



Externalised and Privatised Procedures of EU Migration Control and Border Management

A Study of EU Member State Control and Legal Responsibility

Frank Mc Namara

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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European University Institute
Department of Law

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I confirm that chapter II Externalisation and Privatisation: The Procedures draws upon an earlier article I published: Mc Namara. F., Do good fences make good neighbours? This Century's Review (2014) Vol. 3.

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Thesis Summary

This research considers State control and legal responsibility for the violation of migrant's fundamental rights at the hands of privatised or externalised procedures of European Union (EU) Member State migration control and border management.

The assertion is made that a migrant's access to justice can be frustrated based on *who* (privatisation) it is that is implementing the procedure or because of *where* (externalisation) it is being implemented. Access to justice is frustrated by the failure of a court to overcome certain key preliminary issues which must be established before the merits of the case – the alleged rights violation – can be considered. These preliminary issues therefore represent *triggers* for greater consideration of State legal responsibility.

Privatisation's trigger is a court's potential application of a narrow reading of the State such that a private actor is deemed to be liable for rights violations arising out of the implementation of a procedure. This decision can be made even when the State holds a significant amount of control and authority over the implementation of the procedure in question. Externalisation's trigger is that a court may pursue a restrictive reading of extraterritorial jurisdiction such that the State is not interpreted as having engaged its jurisdiction and as a result that court will not consider the alleged violations and thus legal responsibility will not be established.

The State's exercise of 'compulsory powers', the use of physical force in the implementation of a migration control and border management procedure, has been relied upon as *the* indicator as to whether legal responsibility should be triggered for the State. This research argues that the exercise of compulsory powers is an arbitrary tool by which to decide legal responsibility and results in the neglect of other, more subtle indicators that State legal responsibility should be established.

In the absence of a silver bullet resolution to the challenges posed by the triggers of legal responsibility for both externalisation and privatisation, doctrinal solutions are proposed. These solutions enable the courts to provide easier access to justice for migrants and better reflect State legal responsibility for the State's exercise of control.

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Introduction – *Who and Where?*

A Scenario

In an airport in Pakistan, a British immigration officer examines the travel documents of a Pakistani woman who is attempting to board a plane bound for the UK. The officer advises the employees of the airline that that airline will be fined by the UK if they provide passage to the woman. That advice having been imparted, the officer leaves the final decision as to whether to board to the airline. The woman's intention is to travel to the UK to apply for asylum as she fears persecution in her native Pakistan. However, her passage is denied and she subsequently experiences persecution in Pakistan.

There are two details which make this scenario different from the orthodox perception of what migration control and border management entail. The first is that the implementation of a document check and the decision as to access to the UK takes place in an airport in Pakistan rather than being instigated at the '*traditional*' border check at the destination airport in the UK. Secondly, the crucial decision to facilitate access to the destination country is made by a private actor, albeit with significant input from UK public authorities. This simple narrative thus involves the private implementation of a migration control and border management procedure inside a third State¹ at the behest of an EU Member State. This particular account is fictional yet it is based on current EU law² and there is overwhelming anecdotal evidence that it is replicated in thousands of instances around the world every year. Privatised and externalised procedures are constantly diversifying, have grown increasingly sophisticated and are far from being limited to the specific procedures at work in the scenario taken here. There is perhaps no clearer expression of State power and sovereignty than the procedure of admitting or rejecting a

¹ Third State refers to a State which is not a EU Member State.

² Fines for carriage of an inadequately documented passenger are known as carrier sanctions and the immigration officer posted abroad is known as an Immigration Liaison Officer.

See: Council Directive 2001/51/EC of June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985.

And: Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network. Regulation (EU) No 493/2011 of the European Parliament and of the Council of 5 April 2011 amending Council Regulation (EC) No 377/2004 on the creation of an immigration liaison officers Network.

person at a State's borders but the type of privatisation and externalisation that is exemplified by this scenario challenges certain assumptions as to the implementation of migration control and border management by EU Member States.

Delimiting the Scope of this Research – The Triggers

The focus of this research, as the title suggests, is control exercised by EU Member States and State legal responsibility for that control in the context of externalised and privatised procedures. The reasons for certain decisions taken in this research is explored later in this introduction (section: Parameters of the Research) but it is important to delimit the scope of this research at the very beginning.

This research does not pretend to be an all-encompassing study of externalisation and privatisation. Instead it concentrates on *control* and the *triggering* of *legal responsibility* for rights violations arising out of the implementation of externalised and privatised procedures. As chapters III and IV will illustrate, control is all-important in the attribution of legal responsibility. Control's importance does not come in deciding whether or not to attribute responsibility to the State. The attribution of legal responsibility to the State, if it does come, only arrives with the courts' contemplation of the alleged rights violation. Rather, control-based tests dominate courts' approaches in deciding whether wider consideration of legal responsibility at the merits stage should be *triggered*.

These triggers of legal responsibility for both externalisation and privatisation are at the heart of this research. For externalisation, extraterritorial jurisdiction must be evaluated upon – did the State engage its extraterritorial jurisdiction? For privatisation, the constitution of the act itself must be assessed – should the State be made liable for the acts of a private actor? These are threshold questions which, as a preliminary issue, decide whether or not the State will have to answer in court for the actions which led to an alleged violation of human rights. These triggers therefore decide whether or not a migrant's fundamental rights will be vindicated by the court and thus whether legal responsibility is to be attributed to the State or not. The line from the State or private actor's action from which an allegation of a rights violation has arisen to the moment in which legal responsibility is attributed, hinges on the triggering of contemplation of such responsibility through control. This research is concerned with these crucial triggers.

This research sets out that certain privatised procedures and certain externalised procedures implicate State responsibility more easily simply because physical force (compulsory powers) is used.³ On this basis the research proposes alternative ways forward by which the courts may adjudicate more fairly and not need to rely on such an arbitrary and indefinite approach as waiting for the State to physically manifest itself in such an obvious manner. On this basis, it is posited that neither privatisation nor externalisation take a lead role in this thesis. These phenomena are considered collectively because to a great extent they represent the future direction of migration control and border management and because of the effect that those phenomena have on that most basic tenet of justice – that the exercise of control should entail responsibility for that control. Rather than attempting an all-encompassing and unwieldy thesis on all aspects of externalisation and privatisation, this research considers the nature and effect of State control in triggering legal responsibility for that control through these phenomena. This approach provides an insight into the initial challenges faced by lawyers in making the modern State ultimately responsible for any violation of rights arising out of its implementation of privatised and externalised procedures.

In Chapter II, this research takes several privatised and externalised procedures as examples of the kinds of migration control and border management which can cause uncertainty as to control such that questions arise as to whether legal responsibility can be *triggered* for the State. In total, this study examines four procedures of privatisation and two procedures of externalisation in Chapter II. The consideration of particular procedures serves to illustrate the typical make-up and implementation of externalised and privatised procedures. This examination is also undertaken in order to contextualise the presence and absence of compulsory powers for the analysis that follows in Chapters III, IV and V. The procedures themselves should *not* be taken as being the focus of this research. They serve as examples and reference points but do not drive the analysis. That drive comes from the consideration of relevant jurisprudence and its application to such externalised or privatised procedures in Chapters III and IV.

³ Compulsory powers are later defined in section 1.2.1 but for the sake of completeness here, they are the use of physical force in coercing a specific result.

The layout and structure of the research is laid out below in the final section of this introduction. Suffice to say at this point that the thesis may be approached by the reader as first setting out a conceptual framework (Introduction and Chapter I) for approaching privatisation and externalisation in migration control and border management. Second, the work sets out the afore-mentioned procedures on a descriptive basis (Chapter II). Third, and finally, the research undertakes an analysis on the basis of that conceptual framework and by continual use of the procedures as reference points (Chapters III and IV). This process culminates in the doctrinal solutions set out in Chapter V (Section 5.4). These solutions are ways forward by which the courts can rise to the challenges set out in the preceding analysis. These new tests represent clear proposals on a new path by which legal responsibility can be attributed to the State in a way which does not impose an undue burden on the State but which also offers migrants more meaningful access to justice than simply being dependent on arbitrary and unfair tests in seeking to vindicate their rights for an alleged violation.

Who and Where?

The questions of *who* and *where* have become increasingly crucial in migration control and border management. The questions are: *who* is it that implements a specific procedure of migration control and border management? And, *where* is it implemented? These questions have become decisive in the attribution of legal responsibility for a breach of a migrant's fundamental rights which occurs during the implementation of externalised and privatised procedures. Rather than skipping to the consideration of particular rights violations, these questions reflect the triggers of legal responsibility for each phenomenon.

The questions of *who* and *where* are crucial to privatisation and externalisation respectively. '*Privatisation*,' in this context, comprises any measure that delegates the implementation of a migration control or border management procedure to a private actor. '*Externalisation*' involves the implementation of a migration control and border management procedure beyond the EU's external border.⁴ The concurring judgment of

⁴ This definition thus excludes procedures aimed at the *de-territorialisation* of Member States in immigration no-mans land most notably in airport transit ones. These have been already considered in the ECtHR (*Amuur v France*, 1977/92) and the CJEU (C-170/96, *Commission of the European Communities v Council of the European Union* ('Airport Visas Case')).

Judge Pinto De Albuquerque in the maritime migrant interdiction case of *Hirsi*⁵ is worth quoting at this juncture:

*“Immigration and border control is a primary State function [sic] and all forms of this control result in the exercise of the State’s jurisdiction. Thus, all forms of immigration and border control of a State party to the European Convention on Human Rights are subject to the human rights standard established in it and the scrutiny of the Court, regardless of which personnel are used to perform the operations and the place where they take place.”*⁶

Judge Pinto de Albuquerque argues that migration control and border management remain State functions no matter *who* (*‘the personnel that are used to perform the operations’*) is involved in its implementation and *where* (*‘the place where those operations take place’*) that implementation occurs. This research seeks to examine this claim.

The judicial framework, upon which the EU rests, does *not* recognise migration control and border management as inherently being the legal responsibility of the State in the way Justice de Albuquerque envisages. Instead the national courts and the regional courts which consider fundamental rights, exercise disparate and complex approaches to attributing legal responsibility. For externalised procedures, the principle obstacle (and key trigger) in attributing legal responsibility for migration control and border management to the externalising State has been extraterritorial jurisdiction. Whether or not a State has engaged its extraterritorial jurisdiction is dependent upon the nature of the *control* that that State has exerted in the implementation of the externalised procedure in question. With privatised procedures, the principle impediment (and key trigger) in attributing legal responsibility for migration control and border management to the externalising State is that the private actor is instead seen as being liable for any wrong. The inability to attribute legal responsibility to the State for procedures which they continue, *de facto*, to control goes against the traditional public law assumption that State control entails State legal responsibility.⁷ That assumption is a long-standing norm of public law that has been used

⁵ *Hirsi Jamaa and Others v. Italy*, 27765/09, [GC].

⁶ *Hirsi Jamaa and Others v. Italy*, 27765/09, [GC]. Concurring Opinion of Justice de Albuquerque.

⁷ Lawson speaking in terms of control giving rise to extraterritorial jurisdiction, says: *“Personally I believe in the basic tenet ‘control entails responsibility.’”* Lawson, R., *Life after Bankovic: On the Extraterritorial*

(and misused) sometimes by public lawyers and oftentimes by lay people to the law, in trying to argue for State legal responsibility. This research examines this norm in the context of privatisation and externalisation.

Control and Legal Responsibility for that Control

The primary concern of Member States of the European Union (EU) in migration control and border management remains control. Being *'in control'* of migration control and border management procedures is held up as being demonstrative of a Member State's own ability to govern and as a manifestation of its sovereignty. As a result, any attempt to dilute the State's control in institutional or procedural terms is usually resisted. Entrusting implementation to a private actor and moving procedures to outside of the State's territory would appear at first glance to represent just such a dilution. However, a Member State can remain fixated with control of procedures while also pursuing externalisation and privatisation as governance strategies; it is not a contradiction. This is because these phenomena can serve to frustrate legal responsibility despite the State retaining considerable control in the implementation of a given procedure. Therefore, although these phenomena may, *prima facie*, appear to weaken State control, they, in fact, still provide the State with the ability to effectively govern the implementation of migration control and border management procedures. They do this while also obscuring the clear line of legal responsibility to the State.

Externalisation and privatisation can therefore represent a paradox within that core premise of public law – that control entails legal responsibility. This thesis argues that the judicial framework for the protection of fundamental rights in the EU has, for the most part, not adequately recognised and addressed this reality of externalisation and privatisation. Derivatives of that premise of public law can be identified in the context of both of the phenomena considered here. It is widely held that a State cannot do abroad that which it is obliged not to do at home.⁸ Similarly, it is commonly agreed that a State cannot

Application of the European Convention on Human Rights. Page 86. In Coomans. F., & Kamminga. MT., Extraterritorial Application of Human Rights Treaties (2004).

⁸ As Lawson puts it: It would be *"morally wrong and legally unsound if, in the field of human rights, States were allowed to do abroad what they have undertaken not to do at home."* Brouwer. E., Extraterritorial Migration Control and Human Rights: Preserving the Responsibility of the EU and its Member States. In Ryan. B., and Mitsilegas. V., Extraterritorial Immigration Control (2010). Page 217. Brouwer is quoting:

delegate tasks to a private actor which may include acts that it has undertaken not to do itself.⁹ Both of these norms can be frustrated in the implementation of externalised or privatised migration control and border management. The primary route by which to gauge legal responsibility for the control that a Member State exerts is to refer to the fundamental rights framework to which that Member State is obligated. If legal responsibility cannot be attributed to the State on the basis of the control exerted by the State then a migrant does not adequately gain access to justice such that their rights have fair opportunity to be vindicated by the court in question.¹⁰

This research examines Member State control as it is exerted through privatised or externalised procedures by considering the approach taken to those procedures by that Member State's domestic courts, the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). This research is focussed on consideration of EU Member State control over externalised or privatised procedures in the context of migration control and border management, and legal responsibility for that control. As will be considered, control is all-important in adjudicating on both externalisation and privatisation. Rather than being an examination of legal responsibility for the violation of a particular set of rights, this research concentrates on the crucial *triggers* of legal responsibility. For externalisation, the legal hurdle that triggers consideration of a State's legal responsibility is extraterritorial jurisdiction. All consideration of rights violations flow from the court having established that the State has engaged its extraterritorial jurisdiction. Similarly, courts will examine the legitimacy of public accountability for, *prima facie*, private actions that led to rights violations before it ever considers the

Lawson. R., *Life After Bankovic: On the Extraterritorial Application of Human Rights Treaties*, chapter in: Coomans. F., Kamminga. MT., *Extraterritorial Application of Human Rights Treaties* (2004). Page 97. See generally: Miller. S., *Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention* (2010) *The European Journal of International Law* Vol. 20(4).

⁹ For example: Harris. DJ., O'Boyle. M., Bates. EP., Buckley. CM., *Law of the European Convention on Human Rights* (2014). Page 907.

¹⁰ Similar concepts have been considered previously. See: Gammeltoft-Hansen. T., *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (2011). Page 222. See also: Gammeltoft-Hansen. T., *The Rise of the Private Border Guard Accountability and Responsibility in the Migration Control Industry*. Page 143. In Gammeltoft-Hansen. T., & Nyberg Sørensen. N., *The Migration Industry and the Commercialisation of International Migration* (2013). See also: Ryan. B., *Extraterritorial Immigration Control: What Role for Legal Guarantees?* Page 22. In Ryan. B., & Mitsilegas. V., Ryan. B., & Mitsilegas. V., *Extraterritorial Immigration Control* (2010).

violations themselves. These control triggers are a pre-requisite to that later attribution of legal responsibility. In establishing that the State maintains its ability to control, insofar as it is possible to do so, the first half of this research's framework is accomplished. More fundamental though is consideration of whether or not State legal responsibility for State control can be frustrated before it ever has the chance to be properly considered and that is the crucial second half of this research's framework.

The Research Questions

The research question posed is two-fold. Firstly, what is the *nature* and *effect* of any control that a Member State retains despite having delegated implementation of a procedure to a private actor or having relocated implementation of a procedure beyond the EU's external borders? Secondly, can legal responsibility be attached to the State on the basis of that retained control?

The first question addresses control. The *nature* of the State's control refers to the way in which the State ensures implementation of a procedure in line with its own preferences. The *effect* of the State's control links control to the theme of the second research question – legal responsibility. The *nature* of control decides its *effect* and so the method by which the State controls impacts upon whether legal responsibility will arise for that State. Each phenomenon poses a different set of obstacles for a migrant seeking to vindicate a human right having experienced a violation of that right. These obstacles facilitate the frustration of legal responsibility. It is a starting position of this thesis that the exercise of control by a State, as control has been defined in this work, should engage the legal responsibility of that State.

It is impossible to say with certainty whether or not the fact that a procedure has been externalised or privatised increases the frequency and intensity of fundamental rights violations. From the international waters in the Mediterranean *where* people on board unseaworthy vessels are interdicted by the Member States to the private escorts *who* escort irregular migrants onto commercial aeroplanes in order to return them to their country of origin, the fundamental rights risks are significant and ubiquitous. The 21st century has seen privatisation become an almost inherent part of the operation of globalised, western democracies. This research certainly does not set out any ideological stall against private

actor involvement in the work of public authorities. However, the starting position of this research in approaching privatisation is that keeping migration control and border management in the hands of the State achieves a key objective for any State seeking to uphold rights: It increases the legal transparency of those procedures which in turn can help to ease access to justice for aggrieved individuals. Similarly, this research does not automatically rail against the idea of externalising procedures which has by now become an intrinsic feature of Union migration control and border management. Nevertheless, this research does generally posit that externalised procedures must provide parallel rights guarantees rather than be implemented in a complete protection vacuum. While nodding toward these policy preferences in the implementation of externalisation and privatisation, this research is much more concerned with charting the effective judicial oversight of these phenomena.

Parameters of the Research

In addition to the section above which delimited the scope of this research, certain other parameters of the work are important to note.

Case-Study: UK

This examination of State control and legal responsibility is undertaken in the context of fundamental rights protection within EU Member States.¹¹ Consideration of all Member States, or even a large sample is rejected in favour of a more precise investigation of one Member State: the UK. The UK¹² has invested extensively in both externalisation and privatisation. The UK has been at the cutting edge of externalisation – from its vast use of Immigration Liaison Officers (ILOs) to, in the early 2000s, its campaigning for external processing. Similarly, the UK’s investment in privatisation has resulted in its migrant detention estate becoming part of *“Europe’s most privatised criminal justice system.”*¹³

¹¹ Brouwer. E., Extraterritorial Migration Control and Human Rights: Preserving the Responsibility of the EU and its Member States. In Ryan. B., & Mitsilegas . V., Extraterritorial Immigration Control (2010). Page 211.

¹² It should be noted that while reference is made to the UK, only the English and Welsh courts are considered.

¹³ Bacon. C., The Evolution of Immigration Detention in the UK: The Involvement of Private Prison Companies (2005) Working Paper No. 27, University of Oxford, Refugee Studies Centre. Page 13.

The UK will be an EU Member State for a limited time only. This research was undertaken at a time when any future in-out referendum for UK membership of the EU was a vague and uncertain prospect. The announcement of a referendum, the subsequent campaign and eventual result have not taken away from the choice of the UK as a case-study. Migration control and border management were subject to a particularly outspoken public discussion in the lead up to the so-called ‘Brexit’ referendum¹⁴ and are commonly regarded as being key spurs for a ‘Leave’ vote.¹⁵ Externalisation and privatisation have been invested upon as governance strategies most deeply in the Member State which is leaving the Union in large part due to a perceived loss of control of migration and borders. This dichotomy makes the UK the logical choice as a case-study.

The UK’s conservative government has also signalled its intent to repeal the Human Rights Act. In August 2016, Liz Truss, the then Justice Secretary, stated that it will be replaced by a UK Bill of Rights.¹⁶ Indeed, there have even been murmurings of its repeal in parallel to a withdrawal altogether from the ECHR but the latter has yet to be debated at a high level. Prime minister Theresa May has stated that she intends to derogate from the ECtHR in the event of Britain being involved in future conflicts in order to curb an “*industry of vexatious claims*” against soldiers.¹⁷ In any case, this research concentrates on the current *status quo* which necessarily includes full application of the Human Rights Act and the interaction between the UK judges and their counterparts in Strasbourg on the basis of that Act.

The UK’s ‘*splendid isolation*’ through its non-membership of Schengen, alongside its opt-outs from certain legislative initiatives of the Area of Freedom, Security and Justice, are worth noting but do not take away from its suitability as a case-study Member State. A Member State cannot evade engagement of the Charter for certain procedures by way of a simple opt-out from EU legislation. In particular, it should be noted that the UK did not

¹⁴ Also known as: The United Kingdom European Union Membership Referendum, 2016.

