



# Student Paper Series

The EU's Extraterritorial Asylum Policies  
& Human Rights Obligations:  
Prospects, Limits and the Role of the European Courts  
By Anna Hoffmann (MPP 2015)

**Academic Advisor:** Prof. Mark Dawson, PhD  
Professor of European Law and Governance

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*To all those migrants who drowned while this thesis was written  
I hope they have reached better-managed shores.*

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## ABSTRACT

This paper presents an analysis of the underlying policy and legal mechanisms contributing to the deaths of migrants attempting to reach the EU by crossing the Mediterranean. It is structured into three sections, outlining, firstly, the deficits of the current Common European Asylum System, especially its extraterritorial dimension. It is argued that the reasons for the shortcomings of the current system are linked to the traditional state-centred paradigm still pre-dominant in EU law and policy. Secondly, human rights are presented as the conceptually adequate instrument to fill these gaps and to extend effective protection of migrants' human rights beyond the shores of Europe. The European Convention of Human Rights is singled out as the most promising system for doing so. Thirdly, analysing the role of the two major European Courts in extending human rights protection extraterritorially, it further outlines the prospects and limits of such an approach. The importance of the Courts in clarifying and also extending the reach of human rights protection is demonstrated and the paper concludes with an outlook on future challenges facing the two Courts and the human rights system within the European region.

## INTRODUCTION

*“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, nondiscrimination, tolerance, justice, solidarity and equality between women and men prevail.” - Article 2 TEU*

*“The art is to translate the rhetoric of human rights protection into a working reality that is commensurate with human dignity, compatible with international obligations and consistent with the rule of law.” - Goodwin Gill (2008)*

### The Context

This thesis deals with the increasingly relevant and visible problem of migrants drowning in the Mediterranean Sea while trying to reach Europe. Within the final three weeks of writing this paper, over 1000 migrants died in this manner. Over the last decade the estimated number of deaths is around 20'000 (IOM, 2014). 2014 has been the deadliest year on record with more than 3500 individuals drowning or dying of hunger, thirst or cold during the crossing and 2015 promises to be even worse. After a particularly dramatic incident off the coast of Lampedusa in 2013, Italy started a major search and rescue operation, *Mare Nostrum*. However, due to the financial burden and lack of support by other European states, this program was ended in October 2014. Its replacement, *Joint Operation Triton (JO Triton)*, has a much narrower focus on securing the border and not on saving lives.<sup>1</sup> This has led to a situation in which an increasingly large number of people are in danger of drowning *en route* to Europe, without effective access to asylum and protection. This comes at a time when the number of refugees and migrants is expected to grow substantially, mainly due to the deteriorating situation in the Middle East (UNHCR, 2014). This increase is reflected both in the number of asylum applications lodged within the EU (see Graph Annex 1) and the reported irregular border crossings. According to

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<sup>1</sup> This has recently been made explicit again by the head of the European Border Agency: „EU borders chief says saving migrants' lives 'shouldn't be priority' for patrols” (Guardian, 2015)

Frontex, there were about 278,000 irregular border crossings in 2014, twice as many as in 2011 (Frontex, 2014).

The European Union has met this larger influx with increased border controls, so called “push-back” operations pushing back migrant boats, and other increasingly extraterritorial mechanisms such as third country agreements (“pull-back” agreements) to hold back migrants, e.g. with Morocco or Libya, and increased obligations on airlines to control visa. These operations have been criticised by human rights NGOs for violating the principle of *non-refoulement* and violating other human rights of migrants (Amnesty International, 2014). Politicians have been very reluctant to accept responsibility for the fate of migrants on the high seas, due to a general rising anti-immigration sentiment within Europe (viz. Guiraudon and Lahav, 2013, Davidov et al, 2014). However, the European Courts, most notably, the European Court of Human Rights, have been quite active in establishing the rights of refugees on the high seas and the corresponding state duties. Nevertheless, there are limitations to what the courts can and will most likely do. The one thing that is clear in this complex dilemma is that the current system fails to protect the basic human rights of migrants. ***The overarching question of this thesis is thus: What are the deficiencies in the protection scheme offered by the EU to migrants, on which legal basis could these gaps be filled and what is the role of the Courts in filling these gaps?***

## Overview of the Argument

This thesis seeks to tackle the problem by analysing the structural reasons behind migrants’ deaths at sea with a special focus on the legal framework and the role of the European Courts (hereafter often “The Courts”). It proceeds in a three-step analysis and argumentation:

1. The paper outlines the salient features of the current EU asylum system with a focus on extraterritorial asylum measures. It identifies gaps and shortcomings in the current policy framework, which are rooted in the legal framing of refugee rights more generally. These pertain mostly to the underlying territoriality of the

protection scheme, which does not include migrants at sea. Moreover, it is argued that the extension of jurisdiction and state responsibility by Strasbourg in its *Hirsi* judgment may have created perverse incentives against rescuing refugees. The move from *Mare Nostrum* to *JO Triton* can arguably be explained against this very background. In any case, it is clear that current search and rescue provisions based on the United Nations Convention of the Law of the Seas (UNCLOS) are insufficient in providing effective access to asylum and protection of basic human rights of migrants, such as the right to life.

2. The paper asks which instrument would be most promising to fill these gaps, also taking into account the limitations arising from the instruments themselves and their application and interpretation by the Courts. The argument is advanced that human rights instruments promise the best solution to the situation of migrants at sea as these individuals are often outside the jurisdiction of any state. The Charter, the ECHR and international conventions are analysed as potential candidates and the ECHR singled out as the most promising instrument to offer such protection with clear limitations.
3. The paper asks what role the Courts have played in advancing refugee right protection and human rights protection for migrants more generally.<sup>2</sup> It uses the analytical tool of looking at the dialogue of the Courts between themselves and with Civil Society and EU institutions, to assess how progressive the Courts have been and indeed could be. This section will also argue that there are limits to what the Courts can establish but that the Courts have a crucial role to play in supervising the rapidly developing external dimension of European asylum policy. Ultimately, the decisions will emanate from the political realm, as the current interpretation of the legal instruments does not provide for a clear establishment of a positive duty to search and rescue migrants. Humanitarian arguments and ethical imperatives will have to be brought to bear on governments from other actors, as the Courts are limited by a legal system still restricted by its Westphalian roots.

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<sup>2</sup> Refugees and migrants are entitled to different schemes of protection, however, as the focus lies on extraterritorial protection, this distinction has not yet been established and hence the protection offered to mixed migration flows is analyzed.



## The Methodology

The European extraterritorial asylum system is failing to control migration and to provide effective access to asylum. This paper is based on a problem-driven, inter-disciplinary analysis of this failure. Such an approach has been applied to various governance dilemmas and failures and has been developed significantly in the context of global economic policy analysis (The World Bank, 2009). This method follows a number of clear steps:

- i. “Identifying the problem, opportunity or vulnerability to be addressed
- ii. Mapping out the institutional and governance arrangements and weaknesses
- iii. Drilling down to the political economy drivers, both to identify obstacles to progressive change and to understand where a ‘drive’ for positive change could emerge from” (ibid. ix).

This approach has yielded good results and is the methodology underlying many policy analyses. The present thesis has adapted this method to reflect the focus on the legal framework underlying the problem and proceeds as follows:

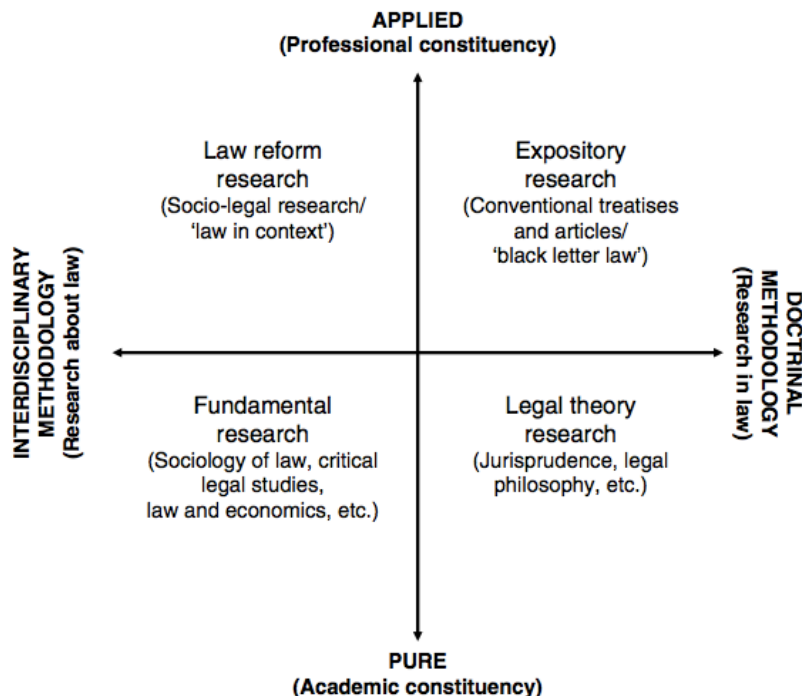
- i. Identifying the problem to be addressed within the European extraterritorial asylum system with a focus on the legal reach of protection for refugee rights.
- ii. Mapping out the *legal* governance arrangements and weaknesses by analysing the potential and limitations of different legal governance regimes.
- iii. Drilling down to the key actors, the European Courts, both to identify obstacles to progressive change and to understand where a ‘drive’ for positive change could emerge from.

