses:

1 The protective nature of the *non-refoulement* obligation necessitates the extraterritorial application of the principle hence the basis for considering privatised push-backs as a breach of the obligation.

2 States are liable for privatised push-backs based on the *Articles on Responsibility.*

1.6 Justification of the Study

The plight of migrants and refugees is one that has been the subject of academic research for decades. Despite this, States continuously attempt to formulate ways in which they can evade their obligation to protect migrants and refugees. This research question is imperative as it seeks to hold States accountable for forgoing their obligation to protect refugees by outsourcing their obligations to private entities. In the instance that this research establishes the avenue for holding States responsible for contracting out of their obligation, then the seas will possibly become a safer route for the migrants and refugees that are fleeing for their lives. From an academic perspective, this study will contribute further understanding to the body of literature specifically.

1.7 Delimitations of this Study

Non-refoulement as a fundamental concept of international law is a very wide topic. It is due to this fact that this study will only aim to answer a narrow question with regard to the application of this principle specifically with regard to whether the privatised pushbacks amount to a violation of the principle. This will not look at the establishment of who a refugee is. In addition to this, this study does not purpose to delve deeply into the exceptions to the principle however, they will be discussed briefly. Furthermore, this study is also only with regard to the movement of refugees from North Africa, specifically Libya, to the coastal states of Europe, more specifically Italy and Malta.

1.8 Conceptual Framework

Chinua Achebe in his book *Things Fall Apart* postulates that "The worst thing that can happen to any person is the loss of their dignity".[41] This quote concisely indicates the need for protecting peoples' dignity regardless of their status. Recognising this the law creates an obligation to protect human rights. This is evident in the preamble of the *Universal Declaration of Human Rights* which reaffirms the worth and dignity of the human person.[42] Furthermore, the Preamble of the *Refugee Convention* in affirming that human beings should enjoy their fundamental rights and freedoms without discrimination recognizes the assertion of human dignity by the *Universal Declaration of Human Rights*.[43] This study recognises this and therefore adopts a conceptual framework based on the concept of human dignity.

[41] Achebe C, *Things Fall Apart*, First Anchor Books, New York, 1984.
[42] UNGA, *Universal Declaration of Human Rights*, 217 A (III) (10 December 1948).
[43] Preamble, *The 1951 convention relating to the status of refugees*, 22 April 1954, 189 U.N.T.S 137.

Philosophers and authoritative policies have severally asserted that humans are imbued with an intrinsic value or worth which they refer to as dignity.[44] The importance of human dignity has resulted in the concept being widely invoked as a ground for "protest against degrading and abusive treatment".[45] Human dignity has been conceptualised in different ways. The following is a discussion of the different conceptualisations of human dignity.

First, human dignity has been conceptualised as equality. This conceptualisation arose in response to the idea of dignity as aristocracy, hence pro-revolutionary activists decided to supplant this conception with an egalitarian understanding of dignity.[46] As a result, Thomas Paine in his treatise, *Rights of Man*, called for the recognition of the "natural dignity of man".[47] The characteristics that are considered to imbue on human beings this dignity can be described based on theology and philosophy. [48] From Judeo-Christian beliefs, human dignity is derived from the basis that humans are created in the image of God. [49] The second explanation is based on philosophy which ascribes that human dignity is universal as a result of the fact that humans possess a common trait worthy of recognition.[50] According to Avishai Margalit, this common trait is simply the trait of being a human being.[51] The conceptualisation of human dignity as being intrinsic was also posited by Immanuel Kant in his second formulation of the Categorical Imperative where he states that human beings should never be treated as a means but rather as an end.[52] This is very important in understanding the need to protect refugees and migrants

[44] Mattson D, Clark G S, 'Human dignity in concept and practice', 44(4) *Policy Sciences*, 2011, 305.
[45] Schacter O, 'Human dignity as a normative concept', 77(4) *American Journal of International Law*, 1983, 848-849.
[46] Henry L M, 'The jurisprudence of human dignity', 160(1) *University of Pennsylvania Law Review*, 2011, 199.
[47] Henry L M, 'The jurisprudence of human dignity', 199.
[48] Henry L M, 'The jurisprudence of human dignity', 200.
[49] Henry L M, 'The jurisprudence of human dignity', 200.
[50] Düwell M, 'Human dignity concepts, discussions, philosophers perspectives', in Düwell M, Braarvig J, Brownsword R, Mieth D (eds) *The Cambridge handbook of human dignity: Interdisciplinary perspectives*, Cambridge University Press, 2014, 26; Henry L M, 'The jurisprudence of human dignity', 200.
[51]Margalit A, 'Human dignity between kitsch and deification', 9(3) *Hedgehog Review*, 2007, 7, 17.
[52] Beyleveld D and Brownsword R, 'Human dignity, human rights and human genetics', 61(5) *The Modern Law Review*, 1998, 666.

because this understanding will enable States to carry out their duty to protect refugees as an end in themselves.[53]

Secondly, human dignity can be conceptualised from a duty-led interpretation. This is based from the Kantian view that if we should not treat human beings as means then there is a corresponding duty to ensure that human beings are treated with self-respect.[54] This duty relates to certain conditions that are imperative for agents to enjoy a sense of self-respect, this specifically relates to protecting them from inhumane and degrading treatment.[55] This conceptualisation will enable us to ascertain to what standard states, such as Italy and Malta, have violated their obligations by encouraging the *refoulement* of migrants to Libya where they are at risk of being tortured, raped and possibly being trafficked.

Thirdly, human dignity can be conceptualised from a rights-led interpretation. This conceptualisation is based off of Allan Gewirithian's treatise, *Human Dignity as the basis of Rights*.[56] This conceptualisation treats dignity as the basis for human rights. [57] It follows from this that the violations of a person's rights also compromises their dignity. [58] Gewrithians understand that the failure to recognise the agency and capacity of other people not only damages their self-respect but also compromises their dignity.[59] Based on this conceptualisation it is evident that the *refoulement* of refugees on commercial ships is therefore a violation of the refugees' rights based on the fact that they their capacity for agency is ignored.

[53] Collste G, 'Human Dignity, immigration and refugees', in Düwell M, Braarvig J, Brownsword R, Mieth D (eds) *The Cambridge handbook of human dignity: Interdisciplinary perspectives*, Cambridge University Press, 2014, 465.
[54] Beyleveld D and Brownsword R, 'Human dignity, human rights and human genetics', 667.
[55] Beyleveld D and Brownsword R, 'Human dignity, human rights and human genetics', 668.
[56] Beyleveld D and Brownsword R, 'Human dignity, human rights and human genetics', 671.
[57] Beyleveld D and Brownsword R, 'Human dignity, human rights and human genetics', 671.
[58] Beyleveld D and Brownsword R, 'Human dignity, human rights and human genetics', 671.
[59] Beyleveld D and Brownsword R, 'Human dignity, human rights and human genetics', 671.

This dissertation contends that these conceptualisations of dignity are paramount to establishing the protective nature of *the non-refoulement* obligation. Which is imperative because if refugees and migrants are not afforded protections, any other attempt to assist them is a failed attempt.[60] This protective nature enables the obligation to be expanded extraterritorially in general and specifically with regard to the privatised push-backs. By expanding the scope of the principle extraterritorially then the State's obligations are expanded, meaning that if they do not fulfil these obligations, they should be held responsible.

1.9 Literature Review

In addressing the research questions illustrated above, this dissertation seeks to highlight certain themes. These themes outline the literature review for this dissertation. The themes seek to cover: the protection afforded by the principle of *non-refoulement*; the extraterritorial application of the principle; and, the attribution of privatised push-backs to States.

1.9.1 Protection by the principle of non-refoulement

One of the most persecuted and therefore vulnerable groups around the world are refugees.[61] It is based on these vulnerabilities that their protection becomes imperative hence the establishment of an obligation on States to protect and safeguard these vulnerable groups. [62] This obligation is highlighted by one of the integral principles of refugee law, the principle of *non-refoulement*. [63] This principle is espoused in Article 33 of the *Refugee Convention* which

[60] Ingram J, 'Sustaining refugees' human dignity: International responsibility and practical reality', 2(3) *Journal of Refugee Studies*, 1989, 329.
[61] Ahmed A, 'Individual protection versus national security: A balancing test concerning the principle of non-refoulement', 21(5) *IOSR Journal of Humanities and Social Science*, 2016, 30.
[62] Ahmed A, 'Individual protection versus national security: A balancing test concerning the principle of non-refoulement', 21(5) *IOSR Journal of Humanities and Social Science*, 2016, 30.
[63] Bacaian L.E, 'The Protection of refugees and their right to seek asylum in the European Union', 70 *Institut Européen De L"université De Genève Collection Euryopa*, 2011, 35.

prohibits states from expelling or returning (*refouler*) a refugee in any manner to the territories where their life would be threatened.[64]

The protective nature of the principle is established based on the scope of the principle which is established where there is a risk to the rights and freedoms of the refugees.[65] Furthermore, the protection is not only afforded to refugees who have been formally recognized but also those who have yet to be recognized.[66] The fact that the protection of the refugees' rights and freedoms is at the centre of the application of the principle illustrates the protective character of the principle. This protective character is further reinforced by the fact that the principle of *non-refoulement* has been appreciated as a peremptory norm meaning that the principle having attained *jus cogens* status is indelible.[67] This is recognized under Article 42(1) of the *Refugee Convention* which provides that Article 33 is amongst a number of provisions to which States are not permitted to make reservations.[68] The *Guidance Note on Extradition and Refugee Protection* asserts the same, it states that the principle of *non-refoulement* is fundamental from which no derogation is permitted as it forms part of customary international law and therefore it is binding on all states including those that have not yet ratified the conventions and/or protocol.[69] This recognition has sparked debates within the academic world.

[64] Article 33, *The 1951 Convention Relating to the Status of Refugees*, 22 April 1954, 189 U.N.T.S 137.
[65] Lauterpacht and Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion', para. 244; Goodwin-Gill and McAdam , *The refugee in international law*, 234.
[66] UN High Commissioner for Refugees, *Advisory opinion on the extraterritorial application of non-refoulement obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, 2; Goodwin-Gill G S, *The refugee in international law*, 2nd ed, Oxford Public International Law, Oxford, 2007, 233.
[67] Crawford J, *Brownlie's principles of public international law*, 8th ed, Oxford University Press, Oxford, 2012, 594.
[68] Article 42(1), *The 1951 Convention Relating to the Status of Refugees*, 22 April 1954, 189 U.N.T.S 137.
[69] UN High Commissioner for Refugees, *Guidance note on extradition and international refugee protection*, April 2008.

Jean Allain emphasizes the *jus cogens* nature of the principle of *non-refoulement* as it has met the two requirements that are requisite to establishing such a norm.[70] These two prerequisites being that the principle has been accepted by the international community of states and that the principle has been recognized as a norm from which derogation is not permitted. [71] This view is supported by Dr Alexander Orakhelashvili, who argues that the principle of *non-refoulement* has attained the status of *jus cogens* due to its "inseparable link with the observance of basic human rights such as the right to life, freedom from torture and non-discrimination".[72]

On the other hand, Rene Bruin and Kees Wouters posit that it is not practical to establish this obligation as a peremptory norm owing to the difficulty that comes with the burden of proof when trying to characterize it as such.[73] They are therefore of the opinion that the laws allow for the violation of *non-refoulement* in certain circumstances where there is a risk to national security of the state and that the consideration of the principle as peremptory encourages impunity.[74] The reasoning behind this is due to the provision of Article 33(2) of the *Refugee Convention* which provides for exceptions to this obligation then it cannot be established as a *jus cogens norm.*

G S Goodwin-Gill disproves this by arguing that the existence of exceptions to the principle of *non-refoulement* is not evidence of fundamental objections to the principle but rather indicates the boundaries of discretion.[75] Furthermore, Alice Farmer argues that there should be strict limits read into the exceptions established under Article 33(2) of the *Refugee Convention.*[76]

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[70] Allain J, 'The jus cogens nature of non-refoulement', 13(4) *International Journal of Refugee Law*, 2002.
[71] Allain J, 'The jus cogens nature of non-refoulement', 538.
[72] Orakhelashvili A, *Peremptory norms in international law*, Oxford University Press, Oxford, 2006, 55.
[73] Bruin R and Wouters K, 'Terrorism and the non-derogability of non-refoulement', 15(1) *International Journal of Refugee Law*, 2003, 26.
[74] Bruin R and Wouters K, 'Terrorism and the non-derogability of non-refoulement', 26.
[75] Goodwin-Gill, *The refugee in international law*, 135.
[76] Farmer A, 'Non-refoulement and jus cogens: limiting anti-terror measures that threaten refugee protection' 2391) *Georgetown Immigration Law Journal*, 2008.

This study agrees with the views posited by Jean Allain, Dr Orakhelashvili, Goodwin-Gill and Farmer which are in consonance with the *UNHCR Guidance Note*. The principle of *non-refoulement* should be considered *jus cogens* owing to the vulnerability the migrants face at the hands of states. This status emboldens the protective scope of the principle of *non-refoulement* hence extending this protection to the refugees and migrants that a pushed back by commercial ships at the request of States.

1.9.2 The extraterritorial scope of the principle of non-refoulement

The protective nature of the principle of *non-refoulement* is further established by the extraterritorial scope of the obligation. The extraterritorial application of the *non-refoulement* obligation was addressed with regard to pushbacks in *Hirsi Jamaa* however in the court's judgment there was no mention or regard for the new phenomenon that is privatised push-backs. This brings back the discussion of whether the *non-refoulement* obligation extends to this instance. In order to address this issue, there is need to refer to the discussion on extraterritoriality within the human rights regime. This is because the ECtHR, in *Hirsi Jamaa*, relied heavily on the human rights regime in establishing the extraterritoriality of *non-refoulement*.

The debate on the extraterritoriality of human rights has been charged because of the classical understanding of jurisdiction, posited in public international law (PIL), which generally links jurisdiction to the territory of the State.[77] Some authors argue that jurisdiction in human rights law is not territorial. Anja Klug and Tim Howe argue for the need to distinguish jurisdiction within the human rights regime from that in the PIL regime based on the fact that the former relates to ascertaining State responsibility while the latter delineates the territories of States in

[77] Shaw M, *International Law*, 6th ed, Cambridge University Press, Cambridge, 2008, 645-646.

an effort to evince the State's sovereignty.[78] Conall Mallory, in support of this position, asserts that jurisdiction within human rights deals with responsibilities and obligations of a State as opposed to its rights.[79] In differentiating the understanding of jurisdiction within these two regimes, Marko Milanovic opines that jurisdiction in human rights relates to the actual control or authority a State has over people within a territory which is different from the understanding in PIL which looks at the control wielded by a State over a territory.[80]

This view has been opposed by Dominic McGoldrick who supports a territorial application of human rights, in consonance with a PIL application, because the extraterritorial application can only apply where there are 'special entitlements' for such an application.[81] Seunghwan Kim highlights that this argument does not outrightly deny the extraterritorial application of human rights.[82] This study agrees with this conclusion.