¹⁵ Mandelson, P., Why is the Brexit camp so obsessed with immigration? Because that’s all they have. The Guardian, 3rd of May 2016.

¹⁶ Wilkinson, M., Human Rights Act will be scrapped in favour of British Bill of Rights, Liz Truss pledges. The Telegraph, 22nd of August 2016.

¹⁷ Walker, P., & Bowcott, O., Plan for UK military to opt out of European convention on human rights. The Guardian, 4th of October 2016.

participate in the Frontex founding Regulation¹⁸ or any of its amending legislation¹⁹ including the '*Frontex at sea*' Regulation.²⁰ Neither is the UK a party to the European border and coast guard Regulation.²¹ The UK only has observer status on the Frontex Management Board but it has contributed to practical cooperation and has been involved in several joint operations.²² The UK is subject to the EU Charter of Fundamental Rights, despite Protocol 30²³ which the UK and Poland demanded in order to sign up to the Charter. Most commentators now agree that that protocol is a clarification rather than being an opt-out.²⁴ The UK remains subject to the direct effect of the Charter and thus subject to the CJEU where the CJEU finds that EU law applies.²⁵

¹⁸ Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. Articles 12, 20(5) and 23(4).

¹⁹ Amending legislation: Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers.

Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur).

²⁰ Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

²¹ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

²² Ryan, B., *The EU's Borders: Schengen, Frontex and the UK* (2016) Free Movement Blog. Available at: <https://www.freemovement.org.uk/brexit-and-borders-schengen-frontex-and-the-uk/>

²³ For UK domestic court stating that the Charter creates freestanding rights in immigration law, see: Abdul (section 55 - Article 24(3) Charter) [2016] UKUT 106 (IAC).

For commentary, see: Yeo, C., *EU Charter of Fundamental Rights creates freestanding rights in immigration law says tribunal* (2016) Free Movement Blog. Available at:

<https://www.freemovement.org.uk/eu-charter-of-fundamental-rights-creates-freestanding-rights-in-immigration-law-says-tribunal/>

For UK domestic case-law which openly states that Charter creates freestanding

²⁴ Cases that are interesting in this context:

UK courts: *Saeedi v SSHD* [2010] EWHC 705.

CJEU: C-411/10 and C-493/10 NS and ME, [GC].

²⁵ C-617/10, Åkerberg Fransson, [GC].

The Limited Influence of International Law Sources

The focus of this work being the triggers for legal responsibility rights violations arising out of the implementation of externalised and privatised procedures, itself serves to limit the relevancy of international law sources. While relevant public international law exists, it is of limited application to the vindication of rights by individuals which itself, in turn, is limited by the aforementioned triggers of legal responsibility. Instead, this research's analysis relies upon an in-depth examination of the relevant jurisprudence from domestic courts, the Court of Justice of the EU and the European Court of Human Rights. Only then can that analysis properly understand the extent to which legal responsibility can be frustrated by narrow judicial interpretations of the triggers of that responsibility.

At the same time, it would be remiss not to acknowledge the basic principles of State responsibility in public international law even if they are not directly applicable to the analysis that follows. Those principles do mirror the ultimate objective of this research in that they focus on setting out how and when States should be held responsible for violations of their international obligations, including international human rights law. These principles do not themselves set out obligations for States, they simply set out responsibility and remedies with regard to the already existing primary obligations of States. As such, they can in fact be researched and written about independently from consideration of the obligations themselves. In this way, the present research mirrors such a study as it concentrates on the initial trigger for responsibility rather than an in-depth consideration of whether the action itself did indeed violate the right in question, as alleged. The International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001) marked a turning point in moving State legal responsibility toward being more concrete and certain and less theoretical. The Draft Articles have already been cited by the International Court of Justice.²⁶ Amongst a wide range of other provisions, the Draft Articles established the circumstances under which the actions of officials and private actors may be attributed to the State.²⁷

²⁶ The Gabcikovo-Nagymaros Project (Hungary-Slovakia), International Court of Justice, Judgment of 25 September 1997, Page 35-36.

²⁷ Article 5 of the Articles on State Responsibility refers to the conduct of persons or entities exercising elements of governmental authority.

The focus in the present research is on the eventual individual vindication of rights in court. That focus naturally limits the scope of application for relevant international law sources. Thus, while it is important to acknowledge the basic principles of State responsibility, their application here is limited. Instead the examination of EU Member State legal responsibility in the context of externalisation and privatisation is made with reference to the judicial framework of protection for fundamental rights that is applicable to those States. That framework consists of the Member States' domestic courts (represented in this study by the UK's court system), the CJEU and the ECtHR. These "*...complex legal issues will ultimately be tested in the courts*"²⁸ and so, this research examines the applicable jurisprudence across the three judicial settings in order to understand the triggers for the attribution of legal responsibility for violations of rights that occur in the implementation of externalised or privatised procedures. The jurisprudence examined does not concentrate solely on the migration control and border management context but also analyses other fields in order to more fully understand the courts' actual and potential approaches to these triggers.

Certain commentators have approached the issues raised in this research, externalisation especially, through the prism of public international law.²⁹ Public international law is influential insofar as it has impacted upon the shaping of opinions within the aforementioned judicial framework. However, this research ultimately only extends to examining a migrant's access to justice in terms of the merits of that migrant's case being heard. At any rate, as an international organization and by virtue of its international legal personality,³⁰ the EU is bound by customary international law. As a matter of EU law, Articles 21 and 3(5) of the Treaty on the European Union ("TEU") stress the EU's commitment to strict observance of international law including customary

²⁸ Roberts. D., Deputy Director, Immigration Service, Home Office, UK. From contribution made at: Round Table on Carriers' Liability Related to Illegal Immigration (2001) Round Table on Carriers' Liability related to Illegal Immigration was jointly organized by the International Road Transport Union, the European Community Shipowners Association, the International Air Transport Association and the International Union of Railways in close cooperation with the European Commission. Available at: https://www.iru.org/apps/cms-filesystem-action?file=en_events_2001/Illegal2001.pdf

²⁹ For a more international perspective, see: den Heijer. M., Europe and Extraterritorial Asylum (2011).

³⁰ Article 47, Treaty on the European Union.

international law and international treaties to which it becomes a party. These commitments effectively turn these international obligations into EU law.³¹

There has been a considerable amount of judicial dialogue between the three judicial settings. One author has even argued that this is true to a degree – in the context of refugee law at least – whereby EU Member States are now moving toward being part of an “*intra-European space where internal borders are transformed to give way to a quasi-single jurisdiction for the treatment of refugees...*”³² It is crucially important that any such *ius commune* is capable of predictably and consistently vindicating the rights of migrants in general against the State whenever those migrants suffer a fundamental rights violation at the hands of a privatised or externalised migration control or border management procedure. That vindication depends upon the judicial framework being able to establish that consideration of State legal responsibility should be *triggered*. For externalisation this means consideration of the circumstances in which the State engages its extraterritorial jurisdiction and for privatisation it means consideration of the circumstances in which private action leads to public responsibility.

Motivation or Design – the limits of the Framework

Some commentators have argued that there exists “*...a strong incentive to seek other ways of carrying out frontier controls where State agencies are less immediately implicated in the problems which may arise.*”³³ Though it could be opined that externalisation and privatisation are governance strategies borne of such incentives, this research does not make any major assertions as to State motivation or strategy. Those arguments have already been made extensively by political scientists³⁴ and are almost impossible to prove definitively in law. The focus here is on examining the judicial framework’s approach to extraterritorial jurisdiction and the public/private divide and its application to migration

³¹ In *Kadi*, the CJEU restated that the Union must respect international law. See: C-402/05 and C-415/05 P and *Kadi*, [GC]. Paragraph 291. In ATAA, the Court stressed the EU’s obligation to adhere to international customary law, C-366/10, ATAA, [GC]. Paragraph 101.

³² Gil-Bazo. MT., *The Protection of Refugees under the Common European Asylum System. The Establishment of a European Jurisdiction for Asylum Purposes and Compliance with International Refugee and Human Rights Law* (2007) Cuadernos Europeos de Deusto, Vol. 36, 153. Page 157-8.

³³ Guild. E., *The Borders of the EU: Visas and Carrier Sanctions* (2004) Tidsskriftet Politick, Volume 7(3), 34. Page 45.

³⁴ Virginie Guiraudon, Gallya Lahav and Sandra Lavenex must be singled out for their contribution.

control and border management. That examination takes place irrespective of whether the frustration of legal responsibility, in spite of the exercise of significant State control, has arisen inadvertently or by design on the part of the State. This research thus considers the kind of control that the State exerts over privatised or externalised procedures and how legal responsibility may be attached to the State on the basis of that control for a violation of a migrant's rights in the implementation of such a procedure. The consequence is that this research's findings cannot be taken as an all-encompassing critique on the direction that EU migration law and policy has taken so much as contributing to the literature on the effects of privatising and externalising migration control and border management procedures. Any frustration of legal responsibility in spite of significant State control is certainly worth highlighting, yet it should not be taken as an overall assessment of the field.

Layout and Structure

Having made multiple references in this introduction to various crucial terms, such as '*control*' and '*legal responsibility*,' the first chapter³⁵ of this research seeks to draw together all of the key concepts and terms employed in this research. The first chapter also delves deeper into privatisation and externalisation.

Chapter II provides a descriptive account of a selection of the procedures that have been privatised or externalised. The priority here is not only to detail how the procedure works. The genesis of that procedure, any legislation which enforces its implementation and how it has been implemented in practice are also important considerations. The degree to which the procedure affords the State control of its implementation is *the* underlying interest. In practical terms however, it is not possible to state definitively whether the State retains control or not as control is defined in this work. Only the courts can conclusively state whether the State has exercised control or not.

Chapters III and IV may be considered a two-part set, one half of which examines externalisation (chapter III) and the other half scrutinises privatisation (Chapter IV). Both chapters are structured around the jurisprudence of the UK's domestic courts, the CJEU and the ECtHR. To provide a more coherent and engaging account of the case-law of each

³⁵ The word 'chapter' will be capitalised in this work only when it is referring to the title of the chapter, e.g. 'Chapter II'; 'the second chapter.'

court and their application of the Human Rights Act, the Charter and the Convention respectively, the sequence in which these courts are examined varies. In Chapter III (externalisation) the crucial consideration is extraterritorial jurisdiction. The inter-court dialogue between the UK domestic courts and the ECtHR recounts a difficult evolution for this key impediment to the vindication of a migrant's rights. It is the potential of the CJEU and the Charter to create change that is examined in this chapter, rather than any material effect that they have had as of yet. In the fourth chapter, the UK domestic courts' approach to a particularly crucial provision of the Human Rights Act for this research, is examined. The ECtHR's approach to private action is next examined. That approach gives rise to positive and negative obligations for the contracting State of the ECHR. The final section of that chapter considers the Luxembourg Court's attitude *vis-à-vis* Member State responsibility for private actions which is, again, a story of potential.

The fifth chapter of this research seeks to tie together the different strands through which the research question has been answered. It also seeks to critique the judicial approaches to both phenomena and to set out the practical and procedural hurdles faced by migrants in vindicating their rights. Finally, and most crucially, the chapter offers up certain doctrinal solutions which are capable of ensuring legal responsibility is tied more definitively to State control in a reliable and effective manner by the courts.

The final part of this research draws a conclusion to the preceding examination by further considering how legal responsibility is triggered, the viability of the doctrinal solutions suggested and the contribution this makes to the vindication of rights and the consequent attribution of legal responsibility to the State.

I. Control and Legal Responsibility for Externalised and Privatised Procedures

1.1 Introduction – Does Control entail Responsibility?

This chapter outlines the conceptual framework which is used in approaching the phenomena in question – privatisation and externalisation. The *key concepts* in the framework are State *control* and State *legal responsibility* for that control. What is control and how does the State exercise it? What is legal responsibility and when should it be attributed to a State? Understanding whether or not a State's legal responsibility will be substantively considered by a court depends upon the triggers of legal responsibility which in turn largely depend upon the nature and effect of the control exercised by the State. These triggers, as will be considered in Chapters III and IV, have been orientated around control-based tests. The eventual vindication of rights depends completely upon the court finding, as a preliminary matter, that the State has acted so as to trigger consideration of its legal responsibility.

Control, legal responsibility and a migrant's relationship with each of those concepts is the subject of the next section (1.2). The subsequent section (1.3) explores the phenomena of externalisation and privatisation themselves. Privatisation is approached in the traditional sense of that word but a distinction is made between those procedures which have been privatised through contract and those which are implemented by a private actor on a more informal basis (1.3.1). The section on externalisation distinguishes externalised procedures from other external procedures that do not involve an organ of the State directly operating in a third State or in international waters (1.3.2). The final section (1.4) of this chapter seeks to draw a conclusion by contextualising the conceptual framework for the chapters that follow.

1.2 Access to Justice – Control and Legal Responsibility

Access to justice may be defined as being “*the right of individuals to enforce their human rights vis-à-vis the Member States. This implies the right of access to legal remedies,*

*including the state's possible liability...*¹ Access to justice can be denied on multiple grounds and can be frustrated for a variety of reasons including procedural and practical issues.² The most serious obstacles to a substantive consideration of alleged rights violations come with preliminary matters (pre-merit issues) before the court. These preliminary considerations are whether extraterritorial jurisdiction³ (externalisation) is engaged and whether an action against the State is appropriate or even possible given the private nature of the offending procedure's implementation (privatisation). These obstacles can serve to *trigger* legal responsibility for the State but they can also deny the opportunity for a court to substantively consider the State's legal responsibility.⁴ Access to justice in the context of rights violations at the hands of externalised procedures is compromised by narrow judicial interpretations of extraterritorial jurisdiction. In privatisation, access to justice is constrained by a court's holding that only private liability is applicable for any alleged wrong and the State has no responsibility. The capacity of a migrant to overcome these hurdles is *the* crucial test in the present context of examining a migrant's access to justice for alleged rights violations arising out of the implementation of a privatised or an externalised procedure.

Control is an elusive concept and this research does not seek to set out a tipping point on a scale whereby State control can be said to exist. It is tempting to interpret control as being that point at which the courts' find that legal responsibility has been engaged. Control must instead remain a somewhat fluid and flexible concept which can be applied

¹ Brouwer. E., Extraterritorial Migration Control and Human Rights: Preserving the Responsibility of the EU and its Member States. Page 201. In Ryan. B., & Mitsilegas. V., Extraterritorial Immigration Control (2010).

² These practical issues will be considered in Chapter V (5.3.1).

³ For an alternative examination of the interplay between legal responsibility and jurisdiction, see: Brouwer. E., Extraterritorial Migration Control and Human Rights: Preserving the responsibility of the EU and its Member States. Page 199. In Ryan. B., & Mitsilegas. V., Extraterritorial Immigration Control (2010).

⁴ Rijpma and Cremona make a similar point: "*It is jurisdiction more than anything else that triggers a State's responsibility...*" See: Cremona. M., and Rijpma. J., The Extra-Territorialisation of EU Migration Policies and the Rule of Law (2007) Working Paper No.1, European University Institute. Page 17.

Cremona and Rijpma make reference to: Gil-Bazo. MT., The Practice of Mediterranean States in the context of the European Unions Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited. 18 International Journal of Refugee Law, 3-4 (2006), 593.
Also interesting in this context: Besson. S., The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to (2012) Leiden Journal of International Law Vol. 25(04), 857.

to increasingly complex and multi-faceted problems. The definition of control must reflect the fact that States exercise different levels of control and it is not a simple ‘yes’ or ‘no’ question of whether the State is in control. It is for this reason that consideration of control responds to the research question by considering the *nature* of control and its *effect*. Examining the nature of the control exerted allows for consideration of control on a scale in order to reflect the different levels and types of control afforded by externalised and privatised migration control and border management procedures. The migration control and border management procedures themselves are later examined (Chapter II) in order to better understand the kind of control that the State implements through these procedures. Jurisprudence from the courts will be used to gauge the *effect* of that control (Chapters III and IV). Legal responsibility, unlike control, can be answered with a ‘yes’ or ‘no’ although how that answer is reached can vary. For both externalised and privatised procedures, the frustration of legal responsibility is all-important. The national courts, the CJEU and the ECtHR must interpret where and how exactly the threshold of legal responsibility is engaged. Whether by design or by happenstance, the *nature* of control is sometimes such that the State is able to materially control the implementation of externalised and privatised procedures without engaging that threshold point. In such circumstances, the State does not have legal responsibility for any rights violations arising out of its control over the implementation of the offending procedure.

This section will first consider control (1.2.1) before turning to examine legal responsibility (1.2.2).

1.2.1 State Control – A Multi-Faceted Concept

Control is a legally ambiguous word and can mean different things in different circumstances. In this research’s case-study Member State, the UK, the ‘Leave’ argument for the Brexit referendum repeatedly made reference to ‘*taking back control*’ in the context of migration and borders. This reference to control was made in the general context of arguing that the UK executive must wrest back the ability to shape law and policy on immigration from the EU. This work considers control more in the context of implementation. Nevertheless, the ‘*Leavers*’ campaign shows what a multi-faceted and difficult concept control is. On the face of it, there lay an internal contradiction within

control with States desiring ‘*control*’ which is associated with the invocation of their sovereignty and ensuring internal security. At the same time, this desire for control drives States to invest in privatised and externalised procedures which, paradoxically, resembles a dilution of State control over implementation. However, in actual fact, externalisation and privatisation can still provide States with control but one may well ask, what type and level of control this is?

The title of this research makes reference to ‘*EU Member State Control*’ and to ‘*Legal Responsibility*.’ It does not use the term ‘*legal control*.’ Control in the present context can be defined as being the extent to which a Member State is capable of directing, steering and influencing the implementation of a migration control or border management procedure.⁵ Legal control, as has been laid down in the courts (to be considered in Chapter III and IV) struggles to reflect such an even-handed definition. This struggle reflects the courts’ hesitancy in over-burdening the State with the potential to be liable for all and every private act that gives rise to a rights violation or to attribute legal responsibility to the State for *any* involvement in the implementation of a procedure in a third State. That concern must be balanced with the fact that legal responsibility must be attributed to the State in a consistent and fair manner. The end result is that consideration of potential State legal responsibility for the violation of a right, arising out of the implementation of externalised or privatised procedures, often struggles to be triggered in the courts despite the State exercising control as it has been defined here. A gulf exists between control as it has been defined here and the legal control which does give rise to legal responsibility.

The State may exercise a substantial level of control without ever engaging any legal responsibility. Defining control more generally provides an important reference point to constantly guide the discussion. This is what the expectation of control is when control of migrants and borders are being discussed. The courts have no such reference point and

⁵ Busuioc, with reference to Roness, defines control similarly in the context of EU agencies: “*Control refers to a whole range of mechanisms employed by the controlling actor in order to direct, steer and influence decision making and behaviour of the controlled agents.*” See: Busuioc. M., *Accountability, Control and Independence: The Case of European Agencies* (2009) *European Law Journal*, Vol. 15, No. 5, 599. Page 605.

See also: Roness. P., et al, *Autonomy and Regulation of State Agencies: Reinforcement, Indifference or Compensation?* (Pisa, 6–8 September 2007), Paper Presented at the Fourth ECPR General Conference, 5.

the definition of control varies, not just in the context of migration control and border management but across fields in consideration of the triggers of consideration of legal responsibility – extraterritorial jurisdiction and the potential for public liability for the acts of private actors. The courts are limited in their ability to reflect the gradation of control. A court can only conclude positively or negatively as to whether a State controlled implementation. It can reflect the difficulty of gauging control of a particular situation through its judgment but its findings can only say ‘yes’ or ‘no’ as to whether the State held control and, under many judicial approaches, thus as to whether consideration of the State’s legal responsibility has been triggered.

The courts approach to control in externalisation and privatisation is oftentimes driven by consideration of the use of *compulsory powers* in the implementation of the procedure in question.⁶ Compulsory powers refer to the use of physical force in coercing a specific result.⁷ The test can be reduced to consideration of whether the implementation of the procedure incorporated a physical expression of power and authority such as arrest, detention or restraint. The exercise of such powers in the implementation of an externalised or privatised procedure is taken by the courts as being indicative that the State has control such that consideration of its legal responsibility should be triggered.

On the one hand there is *direct* control which involves the exercise of compulsory powers in the implementation of a procedure by an organ of the State (externalisation) or by an agent of the State (privatisation). On the other hand, *indirect* control does not incorporate the exercise of compulsory powers.⁸ Organs of the State may well be involved in the implementation of a migration control and border management procedure but crucially, they do *not* include the exercise of any physical force. *Indirect* control does not extend to the use of compulsory powers but it still affords the State control by relying on governance tools such as the design, coordination, oversight and decision making involved in the implementation of a procedure. Those externalised or privatised procedures which

⁶ Chapters III and IV.

