1 Introduction

1.1 The questions of extraterritoriality

1.1.1 Encountering the state

When does a refugee encounter the state? The straightforward answer to this question would be: when arriving at the border and surrendering him- or herself to the authorities, uttering the magic word, 'asylum'. Reality, however, seldom fits this picture. First of all, a substantial number of asylum-seekers only make their claim some time after actually entering the country of prospective asylum. Second, and more importantly, the last decades have seen a number of policy developments to extend migration control well beyond the borders of the state.

A person seeking asylum in, for example, Europe or the United States may thus encounter the authorities of these countries before even departing. It could be at the consulate when attempting to obtain a visa, at the airport of key departure or transit countries where immigration officers are deployed to advise airlines and foreign authorities on whom to allow onwards passage. It could be during an attempt to cross the Mediterranean or the Caribbean seas or any one of the many other places where ships, aircraft and radar systems operate to intercept even the smallest vessel before it can reach the territorial waters of the prospective destination state.

Alternatively, the refugee may not encounter the state *in persona*, but rather through delegation. Under bilateral and European Union (EU) agreements, Libya and Morocco, for example, are expected to carry out exit border control in co-operation with EU member states. Or the controlling authority may take the form of a private company. Most asylum countries today impose heavy fines on airline carriers for allowing passengers to board without proper documentation and visas, effectively

making these companies responsible for carrying out rigorous migration control functions.

The above initiatives are the concrete expressions of the general trend in many states to extend the reach of migration control to destinations outside its territory and to employ agents other than the state's own authorities. Since the first comprehensive framework for a common European asylum and immigration policy was laid down at the EU summit in Tampere in 1999, co-operation with third countries in this area has been given top priority, and in 2005 a full strategy for the 'external dimension' of EU asylum and migration policy was presented.[1] Several scholars have observed how this 'external dimension' is increasingly 'colonising' the foreign policy agenda of many traditional asylum countries.[2] Similarly, the taking on of tasks in relation to asylum and immigration by private companies is becoming a fast-growing industry. Immigration detention centres are increasingly run by private companies; contracts have been awarded to, for example, Boeing to install surveillance systems along the United States–Mexican border; and private security companies are today operating several checkpoints along the border between Israel and the West Bank.

As political phenomena, the trend towards extraterritorialisation and the involvement of private actors may both be thought of as part of a globalisation process whereby migration control is simultaneously 'offshored' and 'outsourced'. These two processes constitute some of the most striking features in the development of migration policies of both developed and less developed countries. Migration control has traditionally focused strictly on the border as the natural sovereign delineation and on the official border guard as a natural expression of state authority. While private

[1] European Council, Presidency Conclusions of the Tampere European Council, SI (1999) 800, 16 October 1999; Council of the European Union, A Strategy for the External Dimension of JHA: Global Freedom, Security and Justice, 14366/1/05 JAI 417 RELEX 628, 24 November 2005.

[2] C. Rodier, 'Analysis of the external dimension of the EU's asylum and immigration policies', European Parliament, Directorate-General for External Policies of the Union Directorate B – Policy Department (2006); S. Lavenex, 'Shifting up and out: the foreign policy of European immigration control', (2006) 29 *West European Politics* 329–50; T. Gammeltoft-Hansen, 'Outsourcing migration management: EU, power, and the external dimension of asylum and immigration policy', DIIS Working Paper no. 2006/1, Danish Institute for International Studies (2006); C. Boswell, 'The "external dimension" of EU immigration and asylum policy', (2003) 79 *International Affairs* 619–38; V. Guiraudon, 'Before the EU border: remote control of the "huddled masses"', in K. Groenendijk, E. Guild and P. Minderhoud (eds.), *In Search of Europe's Borders* (The Hague: Kluwer Law International, 2002), pp. 191–214.

border guards and overseas immigration officers have far from replaced traditional border control, one thing seems safe to conclude: today, the classical dictum that a state's executive power is to be exercised by its own officials and confined within the scope of its territorial borders[3] can no longer be asserted with the same rigour.

