PROTECTING THE EU EXTERNAL BORDERS AND THE PROHIBITION OF REFOULEMENT

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This article investigates the relation between externalisation of border control to regulate or stop migration and the prohibition of refoulement. It aims to elucidate under what circumstances remote measures of border control trigger the obligations of states to protect persons from refoulement. The article focuses on the key concept of jurisdiction. Based on a rigorous study of literature and case law, de jure and de facto control as well as the exercise of public powers are identified as triggers of jurisdiction. Additionally, art 16 on aiding and assisting of the Articles on the Responsibility of States for Internationally Wrongful Acts *('*ARSIWA*') is discussed in relation to refoulement. Finally, in order to clarify state responsibility for refoulement the EU–Turkey Statement is assessed as a paradigmatic example of outsourcing border control.*

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I INTRODUCTION

Between the early spring of 2014 and the beginning of 2016, the number of persons who irregularly crossed the European Union's external borders in search of asylum had been steadily on the rise, peaking in October 2015 with 221 454 arrivals in one month. Although numbers have dropped since then, in 2016 the United Nations High Commissioner for Refugees still recorded a total of 362

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753 sea arrivals.[1] In debates across EU member states there seems to be a general agreement that the 'refugee crisis' is due to insecure external borders.[2] The subsequent call to strengthen and secure the EU's external borders to a large extent depends on the willingness and capacity of third countries to bar asylum seekers from illegally entering EU territory and hence further externalisation of border controls is believed to be the key to border security. Today, we witness the development of a European political agenda that advocates extraterritorial asylum solutions by remote border controls and/or by scaling up and improving regional protection, as is exemplified by the EU–Turkey Statement of March 2016.[3]

The extraterritorialisation of border controls raises the question of the extraterritorial protection of human rights: are there international and European law objections against the externalisation of border control? In particular, the key question to be asked and answered is to what extent states are obliged to refrain from extraterritorial measures of border management that potentially result in refoulement. Both state practice and the views of states expressed at different fora prove that the prohibition of refoulement is triggered the moment an asylum seeker presents himself and seeks admission, whether already within a state's territory or at the borders.[4] But what if state borders can no longer be properly understood as a geographical line that demarcates a state's territory? What if border controls no longer take place at the territorial border itself but are moved outside a state's territory?

This article sets out to explain under what circumstances remote border control triggers the obligation of states to protect persons from refoulement. Against the backdrop of the aftermath of the 'refugee crisis', the article focuses on border control measures in third countries, in particular Turkey. Part II examines the prohibition of refoulement in international and European law. Part III explains why jurisdiction plugs the gap between territorial and extraterritorial protection of human rights. On the basis of a close reading of existing literature and case law, Part IV discusses the conditions under which jurisdiction is triggered. Part V looks at the *Articles on the Responsibility of States for Internationally Wrongful Acts* ('*ARSIWA*') in the context of state responsibility for a breach of the prohibition of refoulement. Part VI then tailors the main findings from the previous Parts to the recent agreements between Turkey and

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1 United Nations High Commissioner for Refugees, *Mediterranean Situation* (24 December 2018) Operational Portal: Refugee Situations <http://data2.unhcr.org/en/situations/mediterranean> archived at <https://perma.cc/Y6CF-47UX>.

2 For example, in the State of the Union Address 2018, President Jean Claude Juncker highlighted, as stated in a European Commission fact sheet summarising the address, the 'persistent gaps that have affected the efficiency of joint operations' to effectively manage the EU's external borders: European Commission, 'State of the Union 2018: A Strengthened and Fully Equipped European Border and Coast Guard' (Fact Sheet, 12 September 2018, European Commission) <https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-factsheet-coast-guard_en.pdf> archived at <https://perma.cc/HQB4-BDE3>.

3 See European Council, 'EU–Turkey Statement, 18 March 2016' (Press Release, 144/16, 18 March 2016) <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-Statement/> archived at <https://perma.cc/YPN9-TRNL>.

4 Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) 208.

EU member states. The analysis only examines the obligations and responsibilities of EU member states for possible violations of the prohibition of refoulement. The choice to focus on EU member states is justified by the fact that the Court of Justice of the EU has recently found in a contested decision that the EU–Turkey Statement was not an agreement between the EU and Turkey but rather between the 28 EU member states and Turkey.[5] It is acknowledged that EU institutions or agencies may also have obligations in terms of non-refoulement, but these obligations are beyond the scope of this article, and they have been addressed elsewhere.[6]

II THE PROHIBITION OF REFOULEMENT IN INTERNATIONAL AND EUROPEAN LAW

The prohibition of refoulement is generally believed to be the cornerstone of refugee protection and derives from art 33(1) of the 1951 *Convention relating to the Status of Refugees* ('*Refugee Convention*'):

> 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.[7]

The prohibition of refoulement thus protects refugees against return to persecution. In addition, international human rights law has made the prohibition of refoulement an integral component of the prohibition of torture.[8] Primary EU law and the case law of the European Court of Human Rights ('ECtHR') enlarged the prohibition of refoulement to also include inhuman or degrading treatment or punishment.[9] Finally, secondary EU law has stretched the

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[5] *NF v European Council* (General Court, T-192/16, 28 February 2017) [69]. For discussion of the decision, see, eg, Sergio Carrera, Leonhard den Hertog and Marco Stefan, 'It Wasn't Me! The Luxembourg Court Orders on the EU–Turkey Refugee Deal' (CEPS Policy Insights No 2017/15, Centre for European Policy Studies, 15 April 2017) <https://www.ceps.eu/publications/it-wasn%E2%80%99t-me-luxembourg-court-orders-eu-turkey-refugee-deal> archived at <https://perma.cc/V3FR-35RP>; Thomas Spijkerboer, 'Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy before the EU Court of Justice' (2017) 31 *Journal of Refugee Studies* 216, 222–4.

[6] See, eg, Roberta Mungianu, *Frontex and Non-Refoulement: The International Responsibility of the EU* (Cambridge University Press, 2016); Melanie Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (PhD Thesis, Leiden University, 2017).

[7] *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 33(1) ('*Refugee Convention*').

[8] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 3 ('*CAT*'); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 7 ('*ICCPR*').

[9] See, eg, *Charter of Fundamental Rights of the European Union* [2016] OJ C 202/389, arts 4, 19; *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 3, as amended by *Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 2 October 2013, CETS No 214 (entered into force 1 August 2018) ('*European Convention on Human Rights*'); *Soering v United Kingdom* (1989) 161 Eur Court HR (ser A) 27–8 [88]; *Salah Sheekh v Netherlands* (European Court of Human Rights, Third Section, Application No 1948/04, 11 January 2007) 45–6 [148].

prohibition of refoulement by establishing subsidiary protection for persons who are not in need of *Convention*-based protection but who are otherwise in need of international protection as they face a risk of torture, inhuman or degrading treatment, or a serious threat to life due to indiscriminate violence in the context of international or internal armed conflict.[10] Importantly, the principle of non-refoulement prohibits return to the country of origin (direct refoulement), to a third country where individuals face one of the risks above and to countries where they are exposed to the risk of onward removal to the country of origin (indirect or chain refoulement).[11]

To analyse the intensification of border controls from the perspective of non-refoulement, it is important to note that both the *EU Return Directive 2008/115/EC* and the *EU Carrier Sanctions Directive 2001/51/EC* reiterate that the 'fight against illegal immigration' is to be carried out 'without prejudice to the obligations resulting from the *Geneva Convention*', which includes the prohibition of refoulement.[12] As early as 1996 the ECtHR elucidated the relation between a state's attempt to prevent immigrants from crossing its borders without prior authorisation on the one hand, and its obligations to comply with the provisions of the *Refugee Convention* on the other. In *Amuur v France* the ECtHR thus ruled that 'States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by [human rights instruments]'.[13] Moreover, the *Schengen Borders Code*, which establishes the rules governing the control of persons crossing the EU's external borders, articulates in art 3 that it shall apply without prejudice to the rights of refugees and persons requesting international protection, in particular as regards the prohibition of refoulement.[14]

According to a minority view, protection from refoulement only covers refugees who are already physically present on the territory of the host country. This view was supported during the drafting period of the *Refugee Convention* by the Swiss representative, who argued that the terms 'expel', 'return' and '*refouler*' could only be taken to apply 'to a refugee who had already been admitted to the territory of a country'.[15] The territorial limitation of art 33 was

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10 *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast)* [2011] OJ L 337/9, art 15; *Elgafaji v Staatssecretaris van Justitie* (C-465/07) [2009] ECR I-921, 934 [35].