⁷ The use of this term reflects its use in the courts of England and Wales in the context of responsibility for the actions of private actors.

⁸ For new, less obvious forms of control that are exercised by the State, see: Bloom. T., Risse. V., Examining hidden coercion at state borders: why carrier sanctions cannot be justified (2014) *Ethics & Global Politics* Vol. 7(2), 2014, 65.

do not incorporate compulsory powers may well not be interpreted as having engaged a State's legal responsibility.⁹ The type of control exercised by the State can sometimes mean that it has a very real control yet it will not be interpreted as triggering consideration of that State's legal responsibility.

Obviously this conceptualisation of control is quite fluid. Exceptions arise and sometimes direct control may be found by a court not to trigger consideration of the State's legal responsibility for the violation in question. On certain other occasion, indirect control may also be found by a court to have triggered such consideration. In any case, the definition of control set out above, which encompasses both categories of control, is designed with an understanding that control can be achieved through a broad sweep of different powers exercised by the State. Control, as will be discussed, is not the only basis by which State legal responsibility can be established, but it is the dominant method for both phenomena. The courts, in focussing on control to understand whether the State's legal responsibility should be considered, can take a narrow approach to what control can mean and focus too much upon the exercise of the direct form. Such an approach, therefore, focuses upon the exercise of compulsory powers and ignores other, more subtle, mechanisms which still afford the State actual control of the procedure in question.

A narrow approach to what constitutes State control is what distorts the public law expectation that legal responsibility should run in parallel to that control. A more open mind on what can constitute control would take into account the State's ability to control a procedure beyond merely considering the absence or presence of compulsory powers. Alternatively, the courts could dispense with attempting to use control-based tests to guide the trigger of legal responsibility. The *nature* of control is the means (direct or indirect) by which the State regulates implementation of a privatised or externalised procedure. Examining the nature of control will establish whether compulsory powers are present or not and the means by which the State controls implementation. The (legal) *effect* of control depends on the nature of that control. Both direct and indirect control can satisfy the

⁹ Moreno-Lax. V., *Seeking Asylum in Europe – Extraterritorial Border Controls and Refugee Rights under EU Law* (2012) PhD Thesis, Université Catholique de Louvain. Page 304.
See also: See: Klug. A., & Howe. T., *The Concept of State Jurisdiction and the Applicability of the Non-Refoulement Principle To Extraterritorial Interception Measures*. Page 94. In Ryan. B., and Mitsilegas. V., *Extraterritorial Immigration Control* (2010).

definition of control used in this work and can thus provide the State with the ability to regulate implementation but only direct control is capable of triggering legal responsibility.

1.2.2 State Legal Responsibility – *Where does the buck stop?*¹⁰

Legal responsibility refers to the vindication of an individual's fundamental rights. That vindication comes through the success of judicial proceedings brought against a Member State on the basis of a violation of those rights arising out of the implementation of a migration control or border management procedure. In other words, legal responsibility entails the vindication of a migrant's rights by a court.¹¹

There is no primary conception in either private or public law of what it means to *'vindicate'* rights, or indeed a singular understanding of what the purpose of vindicating rights might be.¹² In the current context, vindication is restricted to actions taken in fundamental rights. That is not to say that alternative remedies are in some way deficient. In certain circumstances alternative remedies, such as an action for damages through tort, can represent important resolution for the migrant. However, this research only considers the potential for actions in fundamental rights as these are best placed to act as a public expression of rights vindication for the benefit of the whole community.¹³ Public actions also serve to test the capability of the EU's fundamental rights framework in providing adequate protection to migrants who experience a breach of their fundamental rights at the hands of a privatised or externalised procedure. Alternative remedies are only considered

¹⁰ While being questioned by MPs as to who was *responsible* for the death of a returnee during deportation, Mr. David Wood, the Interim Director General of the UK Immigration Enforcement Directorate distanced the State *and* the private actor from any responsibility and instead laid the blame on the employees of the private actor who, he said, had failed to implement the training that they had been given. In frustration at the answers being given as to who was legally responsible, Steve Mc Cabe, Member of Parliament, asked simply: "*Where does the buck stop?*" The story of this returnee, Mr Jimmy Mubenga, will be returned to in Chapter II.

Oral Evidence taken before the Home Affairs Committee. The work of the Immigration Enforcement Directorate. Tuesday 16 July 2013.

¹¹ Consideration of responsibility for both externalisation and privatisation has been examined before. For example, for externalisation, see: Brouwer. E., *Extraterritorial Migration Control and Human Rights: Preserving the Responsibility of the EU and its Member States*. In Ryan. B., & Mitsilegas. V., *Extraterritorial Immigration Control* (2010).

For privatisation, see: Gibney. M., *Beyond the Bounds of Responsibility: Western States and Measures to Prevent the Arrival of Refugees*. (2005) *Global Migration Perspectives*. No. 22.

¹² Barker. K., *Private and Public: The Mixed Concept of Vindication in Torts and Private Law*. Page 91-92. In Pitel. S., Neyers. J., & Chamberlain. E., *Tort Law: Challenging Orthodoxy* (2013).

¹³ On this point, see: Steele. J., *Damages in tort and under the Human Rights Act: remedial or functional separation?* [2008] *Cambridge Law Journal* 606. Page 618.

(in section 5.3.2) insofar as private law may represent an alternative remedy that may attract migrants away from the unqualified vindication that only an action in fundamental rights can offer. A failure to attach responsibility to the State for a fundamental rights breach should not be taken as State responsibility being erased. Member State responsibility *cannot* be erased but can be frustrated. Alternative remedies perform important roles and may attach legal responsibility to the State but their ability to vindicate the fundamental rights of a migrant complainant is questionable.

Rodier refers to externalisation as involving a '*transfer*' of responsibility away from the State and to another State.¹⁴ A '*transfer*' gives the impression of a total disassociation of the State from legal responsibility for externalised procedures and this does indeed seem to be Rodier's intention. Other authors have written in a similar vein but that word was not a focus of their work and its use cannot be taken as a strict avowal of how they see the capabilities of externalised procedures in successfully evading legal responsibility and so '*passing the buck*.'¹⁵ Similarly, privatisation has sometimes been taken as representing a complete and total '*transfer*' of legal responsibility away from the State and to a private actor. Externalisation and privatisation and this supposed ability to '*transfer*' legal responsibility in this way are considered in the next section (1.3).

A final proviso to be added is that this reading of State legal responsibility should not be taken as negating any possibility of shared responsibility. States may be found to be jointly responsible with other States for externalised procedures. Similarly, parallel actions may be made against both a private actor and the State for an alleged wrong.

¹⁴ "*The externalisation of the European asylum and immigration system can be broken down into two main aspects: The EU's plan to 'relocate' outside its territory certain border control procedures; and its plan to hold 3rd countries accountable, through the transfer of responsibilities, for the consequences of its obligations in relation to the application of International commitments...*" Rodier, C., DG for external policies of the Union. 'Analysis of the external dimension of the EU's asylum and immigration policies' – summary and recommendations for the European Parliament (2006). Page 10-11.

¹⁵ Den Heijer speaks in terms of "*shifting responsibilities*" and also of a "*transfer*." See Den Heijer, M., Europe Beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control in Ryan, B., & Mitsilegas, V., Extraterritorial Immigration Control (2010). Peers also uses the word '*transfer*.' See Peers, S., EU Justice and Home Affairs Law. (2011) Page 127 and page 530.

As does Gil-Bazo: Gil-Bazo, M.T., The Practice of Mediterranean States in the context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited. Int J Refugee Law (September/December 2006) 18 (3-4), 571. Page 596.

1.3 Privatisation and Externalisation

Externalisation and privatisation are strategies through which the State can implement its policy and realise its objectives. Certain works have already plotted the evolution of EU law and policy to the point whereby externalisation and privatisation became central tools for Member State migration control and border management.¹⁶ This section intends rather to set out the basic tenets of each phenomenon and the way in which they have been integrated into States' immigration and border systems.

'*Externalisation*' involves the implementation of a State's migration control and border management beyond the EU's external borders. '*Privatisation*' comprises any measure by a State that delegates the implementation of a migration control or border management procedure to a private actor.¹⁷ What is in question then are, firstly, national or Union procedures which are implemented in a third State or on the high seas and which result in a violation of fundamental rights; and secondly, procedures implemented by a private actor which have been *delegated* to that private actor by the State and whose implementation gave rise to the violation of a migrant's rights. Each will be examined here in turn.

1.3.1 Privatisation – *Who?*

In the field of migration control and border management, in certain circumstances, the State delegates to a private actor. *Delegation* consists of a private actor assuming State authority in the implementation of a given procedure. The State provides for this delegation with the expectation that that agent (the private actor delegate) will use that authority to achieve

¹⁶ See: Moreno-Lax. V., Chapter 2 – EU Border Integration: Towards 'Integrated Border Management.' In Moreno-Lax. V., *Seeking Asylum in Europe – Extraterritorial Border Controls and Refugee Rights under EU Law* (2012) PhD Thesis, Université Catholique de Louvain.

See also: Papagianni. G., *Institutional and Policy Dynamics of EU Migration Law* (2006).

See also: Den Heijer. M., Chapter 5 – Extraterritorial Asylum under European Union Law. In Den Heijer. M., *Europe and Extraterritorial Asylum* (2012).

Finally, see also: Trevisanut. S., Which Borders for the EU Immigration Policy? : Yardsticks of International Protection for EU Joint Borders Management. In Azoulai. L., & de Vries. K., *EU Migration Law: Legal Complexities and Political Rationales* (2014).

¹⁷ For discussion as to how privatisation should be defined in the current context, see: Kritzman-Amir. T., *Privatization and Delegation of State Authority in Asylum Systems* (2011) *Law & Ethics of Human Rights*, Vol. 5(1), Art. 6. Page 200.

State objectives.¹⁸ The delegate is empowered to perform tasks either concurrently with the public authorities¹⁹ or unilaterally.

The Dutch Scientific Council on Government Policy has argued that, as a result of the increased complexity of a globalised society, regulators (governments) feel that they no longer have the necessary knowledge to make rules and lack the capacity to check for compliance.²⁰ The inference is that States now *need* private actors in order to govern effectively. The actor involved in this privatisation is a commercial undertaking rather than any other type of natural or legal person.²¹ Each instance of privatisation is unique and must be considered on the basis of the facts particular to it. However, broadly defined categories can be set out. Two such categories are of particular importance in the present context – those activities that are privatised by contract and those which have been privatised on the basis of the private actor being *enforced* to comply with rules that have been set out by the State under the threat of sanction.²² Therefore the two types of privatisation examined in this research are contractual privatisation and ‘*enforced*’²³ privatisation respectively.²⁴

With privatisation by contract, a public tender is usually issued and private actors compete for contracts from the State for the migration control or border management

¹⁸ Cox. A., & Posner. E., Delegation in Immigration Law (2011) John M. Olin Law & Economics Working Paper NO. 572 (2D Series) Public Law and Legal Theory Working Paper No. 360. University of Chicago. Page 4.

¹⁹ Davies. A., The Public Law of Government Contracts (2008). Page 249.

²⁰ See: de Lange. T., The Privatization of Control over Labour Migration in the Netherlands: In Whose Interest? European Journal of Migration and Law (2011) 13, 185. Page 186.

²¹ Colombi-Ciacchi. A., European Fundamental Rights, Private Law, and Judicial Governance. In Micklitz. H., Constitutionalization of European Private Law (2014). Page 103.

²² “...*forces certain responsibilities on employers...*” Similarly de Lange argues that different types of privatisation exist – coerced; contracted etc. Importantly for the current context, De Lange argues that a coercive approach to privatisation meets opposition while a permissive approach encounters acquiescence. See: de Lange. T., The Privatization of Control over Labour Migration in the Netherlands: In Whose Interest? European Journal of Migration and Law 13 (2011) 185. Page 186.

Meanwhile, Simons and Macklin speaks about ‘command and control’ regulation, a coercive or prescriptive form of regulation by the State. See: Simons. P., & Macklin. A., The Governance Gap – Extractive Industries, Human Rights and the Home State Advantage (2014).

²³ This term has been used before: Scholten. S., The Privatisation of Immigration Control through Carrier Sanctions: The Role of Private Transport Companies in Dutch and British Immigration Control (2015) PhD Thesis, Radboud University Nijmegen. Page 9.

²⁴ On the different ways in which a State can privatise and going beyond the limited categories considered here, see: England. E., Privatization: Analyzing the Process of Privatization in Theory and Practice (2011) Student Pulse, 3(08).

procedure that the State has decided to privatise. Unlike enforced privatisation, contracts often do include compulsory powers and so the firms which tender for such contracts are specialised security firms. Contractual privatisation therefore often represents a *direct* control. Davies notes that, in a way, the contracting process does not raise any difficult questions about the public/private divide. The government/purchaser is clearly public and the contractor/vendor is clearly private. However, the shift from simple procurement to more complex and long-term contractual arrangements has made this analysis difficult to sustain.²⁵ Privatisation by contract represents a clear shift in terms of a procedure that was habitually undertaken by the State will now be implemented by a private actor.²⁶ The detention and escorted return of migrants are prime examples of privatisation by contract.

By contrast with those privatised by contract, procedures of enforced privatisation have not previously been implemented by the State. These are new procedures, designed by the State but never implemented by it. They are instead implemented by private actors who are not in any way specialised to work in the field of migration control and border management. Enforced privatisation is established by legislation and imposed mainly through the application of punitive measures (usually monetary) for a failure to implement or for the inadequate implementation of the procedure in question. Such procedures afford the State an *indirect* control in that they do not incorporate compulsory powers. Private actors' actions on the basis of these sanctions are limited to decision-making, information gathering or other so-called '*soft*' powers. Employer sanctions and carrier sanctions are examples of enforced privatisation.

Many different factors can influence a State to privatise. Private actors often have access to information and data which leaves them in a unique position from which they can police irregular migration in ways which the State cannot. Efficiency, money saving, other particular qualities or even political ideology must also be considered as points that can influence whether or not States privatise migration control and border management procedures. The motivation for delegating implementation of a migration control and

²⁵ Davies. A., *Government Contractors: Public or Private?* (2008). Page 231.

²⁶ See: Cox. A., & Posner. E., *Delegation in Immigration Law* (2011) John M. Olin Law & Economics Working Paper, No. 572 (2D Series) Public Law and Legal Theory Working Paper No. 360. University of Chicago. See also: Strausz. R., *Delegation of Monitoring in a Principal-Agent Relationship* (1997) *The Review of Economic Studies* Vol. 64(3), 337.

border management procedure to a private actor is not the focus here; rather it is purely the implications of that privatisation for legal responsibility which is under consideration. To be more precise, it is the legal effect of indirect (non-compulsory powered) control that is especially of interest here as this is what is best placed to frustrate legal responsibility by not being capable of triggering consideration of such responsibility. Thus, while it is absolutely necessary to consider both contracted and enforced privatisation, it is more so the latter in which legal responsibility can be frustrated.

There are a number of ways in which to examine privatisation. It is possible to consider the legislative and regulatory limits; there are also administrative law controls on the delegate which could be examined. Perhaps the greatest scope for research (certainly in the context of privatisation) is in the framework of private law controls on the delegate. Notwithstanding these alternative avenues of research, this study is primarily concerned with EU Member State legal responsibility for violations of fundamental rights.²⁷ The research examines the ability of migrants to vindicate their rights and so alternative remedies through private law are of interest but are not the focus. The potential for private actions are only examined insofar as they may inhibit or distract from fundamental rights based actions against the State. This also means that the horizontal application of fundamental rights is not the focus here.²⁸

The argument goes that if a private actor performs public *functions*, it should comply with public law standards in relation to those actions. However, as Davies argues, such a statement is “*fraught with difficulty.*”²⁹ Primarily, how are public functions to be defined? Procedures in a field such as migration control and border management are presumed to be overtly public functions but this is not necessarily borne out upon closer inspection. Such procedures are, in practice, often a unique hybrid of the public and private which are highly complex to a degree whereby it can be difficult for the Courts to tell State action and that

²⁷ Donnelly gives more all-encompassing approach. See: Donnelly. C., *Delegation of Government Power to Private Parties – A Comparative Perspective* (2007)

²⁸ This research does not contemplate the “*apocalyptic legal question*” of a potential horizontal effect for the Human Rights Act which has seen limited application, see: Morgan. J., *Questioning the ‘True Effect’ of the Human Rights Act* (2002) *Legal Studies* 259. Page 259.

²⁹ Davies. A., *Government Contractors: Public or Private?* (2008). Page 231.

action which is genuinely private, apart.³⁰ While it is necessary that the State is not declared to be culpable for all of the wrongs of its private citizens, migrant control and border management are the epitome of public actions and ask very difficult questions as to where it is that the State ends and private action begins. Essentially, there are two key questions relating to privatisation in the current context: Firstly, “*should public bodies be subject to liability, or should the process of contracting allow them to place certain activities beyond the reach of the routine mechanisms...*”³¹ of legal responsibility? Secondly, in the context of enforced privatisation, should the State be subject to liability for the actions of private actors in implementing procedures under threat of sanction from that State?

The supposition is that “*...a public authority cannot divest itself of its public powers or duties by entrusting performance to a contractor. Where the law allocates powers or duties to a public authority, the authority remains legally ...accountable for their exercise or performance regardless of whether it acts directly, or through contract, or some other mechanism.*”³² That expectation may be extended to procedures of enforced privatisation as well yet, in the context of migration control and border management, that conviction has been challenged. Chapter IV considers how the courts have responded to that challenge.

1.3.2 Externalisation – Where?

In terms of migration control and border management, the first significant signal of a move toward deeper investment in external action by the EU or its Member States was the Tampere programme.³³ Tampere signalled the Council’s strong interest in external action. It underlined that ‘*partnerships*’ with countries of origin and transit were needed in order to formulate “*a comprehensive approach to migration...*”³⁴ This early policy priority has evolved such that the EU’s integrated border management³⁵ policy, alongside the global

³⁰ See: Gilmour. R., & Jensen. L., Reinventing Government Accountability: Public Functions, Privatisation and the Meaning of State Action (1998) Public Administration Review, Vol. 58, No. 3, 247.

³¹ Leyland. P., & Anthony. G., Textbook on Administrative Law (2012). Page 457.

³² Davies. A., Government Contractors: Public or Private? (2008). Page 232.

³³ Tampere European Council, 15th and 16th October 1999.

³⁴ Tampere European Council (Presidency) Conclusions, 15 and 16 October 1999. Paragraph 11.

See also: Garlick. M., The EU Discussions on Extraterritorial Processing: Solution or Conundrum? (2006) International Journal of Refugee Law 18 (3-4) 601. Page 611.

³⁵ JHA Council Conclusions, 4 and 5 of December 2006.

approach to migration,³⁶ has made external action a central plank of the EU's migration control and border management law and policy. More recently, in response to the mass influx of migrants throughout 2015, the Union legislated for a *'Border Package'*,³⁷ a feted part of which was the external action element.

A distinction may be made between how the *'partnerships'*, as envisaged by the Tampere agreement, have developed.³⁸ The distinction is between externalisation where an organ of a Member State implements a procedure as opposed to the external dimension where no immigration official of the Member State is present. With the external dimension,³⁹ the EU, alongside the Member States,⁴⁰ has incorporated migration into its relations with third countries.⁴¹ The external dimension can give rise to a third State

³⁶ The Global Approach to Migration (2005) which became the Global Approach to Migration and Mobility (2011) is the overarching framework of EU external migration and asylum.

See: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on The Global Approach to Migration and Mobility, COM (2011) 743 final.

³⁷ See: European Commission's press release from the 15th of December 2015. Available at: http://europa.eu/rapid/press-release_MEMO-15-6332_en.htm

³⁸ This distinction is also made in: Mc Namara. F., Member State Responsibility for Migration Control within Third States – Externalisation Revisited (2013) European Journal of Migration and Law 15, 319. See a similar distinction being made in: Den Heijer. M., Europe and Extraterritorial Asylum (2011). Page 181.

For a similar distinction, see also: Costello. C., & Moreno-Lax. V., The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model. Page 1658. In Peers. S., Hervey. T., Kenner. J., Ward. A., The EU Charter of Fundamental Rights (2014).

"...we use the term 'external' to refer to those EU laws and policies that are directed towards third countries. We use the term 'extraterritorial' to capture the instances when those laws and policies are actually applied or have a direct impact on those outside the territory of the Member States of the EU. In this sense, 'extraterritorial' is a subcategory of 'external'."

³⁹ Rijpma. J., Chapter 10 - The External Dimension of EU Border Management. In Rijpma. J., Building Borders: The Regulatory Framework for the Management of the External Borders of the EU (2009) PhD Thesis, European University Institute.