It is argued that a transposition of this problem driven methodology is well suited to the problem at hand as it spans different disciplines. The method is based on a *systems approach* to policy problem analysis (e.g., Stewart and Ayres, 2011), arguing that the task of public policy scholars and practitioners is to understand the complexity underlying real world problems and approach them from a required inter-disciplinary perspective. Protection of migrants’ human rights and refugee rights not only requires

an understanding of policy questions, but also a sound understanding of the legal structures within which solutions are sought and suggested. By using legal analysis both in primary and secondary form and by focusing on dialogue between the Courts and other policy actors, this paper seeks to advance a broader and better-informed understanding of the underlying reasons for migrants’ deaths in the Mediterranean.

Regarding the legal analysis of the human rights instruments, this paper is situated between the “legal reform research” and “expository legal research” (closer to the “reform” side), using Arthurs’ classification of different legal research types (Arthurs, 1983). Due to the problem focus, the thesis both analyses the reach of different legal instruments while arguing that this is in some cases insufficient or has been interpreted in a way that leaves migrants without effective protection and access to asylum. The thesis aims to be useful for public policy scholars and policy makers in understanding the legal framework, so the constituency is the professional world, with only a few selected forays into theoretical debates.

Figure 1: Legal Research Styles (Arthurs, 1983)



Lastly, a brief word on *terminology*: migration studies is beset with terminology issues. In the public sphere, the terms “foreigners”, “aliens”, “migrants”, “refugees”, and “asylum-seekers” are often used interchangeably even though they denote different groups who are entitled to different levels of protection. This study will use the term “refugee” as shorthand for all persons entitled to international protection (as den Heijer, 2012) and the more general term “migrant” when referring to migrating individuals whose protection status has not yet been determined.

## Theoretical Context & Debates

The thesis touches upon many important theoretical debates. Two of them will be briefly outlined here to position the paper more clearly.

Firstly, this is a case study for the limitations of an international legal system based on a territorial understanding of state responsibility and also ultimately of rights. This challenges the key promise of human rights as rights individuals have simply by virtue of being human. The vulnerable migrant on the high seas embodies this deficit in the international legal order and her situation questions our notion of state responsibility and the focus on inter-state regulation. “The protective duty of a state is not self-evident in the absence of a territorial linkage between the individual and the state” (den Heijer, 2012: 6). This paper shall outline this fundamental challenge but also show the potential of human rights frameworks in remedying this shortcoming. Nevertheless, it is currently not likely that Courts will interpret the requirements of these human rights documents to entail a positive obligation to assist migrants beyond the territorial waters. The philosopher Immanuel Kant specified the duty to aid others as an “imperfect duty”, as it was not fully specified and lacked correlative rights (Viz. Gregor, 1986). The logic seems to be inverted here and it would be appropriate to describe the human rights of migrants as “imperfect rights” as they lack the correlative duty of states to protect these rights. Thus, a wide-scale search and rescue operation as demanded in the European Parliament at the time of writing, would be based on a humanitarian and ethical rationale. Humanitarianism insists that extreme situations give rise to “special responsibilities” (Gibney, 1999: 44). However, in the

long run, humanitarian concerns cannot compensate for the conceptual gaps in refugee rights and institutional reform is needed to grant the right to have rights to migrants (Heuser, 2007).

Secondly, the ethical debate about competing moral claims in the field of immigration provides the background against which this analysis proceeds. The essential question here is what is owed to people outside one's own political community, especially to those in special need of protection. Taking a strong communitarian view, rights stem from a particular political community and the members of this community take priority over outsiders (e.g., Walzer, 1983). In contrast, global impartial liberalism sees human rights as universal and rejects the priority view, according migrants effectively the same rights and status as citizens of a particular state (e.g., Caney, 2005 or Singer, 1972). The current international legal system favours the communitarian view with some global liberal aspirations, prominently espoused in human rights documents. A balance needs to be found, as neither approach is practical and morally defensible at the same time, and the dilemma of migrants drowning at sea poses a particular problem for Europe which has always emphasized its attachment to a more impartial human rights perspective (Gibney, 1999). "Extraterritorial asylum is essentially about reconciling the principle of territorial sovereignty with claims of humanitarianism" (Morgenstern, 1948: 236). The thesis demonstrates that the balancing of these two values is still biased towards a communitarian view, with progressive strides being made by the Courts in some areas.

## **CHAPTER I: The Current Scheme of Refugee Protection in the European Context**

An analysis of the system of laws regulating and protecting refugee rights within the extraterritorial dimension of EU asylum policy is necessarily very complex and multi-layered. Different levels of law need to be considered, the key instruments being the European Asylum System and Union Law, the Law of the Seas, International Human Rights and Refugee Conventions, and EU Human Rights Instruments (the Charter & Convention). This first Chapter focuses on the not explicitly human rights based systems of protection. The explicit human rights documents will be discussed in more

detail in Chapter 2 to offer a complementary approach for conceptualizing refugee rights and closing persisting gaps.

### 1.1. The Common European Asylum System (CEAS)

The European Asylum Framework has developed rapidly in the last decade, from distinct national policies, over some minimum common standards agreed upon in the Treaty of Amsterdam, towards the 2009 Stockholm Program where a common EU-framed policy was initiated for the first time and subsequently embedded in the Lisbon Treaty. Articles 77(1)(c), 77(2)(d), 78(2)(g) and 79(1) TFEU call respectively for the adoption of measures in the sphere of integrated border management, the creation of partnerships with third countries for managing inflows of asylum seekers, measures relating to the prevention of illegal immigration, and measures relating to the prevention of trafficking of human beings. In light of these fast developments, this first section shall outline the most important features of the regulatory framework with a focus on the extraterritorial dimension.

The basic tension at the heart of the current European regulatory framework concerned with migration and asylum is the tension between *controlling* migration flows, containing and managing them, and on the other hand *protecting* the rights of individuals in need of protection. There is a clear consensus that the current system is biased towards security concerns and reducing the flow of migration through ever increasing control and also criminalization of migration (Guild and Moreno-Lax, 2013: 9, Cholewinski in Guild et al, 2012: 178, Huysmans, 2000: 751, Mitsilegas, 2014). Moreover, there has been vehement criticism of the internal dimension as well, most notably, of the Dublin I-III regulations from many different sides<sup>3</sup> and the European Parliament has called repeatedly for a “more holistic” approach to asylum and migration, most recently in December 2014 (2014/2907(RSP)). The European Commission announced in March 2015 its review of a comprehensive European Agenda on Migration, to be presented in May 2015. However, the focus of this review does not lie on protection of refugee rights but rather emphasizes “fighting irregular

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<sup>3</sup> See: <https://internationalrefugeelaw.wordpress.com/2013/08/26/the-dublin-regulation-a-critical-examination-of-a-troubled-system/>

migration” (EUCOM, 4.3.2015) and does not address some of the key criticisms levied against the current system, such as the fact that individual claims to protection are often not assessed when the applicant originates from a country that is categorized as “safe” (Guild in Kneebone, 2014: 169). This trend is further underlined by the ten-point plan<sup>4</sup> issued by the European Commission after the Refugee Crisis Summit in April 2015. The points reflect a focus on control (combating the smugglers, increasing intelligence and more return programs) and do not significantly alter the mandate of the relevant Operations (Triton and Poseidon) to allow for effective rescue operations close to the Libyan Coast (EurActiv, 2015). The phrase contained in the very first point “within the mandate of Frontex” makes it clear that saving lives is not a priority, as this is not Frontex’ mandate.