11 James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 323.

12 *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals* [2008] OJ L 348/98, 98 [1] ('*EU Return Directive 2008/115/EC*'); *Council Directive 2001/51/EC of 28 June 2001 Supplementing the Provisions of Article 26 of the Convention Implementing the Schengen Agreement of 14 June 1985* [2001] OJ L 187/45, 45 [3] ('*EU Carrier Sanctions Directive 2001/51/EC*').

13 *Amuur v France* [1996] III Eur Court HR, 22 [43].

14 *Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the Rules Governing the Movement of Persons across Boarders (Schengen Boarders Code) (Codification)* [2016] OJ L 77/1, art 3.

15 *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Sixteenth Meeting*, 16th mtg, UN Doc A/CONF.2/SR.16 (23 November 1951) 6.

also affirmed before the United States Supreme Court in the much discussed *Sale v Haitian Centres Council Inc* case.[16] The Supreme Court argued that the prohibition of refoulement did not cover the state's interception of Haitian refugees on the high seas in order to prevent them from reaching its shores. It reasoned that '[b]ecause the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit' the return of refugees who have not yet reached the State's territory.[17] A decade later, the British House of Lords adopted this line of reasoning in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport*.[18] The Lords first held that the *Refugee Convention* did not apply because the applicants had not left their country of origin, as required by art 1 of the *Refugee Convention*. They further argued that the *Refugee Convention* as a whole 'is directed towards those within the receiving state'.[19] With respect to art 33 in particular, the Lords made plain that 'both the text and the negotiating history of article 33 affirmatively indicated that it was not intended to have extraterritorial effect'.[20]

Against this territorial reading of the prohibition of refoulement, many scholars support the view that non-refoulement not only refers to return or expulsion from the host state's territory but also encompasses rejection at the borders. Drawing on the drafting history of the 1951 *Refugee Convention*, Violeta Moreno-Lax demonstrates that the French term 'refoulement' was explicitly chosen as it not only referred to return or expulsion, but also contained rejection at the border or protection from removal.[21] Furthermore, it translates as a defensive or exclusive act that is not limited to conduct within a state's territory.[22] Agreeing that the purpose of the *Refugee Convention* would be frustrated if potential refugees could face rejection at the border, its drafters decided to retain the French word '*refouler*' instead of 'return'.[23] The corollary thereof is that the prohibition of refoulement not only covers recognised refugees but also asylum seekers awaiting status determination and those seeking access to a state's territory in order to lodge an asylum application. Even though the *Refugee Convention* does not enshrine a right to seek asylum and a corresponding duty of states to grant access to their territory, it is uncontroversial

16 *Sale v Haitian Centers Council Inc*, 509 US 155 (1993).

17 Ibid 183.

18 *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 AC 1, 29 [15].

19 Ibid.

20 Ibid 54 [68].

21 Violeta Moreno Lax, 'Must EU Borders Have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection for Refugees' (2008) 10 *European Journal of Migration and Law* 315, 333. See also Sir Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) 87, 113–14.

22 See Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing, 2012) 141.

23 Moreno Lax, 'Must EU Border Have Doors for Refugees?', above n 21, 333; Goodwin-Gill and McAdam, above n 4, 204–5; Hathaway, above n 11, 315.

that the prohibition of refoulement guarantees first gate admission for the purpose of status determination.[24]

III THE TERRITORIAL AND EXTRATERRITORIAL DIVIDE

In both international and European law the prohibition of refoulement applies to all persons within the jurisdiction of the state.[25] Even though some international human rights treaties distinguish between 'jurisdiction' and 'territory',[26] or do not contain any explicit reference to state territory, the guiding criterion for allocating human rights obligations to states is the territorial location of the rights holder. Each state has a primary obligation to respect, protect and fulfil the human rights of individuals located on its own territory. Inversely, extraterritorial human rights protection is considered to be 'exceptional' and in need of special justification. As the ECtHR held in its (in)famous admissibility decision in *Banković v Belgium* ('*Banković*'), '[w]hile international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction … are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States'.[27] While the bulk of *Banković* has been heavily criticised and has meanwhile been overruled,[28] the Court continues to hold the view that '[a] State's jurisdictional competence … is primarily territorial' with the consequence that 'acts of Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 [of the *European Convention on Human Rights*] only in exceptional cases'.[29]

If problems of extraterritorial human rights protection have traditionally been associated with state agents operating on foreign soil and primarily in the context of occupied territories, today's challenge of human rights protection relates to

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24 See Moreno Lax, 'Must EU Borders Have Doors for Refugees?', above n 21, 330–3; Den Heijer, *Europe and Extraterritorial Asylum*, above n 22, 141; Goodwin-Gill and McAdam, above n 4, 215.

25 Article 1 of the *European Convention on Human Rights* enshrines that states shall ensure the rights of the *Convention* to anyone within their jurisdiction. Article 2(1) of the *CAT* tasks states to 'prevent acts of torture in any territory under its jurisdiction'. Article 2(1) of the *ICCPR* in turn stipulates that a state shall respect and ensure the rights of the *Convention* to all persons present in its territory and subject to its jurisdiction.

26 For example, according to art 2(1) of the *ICCPR*, '[e]ach State Party to the present *Covenant* undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present *Covenant'*.

27 *Banković v Belgium* [2001] XII Eur Court HR 333, 351–2 [59] ('*Banković*'). See also *Al-Skeini v United Kingdom* [2011] IV Eur Court HR 99, 166–7 [131] ('*Al-Skeini*').

28 For criticisms of the *Banković* judgment, see, eg, Ralph Wilde, 'The "Legal Space" or "*Espace Juridique*" of the *European Convention on Human Rights*: Is It Relevant to Extraterritorial State Action?' (2005) 10 *European Human Rights Law Review* 115; Ralph Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties', (2007) 40 *Israel Law Review* 503; Erik Roxstrom, Mark Gibney and Terje Einarsen, 'The NATO Bombing Case (*Banković et al v Belgium et al*) and the Limits of Western Human Rights Protection' (2005) 23 *Boston University International Law Journal* 55; Loukis Loucaides, 'Determining the Extra-Territorial Effect of the *European Convention*: Facts, Jurisprudence and the *Banković* Case' (2006) 11 *European Human Rights Law Review* 391; Alexandra Rüth and Mirja Trilsch, '*Bankovic v Belgium (Admissibility)*' (2003) 97 *American Journal of International Law* 168; Matthew Happold, '*Bankovic v Belgium* and the Territorial Scope of the *European Convention on Human Rights*' (2003) 3 *Human Rights Law Review* 77.

29 *Al-Skeini v United Kingdom* [2011] IV Eur Court HR 99, 166–7 [131].

people moving across state borders and states deploying activities beyond their borders. The current externalisation of border controls calls for an analysis of how jurisdiction is determined in order to establish where and when the prohibition of refoulement is engaged and to whom it applies. Scholars may be divided over (roughly) two positions: whereas one strand of thinking stresses that the prohibition of refoulement equally applies on a state's territory, at the borders of a state, on the high seas and when operating in third countries, another strand of thinking stresses the differences between these locations, arguing that a state's responsibility with respect to non-refoulement decreases in proportion to the remoteness of the control exercised.[30] The difference between these positions is most prominent with respect to border controls in third countries. Whereas the application of the prohibition of refoulement inside a state's territory and on the high seas can be said to be uncontroversial, disagreement arises with respect to border controls in third countries for two reasons. First, a straightforward and unequivocal application of the legal obligation to comply with the prohibition of refoulement is complicated due to the existence of 'two competing territorial authorities with concurrent jurisdiction over the affected subject'.[31] Secondly, it seems that refoulement can only occur if a person is removed from one state's territory or its frontiers to another territory. On the understanding that refoulement implies a border crossing to another territory, it would seem that interception of migrants in a third country, including its territorial waters and at airports, can never qualify as refoulement since the person is not sent back to another country but is contained within the third country. That is, if a person is not pushed back over a physical border, it seems difficult to build arguments under art 33 of the *Refugee Convention*.