⁴⁰ The external dimension of the AFSJ is not an exclusive competence of the Union, it is a shared competence. See: Article 4(2) (j) TFEU. On this basis Member States have continued to unilaterally exercise their powers in foreign policy, see: Protocol 23 to the TEU and the TFEU. For summary, see: Monar. J., EU's Growing Role in AFSJ Domain: Factors, Framework and Forms of Action (2013) Cambridge Review of International Affairs 27(1), 147. Page 5.

⁴¹ Alternative definition of external dimension in Garlick. M., The EU Discussions on Extraterritorial Processing: Solution or Conundrum? (2006) International Journal of Refugee Law 18 (3-4) 601. Page 611. Another alternative in: Gil-Bazo. M.T., The Practice of Mediterranean States in the context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited (2006) 18 International Journal of Refugee Law, 3-4, 593. Page 581.

See also: Lavenex. S., Shifting Up and Out: The Foreign Policy of European Immigration Control. West European Politics (2006) Vol 29(2), 329: *"The external dimension consists of the mobilisation of third countries to control migration flows into Europe."*

Claire Rodier has argued that externalisation is taking over from a phase of EU foreign policy. This research presents that foreign policy (the external dimension) and externalisation as operating in parallel.

implementing compulsory powers in their migration control and border management but an EU immigration official will not be involved in that implementation. This is distinct from externalisation whose procedures necessitate that an organ of the State is present and involved.

The external dimension can facilitate externalisation. For example, international agreements can enable the work of Immigration Liaison Officers or maritime interdiction which are prime examples of externalisation. With externalisation the State does not have to delegate implementation to another actor as is the case in privatisation and can be the case for the external dimension. The State may cooperate with a local, third State, as part of implementation of an externalised procedure but an organ of the State is always present. This presence can result in the exercise of direct control or indirect control. In this way, there exists another distinction within externalisation. Readmission and other such agreements are examples of the external dimension of the Union's AFSJ. Of readmission and the resettlement of refugees, O'Nions states: "*Whilst it is apparent that Member States retain legal responsibility for actions which are under their control, many of these mechanisms effectively remove the element of Member State control.*"⁴² The external dimension does not afford the State control as it has been defined here (section 1.2.1).

On this basis, to take an example, the EU-Turkey Statement or other similar deals such as the Italian-Libyan Treaty of 2008,⁴³ cannot in and of themselves trigger legal responsibility as the State does not demonstrate control as is needed so as to engage a State's extraterritorial jurisdiction. This is not to say that such agreements do not give rise to procedures that could very well lead to actions which are capable of triggering legal responsibility by engaging extraterritorial jurisdiction. This is made especially clear from

See: Rodier. C., DG for external policies of the Union. 'Analysis of the external dimension of the EU's asylum and immigration policies' – summary and recommendations for the European Parliament (2006). Boswell on the other hand voiced a distinction between what she termed externalisation and 'preventative measures.' The first term denoted forms of cooperation that essentially externalise traditional tools of domestic or EU migration control, thereby strengthening border controls, the latter term refers to measures designed to change the factors which influence people's decisions to move or change their choice of destination. See: Boswell. C., The External Dimension of EU Cooperation in Immigration and Asylum (2003) International Affairs 619.

⁴² O'Nions. H., Asylum - A Right Denied: A Critical Analysis of European Asylum Policy (2014). Page 165-166.

⁴³ Treaty on Friendship, Partnership and Co-operation by Italy and Libya (2008).

this research's consideration of maritime interdiction. While the Italian-Libyan treaty itself did not give rise to consideration of Italian legal responsibility, its implementation necessitated maritime interdiction. That interdiction did give rise to a discussion as to Italian legal responsibility and led to the case of Hirsi⁴⁴ which is a cornerstone case of this research and which will be considered at length in Chapter III. This is without prejudice to concerns as to the legality of such agreements. The legality of the agreements themselves can and are challenged⁴⁵ but not in any way that can contribute to this research's understanding of extraterritorial jurisdiction as a trigger of legal responsibility which is the continual focus.

The geographic distance involved in externalisation does not diminish the State's ability to control but it can have a substantial impact on a migrant's ability to access justice in very practical ways.⁴⁶ The main legal hurdle for migrants who suffer a fundamental rights violation as a result of an externalised procedure is restrictive interpretations of extraterritorial jurisdiction. Externalised procedures give rise to fundamental questions as to the jurisdiction of a court before the merits of the case can be considered. The key issue revolves around understanding what the nature of control must be so as to have the effect of engaging the State's extraterritorial jurisdiction and thereby triggering legal responsibility.⁴⁷ The administrative reach of a State far exceeds its territorial borders.⁴⁸ The idea that externalised procedures might circumvent legal constraints is essentially based on the understanding that a State's obligations are engaged by a territorial nexus.⁴⁹ Of the judicial systems considered in this work, the ECtHR has provided the most well developed jurisprudence on extraterritorial jurisdiction. Exceptions to the territorial based approach

⁴⁴ Hirsi Jamaa and others v Italy, 27765/09, [GC].

⁴⁵ See: T-192/16, T-193/16 and T-257/16 NF, NG and NM v European Council.

⁴⁶ These practical impediments will be explored in section 5.3.1.

⁴⁷ *"When, if ever, is migration control beyond EU borders tantamount to extraterritorial jurisdiction?"*

This question was asked in: Gammeltoft-Hansen. T., *The Externalisation of European Migration Control and the Reach of International Refugee Law*. Page 13. In Guild. E., Minderhoud. P., *The First Decade of EU Migration and Asylum Law* (2010)

⁴⁸ Noll. G., *Seeking Asylum at Embassies: A Right to Entry under International Law?* (2005) *International Journal Refugee Law*, 17 (3), 542. Page 567.

⁴⁹ Cremona. M., and Rijpma. J., *The Extra-Territorialisation of EU Migration Policies and the Rule of Law* (2007) Working Paper No.1, European University Institute. Page 17.

See also: Gil-Bazo. MT., *The Practice of Mediterranean States in the context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited* (2006) 18 *International Journal of Refugee Law*, 3-4, 593.

to extraterritorial jurisdiction have emerged with varying degrees of clarity. One can now pronounce with certainty that the ECHR is not territorially bounded and that its jurisdiction is, at least to a certain degree, “...*tied to the power of governance by the authorities over people not by the map.*”⁵⁰ Chapter III explores the extraterritorial jurisdiction’s complex jurisprudence in the UK domestic courts, the ECtHR and also considers the potential for application of the Charter of Fundamental Rights in an extraterritorial setting by the CJEU.

1.4 Conclusion – The Commensurability of Responsibility to Control

This chapter set out the conceptual framework of this work. Both control and legal responsibility, in the context of externalisation and privatisation, have been considered. This conceptual framework serves as the basis for an analysis of the courts ability to ensure that State control triggers consideration of State legal responsibility as appropriate. One might ask whether the State’s obligation to secure a migrant’s rights is commensurate with the extent of their control of the procedure in question?⁵¹ Consideration of this question can only be made once the key concepts are defined and understood, thus providing a framework of analysis by which to approach the *nature* of control and its *effect* and in finding whether control should be *the* key guidance for legal responsibility at all.

States have the right to enforce migration control and border management but this right is tempered by the obligation to refrain from the implementation of procedures in ways which could endanger the fundamental rights of migrants.⁵² The nature by which the State implements a rights-violating procedure decides legal effect i.e. whether the State will be made legally responsible for that violation. Chapters III and IV will examine the degree to which legal responsibility has been commensurate with the control exerted by the State, especially with regard to the exercise of indirect control. Chapter V will set out doctrinal solutions which themselves represent a critique of the court’s use of State control to trigger consideration of State legal responsibility.

⁵⁰ Guild. E., *Security and European Human Rights: Protecting Individual Rights in Times of Exception and Military Action* (2007). Page 18.

⁵¹ See: Coomans. F., & Kamminga. T., *Extraterritorial Application of Human Rights Treaties* (2004). Page 105.

⁵² Mc Namara. F., *Member State Responsibility for Migration Control within Third States – Externalisation Revisited* (2013) *European Journal of Migration and Law*, 15, 319. Page 334.

II. Externalisation and Privatisation: The Procedures

2.1 Introduction – A Description

This chapter examines several examples of migration control and border management procedures which take place in an externalised setting or which are implemented by a private actor. This chapter by no means represents an exhaustive list of the procedures which have been privatised or externalised nor is it a meticulous investigation of each particular procedure. Such an examination is beyond the scope of this work. Likewise, the externalised and privatised procedures examined in this research vary in their application and in how they are addressed by the Member States, even where harmonising legislation has been issued. Nonetheless, this chapter is not a simple descriptive work in which the basic functioning of the procedures in question are outlined; the objective in examining each of these procedures is to gain an understanding of the *nature* of the control that certain procedures afford to the State. This entails an examination of the legislative basis of a given procedure or, if applicable, its more informal genesis. It also requires scrutiny of how the procedure works in practice.

This chapter next turns to examine privatisation through contract (2.2) and considers two different privatised procedures in this context – privatised detention and privatised return escorts. It then turns to privatisation by sanction and in this context examines employer sanctions and carrier sanctions (2.3). The fourth section considers externalised procedures (2.4) – maritime interdiction processing and immigration liaison officers. The final section (2.5) concludes this deliberation upon privatised and externalised procedures with some general thoughts on the typical nature of the control afforded to the State through these procedures. That *nature* is crucial to the following chapters' consideration of the *effect* of the control afforded to the State by externalised or privatised procedures (Chapters III and IV).

2.2 Contracted Privatisation

This section examines two procedures of migration control and border management that are implemented by a private actor after having been delegated to that private actor through contract.¹ They have also been chosen on the basis that they represent ‘classic’ privatisation through contract and because of their prominence. The procedures examined in this section are the privatised detention of irregular migrants and the privatised escort of migrants being returned to their countries of origin or to countries of transit. Both procedures have been regularly contracted to private security firms across Europe, especially in the UK.

2.2.1 Detention

In January 2013, Alois Dvorzac, an 84 year old naturalised Canadian citizen of Slovenian origin, was refused entry and detained at Gatwick airport in the UK and was subsequently moved to the private detention centre at Harmondsworth. Mr Dvorzac, a retired electrical engineer, suffered from dementia and it is not clear how he came to travel to the UK but it is supposed that his intention was to travel back to visit his family in his native Slovenia. Two weeks after that initial entry refusal and his subsequent detention, Mr Dvorzac was taken to hospital in handcuffs and chained to an employee of the private security firm Geo. When paramedics and doctors voiced their surprise at these seemingly excessive restraint measures, they were told it was “*Home Office procedures.*”² By the time he died he had spent the previous five hours restrained by handcuffs, had complained of chest pains and had asked to be released.³ Mr Dvorzac passed away while wearing handcuffs and one of the custody officers working for the private firm Geo stated at the inquest that the handcuffs were only taken off “*when they realised he had stopped breathing.*”⁴

Mr Dvorzac had been detained with the intention of removing him from the UK despite the fact that a doctor who examined him had declared him unfit for detention, unfit for removal and in need of care. A prison’s inspectorate report detailing the detention stated

¹ Among those contracted by the UK Home Office are: Serco Limited; Mitie Care and Custody Limited; G4S; GEO Group.

² O’Carroll. L., Man, 84, awaiting deportation died in handcuffs ‘due to Home Office rules’. The Guardian, 27th October 2015.

³ O’Brien. P., Left to die in British detention: who was Alois Dvorzac? Channel 4 News, 18th March 2014.

⁴ O’Carroll. L., Man, 84, awaiting deportation died in handcuffs ‘due to Home Office rules’. The Guardian, 27th October 2015.

that Mr Dvorzac had been “...needlessly handcuffed in an excessive and unacceptable way...”⁵ Mark Harper who at that time was the UK immigration Minister, stated: “*The use of restraint in this case seems completely unjustified and must not be repeated. Clear instructions have been issued making clear that restraint should only happen where absolutely necessary.*”⁶ A spokesman for Geo stated: “*Managers have to use discretion to take difficult decisions and we have issued them with additional guidance.*”⁷ The case illustrates the expectations that are commonly placed on what has traditionally been a public responsibility – the detention of a migrant – and the failure of a private actor to live up to those expectations.

2.2.1.1 Background

Detention of irregular migrants⁸ is no longer regulated solely at the national level.⁹ The Reception Conditions Directive¹⁰ and the Returns Directive¹¹ both contribute to setting out a harmonised approach for EU Member States for the detention of third country nationals. Detention pending removal is dealt with by the Returns Directive and any other form of administrative detention, most likely detention pending an asylum application,¹² is dealt with by the Reception Directive.¹³

⁵ Travis. A., Detention centre castigated over death of elderly man. The Guardian, 16th of January 2014.

⁶ Travis. A., Detention centre castigated over death of elderly man. The Guardian, 16th of January 2014.

⁷ Travis. A., Detention centre castigated over death of elderly man. The Guardian, 16th of January 2014.

⁸ For general reference, see: Bosworth. M., Inside Immigration Detention (2014).

See also: Wilsher. D., Immigration Detention - Law, History, Politics (2011).

⁹ See the Geneva based Global Detention Project for an overview at a national level:

<http://www.globaldetentionproject.org/home.html>

¹⁰ Original Directive: Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

Recast: Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

¹¹ 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.

See also: Communication from the Commission to the Council and the European Parliament on EU Return Policy COM (2014) 199 final.

See: CONTENTION Project, Migration Policy Centre, European University Institute. Available at:

<http://contention.eu/>

And: REDIAL Project, Migration Policy Centre, European University Institute. Available at:

<http://euredial.eu/>

¹² For consideration of the effect of an asylum application on detention pending return, see: C-534/11, Arslan.

¹³ The recast Reception Conditions Directive entered into force on the 21st of July 2015 and goes into much greater depth than its predecessor on the subject of detention. See: Directive 2013/33/EU of the European

The UK opted out of the Returns Directive, opted in to the original Reception Directive but opted out of the recast version of that Directive. In the UK alone, in 2015, 32,400 people entered immigration detention.¹⁴ The vast majority of this detention was carried out on the basis of an administrative decision taken by a Home Office official rather than on the basis of an order made by a court. At the same time, the UK leads the way in the privatisation of immigration detention centres in the EU – Seven of the UK’s eleven immigration detention centres are run by the private sector.¹⁵ This compares to around ten per cent of the UK’s prisons.¹⁶

Privatised detention on this scale is not reflective of the overall picture in the EU. Certain Member States have privatised some or all of their detention facilities. While acknowledging that privatisation can be difficult to identify and track within individual Member States, the Global Detention Project have stated that Sweden, the United Kingdom, the Czech Republic, Luxembourg, Ireland, Estonia, Italy, France, Portugal, Finland, and Germany have all privatised some form of immigration detention at some point.¹⁷

2.2.1.2 In Practice

Privatisation in detention can include both operational and bureaucratic characteristics.¹⁸ The management of a facility could be privately run while the facility itself remains in public hands. A private actor who is contracted to provide security services might subcontract part of the basic services to another private actor. The permutations are endless. The focus here is on the privatisation of the security aspect of detention which involves the

Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

¹⁴ The Migration Observatory, University of Oxford. Available at:

<http://www.migrationobservatory.ox.ac.uk/resources/briefings/immigration-detention-in-the-uk/>

¹⁵ Global Detention Project. Available at: <http://www.globaldetentionproject.org/countries/europe/united-kingdom>

¹⁶ It is commonly held that this is because immigration detention is seen as administrative detention while prisons are seen as being punitive in nature and therefore more in need of the State’s direct supervision. For commentary on the reasons for migrant detention being privatised on such a scale, see: Bacon, C., *The Evolution of Immigration Detention in the UK: The Involvement of Private Prison Companies* (2005) Working Paper No. 27, University of Oxford, Refugee Studies Centre.

¹⁷ Flynn, M., & Cannon, C., *The Privatization of Immigration Detention: Towards a Global View* (2009) Working Paper, Global Detention Project. Page 4.

¹⁸ Flynn, M., *Immigration Detention and Proportionality* (2011) Working Paper No. 4, Global Detention Project

private enforcement of compulsory powers. The initial decision to detain can be administrative or judicial in nature.¹⁹ Despite often being called ‘*illegal*’ migrants, inadequately documented migrants that are detained are generally not convicted criminals, or even remand prisoners awaiting trial.²⁰ Rather, like Mr Dvorzac, they are usually administrative detainees, people who are not charged with a crime but whom the State has decided to detain in order to carry out administrative procedures which concern them, like deportations or decisions on asylum claims.²¹

In the UK, the framework for privatised detention rests upon contracts that are put up for tender by the State. The best bid wins the contract and security firms compete with each other in bidding for contracts. The contracts are released to the public but the part which deals with compulsory powers is redacted.²² Incidents of fundamental rights violations stem from the improper application of compulsory powers. There have been some high-profile instances of abuse by the personnel of security firms that have been contracted to detain migrants.²³ The anecdotal evidence of the abuse or misuse of compulsory powers is overwhelming. Then, there have also been instances of downright criminal behaviour of individuals employed by the private actor to work in detention. Revelations in 2013²⁴ as to serious sexual harassment of a female detainee by an employee

¹⁹ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast). Article 9(2) and (3).

²⁰ See: Quieroz, MB., *Illegally Staying in the EU - An analysis of illegality in EU migration law* (2015) PhD Thesis, European University Institute.

²¹ Flynn, M., & Cannon, C., *The Privatization of Immigration Detention: Towards a Global View* (2009) Working Paper, Global Detention Project. Page 3.

²² See Freedom of Information requests listed in Annex I.

²³ An example from Germany: Meiritz, A., & Weiland, S., *Mutmaßliche Misshandlung: Schockbilder entfachen Debatte über Flüchtlingsheime*. Spiegel Online, 29th of September 2014.

Statement in reply to this incident from the German Federal Government website. Available at: <http://www.bundesregierung.de/Content/DE/Artikel/IB/Artikel/Asyl-Fluechtlinge/2014-09-29-Vorfalle-Asylbewerberunterkunft.html;jsessionid=514EFAFBFE9350BCCF93AB47D69C1976.s4t2>

See also: Hill, J., *German police probe abuse at Burbach asylum centre*. BBC News, 29th of September 2016.

Finally, see also: Atlas of Torture, Germany: Footage shows “pictures that we only know from Guantanamo,” Human Dignity and Public Security team of the Ludwig Boltzmann Institute of Human Rights (BIM) in Vienna, 29th of September 2016.

²⁴ Townsend, M., *Sexual abuse allegations corroborated at Yar's Wood immigration centre*, The Guardian, 21st of September 2013.

of the security firm Serco was compounded by that firm's failure to adequately investigate the allegations made.²⁵

2.2.2 Escorts for Return

On the 12th of October 2010, Mr Jimmy Mubenga died in Heathrow airport in London.²⁶ Mr Mubenga had been forced to board a commercial airline by escorts working for G4S – the private security firm who were contracted by the UK Border Agency to carry out returns.²⁷ The airline carrier was beginning its journey to Angola when Mr Mubenga began resisting his removal and the G4S personnel started to exert restraint.²⁸ At the time of Jimmy Mubenga's death, G4S had a bonus system in place which incentivised its employees to stop returnees from causing disturbances on-board the plane facilitating the deportation. Several passengers of the airline witnessed the removal attempt, including Mr Mubenga's resistance to boarding and, once on board, his cries that he could not breathe. In the immediate aftermath of his death, the now disbanded UK Border Agency maintained that it was a matter for the security firm.²⁹ Two weeks after Jimmy Mubenga's death G4S lost its contract with the UKBA for carrying out deportation orders. However, the UKBA did not revert to public execution of deportations but instead contracted another private security firm to carry out the work. The entire staff of G4S were transferred to the new firm, Reliance, which had underbid G4S for the contract to provide removal services to the UKBA. At the time G4S stated that they “...believe that at all times we acted appropriately

²⁵ Grandjean. G., et al. Yarl's Wood sex abuse allegations: 'They are treating us like animals' – video. The Guardian, 17th of May 2014.

²⁶ The author previously considered the Jimmy Mubenga case in a journal article. See: Mc Namara. F., Do good fences make good neighbours? This Century's Review (2014) Vol. 3.

²⁷ Verkaik. R., Private security firms should face investigation, says former prisons chief. The Independent, 16th of October 2010.

²⁸ The same restraint techniques that were used on Jimmy Mubenga were condemned by the coroner of another inquest. That was the inquest of Gareth Myatt in 2004, a teenager who had died while being restrained in the same fashion. The coroner instructed the Home Office to issue a warning about the use of those restraint techniques. See: Ramsbottom. D., Why the Jimmy Mubenga trial matters. Open Democracy UK, 21st of March 2014.

²⁹ See: Verkaik. R., Security firm accused of abusing deportees sacked. The Independent, 30th of October 2010.