The current key elements and actors of the CEAS are the following<sup>5</sup>:

- 1) **The Qualification Directive (2011)** clarifies the grounds on which international protection is granted to asylum-seekers. The criteria are directly based on the Geneva Refugee Convention.
- 2) **The Asylum Procedure Directive (2013)** establishes common procedures for granting and withdrawing international protection, while strengthening the rights of asylum-seekers during the asylum procedure.
- 3) **The Reception Conditions Directive (2013)** ensures a common standard in Member States for asylum-seekers' access to healthcare, education, employment, etc. It stipulates that detention is possible only as a last resort and for a period “as short as possible”.
- 4) **The Dublin III regulation (2013)** establishes the criteria for determining which Member State is responsible for examining an application for international protection to avoid the phenomenon of 'refugees in orbit' (asylum-seekers for which no Member State takes responsibility) and to prevent multiple asylum

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<sup>4</sup> [http://europa.eu/rapid/press-release\\_IP-15-4813\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4813_en.htm)

<sup>5</sup> Due to limited scope, the more internally targeted legislations cannot be elaborated on in more detail, see for a broader analysis: Velluti, 2014, Chapter 3.

applications. By default the first Member State that the applicant entered is responsible.<sup>6</sup>

- 5) **Frontex**: This Agency, founded in 2004, is tasked with securing the European external borders. It has gained much bad press for disrespecting human rights in its actions. Some of these concerns were at least nominally addressed in its 2011 adoption of a code of human rights; nevertheless many of the problems persist and the basic problem of lacking accountability is not solved (Amnesty International, 2014).
- 6) **The Common European Asylum Office (EASO)**, started to operate in 2010 and is meant to provide information about best practice in the field of asylum policies and also assist member states which come under particular stress through the Dublin system. It cooperates with the UNHCR.

For this study, the **Asylum Procedure Directive** is of special interest as it clarifies the rights of refugees and the corresponding duties of the EU and its member states. The Directive establishes more procedural rights for an effective remedy and sets strict timeframes for the processing of asylum application (registration of application within 3 working days and length of a regular asylum procedure may not exceed 6 months). The Directive establishes a wide reading of the principles of *non-refoulement* but limits its scope of application in Article 3.1 to claims made in the territory or at the border.

## 1.2 Joint Operation Triton<sup>7</sup>

*JO Triton* is the Frontex-led successor for the Italian search and rescue operation *Mare Nostrum* and started its operations on 1 November 2014. It currently is the European external migration control and migrant protection mechanism and clearly deficient. *Mare Nostrum* had a budget of €9 million per month and deployed at any given time five Italian Navy ships with their air units and some 900 staff. It was

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<sup>6</sup>

[http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/551333/EPRS\\_BRI%282015%29551333\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/551333/EPRS_BRI%282015%29551333_EN.pdf)

<sup>7</sup> The focus lies on *JO Triton*, as this replaced *Mare Nostrum* and leaves open the most deadly routes from Libya towards Italy. The other Frontex-led sea operation *JO Poseidon* is smaller and covers the Greek islands in the Aegean sea (plus Crete) and is also mandated with border control.

designed to maximize capacity to assist boats in distress, to host people in safety at sea, and to minimize time in port to disembark rescued people so that assets could be quickly back at sea to save others (Amnesty, 2015: 15). In contrast, JO Triton does not have rescue of migrants in distress as its prime mandate. This is reflected in its much narrower area of operation, only within 30 sea miles of the Italian coast. Frontex and other experts regard Triton's budget, at €2.9 million per month, and its assets as adequate for its operational objectives, i.e. border control (ibid: 19). The current operation is consciously inadequate to rescue lives of migrants beyond the territorial waters of European countries. Civil society actors, such as the Migrant Offshore Aid Stations<sup>8</sup> have started to fill this gap and saved thousands of lives. However, they face the problem of disembarking the migrants, as no state has the duty to accept them. However, this does not compensate adequately for the reluctance of European states and the EU to making migrants' survival a true priority.

### 1.3 The Applicable Law of The Seas

Beyond the territorial waters and the Contiguous Zone and the Exclusive Economic Zone (where states may exercise certain control functions, viz. UNCLOS 33(1)), the Law of the Seas is applicable. The EU is a party to UNCLOS and all EU member states have ratified the convention as well. On the High Seas, the two principles of freedom of navigation and flag-state jurisdiction apply (UNCLOS Articles 92 and 94) and obligations for search & rescue are established for states and masters of ships in Article 98. This provision builds on similar provisions in the 1974 International Convention for the Safety of Life at Sea (SOLAS) and the 1979 International Convention on Maritime Search and Rescue (SAR). The SOLAS Convention obliges a State Party to rescue persons in distress "around its coasts" (SOLAS regulation V/7), whereas the SAR Convention requires that "assistance [is] provided to any person in distress at sea" (Chapter 2.1.10). None excludes the high seas from their scope in theory (Hartmann et al 2015). However, in practice, the search and rescue zones based established on these provisions are often inadequately patrolled and some states do not fulfil their obligations.

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<sup>8</sup> <http://moas.eu/>



Two further limitations emerge for refugee rights protection, in spite of the regime of search and rescue. Firstly, the old “Catch 22 of the Law of the Seas”, already commented upon during the Vietnamese exodus of boat people: “that the shipmaster of a freighter in international waters is obliged to rescue boat people/migrants in distress but no one is obliged to take in the refugees, once they have been rescued” (Pugash, 1977). This problem is magnified in the European context of supposed burden sharing. As a mirror image to the reluctance of member states to equally share the burden of taking in refugees within Europe, the burden of rescuing and processing refugee applications is also not equally shared. Examples abound of disputes between states about whose responsibility the migrants are, and as Search and Rescue (SAR) zones overlap and some states, e.g., Libya, are not willing and or able to fulfil their duties under the SAR Convention and the SOLAS, these disputes happen sometimes at the expense of the lives of refugees. The issue at the heart of the matter is indeed “where protection must be provided and by whom” (Guild and Moreno Lax, 2013: 12). A prime example of the break-down of burden sharing that demonstrates the persisting flaws in the internal and external European asylum policies is Malta that illegally detains migrants, while claiming they are not Malta’s responsibility (DeBono in Dembour et al, 2011 and aida, 2015).

Secondly, the scheme of protection offered to refugees under these conventions is limited to the obligation of *non-refoulement* and no specific rules of conduct or protection mechanisms are clearly installed. Moreover, the UNCLOS remains a very state centred convention, ill equipped to conceptualize the rights of vessels and people without a clear nationality and hence there are many gaps and much room for state discretion when relying on UNCLOS solely on the High Seas (Ryan and Mitsilegas, 2010: 114).

#### **1.4 In Focus: the principle of *Non-Refoulement***

The principle of *non-refoulement* has always been the centrepiece of refugee protection. Article 78 TFEU establishes that the Union’s common policy on asylum

must be in accordance with the 1951 Convention Relating to the Status of Refugees (Refugee Convention) and other relevant treaties such as the International Covenant on Civil and Political Rights (ICCPR, 1966) and the UN Convention against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment (CAT, 1984). This Article 78 also establishes the principle of *non-refoulement* as phrased in the Refugee Convention:

**Article 33 (1)**

*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.*

The prohibition of *refoulement* is also contained in Article 3 ECHR on the prohibition of torture and inhuman and degrading treatment or punishment. The protection afforded by this Article of the ECHR, and also the similar ones in the ICCPR and the CAT, is absolute and there is no derogation possible.<sup>9</sup> Article 19 of the EU Fundamental Rights Charter also prohibits *refoulement*.

The key issue with this framing of *non-refoulement* is that it remains essentially territorial and is hence vulnerable to the charge of complete moral arbitrariness as it provides very different access to protection depending on whether refugees attempt to arrive by land or sea. However, the duty to not engage in *refoulement* once jurisdiction is established *ratione personae* and/or *ratione loci* has been established firmly by the ECtHR (see below). Moreover, it has been argued that this norm of *non-refoulement* has gained the status of *jus cogens* (Farmer, 2009). Indeed, the norm of *non-refoulement*, in spite of the inherent erratic nature in which this rule is applied due to subjective assessments of consequences and dangers, can be seen as a revolutionary or “destabilizing” norm (Unger, 1986)<sup>10</sup> as it has been applied

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<sup>9</sup> ECtHR (GC) 2008: Saadi v. Italy, no 37201/06, paras 137-38.