1.1.2 The questions raised in this volume

For any refugee lawyer, the most pertinent question arising from the developments sketched above is the extent to which international refugee and human rights law gives rise to state responsibility when migration control is carried out extraterritorially and/or by private actors. The question is important for several reasons. Both scholars and refugee advocates have repeatedly argued that, for example, the interception of boat refugees or the rejection of asylum-seekers by airlines is fundamentally in violation of both the 1951 Convention Relating to the Status of Refugees (Refugee Convention) and general human rights law instruments. The concern is that privatisation and extraterritorialisation are used as a pretext for effectively circumventing basic human rights obligations, either because these are not applicable extraterritorially or when private actors carry out controls, or because these rights are simply not realised. Second, it has been argued that the 1951 Refugee Convention is inadequate in guaranteeing the rights of refugees beyond the territorial boundaries of states. The majority of rights are based on the premise that the refugee is present within the territory or at least at the border of the obliged state. The move towards privatisation and extraterritorial migration control may thus make redundant a number of treaty provisions, thereby undermining the ability of the present framework to guarantee refugee protection effectively.

From these considerations alone it becomes clear that any comprehensive answer to the above is premised on at least three different sub-questions. The first of these relates to the applicability *ratione loci* of international refugee law: to what extent does international refugee and human rights law apply to situations where states exercise migration control outside their territory? Several commentators have expressed concern that extraterritorial migration control appears to take place 'beyond

[3] *Case of the S.S. Lotus*, PCIJ, Ser. A, No. 10 (1927), 4, at 18. See also H. J. Morgenthau, 'The problem of sovereignty reconsidered', (1948) 48 *Columbia Law Review* 341–65, at 344.

the rule of law', in a 'rights vacuum' or 'legal black hole'.[4] A number of states seem to suggest that somehow international human rights and refugee law do not apply, or apply differently, when states act outside, as opposed to within, their territory. This is not peculiar to refugee law but finds parallels in a number of issues, ranging from offshore detention of prisoners to international tax havens.[5] As such, it begs both a specific examination of the geographical reach of core refugee obligations and a general analysis of the exact limits for state jurisdiction. In other words, is there such a thing as extraterritorial legal responsibility in cases of offshore migration control and, if so, how far does it extend?

The second question concerns the vertical application of international refugee law when states delegate authority to private actors: under what circumstances does migration control carried out by private actors give rise to state responsibility under refugee and human rights law? The outsourcing of control functions to airlines or other private actors has raised concerns that protection obligations are being undermined.[6] Carrier sanctions are generally operated regardless of protection concerns, and asylum-seekers are particularly likely to be rejected since they often lack proper documentation.[7] Concerns have further been raised that the use of private contractors to carry out border controls or operate immigration detention centres creates an accountability gap, where the 'corporate veil' blurs public oversight and states all too easily rid themselves of legal obligations otherwise owed.[8] Where privatised migration controls

[4] B. Vandvik, 'Extraterritorial border controls and responsibility: a view from ECRE', (2008) *Amsterdam Law Forum* 27–36, at 28; R. Wilde, 'Legal "black hole"? Extraterritorial state action and international treaty law on civil and political rights', (2005) 26 *Michigan Journal of International Law* 739–806.

[5] J. Steyn, 'Guantánamo Bay: the legal black hole', (2004) 53 *International and Comparative Law Quarterly* 1–15; R. Palan, *The Offshore World: Sovereign Markets, Virtual Places and Nomad Millionaires* (Ithaca: Cornell University Press, 2003).

[6] Amnesty International, 'No flights to safety: carrier sanctions: airline employees and the rights of refugees', ACT 34/21/97, November 1997; UNHCR, Position on Conventions Recently Concluded in Europe (Dublin and Schengen Conventions), Geneva, 16 August 1991; Council of Europe Parliamentary Assembly, Recommendation 1163 (1991) on the Arrival of Asylum-Seekers at European Airports.

[7] F. Nicholson, 'Implementation of the Immigration (Carriers' Liability) Act 1987: privatising immigration functions at the expense of international obligations', (1997) 46 *International and Comparative Law Quarterly* 586–634, at 598; E. Feller, 'Carrier sanctions and international law', (1989) 1 *International Journal of Refugee Law* 48–66.