However, as Maarten den Heijer and Rick Lawson argue with respect to the existence of competing jurisdictions, it is important to distinguish between the function of jurisdiction in international law and the function of jurisdiction in human rights law. Whereas jurisdiction in international law is primarily about delimiting the exclusive competence of a state in respect of its own territory, precluding intervention in the territories of other sovereign powers, jurisdiction in human rights law is primarily about delimiting the scope of persons to whom a state ought to secure human rights obligations.[32]

This is also reflected by a number of opinions put forward by several human rights monitoring bodies. The Human Rights Committee ('HRC') has made sufficiently clear that the notions of 'territory' and 'jurisdiction' in art 2(1) of the *International Covenant on Civil and Political Rights* ('*ICCPR*') are not cumulative requirements to trigger state responsibility:

> States Parties are required by article 2, paragraph 1, to respect and to ensure the *Covenant* rights to all persons who may be within their territory and to all persons

30 See, eg, Moreno Lax, 'Must EU Borders Have Doors for Refugees?', above n 21, 334–5; Gregor Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?' (2005) 17 *International Journal of Refugee Law* 542, 548–53; Hathaway, above n 11, 335–42.

31 Moreno Lax, above n 21, 335.

32 Maarten den Heijer and Rick Lawson, 'Extraterritorial Human Rights and the Concept of "Jurisdiction"' in Malcolm Langford et al (eds), *Global Justice, State Duties: The Extra-Territorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press, 2013) 153.

> subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the *Covenant* to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.[33]

Referring to its *General Comment 15*, the HRC clarified in *General Comment 31* that the enjoyment of *Covenant* rights is not limited to citizens

> but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.[34]

Furthermore, the Committee against Torture has explained that states not only exercise jurisdiction over territories, as the literal wording of art 2(1) of the *Convention against Torture* ('*CAT*') suggests,[35] but can also exercise jurisdiction extraterritorially. In its *General Comment 2* the Committee against Torture stated:

> The Committee also understands that the concept of 'any territory under its jurisdiction,' linked as it is with the principle of non-derogability, includes any territory or facilities and must be applied to protect any person, citizen or non-citizen without discrimination subject to the de jure or de facto control of a State party.[36]

It can thus be argued that the practice of the Committee against Torture, in combination with the interpretation of the term 'in any territory under its jurisdiction' as regards the text, context, and object and purpose of the *CAT*, supports the argument that 'the *Convention* may also apply in situations in which a state party exercises control over persons abroad but not necessarily at the same time control also over any particular area or location'.[37]

As the opinions of several monitoring bodies suggest, the exercise of control over persons brings them within a state's jurisdiction. Both before and after *Banković* the ECtHR had accepted that a *Convention* state's exercise of control over persons is sufficient to bring them within the jurisdiction of that state.[38] In

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33 Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, 2187th mtg, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 4 [10] ('*General Comment No 31*').

34 *General Comment No 31*, UN Doc CCPR/C/21/Rev.1/Add.13, 4 [10]; Den Heijer, *Europe and Extraterritorial Asylum*, above n 22, 146.

35 Article 2(1) of the *CAT* tasks states to 'prevent acts of torture in any territory under its jurisdiction'.

36 Committee against Torture, *General Comment No 2: Implementation of Article 2 by States Parties*, UN Doc CAT/C/GC/2 (24 January 2008) 2 [7] ('*General Comment No 2*').

37 Karen da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Martinus Nijhoff, 2013) 300.

38 For a more detailed discussion of the co-evolution of the jurisdictional tests of control over territory and control over persons in the case law of the ECtHR, see Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, 2009).

the early case of *Stocké v Germany*, the European Commission on Human Rights examined the lawfulness of the arrest of the German applicant in France and noted that the state's obligation under art 1 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* ('*European Convention on Human Rights*')[39] to secure the rights guaranteed by the *Convention* to everyone within its jurisdiction was

> not limited to the national territory of the High Contracting Party concerned, but extends to all persons under its actual authority and responsibility, whether this authority is exercised on its own territory or abroad. Furthermore … authorised agents of a State not only remain under its jurisdiction when abroad, but bring any other person 'within the jurisdiction' of that State to the extent that they exercise authority over such persons. Insofar as the State's acts or omissions affect such persons, the responsibility of that State is engaged.[40]

The Court repeated its position with respect to the arrest of Abdullah Öcalan by Turkish security forces in Kenya. Turkey denied having exercised jurisdiction, arguing that it had no control over any part of Kenya's territory. The ECtHR's First Chamber and Grand Chamber, by contrast, considered that despite lacking territorial control the Turkish officials had exercised sufficient effective control over Öcalan to bring him within Turkey's jurisdiction.[41] Similarly, in *Issa v Turkey* ('*Issa*') the Court considered that regardless of control over foreign territory, a state may be held accountable

> for violation of the *Convention* rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating — whether lawfully or unlawfully — in the latter State.[42]

The limited scope of this article does not allow for an exhaustive analysis of the concept of jurisdiction in international human rights law, which has been addressed extensively elsewhere.[43] It must be noted, however, that the concept of (effective) control as a trigger of jurisdiction has been criticised by various scholars. Marco Milanovic thus argues that jurisdiction conceived as control either over territory or over persons is unsatisfactory, and instead proposes a third model,

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39 *European Convention on Human Rights*.

40 *Stocke v Germany* (1989) 59 Eur Comm HR 166, [166].

41 *Öcalan v Turke*y (European Court of Human Rights, First Section, Application No 46221/99, 12 March 2003) 27 [93] ('*Öcalan*'). Confirmed in *Öcalan v Turke*y [2005] IV Eur Court HR 131, 164–5 [91] ('*Öcalan [GC]*').

42 *Issa v Turkey* (European Court of Human Rights, Second Section, Application No 31821/96, 16 November 2004) [71] ('*Issa*').

43 See, eg, Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press, 2011); Gondek, above n 38; Samantha Besson, 'The Extraterritoriality of the *European Convention on Human Rights*: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 *Leiden Journal of International Law* 857; Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004); Ralph Wilde, 'The Extraterritorial Application of International Human Rights Law on Civil and Political Rights' in Scott Sheeran and Sir Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge, 2013).

> where state jurisdiction is conceived of only territorially, but where that threshold criterion applies only to the positive obligations of states to secure or ensure human rights, because it is only when states possess a sufficient degree of control over territory that these obligations can be realistically kept.[44]

Others, on the other hand, seem to conceptualise extraterritorial obligations as a continuum or sliding scale and apply a reasonableness or proportionality test.[45] Lawson, for instance, argues that 'the extent to which contracting parties must secure the rights and freedoms of individuals outside their borders is proportionate to the extent of their control over these individuals'.[46] According to this view,

> [i]f there is a direct and immediate link between the extraterritorial conduct of a state and the alleged violation of an individual's rights, then the individual must be assumed to be 'within the jurisdiction', within the meaning of Article 1, of the state concerned.[47]

Furthermore, Vassilis Tzevelekos questions the 'effective' control element by discussing the meaning of 'effectiveness'.[48] In any event, it can be argued that jurisdiction plugs the gap between the territorial and extraterritorial application of human rights. What is decisive in triggering a state's obligation to comply with human rights in general and with the prohibition of refoulement in particular is not only that the person concerned, if returned, crosses a territorial border; the obligation can equally be triggered if the person crosses a state's jurisdictional border and is moved from one jurisdiction to another. This implies that the prohibition of refoulement also applies to persons subjected to border control activities outside the state's territory, and in particular within third countries. If the prohibition of refoulement is not exclusively territorially limited, it is conceivable that border control activities in third countries can also qualify as refoulement. This view finds support in the analogy with diplomatic asylum. In the view of Sir Elihu Lauterpacht and Daniel Bethlehem, if a person has taken refuge at a diplomatic post within her/his own country, then the protecting state is under the obligation to protect the refugee against refoulement and cannot remove the person and deliver her/him over to the jurisdiction of the country of origin.[49] Even if the person remains within the same country and does not cross a physical or territorial border, the person might cross a jurisdictional border and the prohibition of refoulement may apply. In the words of Gregor Noll, the prohibition of refoulement is 'a right to transgress an administrative border'.[50]

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44 Milanovic, above n 43, 119 (citations omitted).

45 See, eg, Gondek, above n 38, 375–6; Françoise Hampson, 'The Scope of the Extra-territorial Applicability of International Human Rights Law' in Geoff Gilbert, Françoise Hampson and Clara Sandoval (eds), *The Delivery of Human Rights: Essays in Honour of Professor Sir Nigel Rodley* (Routledge, 2011) 157, 170.

46 Rick Lawson, 'Life after *Banković*: On the Extraterritorial Application of the *European Convention on Human Rights*' in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004) 83, 120.

47 Ibid.

48 Vassilis P Tzevelekos, 'Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility' (2014) 36 *Michigan Journal of International Law* 129.