<sup>10</sup> In Unger’s theory, the central idea of destabilisation rights is „to provide a claim upon governmental power obliging government to disrupt those forms of division and hierarchy that, contrary to the spirit of the constitution, manage to achieve stability only by distancing themselves from the transformative conflicts that might disturb them” (Unger, 1986: 53).

extraterritorially and could thus function as a front-runner for other rights (Kelly in Dembour et al, 2011). The subsequent study of *Hirsi* shows how this progressive reading of this right took hold.

### 1.5 Case Study: *Hirsi Jamaa and Others v Italy* (ECtHR 2012)

*The Facts of the Case:* The case concerned a group of about 200 Somali and Eritrean migrants en route from Libya to the Italian Coast on 6 May 2009. They were intercepted at sea by Italian authorities when they were already within the Maltese Search and Rescue Region and escorted back to Libya on Italian ships without having their cases examined. The operation was based on a bi-lateral agreement between Italy and Libya, signed in 2007 with an additional protocol in 2009, to conduct such push back operations. Two of the migrants died after this operation in undisclosed circumstances and 14 were granted refugee status by the UNHCR Office in Tripoli between June and October 2009.

*Decision and Reasoning:* This was the first instance where a European Court ruled on an interception at sea case and the Grand Chamber found unanimously:

- That “in the period between boarding the ships of the Italian forces and being handed over to the Libyan authorities, the applicants were under continuous and exclusive *de jure* and *de facto* control of the Italian authorities. (...) Accordingly, the events giving rise to the alleged violations fall within Italy’s jurisdiction within the meaning of Article 1 of the Convention” (ECtHR, 2012, para. 81 and 82).
- That Italy violated Article 3 ECHR prohibiting inhuman and degrading treatment on two counts (risk of ill-treatment in Libya and risk of repatriation from Libya to countries where ill-treatment is rife) and
- That Italy violated Article 4 of Protocol no. 4 prohibiting collective expulsion and lastly,
- That Italy violated Article 13 ECHR guaranteeing a domestic remedy for any arguable complaint of a violation of the Convention.

The Court relied on a wide range of materials, including statements by third parties, such as the United Nations High Commissioner for Refugees as well as assessments by civil society actors. Evidence provided by Amnesty International and Human Rights Watch was important for ascertaining the facts of the case and assessing the situation in Libya.

*Implications & Impact:* The implications of this judgment are very significant in the context of extraterritorial refugee right protection as the Court firmly established the duty of states to abide by their obligations under European Union Asylum as well as Human Rights Law when exercising *de jure* or/and *de facto* jurisdiction. In a world where, “states are reluctant to accept responsibility for providing international protection when they engage in extraterritorial action” (Guild and Moreno-Lax, 2013: 1), this was a milestone decision. Moreover, the judgment speaks directly to contested practices of mass expulsion more widely practiced by Frontex and must be seen as a clear case of interaction and dialogue between the Court, the EU legislative bodies, and national governments. In a time when questions around asylum are deeply politicized, the Court has assumed a very active and clear role, as will be argued more fully in the third chapter. The impact of the judgment was instantly visible in new proposed regulation for Frontex, issued by the Commission for consideration by the Parliament in 2013. The UNHCR commented on this piece of legislation and based itself heavily on the ruling in *Hirsi*, also drawing on CJEU<sup>11</sup> case law, mainly *M.S.S v Belgium and Greece*, e.g., “UNHCR welcomes the inclusion of Article 4(2), which reflects the ruling of the European Court of Human Rights in the *Hirsi* judgment. The ECtHR concluded that the *non-refoulement* obligation under Article 3 ECHR requires the returning state to assess the treatment to which applicants for asylum would be exposed upon their return”(UNHCR, 2013: 4). The new regulation (No 656/2014) was enacted in April 2014 and the key points of *Hirsi* are clearly reflected in Article 4. Lastly, it should be noted that the Court ended the judgment with a plea for more humanity and respect for human rights by citing *Sale v. Haitian Centres Council*:

“Refugees attempting to escape Africa do not claim a right of admission to Europe. They demand only that Europe, the cradle of human rights idealism and the birthplace

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<sup>11</sup> In the interest of consistency the Court of Justice of the European Union is abbreviated with CJEU.

of the rule of law, cease closing its doors to people in despair who have fled from arbitrariness and brutality. That is a very modest plea, vindicated by the European Convention on Human Rights. ‘We should not close our ears to it’” (*Hirsi*, last paragraph).

## 1.6 The Persisting Gaps & Perverse Policy Incentives

There are a number of gaps in the European external asylum policies, most notably, a lack of clear rights protection on the high seas, as the main applicable framework remains the UNCLOS in this context, which in essence protects states’ freedom of navigation. This system of protection does not *in itself* regulate the powers a state may exercise vis-à-vis migrants (den Heijer, 2012: 240). EU human rights regimes and international human rights can supplement this protection regime, as has been demonstrated by the ECtHR in *Hirsi*. However, such an extraterritorial application of the ECHR hinges on the establishment of jurisdiction. More clarity is needed on actor responsibility in this nebulous zone of law and when exactly a jurisdictional link is activated between a state / the EU and migrants. Moreover, the CEAS instruments, while being constantly updated, still reflect a very territorial and control focused view of asylum policies, which does not mirror the reality and needs of refugees crossing the sea and does not sufficiently address the tragedies occurring before Europe’s shores. In spite of the increasing official ‘communitarization’ of the Area of Freedom, Security and Justice (AFSJ) the inter-governmental and security bias, already identified over a decade ago (Geddes, 2000 and Guiraudon 2000), has persisted.

Employing the logic of incentives (e.g., Downs, 1998) one may worry how the extension of state duties through judgments such as *Hirsi* will affect the willingness of states to engage migrants in distress on the high seas in a way that will risk establishing jurisdiction and hence also human rights duties. Arguably, the costs of rescue actions have risen sharply with this judgment and amended regulation. The very narrow and territorially focused scope of *JO Triton* could be seen as confirming this view. This analysis is supported by Cornelisse, who argues in the context of asylum and detention that “in a situation in which one’s presence on national territory

automatically leads to an entitlement to fundamental rights, the sovereign state may wish to keep people outside its territory in order not to have to accord them these fundamental rights” (Cornelisse, 2012: 131).

Moreover, continued evasion tactics by governments, such as increased use of third state agreements and the redirecting of commercial vessels to assist migrants reflect the above mentioned gaps in the inter-play between UNCLOS and the EU external asylum system. Using commercial vessels perpetuates the responsibility evasion by states and reflects the underlying crisis concerning burden sharing amongst member states. In 2014, Italian authorities called on 700 mercantile vessels to help rescue about 40,000 migrants. One ship supplying oil platforms off the Libyan coast participated in 62 operations. As a result many commercial operators announced that they would change their routes (Moloney, 2015).

While there surely is a rational element to these developments, the incentive to appear as a responsible and legitimate actor, the “logic of appropriateness” must not be underestimated, especially in the European context (Franck, 1998). Such a “compliance pull”, as conceptualized by Franck, can be observed in the EU states’ attempt to comply with the existing rules and can be deduced from firstly their willingness to adapt to the pronouncements by the ECtHR on the matter and secondly, by the EU’s self-conception as a “normative power”, which speaks to a true internalization of certain norms such as human rights through a *transnational legal process* (Koh, 1998). The main policy question that emerges is thus, how these values and rights can relate to extraterritorial asylum, on which basis the current system could be improved and how the incentives can be changed in such a way to make a) non-compliance with such a system more costly and/or b) compliance easier and more attractive. However, as we are concerned here with the role of the Courts, the question of the legal base for providing effective extraterritorial access to asylum is our focus.

## CHAPTER II: Extending the Scheme of Protection: Human Rights for Migrants and the potential of the ECHR

In spite of advances in the protection of the rights of migrants and refugees, the scheme of protection currently offered by the EU is still insufficient. The system most fundamentally lets down the group of migrants who do not reach the shores of Europe or where states successfully avoid responsibility and no jurisdictional link can be established between a refugee/migrant and the state. Hence this chapter will analyse which human rights instruments offer the most substantial and also effective protection and how EU member states' responsibility may be engaged to fill these gaps in the system of extraterritorial asylum.