The literal reading of Article 33 of *Refugee Convention* may be misconstrued to mean that the principle of *non-refoulement* does not apply extraterritorially. Goodwin-Gill and McAdam highlight that the *non-refoulement* obligation, as established in the *Refugee Convention*, is not limited territorially based on the fact that Article 33 provides that a state should not refoul a refugee "in any manner whatsoever".[83] This position was reinforced in *Hirsi Jamaa* where the ECtHR held that the obligation of *non-refoulement* can be extended extraterritorially if it is

[78] Klug A and Howe T, 'The concept of State jurisdiction and the applicability of the *non-refoulement* principle to extraterritorial interception measures', in Ryan B and Mitsilegas V (eds) *Extraterritorial immigration control: Legal challenges*, Martinus Nijhoff Publishers, Leiden, 2010, 69-98.

[79] Mallory C, 'I. European Court of Human Rights Al-Skeini and others v United Kingdom (Application no 55721/07) Judgment of 7 July 2011', 61 (01) *International and Comparative Law Quarterly*, 2012, 310.

[80] Milanovic M, *Extraterritorial application of human rights treaties: Law, principles, and policy*, Oxford University Press, Oxford, 2011, 41.

[81] McGoldrick D, 'Extraterritorial Application of the International Covenant on Civil and Political Rights', in Coomans F and Kamminga M T (eds), *Extraterritorial Application of Human Rights Treaties*, Cambridge University Press, Cambridge, 2004, 41-42.

[82] Kim S, 'Non-refoulement and extraterritorial jurisdiction: State sovereignty and migration controls at sea in the European context', 30(1) *Leiden Journal of International Law*, 2017, 52.

[83] Goodwin-Gill and McAdam, *The refugee in international law*, 246; Lauterpacht and Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion', para. 67.

established that the State exercised continuous and exclusive *de jure* and *de facto* control over the migrants. [84] This was established in the case based on the fact that the migrants were under the control of Italy's military personnel.[85]

In this article, the author will for the first time attempt to establish the extraterritorial scope of the *non-refoulement* obligation with regard to privatised push-backs. This will be done by referring to the jurisprudence established by the ECtHR and the academic debates on extraterritorial jurisdiction as highlighted above.

1.9.3 Attributing the privatised push-backs to States

State responsibility, as a principle of international law, has been recognized as customary international law.[86] This recognition as customary international law highlights the fact that it is imperative to hold State's accountable when they have breached their obligations. Despite this, the classical notion of this principle posits that a State can only be held responsible for its own actions therefore excluding the acts of private entities.[87] International refugee law prescribes to this understanding as it does not foresee that refugees can be met by anything other than a State's official.[88] This *Articles on Responsibility* address the means by which States can be held responsible for the acts of private entities.

[84] *Hirsi Jamaa and Others v Italy,* ECtHR, para. 81.
[85] *Hirsi Jamaa and Others v Italy,* ECtHR, para. 80-81.
[86] *Caire (France) v Mexico* (1929), 5 Reports of International Arbitral Awards.
[87] Gammeltoft-Hansen T, 'International refugee law and the offshoring and outsourcing of migration control' Published PhD Thesis, Institute of Law: Aarhus University, Aarhus, 2009, 188.
[88] Gammeltoft-Hansen T, 'International refugee law and the offshoring and outsourcing of migration control' Published PhD Thesis, Institute of Law: Aarhus University, Aarhus, 2009, 188.

Some authors such as Andrew Clapham believe that the Articles on Responsibility cannot be used when ascertaining human rights violations.[89] The converse of this, which this dissertation agrees with, is that the articles are not only applicable to human rights but also to refugee law.[90] Furthermore, Robert McCorquodale and Penelope Simmons argue that the principles espoused in these articles are customary international law and therefore they apply to both regimes of law. [91]

James Crawford, in his treatise The *International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, analyses the *Articles on Responsibility*.[92] In his analysis and interpretation of Articles 5 and 8 he is able to ascertain the means in which the conduct of private entities can be attributed to a State. The attribution of the conduct of private entities to a State is based on the establishment of a link between the two. This can either be done where there is a national law that empowers a non-state actor to carry put the public functions of a government[93] or where the State exercises control over, instructs and directs the private actor to carry out a certain activity. [94]

[89] Clapham A, 'The 'drittwirkung' of the convention', in Matscher F, Macdonald R J and Petzold H (eds) *The European system for the protection of human rights*, Martinus Nijhoff Publishers, Boston, 1993, 170.

[90] McCorquodale R and Simons P, 'Responsibility beyond borders: State responsibility for extraterritorial violations by corporations of international human rights law', 70(4) *The Modern Law Review*, 2007, 602; McGoldrick D, 'Extraterritorial Application of the International Covenant on Civil and Political Rights'; Crawford J, *The International Law Commission's articles on State responsibility: Introduction, text and commentaries,* Cambridge University Press, Cambridge, 2004, 25; *Banković and others v Belgium and others*, ECtHR Judgement of 12 December 2001, para. 57.

[91] McCorquodale R and Simons P, 'Responsibility beyond borders: State responsibility for extraterritorial violations by corporations of international human rights law', 601.

[92] Crawford, *The International Law Commission's articles on State responsibility: Introduction, text and commentaries.*

[93] Crawford, *The International Law Commission's articles on State responsibility: Introduction, text and commentaries,* 100.

[94] Crawford, *The International Law Commission's articles on State responsibility: Introduction, text and commentaries,* 110.

This dissertation will use this analysis to ascertain whether the privatised push-backs can be attributed to Italy and Malta.

1.10 Research Methodology

This study will rely on doctrinal research. Therefore, this study will rely on the works of scholars in the field of refugee law and human rights law in order to answer the research questions and ultimately achieve the research's aims and objectives. These works include treaties, case law, books, dissertations and theses, journal articles, reports and credible newspaper articles.

1.11 Chapter Breakdown

Chapter One is an introduction of the subject of the study. This chapter gives the background of the study, the statement of the problem, the aims and objective of the study, the research questions and hypotheses, the justification and delimitation of the study, the conceptual framework, the literature review and the research methodology.

Chapter Two analyses the principle of *non-refoulement* and its protective nature. In addressing this analysis, the chapter examines whether the principle has attained the status of customary international law and whether it is recognized as a *jus cogens* norm.

Chapter Three assesses the extraterritorial application of the *non-refoulement* obligation with specific regard to the privatised push-backs on the Mediterranean.

Chapter Four attempts to attribute the privatised push-backs to Italy and Malta by applying the *Articles on Responsibility* in order to hold these States responsible for breaching their *non-refoulement* obligation.

Chapter Five provides recommendations in response to the issues addressed in this dissertation. This chapter also provides a conclusion to the dissertation.

Chapter Two: The Principle of Non-Refoulement as a Protection Mechanism for Refugees

2.1 Introduction

The cornerstone of international refugee law is the principle of *non-refoulement*.[95] This principle is considered foundational because it protects refugees and asylum seekers against their forceful return to a country where they have a reason to fear persecution and the possibility of their life being in danger. [96] Furthermore, this principle is essential as it embodies the purpose of refugee protection which is the safeguarding of vulnerable individuals by ensuring that they are adequately protected beyond the borders of their state of refuge. [97]

The recognition of this principle by States does not seem to deter them from seeking to limit this protection as some States introduce policies whose effects are the violation of Article 33 of the *Refugee Convention*.[98] This is as a result of the States erroneous reliance on the exceptions provided in Article 33(2) of the *Refugee Convention*. This reliance is erroneous because these States fail to apply a restrictive interpretation to these exceptions as is required by the *Vienna Convention on the Law of Treaties*.[99] Some of these policies include the push-back of refugees, and in more recent years the privatised push-backs of refugees.

This chapter seeks to analyse the protection provided to refugees under the principle of *non-refoulement*. This analysis shall be conducted by examining the scope and exceptions of the

[95] UN High Commissioner for Refugees, *Advisory opinion on the extraterritorial application of non-refoulement obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, 2.
[96] UN High Commissioner for Refugees, *Note on on-refoulement (submitted by the High Commissioner)*, 38 Session, 23 August 1977, EC/SCP/2, para. 1.
[97] Islam R, ' The origin and evolution of international refugee law', in Islam R, Bhuiyan J H (eds), *An introduction to international refugee law*, Martinus Nijhoff Publishers, Leiden, 2013, 14.
[98] Allain J, 'The jus cogens nature of non-refoulement', 13(4) *International Journal of Refugee Law*, 2002, 533.
[99] Articles 31 and 32, *Vienna convention on the law of treaties*, 23 May 1969, 1155 UNTS 331.

principle. Moreover, this analysis will lead to the assessment of the principle as customary international law and as a *jus cogens* norm. This analysis shall be conclusive to ascertaining whether the privatised push-back of refugees to Libya is a violation of the principle of *non-refoulement*.

2.2 The Principle of non-refoulement

This principle of *non-refoulement* is enshrined in Article 33(1) of the *Refugee Convention* as follows;

> *"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".*[100]

The term *refoulement* is derived from the French word 'refouler' whose literal meaning is to drive back or to repel.[101] Therefore, within the context of refugee migration the term means the "re-conduction to the frontier of those found to have entered illegally and the summary refusal of admission of those without valid documents". [102] The principle of *non-refoulement* seeks to remedy this by forbidding States from expelling refugees in any manner whatsoever to the countries where their lives and freedoms are endangered. [103]

[100] Article 33(1), *The 1951 Convention Relating to the Status of Refugees*, 22 April 1954, 189 U.N.T.S 137.
[101] Goodwin-Gill G S, *The refugee in international law*, 2nd ed, Oxford Public International Law, Oxford, 2007, 117.
[102] Goodwin-Gill, *The refugee in international law*, page 117.
[103] Ahmed A, 'Individual protection versus national security: A balancing test concerning the principle of non-refoulement', 21(5) *IOSR Journal of Humanities and Social Science*, 2016, 30.

2.2.1 Inception of the principle

This idea that States should not return persons to other States especially with regard to the surrounding circumstances is of comparatively recent origin.[104] In the past, States would cooperate with each other, through formal agreements, for the reciprocal surrenders of persons they considered traitors or dissidents.[105] It was only in the mid-nineteenth century that States begin to recognise the principle of non-extradition and the need to protect political offenders.[106] This trend established the need for a concrete principle that would protect persons from being returned to territories where their rights were at risk of being violated.

The inception of such a principle, 'the principle of *non-refoulement'*, can be attributed to the *Geneva Session of the Insitut de Droit International* in 1892 where is was formulated that a refugee should not by way of expulsion be delivered up to another State that sought him unless the guaranteed conditions set forth with respect to extradition were duly observed.[107] This principle was then recognised for the first time internationally in Article 3 of the 1933 *Convention Relating to the International Status of Refugees*, where the contracting parties undertook "not to return refugees across the frontiers of their country of origin".[108] This recognition, however, was not proof of acceptance as only eight States ratified the Convention and of the eight, three ratified with reservations and declarations. [109]

[104] Goodwin-Gill G S and McAdam J, *The refugee in international law*, Oxford University Press, Oxford, 2007, 201.
[105] Goodwin-Gill and McAdam, *The refugee in international law*, 202.
[106] Goodwin-Gill and McAdam, *The refugee in international law*, 202.
[107] L'Institute de Droit International, *Règles internationales sur l'admission et l'expulsion des étrangers*, 1892, Article 16.
[108] Article 3, *Convention Relating to the International Status of Refugees*, 28 October 1933, 159 LNTS 199, 205.
[109] Goodwin-Gill and McAdam, *The refugee in international law*, 202.

The Second World War, however, ushered in a new era where the principle began gaining traction in different States.[110] This is because the six-year cataclysm had led to devastating effects which led to millions of people seeking refuge in an ultimate host country.[111] In response to this the United Nations through a resolution in 1946 expressly stated that refugees or displaced persons who had expressed their valid objections to going back to their country of origin should not be forced to do so.[112] As a result, the prohibition was formulated in Article 45 of the *1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War* which provided that a protected person should, in no circumstances, be transferred to a country where they have a reason to fear persecution due to their opinions or beliefs.[113] Article 45 was evidence of the universal acceptance of the principle, albeit in the field of international humanitarian law. [114]

This instigated the need for formulating a Convention that would have the protection of refugees at its core. In 1949, an *Ad hoc* Committee was appointed by the United Nations Economic and Social Council to prepare a consolidated Convention relating to the international status of refugees and stateless persons.[115] This Committee proposed a provision which they considered so important that they did not propose exceptions;

[110] Bhuiyan J H, 'Protection of refugees through the principle of *non-refoulement'*, in Islam R, Bhuiyan J H (eds), *An introduction to international refugee law*, Martinus Nijhoff Publishers, Leiden, 2013, 101.
[111] Molnàr T, 'The principle of *non-refoulement* under international law: Its inception and evolution in a nutshell', 1(1) *The Corvinus Journal of International Affairs*, 2016, 52.
[112] UNGA, *Question of refugees*, UN A/Res/8(1) (12 February 1946), para. c(ii).
[113] Article 45, *Geneva Convention relative to the Protection of Civilians Persons in Time of War*, 12 Aug 1949, 75 UNTS 287.
[114] Molnàr T, 'The principle of *non-refoulement* under international law: Its inception and evolution in a nutshell', 52.
[115] ECOSOC, *Refugees and stateless persons*, 8 August 1949, UN E/RES/ 248(IX)B.

> *"No contracting State shall expel or return a refugee in any manner whatever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality or political opinion".*[116]

This was, however, met with a lot of resistance hence the reason why in 1951 the Conference on Plenipotentiaries included exceptions to this provision as a way of limiting its absoluteness, these exceptions mirror the exceptions as provided for in Article 33 of the *Refugee convention*.[117]

As a result of this history the drafters of the 1951 *Refugee Convention* included the principle of non-refoulement and its exceptions by dint of Article 33 which has now gained positive legal reinforcement universally.[118]

2.2.2 Legal framework of the principle

The principle of *non-refoulement* is not only expressed in the *Refugee Convention* but is also recognised, explicitly and implicitly, by other legal instruments.