See also: Amnesty International UK. Out of Control: The case for a complete overhaul of enforced removals by private contractors (2011). Page 12.

and in full compliance with the terms of our contract”³⁰ and later argued that its employees had inadequately implemented its instructions. Finally, those employees denied culpability. The Crown Prosecution Service investigated the death and initially arrested the three G4S employees involved but did not press any charges against G4S or its employees – a decision which was roundly criticised at the time.³¹ The jury in Mr Mubenga’s inquest returned a verdict of “*unlawful killing*” after an eight-week hearing but did not make a finding as to the responsibility of each of the actors involved – the State, G4S, G4S employees.³² In July 2013, in light of “*all new evidence*” which emerged from the inquest, the Crown Prosecution Service announced that the three employees of G4S were to be charged with manslaughter. In December 2014, more than four years after Mr Mubenga’s death, the three G4S employees were found *not guilty* of his manslaughter

2.2.2.1 Background

The EU attempted to harmonise Member State removals through the Return Directive in 2008. The Directive establishes a common minimum set of procedural safeguards on decisions related to return which are meant “*to guarantee effective protection of the interests of the individuals concerned.*”³³ The Return Directive sets out that removal may be enforced as a last resort by the use of compulsory powers (it refers to “*coercive measures*”) but that these measures must be proportional, not exceed reasonable force and be in accordance with human rights and the dignity and integrity of the person concerned.³⁴ Frontex has been charged with coordinating return activities.³⁵ According to Frontex’s

³⁰ Jimmy Mubenga: G4S guards face plane death charges . BBC News, 20th of March 2014.

³¹ See: Jimmy Mubenga: G4S guards face plane death charges. BBC News, 20th of March 2014. For criticism of this decision, see: Lord Ramsbottom speaking in the UK House of Lords debate, 19th of July 2012. Available at: <http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/120719-0002.htm#12071967000298>

For further commentary, see: Sambrook. C., Lord Ramsbotham attacks 'perverse' decision not to prosecute G4S over Mubenga death. Open Democracy UK, 10th of July 2013.

³² Taylor. M., Jimmy Mubenga: three G4S guards to be charged with manslaughter. The Guardian, 20th of March 2014.

³³ 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. Recital 11.

³⁴ 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. Article 8(4).

³⁵ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament

2016 risk analysis, 286,725 return decisions were made in the EU in 2015. This represented a 14% increase from 2014. However, the figure is likely to be actually much higher as no data was available from a number of Member States including France, the Netherlands and Sweden. There were 175,220 “*effective returns*”³⁶ in 2015. For these roughly one hundred and seventy-five thousand people, 47% were reported as being on a voluntary basis and 41% were forced returns. The type of return was not specified for the remaining 12%. The European Border and Coast Guard Regulation³⁷ expands the agency’s role in returns by providing for a pool of forced return escorts.³⁸ That Regulation references the provision from the Return Directive³⁹ which states that “*coercive measures*” must be used only as a last resort and must be proportionate. The European Border and Coast Guard Regulation also provides that escorts remain subject to the disciplinary measures of their home Member State in the course of all return operations undertaken.⁴⁰

The Commission’s communication on return policy⁴¹ stated that the Return Directive has been “*a driver for change in forced return monitoring.*”⁴² Eleven out of fourteen Member States now take account of the EU guidelines on forced returns by air.⁴³ The report states that seven Member States were not compliant with the obligation to set

and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC. Articles 27 – 33.

³⁶ Frontex, Risk Analysis for 2016. Page 34.

³⁷ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

³⁸ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC. Article 30.

³⁹ 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. Article 8(4).

⁴⁰ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC. Article 30(5).

⁴¹ Communication from the Commission to the Council and the European Parliament on EU Return Policy COM (2014) 199 final.

⁴² Communication from the Commission to the Council and the European Parliament on EU Return Policy. COM (2014) 199 final. Page 21.

⁴³ Communication from the Commission to the Council and the European Parliament on EU Return Policy. COM (2014) 199 final. Page 21.

up a forced return monitoring system and the Commission had started related EU Pilot procedures.⁴⁴ The report also states that there is a broad split between those States which monitor removals through ombudsmen or authorities that are tied into the national Ministry and those States which monitor through human rights NGOs.⁴⁵ The report did not provide detailed statistics as to the percentage of returns by Member States which are actually monitored, and as to whether any complaints have been made as to the treatment received by irregular migrants during removals.⁴⁶ Neither did the report give any breakdown of what kind of compulsory powers are employed and how frequently they are resorted to in each Member State. The Commission's report is also lacking information as to whether removal operations have been proportionate and have used only reasonable force, were consistent with fundamental rights and observed the dignity and physical integrity of irregular migrants.⁴⁷

2.2.2.2 In Practice

Subject to the law, it is the prerogative of the State to decide who will be returned and when it will happen. Just as was the case with detention, it is the exercise of compulsory powers which gives rise to the most risk of violations. While a return which represents *refoulement* is still clearly the legal responsibility of the State, a rights violation arising out of the exercise of compulsory powers is not categorically the State's responsibility. This is particularly true when the escorts to a return are the employees of a private actor rather than the State.

The UK's system of escorts for returns has been completely privatised. According to figures provided by the now defunct UK Border Agency to the House of Commons Home Affairs Committee, compulsory powers have only been exercised in a

⁴⁴ Communication from the Commission to the Council and the European Parliament on EU Return Policy. COM (2014) 199 final. Page 21.

⁴⁵ Communication from the Commission to the Council and the European Parliament on EU Return Policy. COM (2014) 199 final. Page 21.

⁴⁶ Peers. S., The EU's Returns Directive: Does it improve or worsen the lives of irregular migrants? (2014) EU Law Analysis. Available at: <http://eulawanalysis.blogspot.it/2014/03/the-eus-returns-directive-does-it.html>

⁴⁷ Peers. S., The EU's Returns Directive: Does it improve or worsen the lives of irregular migrants? (2014) EU Law Analysis. Available at: <http://eulawanalysis.blogspot.it/2014/03/the-eus-returns-directive-does-it.html>

small minority of returns undertaken in the UK.⁴⁸ Nevertheless, the Committee was investigating the use of force during removals in light of the claims made in the Outsourcing Abuse report written by Birnberg Peirce, Medical Justice and the National Coalition of Anti-Deportation Campaigns.⁴⁹ The Immigration Act of 2014 extended the power to use force during returns.⁵⁰ The suggestion was made during debates on the Immigration Act that “...*the problem is that the Home Office has delegated all use of force to the contracting companies without overseeing it or insisting that anyone do so.*”⁵¹ The few reports into monitoring that have been done⁵² add credence to the belief that there is a problem with the disproportionate use of force during removal. Immediate reaction to Jimmy Mubenga’s death mainly focussed on a review of the ‘*restraint techniques*’ used by the employees of the private security firm. Obviously, it would be naive to argue that the replacement of these employees of a private actor with employees of the State would automatically guarantee that deportees would receive better treatment. Nevertheless, the performance of employees of State would inevitably be more transparent and accountable than those of a private security firm.

In general, State practice of reception and return of migrants is carefully monitored by NGO’s, civil society and academia. The exercise of compulsory powers causing death will obviously draw investigation. Less obvious injuries can still represent a violation of rights. The ability to monitor private enterprise is a much more arduous task. In the UK, the death of Jimmy Mubenga was the first death to occur during enforced removal since

⁴⁸ House of Commons, Home Affairs Committee Report. Rules Governing Enforced Removals from the UK. Eighteenth Report of session 2010-12. Paragraph 3.

⁴⁹ Birnberg Peirce & Partners, Medical Justice, National Coalition of Anti-Deportation Campaigns, Outsourcing Abuse: The Use and Misuse of State-sanctioned Force during the Detention and Removal of Asylum Seekers (2008)

⁵⁰ Immigration Act 2014. Schedule 1.

⁵¹ House of Lords debate on Immigration Act 2014, 3rd March 2014. Clause 2: Enforcement powers. Amendment 12. Moved by Lord Rosser. Column 1143. Amendment 12 suggested oversight powers for certain authorities such as HM Inspector of Prisons, was withdrawn.

⁵² See: Amnesty International UK. Out of Control: The case for a complete overhaul of enforced removals by private contractors (2011).

See: Birnberg Peirce, Medical Justice and the National Coalition of Anti-Deportation Campaigns Report: Outsourcing Abuse - The use and misuse of State-sanctioned force during the Detention and Removal of Asylum Seekers (2008).

Also see: Baroness O’Loan: Report to the UK Border Agency on “*Outsourcing Abuse*” (2010).

Finally, see: HM Inspectorate of Prisons Report: A Thematic Review on Detainee Escorts and Removals (2009).

Mrs Joy Gardner died after being gagged and restrained by officers from the Metropolitan Police's specialist deportation squad at her home in London in 1993. The officers involved in Mrs Gardner's death were found not guilty of manslaughter at a subsequent trial but the specialist deportation squad was disbanded and the job of carrying out forced deportations was from then on contracted out by the State. It was only after Mr. Mubenga's death that a public review of private security firms' conduct was initiated. That review exposed many questionable practices by the private actor involved such as the system of bonus payments that rewarded guards if they could keep a detainee quiet until the aircraft took off. A system of transparent procedures conducted by the State with a clear chain of command would at least ensure that the State does everything it can to avoid rights breaches. It would also offer a better opportunity for rights breaches to be reported and dealt with which would help foster a fairer and more accountable system of removal.

2.2.3 The Nature of Control through Contract

Migrant detention and removal, the two most prominent procedures that have been privatised by contract are not new procedures. Accordingly, their implementation by private actors represent the traditional understanding of privatisation as being a transfer of public power to the private sector. The private actors involved are very much for profit, are all specialised in security and won contracts that were tendered by the UK Home Office. This specialisation in security is a prerequisite to the implementation of procedures that are privatised by contract, because those procedures include the use of compulsory powers.

The Home Office's policy and method in releasing the details of contracts are less than straightforward. The Home Office does release some of its contracts through its '*contractsfinder*' search portal – albeit redacted versions.⁵³ Annex I details correspondence between the author and the Home Office. This correspondence *eventually* led to access to the contracts between the Home Office and several private security firms for a diverse range of services all of which are "*looking to maximise the efficient use of its [the UK Home Office] immigration estate.*"⁵⁴ The author managed to secure further disclosure of

⁵³ The UK Home Office's 'contractsfinder' search portal is difficult to navigate. Available at: <https://www.gov.uk/contracts-finder>

⁵⁴ Quoted from the 'Gatwick Re-tender Project' which was an open tender requesting expressions of interest from private security firms to bid for a "*Contract for the provision of operational, management and*

contracts through correspondence. The contract which exists between the Home Office and Serco “for the provision of operation, management and maintenance services at Yarl’s Wood Immigration Removal Centre” between November 2014 and April 2022⁵⁵ is typical of such contracts. That contract is worth £70,000,000.⁵⁶ Many aspects of that contract were made available such as the schedules for maintenance and cleaning and for financial reports and audit rights.⁵⁷ However, the schedules which one would expect to be most likely to deal with the crucial issue of the limits on compulsory powers for the firm’s employees are “exempt from disclosure.”⁵⁸ Schedule D (Operational Requirement) is key in this regard, as can be gleaned from Schedule G (Performance Evaluation) which states that one “Performance Standard” for Serco is a “Failure to follow agreed processes and approved techniques and restraints during use of force as listed in schedule D.”⁵⁹ When compulsory powers are used, Serco must issue a report to the “UK Manager” within 24 hours of the incident. The contract also states, quite broadly, that Serco must operate and manage the Removal Centre in accordance with the Human Rights Act.⁶⁰ A general demand that the private actor that is contracted to carry out a procedure, does so in accordance with the State’s fundamental rights obligations has, in practice, not prevented violations in implementation by that private actor. Gaps appear between instructions to abide by human rights obligations and implementation on the ground by the private actor’s employees and by any sub-contractors.⁶¹

maintenance services at Tinsley House Immigration Removal Centre, Brook House Immigration Removal Centre and Cedars Pre-Departure Accommodation.”

Available at: <https://www.contractsfinder.service.gov.uk/Notice/d0f3ed51-4746-4971-b619-d57c322db7c3>

⁵⁵ The Yarl’s Wood contract.

Available at: <https://www.contractsfinder.service.gov.uk/Notice/02227540-2d38-461a-b53c-d344f8738ab9>

⁵⁶ This figure is not exceptional; an eight year contract for the operation, management and maintenance of Colnbrook and Harmondsworth Removal Centres was worth £181,023,729. Available at: <https://www.contractsfinder.service.gov.uk/Notice/6f06e335-cd7d-4bca-9514-43af3602385a>

⁵⁷ Schedule C and Schedule T respectively. Available at: <https://www.contractsfinder.service.gov.uk/Notice/02227540-2d38-461a-b53c-d344f8738ab9>

⁵⁸ Schedule E – Contingency and Emergency Procedures. Schedule D – Operational Requirement.

Available at: <https://www.contractsfinder.service.gov.uk/Notice/02227540-2d38-461a-b53c-d344f8738ab9>

⁵⁹ Schedule G – Performance Evaluation. Available at: <https://www.contractsfinder.service.gov.uk/Notice/02227540-2d38-461a-b53c-d344f8738ab9>

⁶⁰ Yarl’s Wood IRC Final Contract - Terms & Conditions - Redacted version. Available at: <https://www.contractsfinder.service.gov.uk/Notice/02227540-2d38-461a-b53c-d344f8738ab9>

⁶¹ Birnberg Peirce & Partners, Medical Justice, National Coalition of Anti-Deportation Campaigns, Outsourcing Abuse: The Use and Misuse of State-sanctioned Force during the Detention and Removal of Asylum Seekers (2008).

The State can control its relationship with the private security firm from the start through the contract. Contract as a method of service delivery offers flexibility to the State in how to set out the terms of reference for the implementation of a procedure to suit the needs of the public authorities as they understand those needs. Contracting by tender means that the private security firms which compete for the contracts must abide by the State's terms of reference or drop out of the race. Presumably private actors' greatest tool in this competition is to lower their price. It stands to reason that undercutting each other in such a competitive environment inevitably leads to threats to the quality of the service that they are capable of delivering. Continued State control of privatised detention in the UK is evidenced by the permanent presence of officers of the Home Office on-site, which the Home Office refer to as their "*Oversight team.*"⁶²

The human rights obligations in implementation of a procedure under these contracts are sometimes publicly called into question as a result of a particular tragedy which occurs in the care of the firm. The State responds to these tragedies with statements that promise to review standards just as in the case of Minister Harper's response to Mr Dvorzac's death considered above.⁶³ Such reviews have not resulted in tangible changes in the contracts as far as can be publicly seen and it may be questioned whether they make any material difference in practice. In November 2015, less than a month after the inquest into the death of Alois Dvorzac, the Home Office were accused of breaching their new rules by using handcuffs to bring detainees to the hospital.⁶⁴ The Home Office, had promised that new controls on the use of handcuffs would be implemented in light of a damning report of the prison ombudsman⁶⁵ as to the failings that led to Mr Dvorzac's death. The contracts between the Home Office and the relevant private companies lack clearly defined lines of accountability for serious errors and do not touch upon legal responsibility

⁶² UK Parliament Live Television Home Affairs Committee public hearing, 24th of June 2014. Available at: <http://www.parliamentlive.tv/Main/Player.aspx?meetingId=15608&st=15:54:00>

⁶³ For another example, see: Taylor. D., Detention centre failures contributed to death of asylum seeker, inquest finds, *The Guardian*, 25th of May 2012.

⁶⁴ O'Carroll. L., Home Office accused of breaking rules on cuffing asylum seekers. *The Guardian*, 9th of November 2015.

⁶⁵ A Report by the Prisons and Probation Ombudsman Nigel Newcomen CBE. Investigation into the death of a man on 10 February 2013 while a detainee at Harmondsworth Immigration Removal Centre. July 2014. Available at: http://www.ppo.gov.uk/wp-content/uploads/2015/10/H176-13-Death-of-a-male-detainee-in-hospital_Harmondsworth-IRC_10.02.13_Nat.pdf

for fundamental rights violations which occur as a direct result of the implementation of compulsory powers. Media reports follow a familiar pattern of condemnation coming from the Home Office or a government Minister and a response from the private actor which avows that the occurrence was exceptional and its procedures will be reviewed and reformed accordingly. However, it is difficult to tell the extent to which there is any change in practice.

With a contracted relationship, the scope is there for wholly private internal review of procedures while public involvement is limited to condemnation and a demand for improved service delivery. There is no evidence of contracts being subject to fundamental rights standards and being suspended in the event that those standards are not met. With contract, the State continues to effectively control traditionally public tasks such as detention and removal but it is the private actor which is on the front-line and takes criticism and face most tort actions which arise. It is difficult to see how *“the mere fact of contracting out a function can change its nature from public to private: if a function is regarded as public when delivered by a local authority in-house, it should equally be regarded as public under the HRA when contracted out to be performed by a private organisation on the local authority's behalf.”*⁶⁶

2.3 Enforced Privatisation

This section examines two procedures of migration control and border management that are implemented by a private actor under threat of sanction. The procedures examined in this section are Employer Sanctions and Carrier Sanctions. Both procedures are examples of enforced privatisation. They have not been privatised in the traditional sense of there being a public to private transfer of any kind. These procedures were never undertaken by the public authorities. Rather, they are new forms of migration control and border management which rely upon private actors for their very existence.

⁶⁶ Williams. A., Public authorities: what is a hybrid public authority under the HRA? Page 51. In Hoffman. D., The Impact of the UK Human Rights Act on Private Law (2011). See also: Craig. P., Contracting out, the Human Rights Act and the scope of judicial review (2002) Law Quarterly Review, 118, 551. Page 556.

2.3.1 Employer Sanctions

In April of 2013, two hundred migrant workers whom were working on a strawberry farm near the town of Manolada on the Peloponnese peninsula in Greece; gathered to demand six months of back pay that they were owed. The farmers shot at the workers, seriously wounding twenty-eight of them. Fast-forward to July 2014 and a Greek court acquitted two of the farmers for the role that they played in the violence and although it convicted two others, it freed them pending an appeal. They were eventually fined and served no jail time.⁶⁷ Unscrupulous employers across the EU hire migrants and typically offer them extremely low wages and provide poor working conditions in terms of safety, training or any other expected standards that are placed on normal employers. The Union's response to the employment of irregular migrants is of interest in this section.

2.3.1.1 Background

The EU's Employer Sanctions Directive⁶⁸ represents the typical arrangements by which the procedure is implemented. ⁶⁹ Criticism of the Directive has been vociferous with censure focused mainly upon the accusation that the Directive is based upon a great assumption. That assumption is that the supposed ease with which migrants can gain employment represents *the* great pull factor for irregular migrants to the EU. The Directive targets the eradication of such '*illegal*' employment.⁷⁰ Condemnation has also been voiced that the Directive does not adequately address the protection of migrants' fundamental rights so much as the "...*fight against illegal immigration into the EU...*"⁷¹ While Article 6(2)(a) and (5) of the Directive relate to procedures which ensure that employers must pay

⁶⁷ Smith. H., Greek court acquits farmers who shot 28 Bangladeshi strawberry pickers, The Guardian, 31st of July 2014.

See also: PICUM Position Paper. Employer's Sanctions: Impacts on Undocumented Migrant Workers' Rights in Four EU Countries (2015). Page 9.

⁶⁸ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

⁶⁹ For a summary of the Directive's provisions, see: Boeles. P., Den Heijer. M., Lodder. G., & Wouters. K., European Migration Law (2014). Page 397.

⁷⁰ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals. Recital 2.

⁷¹ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals. Recital 2.

any outstanding wages which are due to the third country national who gave rise to the sanctions on that employer, very few Member States (only Bulgaria, Cyprus, Greece and Slovenia as of May 2014) have actually “*explicitly transposed the right of illegally employed migrants to make a claim against their employer for any outstanding remuneration...*”⁷² The UK opted out of this Directive but have their own regime of sanctions for employers.⁷³ The Directive ensures that the employer will be held to account for a “*lack of supervision or control*” over the hiring of irregular migrants.⁷⁴ It provides for minimum common standards on fines and other measures (disqualification from public benefits, etc.⁷⁵) and, in serious cases, criminal penalties against the employers of third country nationals.⁷⁶

Under the Directive, before recruiting a third-country national, employers are required to check that they are authorised to stay, and to notify the relevant national authority if they are not.⁷⁷ Employers have access to information that the public authorities, in normal circumstances, would not be able to access. How Member States place responsibilities on private sector actors for the management of immigration controls has been referred to as being “*the key issue of the Directive...*”⁷⁸ The Directive takes a strong position on this:

⁷² See: Communication from the Commission to the European Parliament and the Council on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals COM (2014) 286 final. See also: Joint Report - Platform for International Cooperation on Undocumented Migrants (PICUM), European Network Against Racism (ENAR) & SOLIDAR. Employers' Sanctions Directive: Will migrant workers pay the price of their exploitation? (2008).

⁷³ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals. Recital 38.