49 Goodwin-Gill and McAdam, above n 4, 250.

50 Noll, above n 30, 548.

Moreover, rejecting this reasoning would create an opportunity for states to escape responsibility for refoulement by replacing controls at the physical borders with extraterritorial control activities. Indeed, within both European and international human rights law there is strong support for the claim that human rights obligations must govern extraterritorial activities in order to prevent a human rights vacuum from being created, referred to as the ban on circumventing human rights. The HRC thus stated that

> it would be unconscionable to so interpret the responsibility under article 2 of the *Covenant* as to permit a State party to perpetrate violations of the *Covenant* on the territory of another State, which violations it could not perpetrate on its own territory.[51]

The ECtHR has confirmed this ban on circumventing human rights in *Issa*,[52] while the International Court of Justice ('ICJ') has also endorsed this line of reasoning.[53] On a generous interpretation, therefore, jurisdiction functions as a safety net when states attempt to circumvent human rights obligations and to avoid a human rights vacuum.[54]

IV TRIGGERS OF JURISDICTION

On the basis of a close reading of relevant literature and case law, the following situations can be identified as relevant when establishing a jurisdictional link between persons affected by external border controls and the state authorising such control: the exercise of de jure control, the exercise of de facto control and the exercise of public powers. These factors are examined in turn below.

First, if states exercise de jure control outside their own territory, individuals fall within their jurisdiction. For example, states exercise de jure control if migrants are taken on board a state vessel operating on the high seas or in the territorial waters of coastal states, because states enjoy exclusive jurisdiction over vessels flying their flag.[55] Taking migrants on board a ship establishes a jurisdictional link for the purpose of art 1 of the *European Convention on Human Rights* and thus triggers the state's human rights obligations. In *Hirsi Jamaa v Italy* ('*Hirsi*'), the ECtHR clarified that a state cannot circumvent its jurisdiction

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[51] Human Rights Committee, *Views: Communication No 52/1979*, 13th Sess, UN Doc CCPR/C/OP/l (adopted 29 July 1981) 91 [12.3] ('*López Burgos v Uruguay*').

[52] *Issa* (European Court of Human Rights, Second Section, Application No 31821/96, 16 November 2004); Den Heijer and Lawson, above n 32, 177; Andreas Fischer-Lescano, Tillmann Löhr and Timo Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21 *International Journal of Refugee Law* 256, 276.

[53] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (*Advisory Opinion*) [2004] ICJ Rep 136, 179 [109]; *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*) (*Judgment*) [2005] ICJ Rep 168, 242–3 [216].

[54] Thomas Gammeltoft-Hansen and James C Hathaway, '*Non-Refoulement* in a World of Cooperative Deterrence' (2015) 53 *Columbia Journal of Transnational Law* 235, 263.

[55] *Hirsi Jamaa v Italy* [2012] II Eur Court HR 97, 132 [77] ('*Hirsi*'); Maarten den Heijer, 'Reflections on *Refoulement* and Collective Expulsion in the *Hirsi* Case' (2013) 25 *International Journal of Refugee Law* 265, 271; Violeta Moreno-Lax, '*Hirsi Jamaa and Others v Italy* or the Strasbourg Court versus Extraterritorial Migration Control?' (2012) 12 *Human Rights Law Review* 574, 579–81.

by describing the intercepting of migrants on the high seas as a rescue operation.[56] During the time that migrants are under the de jure control of a state, the latter bears responsibility to protect against refoulement. According to the Committee against Torture, a state also exercises lawful control outside its own territory if the control is based on an agreement, in fact a diplomatic agreement concluded between Mauritania and Spain.[57] As such the Committee against Torture uses de jure control to establish de facto control. The question remains whether without such agreement de facto control would have been sufficient to trigger Spain's jurisdiction in *Decision: Communication No 323/2007* ('*JHA v Spain (Marine I)*').

Secondly, with respect to the exercise of de facto control, it is generally believed that effective human rights protection would be seriously hampered if jurisdiction is taken to require that a state has legitimately exercised jurisdiction. In its *General Comment 2* the Committee against Torture held that '*de jure* or *de facto* control' over a person establishes jurisdiction.[58] Indeed, in the *JHA v Spain (Marine I)* case, the Committee against Torture affirmed that Spain exercised de facto control over the migrants on board and therefore they were subject to Spain's jurisdiction. It reaffirmed its position with respect to detainees at Guantánamo Bay, arguing that the rule of the *CAT* concerning the establishing of jurisdiction applies extraterritorially if effective control is exercised over persons.[59]

Whether or not a person falls within the jurisdiction of a state is believed to be a question of fact, not of law.[60] With respect to jurisdiction that enlivens a state's responsibilities to protect human rights, the basic tenet is that factual control 'creates normativity'.[61] On several occasions, the ECtHR has confirmed that de facto control over persons or territories creates de jure responsibilities.[62] That the decisive criterion for establishing extraterritorial human rights obligations is the act of a state which creates a qualified relationship with the victim of human rights violations is already somewhat inherent in the ECtHR's dictum in *Banković*. The Court established that the essential question to be examined was whether the applicants were, 'as a result of [the] extraterritorial act, capable of

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56 *Hirsi* [2012] II Eur Court HR 97, 132 [77], 133 [79].

57 Committee against Torture, *Decision: Communication No 323/2007*, 41st sess, UN Doc CAT/C/41/D/323/2007 (21 November 2008) para 8.2.

58 *General Comment No 2*, UN Doc CAT/C/GC/2, 5 [16].

59 Committee against Torture, *Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America*, UN Doc CAT/C/USA/CO/3–5 (19 December 2014) [10].

60 See Den Heijer and Lawson, above n 32, 164–5; Tally Kritzman-Amir and Thomas Spijkerboer, 'On the Morality and Legality of Borders: Border Policies and Asylum Seekers' (2013) 26 *Harvard Human Rights Journal* 1, 14; Fischer-Lescano, Löhr and Tohidipur, above n 52, 275.

61 Kees Wouters and Maarten den Heijer, 'The *Marine I* Case: A Comment' (2010) 22 *International Journal of Refugee Law* 1, 10.

62 *Öcalan* (European Court of Human Rights, First Section, Application No 46221/99, 12 March 2003) 27 [93]. Confirmed in *Öcalan [GC]* [2005] IV Eur Court HR 131, 164–5 [91]; *Al-Saadoon v United Kingdom* [2010] II Eur Court HR 61, 97–100; *Medvedyev v France* [2010] III Eur Court HR 61, 92 [67]; *Al-Skeini* [2011] IV Eur Court HR 99, 168 [137]; *Hirsi* [2012] II Eur Court HR 97, 132 [77]; *Banković* [2001] XII Eur Court HR 333, 351–2 [59]–[61].

falling within the jurisdiction of the respondent States'.[63] In *Al-Skeini v United Kingdom* ('*Al-Skeini*'), the Court is more affirmative: 'What is decisive in such cases is the exercise of physical power and control over the person in question'.[64] A number of preliminary — and in part tentative — conclusions regarding the 'primarily territorial' nature of jurisdiction may be drawn from this brief survey of case law. What matters for the purpose of establishing jurisdiction is less the territorial location of the victim (the traditional criterion for distinguishing territorial from extraterritorial human rights obligations) than the assertion of physical state power and control over an individual *wherever located*. This is confirmed by the HRC: what matters is not the place where the violation occurred, but rather the relationship between the individual and the state in relation to the violation of any of the rights set forth in the *Covenant*, wherever they occurred.[65]

In the academic literature, de facto control is understood to also require a minimum level of physical constraint.[66] De facto control is exercised if migrants are prevented from continuing their journey, if state vessels use their strength and physical presence to push back smaller migrant boats, or if force is used to prevent migrants from reaching the border.[67] Although the ECtHR remains silent as to which acts qualify as de facto control, it is clear that the determining factor is the result: if the effect of border control measures is that migrants are prevented from reaching the borders of a state, jurisdiction is established.[68] In *Hirsi*, the Court considered that

> the removal of aliens carried out in the context of interceptions on the high seas by the authorities of a State in the exercise of their sovereign authority, the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State, constitutes an exercise of jurisdiction within the meaning of Article 1 of the *Convention* …[69]

On the understanding that location is not decisive in establishing jurisdiction, but that jurisdiction is instead contingent on the exercise of de facto control, the corollary of which is to keep immigrants at bay, it is irrelevant whether surveillance and patrol activities are carried out on the high seas or in the territorial waters or on the territory of a third state.

Thirdly, the exercise of public powers in a third state can involve the exercise of jurisdiction. Thomas Gammeltoft-Hansen and James Hathaway refer to the recent case law of the ECtHR on this third factor.[70] Indeed, in *Al-Skeini*, the ECtHR held that:

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63 *Banković* [2001] XII Eur Court HR 333, 350 [54].