The *Convention Governing the Specific Aspects of Refugee Problems in Africa* explicitly provides that no one shall be subjected by a Member State, of the Organization of African Unity, to measures that would compel them to return to a territory where their life, liberty or

[116] *Report of the Ad Hoc Committee on Refugees and Stateless Persons,* Second Session, 1950, E/AC. 32/8;E/1850, para. 30.
[117] Goodwin-Gill and McAdam, *The refugee in international law*, 202; see UNGA, *UN conference of plenipotaries on the status of refugees and stateless person,* UN A/CONF.2/SR.16 (23 November 1951), views of the United Kingdom '*The benefit of the present provision may not, however, be claimed by a refugee whom in there are reasonable grounds for regarding as a danger to the security of the country final which he is, or who, having been convicted by a judgment of a particularly serious crime, constitutes a danger to the community of that country'.*
[118] Molnàr T, 'The principle of *non-refoulement* under international law: Its inception and evolution in a nutshell', 52.

physical integrity is threatened by the forces that drove them out *ab initio*.[119] Furthermore, the *Convention Against Torture* in Article 3 encompasses the absolute prohibition to return any person to a country where person believes that there are substantial grounds that they would be subjected to torture.[120] This applies whether or not the person "is a security risk or has been convicted of a serious crime and constitutes a public danger".[121]

Article 7 of the *International Covenant on Civil and Political Rights (ICCPR)* in its provision against torture, cruel, inhuman or degrading treatment has been interpreted to implicitly provide for the principle of *non-refoulement*.[122] In addition to this, Article 3 of the *European Convention on Human Rights (ECHR)* has implicitly recognised this principle in its declaration of the prohibition against torture, cruel, inhuman or degrading treatment or punishment.[123] This is evinced by the holdings of the European Court of Human Rights (ECtHR) where extraditions[124] and expulsions[125] are considered breaches of Article 3 in instances where it is evident that the person is at risk of being subjected to torture or inhuman treatment or punishment.[126] This recognition is absolute as Article 3 does not provide for exceptions with regard to how "undesirable or dangerous" the individual is.[127]

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[119] Article II para. 3, *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 UNTS 45.

[120] Article 3, *Convention against torture and other inhuman and degrading treatment or punishment*, 10 December 1984, 1465 U.N.T.S 85

[121] Article 3, *Convention against torture and other inhuman and degrading treatment or punishment*, 10 December 1984, 1465 U.N.T.S 85; Clark T and Crepeau F, 'Mainstreaming Refugee Rights: The 1951 Convention and International Human Rights Law', 17(4) *Netherlands Quarterly of Human Rights*, 1999, 397

[122] *CCPR General Comment No. 31[80], The nature of the general legal obligation imposed on state parties to the covenant*, 26 May 2004, para. 12. 'The Human Rights Committee's opinion is that the prohibition in Article 7 applies also to this kind of treatment upon return to another country by way of their extradition, expulsion or refoulement.'

[123] Article 3, *European Convention for the protection of Human Rights and fundamental freedoms*, 4 November 1950, ETS 5.

[124] *Soering v UK*, ECtHR Judgment of 7 July 1989.

[125] *Chahal v UK*, ECtHR Judgment of 15 November 1996.

[126] Clark T and Crepeau F, 'Mainstreaming Refugee Rights: The 1951 Convention and International Human Rights Law', 396.

[127] *Soering v UK*, ECtHR, para. 88; *Chahal v UK*, ECtHR, para. 80.

The principle has also been recognized by soft law.[128] The Member States of the Council of Europe undertook, in *Resolution (67)* of the Committee of Ministers of the Council of Europe, not to subject anyone to refusal of admission at the frontier, to rejection, or to expulsion, or to compel one to return to a territory where he would be in danger of persecution.[129] A few months later, the United Nations General Assembly unanimously adopted the *1967 Declaration on Territorial Asylum* where it was recommended that States should be guided by the principle that persons entitled to seek asylum should not be subjected to rejection at the frontier or if they have already entered the territory they should not be compulsorily expelled or returned to a State where they are at risk of being persecuted.[130] The 1984 *Cartagena Declaration of Refugees* recognised the principle of non-refoulement as "a cornerstone of the international protection of refugees" and as a result suggested that the principle should be recognised as a *jus cogens* norm.[131]

The legal framework establishes that the principle has now received wide recognition in different legal instruments due to the role it plays in protecting the rights and freedoms of refugees.

2.2.3 Scope of the principle

The principle of *non-refoulement* prefers protection to refugees as provided for in Article 1 of the *Refugee Convention*.[132] This protection, however, is not limited solely to those who have been formally recognised as refugees for as long as there is a prima facie claim to such

[128] Soft law refers to agreements, principles and declarations that despite not have a legally binding character are thought to have legal significance.
[129] Council of Europe: Committee of Ministers, *Resolution (67) 14 : Asylum to persons in danger of persecution*, 25 June 1967.
[130] Article 3(1), UNGA, *Declaration on Territorial Asylum*, A/RES/2312 (XXII) 14 December 1967.
[131] Regional Refugee Instruments & Related, *Cartagena Declaration on Refugees*, 22 November 1984, OAS Ser. L/V/II. 66, doc. 10, rev. 1, Section III, para. 5.
[132] Goodwin-Gill and McAdam, *The refugee in international law*, 232.

recognition.[133] This stems from the humanitarian character of the principle which seeks to protect the refugees.

The entitlement to the protection afforded by this principle is prefaced by establishing that the person has a well-founded fear.[134] This well-founded fear can be based on the threat of persecution, or on the risk of torture or cruel, inhuman or degrading treatment or punishment.[135] There is a suggestion that these two forms of fear are based off of the two different contexts to which the principle applies to, that is the refugee context and the human rights context.[136] Despite this suggestion, this distinction does not carry weight owing to the fact that these two risks cannot be separated in real life as the refugees are exposed to both when being returned to countries from which they fled.

Subsequently, the protection is not dependent on the actions of the refugees but rather it depends on how a State and its agents treat the refugee once they come into their jurisdiction.[137] For as long as there is a well-founded fear then the State and its agents are prohibited from returning or expelling refugees, in whatever form, to the countries they fled from.[138] The use of the words "in any manner whatsoever" alludes to the fact that the identification of the method of return or expulsion is not material.[139] Furthermore, the use of this phrase alludes to the

[133] UN High Commissioner for Refugees, *Advisory opinion on the extraterritorial application of non-refoulement obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, 2; Goodwin-Gill and McAdam, *The refugee in international law*, 233.
[134] Goodwin-Gill and McAdam, *The refugee in international law*, 233.
[135] Lauterpacht E and Bethlehem D, 'The scope and content of the principle of non-refoulement: Opinion', in Feller E, Türk V and Nicholson E (eds) *Refugee protection in international law: UNHCR's global consultations on international protection*, Cambridge University Press, Cambridge, 2003, para. 244; Goodwin-Gill and McAdam, *The refugee in international law*, 234.
[136] Lauterpacht and Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion', para. 244
[137] Goodwin-Gill and McAdam, *The refugee in international law*, 233.
[138] UN High Commissioner for Refugees, *Advisory opinion on the extraterritorial application of non-refoulement obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, 3.
[139] Article 33(1), *The 1951 Convention Relating to the Status of Refugees*, 22 April 1954, 189 U.N.T.S 137.

extraterritorial application of the principle because it suggests a wider application.[140] The return does not necessarily have to be to the refugees country of origin, the return is considered a violation of the *non-refoulement* principle if it is to a country where there is a substantial risk to the rights and freedoms of the refugee.[141]

2.2.4 Exceptions to the principle

The *non-refoulement* obligation under international human rights law does not permit exceptions as the obligation is considered absolute.[142] This was intended to be the case in international refugee law however States had concerns about the attrition of their sovereignty if this was the case.[143] It was on this basis that the exception provided in Article 33(2) of the *Refugee Convention* was included.[144]

Article 33(2) provides that the principle of *non-refoulement* may be limited in instances where there are reasonable grounds for considering a refugee as a danger to the security of the country that is giving him refuge or that the refugee has been convicted of a serious crime which constitutes a danger to the community of that country.[145] These exceptions can also be referred to as the national security and public order exceptions.

[140] Goodwin-Gill and McAdam, *The refugee in international law*, 246.
[141] UN High Commissioner for Refugees, *Advisory opinion on the extraterritorial application of non-refoulement obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, 3.
[142] UN High Commissioner for Refugees, *Advisory opinion on the extraterritorial application of non-refoulement obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, 4.
[143] Ahmed A, 'Individual protection versus national security: A balancing test concerning the principle of non-refoulement', 31.
[144] Ahmed A, 'Individual protection versus national security: A balancing test concerning the principle of non-refoulement', 31.
[145] Article 33(2), *The 1951 convention relating to the status of refugees*, 22 April 1954, 189 U.N.T.S 137.

From these two exceptions to apply, it is evident that the refugee has to pose a material prospective danger to the country of refuge.[146] Therefore, the danger cannot be a mere possibility as it has to be supported by evidence.[147] In addition to this, the national security exception requires the State to establish 'reasonable grounds' for its application.[148] The provision does not establish what exactly a 'reasonable ground' is hence leaving it up to the discretion of the States which leads to several interpretations. According to some authors, the broad application subsequently affords the State's a wider discretion when establishing what the 'reasonable grounds' are. [149] On the other hand, some authors suggest that the margin of appreciation is limited as it requires the relevant authorities to actively address the questions on what constitutes the future risk, which needs to be supported by evidence.[150]

These exceptions for a long time have been recognized as potential justifications for derogation.[151] This is an egregious position because these exceptions do not permit derogation based on the fact that the *Vienna Convention on the Law of Treaties* requires that these exceptions be read restrictively.[152] This is illustrated where the requirement for danger in establishing these exceptions requires a test of proportionality.[153] This test requires that the danger posed by the refugee should not be less than the possible danger the refugee will face if returned to the territory they fled from. This can be attributed to the humanitarian nature of the

[146] Lauterpacht and Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion', para. 164.
[147] Bruin R and Wouters K, 'Terrorism and the non-derogability of non-refoulement', 15(1) *International Journal of Refugee Law,* 2003, 18.
[148] Farmer A, 'Non-refoulement and jus cogens: limiting anti-terror measures that threaten refugee protection', 9.
[149] Farmer A, 'Non-refoulement and jus cogens: limiting anti-terror measures that threaten refugee protection', 9-10.
[150] Lauterpacht and Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion', para. 168.
[151] Goodwin-Gill and McAdam, *The refugee in international law*, 235.
[152] Articles 31 and 32, *Vienna convention on the law of treaties*, 23 May 1969, 1155 UNTS 331.
[153] Lauterpacht and Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion', para. 159.

principle which requires a restrictive interpretation of the exceptions in order to limit the return of refugees from to countries where their lives and freedoms are at risk.[154]

2.3 The principle as customary international law

The Executive Committee since 1977 has reinforced the fact that the principle of *non-refoulement* has acquired a universally accepted and significant character in the international community.[155] In other words, the principle has acquired the status of customary international law. In order to establish whether the principle has crystallised into customary international law, the principle has to fulfil the three elements established in the *North Sea Continental Shelf* case (*Germany v Denmark*).[156]

The principle of *non-refoulement* has met the three elements requisite for establishing whether a norm has achieved customary international law; first, the principle has a "fundamentally norm creating character" due to the fact that it has found several expressions in international instruments that have been adopted by States at both the regional and universal level.[157] These expressions are evidenced in both binding and non-binding instruments whether it is explicitly or implicitly.[158] Secondly, the participation by States, from different regions, in these different international instruments illustrates the widespread and universal support the principle has received.[159] Lastly, when establishing consistent practice and general recognition of a rule there

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[154] *UN High Commissioner for Refugees, Note on non-refoulement (submitted by the High Commissioner)*, 38 Session, 23 August 1977, EC/SCP/2, para. 4.

[155] Molnàr T, 'The principle of *non-refoulement* under international law: Its inception and evolution in a nutshell', 55.

[156] *North Sea Continental Shelf case (Federal Republic of Germany v Denmark),* Judgment, ICJ Reports 1969, para 72-74; These three elements are; *first, the conventional rule should be of a 'fundamentally norm creating character'. Second, there was a 'widespread and representative participation in the convention' especially by States that are specially affected. Lastly, that there is consistent practice and general recognition of the rule.*

[157] Executive Committee of the High Commissioner's Programme, *Non-refoulement No 6 (XXVIII)-1977*, 12 October 1977; Lauterpacht and Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion', para. 201.

[158] Refer to Section 2.2.2.

[159] Lauterpacht and Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion', para. 209.

is need to establish State practice and *opinio juris*.[160] The existence of a rule of custom can be deduced from practice such as the near universal participation by States in several treaty regimes that embody the principle.[161] This consistent practice is also evident from the conclusions of the Executive Committee which can be taken as expressions of opinion which broadly represents the views of the international community.[162] This all points to the fact that the principle has attained the status of customary international law. This recognition, however, has been met with objections and criticisms.

Some authors claim that the principle cannot have reached customary status because it is contrary to the idea of State sovereignty.[163] These criticism does not hold merit due to the fact that several States accepted and recognised this principle as fundamental. Furthermore, the principle respects the concept of State sovereignty based off of the exceptions provided for in Article 33(2) of the *Refugee Convention*.

2.4 The Jus cogens nature of the principle

The *jus cogens* nature of *non-refoulement* is increasingly being recognised.[164] For a norm to be established as a *jus cogens* there is need for a consensus on the normative level, whereby a norm is examined to ascertain whether it qualifies as a *jus cogens*, and on a categorical level, which focuses on the basic nature and the factors that make a peremptory norm.[165]

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[160] *Military and paramilitary activities in and against Nicaragua (Nicaragua v United States)*, Judgement, ICJ Reports 1986.
[161] Lauterpacht and Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion', para. 212.
[162] Lauterpacht and Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion', para. 214.
[163] Supaat D I, 'Escaping the principle of *non-refoulement*', 2(3) *International Journal of Business, Economics and Law*, 2013, 88.
[164] Farmer A, 'Non-refoulement and jus cogens: limiting anti-terror measures that threaten refugee protection', 22. (*A jus cogens norm is a norm that is accepted by 'the international community of States as a whole' as a 'norm from which no derogation is permitted*); UN High Commissioner for Refugees, *Guidance note on extradition and international refugee protection*, April 2008.
[165] Orakhelashvili A, *Peremptory norms in international law*, Oxford University Press, Oxford, 2006, 36.