See also: UK Government service and information website. Available at: <https://www.gov.uk/penalties-for-employing-illegal-workers>

⁷⁴ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals. Article 11(2).

⁷⁵ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals. Recital 18. Article 7(1)(a).

⁷⁶ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals. Recital 21-25. Article 9-11.

⁷⁷ Press Release – European Commission. Sanctioning employers of irregular migrants: Commission urges three Member States to act. Brussels, 27 February 2012.

⁷⁸ Peers. S., Guild. E., Acosta Arcarazo. D., Groenendijk. K., Moreno-Lax. V., & Tomkin. J., EU Immigration and Asylum Law (2015). Page 443.

*“employers are part of the system of immigration controls and must participate...”*⁷⁹ Article 14 of the Directive provides that Member States shall ensure that effective and adequate inspections by State representatives are carried out to “control” the employment of illegally staying third country nationals.⁸⁰ In any case, the State has the ability to dictate the precise terms of implementation through its domestic legislation. In parallel, it holds the power to control just how that implementation is being done in a very practical sense. The emphasis of harmonisation within the Directive is in setting minimum levels and several Member States have actually decided to go “...beyond the scope of the Directive, applying it also to third-country nationals who are legally-staying but whose residence permit does not allow them to perform an economic activity.”⁸¹

2.3.1.2 In Practice

Employer sanctions are enforced through a threat of sanction for non-compliance or for inadequate compliance. The primary method of sanction is a financial fine but sanction is not limited to this. Gathering the necessary private information can be quite challenging for an employer as former UK Minister of State for Immigration, Mark Harper, found to his cost. Mr Harper was steering a controversial immigration bill through the UK House of Commons, part of which warned employers that they had a duty to check the status of their employees, when he was forced to resign.⁸² Harper’s resignation stemmed from the discovery that his self-employed cleaner of seven years did not have permission to work in the UK.⁸³ As Harper learned, it is not always easy for an employer to ensure that all of his or her employees are legally resident. Added to this is the fact that many employment sectors, and particularly those which rely on employing migrants “*such as construction,*

⁷⁹ Peers. S., Guild. E., Acosta Arcarazo. D., Groenendijk. K., Moreno-Lax. V., & Tomkin. J., EU Immigration and Asylum Law (2015). Page 443.

⁸⁰ Peers. S., Guild. E., Acosta Arcarazo. D., Groenendijk. K., Moreno-Lax. V., & Tomkin. J., EU Immigration and Asylum Law (2015). Page 442.

⁸¹ Communication from the Commission to the European Parliament and the Council on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals COM (2014) 286 final.

⁸² Immigration Act 2014. Tougher sanctions for employers of irregular migrants have been introduced to the UK with the Immigration Act 2016.

⁸³ Townsend. M., Immigration Minister Mark Harper resigns over illegal immigrant cleaner. The Guardian, 9th of February 2014.

agriculture, cleaning and hotel/catering,"⁸⁴ also rely extensively upon sub-contractors to perform the work. The very industries in which sub-contracting abounds are those which have been targeted as being particularly concentrated with *'illegal'* employment. They are also industries where labour can be exceptionally mobile and jobs can change hands quickly.

A number of complementary tools ensure that the State can reward what it deems to be good behaviour or best practice among private actors. Under the UK's sponsorship system, trusted employers receive preferential treatment and migration control responsibilities.⁸⁵ These employers are entitled to fast-track simple immigration procedures, mainly for highly skilled migrant workers, in exchange for implementing State preferences in migration control.⁸⁶ As the former Dutch Secretary of State Albayrak explained, the system is based on a concept of trust: once an employer is approved by the state, it will gain more responsibilities and will need less governmental approval in the admission process.⁸⁷ Employer sanctions encourage private actor cooperation with the State by use of complementary tools that make it even more in the private actor's interest to comply. The State can control employers' implementation by tailoring their sanction accordingly. The UK has provided for fines of up to £20,000 per irregular migrant.⁸⁸ Fines or other penalties can specifically target certain types of employment, certain types of migrant and generally be tailored to suit the policy objectives of the State.

The measures in the Directive which were designed to redress injustices suffered by irregular migrants have not been properly implemented by Member States. Access to justice in this regard has been explicitly stated by the Commission's Transposition Report

⁸⁴ Frequently Asked Questions – European Commission. The Employer Sanctions Directive. Brussels, 22 May 2014.

⁸⁵ De Lange. T., The Privatisation of Control over Labour Migration in the Netherlands: In whose interest? *European Journal of Migration and Law* 13 (2011) 185-200. Page 185.

⁸⁶ De Lange. T., The Privatisation of Control over Labour Migration in the Netherlands: In whose interest? *European Journal of Migration and Law* 13 (2011) 185-200. Page 195.

⁸⁷ De Lange. T., The Privatisation of Control over Labour Migration in the Netherlands: In whose interest? *European Journal of Migration and Law* 13 (2011) 185-200. Page 186.

⁸⁸ UK Government service and information website. Available at: <https://www.gov.uk/penalties-for-employing-illegal-workers>

to have been inadequately implemented by “*weak or non-existing mechanisms.*”⁸⁹ By contrast, sanctions have been rigorously applied by the State to non-compliant employers. PICUM also point out that “*labour inspectors in many member states are often obliged by national law to immediately report undocumented migrant workers to the migration authorities [and this] ...takes precedence over their duty of protecting workers’ rights.*”⁹⁰

It is very difficult to verify accusations that the general effect of the Directive has been that “*It remains commonplace to deport undocumented workers instead of or before examining the violation of their labour rights.*”⁹¹ The Directive is not bereft of protection for migrants found to have been working illegally. Article 6(2)(a) and (5) relate to procedures which ensure that employers must pay any outstanding wages which are due to the third country national who gave rise to the sanctions on that employer. However very few Member States⁹² have actually “*explicitly transposed the right of illegally employed migrants to make a claim against their employer for any outstanding remuneration...*”⁹³ Therefore, the Directive’s attempts at providing certain protection to employed irregular migrants have been inadequately implemented while the State has benefited from the unique information to which private actors are privy but which is new to the State.

2.3.2 Carrier Sanctions

In 1992, a Ghanaian named Kingsley Ofose and eight of his compatriots stowed away on board the cargo ship MC Ruby, bound for Le Havre. During the journey the crew of the ship discovered the stowaways. The captain and crew, motivated by the heavy fines they

⁸⁹ Communication from the Commission to the European Parliament and the Council on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals COM (2014) 286 final. Page 7.

⁹⁰ PICUM Press Release. Protecting the Rights of undocumented Workers: EU Parliament Hearing Calls for Stronger Commitment to Labour Rights Enforcement in the EU Employers’ Sanctions Directive (2014). Available at: http://picum.org/picum.org/uploads/file_/Release_EP%20Hearing_EmployerSanctions_2Dec%202014_FINAL.pdf

⁹¹ PICUM Position Paper. Employer’s Sanctions: Impacts on Undocumented Migrant Workers’ Rights in Four EU Countries (2015). Page 11.

See also: Guild. E., What are the Member States doing regarding sanctions on employers of irregularly staying third country nationals? (2015) EU Law Analysis Blog. Available at: <http://eulawanalysis.blogspot.it/2014/06/what-are-member-states-doing-regarding.html>

⁹² Only Bulgaria, Cyprus, Greece and Slovenia as of May 2014.

⁹³ Communication from the Commission to the European Parliament and the Council on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals COM (2014) 286 final. Page 7.

knew they would face in France should they arrive there with undocumented migrants, decided to murder the stowaways and to dump their bodies off the coast of Portugal. Kingsley Ofori managed to escape and raised the alarm once the ship arrived in France but his eight companions had already been killed.⁹⁴ Carrier sanctions are designed to deter private transport companies from affording passage to irregular migrants by imposing punitive fines and other sanctions on those private actors when they failed to implement State migration law and policy or fail to do so adequately. Carrier sanctions are most keenly felt in the airline industry. There are 644 international air border crossing points in the EU with close to 375 million people per year entering the EU through one of these airports.⁹⁵ That is much more people than road and sea entries combined.

2.3.2.1 Background

As Section 26 of the Schengen Convention outlines, carrier sanctions⁹⁶ are fines or other penalties given to airlines or other transport companies for transporting inadequately

⁹⁴ See: Le Bourhis. K., *Les Transporteurs et le Contrôle des Flux Migratoires* (2001). Page 92-94.

See also: Whitaker. R., *Life terms for stowaway massacre*. *The Independent*, 11th December 1995.

⁹⁵ Commission infographics on: *Entering the EU Borders and Visas*. Taken from Europa.eu. Available at: http://ec.europa.eu/dgs/home-affairs/e-library/multimedia/infographics/index_en.htm#0801262489595c5e/c_

⁹⁶ Notable publications on carrier sanctions include:

Carlier. JY., & De Bruycker. P., *Immigration and Asylum Law of the EU: Current Debates* (2005).

Scholten. S., *The Privatisation of Immigration Control through Carrier Sanctions: The Role of Private Transport Companies in Dutch and British Immigration Control* (2015)

Moreno-Lax. V., *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 to Refugees* (2008) *European Journal of Migration and Law* 10, 315.

Cruz. A., *Shifting Responsibility: Carriers' Liability in the Member States of the European Union and North America* (1995).

Moreno-Lax. V., *Seeking Asylum in Europe – Extraterritorial Border Controls and Refugee Rights under EU Law* (2012) PhD Thesis, Université Catholique de Louvain.

Basaran. E., *Evaluation of the “Carriers’ Liability” Regime as Part of the EU Asylum Policy under Public International Law*. *Uluslararası Hukuk ve Politika* (2008) Vol 4(15), 149.

Collison. S., *Visa Requirements, Carrier Sanctions, ‘safe third countries’ and ‘readmission’: the development of an Asylum ‘buffer zone’ in Europe*. *Transactions of the Institute of British Geographers* (1996) New Series, vol 21(1), 76.

Guild. E., *The Borders of the EU: Visas and Carrier Sanctions*. (2004) *Tidsskriftet Politick*. Volume 7(3), 34.

Scholten S., Minderhoud. P., *Regulating Immigration Control: Carrier Sanctions in the Netherlands* (2008) *European Journal of Migration and Law* 10,123.

Rodenhäuser. T., *Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control* (2014) *International Journal of Refugee Law*, Vol. 26(2), 1.

documented migrants.⁹⁷ Article 26 of the Schengen Convention in fact obliges private carriers to “*assume responsibility*” for inadequately documented migrants that they have transported. In 2001, the EU introduced a Carrier Sanctions Directive.⁹⁸ The UK opted-in to this Directive. The Directive does not go into how carriers should come to their decision to allow or deny entry to the Union but does state (Article 4) that sanctions should be “*dissuasive, effective and proportionate.*” Article 5 states that the Directive does not prevent Member States from taking additional measures for carriers which will add to a Member State’s ability to deter carriers from carrying inadequately documented migrants. Article 6 provides that there should exist effective rights of defence and appeal *for the carrier*. Section 6.10 of the Schengen Handbook further sets out that “*If the refused third-country national has been brought by a carrier by air, sea or land the carrier must be obliged immediately to assume responsibility for him/her again... When the refused third-country national cannot be taken back immediately, the carrier must be made to bear all necessary costs of lodging, maintenance and return travel. If the carrier is not able to return the third-country national, it must be obliged to ensure that his/her return by any other means (e.g. by contacting another carrier).*”⁹⁹ The Directive contains no obligation to ensure that procedures are in place, whereby individuals who are refused passage can bring an appeal against a carrier or a State.¹⁰⁰ The Schengen Borders Code saw fit that “*persons refused entry have the right to appeal against this decision.*”¹⁰¹ The Carrier Sanctions Directive does not provide for any such provision.

⁹⁷ The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders. Article 26.

⁹⁸ Council Directive 2001/51/EC of June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985.

⁹⁹ European Commission Recommendation establishing a common “Practical Handbook for Border Guards (Schengen Handbook)” to be used by Member States’ competent authorities when carrying out the border control of persons C(2006) 5186 final.

¹⁰⁰ Peers. S., EU Justice and Home Affairs Law (2016) Page 472.

¹⁰¹ 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 borders (Schengen Borders Code). Article 14(3).

The drafting history of the Directive reveals that carrier sanctions are seen by certain Member States as being ineffective if an exception is made for asylum seekers.¹⁰² The original French initiative had proposed that carriers be made exempt from sanctions where a third country national is admitted to the territory to enter into the asylum system.¹⁰³ Eventually, the Directive's final draft included a compromise and includes a reference that it does not prejudice protection obligations¹⁰⁴ but it simultaneously does not include any duty or incentive for the carrier to differentiate in its decision on access on the basis of the protection requirements of the passenger.¹⁰⁵ Peers states that *"This replacement of an enforceable asylum exception with fuzzy ambiguity is the biggest disappointment of this Directive."*¹⁰⁶ Peers also noted the apparent aim of the German delegation was to prevent asylum seekers from making landfall on Union territory as the delegation argued that inclusion of the asylum exception *"could make penalties for carriers ineffective and increase asylum applications."*¹⁰⁷

2.3.2.2 In Practice

Only half of the Member States have subsequently transposed the Directive in a way that takes into account the position of refugees and asylum seekers. A study done by the European Council on Refugees and Exiles found that France, Italy and the Netherlands waived the fines if a person was admitted to their asylum procedure, while Denmark, Germany and the United Kingdom fined carriers regardless of protection concerns.¹⁰⁸ Even

¹⁰² For commentary on the drafting of Council Directive 2001/51/EC of June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, see: Chapter 12 Carrier Sanctions. In Peers, S., Guild, E., Acosta-Arcarazo, D., Groenendirk, K., & Moreno-Lax, V., *EU Immigration and Asylum Law (Text and Commentary)*.

Chapter 5 Carrier Sanctions and Immigration Liaison Officers. In Moreno-Lax, V., *Seeking Asylum in Europe – Extraterritorial Border Controls and Refugee Rights under EU Law (2012) PhD Thesis*, Université Catholique de Louvain.

Hathaway, J., *Rights of Refugees under International Law* (2005). Page 404.

Peers, S., *EU Justice and Home Affairs Law* (2016) Page 471-472.

¹⁰³ Initiative of the French Republic with a view to the adoption of a Council Directive concerning the harmonisation of financial penalties imposed on carriers transporting into the territory of the Member States third-country nationals lacking the documents necessary for admission (2000/C 269/06). Recital 2.

¹⁰⁴ Council Directive 2001/51/EC of June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985. Recital 3 and Article 4(2).

¹⁰⁵ Council Directive 2001/51/EC of June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985. Article 4.

¹⁰⁶ Peers, S., *EU Justice and Home Affairs Law* (2016) Page 472.

¹⁰⁷ Peers, S., *EU Justice and Home Affairs Law* (2016) Page 472.

See also: Comments of the German delegation (Council doc 12361/00, 16 October 2000).

¹⁰⁸ Den Heijer, M., *Europe and Extraterritorial Asylum* (2011) PhD Thesis, Leiden University. Page 186.

as early as 2001, then Deputy Director of the Immigration Service within the UK Home Office stated that the inclusion of airlines in controlling migration had “*really made the difference.*”¹⁰⁹ The UK authorities have introduced complementary guidance as to whom should be excluded. Guidance is also given to private actors on the spot by the UK’s immigration liaison officers.

There has in fact been incidents of the carriers introducing more stringent standards than are required by Member States and refusing to sell certain customers tickets in order to ensure compliance.¹¹⁰ In the Netherlands the adoption of carrier sanctions led to the signing of a Memorandum of Understanding between the Netherlands and the national carrier – KLM. Under that agreement, in return for KLM agreeing to implement checks on every passenger, to train its staff, and to follow immigration liaison officers’ advice in all cases, it was agreed that it would only be prosecuted for inadequately documented passengers, up to a defined annual quota.¹¹¹

In truth, private actors are not capable of making a decision regarding access for someone who intends on lodging an application for asylum upon arrival. Staff training, when it does occur, focuses on saving the private actor from further sanctions through more thorough checks on documents rather than the protection of rights. The final access decision, as public authorities and their representatives are eager to point out,¹¹² is to be

See also: European Council on Refugees and Exiles Report. *Defending Refugees’ Access to Protection in Europe* (2007). Page 28-30.

See also: Moreno Lax V., (Extraterritorial) Entry Controls and (Extraterritorial) Non Refoulement in EU Law. Page 435. In Maes. M., Foblets. MC., De Bruycker. P., Venheule. D., Wouters. J., *The External Dimensions of EU Asylum and Immigration Policy* (2011).

¹⁰⁹ Roundtable on Carriers’ Liability Related to Illegal Immigration. Minutes of the Meeting. Brussels, 30th November 2001.

¹¹⁰ Rodier. C., DG for External Policies of the Union. ‘Analysis of the external dimension of the EU’s asylum and immigration policies’ – summary and recommendations for the European Parliament (2006) Page 11.

¹¹¹ Ryan. B., *Extraterritorial Immigration Control: What Role for Legal Guarantees?* Page 21. In Ryan. B., and Mitsilegas. V., *Extraterritorial Immigration Control* (2010). See also: Scholten. S., & Minderhoud. P., *Regulating Immigration Control: Carrier Sanctions in the Netherlands*. 10 *European Journal of Migration and Law* 123, 2008.

¹¹² To give two examples, in aforementioned answer to Parliamentary questions E-3228/2008 on the 18th of July 2008, Mr Barot, on behalf of the Commission, stated “*The ILOs can give advice to airline staff on the verification of travel documents and entry conditions upon arrival in the EU, but the company and the national authorities of the third-country are responsible for denying boarding.*” Dave Roberts - Deputy Director, Immigration Service, Home Office, UK. Jean-Francois Duriex, UNHCR, Roundtable on Carriers’ Liability: “*Our 24-hour help lines: on-the-spot advice is given on whether a particular passenger might ‘incur a chance’. 50’000 calls a year are made to the help line, but the responsibility for deciding whether*

made by the carrier alone. Immigration Liaison Officers are a procedure that will be considered later in this chapter (2.4.2). Suffice to say that this point that the presence of these State officials alongside the threat of sanction from the State allows the State to direct, steer and influence that access decision. In doing so, the State relies upon the private actor's natural preference to make a rational business decision and avoid the financial risk involved in carrying an inadequately documented person.¹¹³

Directive 2004/82 provided an obligation on carriers to communicate passenger data to the national authorities of the destination State in advance of departure.¹¹⁴ This directive refers to what has become known as Advanced Passenger Information (API). The UK participated in this Directive. This Directive works in conjunction with carrier sanctions rather than being a substitute to those sanctions.¹¹⁵ Carriers which fail in their obligation to transmit passenger data will be fined.¹¹⁶ Since 2003,¹¹⁷ the Commission had been looking to legislate for passenger name records (PNR) which are far more extensive than API. A PNR proposal was brought forward in 2011¹¹⁸ but it was rejected by the Civil Liberties Committee in 2013. It was only in April 2016 that the Council finally adopted a PNR Directive¹¹⁹ to which the UK opted-in. The UK already had a PNR system in place. Then Head of UK Border Force, Brodie Clark, stated: *"In terms of the arrangements we have ... it is as near real time as we can make it. We want real-time information so that we can stop people getting on board the plane, which is the principle behind exporting the*

to board the passenger has to be with the carrier. We have no extra-territorial powers to refuse somebody's entry..."

¹¹³ Noll. G., *Negotiating asylum: The EU Acquis, Extraterritorial Protection, and the Common Market of Deflection* (2000) Page 178.

¹¹⁴ Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to Communicate passenger data.

¹¹⁵ Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to Communicate passenger data. Article 3(3).

¹¹⁶ Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to Communicate passenger data. Article 4.

¹¹⁷ Communication from the Commission to the Council and the Parliament on the Transfer of Air PassengerName Records (PNR) Data: A Global EU Approach COM (2003) 826 final.

¹¹⁸ Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record Data for the Prevention, Detection, Investigation and Prosecution of Terrorist Offences and Serious Crime COM (2011) 132 final.

¹¹⁹ Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.

border. Stopping people as far away from the UK as possible."¹²⁰ The EU has strengthened State involvement with carriers and the State has been able to benefit from the information that is normally only available to the carrier.

As far as carrier resistance goes, in 1990, four major airlines (Lufthansa, Swissair, Iberia and Alitalia) refused to pay the fines levied against them by the UK government, on the grounds that they were being asked to 'act as immigration officers.' The British Home Office responded that if the airlines did not pay, they could lose their landing rights.¹²¹ Such resistance to the carrier sanctions regime, from the carriers themselves, have seemingly disappeared from the landscape.¹²² The industry has moved to a time in which the carriers see cooperation with the State as the best option and have abandoned any attempts at not following the regime.¹²³

2.3.3 The Nature of Control through Sanctions

Enforced privatisation does not incorporate compulsory powers. This is the primary contrast with the nature of control afforded to the State when it privatises through contract. That difference can have important implications for access to justice and, in turn, for the vindication of any rights that a migrant alleges to have been violated in the course of implementation of a migration control and border management procedure. The nature of control through sanctions is also such, that it provides the State with an effective means by which to control the relevant private actor. The terms and conditions attached to a sanction may be changed – through legislation if needs be – such that the State is capable of directing, steering and influencing the implementation of a migration control or border management procedure. Therefore, sanctions afford the State a reactive tool by which to control the private actor. In this sense, enforced privatisation resembles its contracted counterpart. Sanctions are in fact even more reactive to State needs than contracts which

¹²⁰ Interviewing Brodie Clark. The Times, April 2008.