### 2.1 Human Rights as the Foundation for a Better Protection Scheme

It should be self-evident that migrants have human rights. Yet, migrants find it very hard to access these rights (Dembour et al, 2011). This is so for a multitude of reasons, but a key factor is that, while rights exist, no clear obligations are established regarding their enforcement and protection. This is possibly the most glaring shortcoming of the Refugee Convention and the Universal Declaration of Human Rights: they grant a right to seek asylum but establish no duties on states to grant asylum. This again reflects the state-centred view of asylum as relating to the national sovereignty of a state to control its own borders instead of conceptualizing asylum from the perspective of the refugee, whose human rights have to stand down when faced with a state's sovereignty (Benhabib, 2004). This tension, between sovereign self-determination and universal principles of human rights is not easy to resolve. The only right that managed to transcend the boundary of state sovereignty so far has been the right of *non-refoulement*.

However, human rights still remain the appropriate framing for these issues and they do retain a "restrained but radical potential" for change (Cornelisse, 2011: 112). Firstly, this holds true for conceptual reasons: Human rights, as debated and contested as they may be, still offer their original promise of rights and protection to everyone based on membership in the human race. The scope of these rights is unequivocally

stated at the start of the UNDHR:

**Art. 2 UNDHR**

*Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

*Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty. (my emphasis)*

This passage speaks directly to the migrant experience of individuals who no longer enjoy the protection of a specific state. The one thing protection claims can be based on in these situations beyond jurisdiction is the migrants' human rights. Crucial rights, which become relevant here are, amongst others: the right to life (Spijkerboer, 2007), the right to identity (Grant, 2011), the right to seek/have asylum, the right to leave one's country and the right to an effective remedy (Reneman, 2014). EU extraterritorial asylum policies endanger and often disregard these most fundamental rights. The challenge faced by Europe at the moment (and also other countries with pressured and very questionable asylum systems, such as the USA and Australia) is to prove Hannah Arendt wrong, who wrote in 1968:

*“The conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who had professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships – except they were still human. The world found nothing sacred in the abstract nakedness of being human” (Arendt, 1968: 279).*

## **2.2 Sources and Specific Instruments of Human Rights**

In order to present a precise argument about which human rights should be protected better for migrants, a clarification of the conception of human rights used in this study



is in order. Dembour's classification scheme of four broad schools is a useful starting point, although there is much overlap and this paper does not fit neatly into any one school. In Dembour's scheme the "natural school" conceives of human rights as *given*, the "deliberative school" as *agreed upon*, the "protest school" as *fought for*, and the "discourse school" as *talked about* (Dembour, 2006). This author's view of the origins of human rights is a mixture of the natural and deliberative school, where given and shared moral intuitions are codified and agreed upon to form a base of human rights to rely upon. This paper, however, also picks up the protest argument when it highlights the deficits of the current asylum policies and calls for better protection of migrants' human rights. Lastly, there is a strong discursive element presented here in acknowledging the power of the language of human rights in the dialogue between The Courts and between The Courts and legislatures.

In our case, there are three instruments of human rights protection, which may apply to migrants on the high seas: international human rights conventions, the EU Charter applied extraterritorially and the ECHR applied extraterritorially. There are different advantages and limitations to all three of these sources of human rights.

### **International Human Rights Covenants**

International Covenants have the advantage that they are not limited to a specific jurisdiction of a state and thus offer rights to migrants everywhere. The Refugee Convention, the UDHR, the ICCPR as well as more specialised conventions such as the Convention against Torture (CAT) and the Convention on the Rights of the Child all inspire the ECHR and Union law. However, they also have significant weaknesses: firstly, there is the general problem of enforcement of these conventions directly and secondly, the conventions do not sufficiently conceptualize states' duties beyond their borders and thirdly, the EU has yet not ratified or acceded to a UN human rights treaty, with the exception of the Convention on the Rights of People with Disabilities.

Hence these treaties usually form a source of inspiration for the CJEU and the ECtHR, which have their own respective human rights instruments and each other to

consider first. Arguably, this should be different in the case of asylum procedures, as Article 78(2) TFEU is exceptional in its wording by requiring that EU legislation be interpreted “in accordance with” the relevant international treaties. Indeed the CJEU has followed this interpretation of Article 78 by ensuring that the Refugee Convention be used to interpret the Qualification Directive in *Salahadin Abdullah and B and D*. However, it is unsurprising that the ECHR and the Charter are more important sources for the European Courts, especially as both instruments incorporate and expand on many elements in international covenants. When analysed, the Charter and ECHR offer more protection than international Covenants, or certainly no less (Reneman, 2014). Hence we shall focus on a comparison of these two instruments.

### The European Charter of Fundamental Rights

The Charter is very interesting as it provides in many instances a broader reading of refugee rights than any other instrument. Most notably it grants a right to asylum:

#### **Article 18**

*The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.*

The formulation “due respect” is significant here as it is used instead of “in accordance with” the Convention and Protocol, as set out in Article 78 TFEU. This emphasizes the independent character of the Charter, which may establish with this right a much more substantial right to asylum than the ECHR or the Refugee Convention (Peers in Kneebone et al, 2012). This right is reflected in the Qualification Directive (2011/95/EU) and hence Union law and applicable to member states (see Article 51 on the Scope of the Charter). Yet, the CJEU has not conclusively explained how this right to asylum should be interpreted. The Court evaded answering such questions when they were referred to it in *Halaf*. However, it is clear that this right to “asylum status” is not absolute and will be balanced against the interest of the community (Reneman, 2014: 4).

The Charter may also provide a wider scope of protection than other human rights instruments because it specifically mentions *citizens'* rights. Applying the *a contrario* method of legislative interpretation, we could conclude that all the provisions of the Charter which are not expressly limited in personal scope must apply equally to EU citizens and non-citizens alike (Peers in Guild et al, 2012: 446, Velluti, 2014:28). However, the CJEU has so far refrained from establishing clear extraterritorial application of fundamental rights beyond the prohibition on *refoulement* (viz. *N.S. v Secretary of State for the Home Department*). A reluctance to extend domestic levels of protection to extraterritorial situations also emerges from a careful analysis of recent CJEU case law by Costello and Moreno-Lax, who predict that the Court will evade establishing a dual standard of protection by not applying fundamental human rights to extraterritorial situations in the first place (Costello and Moreno-Lax in Peers, 2014).

Combined with this assessment of the current stance of the CJEU comes the institutional handicap that individual petition remains very difficult and even more difficult when such a petition is based on human rights as individual concern will be very difficult to prove (Chalmers et al, 2014). Additionally, the CJEU can only review human rights issues when they pertain to the application of or derogation from Union law. Thus a situation has emerged in which the CJEU's supranational strong judicial review is used in the field of human rights "in a belated and bridled fashion and not to its maximal potential", whereas the ECtHR's international judicial review has developed and emancipated in the course of fifty years into "strong judicial review, solely focused on human rights, that goes beyond its strictly legal jurisdiction" (Besson, 2011: 122).

### **The European Convention of Human Rights**

The ECHR is the most promising base for engaging extraterritorial human rights obligations for three main reasons, in spite of the EU's delayed accession to it. Firstly, the expressed willingness of the ECtHR to extend Contracting States' obligations also

towards the high seas and a progressing interpretation of the meaning of jurisdiction under Article 1 of the Convention. Secondly, the necessary distinction between the concepts of jurisdiction and state responsibility. Thirdly, the assertive role taken by the ECtHR in extending the human rights regime of the Convention and the institutional possibility of individual petition that has transformed the Court into one of the main actors in safeguarding human rights in the European context.

The problem of a possible legal vacuum or *terra nullius* on the high seas has been acknowledged by the ECtHR. In *Medvedyev*, which concerned the boarding and subsequent seizure and arrest of a vessel and its crew on the high seas during an anti-drug trafficking operation, the Court considered this incident to fall within the ambit of Article 5 ECHR and notes more generally in its judgment that “the special nature of the maritime environment (...) cannot justify an area outside of the law where ships’ crews are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction, any more than it can provide offenders with ‘safe haven’” (ECtHR, 2008: para 81).

Moreover, as was shown above with *Hirsi*, the Court has established extraterritorial obligations of human rights in a number of cases already, drawing an ever clearer picture of what jurisdiction amounts to in *Loizidou*, *Al-Saadoon*, *Al-Skeini*, and *Medvedyev*. As jurisdiction is commonly seen as the threshold criterion for the application of human rights duties on the part of state actors, much has been written on the factual tests regarding the establishment of jurisdiction. Interestingly, the criterion for the ECHR to apply (Article 1) is not territorial at all, but functional: it pertains to the function of jurisdiction. Contrary to this, Besson argues that, from a theoretical point of view, jurisdiction is best understood as “*de facto* political and legal authority” (Besson, 2012: 7). This focus on the normative dimension of the exercise of power, however, stands in contradiction to the universal claim of human rights. These rights are not merely to be observed based on common membership within a certain legitimate order. They are based on being human and obligations to observe these rights should be engaged, as has been argued by the ECtHR, once effective control is given. An interesting question emerging from the ruling in

*Bankovic* is whether increasing drone surveillance and *de facto* control of the Mediterranean through Frontex technology would amount to such control.