[8] P. R. Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do About It* (Cambridge University Press, 2007); J. Vedsted-Hansen, 'Privatiseret Retshåndhævelse og Kontrol', in L. Adrian (ed.), *Ret og Privatisering* (Copenhagen: Gad Jura, 1995), pp. 159–79.

simultaneously operate extraterritorially these problems are only likely to be exacerbated. As is known from the parallel debate on the use of private military companies (PMCs), impunity of both private contractors and the outsourcing states is a recurrent problem.[9] The privatisation of migration control thus equally raises more general questions of international law: when and under what circumstances does private conduct give rise to state responsibility under international refugee and human rights law, and to what extent are these obligations affected by the *locus* of migration control and concomitant extraterritorialisation?

Last, but not least, it is crucial to look beyond the strictly legal analysis and ask how the actual realisation of rights under international refugee and human rights law is affected by the extraterritorialisation and privatisation of migration control. Access to legal aid, counselling and national complaint mechanisms may be severely impaired for a refugee who never sets foot on European soil. Several commentators have argued that moving migration control away from the territory or delegating it to private actors may entail an 'out of sight, out of mind' effect vis-à-vis constituencies and national monitoring mechanisms.[10] Many of the institutional mechanisms that normally ensure the realisation of human rights and the rule of law are essentially territorially limited. Similarly, the conceptual distinction between public and private that continues to permeate national and international law means that many of the ordinary accountability mechanisms do not operate effectively when otherwise governmental functions are delegated to private actors. Beyond questions of the extraterritorial applicability of refugee law and attribution of private conduct there is also, therefore, a concern that protection entitlements are simply not realised as the activities take place further away from the state and its territory, where little oversight is provided and access to the ordinary institutions guiding an asylum claim or human rights procedure is lacking.

[9] P. W. Singer, 'War, profits, and the vacuum of law: privatized military firms and international law', (2004) 42 *Columbia Journal of Transnational Law* 521–49.

[10] T. Gammeltoft-Hansen, 'The refugee, the sovereign and the sea: EU interdiction policies in the Mediterranean', in R. Adler-Nissen and T. Gammeltoft-Hansen (eds.), *Sovereignty Games: Instrumentalising Sovereignty in Europe and Beyond* (New York: Palgrave Macmillan, 2008) pp. 171–96; S. H. Legomsky, 'The USA and the Caribbean interdiction programme', (2006) 18 *International Journal of Refugee Law* 677–96, at 679; V. Guiraudon, 'Enlisting third parties in border control: a comparative study of its causes and consequences', paper presented at a workshop on 'Managing International and Inter-Agency Co-operation at the Border', Geneva Centre for the Democratic Control of Armed Forces, 13–15 March 2003.

1.1.3 Understanding the globalisation of migration control

Beyond the more legal questions set out above, the present volume also hopes to contribute indirectly to the more general understanding of the globalisation of migration control as a political phenomenon.

A growing number of scholars from a variety of disciplines are starting to engage with this question and, as one might expect, rather different frameworks have been presented to answer it. From an economic perspective, policies for offshore migration control and refugee protection have been argued to provide more cost-effective solutions. A number of scholars emphasise that the 'externalisation'[11] or 'externalities'[12] of asylum and immigration policy represent a natural response to more complex and diverse migration flows, a complexity which has made it important to extend control over the entire length of the journey[13] and to develop more preventive strategies focusing on the 'root causes' of migration.[14] Others argue that the 'colonisation' of the foreign policy agenda by hitherto domestic issues is a reflection of the growing politicisation of asylum and immigration issues. As domestic solutions are complicated by policy dilemmas and are difficult to realise, the venue for political action shifts outwards to avoid the constraints of domestic policy-making.[15] In particular, immigration is increasingly viewed as an 'internal security

[11] Rodier, 'Analysis'; A. Betts, 'International co-operation between north and south to enhance refugee protection in regions of origin', RSC Working Paper No. 25, Refugee Studies Centre, Oxford, 2005; S. Sterkx, 'Curtailing the comprehensive approach: governance export in EU asylum and migration policy', paper presented at ECPR Joint Sessions of Workshops, Uppsala, 13–18 April 2004; I. Kruse, 'Creating Europe outside Europe: externalities of the EU migration regime', paper presented at ECPR conference, 'Theories of Europeanisation', Marburg, 18–21 September 2003.

[12] S. Lavenex and E. M. Ucarer (eds.), *Migration and the Externalities of European Integration* (Lanham: Lexington Books, 2002).