As has been asserted above the principle of *non-refoulement* is customary international law and is therefore binding on all States regardless of their specific assent.[166] This is evidence that it has been accepted by the international community. In addition to this, the principle has been established as non-derogable due to its importance.[167] The non-derogability of a norm emphasises the special status of the right as it cannot be set aside even in situations that would justify derogation from others.[168] According to Allain this is proof that the principle is a *jus cogens* because not only has it been accepted by the international community but it has also been established as a non-derogable principle.[169] He further argues that any doubt with regard to this acceptance as a result of the increased violations of the principle are irrelevant due to the fact that State practice need not be in rigorous conformity with the rule for it to emerge as *jus cogens*.[170] Moreover, this principle has achieved this status as a result of its inseparable link to the observance of basic human rights such as the right to life and the freedom from torture.[171]

Bruin and Wouters, in reviewing Allain's argument, argue that the problem remains the establishment of the principle as a *jus cogens* before a court of law because the burden of proof has not been established.[172] Moreover, some commentators argue that the acceptance of *non-refoulement* as a *jus cogens* is not reflected in State practice.[173] This argument is furthered by Orakhelashvili when he points out that State deviation from this principle, by way of the exceptions, permits serious violations of other peremptory norms hence cannot be categorically established as a *jus cogens*.[174] Farmer counters this argument by arguing that the existence of

[166] Allain J, 'The jus cogens nature of non-refoulement', 538.
[167] Supaat D I, 'Escaping the principle of *non-refoulement*', 90-91.
[168] Farmer A, 'Non-refoulement and jus cogens: limiting anti-terror measures that threaten refugee protection', 25.
[169] Allain J, 'The jus cogens nature of non-refoulement', 538.
[170] Allain J, 'The jus cogens nature of non-refoulement', 540.
[171] Orakhelashvili, *Peremptory norms in international law*, 55.
[172] Bruin R and Wouters K, 'Terrorism and the non-derogability of non-refoulement', 26.
[173] Farmer A, 'Non-refoulement and jus cogens: limiting anti-terror measures that threaten refugee protection', 27.
[174] Orakhelashvili, *Peremptory norms in international law*, 36.

exceptions to a rule can have the effect of strengthening rather than undermining the rule's characterisation as a fundamental norm.[175] The establishment of *non-refoulement* as a *jus cogens* norm necessitates that those exceptions are circumscribed or limited which therefore limits the subsequent deviations from the principle as well.

The recognition of the principle as a *jus cogens* norm adds to its protective character. This is because the recognition of the principle as a norm from which no derogation is permissible enforces the observance of basic human rights that are foundational to refugee protection, furthermore, it prevents the return of these refugees to a situation where their rights are likely to be violated. [176]

2.5 Protection of refugees evidenced through the application of this principle

Most, if not all, refugees are victims of natural disasters, civil wars, military takeovers and human rights violation which leaves them exposed to many vulnerabilities.[177] It is as result of these vulnerabilities that the principle of *non-refoulement* has been applied in order to protect them. This is evinced by the courts' application of this principle.

First and foremost, at the core of the *non-refoulement* principle is the protection from torture, cruel, inhuman or degrading treatment. In *Soering v UK*, the European Court of Human Rights expressed that the extradition would amount to an inhuman and degrading treatment due to the fact that the requesting jurisdiction was likely to subject the applicant to the death penalty. [178] Owing to the application of the principle, the government of the United Kingdom was able to

[175] Farmer A, 'Non-refoulement and jus cogens: limiting anti-terror measures that threaten refugee protection', 27.
[176] Farmer A, 'Non-refoulement and jus cogens: limiting anti-terror measures that threaten refugee protection', 23.
[177] Bhuiyan J H, 'Protection of refugees through the principle of *non-refoulement',* 120.
[178] *Soering v UK,* ECtHR.

acquire assurances from the United States government that Soering would not be subjected to the death penalty.[179] Moreover, the ECtHR in *Chahal v UK* pointed out that the prohibition of torture and hence the prohibition of any return to a real risk of torture are absolute, removing the possibility of refoulement on refugees on the basis of security risk or serious crime and public danger.[180] The high regard paid to ascertaining whether the refugees and migrants will be at risk grievous violations of their rights and freedoms illustrates that the principle of *non-refoulement* is greatly concerned with the protection of the refugees.

It is therefore evident that States, as a result of this principle, have an obligation to protect refugees from torture and treatment that is cruel and degrading. The return of refugees to Libya on request of States, such as Italy and Malta, is therefore a violation of the principle because the States have ignored the need to protect the refugees. These States fail to receive assurances from Libya that the rights of the refugees will not be violated. This however may not be relevant especially due to the situation in Libya. Since the uprising in 2011, the country has been plagued by armed conflict which has resulted in gross violations of human rights, especially of migrants and refugees.[181] Doctors' Without Borders have reported that these migrants are held in detention centres that are packed with hundreds of people.[182] In these detention centres they face the worst forms of abuse which is evinced by the fact that some migrants that have escaped are usually anaemic, in shock and have visible signs of abuse.[183] This has been recognised by the EU Commissioner who referred to the treatment of refugees in Libya as "appalling" and

[179] Sizemore B, 'No hope for Jens Soering' The Virginian Plot, 18 February 2007, http://hamptonroads.com/2007/02/no-hope-jens-soering-prisoners-story-shows-how-survive on 19 December 2020.
[180] *Chahal v UK*, ECtHR.
[181] Doctors Without Borders, 'The grinding machine: Refugees and migrants trapped in Libya', http://grand-format.msf.fr/libye-la-machine-a-broyer on 18 December 2020.
[182] Doctors Without Borders, 'The grinding machine: Refugees and migrants trapped in Libya', http://grand-format.msf.fr/libye-la-machine-a-broyer on 18 December 2020.
[183] Doctors Without Borders, 'The grinding machine: Refugees and migrants trapped in Libya', http://grand-format.msf.fr/libye-la-machine-a-broyer on 18 December 2020.

yet Italy and Malta are still adamant to enter into agreements with Libya that enables the push-back of refugees.

The importance of this principle has been recognised in *Hirsi Jamaa and others v Italy*, where the ECtHR applied the protection of this principle extraterritorially.[184] In this case, the court in recognising that the foundation of the principle of *non-refoulement* is the protection of the refugees held that the interception of the refugees by the Italian authorities and the subsequent push-back to Libya disregarded the principle because they did not ascertain the risk of torture that these refugees were going to face.[185] In addition to this they exposed these refugees to *indirect refoulement* as the Libyan government was likely to deport them back to the countries they originally fled from.[186] Furthermore, some authors attribute this extraterritorial application to the fact that Article 33 of the Refugee Convention needs to be applied in consonance with the humanitarian character of the Refugee Convention.[187]

The push-back of the refugees on the commercial ships mirrors the situation in *Hirsi Jamaa and others v Italy*. This is because the States that requested these push-backs without examining the risk that the migrants were likely to face hence putting them in harm's way which inconsistent with the principle. Nivin situation overtly illustrataes this, where the Libyan Security Forces resorted to the use of force, that is they used tear gas, rubber bullets and live ammunition when attempting to debark the refugees from the ship.[188] This was the same experience of refugees who were rescued by the Panther two years later as they were forced

[184] *Hirsi Jamaa and Others v Italy*, ECtHR Judgement of 23 February 2012.
[185] *Hirsi Jamaa and Others v Italy*, ECtHR.
[186] *Hirsi Jamaa and Others v Italy*, ECtHR.
[187] UN High Commissioner for Refugees, The *State of The World's Refugees 1995: In Search of Solutions, State of the World's Refugees*, 1 January 1995.
[188] 'Italy faces complaint at UN over 'abusive' Libya asylum returns' France 24, 18 December 2019, https://www.france24.com/en/20191218-italy-faces-complaint-at-un-over-abusive-libya-asylum-returns on 4 August 2020.

off the ship at gunpoint and then driven to a detention camp where they are exposed to torture and ill-treatment.[189]

With regard to the fact that the migrants are being returned to Libya and due to the fact that the facts in *Hirsi Jamaa* are reflected in the privatised push-backs then it is evident that the migrants should be protected under the principle of non-refoulement.

2.6 Conclusion

The essence of the *non-refoulement* principle has been the protection of the refugees since its inception. The safeguarding of refugees though at the center of the principle, has been breached by States who rely on the exceptions outlined in Article 33(2) of the *Refugee Convention*. Despite this reliance, the exceptions do not provide an absolute mechanism by which States can circumvent their obligations. This is because the principle has acquired *jus cogens* status which means that these exceptions have to be interpreted restrictively in order to ensure the ultimate protection of the refugees.

This protective character is further evidenced by the fact that the establishment of risk of torture, cruel, inhuman and degrading treatment is pertinent to the application of the principle. Furthermore, the scope of the principle is extended to apply extraterritorially by dint of the judgement in *Hirsi Jamaa*. At face value, the prohibited conduct in this case mirrors the situation illustrated by privatised push-backs. Therefore, the protection preferred by the principle applies to the migrants however the question remains whether the States behind these privatised push-backs will be held accountable in line with this principle.

[189] Aslan D, 'EU, Italy's support of migrant returns to Libya aids human rights abuses' Daily Sabah, 23 March 2020,https://www.dailysabah.com/politics/eu-italys-support-of-migrant-returns-to-libya-aids-human-rights-abuses/news?gallery_image=undefined#big on 4 August 2020.

Chapter 3: The extraterritorial applicability of the principle of non-refoulement

3.1 Introduction

Interception[190] of migrant ships on the high seas are considered an illustration of State sovereignty. Sovereignty is established where the State has the right to decide whom to permit entry to and subsequently allow to stay within their territories.[191] These interception measures have gained popularity not only because they evince sovereignty but also because States regard them as being outside the scope of the *non-refoulement* obligation, therefore limiting their liability.[192] This perception has arisen from the notion that the principle of *non-refoulement* is merely a general moral principle that imposes only narrowly defined legal constraints.[193] One of these legal constraints is considered to be the territorial nature of the principle hence the denial of its extraterritorial applicability.[194] This denial was successfully challenged by the ECtHR in *Hirsi Jamaa and others v Italy (Hirsi Jamaa)* whereby the court expanded the scope of application of the *non-refoulement* obligation beyond state territory.[195]

This chapter seeks to scrutinise the *Hirsi Jamaa* case as it is the precedence that cemented the extraterritorial application of the *non-refoulement* principle. Before delving into this, the chapter shall canvas the case law of the ECtHR that has established extraterritorial jurisdiction

[190] An interception refers to mechanisms that directly or indirectly prevent, interrupt or stop individuals who do not possess the required documentation from reaching, entering and/or remaining on their territory. Push-back mechanisms categorically fall within this.
[191] Klug A and Howe T, 'The concept of State jurisdiction and the applicability of the *non-refoulement* principle to extraterritorial interception measures', in Ryan B and Mitsilegas V (eds) *Extraterritorial immigration control: Legal challenges*, Martinus Nijhoff Publishers, Leiden, 2010, 69.
[192] Kim S, 'Non-refoulement and extraterritorial jurisdiction: State sovereignty and migration controls at sea in the European context', 30(1) *Leiden Journal of International Law*, 2017, 49.
[193] Kim S, 'Non-refoulement and extraterritorial jurisdiction: State sovereignty and migration controls at sea in the European context', 49.
[194] North A M, 'Extraterritorial Effect of Non-Refoulement', The International Association of Refugee Law Judges World Conference, Bled, 7–9 September 2011.
[195] *Hirsi Jamaa and Others v Italy*, ECtHR Judgement of 23 February 2012.

in an effort to appreciate the pertinence for expanding the scope of application of the principle. This discussion is pointed towards ascertaining whether privatised push-backs fall within the extraterritorial scope of the principle.

3.2 Extraterritorial jurisdiction in international law and in human rights law

In public international law (PIL), the classical understanding of jurisdiction has been closely tied to the principle of State sovereignty.[196] As a result, the nature of jurisdiction is generally regarded as territorial.[197] This understanding has made it very difficult to define jurisdiction extraterritorially, however the Permanent International Court of Justice (PICJ) in the famous *S. S. Lotus* case extended the exercise of State's criminal jurisdiction outside the bounds of their territory for as long as it does not conflict with international law.[198] According to the PICJ, this exercise of extraterritorial jurisdiction should be based off of a special entitlement which is either established by customary international law, a treaty or the consent of the State on whose territory the jurisdiction is exercised.[199]

The notion of jurisdiction has also been the subject of many debates within the realm of human rights law especially with regard to whether it is territorial. Some authors argue that it is not territorial. They do so by distinguishing the concept of jurisdiction as understood in human rights law from that of PIL. Anja Klug and Tim Howe argue for this distinction by pointing out that jurisdiction within the context of human rights law is imperative to ascertaining the applicability of human rights obligations hence the "possibility of assessing State responsibility" whereas the traditional notion of jurisdiction as provided for in PIL delineates

[196] Shaw M, *International Law*, 6th ed, Cambridge University Press, Cambridge, 2008, 645; Brownlie I, *Principles of public international law*, 6th ed, Oxford University Press, Oxford, 2003, 106f.
[197] Shaw, *International Law*, 645-646.
[198] *Case of S.S. Lotus (France v Turkey)*, Judgement, PICJ, 1927, para.17.
[199] Klug A and Howe T, 'The concept of State jurisdiction and the applicability of the *non-refoulement* principle to extraterritorial interception measures', 74.

the spheres of different States in a manner that respects the sovereignty of each.[200] In the same breath, Conall Mallory suggests that jurisdiction as understood in human rights law deals with the responsibilities and obligations a State has by dint of international treaties as opposed to its rights.[201] To further propagate this distinction Marko Milanovic avers that jurisdiction within the realm of human rights relates to the actual authority and control a State has over persons or a territory.[202] He goes on to state that this simply means actual power whether exercised lawfully or not.[203] This is different from jurisdiction in PIL which looks at control over a territory wielded by a State.

The converse of this has been postulated by Dominic McGoldrick who argues for the territorial notion of jurisdiction in human rights law by stating that the extraterritorial application still has to apply within the framework as established in PIL.[204] This means that the extraterritorial application of human rights obligations would be subject to the 'special entitlement' requirement as provided for in the *Lotus* case. Some other authors argue against the extraterritorial application due to a fear of "potential clashes with foreign territorial jurisdictions".[205] According to Seunghwan Kim, these arguments do not deny the extraterritorial nature of jurisdiction per se as they accept that it may apply to exceptional cases.[206]

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[200] Klug A and Howe T, 'The concept of State jurisdiction and the applicability of the *non-refoulement* principle to extraterritorial interception measures', 69-98

[201] Mallory C, 'I. European Court of Human Rights Al-Skeini and others v United Kingdom (Application no 55721/07) Judgment of 7 July 2011', 61 (01) *International and Comparative Law Quarterly*, 2012, 310.