It is unlikely that the parameters of effective control will be shifted significantly beyond *Bankovic* to include drone surveillance in spite of ambiguous case law.<sup>12</sup> However, the option of a functional framing of jurisdiction already moves beyond the exclusively territorial understanding of state responsibility, even though a Westphalian bias is still clearly present (Cornelisse, 2011). It has given rise to the claim that European states are to be held responsible for the actions of third parties such as private agencies and third countries when they effectively carry out EU policy.<sup>13</sup> This interpretation is made more plausible when considering other case law by the ECtHR in which “effective control” was not seen in such a strict sense as *Bankovic* would imply. Thus, in *Isaak*, the proximity of the Turkish troops to the incident and their omission to protect the applicant’s life, were enough for the Court to rule that Turkey had incurred guilt because these troops “manifestly failed to take preventive measures to protect the victim’s life” (*Isaak v. Turkey*, para. 119). Moreover, in *Treska* the Court seems to endorse a broad reading of positive extraterritorial obligations when it states that:

“even in the absence of effective control of a territory outside its borders, the State still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial and other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.” (*Treska v. Albania and Italy*, p. 12).

The extent of positive obligations beyond the territory of signatory states to the Convention is thus not conclusively determined by the Court and passages such as this one from *Treska* could form a convincing base for positive duties towards migrant protection on the high seas. It is the responsibility of the European Courts to clarify these duties further.

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<sup>12</sup> <http://www.ejiltalk.org/european-court-decides-al-skeini-and-al-jedda/>

<sup>13</sup> Viz den Heijer: “when European states endeavor to control the movement of asylum seekers outside their territories, they remain responsible under international law for possible wrong-doings ensuing from their sphere of activity.” (den Heijer, 2012: 1)

Additionally, the concepts of state responsibility and jurisdiction need to be distinguished more precisely, arguably more precisely than the Court has done in its past case law on the matter (Milanovic, 2011: 41-53). The concepts refer to different sources of international state responsibility, the concrete treaty under question (the ECHR) and the ILC Articles on State Responsibility. If we look at the matter through the ILC's conceptual framework, attribution is an issue under Article 2(a) of the ILC Articles (is the conduct that of the relevant state?), while jurisdiction is an issue under Article 2(b) (did the conduct breach an obligation of the state, i.e. did that obligation even apply to that particular conduct?)<sup>14</sup> The distinctness of the two concepts was confirmed by the Court in *Jaloud* (para. 154): "The Court reiterates that the test for establishing the existence of "jurisdiction" under Article 1 of the Convention has never been equated with the test for establishing a State's responsibility for an internationally wrongful act under general international law". Even though the attribution question always features as part of the jurisdiction establishment process, it is useful to frame the issue more precisely and use the ILC Articles to establish clear lines of attribution of non-state migration control actors, such as private border agency personnel, to establish a jurisdictional link.

Even with this limited extension of human rights to migrants beyond the territory of European states, the ECtHR has emerged as the most assertive Court in tackling the problem of engaging states' responsibility for protecting the human rights of migrants. Moreover, even to the most idealist observer, it must be clear that Europe cannot impose on itself binding human rights obligations for effective access to asylum on all of the high seas as this would lead to a collapse of internal European institutions, while possibly establishing an undesirable pull factor for irregular migration that may endanger the lives of migrants even more. Hence a balance must be struck between rights protection and protection of the system that made such rights guarantees possible in the first place (Guild and Moreno-Lax 2013).

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<sup>14</sup> <http://www.ejiltalk.org/jurisdiction-attribution-and-responsibility-in-jaloud/#more-12706>

## **CHAPTER III: The Role of the European Courts**

It has emerged from the analysis above that the European Courts, most notably, the European Court of Human Rights are key actors in interpreting and expanding the scope of human rights protection available to migrants. They have even been labelled “regional refugee law courts” (Velluti, 2014: 77). An argument has already been presented about the potential of the ECHR and the Strasbourg Court to extend such a rights scheme. This section will elaborate on this and place the role of the CJEU and the ECtHR in the theoretical context of two concepts: constitutional dialogues and judicial activism. This paper seeks to extend the US American origins of the idea of constitutional dialogue and apply it to the more complex and multi-dimensional European reality to include various contemporaneous dialogues. These dialogues exist between the ECtHR and the CJEU and the national constitutional courts, between the two Courts, between the CJEU and other EU institutions, between the ECtHR and Council as well as the EU institutions and also, crucially between Civil Society agents and the two Courts. A better understanding of them will not only elucidate the important (political) role the Courts occupy but also highlight important linkages to mobilize in favour of increased rights protection and identify pressure points for strategic litigation.

While the limited scope of this study does not permit an in depth analysis of all of these complex relationships, the broad argument presented here is that the analytic lens of dialogue analysis is under-used in charting the influence of the European Courts. This is especially true of the ECtHR, which may reflect a wider deficit in scholarly understanding of that Court when compared to CJEU scholarship (Christoffersen et al, 2011: 3). Rather, the focus has been on “activism”, a perennial concern where the judiciary is concerned (Dawson et al, 2013) and section 3.2 will address this issue briefly.

### **3.1 Constitutional Dialogues**

The notion of constitutional dialogues, a phenomenon much more debated in the US American and Canadian context, has only recently been applied to the European

situation (e.g. Dawson, 2013). While the parallels between the two settings are imperfect, as the EU is supra-national and much more complex, the notion of dialogue is a very useful analytical frame to understand the dynamics between the various actors involved in the creation of European asylum policies. Since the Charter became binding in 2009, even more has been made of an increasing constitutionalization of the European legal system (Alter, 2009: 288, Ritterberg and Schimmelfenning, 2007). This section aims to show how the dialogue over fundamental rights of a constitutional character, or general principles of an unwritten constitution, emerged over the last decades. It is argued that this is not only a crucial dialogue between the courts and the legislative institutions of the EU, but extends beyond that and should include an analysis of further relevant stakeholders such as civil society actors. This study shall not focus on the relationship between national constitutional courts and the ECtHR or national courts and the CJEU, as much good scholarship exists on these important links.<sup>15</sup> Rather, the focus will be, firstly on the dialogue between the two Courts, and then focus on the remarkable influence of the ECtHR on EU legislation, also indirectly through the CJEU. This dimension of the dialogue is not as well developed in the literature as the dialogue between the CJEU and EU institutions itself.

On the relationship between the two Courts in the area of fundamental human rights protection, a convincing argument has been presented to the effect that they have been mutually empowered vis-à-vis national institutions through their cooperation and developed a “strategic interdependence” (Scheeck, 2011: 164). Because the CJEU has constantly built up its jurisdiction, the ECtHR was able to become bolder in the exercise of its own review powers. Conversely, it is because EU member states are so closely scrutinized by the ECtHR in the human rights context that the CJEU has had to strengthen its own control mechanisms in this space (Besson, 2011: 120). In fact, the direct dialogue between the two Courts has flourished in the last decades and has been built up through determined individuals (Scheeck, 2009). The ECtHR only started in the mid-1990s to rule on EU-related cases and supported the CJEU

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<sup>15</sup> viz. e.g., Alter, K.J. (2009) *The European Court’s Political Power*; Dawson, M., De Witte, B., Muir, E. (eds.) (2013) *Judicial Activism at the European Court of Justice*; Krisch, N. (2008) *The Open Architecture of European Human Rights Law*. Also: the JURISTRAS Project viz. Anagnostou, D. and Millns, S. (2010)



preliminary reference system through key judgments such as *Soc Divagsa v Spain* and *Fritz and Nana v France*. It also cites CJEU rulings and also the Charter in its own work, viz. *Pellegrin v. France or Goodwin v. the UK*. Conversely, the CJEU has relied heavily on the ECHR as a key source of inspiration for its own fundamental rights adjudication before it had its own instrument. Already since 1975, individual articles of the ECHR were mentioned by the CJEU, and the Charter and the ECHR feature prominently next to each other in key judgments such as *Kadi*.