[13] S. Lavenex and E. M. Ucarer, 'The external dimension of Europeanization: the case of immigration policies', (2004) 39 *Cooperation and Conflict* 417–445; Boswell, '"External dimension"'; D. Bigo, 'When two become one: internal and external securitisations in Europe', in M. Kelstrup and M. C. Williams (eds.), *International Relations and the Politics of European Integration: Power, Security and Community* (London: Routledge, 2000), pp. 171–205.

[14] S. Turner, J. Munive and N. N. Sørensen, 'European attitudes and policies towards the migration/development nexus', in N. N. Sørensen (ed.), *Mediterranean Transit Migration* (Copenhagen: Danish Institute for International Studies, 2006), pp. 67–100.

[15] Lavenex and Ucarer, 'External dimension'; V. Guiraudon, 'The constitution of a European immigration policy domain: a political sociology approach', (2003) 10 *Journal of European Public Policy* 263–82; J. v. d. Klaauw, 'European asylum policy and the global protection regime: challenges for UNHCR', in Lavenex and Ucarer, *Migration and the Externalities of European Integration*, pp. 33–54; F. Pastore, 'Aeneas' route – Euro-Mediterranean relations and international migration', in ibid., pp. 105–123.

threat', albeit one that necessitates an international response in order to be effective.[16]

Equally, the involvement of private actors in migration control may be seen as part of a much larger trend to privatise tasks hitherto exclusively carried out by the state. Thus private migration control has been argued to be cost-saving through shifting the costs of control to, for example, carriers and creating competition among several bidding contractors.[17] Privately operated migration controls have also been seen as a response to the inability of national authorities to achieve effective control. By requiring airlines to carry out document checks an additional layer of control is installed at the crucial point of departure, when airlines have unique access to inbound passengers and their data.[18] Lastly, the privatisation of migration control has even been claimed to result in increased accountability as a competition parameter, and the use of privately contracted border guards to achieve a 'civilising' effect by presenting a more friendly face than that presented at borders operated by national border authorities or military personnel.[19]

The present volume, however, starts from the hypothesis that at least part of the explanation for the current drive towards offshore and privatised migration control should be found in the answers to the questions regarding the relationship between these policies and international legal structures. It is suggested that extraterritorial controls and the involvement of private actors are becoming increasingly fashionable largely because states believe that by delegating authority and moving beyond

[16] R. Furuseth, 'Creating security through immigration control: an analysis of European immigration discourse and the development towards a common EU asylum and immigration policy', NUPI Report 274, Norsk Utenrikspolitisk Institutt (2003); C. Rudolph, 'Globalization and security: migration and the evolving conceptions of security in statecraft and scholarship', (2003) 13 *Security Studies* 1–32; Guiraudon, 'Before the EU border'; D. Bigo, 'Security and immigration: towards a critique of the governmentality of unease', (2002) 27 *Alternatives* 63–92; Bigo, 'When two become one'; J. Huysmans, 'The European Union and the securitization of migration', (2000) 38 *Journal of Common Market Studies* 751–777.

[17] S. Scholten and P. Minderhoud, 'Regulating immigration control: carrier sanctions in the Netherlands', (2008) 10 *European Journal of Migration and Law* 123–147; Verkuil, *Outsourcing Sovereignty*.

[18] G. Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (The Hague: Martinus Nijhoff, 2000), p. 108; Vedsted-Hansen, 'Privatiseret Retshåndhævelse', p. 160.

[19] L. Dickinson, 'Contract as a tool for regulating PMCs', in S. Chesterman and C. Lehnart (eds.), *From Mercenaries to Markets* (Oxford University Press, 2007), pp. 217–38, at p. 230; C. H. Logan, *Private Prisons: Cons and Pros* (Oxford University Press, 1990).

their territory they are able to release themselves – de facto or de jure – from some of the constraints otherwise imposed by international law.

In that context, the legal analysis set out above becomes a stepping stone to asking more critically to what extent offshoring and outsourcing policies enable states to realise migration control unconstrained by refugee and human rights law. As will be seen, this is not a question that may simply be answered by 'either–or', but rather one that requires nuanced answers and one in relation to which a certain amount of interpretative disagreement persists in some areas. Yet it is only through a more thorough understanding of the limits of legal responsibility and the areas where such responsibility may at least be contested that it is possible to understand how states enact and position offshore and outsourced migration control. Why is it that European states have been so keen to negotiate access in order to move migration control from the high seas and into the territorial waters of African states? And why is it that several states emphasise that immigration officers posted to foreign airports maintain only an advisory role with regard to the controls carried out by airline staff?