[202] Milanovic M, *Extraterritorial application of human rights treaties: Law, principles, and policy*, Oxford University Press, Oxford, 2011, 41.

[203] Milanovic, *Extraterritorial application of human rights treaties: Law, principles, and policy*, 41.

[204] McGoldrick D, 'Extraterritorial Application of the International Covenant on Civil and Political Rights', in Coomans F and Kamminga M T (eds), *Extraterritorial Application of Human Rights Treaties*, Cambridge University Press, Cambridge, 2004, 41-42.

[205] *Amnesty International Canada v. Canada* (*Canadian Forces)*(2008), Federal court of Appeal of Canada, para. 274.

[206] Kim S, 'Non-refoulement and extraterritorial jurisdiction: State sovereignty and migration controls at sea in the European context', 52.

3.2.1 The European Court of Human Rights on extraterritorial jurisdiction

Prior to establishing the extraterritorial applicability of the principle of *non-refoulement* as established in *Hirsi Jamaa* it is imperative to look at the jurisprudence of the ECtHR prior to this determination. This is because the Court in *Hirsi Jamaa* relied heavily on past jurisprudence that interpreted the extent of jurisdiction as provided for under Article 1 of the ECHR.

One of the earliest extraterritorial interpretations of jurisdiction was in the case of *Lozidou v Turkey*.[207] In this case Turkish soldiers had detained a Cypriot national in Northern Cyprus where there was alleged ill-treatment. The ECtHR held that Turkey was responsible for the human rights violations on the basis that they exercised 'effective control' over Northern Cyprus.[208] The court extended the jurisdiction of Turkey based on the military authority the Turkish soldiers had over Northern Cyprus hence the establishment of effective control.

The ECtHR further expanded the exceptions to the territorial nature of jurisdiction in *Banković and others v Belgium and others (Banković)*.[209] The Grand Chamber emphasized the territorial nature of jurisdiction however, accepted that in certain exceptional cases the acts of States performed outside their territory could amount to an exercise of their jurisdiction.[210] These exceptional cases are; extradition and expulsion, effective control over territory evidenced by military action, actions within their territories that have extraterritorial effects and actions of diplomatic or consular agents aboard and on board craft; and vessels registered in, or flying the flag State.[211] In bolstering the territorial notion of jurisprudence the Court rejected the

[207] *Loizidou v. Turkey*, ECtHR Judgement of 18 December 1996.
[208] *Loizidou v. Turkey*, ECtHR, para. 52.
[209] *Banković and others v Belgium and others*, ECtHR Judgement of 12 December 2001.
[210] *Banković and others v Belgium and others*, ECtHR, para. 67.
[211] *Banković and others v Belgium and others*, ECtHR, para. 68-73.

applicants' submission for a 'cause and effect' approach to jurisdiction.[212] This sparked academic debates with Milanović asserting that the Court erred in its decision that jurisdiction under Article 1 of the *ECHR* is territorial because according to him it contradicts the Court's jurisprudence but is also 'unsupported by anything produced by the Court'.[213] In response to this critique, Sarah Miller agrees with the Court because not only was the Court guided by PIL but also by the jurisprudence of the ECtHR in establishing jurisdiction as being primarily territorial while still recognizing the exceptions.[214]

The case that followed was *Issa and others v Turkey*, where the ECtHR explicitly, in contrast to *Banković,* held that jurisdiction of a State can be triggered where the State exercises authority and control over persons in the territory of another State.[215] This control is established through the actions of their agents regardless of whether they are lawfully or unlawfully operating in the other State. [216] It is important to note that the ECtHR did not find extraterritorial jurisdiction in this case because there was insufficient evidence to prove that the Turkish soldiers had actually conducted military activities in that area however, it validated that jurisdiction can be established where there is evidence of personal control. Miller completely opposes this decision because according to her it expands the application of the ECHR to the whole world , which was not the intended purpose.[217] Milanović on the other hand applauds the Court for this decision by arguing that the Court's appeal for universality is important as it prevents State

[212] *Banković and others v Belgium and others*, ECtHR, para. 75.
[213] Milanovic, *Extraterritorial application of human rights treaties: Law, principles, and policy*, 22.
[214] Miller S, 'Revisiting extraterritorial jurisdiction: A territorial justification for extraterritorial jurisdiction under the European Convention', 20(4) *European Journal of International Law*, 2010, 1223.
[215] *Issa and others v Turkey*, ECtHR Judgement of 16 November 2004, para. 71.
[216] *Issa and others v Turkey*, ECtHR, para. 71.
[217] Miller S, 'Revisiting extraterritorial jurisdiction: A territorial justification for extraterritorial jurisdiction under the European Convention', 1228.

parties of the ECHR from conducting violations in the territories of other States that they would not have conducted in their own territory.[218]

In *Xhavara and others v Italy and Albania*,[219] the Court confirmed that flag state jurisdiction prefers an obligation under the ECHR. Prior to this case, Italy and Albania had entered a bilateral agreement which permitted Italian agents to intercept vessels flying the Albanian flag. In attempting to carry out an inspection of a ship, flying the Albanian flag, the Italian coast guard ship collided with this ship which led to the drowning of fifty-eight people. The Court despite dismissing the case, because Italy had fulfilled its obligation by conducting an investigation and subsequently bringing criminal proceeding against the ship's commander, found that jurisdiction can be established where the violation is conducted by the flag state.[220]

In *Al-Saadoon and Mufdhi v The United Kingdom*, the Court established a jurisdictional link by ascertaining that total and exclusive *de facto* and *de jure* control over the territory of another State would amount to having jurisdiction.[221]

The Court established extraterritorial jurisdiction with close relations to maritime interception in *Medvedyev and others v France (Medvedyev)*.[222] This case concerns an interception on the high seas by the French coastguard of a ship flying the Cambodian flag as part of an operation against drug-trafficking which was established under an agreement between France and Cambodia. The Grand Chamber held that France's jurisdiction under Article 1 of the ECHR was established because France exercised full and effective *de facto* control over the

[218] Milanovic, *Extraterritorial application of human rights treaties: Law, principles, and policy*, 183.
[219] *Xhavara and others v Italy and Albania* , Application no. 39473/09, Admissibility decision of 11 January 2001, (unreported case), read in Klug A and Howe T, 'The concept of State jurisdiction and the applicability of the *non-refoulement* principle to extraterritorial interception measures', 85.
[220] Klug A and Howe T, 'The concept of State jurisdiction and the applicability of the *non-refoulement* principle to extraterritorial interception measures', 85.
[221] *Al-Saadoon and Mufdhi v. The United Kingdom*, ECtHR Decision on Admissibility of 30 June 2009, para. 88.
[222] *Medvedyev and others v. France* , ECtHR Judgment of 10 July 2008.

intercepted ship.[223] This *de facto* control means that jurisdiction can be linked to a State even where there is no *de jure* control for example flag ship jurisdiction.[224] In Miller's critique of this case she posits that there is still a need for a nexus to the State's physical territory when establishing extraterritorial jurisdiction.[225] The fact that the crew was brought onto French territory in *Medvedyev* supports her argument however this will be disproved when discussing *Hirsi Jamaa*.

The case that confirmed all these cases is *Al-Skeini and others v The United Kingdom (Al-Skeini)*, where the ECtHR confirmed the territorial nature of jurisdiction as provided for under Article 1 of the ECHR.[226] In recognizing this notion of jurisdiction the Court however established two critical exceptions that extend the scope of jurisdiction, these are 'state agent authority and control' and effective control over an area'.[227] Of significance is the Court's statement that, 'what is decisive in such cases is the exercise of physical power and control over the person in question'.[228] This statement propagates the extraterritorial notion of jurisdiction because there is no mention of a nexus to a State's physical territory.

In the context of interception of refugees at sea, the decision in *Al-Skeini* clarifies that jurisdiction is not necessarily territorial in the case of custody of a person on the vessel by a

[223] *Medvedyev and others v. France* , ECtHR, para. 67.
[224] Milanovic, *Extraterritorial application of human rights treaties: Law, principles, and policy*, 162.
[225] Miller S, 'Revisiting extraterritorial jurisdiction: A territorial justification for extraterritorial jurisdiction under the European Convention', 1236.
[226] *Al-Skeini and Others v. The United Kingdom*, ECtHR Judgement of 7 July 2011, para. 13.
[227] *Al-Skeini and Others v. The United Kingdom*, ECtHR, para. 133-140.
[228] *Al-Skeini and Others v. The United Kingdom*, ECtHR, para 136.

contracting State. [229] Secondly, that exceptions to the territorial nature can be established by looking at the facts, for example the control or influence held, as opposed to fixed principles.[230]

3.3 Extraterritorial jurisdiction and non-refoulement

A literal reading of the *Refugee Convention* many intimate that the principle of *non-refoulement* is silent on the extraterritorial applicability of the principle however, there are many arguments that have been made in support of such an understanding. [231] First, the use of the phrase 'in any manner whatsoever', in Article 33(1) of the *Refugee Convention*, when prohibiting *refoulement* can be understood to mean that that this protection applies regardless of whether the action occurs outside the borders of the State in question.[232] Second, Article 1(3) of the *1967 Protocol to the Refugee Convention* provides that the *Protocol* shall apply without geographical limitations.[233] The application of this provision despite being restricted to the *Protoco*l has been understood by scholars to represent the intention of the *Refugee Convention* to be applied without territorial restrictions in order to give effect to its protective character.[234] Third, the telos of the *Refugee Convention* is to ensure the widest possible protection for refugees universally.[235] Restricting the scope of the *Refugee Convention* to the territory of the refouling State would frustrate this aim.[236] Not only would it frustrate the protective aims but it would

[229] Kim S, 'Non-refoulement and extraterritorial jurisdiction: State sovereignty and migration controls at sea in the European context', 58.
[230] Kim S, 'Non-refoulement and extraterritorial jurisdiction: State sovereignty and migration controls at sea in the European context', 58.
[231] O'Brien K S, 'Refugees on the high seas: International refugee law solutions to a law of the sea problem', 3(2) *Goettingen Journal of International Law*, 2011, 727.
[232] Goodwin-Gill G S and McAdam J, *The refugee in international law*, Oxford University Press, Oxford, 2007, 246; Lauterpacht E and Bethlehem D, 'The scope and content of the principle of non-refoulement: Opinion', in Feller E, Türk V and Nicholson E (eds) *Refugee protection in international law: UNHCR's global consultations on international protection,* Cambridge University Press, Cambridge, 2003, para. 67.
[233] Article 1(3), *1967 Protocol to the Refugee Convention*, 31 January 1967, 60 UNTS 267.
[234] Lauterpacht and Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion', para. 84.
[235] Preamble, *The 1951 Convention Relating to the Status of Refugees*, 22 April 1954, 189 U.N.T.S 137
[236] O'Brien K S, 'Refugees on the high seas: International refugee law solutions to a law of the sea problem', 729.

also give leeway for States to circumvent their obligation by moving the border controls outside the confines of their territory.[237]

As there are two sides to a coin there are two sides to an argument. The first argument against the extraterritorial application of the principle of non-refoulement was established by the Supreme Court of the United States in *Sale v Haitian Centres Council (Sale)*, whereby the Court held that Article 33(1) of the *Refugee Convention* did not apply to refugees in international waters.[238] The Court analysed the meaning of the term 'refouler' as used in the Refugee Convention and found that the term return did not sufficiently explain the term and instead interpreted the word to mean expulsion.[239] Furthermore, the Court supported its decision by stating that because Article 33(2) of the *Refugee Convention*, which provides exceptions to Article 33(1), is restricted to a State's territory then the same restriction applies to the *non-refoulement* principle.[240] Lastly, the Court, in reviewing the history of the *Refugee Convention*, held that the *ad hoc* committee only intended for a territorial application of the treaty. [241]

This decision has been the subject of many critiques. Authors have argued that this decision was erroneous because the Court used the exception to infer the rule hence forgetting that the two provisions have an exceptional relationship to each other.[242] Secondly, the Court did not consider that the two provisions serve different purposes.[243] Furthermore, if the drafters of the

[237] Fischer-Lescano A, Löhr T and Tohidipur T, 'Border controls at sea: Requirements under international human rights and refugee law', 21(2) *International Journal of Refugee Law*, 2009, 270.
[238] *Sale v Haitian Centres Council* (1993), The Supreme Court of the United States.
[239] *Sale v Haitian Centres Council* (1993), The Supreme Court of the United States, para. 180-182.
[240] *Sale v Haitian Centres Council* (1993), The Supreme Court of the United States, para 179-183.
[241] *Sale v Haitian Centres Council* (1993), The Supreme Court of the United States, para 184-187.
[242] Fischer-Lescano A, Löhr T and Tohidipur T, 'Border controls at sea: Requirements under international human rights and refugee law', 193.
[243] UN High Commissioner for Refugees, *Advisory opinion on the extraterritorial application of non-refoulement obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, para. 28; *Sale v Haitian Centres Council* (1993), The Supreme Court of the United States, para 194 dissenting opinion by Justice Blackmun.

Refugee Convention had intended for Article 33(1) to be territorial, they would have used clear language to establish this because they made the territorial application explicit in other provisions, for example Article 32 which uses the language 'lawfully on the territory'.[244]

In contrast to the decision in *Sale*, the ECtHR recognized the extraterritorial scope of the principle of *non-refoulement* in *Hirsi Jamaa.*[245] The Court was able to do this by relying on its previous jurisprudence to further extend the scope of jurisdiction to the high seas.[246] The Court extended this scope by holding that jurisdiction is established where the State exercises continuous and exclusive *de jure* and *de facto* control. [247] The Court established *de jure* jurisdiction, in line with international maritime law, based on the fact that the applicants were transferred onto a vessel flying the Italian flag.[248] Moreover, the Court established *de facto* control by illustrating that the applicants were under the continued and uninterrupted control of the Italy military personnel.[249] This decision subsequently challenged State practice because it did not adopt the narrow interpretation that most States afford the non-refoulement principle, this was the result of placing the principle within the human right context.[250] This case is important because it reinforced the protective nature of the principle by expanding its geographical scope of the principle even though it discussed its extraterritorial applicability very briefly.