A continued strong dialogue on these matters between the Courts is desirable, as it harmonizes and strengthens the fundamental rights granted in Europe and also strengthens supra-national judicial review in a context where it is increasingly challenged by national legislatures and constitutional courts. However, the relationship clearly stands at a crossroads. The CJEU asserted the importance of fundamental rights within the EU rather late, arguably against the will of the original Treaty drafters (de Burca, 2011) and thus expanded its “enhanced constitutional mandate” (Muir, 2011: 78), while creating a parallel structure of human rights protection in the European system. The delayed accession to the ECHR by the EU, in spite of the obligation to accede contained in Article 6(2) TEU, may not bode well for the dialogue between the two institutions, nor does the fact that the CJEU now favours its own instrument, the Charter, over the ECHR (de Burca, 2013). Preserving the autonomy of the EU legal order is a key concern of the CJEU and member states alike and this may threaten the position of the ECHR and ECtHR, which would be harmful for migrant interests, as this is the most promising system of protection, as outlined above.

So far, the influence of the ECtHR on EU legislation has been remarkable. Contrary to the intuitive assumption that the EU system is more powerful, ECtHR norms have progressively been super-imposed in the field of asylum protection over EU norms within the EU itself, even in the absence of formal institutional linkages between the EU and the Council of Europe (Scheeck, 2011: 164). The influence of *Hirsi* on the amended Frontex regulation was already mentioned as a prime example of a direct dialogue between the EU legislative/executive and the ECtHR. Indeed, the European Commission asked repeatedly for clarification on matters such as the circumstances

under which states incur responsibility under international refugee law (COM(2006) 733 final, esp. paras. 31-35) or concerning the rules applicable to maritime controls (COM(2009) 262 final). In addition to this, the Parliamentary Assembly of the Council of Europe also repeatedly highlighted the need for addressing migration control measures (Resolution 1821, 2011). The Court's answer to these questions and clear rejection of mass expulsions, or "push backs", have had a profound impact on EU policies and the dialogue will have to continue concerning the currently promoted "pull back" and readmission agreements with countries (e.g. Ukraine and Turkey) where safety of refugees is at least contested, if not manifestly absent (O'Nions, 2014).

Turning to the influence of civil society actors on these dialogues, the ECHR system is currently more promising to extend more protection to migrants, as it has a long-standing tradition of NGO involvement and even direct litigation (Hodson, 2011). Such an involvement of civil society is less developed or institutionally possible at the CJEU.<sup>16</sup> Cichowski has shown, through a careful analysis of cases brought against Turkey and the UK respectively, the crucial influence of NGOs before the ECtHR both as litigants and as a resource to establish the facts of a case (Cichowski, 2011). The ECtHR has expanded the possibility for such involvement through developing an "indirect victim" approach that enables people who were not directly affected to bring a claim if they are close relatives or have a valid personal interest to have a violation confirmed.<sup>17</sup> Some see in this development an opening for even more NGO participation in the future (Vajic in Treves et al, 2005). Human Rights organizations already often submit *amicus curiae* briefs in cases they consider strategically important and are often instrumental to the functioning of the Court, e.g., in the landmark case *Soering*, the amicus brief submitted by Amnesty International was quoted extensively in the final judgment. Given this established relationship and the challenges faced at the CJEU, it is both likely and also strategically preferable that the continued balancing between migrant rights and EU border securitization will be carried out before the ECtHR.

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<sup>16</sup> See e.g., Bogojevic, S. (2013) 'CJEU, can you hear me? Access to Justice in Environmental Matters' (2013) 16 *Europarättslig Tidskrift* 728-740.

<sup>17</sup> See e.g., *Aksoy v Turkey* (2000) where the claim was brought by the victim's father with assistance from a Kurdish Human Rights Group, the KHRP.

### 3.2 A Note on Judicial Activism

There is neither the scope nor the need to review the vast literature on judicial activism here.<sup>18</sup> The argument presented is that the charge of judicial activism is misplaced in the context of fundamental rights. This is so because, if we “take rights seriously” (Dworkin, 1988), then they are part of the very foundation of a liberal democracy and should not be determined by a simple vote of majority but rather be seen as the very precondition for the exercise of equal democratic participation, as argued by Habermas (Habermas in Baxter, 2011). Moreover, the idea of government by judges misses an important distinction in political theory. This is the distinction between arguments of *principle* on the one hand and arguments of *policy* on the other. Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole. “Arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right” (Dworkin, 1998: 107). Especially in the context of migration, the courts have a vital role to play in establishing and safeguarding the principles derived from rights against arguments of efficiency and political realism that is often poorly disguised xenophobia (Dembour, 2015).

The main point is that courts are meant to be active in protecting rights. In fact that is their stated purpose and also self-conception, as shown in the self-identification of the ECtHR as the “conscience of Europe” (Council of Europe, 2010). Thus, it should be highlighted here that the scope of the Charter (Article 51) states that the document is addressed to the “institutions and bodies of the Union”. The CJEU, being the institution most intuitively in charge of protecting fundamental rights does have a clear mandate for such protection. The role of the ECtHR is equally clearly phrased in Article 19 ECHR as: “To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto.” The real question at hand is whether the Courts are active enough in fulfilling this role.

Refugee and migrant rights protection highlights the tension between state sovereignty and individual human rights. A balancing of these interests in favour of

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<sup>18</sup> For a powerful critique see: Waldron, J. (2006) *The Core Case Against Judicial Review*.

more rights protection at the expense of sovereignty will be unpopular with states and legislatures. This has led some observers to claim that the judiciary has to perform this role (Velluti, 2014: 70).

### 3.3 How progressive are the Courts?

Progressive is taken here to mean progressively protecting the rights of refugees and the human rights of migrants. By extending and reaffirming protective obligations once jurisdiction is established by a state and by establishing minimum conditions of rights protection within the Dublin System (*MSS* and *NS*), both Courts have progressively expanded the rights of migrants/refugees. A comparative case law analysis leads Velluti to conclude that the activism of both courts, especially also of the CJEU, is successfully “filling in the lacunae of EU asylum legislation” (Velluti, 2014: 100).

However, the overall assessment is mixed when the persisting rights violations (e.g. in migrant detention) and the deplorable condition of many non-citizens within the Union as well as the border deaths are taken into account. Dembour has highlighted in a recent study the persisting deficiencies while arguing that the European system of refugee and migrant protection suffers from a conceptual bias towards the rights of the state over the rights of the individuals (Dembour, 2015). When contrasted with the clear *pro homine* approach of the Inter-American Court, the Strasbourg system tends to see the migrant not primarily as an alien in need but rather as an alien subject. This focus on state (territorial) control and the prerogative of state sovereignty vis-à-vis human rights has already been identified as a key deficiency within the ECHR system which was primarily designed to protect the rights of citizens.

Concrete ways in which such a more progressive stance could be developed by the Court would mainly hinge on the application of Articles 3, 6 and 14 of the Convention, as these are well developed in migrant case law but could be taken further to ensure protection (Dembour, 2015). Currently the threshold for proving inhuman and degrading treatment is very high and could be lowered given the many instances in which such treatment has been documented in the migration context (Amnesty International, 2014). The *Maaouia* judgment had a detrimental effect on the

right to fair trial for migrants and should be reversed, while effective access to judicial review remains a core challenge. Procedural questions are just as central to establishing a more progressive protection scheme and here much could be done to lower the hurdles migrants face in accessing the justice system in the first place. In this instance, the burden of proof could be lowered in certain circumstances and NGOs could be involved even more in establishing the facts of a case and friendly settlements without admission of a violation should not be accepted to name a few salient improvement measures. In the meantime, NGOs should bring strategic litigation to press these reforms and force the Court to establish clearer lines of accountability for states in extraterritorial situations.