¹²¹ Cruz. A., Carrier Sanctions in Four European Community States: Incompatibilities between International Civil Aviation and Human Rights Obligations (1991) Journal of Refugee Studies 1, 63. Page 72.

¹²² In the UK, see: International Transport Roth GmbH and Other v SSHD [2002] 3 WLR 344. See also: R (on the application of Balbo B&C Auto Transport Internazionale) v SSHD [2001] 1 WLR 1556. These cases are examined in: Clayton. G., Textbook on Immigration and Asylum Law (2014). Page 176-180.

¹²³ Scholten. S., The Privatisation of Immigration Control through Carrier Sanctions: The Role of Private Transport Companies in Dutch and British Immigration Control (2015). Chapters 7 and 8.

can have long life spans. The State has the freedom to pursue its policy objectives by varying the severity of sanctions, the type of sanctions and the situations in which they will be applied. Just as a State can revise the terms of a tender that it offers private companies when it privatises through contract, the State can also vary its application of sanctions. The difference between the two, and the reason why they are distinguished here, is the absence of compulsory powers for procedures of enforced privatisation and their presence in contracted privatisation.

Both sets of firms are profit driven but they undertake a markedly different role within the State's migration control and border management apparatus. The *raison d'être* of certain private actors is to bid for contracts and, as a prerequisite to winning that contract, they must be highly specialised in administering compulsory powers. By contrast, enforced private actors are simply seeking to protect their enterprise from State requirements which are an unwelcome hindrance to their actual work. They are not in any way specialised to undertake any procedure in migration control and border management. The participation of an enforced private actor in a procedure boils down to their unique ability to acquire important information to which the State is not privy and to make a commercial risk based decision about a migrant.

In examining enforced privatisation it is important not to consider sanctions in isolation, instead of considering them alongside the ability of the State to incentivise cooperation among private actors and to implement the support structure. It is common for States not to implement sanctions or to apply them more forgivingly if the private actor agrees to apply extra controls and thereby improve upon the quantity or quality of the results of the procedure from the perspective of the State. For instance, informal arrangements exist across the airline industry, whereby one carrier can have an agreement which is completely different from their competitors. This results in practices such as that referred to in the carrier sanctions section (2.3.2.2), whereby carriers are excluding high risk passengers even beyond what is technically required of them by the letter of the recommendations made by public authorities. The sanctions have undergone “...*a change from a deterrent approach focused on sanctioning, to an approach aimed at furthering*

compliance."¹²⁴ Thus, while sanctions remains, to all intents and purposes, the State's real leverage, there is now also this further inducement within enforced privatisation.

The sanctions system provides the State with an increased flexibility and improved control while the private actor is attracted to the narrower degree to which it is liable to sanctions.¹²⁵ Employers are incentivised by being able to gain easier access to approval for visas and documentation that it may need to give employment to regular migrants. Carriers can sign agreements with the State that they will undertake extra checks or undertake to follow all advice given by Immigration Liaison Officers if they are only made liable up to a certain amount of money each year. Such incentives have also helped to move the private actors on from initially flirting with the idea of resisting such sanctions. Alternative approaches to the imposition of sanctions are typically being developed while the threat of sanction is retained in the background.¹²⁶

Enforced privatisation creates an informal public/private relationship in comparison to privatisation on the basis of a contract. Rather than examining the contract itself, albeit in a redacted state, an examination of the public-private relationship must rely upon the State's law which gives force to the sanction in question. In this sense, the nature of control through sanction is much less transparent than the more formal relationship of control through contract. The presence of a contract does confirm that a relationship exists but it is the nature of the control within a procedure which influences the courts toward finding whether the State is legally responsible. This control-based approach gives rise to the importance of compulsory powers in a procedure. While commentators confidently state that such powers will confirm State legal responsibility, placing such stock in their presence or absence works to the detriment of enforced privatisation procedures which do not incorporate such powers. Procedures undertaken by a private actor under threat of sanction and which consist of tasks which the State had not undertaken previously, like

¹²⁴ Scholten. S., *The Privatisation of Immigration Control through Carrier Sanctions: The Role of Private Transport Companies in Dutch and British Immigration Control* (2015). Page 281.

¹²⁵ Ryan. B., *Extraterritorial Immigration Control: What Role for Legal Guarantees?* Page 21. In Ryan. B., & Mitsilegas. V., Ryan. B., and Mitsilegas. V., *Extraterritorial Immigration Control* (2010).

See also: Scholten S., & Minderhoud. P., *Regulating Immigration Control: Carrier Sanctions in the Netherlands* (2008) *European Journal of Migration and Law* 10,123.

¹²⁶ Scholten. S., *The Privatisation of Immigration Control through Carrier Sanctions: The Role of Private Transport Companies in Dutch and British Immigration Control* (2015). Page 279.

decision-making and reporting to the State, constitute an *indirect* but substantial control which may not trigger judicial consideration of State legal responsibility for that control.

2.4 Externalisation – Procedures

This section examines two procedures which have been externalised.¹²⁷ They have been chosen on the basis of their prominence and because they raise key questions as to legal responsibility for Member States. The procedures examined in this section are maritime interdiction and immigration liaison officers.

2.4.1 Maritime Interdiction

In 2015, migration by boat in the Mediterranean Sea was said to have reached ‘*crisis*’ levels. Taking Greece alone, 856,000 people crossed the Aegean Sea from Turkey to Greece in 2015, almost twenty times as many as arrived in the whole of 2014. The crisis continued into 2016 with almost as many people arriving in the first two months of 2016 as in the first seven months of 2015¹²⁸ with the first month of 2016 being the deadliest January on record for migrant fatalities in the Mediterranean.¹²⁹ The 2016 numbers subsequently decreased from their equivalent numbers of 2015 with 173,000 people arriving by November 2016 with a good proportion of that number having arrived in the first two months of the year. In fact of that 173,000, 151,000 had arrived by March of that year.¹³⁰ It was only with the EU-Turkey Statement¹³¹ in March of 2016 that the mass influx slowed to a trickle. Italy has also borne witness to large numbers of arrivals¹³² which, in the absence of a Libyan version of the EU-Turkey Statement.¹³³ Plans for closing down the central Mediterranean route have been very much to the fore in the spring of 2017.¹³⁴

¹²⁷ For further consideration of instruments that have been externalised, see: De Boer. T., Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection (2014) Journal of Refugee Studies, 118.

¹²⁸ PACE Report. Human rights of refugees and migrants – the situation in the Western Balkans (2016) Committee on Migration, Refugees and Displaced Persons. Rapporteur: Ms Tineke Strik.

¹²⁹ Tran. M., Dozens drown off Greek islands in deadliest January for refugees. The Guardian, 22nd January 2016.

¹³⁰ UNHCR, Greece Sea Arrivals Dashboard. Available at: <https://data.unhcr.org/mediterranean/country.php?id=83>

¹³¹ EU-Turkey statement, 18 March 2016. Available at: <http://www.consiliumeuropa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>

¹³² 2016 was been on a par with 2015 for arrivals by sea in Italy. See: UNHCR, Italy Sea Arrivals Dashboard. Available at: <https://data.unhcr.org/mediterranean/country.php?id=105>

¹³³ Baczynska. G., EU needs Turkish-style migration deal on Libya: Maltese PM. Reuters, 18 January 2017.

¹³⁴ European Council Conclusions, 3rd February 2017.

One particular crossing from Turkey to Greece in 2015 ended with the drowning of several migrants and was unremarkable from innumerable other tragedies except for a picture taken by a press photographer of Alan Kurdi, a three-year-old boy from Kobane, Syria. The boy was found on a Turkish beach having tried and failed to reach Greece with his family. The image quickly became an international sensation and was taken as encapsulating the challenge posed by migration at sea and faced by the EU. By the end of 2015, the year in which the most migrants had gone to sea, roughly 3,770 had drowned or were missing in the Mediterranean Sea.¹³⁵ One of the key responses of the Union to migrants arriving by sea, even before the mass influx of people fleeing the war in Syria, was to interdict migrants while they were still in international waters or in the territorial waters of a third State. That procedure is the topic of this section.

2.4.1.1 Background

Maritime interdiction has a long history among Member States in a unilateral sense. However, nowadays Frontex implements joint sea-operations with Member States. Those operations were primarily focussed on the Aegean Sea and arrivals on the Greek islands from Turkey, but ever since the signing of the EU-Turkey Statement, numbers making the journey have dropped dramatically. As a result of monthly numbers having dramatically fallen off after the Statement was signed in March, attention has shifted to the central Mediterranean route. Maritime interdiction is by not limited to Libya but approximately 90% of all migrants on the central Mediterranean route leave from Libyan shores and so it dominates discussion. At 181,000 individuals in 2016,¹³⁶ it now stands as the largest maritime access point to the EU.

Council Decision 2010/252 on the role of Frontex at sea dealt with that agency's "*surveillance of the sea external borders...*"¹³⁷ Frontex was made "*responsible for the coordination of operational cooperation between Member States...*"¹³⁸ The Decision made

¹³⁵ Safdar. A., Deadliest January on record for refugees raises alarm. Al-Jazeera, 29 January 2016.

¹³⁶ UNHCR, Italy Sea Arrivals Dashboard. Available at: <https://data.unhcr.org/mediterranean/country.php?id=105>

¹³⁷ Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (2010/252/EU).

¹³⁸ Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the

reference¹³⁹ to the obligations of Member States to refugees and asylum seekers, the particular duty of *non-refoulement* and requirements of the Procedures Directive.¹⁴⁰ The Decision stated that in conducting border surveillance operation at sea, Member States would encounter craft that were in distress¹⁴¹ and that on such occasions, “*priority should be given to disembarkation in the third country from where the ship carrying the persons departed or through the territorial waters or search and rescue region of which that ship transited.*”¹⁴² In 2012, that Decision was annulled in *Parliament v Council*.¹⁴³ The challenge was made on the basis of the aforementioned disembarkation priority. The Court found that that priority “*constitutes a major development in the SBC system*”¹⁴⁴ rather than being a minor and non-essential provision of the Schengen Border Code as the Council had argued. The CJEU was concerned that the exercise of the Decision’s powers “*meant that the fundamental rights of the persons concerned may be interfered with to such an extent that the involvement of the EU legislature is required.*”¹⁴⁵

Regulation 656/2014¹⁴⁶ replaced Council Decision 2010/252 and its Article 4 reflected the CJEU’s earlier decision in *Parliament v Council* by providing for greater protection of fundamental rights. The European Border and Coast Guard Regulation¹⁴⁷

European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (2010/252/EU). Recital 2.

¹³⁹ Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (2010/252/EU). Recital 3.

¹⁴⁰ The Procedures Directive in force at that time: Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

¹⁴¹ Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (2010/252/EU). Recital 7-8.

¹⁴² Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (2010/252/EU). Annex, Part II, Section 2.1.

¹⁴³ C-355/10, *European Parliament v Council*, [GC].

¹⁴⁴ C-355/10, *European Parliament v Council*, [GC]. Paragraph 76.

¹⁴⁵ C-355/10, *European Parliament v Council*, [GC]. Paragraph 77.

¹⁴⁶ Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

¹⁴⁷ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and

affords significant extra powers to Frontex *vis-à-vis* maritime interdiction. These extra powers include being able to draw upon a rapid reserve pool of border guards and technical equipment.¹⁴⁸ The Council, on the basis of a proposal from the Commission, can adopt a decision identifying measures to mitigate the identified risks which is to be implemented by the Agency.¹⁴⁹ That decision will allow the Agency to step in and deploy European Border and Coast Guard Teams to ensure that action is taken on the ground even when a Member State is unable or unwilling to take the necessary measures.¹⁵⁰ The new Regulation will also provide for certain strengthening of fundamental rights provisions.¹⁵¹

On the basis of this evolution, maritime interdiction is very much in the hands of Frontex in terms of its initiation and coordination, yet it remains the Member States for the most part who participate in a practical sense. Thus, the compulsory powers involved in the implementation of maritime interdiction will, *prima facie* at least, be at the hands of the State.

2.4.1.2 In Practice

The stated policy of the EU in facing migrants arriving to the Member States by sea has revolved around fighting against people smugglers¹⁵² and saving lives at sea. Maritime interdiction¹⁵³ is part of the solution to these problems and turns on two policy options with

of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

¹⁴⁸ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC. Article 20(4) and 8(1)(h) respectively.

¹⁴⁹ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC. Article 19.

¹⁵⁰ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC. Article 20.

¹⁵¹ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC. Article 34.

¹⁵² See: E., & Carrera. S., EU Borders and Their Controls Preventing unwanted movement of people in Europe? November 2013, 6/14.

¹⁵³ See: Nessel. L., Externalised Borders and the Invisible Refugee (2009) Columbia Human Rights Law Review 40, 625. Giuffré. M., State Responsibility Beyond Borders: What Legal Basis for Italy's Push-backs to Libya? (2013) International Journal of Refugee Law Vol. 24(4), 692. Scheinin. M., Burke. C., &

regard to disembarkation.¹⁵⁴ The first is to intercept the boat that migrants are travelling on and bring them to EU territory and enter them into the immigration system whether that is within the asylum procedure or otherwise. The second option has been called ‘*push-backs*’ – the interception and return of migrants to the third State from which they departed. Both options can abide by the legal onus on Member States to rescue distressed craft at sea.¹⁵⁵ However, the second option is where legal conflicts can arise as push-backs can come at the cost of State’s abidance by certain of their legal obligations.¹⁵⁶ Then UK Home Secretary, Theresa May, caused controversy in 2015 when she stated that interdiction acted as an incentive to economic migrants.¹⁵⁷ The UK has contributed to several Frontex joint sea operations in the past¹⁵⁸ and in 2016 it also made a large commitment of resources to the NATO response to the crisis.¹⁵⁹

There are many variables at play in interdiction of a migrant vessel as it makes its way to the EU. Maritime interdiction necessarily involves stopping a boat of irregular migrants. Once stopped, the migrants may be left on board their own ship, they may be towed somewhere or they may be taken on board the intercepting craft. This decision may be heavily influenced by the circumstances of the interdiction – what the intercepting ship is capable of doing, what the standard of the intercepted ship is, what the weather permits etc. Stopping the ship itself already represents the power of the State in implementing this procedure and is a very physical manifestation of the State’s ability to direct and steer the situation toward the State’s preferred conclusion.

Galand. AS., *Rescue at Sea – Human Rights Obligations of States and Private Actors, with a Focus on the EU’s External Borders* (2012) Policy Paper No. 05, RSCAS, European University Institute.

¹⁵⁴ Trevisanut. S., *Which Borders for the EU Immigration Policy? Yardsticks of International Protection for EU Joint Borders Management*. Page 127. In Azoulai. L., & de Vries. K., *EU Migration Law: Legal Complexities and Political Rationales* (2014).

¹⁵⁵ See: UN Convention on the Law of the Sea, in force November 16th, 1994. Article 98 (1).

¹⁵⁶ For example: the right to asylum, Article 18, Charter of Fundamental Rights of the European Union; the prohibition on refoulement, Article 19, Charter of Fundamental Rights of the European Union and Article 3, European Convention on Human Rights.

¹⁵⁷ Perraudin. F., *Theresa May: UK will not participate in EU migrant resettlement proposals*. *The Guardian*, 13th of May 2015.

¹⁵⁸ Ryan. B., *The EU’s Borders: Schengen, Frontex and the UK* (2016) Free Movement Blog. Available at: <https://www.freemovement.org.uk/brexit-and-borders-schengen-frontex-and-the-uk/>

¹⁵⁹ See UK government announcement: <https://www.gov.uk/government/news/pm-announces-uk-deployment-for-nato-mission-in-aegean-sea-to-tackle-migrant-crisis>

See also NATO announcement: http://www.nato.int/cps/en/natohq/topics_128746.htm

The foregoing discussion presumes that the intercepting ship is manned, equipped and funded by a Member State. This may not always be the case. Frontex's operational plan for the *Hera III* operation¹⁶⁰ implemented bilateral agreements between Spain and Mauritania and Senegal and made the placement of Senegalese and Mauritanian agents on board vessels compulsory.¹⁶¹ A multitude of variables can come between the direct line of control between the State and the interdicted migrants. The presence of Frontex,¹⁶² the involvement of other Member States and the participation of a third State can mean that the clear line, between a Member State and a migrant, can become clouded. However, in general, in joint operations any contribution toward participation can be considered as potentially representing the ability to control implementation.

2.4.2 Immigration Liaison Officers (ILOs)

In February 2001, the British and Czech governments signed an agreement. The effect of this agreement was to permit British immigration officials (ILOs) access to passengers at Prague Airport before they boarded aircraft bound for Britain. It was openly accepted that the objective of the procedure was to stem the flow of asylum seekers to Britain from the Czech Republic and indeed, that was its effect. The agreement was implemented in the summer of 2001 and the number of asylum claims arising from Czech passengers fell by 90% in the three weeks after implementation in comparison to the three weeks prior to implementation.¹⁶³ The vast majority of asylum seekers coming from the Czech Republic to Britain at this time were Roma. ILOs usually operate in close cooperation with carriers. In 1999 a Council of Europe report¹⁶⁴ found that a Czech Airline was writing 'G', for gypsy, beside the names of passengers who had Roma names or who looked like Roma with the express intention of alerting the British authorities to potential asylum seekers of

¹⁶⁰ This operation took place in the Canary Islands region in 2007. The participating Member States were France, Germany, Italy, Luxembourg and Portugal. The aim of the operation was to coordinate operational cooperation between Member States in the field of management of external borders through the organisation of joint patrols of the assets provided by the Member States in the predefined areas in order to combat illegal migration across the external maritime borders of the EU from West African countries disembarking in Canary Islands.

¹⁶¹ Den Heijer. M., *Europe and Extraterritorial Asylum* (2011) PhD Thesis, Leiden University. Page 225.

¹⁶² Trevisanut. S., *Maritime Border Control and the Protection of Asylum-Seekers in the European Union* (2009) *Touro International Law Review*, vol. 12, 157.

¹⁶³ The facts here are taken from a case which examined the work of these ILOs. The case will be further examined in Chapter III (3.4.3). See: *Regina v Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others* [2004] UKHL 55.

¹⁶⁴ Council of Europe Report. *Restrictions on Asylum in the Member States of the Council of Europe and the European Union*. Parliamentary Assembly (1999) Doc. 8598.

Roma origin.¹⁶⁵ The case shows how airlines and ILOs, acting together can form a very significant boundary to protection for more vulnerable migrants and only came to light because of a tremendous amount of research done by NGOs and civil society.

2.4.2.1 Background

In reality, the tasks of ILOs vary massively according to their location and their instructions but can generally be defined as being representatives of a State who are posted abroad by that State in order to contribute to the prevention of illegal immigration. The primary tasks of ILOs tend to be in cooperating with local authorities and in advising carriers as to whether a person is adequately documented or not.

The Seville European Council¹⁶⁶ of 2002 called for the creation of a network of ILOs and Council Regulation 377/2004¹⁶⁷ (*the founding Regulation*) created such a network but the genesis of ILOs in a European wide context can be traced back to the Schengen Convention.¹⁶⁸ A Council decision¹⁶⁹ in 2005 created ICONET, an information and coordination network for Member States' migration services, designed to enhance co-operation among immigration liaison officers posted abroad by the Member States. Neither the founding Regulation, nor Regulation 493/2011,¹⁷⁰ is specific or exhaustive as to the tasks of ILOs.¹⁷¹ The founding Regulation states that "*This Regulation is without prejudice to the tasks of immigration liaison officers within the framework of their responsibilities under national law...*"¹⁷² The Member States, with the UK opting-in for both the founding and the amending Regulations, are free to add additional tasks to the basic *modus operandi*

¹⁶⁵ Scholten. S., *The Privatisation of Immigration Control through Carrier Sanctions: The Role of Private Transport Companies in Dutch and British Immigration Control* (2015). Page 263.

¹⁶⁶ Seville European Council Conclusions, 21 and 22 of June 2002. Page 10.

¹⁶⁷ Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network.

¹⁶⁸ Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders. Articles 7, 47, 125.

¹⁶⁹ Council Decision of 16 March 2005 establishing a secure web-based Information and Coordination Network for Member States' Migration Management Services (2005/267/EC).