[244] UN High Commissioner for Refugees, *Advisory opinion on the extraterritorial application of non-refoulement obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, para. 28.
[245] *Hirsi Jamaa and Others v Italy*, ECtHR.
[246] Guiffré M, 'Watered-down rights on the high seas: Hirsi Jamaa and other v Italy', 61(3) *The International and Comparative Law Quarterly*, 2012, 731.
[247] *Hirsi Jamaa and Others v Italy*, ECtHR, para. 81.
[248] *Hirsi Jamaa and Others v Italy*, ECtHR, para. 77.
[249] *Hirsi Jamaa and Others v Italy*, ECtHR, para .80-81.
[250] Klug A and Howe T, 'The concept of State jurisdiction and the applicability of the *non-refoulement* principle to extraterritorial interception measures', 70.

3.4 Background

The decision in *Hirsi Jamaa* led States to institute policies that caused a vacuum on the high seas; policies such as the criminalization of rescue NGOs (also known as the Mare Clausum strategy [251]) , the 'closed ports' policy and the retreat of the European Union's search and rescue mission at sea.[252] These policies were put in place in order to sever the jurisdictional link between the push-back of refugees and the European Union (EU) States, hence limiting their State responsibility.[253]

The most evident strategy is the signing of the *Memorandum of Understanding* (MOU) by Italy and Libya in 2017.[254] The main objective of the MOU was to stem the inflow of illegal migrants despite the fact that it mentioned other objectives like increasing cooperation in the development sector, reducing human-trafficking and the transportation of contraband.[255] The main aim of the MOU is one that is strongly supported by the other members of EU because the very next day, after the MOU was signed, all the Member States signed this agreement and passed it as the *Malta Declaration*.[256] Furthermore, this MOU is still in force as it was renewed on 2 November 2019.[257] This agreement enabled States like Italy and Malta to impose a strict

[251] Global Legal Action Network, *Complaint filed with UN body over Italy's role in privatised push-backs to Libya resulting in migrant abuse*, 18 December 2019.
[252] Global Legal Action Network, *Complaint filed with UN body over Italy's role in privatised push-backs to Libya resulting in migrant abuse*, 18 December 2019.
[253] Forensic Oceanography, *The Nivin case: Migrants' resistance to Italy's strategy of privatised push-backs*, December 2018, 17.
[254] *Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic*, 2 February 2017, https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf on 5 August 2020.
[255] Forensic Oceanography, *The Nivin case: Migrants' resistance to Italy's strategy of privatised push-backs*, December 2018, 19.
[256] Council of the European Union, *Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route*, 3 February 2017.
[257] ANSA, 'Italy renews Libya cooperation deal, pledges to 'improve it'', Infomigrants, 1 November 2019 https://www.infomigrants.net/en/post/20536/italy-renews-libya-cooperation-deal-pledges-to-improve-it on 6 August 2020.

'closed ports' policy. The effect of this was to not only outsource their obligations to a third State party but it also increased privatised push-backs due to the fact that commercial ships were called upon to intercept migrant ships when the Libyan Coast Guard was unable to do so.[258]

As a result, privatised push-backs have been on the rise. Whereas there was only one privatised push-back between 2011 and 2018, there have been thirty times more privatised push-backs since 2018. [259] To illustrate this, this study shall focus on two examples of privatised push-backs. These two incidences are the Nivin case and the privatised push-backs ordered by Malta.

3.5.1 The Nivin Case

The Nivin case is the first ever submitted complaint to a human rights forum with regard to a privatised push-back.[260] The complaint submitted by Global Legal Action Network (glan) to the Human Rights Committee seeks to establish that Italy and other States have violated their international obligations by returning refugees to Libya, where there is a risk of torture and persecution, through the use of private merchant vessels.[261]

The migrant ship that was carrying ninety three migrants was first spotted by a Spanish surveillance aircraft in Libyan Search and Rescue Zone.[262] The surveillance aircraft then notified both the Italian and Libyan Coast Guards in order for the refugees to be pushed back

[258] Forensic Oceanography, *The Nivin case: Migrants' resistance to Italy's strategy of privatised push-backs*, December 2018, 16.
[259] Kingsley P, 'Privatised pushbacks: How merchant ships guard Europe' New York Times, 20 March 2020, https://www.nytimes.com/2020/03/20/world/europe/mediterranean-libya-migrants-europe.html on 4 August 2020.
[260] Global Legal Action Network, *Complaint filed with UN body over Italy's role in privatised push-backs to Libya resulting in migrant abuse*, 18 December 2019.
[261] Global Legal Action Network, *Complaint filed with UN body over Italy's role in privatised push-backs to Libya resulting in migrant abuse*, 18 December 2019.
[262] Heller C, 'Privatised push-back of the Nivin' Forensic Oceanography, 18 December 2019', https://forensic-architecture.org/investigation/nivin on 4 August 2020.

to Libya.[263] This is due to the 'closed ports' policy that the EU States adopted. Due to the fact that the Libyan Coast Guard could not conduct the interception the Italian Coast Guard instructed the Nivin, a commercial ship flying the Panamanian flag, to rescue and return the refugees to Libya.[264] In instructing them to carry out the r*efoulement* the Italian Maritime Rescue Coordination Centre oversaw the entire rescue mission but once the rescue was conducted informed the ship to coordinate with the Libyan Coast Guard.[265]

The migrants had been told that they were being taken to Italy however they realized they had been lied to and were instead being taken to Libya.[266] Once they realised this they locked themselves up in the holding of the ship in order to protect themselves from the Libyan authorities that had been threatening them.[267] When they refused to disembark, the Libyan Security Forces resorted to the use of tear gas, rubber bullets and live bullets to forcefully debark them from the ship.[268]

3.5.2 The privatised push-backs by Malta

More recently, Malta has become very notorious for privatised push-backs. In April of 2020, the Maltese government enlisted three private commercial ship, they were fishing trawlers, to

[263] Heller C, 'Privatised push-back of the Nivin' Forensic Oceanography, 18 December 2019', https://forensic-architecture.org/investigation/nivin on 4 August 2020.
[264] Heller C, 'Privatised push-back of the Nivin' Forensic Oceanography, 18 December 2019', https://forensic-architecture.org/investigation/nivin on 4 August 2020.
[265] 'Italy faces complaint at UN over 'abusive' Libya asylum returns' France 24, 18 December 2019, https://www.france24.com/en/20191218-italy-faces-complaint-at-un-over-abusive-libya-asylum-returns on 4 August 2020.
[266] Forensic Oceanography, *The Nivin case: Migrants' resistance to Italy's strategy of privatised push-backs*, December 2018, 11.
[267] Forensic Oceanography, *The Nivin case: Migrants' resistance to Italy's strategy of privatised push-backs*, December 2018, 11.
[268] Global Legal Action Network, *Complaint filed with UN body over Italy's role in privatised push-backs to Libya resulting in migrant abuse*, 18 December 2019.

intercept migrants and return them to Libya.[269] According to the captain of one of the ships, the trawlers were acting on the instructions of the Armed Forces of Malta.[270]

The first of these privatised push-backs was on April 12, where the Dar Al Salam 1, the Salve Regina and the Tremar all departed from the Maltese capital within one hour of each other at the request of the Maltese authorities.[271] Mr Neville Gafa, a former Maltese official, recounted that he was enlisted by the government on the same night to ensure that these boats had safe passage to Libya.[272] It is important to note that the migrant ship, when making its mayday call, had reached the area of jurisdiction of Malta's armed forces which means that it was Malta's responsibility to rescue the migrant ship according to international maritime law.[273] In addition to this, two of the trawlers who had reached the migrant ship on the 14th of April had been guided by a Maltese military helicopter.[274] Lastly, these trawlers were flying the Maltese flags when they were intercepting these migrant boats.[275]

[269] Kingsley P, Willis H, 'Latest tactic to push migrants from Europe? A private, clandestine fleet' New York Times, 30 April 2020, https://www.nytimes.com/2020/04/30/world/europe/migrants-malta.html on 4 August 2020.
[270] Kingsley P, Willis H, 'Latest tactic to push migrants from Europe? A private, clandestine fleet' New York Times, 30 April 2020, https://www.nytimes.com/2020/04/30/world/europe/migrants-malta.html on 4 August 2020.
[271] Kingsley P, Willis H, 'Latest tactic to push migrants from Europe? A private, clandestine fleet' New York Times, 30 April 2020, https://www.nytimes.com/2020/04/30/world/europe/migrants-malta.html on 4 August 2020.
[272] Kingsley P, Willis H, 'Latest tactic to push migrants from Europe? A private, clandestine fleet' New York Times, 30 April 2020, https://www.nytimes.com/2020/04/30/world/europe/migrants-malta.html on 4 August 2020.
[273] Kingsley P, Willis H, 'Latest tactic to push migrants from Europe? A private, clandestine fleet' New York Times, 30 April 2020, https://www.nytimes.com/2020/04/30/world/europe/migrants-malta.html on 4 August 2020.
[274] Kingsley P, Willis H, 'Latest tactic to push migrants from Europe? A private, clandestine fleet' New York Times, 30 April 2020, https://www.nytimes.com/2020/04/30/world/europe/migrants-malta.html on 4 August 2020.
[275] Kingsley P, Willis H, 'Latest tactic to push migrants from Europe? A private, clandestine fleet' New York Times, 30 April 2020, https://www.nytimes.com/2020/04/30/world/europe/migrants-malta.html on 4 August 2020.

3.5 The jurisdictional link between the EU coastal States and the commercial ships

According to international case-law, for the purposes of extraterritorial application, 'control' is understood as situations in which a State exercises authority or control over an individual outside its own territory. A decisive factor is the physical control the State exercises over the individual. Kim asserts that *Hirsi Jamaa* established a jurisdictional link where States intercept refugees on the high seas by using their own vessels and personnel.[276] This conclusion fails to take into consideration the instances of privatised push-backs.

It is evident from the background discussed above that the privatised push-backs are carried out by commercial ships and by personnel who are non-state actors. However, this does not mean that the extraterritorial scope of the jurisdiction cannot extend to such situations because of the control the States wield over these non-state actors.

The ICJ in *Nicaragua*,[277] established two tests by which non-state actors can be recognised as agents of the State. The first test is that of complete control or dependence.[278] This test assesses whether the relationship between a State and a non-actor is one where there is so much control by one of the parties and dependence by the other.[279] Where this relationship has been established then the non-state actor becomes an organ of the State *de facto.*[280] This is because not only does the foreign State pay for and equip the operation but they also actively participate

[276] Kim S, 'Non-refoulement and extraterritorial jurisdiction: State sovereignty and migration controls at sea in the European context', 61.
[277] *Military and paramilitary activities in and against Nicaragua (Nicaragua v United States)*, Judgement, ICJ Reports 1986.
[278] *Military and paramilitary activities in and against Nicaragua (Nicaragua v United States)*, Judgement, para. 109.
[279] *Military and paramilitary activities in and against Nicaragua (Nicaragua v United States)*, Judgement, para. 109.
[280] Milanovic, *Extraterritorial application of human rights treaties: Law, principles, and policy*, 44.

in the planning and the direction. [281] The second test is that of effective control.[282] This test only applies when the first test has not been met. It assesses whether the specific operation of a non-state actor, which is neither a *de jure* nor *de facto* organ of the State, was conducted under the control of the State.[283] This means that the non-state actor retains a degree of independence from the State.[284]

It is on application of the first test that we can establish that the personnel on these commercial ships are agents of the EU Coastal States, that is Italy and Malta. This is because these States actively participate in the directing and instructing of the commercial ship when the privatised push-backs are being carried out. In the Nivin case this was illustrated by the fact that the Nivin was called upon by the Italian Coast Guard to intercept and refoule the migrant ship.[285] Furthermore, the Italian Coast Guard ensured that they oversaw the interception by the Nivin before requesting the Libyan Coast Guard to take over.[286] This overall control and dependence is also evidenced in the Malta push-backs where not only did the three trawlers receive instructions from the Maltese Armed Forces but they were also guided by a Maltese military helicopter.[287] This points to the fact that the personnel on the intercepting commercial ships can

[281] Cassese A, 'The Nicaragua and Tadić test revisited in light of the ICJ Judgement on Genocide in Bosnia' , 18(4) *European Journal of International Law*, 2007, 652.
[282] *Military and paramilitary activities in and against Nicaragua (Nicaragua v United States)*, Judgement, para. 115.
[283] *Military and paramilitary activities in and against Nicaragua (Nicaragua v United States)*, Judgement, para. 115.
[284] Cassese A, 'The Nicaragua and Tadić test revisited in light of the ICJ Judgement on Genocide in Bosnia' , 652
[285] Heller C, 'Privatised push-back of the Nivin' Forensic Oceanography, 18 December 2019', https://forensic-architecture.org/investigation/nivin on 4 August 2020.
[286] 'Italy faces complaint at UN over 'abusive' Libya asylum returns' France 24, 18 December 2019, https://www.france24.com/en/20191218-italy-faces-complaint-at-un-over-abusive-libya-asylum-returns on 4 August 2020.
[287] Kingsley P, Willis H, 'Latest tactic to push migrants from Europe? A private, clandestine fleet' New York Times, 30 April 2020, https://www.nytimes.com/2020/04/30/world/europe/migrants-malta.html on 4 August 2020.

be identified as State agents therefore expanding the extraterritorial scope of *non-refoulement* to privatised push-backs.

Moreover, Article 98(1) of the UNCLOS provides that 'every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew, or the passengers […] to render assistance to any person found at sea in danger of being lost' and 'to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance'.[288] The trawlers that carried out the privatised push-backs on behalf of the Maltese government were flying the Maltese flag and therefore were bound by the obligation provided for in Article 98(1). This further illustrates that the extraterritorial scope of *non-refoulement* applies to privatised push-backs.

3.6 Conclusion

Jurisdiction is generally understood to apply territorially, especially within the PIL regime. This notion is not questioned however the need for an extraterritorial application in the human rights regime has been recognised by both the ECtHR and recognised authors. This is imperative to holding States accountable for breaching their obligations.

The ECtHR, in *Hirsi Jamaa,* has extended this extraterritorial application to the *non-refoulement* obligation. The Court held that jurisdiction is established where there is *de jure* and *de facto* control over an intercepted vessel by the State or its agents. On application of the test developed in *Nicaragua* it is evident that the personnel on commercial ships, that carry out the privatised push-backs, are State agents. This therefore illustrates that the extraterritorial scope of the non-refoulement obligation applies to privatised push-backs.

[288] Article 98(1), *United Nations Convention on the Law of the Sea*, 16 November 1994, 1833 U.N.T.S. 397.