### **3.4 Constraints and Restraint: How Progressive Can the Courts Be?**

The European Courts are limited in a number of ways in extending the protection offered to migrants and potential refugees. Firstly, there is limited jurisdiction: the CJEU can only pronounce on matters of Union law and while this area has been progressively expanded, there are limits on this based on the principle of conferral contained in Article 5 TEU. Secondly, there is limited enforcement capacity. With regard to the CJEU this is most critical in the gap between jurisdiction of the court and capacity of EU legislatures (Dawson, 2013: 386). For the ECtHR the problem is even more acute with no control over the enforcement of its pronouncements and slow compliance. The ECtHR is also facing a severe case-load crisis, leading some observers to question its continued ability to provide individual justice (Keller et al., 2010). Lastly, the two Courts have to consider their standing and legitimacy in the eyes of other political actors and tread carefully in order to maintain their normative power. Nevertheless, both Courts have been “active” in expanding their roles, also in the field of migration, and “have been creative even in cases where there is no consensus among Contracting Parties” (Besson, 2011: 107). This is especially true of the ECtHR and it arguably enjoys a special role in promoting more assertive human rights protection in Europe in spite of its original role of providing a minimum level of protection (Butti, 2013). Similar trends of assertiveness can also be seen on the part of the CJEU in areas such as terrorism policy review (Gearty, 2014).

The analysis of the legal instruments available to the Courts has shown that the scope for extraterritorial protection of migrant and refugee rights is limited by the inherently territorial understanding of protective duties that prevails in the current legal system and international relations. While migrants have human rights, it is very difficult to establish clear positive duties, based on law, as opposed to morality, for states to offer protection beyond their own borders / territorial waters. This stance is also reflected in the ‘wet foot / dry foot’ policy of the United States or the offshore migration control program run by Australia (Reneman, 2011). European legal instruments, the Convention and Charter, have been interpreted to have a wider application. However, they fall short of establishing positive duties beyond existing SAR duties or Operation Triton. From a policy perspective it may indeed be undesirable to establish such duties, as they may lead to vastly increased migration streams and be a pull factor for even more unsafe crossings. From a humanitarian perspective, it seems completely morally arbitrary why a person should enjoy less access to asylum and human rights protection simply based on her place of origin. Legally, states can currently be held liable in the ECHR system for human rights violations once they have established a sufficiently clear jurisdictional link or a “sufficiently direct link between the applicant and the damage alleged”, as contained in ECHR, Art. 34. Interestingly, this Article also states that individual applications may be brought “because of actions or omissions by a state”. Following *Treska* and with the planned increase in maritime patrols, the Courts may make more out of an omission to assist and protect. However, it is unlikely that a true duty to protect refugees on the high seas in the form of positive obligations to go and search for refugees will ever emerge. Hence, the questions will focus on how far states are responsible for the extraterritorial dimensions of asylum policies.

Given the charges of judicial activism levied against the European Courts and a popular turn against increased migration flows, there is a renewed and mounting “ambient pressure to stem the tide” (Sedley, 2002: 322). It is exactly in such a climate of popular fear and state reluctance to take responsibility for human rights protection, that the judiciary should balance these trends, and protect the rights which societies have committed to, also for people of a different citizenship.

### 3.4 Outlook on Future Challenges: Balancing Rights & Effective Policy

This study identifies four challenge clusters emerging for the two Courts in the field of extraterritorial asylum and human rights protection for migrants and refugees. Firstly, striking the right balance between efficiency and justice will be important, especially for the ECtHR, given its primary role in migration adjudication and persisting caseload crisis. Given the truth in the statement that “justice delayed is justice denied”, this is the most urgent dilemma, which needs to be addressed. An inefficient Court will lose relevance and a Court that prioritizes efficiency too much over justice loses its functional identity. Given the increasing number of migration cases, ad hoc tribunals and potentially pilot judgments could be solutions to this problem (Reneman, 2014).

Secondly, the Courts will have to continue to scrutinize the extraterritorial activities of migration control by the EU and member states carefully and make sure that human rights, such as the right to leave, are not infringed by third country “pull back” agreements. Moreover, dialogue with EU institutions should continue about what constitutes a safe place and critique agreements with countries lacking sound asylum regulations themselves (e.g. Morocco). Current EU Joint Resettlement Programs, Regional Protection Programs, Protected Entry Procedures and other offshore processing plans need to be reviewed through the lens of human rights protection. Working closely with NGOs in the field will enable the Courts to reach better-informed and more efficient judgments.

Thirdly, the two Courts will have to continue to grapple with extraterritorial state responsibility to protect and respect human rights in a context of increasing control of the Mediterranean and under-developed SAR duties (Amnesty, 2015). Reconsidering the linkage between drone activity and control may be in order as well as a conceptual clarification of the applicable legal standards of state responsibility under international law, the Convention and the Charter. A key challenge in this field is that the legal standards are contested (Reneman, 2014: 195). As the extraterritorial dimension of EU migration control is also in an emerging state, this is a significant opportunity for the Courts to establish clear standards, extend their role and relevance,

and influence the shape of these policies through continuous dialogue.

The last challenge will be clarifying the relationship between the two Courts and the two human rights protection systems of the Convention and the Charter. The Courts have achieved remarkable results and institutional strength through cooperation. Now, this relationship has entered a new phase and it remains to be seen what this means for refugee and migrant right protection. If a drifting apart of the Courts and an increased focus on the Charter and CJEU case law in Luxembourg should emerge, this could possibly be detrimental to the progress made by the ECtHR in extending protection duties. Clearly, a divergence of the two systems is undesirable, as it would not help in creating a clear legal base to protect human rights for migrants. Moreover, the Courts face individual challenges and given the prominence given here to the ECtHR it is worth highlighting the challenges which will emanate from the changed admissibility criteria and the new pilot judgment procedure.<sup>19</sup>

## CONCLUSION

This thesis has attempted to further a structural understanding of the deaths of migrants we are witnessing before Europe's shores. It has demonstrated in the first chapter that the CEAS, while increasingly well developed, suffers from the limitations inherent to a territorial understanding of rights. While better rights protection has been advanced for migrants within Europe, effective access to asylum before migrants reach European shores is not included. An increasing use of private agents, such as commercial ships, and offshore migration processing are all symptoms of responsibility evasion by European states in the extraterritorial dimension of asylum policies. Moreover, the existing sea operations beyond the borders of the EU are focused explicitly on controlling the border and not on rescuing lives. Other rescue provisions such as contained in the UNCLOS, SAR or SOLAS are also insufficient, as they are primarily aimed at inter-state encounters and presuppose a functioning

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<sup>19</sup> <http://ukhumanrightsblog.com/2013/07/09/radical-but-risky-changes-afoot-at-the-european-court-of-human-rights-andrew-tickell/>



cooperation between the Mediterranean countries for search and rescue. This is not given at the moment and migrants will continue to die during the dangerous crossing.

The case study of *Hirsi* shows how the Court in Strasbourg has started to address this responsibility gap. The judgment effectively declared “push-back” operations to be illegal. However, this apparent progress may well have had a regressive impact on policy by raising the costs of rescue operations. However, it pointed to the importance of human rights in this context and the promise they may hold for migrants.

Thus, the paper analysed which legal instruments could extend the scheme of rights protection available to migrants on the high seas and identified the ECHR as the most promising base for such rights. By analysing the institutional mechanisms and case law, it becomes apparent that the ECHR system has much potential to protect migrants’ human rights better and beyond European borders. Its functional interpretation of jurisdiction may turn out to be especially interesting in a climate of increasing control over the Mediterranean. However, if the Court does not reverse *Bankovic*, jurisdiction will remain tied to concrete sea operations. Positive duties of assistance may be even harder to establish and will remain ultimately a matter of political will and humanitarian action. Ideally, European states would develop a similar rationale to the Responsibility to Protect (R2P) – to protect refugees in this case to avoid migrant deaths at sea.

The Courts are often underestimated as actors in the realm of extraterritorial asylum policies. By outlining the dialogue between the two main European Courts and the ECtHR and the EU legislative bodies, this paper has shown how the Courts have progressively expanded their sphere of influence and how the ECtHR affirmed its position as the main adjudicator of human rights. Hence it is the responsibility of the ECtHR and the CJEU to bring more clarity into states’ extraterritorial obligations towards migrants. Moreover the ECtHR has deferred to states’ sovereignty to control their borders, often at the expense of migrants. Effective access to asylum may in the present circumstances, where so few legal routes towards asylum in the EU exist, be crucially dependent on effective rescue operations with a wide regional mandate. The Courts could be more assertive in this area, as it is their role to progressively realize

the rights granted in the Charter and Convention

In spite of the many challenges facing the two Courts, they have a very important role to play in safeguarding human rights in Europe's growing extraterritorial asylum dimension. The migration dilemma, cast into high relief by the deaths in the Mediterranean, tests the human rights commitment of the EU and affects its legitimacy as a normative actor. The Courts, as guardians of fundamental rights, should remind states and the EU of these commitments and realize the potential of human rights for everyone, including migrants.

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## ANNEX