64 *Al-Skeini* [2011] IV Eur Court HR 99, 168 [136].

65 *López Burgos v Uruguay*, UN Doc CCPR/C/OP/l, 91 para 12.1; Fischer-Lescano, Löhr and Tohidipur, above n 52, 272; *General Comment No 31*, UN Doc CCPR/C/21/Rev.1/Add.13.

66 Moreno-Lax, '*Hirsi Jamaa and Others v Italy*', above n 55, 581; Kritzman-Amir and Spijkerboer, above n 60, 14.

67 Fischer-Lescano, Löhr and Tohidipur, above n 52, 275.

68 Moreno-Lax, '*Hirsi Jamaa and Others v Italy*', above n 55, 589; Den Heijer 'Reflections on Refoulement and Collective Expulsion', above n 55, 271; Den Heijer and Lawson, above n 32, 172.

69 *Hirsi* [2012] II Eur Court HR 97, 155 [180].

70 Gammeltoft-Hansen and Hathaway, above n 54, 267–9.

> the Court has recognised the exercise of extraterritorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government … Thus, where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the *Convention* thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State …[71]

Three conditions can be identified for the establishment of jurisdiction within the context of the exercise of public powers: the state must act in accordance with custom, treaty or other agreement (eg a Memorandum of Understanding), the public powers are normally exercised by the government with which an agreement is made and the breach must be attributable to the acting state.[72] Accordingly, in cases of extraterritorial migration control, for instance, through border controls or pushback operations, jurisdiction might be triggered based on the exercise of the public powers doctrine on the condition that these three requirements are fulfilled. Gammeltoft-Hansen and Hathaway even go a step further by stating that

> [e]ven where there is no territorial or personal control, the fact that the sponsoring state can be said to exercise migration control functions beyond its borders — an increasingly common phenomenon — will often suffice to establish jurisdiction despite formal assertions to the contrary.[73]

In conclusion, we can identify an evolution in the triggers of jurisdiction in which de jure and de facto control can be seen as a further development in the extraterritoriality of human rights obligations. The interesting question that remains is how the conditions under which state jurisdiction is triggered by the exercise of public powers will be further operationalised in practice.

V STATE RESPONSIBILITY FOR A BREACH OF THE PROHIBITION OF REFOULEMENT

Given the situations in which jurisdiction can be established discussed above, the question arises under which conditions state responsibility for a possible violation of the prohibition of refoulement may occur. Article 2 of *ARSIWA* lays down two conditions for such responsibility to arise: the conduct must be attributable to the state and it must constitute a breach of an international obligation of the state.[74] In cases where jurisdiction can be established on the basis of one of the grounds discussed in the previous Part, the state has an obligation to respect international law. Violating the prohibition of refoulement by state authorities can therefore be said to amount to an internationally wrongful act. Furthermore, the heading of art 2 of the *ARSIWA* states that the conduct of a

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71 *Al-Skeini* [2011] IV Eur Court HR 99, 167 [135].

72 Gammeltoft-Hansen and Hathaway, above n 54, 267–9.

73 Ibid 269.

74 *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 56th sess, 83rd plen mtg, Agenda Item 162, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) annex ('*Responsibility of States for Internationally Wrongful Acts*') art 2 ('*Articles on the Responsibility of States for Internationally Wrongful Acts*').

state can consist of an *act or omission*, meaning that situations in which a state ought to have acted but omitted to do so can trigger that state's responsibility.

Since *Soering v United Kingdom*,[75] the case law on the ECtHR is highly supportive of the view that if it is established that a person comes within the jurisdiction of a state, that state becomes bound by the protective duty to prevent exposure to treatment in violation of art 3 of the *European Convention on Human Rights*. The Court reaffirmed this view in *MSS v Belgium and Greece* and *Hirsi*:[76] the obligation to protect immigrants from refoulement is triggered if the authorities of the returning state know, or should have known, that the state of disembarkation mistreats migrants, does not have proper asylum procedures in place, or engages in forced returns or indirect refoulement without due process. The implication of the fact that the authorities 'knew or should have known' is a protective duty (a positive obligation) that arises independently of any specific claims brought by the intercepted migrants.[77] Vice versa, and in line with art 38 of the *Asylum Procedures Directive 2013/32/EU*, such obligation is not triggered if migrants are sent back to a safe third country or to a country in which alternative means for international protection are available.[78] Note, however, that in *Hirsi* the Court made it clear that even if it can be assumed that the country to which the immigrant is returned is safe, the individual migrant must always have the opportunity to argue that the country might be safe in general, but not for her/him.[79] With respect to the latter, the ECtHR puts forward an additional argument, having recourse to the prohibition on collective expulsion as articulated in art 4 of the Fourth Protocol to the *European Convention on Human Rights*: an interception activity that prevents entry may be construed as collective expulsion if the transfer at sea is not based on an individual decision and if effective remedies against the decision are unavailable.[80] Interception on the high seas that results in disembarkation to a third country without an objective examination of the particular case of each individual of the group also qualifies as an internationally wrongful act under art 2 of the *ARSIWA*.[81]

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75 *Soering v United Kingdom* (1989) 161 Eur Court HR (ser A).

76 *MSS v Belgium and Greece* [2011] I Eur Court HR 255; *Hirsi Jamaa v Italy* [2012] II Eur Court HR 97.

77 See Den Heijer, Reflections on *Refoulement* and Collective Expulsion, above n 55, 276; Itamar Mann, 'The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece' (Report, Human Rights Watch, 21 September 2011) 46–8 <https://www.hrw.org/report/2011/09/21/eus-dirty-hands/frontex-involvement-ill-treatment-migrant-detainees-greece> archived at <https://perma.cc/WR3G-NYY5>; *MSS v Belgium* [2011] I Eur Court HR 255, 341 [358]; *Hirsi Jamaa v Italy* [2012] II Eur Court HR 97, 143–4 [131].

78 *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast)* [2013] OJ L 180/60, art 38(2)(c) ('*Asylum Procedures Directive 2013/32/EU*').

79 *Hirsi* [2012] II Eur Court HR 97, 144 [133]; Kritzman-Amir and Spijkerboer, above n 60, 24–25. See also *Asylum Procedures Directive 2013/32/EU* [2013] OJ L 180/60, art 38(2)(c).

80 *Hirsi* [2012] II Eur Court HR 97, 185–6; *Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 16 September 1963, ETS No 5 (entered into force 2 May 1968), as amended by *Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 11 May 1994, ETS No 155 (entered into force 1 November 1998).

81 See Den Heijer, Reflections on *Refoulement* and Collective Expulsion, above n 55, 284; Moreno-Lax, '*Hirsi Jamaa v Italy*', above n 55, 589–91.

Furthermore, reference can be made to art 16 of the *ARSIWA*, which states that '[a] State which aids or assists another State in the commission of an internationally wrongful act by the latter' is internationally responsible if 'that State does so with knowledge of the circumstances of the internationally wrongful act' and 'the act would be internationally wrongful if committed by that State'. Indeed, if the triggers of jurisdiction discussed in the previous part do not apply and therefore the requirements of art 2 of the *ARSIWA* are not met, a state could nevertheless incur responsibility for aiding or assisting another state in breaching the prohibition of refoulement.

The International Law Commission commentary on the *ARSIWA* ('ILC Commentary') specifies that art 16 imposes three requirements for responsibility to be triggered under art 16.[82] First, the state organ or agency providing aid or assistance must 'be aware of the circumstances making the conduct of the assisted State internationally wrongful'. Secondly, 'the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so'. Thirdly, it is required that the wrongful act 'would have been wrongful had it been committed by the assisting State itself'.[83] With regards to human rights violations in particular, the ILC Commentary further states that if a state is accused of having facilitated human rights violations by another state, it must be determined 'whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct'.[84]

However, as there is little jurisprudence to provide guidance in the interpretation and application of art 16 of the *ARSIWA*, there is a lack of clarity as to when the requirements are fulfilled. This is reflected in the literature, as scholars disagree on how to interpret and apply art 16. Three particular issues can be highlighted in this regard. First, it has been questioned whether, notwithstanding the ILC Commentary, art 16 requires intent or whether knowledge is sufficient. James Crawford argues that 'knowledge of the circumstances' of the wrongful act requires that the aiding or assisting state intends to facilitate the commission of the wrongful act.[85] Vladyslav Lanovoy, on the other hand, contends that knowledge of the circumstances of the wrongful act, rather than intent, is a sufficient standard for triggering the responsibility of the complicit state.[86] Likewise, James Fry notes that different primary rules can provide for different standards of knowledge for responsibility purposes and that it is not always necessary to prove actual knowledge. Rather, a less rigorous standard of knowledge ('should have known') is also accepted in certain cases.[87]

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82 'Report of the Commission to the General Assembly on the Work of its Fifty-Third Session (23 April – 1 June and 2 July – 10 August)' [2001] II(2) *Yearbook of the International Law Commission* 31, 66 [3].