Lastly, it is hoped that the present analysis might contribute to a better understanding of how extraterritorialisation and privatisation practices fundamentally operate at the intersection between law and politics in today's world. The apparent difficulties in bringing refugee and human rights law fully to bear in all situations of extraterritorial and/or privatised migration control point to a deeper conflict between the universal purpose and idea behind human rights law, on the one hand, and the codification of human rights law as part of general international law building on principles of national sovereignty, on the other. It is in the context of this tension that extraterritorialisation and privatisation become attractive strategies, as they create a disjuncture between the increasingly global and market-oriented modes of governance pursued by states and an international legal framework still largely vested in a conceptualisation of the state building on territorial delineations and the distinction between public and private. The result is what may be termed the increasing commercialisation of sovereignty, in which sovereign prerogatives, territory and functions are strategically traded and commodified among states and between governments and private actors, a development that ultimately either threatens severely to undermine the effectiveness of human rights law or demands that some of the most fundamental principles of international law and our politico-legal conception of the state be readjusted.

1.2 Structure

The nexus between the globalisation of migration control and international refugee law raises three interrelated legal issues around which the following chapters are structured. The first concerns the geographical applicability of core norms under the Refugee Convention. Chapter 3 examines the extraterritorial application of the *non-refoulement* principle as set out in Article 33 of the Refugee Convention, which has been a hotly debated issue ever since its inception. The chapter summarises and seeks to structure the different arguments to be made from the language of the text, and the object and purpose of the article and the drafting documents. It then goes on to examine subsequent interpretation as set out in soft law, state practice and other formulations of *non-refoulement* principles in general human rights and customary law.

The second issue concerns the wider applicability of human rights law to situations of extraterritorial migration control. Chapter 4 analyses the basis for establishing extraterritorial jurisdiction, which is a threshold criterion for both Article 33 of the Refugee Convention and the majority of general human rights instruments. The chapter looks first at the meaning of jurisdiction in general international law and human rights law respectively. It then goes on to examine whether and under what circumstances jurisdiction may be brought about by migration control exercised in three different geographic spheres: areas where authority is withdrawn or territory legally excised, migration control carried out in international waters, and migration control carried out within the territorial jurisdiction of another state.

The third part of the legal analysis concerns the attribution of private conduct, and thus state responsibility, in cases where private actors exercise migration control or other forms of authority vis-à-vis asylum-seekers and refugees. Chapter 5 starts out by recalling different practices as regards private involvement for the purpose of migration control and the protection concerns voiced over the use of, for example, carrier sanctions and private contractors. It then goes on to examine when and under what circumstances migration control carried out by private actors may give rise to direct state responsibility. To this end the International Law Commission's Articles on State Responsibility (ILC Articles) are employed as a guiding framework. In addition, it is argued that states also retain certain due diligence obligations under refugee and human rights law in respect of private actors exercising migration control.

Ensuring access to asylum, however, does not stop here. While the legal analysis is a necessary and crucial first step, the refugee subjected to offshore and outsourced migration control often finds him- or herself unable de facto to realise rights owed de jure. Chapter 6 thus sketches some of the more practical protection issues raised by extraterritorial and privatised migration control. As will be shown, offshoring and outsourcing tend to render the control practices themselves invisible and eclipse the ordinary human rights institutions and mechanisms aiding persons to launch an asylum claim and monitoring state behaviour.

Before all this, however, chapter 2 will attempt to establish a more general framework for understanding the relationship between international refugee law and state policies to control migration flows in a globalised world. It first locates the refugee as a traditional marker of state sovereignty and traces the current drive towards extraterritorial and privatised migration control. It is then argued that the current developments reflect a deeper tension between the universal claim of human rights and core norms pertaining to national sovereignty, linking human rights to the principle of territoriality and the public/private distinction. The result is the current bifurcation between the reach of refugee law and state practices to offshore and outsourced migration control.

Chapter 7 seeks to draw together the conclusions of the preceding analysis as well as to set out a few perspectives as regards the wider significance of these issues.