Chapter 4: State responsibility for privatised push-backs

4.1 Introduction

State responsibility, as a principle of international law, developed with its main aim being protection.[289] The traditional understanding of this principle posits that State responsibility arises when a State commits an international wrong against another State.[290] This emanates from the twin doctrines of State sovereignty and equality of States.[291] The importance of this principle is illustrated by the fact that the principle has received the status of customary international law.[292] Furthermore, the Permanent Court of International Justice recognised that State responsibility is not only just a principle of international law but that it is also 'a greater conception of law' which involves an obligation to make reparation for any breach of an engagement.[293]

The classical position that State responsibility can only be triggered when a State carries out a breach excludes the acts of private entities.[294] Furthermore, international refugee law in subscribing to this understanding does not foresee instances where refugees are met by anything other than a State's own officials.[295] It is on this basis that States have begun

[289] Brownlie I, *System of the law of Nations: State responsibility : Part 1*, Oxford University Press, Oxford, 1983, 9.
[290] Brownlie I, *Principles of public international law*, 5th ed, Oxford University Press, Oxford, 1999, 435-436.
[291] Shaw M, *International Law*, 5th ed, Cambridge University Press, Cambridge, 2003, 541.
[292] *Caire (France) v Mexico* (1929), 5 Reports of International Arbitral Awards.
[293] *Chorzów Factory* (Germany v Poland), Merits, Permanent Court of International Justice 1928, para. 29; *Corfu Channel* (United Kingdom v Albania), Merits ICJ Reports 1949, para. 23.
[294] Gammeltoft-Hansen T, 'International refugee law and the offshoring and outsourcing of migration control' Published PhD Thesis, Institute of Law: Aarhus University, Aarhus, 2009, 188.
[295] Gammeltoft-Hansen T, 'International refugee law and the offshoring and outsourcing of migration control' Published PhD Thesis, Institute of Law: Aarhus University, Aarhus, 2009, 188.

privatising their migration control mechanisms in an effort to circumvent their legal obligations.[296] The privatised push-back mechanisms are an illustration of such efforts.

The general principles of international law such as the *Articles on Responsibility of States for Internationally Wrongful Acts (Articles on Responsibility)* provide means for holding States accountable in an effort to achieve the protective essence of State responsibility. This chapter seeks to analyse these principles in an attempt to establish that the European Union Coastal States are responsible for violating the principle of *non-refoulement* by enabling the privatised push-backs of refugees.

4.2 Attribution of actions by non-state actors to a State

The dualism in national and international law with regard to what is private and public creates an initial presumption against engaging the responsibility of a State for actions carried out by persons who are not agents of the State.[297] Olivier Schutter, in stating this, is simply highlighting the traditional notion that private actions cannot be attributed to the State. Despite this point of view, the principles of international law have foreseen situations in which a State may be held responsible for the actions of non-state actors. These principles, however, should consider the initial presumption, that States cannot be held responsible for the wrongful acts of private entities, and only on fulfilling certain tests may this presumption be successfully rebutted. [298]

[296] Gammeltoft-Hansen T, 'International refugee law and the offshoring and outsourcing of migration control' Published PhD Thesis, Institute of Law: Aarhus University, Aarhus, 2009, 198.
[297] Schutter O, 'Extraterritorial jurisdiction as a tool for improving the human rights accountability of transnational corporations', Background paper *UN High Commissioner for Human Rights*, 2006, 18.
[298] Gammeltoft-Hansen T, 'International refugee law and the offshoring and outsourcing of migration control' Published PhD Thesis, Institute of Law: Aarhus University, Aarhus, 2009, 207.

The *Articles on Responsibility* are a starting point in attributing breaches of obligations by non-state actors to the State. Some authors such as Andrew Clapham, disagree with this by stating that these articles should be considered inappropriate especially when ascertaining human rights violations.[299] The alternate response, which this study is in complete consonance with, is that these articles are applicable not only to human rights but also to refugee law.[300] Furthermore, the principles espoused in these articles are thought to be customary international law which makes them applicable to the discussion any way.[301] The following discussion shall analyse the *Articles on Responsibility* in order to establish whether the privatised push-backs by Italy and Malta can be attributed back to them.

4.2.1 Private actors exercising governmental authority

Article 5 of the *Articles on Responsibility* sets out one of the instances in which the actions of a private entity can be attributed to a State. Article 5 provides that;

> *'The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental*

[299] Clapham A, 'The 'drittwirkung' of the convention', in Matscher F, Macdonald R J and Petzold H (eds) *The European system for the protection of human rights*, Martinus Nijhoff Publishers, Boston, 1993, 170.

[300] McCorquodale R and Simons P, 'Responsibility beyond borders: State responsibility for extraterritorial violations by corporations of international human rights law', 70(4) *The Modern Law Review*, 2007, 602; McGoldrick D, 'Extraterritorial Application of the International Covenant on Civil and Political Rights', in Coomans F and Kamminga M T (eds), *Extraterritorial Application of Human Rights Treaties*, Cambridge University Press, Cambridge, 2004; Crawford J, *The International Law Commission's articles on State responsibility: Introduction, text and commentaries*, Cambridge University Press, Cambridge, 2004, 25; *Banković and others v Belgium and others*, ECtHR Judgement of 12 December 2001, para. 57- *'the Court recalls that the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law'*

[301] McCorquodale R and Simons P, 'Responsibility beyond borders: State responsibility for extraterritorial violations by corporations of international human rights law', 601; Lauterpacht E and Bethlehem D, 'The scope and content of the principle of non-refoulement: Opinion', in Feller E, Türk V and Nicholson E (eds) *Refugee protection in international law: UNHCR's global consultations on international protection*, Cambridge University Press, Cambridge, 2003, 108.

authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance'. [302]

This article recognises the trend where States outsource their functions and duties to private corporations. According to James Crawford, the intent behind Article 5 was to address the phenomenon of parastatal entities that would carry out government functions in place of the State organ.[303] Crawford recognises that the use of the term 'entity' in Article 5 has no limits and therefore covers a wide variety of private bodies that have been empowered by the State's law to exercise elements of governmental authority. [304] The pertinent requirement under this article is that the non-state actor has been empowered by the State's internal law to exercise a specific function that would have otherwise been carried out by a State organ. This was recognised by the ICSID Tribunal in *Noble Ventures v Romania* where the Tribunal on application of Article 5 of the *Articles on Responsibility* held that there is no legal distinction to be drawn between the non-state actors and the government ministry due to the fact that the private entity was functioning as the empowered public institution under the Privatization Law.[305]

The attribution under this article should however, be understood in a narrow sense. [306] First, the law that is empowering the private entity has to specifically authorise the exercise of public

[302] Article 5, *Draft articles on state responsibility for internationally wrongful acts*, ILC 53rd Report, 2001, UN Doc A/56/10.
[303] Crawford, *The International Law Commission's articles on State responsibility: Introduction, text and commentaries,* 100.
[304] Crawford, *The International Law Commission's articles on State responsibility: Introduction, text and commentaries,* 100.
[305] *Noble Ventures, Inc. v Romania,* ICSID Award of 12 October 2005, (ICSID Case No. ARB/01/11), para. 79.
[306] Crawford, *The International Law Commission's articles on State responsibility: Introduction, text and commentaries,* 102.

authority.[307] Second, the wrongdoing by the private actor has to be related to the public function that the law prescribed and should not be any other private or commercial activity.[308]

Privatised push-backs by the European Coastal States do not meet the requirements under this article. This is because these States have not implemented legislations that would enable private entities to carry out the *refoulements* on their behalf. This is for the obvious reason that if they were to pass such legislations then they would be admitting to violating their obligations under Article 33 of the *Refugee Convention* as expounded by the ECTHR in *Hirsi Jamaa*.

4.2.2 Conduct by private actors that are under the control and directions of the State

It is very clear that States may circumvent the attribution under Article 5 of the *Articles on Responsibility* by delegating their functions to private entities without the empowerment by a national legislation.[309] These situations are covered under Article 8 of the *Articles on Responsibility* which provides that;

> *'The conduct of a person or group of persons shall be considered an act of State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'.* [310]

This provision is able to bypass the attempts by States to circumvent the attribution under Article 5. This is owing to the fact that this article does not depend on the establishment of a *de jure* relation by national law but rather establishes whether there is *de facto* control exercised

[307] Gammeltoft-Hansen, 'International refugee law and the offshoring and outsourcing of migration control' Published PhD Thesis, Institute of Law: Aarhus University, Aarhus, 2009, 211.
[308] Gammeltoft-Hansen, 'International refugee law and the offshoring and outsourcing of migration control' Published PhD Thesis, Institute of Law: Aarhus University, Aarhus, 2009, 211.
[309] Gammeltoft-Hansen, 'International refugee law and the offshoring and outsourcing of migration control' Published PhD Thesis, Institute of Law: Aarhus University, Aarhus, 2009, 211.
[310] Article 8, *Draft articles on state responsibility for internationally wrongful acts*, ILC 53rd Report, 2001, UN Doc A/56/10.

by the State over the non-state actor.[311] This *de facto* relationship may be identified in two circumstances; firstly, where the State authorises the private actor who then acts on this instruction, and secondly, where the private entity though not directly authorised carries out the activity under the control and direction of the State.[312]

In the first circumstance, the conduct despite not being explicitly empowered through national laws needs to be established through some sort of formal authorisation or instruction.[313] Furthermore, the instructions must clearly relate to a violation of an obligation.[314] This is foundational to establishing that the privatised push-back which occurred in the Nivin case can be attributed to Italy. After the Italian and Libyan Coast Guards had been informed, by the Spanish surveillance aircraft, that there was a migrant ship that needed to be pulled back to Libya, the Italian Coast Guard instructed the Nivin to rescue and return the refugees to Libya.[315]

Commercial ship masters have an obligation under Chapter V Regulation 33.1 of the *International Convention for the Safety of life at Sea*[316] and Article 10(1) of the *International Convention on Salvage to assist distressed persons at Sea*.[317] This coupled with the fact that the *1979 International Convention on Maritime Search and Rescue* requires that these commercial ships obey the orders from a State's coast guard illustrates that the instructions and

[311] Crawford, *The International Law Commission's articles on State responsibility: Introduction, text and commentaries*, 110.
[312] Crawford, *The International Law Commission's articles on State responsibility: Introduction, text and commentaries*, 110.
[313] Crawford, *The International Law Commission's articles on State responsibility: Introduction, text and commentaries*, 113.
[314] Crawford, *The International Law Commission's articles on State responsibility: Introduction, text and commentaries*, 113.
[315] Heller C, 'Privatised push-back of the Nivin' Forensic Oceanography, 18 December 2019', https://forensic-architecture.org/investigation/nivin on 4 August 2020.
[316] Chapter V Regulation 33.1, *International Convention for the Safety of life at Sea*, 25 May 1980, 1184 U.N.T.S 3.
[317] Article 10(1), *International Convention on Salvage*, 28 April 1989, 1953 UNTS.

direction from the States of Italy and Malta are formal authorisations.[318] Moreover, it is a clear violation of their *non-refoulement* obligation by dint of the ECtHR judgement in *Hirsi Jamaa*, where it was established that push-backs of migrant ships on the high seas amounts to *refoulement*.[319]

This, however, is not the only avenue of attributing wrong doings by private entities to a State. The second circumstance provided for by Article 8 arises in situations where non-state actors despite not being directly authorized act under the direction and control of the State.[320] The direction and control is of the specific operation that is being complained of.[321] This therefore means that any action that was incidental to the operation or was in excess of the instructions given would not be attributable to the State.[322]

The question of degree when discussing the control meted by the State has been discussed in different cases. The ICJ in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua)* discussed the issue of control with regard to ascertaining whether the acts of the contras could be attributed to the United States.[323] The court recognized that the United States was responsible for planning, directing and controlling the contras however could not conclude that all the acts of the contras was attributable to the United States.[324] The ICJ established two

[318] *International Convention on Maritime Search and Rescue*, 27 April 1979, 1403 UNTS*;* Kingsley P, 'Privatised pushbacks: How merchant ships guard Europe', New York Times, 20 March 2020, https://www.nytimes.com/2020/03/20/world/europe/mediterranean-libya-migrants-europe.html on 4 August 2020.

[319] *Hirsi Jamaa and Others v Italy*, ECtHR Judgement of 23 February 2012

[320] Gammeltoft-Hansen T, 'International refugee law and the offshoring and outsourcing of migration control' Published PhD Thesis, Institute of Law: Aarhus University, Aarhus, 2009, 218; james Crawford page 110.

[321] Crawford, *The International Law Commission's articles on State responsibility: Introduction, text and commentaries*, 110.

[322] Crawford, *The International Law Commission's articles on State responsibility: Introduction, text and commentaries*, 110.

[323] *Military and paramilitary activities in and against Nicaragua (Nicaragua v United States)*, Judgement, ICJ Reports 1986

[324] *Military and paramilitary activities in and against Nicaragua (Nicaragua v United States)*, Judgement, para. *86.*

tests in this case that would result in attribution of wrongdoings to a State. These two test, as discussed in the previous chapter, are the tests of complete control or dependence,[325] and of effective control.[326] In the first test, the establishing factor is that one party mets out a lot of control and the other party heavily depends on the former party.[327] In the second test, the establishing factor is that the private entity cannot be seen to carry out functions *ultra vire*s of instructions by the State. This means that the private entity whilst conducting the specific function should not be seen to have any independence from the State.

The International Criminal Tribunal for the former Yugoslavia (ICTY) also addressed this issue in *Prosecutor v Tadić (Tadić)*.[328] The court established that the requisite degree is overall control that goes beyond mere financing and equipping of the non-state actors.[329] This means that there should be active participation in the planning and supervision of these entities. [330] These two cases have been differentiated on the basis that the standard in *Tadić* is directed to individual criminal responsibility whereas the standard in *Nicaragua* is directed to State responsibility.[331] Therefore the requisite standard to apply is that which was established in *Nicaragua*. This is further illustrated by the fact that the ICJ has rejected the standard provided for in *Tadić* and has reaffirmed the tests as provided for in *Nicaragua*.[332]

[325] *Military and paramilitary activities in and against Nicaragua (Nicaragua v United States)*, Judgement, para. 109.
[326] *Military and paramilitary activities in and against Nicaragua (Nicaragua v United States)*, Judgement, para. 115.
[327] *Military and paramilitary activities in and against Nicaragua (Nicaragua v United States)*, Judgement, para. 109.
[328] *Prosecutor v Tadić* (1999), The International Criminal Tribunal for the Former Yugoslavia.
[329] *Prosecutor v Tadić* (1999), para. 145.
[330] *Prosecutor v Tadić* (1999), para. 145.
[331] *Prosecutor v Tadić* (1999), 1614-1615 (comments by Judge Shahabuddeen).
[332] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Reports 2007, para. 403. See also *Case concerning Armed Activities on the Territory of the Congo (DR Congo v. Uganda*), ICJ Report 2005.