83 Ibid.

84 Ibid 67 [9].

85 James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013) 337.

86 See, eg, Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Hart Publishing, 2016) 240.

87 James D Fry, 'Attribution of Responsibility' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press, 2014) 98, 123.

Secondly, there is a lack of clarity regarding the meaning of 'aid or assistance', especially whether it includes omissions as well as acts. While in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v Serbia)* the ICJ held that complicity consists of an affirmative or positive action,[88] authors such as Helmut Aust and Lanovoy argue that 'aid or assistance can also consist of omissions'.[89] Gammeltoft-Hansen and Hathaway, however, believe that an omission, such as not preventing another state from committing refoulement, does not qualify as aid or assistance and hence does not trigger a state's responsibility under art 16.[90]

Thirdly, art 16(b) of the *ARSIWA* requires that the conduct be internationally wrongful for the aiding state, as well as for the one that is being aided. With regards to the prohibition of refoulement, Gammeltoft-Hansen and Hathaway concur with Crawford that the two states involved need not be bound by the same legal norm.[91] In other words, if one state is bound by the prohibition of refoulement because it is a state party to the *Refugee Convention* while the other has ratified the *ICCPR* or *CAT*, art 16 of the *ARSIWA* is applicable. The requirement in art 16(b) is therefore no serious concern with regards to the prohibition of refoulement.

Gammeltoft-Hansen and Hathaway address the question of whether cooperation between states on migration control, in the form of aid and assistance (eg providing equipment, financial support, or training of personnel) could trigger the responsibility of the supporting state. They clearly answer this question in the affirmative:

> Because these *non-entrée* policies are implemented by, or under the jurisdiction of, the authorities of other countries, sponsoring states believe that they can immunize themselves from legal responsibility for the deterrence of refugees and other persons entitled to international protection … In truth, these new, cooperation-based *non-entrée* policies are rarely as 'hands off' as developed states like to suggest.[92]

The previous paragraphs make it clear that how one interprets the requirements of art 16 of the *ARSIWA* has an impact on the finding of state responsibility. The lack of guiding jurisprudence in that regard complicates the drawing of conclusions as to when states are responsible for aiding or assisting other states. Nevertheless, we can agree with Gammeltoft-Hansen and Hathaway who identify the provision of maritime patrol vessels or border control equipment, the secondment of border officials, the sharing of relevant intelligence and the direct funding of migration control efforts that assist another country to breach its non-refoulement or other protection obligations as practices which come within the ambit of aiding or assisting.[93] In their view, if the sponsoring state 'has at least constructive knowledge that its contributions will

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88 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia v Serbia*) (*Judgment*) [2007] ICJ Reports 43, 222–3 [432].

89 Helmut Philipp Aust, Complicity and the Law of State Responsibility (Cambridge University Press, 2011), 420; Lanovoy, above n 86, 184.

90 Gammeltoft-Hansen and Hathaway, above n 54, 279.

91 Ibid 281.

92 Ibid 243.

93 Ibid 279.

aid or assist another country to breach its obligations and chooses to aid or assist notwithstanding such constructive knowledge', it could be held responsible under art 16 of the *ARSIWA*.[94]

VI SECURING THE EU'S SOUTH-EASTERN BORDER

In late 2015 and early 2016 the EU undertook several actions in order to control its south-eastern external border, including several measures of cooperation with Turkey. As these have had the most concrete effects in terms of stemming migration flows into the EU, they are the focus of the analysis. Accordingly, the remainder of this article tailors the above theoretical exposition of jurisdiction and responsibility with respect to the prohibition of refoulement to the implementation of measures to control the EU's south-eastern external border. Part VI(A) briefly describes the recent developments in relation to cooperation with third countries and specifically addresses the agreement between EU member states and Turkey. Parts VI(B) and (C) then discuss, respectively, the return of Syrian asylum seekers to Turkey and financial support for Turkey. Lastly, Part VI(D) addresses other issues which may play a role as regards the prohibition of refoulement in cooperation agreements between EU member states and third countries such as Turkey, namely pushbacks and information sharing.

A *Migration Agreements with Third Countries*

When more than a million potential refugees arrived in Southern Europe in 2015, the EU's response was to stem the flow of persons making the journey from Turkey or Libya to Europe in search of international protection so as to regain control over its external borders. These policy developments are part of a wider trend whereby the EU has recently taken renewed action to prevent irregular migration. In June 2016 the European Commission thus announced the new Migration Partnership Framework, which consists of reinforced cooperation with third countries to better manage migration.[95] More recently, the Council of the European Union has reiterated its wish to strengthen its cooperation in the field of migration control with Libya.[96] There have also been reports that a joint delegation of several EU member states visited Eritrea in January 2017 to hold talks on migration.[97] Furthermore, the EU prioritised five countries to start negotiations with on migration control, including Niger. The EU's migration

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94 Gammeltoft-Hansen and Hathaway, above n 54, 280.

95 European Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on Establishing a New Partnership Framework with Third Countries under the European Agenda on Migration' (Communication COM/2016/0700, 7 June 2016).

96 General Secretariat of the Council of the European Union, 'Council Conclusions on Libya', (Council Conclusions 5321/17, 6 February 2017), 4–5 [8] <http://data.consilium.europa.eu/doc/document/ST-5321-2017-INIT/en/pdf> archived at <https://perma.cc/W9PG-6YJK>.

97 Shoefner, *Secret Mission Eritrea: Joint Cooperation to Curb Migration* (20 March 2017) Europe External Policy Advisors/Europe External Programme with Africa <http://www.eepa.be/?p=1397> archived at <https://perma.cc/ZW97-5JTW>.

control agreements recently led to the arrest of smugglers and adaptation of migration routes to more dangerous routes through the Sahara.[98]

As regards the south-eastern border, on 29 November 2015 the leaders of the European Union, together with their Turkish counterparts, activated the EU–Turkey Joint Action Plan. The EU leaders expressed several intended actions, including: (i) to reinforce the Turkish coast guard's patrolling and surveillance capacity; (ii) to enhance the capacity to exchange information in the fight against illegal immigration by deploying a Frontex Liaison Officer to Turkey; and (iii) to increase the financial assistance to develop a well-functioning system for temporary protection, humanitarian aid and public services based on a joint needs assessment.[99]

Additionally, the so-called EU–Turkey Statement was concluded on 18 March 2016. It aims to reduce illegal entry into the EU, breaking the business model of the smugglers and offering migrants an alternative to putting their lives at risk when trying to reach the EU. To that end readmission and resettlement measures were combined by returning new arrivals in Greece to Turkey and resettling, for every Syrian readmitted by Turkey, another Syrian from Turkey to an EU Member State (so-called 1:1 scheme).[100] Since 20 March 2016, there have been 1 563 returns to Turkey under the EU–Turkey Statement and 601 returns under the Greece–Turkey bilateral admissions protocol.[101] Moreover, '19 432 people in need of international protection, mostly from Turkey, Jordan and Lebanon, but also from other third countries, were resettled to 21 Member States and four Associated States'.[102] The Statement also includes financial support for services to refugees in Turkey, euphemistically called 'Facility for Refugees'. It is described as a coordinating mechanism the aim of which is to ensure

> the optimal mobilisation of relevant existing EU financing instruments, either as humanitarian assistance or non-humanitarian assistance, to ensure that the needs

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98 European Commission, 'Enhanced Cooperation between the European Union and Niger' (Press Release, MEMO/16/4375, 15 December 2016) <http://europa.eu/rapid/press-release_MEMO-16-4375_en.htm> archived at <https://perma.cc/74SW-W56T> ('*Enhanced Cooperation*'); 'Dozens Abandoned in Niger Desert Feared Dead', *Al Jazeera* (online), 27 June 2017 <http://www.aljazeera.com/news/2017/06/dozens-feared-dead-abandoned-niger-desert-170626213859163.html> archived at <https://perma.cc/9TKA-YMVX>.

99 For a full overview of the intentions, see European Commission, 'EU–Turkey Joint Action Plan' (Press Release, MEMO/15/5860, 15 October 2015) <http://europa.eu/rapid/press-release_MEMO-15–5860_en.htm>. See also European Commission, 'Commission Recommendation of 15.12.2015 for a Voluntary Humanitarian Admission Scheme with Turkey' (Commission Recommendation C(2015) 9490, 15 December 2015) 4–6 <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/securing-eu-borders/legal-documents/docs/commission_recommendation_for_a_voluntary_humanitarian_admission_scheme_with_turkey_en.pdf> archived at <https://perma.cc/7XXC-K4PG>.

100 Council of the European Union, 'EU–Turkey Statement, 18 March 2016' (Press Release, 144/16, 18 March 2016) <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-Statement/> archived at <https://perma.cc/5QYM-LCRR>.

101 European Commission, 'Communication from the Commission to the European Parliament, the European Council and the Council: Progress report on the Implementation of the European Agenda on Migration' (Communication COM (2018) 250, 14 March 2018) 7.

102 Ibid 19.

> of refugees and host communities are addressed in a comprehensive and coordinated manner.[103]

Additionally, the EU financially supports the Turkish coast guard's capacity. A contract of €20 million was thus signed in August 2016 with the International Organization for Migration ('IOM') to develop the capacities of the Turkish coast guard for search and rescue operations.[104] In light of the above-mentioned discussions on aiding and assisting, as well as on the exercise of public powers, this could be an element that gives rise to state responsibility. Whether this is the case is discussed further below.

B *Returning Syrians Back to Turkey*

With respect to the EU–Turkey Statement many scholars and organisations have criticised the so-called 1:1 scheme according to which a Syrian refugee in Turkey is invited to come to Europe under the condition that Turkey takes back an 'illegal Syrian' from Europe.[105] The misgivings expressed concern the qualification of Turkey as a safe third country, the fear that the return of all illegal immigrants amounts to collective expulsion and, finally, the dire observation that the EU–Turkey Statement is turning asylum reception facilities into detention centres.[106]

When concluding return and readmission agreements with third countries the reputation of the third state must be taken into account. This is in line with suggestions made by the European Commission in its 2011 evaluation report on EU readmission agreements.[107] Translated to the cooperation between the EU and Turkey, supporting migration management and border control by Turkey may give rise to human rights issues if the EU or its member states know or should have known that Turkey has a deplorable reputation in terms of human rights. In Greece, asylum seekers arriving after 20 March 2016 are excluded from relocation to EU member states in practice and are subject to a fast track border procedure which focuses on admissibility by examining whether applications may be dismissed on the ground that Turkey is a 'safe third country'.[108] The Council of State (the highest administrative court in Greece) in

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103 European Commission, 'Communication from the Commission to the European Parliament and the Council: First Annual Report on the Facility for Refugees in Turkey' (Communication COM (2017) 130, 2 March 2017) 5 ('*Annual Report on the Facility for Refugees in Turkey*').

104 Ibid 12.

105 Maarten den Heijer, Jorrit Rijpma and Thomas Spijkerboer, 'Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System' (2016) 53 *Common Market Law Review* 607, 634–6.

106 Dutch Council for Refugees et al, 'The Implementation of the Hotspots in Italy and Greece: A Study', (Study, December 2016) <https://www.ecre.org/wp-content/uploads/2016/12/HOTSPOTS-Report-5.12.2016..pdf> archived at <https://perma.cc/8AS6-V5BF>.

107 European Union Agency for Fundamental Rights, 'Fundamental Rights at Europe's Southern Sea Borders' (Report, March 2013), 103 <http://fra.europa.eu/en/publication/2013/fundamental-rights-europes-southern-sea-borders> archived at <https://perma.cc/9Y6G-XVQY>.

108 Greek Council for Refugees, 'Country Report: Greece (2016 Update)' (Report, Asylum Information Database, 28 March 2017) 14 <http://www.asylumineurope.org/sites/default/files/report-download/aida_gr_2016update.pdf> archived at <https://perma.cc/VB2G-UQEW>.

its ruling of 22 September 2017 declared the fast track border procedure in line with national and EU legislation and validated a decision of the appeals committee in this case to declare Turkey a safe third country.[109]

More generally, whether Turkey can be considered a safe third country depends on the facts on the ground. It is difficult to make any general pronouncements, although several NGOs indicate Turkey is not a safe third country.[110] It may be the case that Turkey can be deemed a safe country for some asylum seekers but not for others, but this has to be assessed on a case by case basis. In this regard, it is important to note that the ECtHR has communicated a case concerning the asylum procedure in Greece and the definition of Turkey as a safe third country.[111] The case has been prioritised by the ECtHR and might shed light on the question of whether Turkey can be considered a safe third country or not. If Turkey is deemed not to be a safe third country, returning asylum seekers from Greece to Turkey would amount to a violation of the prohibition of refoulement. As returned asylum seekers were on Greek territory, no issues of jurisdiction arise, as Greece exercises jurisdiction over its territory.

C *Financial Support to Turkey*

As mentioned above, the EU–Turkey deal also includes financial support for services to refugees in Turkey. The Facility for Refugees in Turkey's total budget amounts to €3 billion, consisting of €1 billion from the EU budget and €2 billion from the member states.[112] The full Facility budget of €3 billion was committed and contracted through 72 projects by the end of 2017.[113] The idea behind the financial injection is to make the Turkish asylum system comply with the requirements of the *Refugee Convention*. At the same time, financially supporting and training Turkish border guards fits the EU's member states' and the EU's agenda to protect the EU border.[114]

Moreno-Lax and Mariagiulia Giuffré note that since 2016 the EU's policy and practice 'aims to eliminate any physical contact, direct or indirect, between refugees and the authorities of would-be destination States' by transferring

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109 *Joint Decisions 2347/2017 and 2348/2017* (Greek Council of State, 22 September 2017).

110 On returns from Greece under the EU–Turkey Statement, see Fred Abrahams, *Dispatches: EU Deportations Resume, Troubles Abound* (27 April 2016) Human Rights Watch <https://www.hrw.org/news/2016/04/27/dispatches-eu-deportations-resume-troubles-abound> archived at <https://perma.cc/7U7X-GS7K>. On the illegality of returning refugees to Turkey, see Amnesty International, *Turkey: Illegal Mass Returns of Syrian Refugees Expose Fatal Flaws in EU–Turkey Deal* (1 April 2016) <https://www.amnesty.org/en/latest/news/2016/04/turkey-illegal-mass-returns-of-syrian-refugees-expose-fatal-flaws-in-eu-turkey-deal/> archived at <https://perma.cc/AZ4Z-HF9M>.

111 *JB v Greece (Written submission on behalf of the interveners)* (European Court of Human Rights, First Section, Application No 54796/16, 18 May 2017).

112 *Annual Report on the Facility for Refugees in Turkey*, above n 103.

113 European Commission, 'Communication from the Commission to the European Parliament, the European Council and the Council: Second Annual Report on the Facility for Refugees in Turkey', (Communication COM (2018) 91, 14 March 2018), 7.

114 See, eg, 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' (Press Release, 43/17, 3 February 2017) <http://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/> archived at <https://perma.cc/29H4-8V99> ('*Malta Declaration*').

migration management to third countries such as Turkey and Libya.[115] Such forms of 'contactless control' present new challenges in terms of compliance with international human rights standards and determining responsibility.[116] There is a general consensus that giving material aid (eg equipment, financial support or training) to third countries does not qualify as exercising jurisdiction.[117] Indeed, it cannot be said to qualify as de jure nor de facto control, as the involvement of the EU member state is too tenuous. Likewise, the requirements for the exercise of public powers are not met, since any violation of the prohibition of refoulement would be attributable to Turkey rather than the EU member state, as the involvement of the EU member state is limited to financing.