The standard as established in Nicaragua will clearly evince that the privatised push-backs of refugees and migrants to Libya are attributable to Italy and Malta. This is because the commercial ships received instructions and directions from the Maltese Armed Forces[333] and the Italian Coast Guard.[334] Furthermore, these direction and instruction was supplement by supervision where the Maltese Armed Forces sent out a military helicopter to guide the trawlers to Libya.[335] In the Nivin case, the Italian Coast Guard closely supervised the Nivin before it was able to hand it over to the Libyan Coast Guard.[336] In addition to this, the commercial ships are under an obligation to respect the orders they receive from the authorities of a State,[337] which illustrates that the refoulement of the refugees was not an independent act of the merchant ships hence satisfies the requirements of the standard established in *Nicaragua*.

4.3 Conclusion

State responsibility as a principle of international law has been recognized as customary law. Despite this recognition, the classical notion of State responsibility excludes the attribution of wrongdoing to States in the instance that the actions are carried out by a private entity. This has resulted in the privatization of many State functions, the privatised *refoulements* of refugees is one such instance.

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[333] Kingsley P, Willis H, 'Latest tactic to push migrants from Europe? A private, clandestine fleet', New York Times, 30 April 2020, https://www.nytimes.com/2020/04/30/world/europe/migrants-malta.html on 4 August 2020.

[334] Heller C, 'Privatised push-back of the Nivin' Forensic Oceanography, 18 December 2019', https://forensic-architecture.org/investigation/nivin on 4 August 2020.

[335] Kingsley P, Willis H, 'Latest tactic to push migrants from Europe? A private, clandestine fleet', New York Times, 30 April 2020, https://www.nytimes.com/2020/04/30/world/europe/migrants-malta.html on 4 August 2020.

[336] 'Italy faces complaint at UN over 'abusive' Libya asylum returns', France 24, 18 December 2019, https://www.france24.com/en/20191218-italy-faces-complaint-at-un-over-abusive-libya-asylum-returns on 4 August 2020.

[337] *International Convention on Maritime Search and Rescue*, 27 April 1979, 1403 UNTS; Kingsley P, 'Privatised pushbacks: How merchant ships guard Europe', New York Times, 20 March 2020, https://www.nytimes.com/2020/03/20/world/europe/mediterranean-libya-migrants-europe.html on 4 August 2020.

The *Articles on Responsibility* recognising this trend has established means by which the actions of non-state actors can be attributed to a State. This is through the establishment of a link between the private actor and the State. Firstly, a link can be established where a State's national law empowers an private entity to exercise a public function that would breach its obligations. It may be challenging to attribute the breach to a State in this instance as States do not implement such legislation in an attempt to shield themselves from liability. In the absence of such legislation, the link can be established where the State wields control over the entity. It is on this basis that the EU Coastal States exercised the requisite degree of control over the merchant ships as espoused by the ICJ in *Nicaragua* hence violating their *non-refoulement* obligations.

Chapter 5: Recommendations and Conclusion

5.1 Introduction

This dissertation identified the dire reality facing very many migrants and refugees, which is their privatised push-backs at the request of States such as Italy and Malta. These privatised push-backs, in attempting to prevent the entry of migrants and refugees, results in their *refoulement* back to Libya where their rights and freedoms are at risk of being violated. It is important to recognise that the refouling States are not carrying out the push-backs, instead they are ordering and instructing commercial ships to intercept the migrants' boats and return them to Libya. The attribution for this grievous breach has to be seriously considered hence the need to refer to the *Articles on Responsibility of States for Internationally Wrongful Acts (Articles on Responsibility).* In this respect, the dissertation hypothesised that the protective nature of the *non-refoulement* obligation necessitates the extraterritorial application of the principle hence the basis for considering privatised push-backs as a breach of the obligation. Furthermore, referring to the *Articles on Responsibility* attributes the actions of these private entities to Italy and Malta.

This chapter is the clincher of this dissertation that seeks to address some recommendations and succinctly summarises the discussions in the previous chapters. It will also highlight some areas of possible future study.

5.2 Recommendations

5.2.1 A wider interpretation of the non-refoulement obligation

A wider interpretation of the principle of *non-refoulement* is the best approach to limiting the grievous attempts by States to circumvent their obligations. Currently there is a trend where

States attempt to limit their liability by narrowly interpreting their *non-refoulement* obligation. Prior to 2012, States would narrowly interpret the principle's scope of application by limiting it to their territories in order to push-back migrant ships on the high seas. The ECtHR remedied this in *Hirsi Jamaa* where it extended the scope of application extraterritorially. In response to this, States then begun instructing merchant ships to push-back these migrant ships.

For as long as States' can solely rely on the original intention of the *Refugee Convention*, they will continually find new methods to circumvent their *non-refoulement* obligation. The only way to curb this is by extending the interpretation of this obligation's scope. This can be done by applying Lauterpacht's doctrine of effectiveness.[338] Lauterpacht posits that the purpose of a treaty should not be interpreted by solely referring to the original intention of the drafters, as their wording and intention may not have conceptualised the current contexts and practices. In order for the treaty to remain effective the original intent should be coupled with the current context and implementation when interpreting it.

Applying this doctrine of effectiveness, the principle of *non-refoulement* will not only extend extraterritorially but will also apply to privatised push-backs. This is based off of the drafters' original intent to protect refugees coupled with the current use of privatised push-backs by States as a means to circumvent their obligation. Hence when interpreting the obligation, it is evident the need to apply it to privatised push-backs in order to prevent it becoming redundant.

5.2.2 A regulatory framework for international cooperation

International cooperation is a term that is established in the provisions of the *United Nations Charter*.[339] It broadly refers to a cooperation framework among States' which includes an

[338] Lauterpacht H, *The development of international law by the Permanent Court of Justice*, Longmans, Green & Co, New York, 1934, 69ff.
[339] Articles 1, 13, 55 and 56, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

agreement to cooperate and share burdens and responsibilities in order to resolve refugee situation.[340] The 2017 *Memorandum of Understanding*, between Italy and Libya, is an example of a cooperative agreement between States that was later passed as the *Malta Declaration*. According to Astri Suhrke cooperation in this regard, especially between Northern States and Southern States, usually tend to fail within the refugee regime.[341] Suhrke's main reason for this failure is due to the imbalance in bargaining power which benefits the Northern States as they are able to acquire terms that greatly favour them.[342] This is the situation at hand as the European Union Coastal States are using the *Malta Declaration* as a means to institute a 'closed ports' policy the result of this being that their obligations to intercept migrant ships are not only outsourced to Libya but also to private entities. This enables them to escape their *non-refoulement* obligations.

A clear and binding regulatory framework should be drafted and implemented in order to regulate these international cooperative initiatives between States. Such a framework should clear ascertain the extent to which these cooperative agreements can be used to circumvent their *non-refoulement* obligations. Furthermore, this framework can highlight the States that cannot enter these cooperative agreements due to the fact that they are not a place of safety for refugees. Lastly, the regulatory framework should prefer the UNHCR with a stronger supervisory role so as to ensure that the cooperative agreements entered into between States are in tandem with the regulatory framework.

[340] UNHCR, 'International cooperation to share burden and responsibilities' United Nation High Commisioner for Refugees, Expert Meeting Discusson Paper 27 and 28 June 2011, https://www.refworld.org/docid/4e9fed232.html%20on%2026%20January%202021 on 26 January 2021, 3.
[341] Suhrke A, 'Burden-sharing during refugee emergencies: The logic of collective action versus national action', 11(4) *Journal of Refugee Studies*, 1998.
[342] Suhrke A, 'Burden-sharing during refugee emergencies: The logic of collective action versus national action'.

5.2.3 Establishing an International Judicial Commission for refugees

Justice Anthony North, there is need for a 'clear voice of legal authority to speak on the breaches of the *Refugee Convention...'* which can be achieved by establishing an international judicial entity.[343] According to Justice North and Joyce Chia, there is a need for an International Judicial Commission for refugees because; first, the lack of such a body means that cases with the same subject matter will be treated differently.[344] An International Judicial Commission will ensure consistency in the way the cases are treated and will also establish jurisprudence on the interpretation of the *Refugee Convention*. This jurisprudence will ensure that there is no diversity with regard to the interpretation of the *Refugee Convention*.[345] This jurisprudence will also prevent States from circumventing their obligations based on their narrow and limited interpretations. Furthermore, this body would be imperative to the refugee law regime as it would enforce and emphasise the international legal obligations.

According to Justice North and Chia, this Commission can be established under the supervisory mandate of the UNHCR.[346] Article 8 of the *UNHCR Statute* provides the High Commissioner with the mandate to supervise the application of international conventions for the protection of refugees.[347] This is because the notion of supervision can be understood to comprise of three

[343] North A M, 'Extraterritorial Effect of Non-Refoulement', The International Association of Refugee Law Judges World Conference, Bled, 7–9 September 2011.
[344] North A M and Chia J, 'Towards convergence in the interpretation of the Refugee Convention: A proposal for the establishment of an international judicial commission for refugees', 25(5) Australian Yearbook of International Law, 2006 http://www5.austlii.edu.au/au/journals/AUYrBkIntLaw/2006/5.html#fn2 on 25 January 2021.
[345] North A M and Chia J, 'Towards convergence in the interpretation of the Refugee Convention: A proposal for the establishment of an international judicial commission for refugees', 25(5) Australian Yearbook of International Law, 2006 http://www5.austlii.edu.au/au/journals/AUYrBkIntLaw/2006/5.html#fn2 on 25 January 2021.
[346] North A M and Chia J, 'Towards convergence in the interpretation of the Refugee Convention: A proposal for the establishment of an international judicial commission for refugees', 25(5) Australian Yearbook of International Law, 2006 http://www5.austlii.edu.au/au/journals/AUYrBkIntLaw/2006/5.html#fn2 on 25 January 2021.
[347] Article 8, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V).

elements these being; information gathering, analysis and assessment of this information and enforcement.[348] The supervisory elements can be understood to highlight the mandate of a judicial body which enforces, analyses and assesses information with regard to complying with a legal instrument. It is on this basis that an International Judicial Commission should be established.

5.2.4 States should refrain from privatised push-backs

The ultimate solution to the problem at hand is for States' to embrace their *non-refoulement* obligation. This includes refraining from pushing back refugees and migrants to countries where their rights and freedoms are at risk of being violated. Furthermore, States' should stop abusing the control they wield over commercial ships on the high seas. This will enable the commercial ships to disembark the refugees and migrants in the EU Coastal States as opposed to *refouling* them to Libya because they were instructed to do so.

This can be guaranteed if the States are held responsible for the breach of their non-refoulement obligation. The effect of the *Hirsi Jamaa* decision was that Italy implemented operations on the high seas that led to the rescue of 150,000 refugees Sover a period of ten months.[349] Holding States responsible for the breach resulted by privatised push-backs may have the same effect.

5.3 Conclusion

The study posed several questions to this regard: Does the principle of *non-refoulement* protect refugees that have been refouled by non-state actors? Does the extraterritorial application of

[348] S 627.

[349] International Organization for Migration, *IOM applauds Italy's life-saving Mare Nostrum Operation: 'Not a migrant pull factor'*, https://missingmigrants.iom.int/iom-applauds-italy's-life-saving-mare-nostrum-operation-'not-migrant-pull-factor' on 5 September 2020.

the principle extend to privatised push-backs? Can States be held responsible for the violation of the principle resulting from the privatised push-backs?

At the heart of this research is the refugees and migrants who attempt to cross the Mediterranean acknowledging the risks posed by this journey just so they can reach a land of milk and honey. Countries such as Italy and Malta are Canaan-like countries to them based on the fact that their rights and freedoms are not at risk in theses jurisdictions. It is on this basis that Chapter 2 reinforces the need to protect these refugees on the basis of the principle of *non-refoulement*. This protection is established not only in the *Refugee Convention* but also in other binding and non-binding international instruments. The customary law status and the recognition of the principle as a *jus cogens* norm bolsters the ability of the principle to protect refugees as it cannot be derogated from. The core of this protection is the assessment of risk which requires that a State has to ascertain the risk posed on the rights and freedoms of a refugee when ascertaining whether they can return a refugee to a country they fled from. Furthermore, the protective nature of this principle is highlighted by the fact that the principle applies regardless of a formal recognition as refugee.

Chapter 3 of this dissertation addresses the extraterritorial scope of the principle. The discussion on the extraterritoriality of the principle illustrates the interplay between human rights and refugee law. Prior to the *Hirsi Jamaa* judgment, the scope of the principle was territorial however the scope was expanded based on the foundation established by the European Court of Human Rights where it was established that human rights obligations applied extraterritorially. It was necessary to look at how the standard established in *Hirsi Jamaa* would apply to privatised push-backs. The prerequisite to establishing this standard was that the push-back had to be carried out by the State or its agents. Based on the fact that States

were instructing and directing the merchant ships they are recognized as agents hence the extraterritorial scope of the principle applying to privatised push-backs.

When addressing the issue of liability with regard to the privatised push-backs, which was tackled in Chapter 4, it is argued that liability can be attributed to States. The basis for this is the *Articles on Responsibility* which establish that the actions of private entities can be linked to States in several instances. In this regard it was established that there is a link between the commercial ships and the States because these privatised push-backs were at the instruction and direction on the States. The reason for this is that the private entities were completely dependent on the States to carry out the push-backs. If it were not for the instructions and directions by the State, the non-state actors would not have carried out the *refoulement*.

Chapter 5 highlighted recommendations with regard to the privatisation of push-backs. These recommendations include; expanding the interpretation of the non-refoulement obligation by taking into consideration the current practices; the establishment of a regulatory framework that will address the international cooperation between States which has led to the privatised push-backs; establishing an International Judicial Commission for refugees; and the ultimate recommendation is for States to refrain not only from pushing back refugees but also from abusing their control over merchant ships by requiring them to push-back these refugees in their stead.

This dissertation hopes that the recommendations made will pave way to further possible studies in analysing the downfalls of international cooperation mechanisms with regard to the protection of refugees and how these downfalls can be rectified.

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