However, the level of leverage exercised by EU member states over the use of the money (rather than only giving the money) is critical in establishing whether they can be said to exercise jurisdiction. It must be high enough to amount to de jure and/or de facto control or meet the requirements for the exercise of public powers identified in Part IV. If the level of leverage increases, for instance, when funding of facilities is made dependent on the implementation of a border management policy, as is the case in the EU–Turkey deal, it cannot be excluded that the influence of the EU member states is such that it amounts to the exercise of de facto control. In the words of Den Heijer, the existence of a 'jurisdictional link' will

> depend on the relationship of the state to a particular set of circumstances involving the individual's circumstances being of such a special nature that the state can be considered to fall under a duty to use its influence, knowledge, or other resources at its disposal to prevent the manifestation of human rights violations, provided that the state is indeed legally and factually capable of doing so.[118]

Thus, Moreno-Lax and Giuffré argue that the funding, training and equipment provided by EU member states to Turkey under the EU–Turkey Statement, which is 'explicitly conditioned on [Turkey] "managing" migratory flows and impeding exit for transit towards Europe, can be said to constitute a form of "decisive influence"', which in turn constitutes 'a form of indirect but nonetheless effective control that amounts to "jurisdiction" under Article 1 ECHR'.[119] Furthermore, in cases where the level of leverage is insufficient to trigger jurisdiction, it must be remembered that EU member state responsibility could also arise on the basis of art 16 of the *ARSIWA*. The provision of maritime patrol vessels or border control equipment, the secondment of border officials, the sharing of relevant intelligence and the direct funding of migration control efforts that assist another country to breach its non-refoulement or other protection obligations can be considered to fall within the ambit of aiding or

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115 Violeta Moreno-Lax and Mariagiulia Giuffré, 'The Raise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' in Satvinder Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar, forthcoming) 4.

116 Ibid.

117 See, eg, Gammeltoft-Hansen and Hathaway, above n 54, 276–7.

118 Den Heijer, *Europe and Extraterritorial Asylum*, above n 22, 283.

119 Moreno-Lax and Giuffré, above n 115, 23–4.

assisting.[120] Moreno-Lax and Giuffré thus argue that the requirements of arts 16(a) and (b) of the *ARSIWA* can be said to be met as regards the support provided by EU member states to Turkey.[121]

Accordingly, although it seems difficult to argue that by providing financial support to Turkey EU member states exercise jurisdiction, it cannot be entirely excluded, provided the level of leverage is high enough to trigger jurisdiction. In addition, the provision of financial support can trigger state responsibility for aiding or assisting Turkey. It must be noted in that regard that financing the development of the capacities of the Turkish coast guard for search and rescue operations is particularly problematic, as it involves a direct risk of refoulement. Financing the improvement of reception conditions in Turkey, on the other hand, is not problematic in terms of non-refoulement. However, if the financial contributions are used to commit human rights violations or otherwise take place despite reports of human rights violations in reception centres, the responsibility of EU member states could be triggered for such violations.

On a general note, the view that the role of donor exempts EU member states from human rights obligations does not sit easily with the EU's self-proclaimed status of a human rights polity, particularly if it is kept in mind that the aim of capacity building in third countries is to embank migration flows to Europe. Article 2 of the *Treaty on European Union* provides that the EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.[122] Scholars across the disciplines have characterised external support activities as the export and transshipment of responsibilities that contradict the EU's commitment, laid down in the *Treaty of Lisbon*,[123] to protect human rights.[124]

D *Other Relevant Issues*

1 *Pushbacks*

Stopping migration flows is the main purpose of an agreement such as the EU–Turkey Statement.[125] In the theoretical analysis in Parts II and III we have explained that a state can be held accountable for containing persons in the

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120 Gammeltoft-Hansen and Hathaway, above n 54, 279.

121 Moreno-Lax and Giuffré, above n 115, 21.

122 *2016 Consolidated Version of the Treaty on European Union*, opened for signature 7 February 1992, [2016] OJ C 202/13 (entered into force 1 November 1993) art 2.

123 *2016 Consolidated Version of the Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community*, signed 13 December 2007, [2016] OJ C 202/01 (entered into force 1 December 2009).

124 See, eg, Sarah Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' (2009) 20 *European Journal of International Law* 1223; William Walters, 'Imagined Migration World: The European Union's Anti-Illegal Immigration Discourse' in Martin Geiger and Antoine Pécoud (eds), *The Politics of International Migration Management* (Palgrave McMillan, 2010) 73; Mariagiulia Giuffré, 'State Responsibility beyond Borders: What Legal Basis for Italy's Push-backs to Libya?' (2012) 24 *International Journal of Refugee Law* 692.

125 See, eg, European Commission, 'EU–Turkey Statement: Two Years On' (Fact Sheet, 14 March 2018) <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180314_eu-turkey-two-years-on_en.pdf> archived at <https://perma.cc/UY3W-SV55>.

territory of a third country. This can occur in various ways. Pushbacks are one example and can be conducted with the active involvement of representatives of a third state. The HERA operations in the territorial waters of Mauritania and Senegal and in the Mediterranean Sea are concrete examples of such practices.[126] In such situations de facto jurisdiction can be triggered if an official of an EU member state is posted on a vessel that is responsible for stopping boats in a third country's territorial waters and disembarking takes place in a country in which the migrants' human rights are at risk. Furthermore, if based on an agreement with the third country the representatives of an EU member state act on behalf of the third state in surveilling the latter's borders, this can also trigger jurisdiction based on the exercise of public powers. Moreover, as noted in Part V, according to Gammeltoft-Hansen and Hathaway, the secondment of border officials comes within the ambit of aiding or assisting.[127]

2 *Exchanging Information*

Another issue that arises as regards the prohibition of refoulement when EU member states cooperate with third countries concerns the sharing of information. Thus, in the case of Turkey, a Frontex Liaison Officer started work on 1 April 2016 in Turkey 'to step up information sharing, joint analytical work and specific operations'.[128] Although it is unclear what the work of the Frontex Liaison Officer entails exactly, it is worth discussing the sharing of information between EU member states and third states more generally.[129] Indeed, it is relevant in situations where EU member states share information with third countries that leads to refoulement practices by the third country. With regards to the question whether the sharing of information amounts to the exercise of jurisdiction, it has been noted in Part IV that jurisdiction is established if the effect of border control measures is that migrants are prevented from reaching the borders of a state, but also that de facto control requires a minimum level of physical constraint. Accordingly, it seems that information sharing does not amount to exercising jurisdiction, since it cannot be identified as de jure control or the exercise of public powers either. However, as for the case of pushbacks discussed above, it can be recalled that according to Gammeltoft-Hansen and Hathaway the sharing of relevant intelligence comes within the ambit of aiding or assisting.[130] Accordingly, it cannot be excluded that by sharing information with third countries, officials of EU member states are responsible for aiding or assisting that country in violating the prohibition of refoulement. Whether this is the case in practice depends on the particular circumstances of the case.

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126 Carling and Hernández-Carretero, 'Protecting Europe and Protecting Migrants? Strategies for Managing the Unauthorised Migration from Africa' (2011) 13 *British Journal of Politics and International Relations* 42.

127 Gammeltoft-Hansen and Hathaway, above n 54, 279.

128 European Commission, 'Communication from the Commission to the European Parliament, the European Council and the Council: First Report on the Progress Made in the Implementation of the EU–Turkey Statement' (Communication COM(2016) 231, 21 April 2016) 4.

129 To what extent the conduct of the Frontex Liaison Officer is attributable to Frontex as well as the member state of which he is a national is subject to debate. This article only addresses the responsibility of the member state.

130 Gammeltoft-Hansen and Hathaway, above n 54, 279.

VII CONCLUSION

This article aimed to explain under what circumstances remote border control triggers the obligation of states to protect persons from refoulement. In particular, it examined when a state exercises jurisdiction and when it incurs responsibility for aiding and assisting another state and applied these theoretical insights to various cooperation measures between EU member states and Turkey. The article has thus identified three triggers of jurisdiction that are based on extraterritorial human rights obligations, namely, de jure control, de facto control and the exercise of public powers. With regards to the responsibility for aiding or assisting another state to breach the prohibition of refoulement, there is a lack of clarity as to whether states incur responsibility, and states use this lack of clarity by cooperating with third countries such as Turkey in order to prevent migrants from reaching their territories without incurring responsibility for breaching the prohibition of refoulement.

These developments show the adaptability of international law, especially international human rights law, and the law of state responsibility to the creativity of states in migration control. However, given the current situation in which the EU intensifies its cooperation with countries such as Libya and Niger, the creativity of the EU and EU member states seems to exceed the adaptability of international law.[131] In those situations in which the EU or EU member states financially support third countries or train or advise local authorities, the safety net function of jurisdiction seems to fail. The only option left to hold EU member states accountable is state responsibility based on aiding and assisting. An extensive reading of art 16 of the *ARSIWA* could include responsibility for human rights violations in third countries as a consequence of, or in the context of, financial support or training activities. Judicial bodies will need to clarify the boundaries of state responsibility in that regard. Current developments in the field of migration control will provide these bodies with ample opportunities to do so in the near future.

131 *Malta Declaration*, above n 114; *Enhanced Cooperation*, above n 98.