¹⁷⁰ Regulation (EU) No 493/2011 of the European Parliament and of the Council of 5 April 2011 amending Council Regulation (EC) No 377/2004 on the creation of an immigration liaison officers network.

¹⁷¹ An interesting question raised by Den Heijer is as to whether if ILOs carry out tasks which amount to 'border control' or 'border checks' in the meaning of the Schengen Borders Code, should those officers not also then be regarded as 'border guards' under the Borders Code and/or be required to comply with all procedural and other standards laid down in the Code? See: Den Heijer. M., *Europe and Extraterritorial Asylum* (2011) PhD Thesis, Leiden University. Page 189.

¹⁷² Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network. Article 1(4).

of ILOs as set out in the Regulations. The Frontex Regulation provides for the Agency having its own ILOs deployed “to third countries in which border management practices comply with minimum human rights standards.”¹⁷³ European Border and Coast Guard Regulation provides for the deployment of those officers to third countries.¹⁷⁴ The Union’s ILO network has now evolved to the extent that the first European Migration Liaison Officers were deployed as a matter of priority to Ethiopia, Niger, Pakistan and Serbia in January 2016.¹⁷⁵

The UK has invested heavily in ILOs within the framework of the Risk and Liaison Overseas Network. That investment has had a serious impact on preventing passage. There are no readily available statistics on the true impact of ILOs but the UK Immigration Minister stated that in the five years to 2009, the UK’s ILO network had assisted in preventing nearly 210,000 people from boarding planes on their way to the UK.¹⁷⁶ British ILOs¹⁷⁷ do not have the powers of a ‘regular’ British immigration officer. A ‘regular’ officer can take the decision to refuse leave to enter and make this decision at any point in the journey.¹⁷⁸ “Leave may be given before or during travel, and the immigration officer need not be based at the port.”¹⁷⁹ By contrast, British ILOs are limited to offering ‘advice’

¹⁷³ Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. Article 14(3) and (4).

¹⁷⁴ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC. Article 55.

¹⁷⁵ Press Release – JHA Council. Council Conclusions on Measures to handle the refugee and migration crisis. Brussels, 9 November 2015.

A vacancy notice for positions in a further ten locations were advertised by the Commission for seconded national officials in March of 2016. Available at:

http://www.esteri.it/mae/resource/endtemp/2016/03/com_-_notice_of_vacancy_-_migration_10_posts_-_mar16.pdf

¹⁷⁶ Clayton, G., *Textbook on Immigration and Asylum Law* (2014). Page 173.

¹⁷⁷ They are known as Immigration Liaison Managers in the UK.

¹⁷⁸ Immigration (Leave to Enter and Remain) Order 2000, SI 2000/1161. Article 7.

¹⁷⁹ Clayton, G., *Textbook on Immigration and Asylum Law* (2014). Page 171.

It should also be noted that the Immigration Act 2014 drastically reduces the ability of migrants to appeal decisions of Immigration Officers including the decisions of those officers who give travelers entry clearance. See: Immigration Act 2014.

to carriers on passengers and liaising with local authorities. British ILOs conduct this work in over 120 States across the world.¹⁸⁰

2.4.2.2 In Practice

The founding Regulation lists maintaining contacts with local authorities, the management of *'legal'* migration, the prevention of *'illegal'* immigration and organising returns as being the main tasks of an ILO.¹⁸¹ As officials of a State, ILOs represent an organ of the State and so that State is able to control the work of its ILOs by issuing them with instructions as to how to cooperate with carriers or local authorities. They are not limited in this regard by the terms of the founding or amending Regulations. The terms of reference for any particular mission is responsive to changing policy priorities of the State.

ILOs lack all of the traditional compulsory powers – arrest, detention, restraint etc. As noted above (2.4.2.1), ILOs, at least in the UK, are not even granted the ordinary power associated with immigration officials of making a decision as to access. Instead, State control over migrants through ILOs extends only so far as giving *'advice'* to carriers as to whether a passenger should be boarded or not on the basis of that passenger's travel documentation and any other intelligence available to the ILO. This all important role as an *'adviser'* cannot be found in either the founding Regulation nor in the amending Regulation. The role of ILOs is controversial because question marks have been raised as to the role that they play in either directly prohibiting persons from entering a plane or in circumstances where they indirectly recommend to a carrier or a foreign border authority not to allow boarding or exiting the country.¹⁸² The ILOs' usual role in the crucial access decision has been in *'advising'* the airlines as to the boarding of passengers who possess suspect documentation or are perceived as representing a risk. The actual decision as to whether to board a passenger or not remains one to be made by the airline.

The context in which advice is conveyed is all important. ILOs advise a carrier's staff about a matter of which that staff has little knowledge. However, those staff are aware that their employer will be fined should an individual be afforded passage if that person

¹⁸⁰ A useful map has been produced by the UK's Risk and Liaison Overseas Network. It is available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/278158/ralon-map.pdf

¹⁸¹ Council Regulation (EC) 377/2004 of 19 February 2004 on the Creation of an Immigration Liaison Officer Network. Articles 1 and 2.

¹⁸² Den Heijer. M., *Europe and Extraterritorial Asylum* (2011) PhD Thesis, Leiden University. Page 188.

has been highlighted as being inadmissible by an ILO. The staff is also aware that in the unlikely event that they decide to board the person, despite advice to the contrary received from ILOs, the authorities at the receiving State will be alerted to this and a gate check will be conducted upon arrival.¹⁸³ In such circumstances, is the opinion expressed by an ILO still just advice or does it become something more? The weight given to ILO 'advice' by carriers was made clear by the then Dutch Minister for Alien Affairs and Integration who stated that in over 99% of cases, that advice was followed by Dutch airlines.¹⁸⁴ Certainly, the State is capable of directing, steering and influencing the work of ILOs and the all-important decision as to access. While more powers may be added at the behest of the Member State from which the ILO originates, there has been no indication as of yet, that any Member State has given any wider ranging powers to its ILOs than that of advising the carrier. Certainly, no State has afforded them any kind of compulsory power. The work of ILOs is not transparent and this impacts upon any proper assessment of the control that they hold over the decision to provide access to a migrant. Their activities are not monitored apart from the report, which each Member State that has ILOs must submit to the Council. That completed report is not made public but a blank version of that report is publicly available.¹⁸⁵

Mr Barrot, a Commission official, answered questions in the European Parliament as to the use and power of ILOs and specifically: To what extent do airlines act on the recommendation of ILOs as to whether or not to carry a passenger? In Answer Mr Barrot stated that it was not possible to precisely gauge the impact of ILO advice on airlines decisions to enable or deny passage to passengers but went on to say that "*The ILOs can give advice to airline staff on the verification of travel documents and entry conditions upon arrival in the EU, but the company and the national authorities of the third-country*

¹⁸³ Scholten S., Minderhoud, P., *Regulating Immigration Control: Carrier Sanctions in the Netherlands* (2008) *European Journal of Migration and Law* 10,123. Page 140.

¹⁸⁴ Scholten S., Minderhoud, P., *Regulating Immigration Control: Carrier Sanctions in the Netherlands* (2008) *European Journal of Migration and Law* 10,123. Page 138.

¹⁸⁵ Commission Decision of 29 September 2005 on the format for the report on the activities of immigration liaison officers networks and on the situation in the host country in matters relating to illegal immigration (2005/687/EC).

*are responsible for denying boarding.*¹⁸⁶ Likewise, according to the Council, ILOs “*do not carry out any tasks relating to the sovereignty of States.*”¹⁸⁷

2.4.3 The Nature of Control through Externalisation

The procedures taken in externalisation provide a contrast between a procedure that depends upon compulsory powers for its success and a procedure in which compulsory powers are conspicuous in their absence. For the latter procedure, Immigration Liaison Officers, the EU and the Member States have repeatedly underlined the fact that the decision on access is *not* within the procedure’s purview let alone any kind of compulsory power. The fact that ILOs are not directly empowered to take the decision to grant access could be argued as betraying a recognition on the part of the State that making that decision directly is indicative of control. The question stands: “*Why cannot the authorities, the ALO’s posted overseas, be granted these powers?*”¹⁸⁸ There is no such issue with maritime interdiction. However, compulsory powers being so central to the implementation of a procedure brings its own set of challenges.

The act of stopping a ship can, in and of itself, be taken as a compulsory power but interdiction can involve very different types and levels of compulsory powers. Such variables notwithstanding, the kind of physical force and control exercised by the State during a procedure will be crucially important for a court to understand whether the extraterritorial jurisdiction of the State has been engaged or not.

The contrast between maritime interdiction and ILOs in terms of the use of compulsory powers is also manifested in the types of rights that are violated in the implementation of each procedure. By incorporating compulsory powers, maritime interdiction puts rights at risk whose violation are more obvious because they are often manifested in physical injury. Most notably and not exhaustively, these rights include right to life and the prohibition of torture, inhuman or degrading treatment. Maritime interdiction though also places at risk certain other rights such as the right to asylum or the prohibition

¹⁸⁶ Answer to Parliamentary questions E-3228/2008. 18th July 2008. Mr Barrot on behalf of the Commission.

¹⁸⁷ JHA Council Conclusions, 27 February 2002. Paragraph 67.

¹⁸⁸ Roundtable on Carriers’ Liability Related to Illegal Immigration. Minutes of the Meeting. Brussels, 30th November 2001. Page 30.

on *refoulement* which do not necessarily include such an overtly obvious physical result. ILOs, not equipped with compulsory powers, also put these latter rights at risk and so, in many cases may not be as visible in their violation.

Both maritime interdiction and ILOs, unlike privatised procedures, involve an organ of the State implementing the procedure directly. As opposed to its counterpart procedures of privatisation, the State does not have to delegate its control in order to externalise, it can control procedures directly. That organ is placed in a position by which it can direct, steer and influence the implementation of an externalised procedure. The capability of the migrant to attach legal responsibility to the State for externalised procedures is predicated upon being able to access justice and, upon doing so, being able to vindicate their rights in court. The primary legal hurdle faced in doing so is extraterritorial jurisdiction. The State must be shown to have engaged its rights obligations by having exercised extraterritorial jurisdiction. Potentially, extraterritorial jurisdiction can *trigger* State extraterritorial legal responsibility.¹⁸⁹ As has been noted in the Strasbourg court: “*The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it...*”¹⁹⁰

Maritime interdiction and Immigration Liaison Officers provide the courts with different challenges to the courts’ approach. An approach which takes compulsory powers as being *the* trigger of when a State has exerted control is difficult to reconcile with a procedure such as ILOs, which provide the State with a different type of control. However, such a procedure still affords the State a very significant power to decide outcomes according to State preferences in the “*problem airports*”¹⁹¹ of third States. Yet, the mere presence of an organ of the State at the time of making a decision on entry surely cannot

¹⁸⁹ Brouwer. E., Extraterritorial Migration Control and Human Rights: Preserving the Responsibility of the EU and its Member States. Page 216. In Ryan. B., & Mitsilegas. V., Extraterritorial Immigration Control (2010).

¹⁹⁰ Hirsi Jamaa and Others v. Italy, 27765/09, [GC]. Paragraph 70.

¹⁹¹ To use a phrase coined by a recommendation of the German Presidency in 1999 proposing the establishment of round-the-clock document adviser bureaux in ‘*problem*’ airports with alternate participation of all EU Member States. See: Council Document 5529/99, Establishment of round-the-clock document adviser bureaux at problem airports with alternate participation of all EU Member States. Recommendation of the German Presidency. See also: Scholten S., Minderhoud. P., Regulating Immigration Control: Carrier Sanctions in the Netherlands (2008) European Journal of Migration and Law 10,123. Page 138.

impact upon the legal responsibility of the State. The UK provides a twenty-four-hour telephone helpline which gives on the spot 'advice' to carriers should their advice on the ground be unavailable or extra expertise be needed.¹⁹² *Prima facie*, that phone line provides just as much input into a boarding decision as an ILO would do if he/she were present on the ground. The challenge facing the courts is finding an appropriate test which adequately holds the State to account without making it liable for all and every trivial involvement in a third State. This is a little easier said, than done.

2.5 Conclusion – Nature of Control

This chapter has examined a range of different procedures which have externalised or privatised the implementation of EU Member State policy. The chapter briefly set out how each procedure is implemented and considered the nature of the control exerted by the State in that implementation. Across the procedures, Member States retain certain control but the nature of that control varies. In privatisation, the State is still able to control implementation of procedures despite working through delegation. This is true for both sides of the privatisation distinction – by contract and by threat of sanction. Privatisation through contract and certain externalisation incorporate the use of compulsory powers. Enforced privatisation does not incorporate compulsory powers. Likewise, the powers afforded to Immigration Liaison Officers do not include the use of detention, restraint or any other such power. Compulsory powers are closely associated with the State and the courts, as will be examined (Chapters III and IV), are more inclined to find that the State has legal responsibility where they are present. Obviously, it is also possible for non-compulsory powered procedures to be found as having engaged a State's legal responsibility. However, the courts have been markedly less inclined to find procedures that involve a somewhat removed influence or the exercise of so-called soft powers orientated around coordination and organisation, as being significant enough to engage the legal responsibility of the State. There is therefore, a significant deviation between control as it has been defined here (1.2.1) and control which entails legal responsibility in the eyes of the courts.

¹⁹² Reynolds. S., Muggerridge. H., Remote Controls: How UK Border Controls are Endangering the Lives of Refugees (2008) UK Refugee Council Report. Page 45.

Common to all externalisation and privatisation procedures is the fact that the State retains the ability to quickly change the terms of the relationship. Externalisation affords the State the opportunity to simply change the terms of reference for its immigration officials acting in an external setting. Privatisation allows the State to set the terms of a contract or to change the reasons for sanction as required.

Privatisation and externalisation are by no means limited to the instruments explored in this chapter. These phenomena have touched a diverse and important range of services and facilities upon which irregular migrants depend. From the growing flirtation with the external processing of refugees¹⁹³ to the privatised migration control through health care systems,¹⁹⁴ education¹⁹⁵ and landlords,¹⁹⁶ these phenomena are becoming increasingly intrinsic to migration control and border management in the Member States of the EU. The crucial question for each procedure is whether the *nature* of the control exerted is such that it engages the State's legal responsibility – an area of law in which certainty is required has been left somewhat ambiguous.

¹⁹³ German minister urges processing migrants outside of the EU. EBL News, 26 January 2017. Available at: <https://eblnews.com/news/europe/german-minister-urges-processing-migrants-outside-eu-53762>

¹⁹⁴ Nason. N., NHS shares patient data of suspected immigration offenders with Home Office (2017) Free Movement Blog. Available at:

<https://www.freemovement.org.uk/nhs-shares-patient-data-suspected-immigration-offenders-home-office/>

¹⁹⁵ El-Enany. N., London Metropolitan University is there to educate, not police. The Guardian, 31st August 2012.

¹⁹⁶ Immigration Act 2014. Chapter 1, penalty notices, section 23.

III. Externalisation's Trigger – Extraterritorial Jurisdiction

3.1 Introduction – Externalised Control

In participating in the debate as to external processing, the then German Interior Minister, Mr. Otto Schily, made an extreme proposal.¹ Schily proposed that there should be external processing for those asylum seekers who are intercepted by the Member States in international waters. Mr. Schily explicitly argued that such people could lawfully be brought to other (third) countries for processing of their asylum claims because they were not the responsibility of the intercepting Member State as that Member State was acting outside of its territory.² Territoriality has oftentimes been understood thusly – as being *the* crucial factor in deciding whether State responsibility has or has not been engaged. This chapter considers the old assumption that jurisdiction, and consequently a State's legal responsibility, is in some way tied to territory. This chapter also examines migrant's ability to attach legal responsibility to the State for a rights violation experienced during the implementation of an externalised procedure. *The* crucial legal impediment to a migrant's access to justice when he/she experiences a rights violation at the hands of an externalised procedure is extraterritorial jurisdiction. Jurisdiction and state responsibility are different concepts, which address separate legal questions.³ The two concepts cannot be equated but that does not compromise jurisdiction's role as a trigger of legal responsibility.⁴ A migrant's ability to access justice and to vindicate his or her rights before the UK Courts, the CJEU or the ECtHR, thereby attaching legal responsibility to the State, may be frustrated by a court's narrow approach to extraterritorial jurisdiction.

¹ For an analysis of the original UK proposal, the Commission Communication in response and the German elaboration, see: Noll, G., *Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones* (2003) *European Journal of Migration and Law* 5, 303. See also: Haun, E., *The Externalisation of Asylum Procedures: An Adequate EU Refugee Burden Sharing System?* (2007).

² Garlick, M., ED "Regional Protection Programmes:" Development and Prospects. Page 375. In Maes, M., Foblets, MC., De Bruycker, P., Venheule, D., Wouters, J., *The External Dimensions of EU Asylum and Immigration Policy* (2011).

³ Milanovic, M., *Extraterritorial Application of Human Rights Treaties* (2011). Page 41. See also: Besson, S., *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to* (2012) *Leiden Journal of International Law*, 25, 857. Page 867.

This chapter first turns to consider the extraterritorial application of the Charter (3.2). The role of the ECtHR (3.3) and the UK's domestic courts (3.4) represent the other two chief sections of this chapter. However, such has been the interaction on extraterritorial jurisdiction between these later two fora that they may be conceived as one overarching conversation as to how extraterritorial jurisdiction is engaged. While the UK's actions abroad have given rise to seminal case-law in consideration of extraterritorial jurisdiction by the Strasbourg court, its domestic courts also have the capability in their own right to pass influential judgments as to where the UK's fundamental rights obligations begin and end. The final section (3.5) concludes by proffering some conclusions on the role of the CJEU and its potential for a greater role; while also synopsisizing the challenges jointly faced by the UK domestic courts and the ECtHR in attaching legal responsibility to States which exercise *de facto* control.

3.2 Application of EU Fundamental Rights Law to Externalisation

This section considers the legal responsibility of EU Member States for fundamental rights violations which occur in the implementation of an externalised procedure of migration control and border management. The EU is supposed to become a full contracting party to the ECHR and should thus itself one day be subject to its Article 1.⁵ However, as Costello and Moreno-Lax point out this is “*not relevant to the question of the scope of application of EU fundamental rights and the Charter within the EU legal context as a matter of EU*

⁴ “*Jurisdiction only triggers the applicability of human rights law, whereas State responsibility examines whether the State is liable for the violation of a specific human right.*” See: Klug, A., & Howe, T., *The Concept of State Jurisdiction and the Applicability of the Non-Refoulement Principle To Extraterritorial Interception Measures*. Page 100. In Ryan, B., and Mitsilegas, V., *Extraterritorial Immigration Control* (2010).

“*The concept of jurisdiction... remains important as a threshold criterion of responsibility for human rights violations...*” See: Goodwin-Gill, G., *The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement*, *International Journal of Refugee Law* (2011) Vol. 23 No. 3, 443. Page 452. See also: Scheinin, M., *Just Another Word? Jurisdiction in the Roadmaps of State Responsibility and Human Rights*. In Langford, M., Vandehole, W., Scheinin, M., & Van Genugten, W., *Global Justice, States' Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (2013).

For Gammeltoft-Hansen's position as to the relationship between extraterritorial jurisdiction and State legal responsibility, see: Gammeltoft-Hansen, T., *Access to Asylum* (2013). Page 146.

⁵ Important to note here the CJEU's finding that the EU could not accede to the ECHR under the draft agreement proposed. See: Opinion 2/13

law.”⁶ Notwithstanding the territorial limitations in place in the Treaties,⁷ CJEU case-law has confirmed that Union law can have effect “*outside the territory of the Community*.”⁸ It is left to examine the application of the Charter of Fundamental Rights and the ways in which the Member States may be held liable for rights violations that occur in the implementation of externalised migration control and border management procedures.

The ECtHR and EU Member States’ domestic courts have a long and storied history of considering externalised procedures and actions which could possibly give rise to extraterritorial jurisdiction. What is sometimes overlooked is the potential for the CJEU and the Charter of Fundamental Rights to play a key part in ensuring that EU Member State fundamental rights obligations are observed extraterritorially and that key fundamental rights, for asylum seekers especially, are protected. Extraterritorial jurisdiction represents the principle legal obstacle *vis-à-vis* a migrant being able to vindicate the rights contained in the Charter which have allegedly been violated beyond Convention territory (*espace juridique*). The Charter does not define its extraterritorial reach and so there has been a discussion as to whether or not it can be applied extraterritorially. That discussion is addressed in the following subsection (3.2.1). What emerges as being crucial to engaging the Charter is the CJEU’s interpretation of when is the Member State “*implementing*” EU law.⁹ This is subject matter of the subsequent subsection (3.2.2).

3.2.1 Extraterritorial Application of the Charter

Unlike the ECHR, the Charter does not possess a jurisdiction based clause which delimits its scope of application.¹⁰ The Charter certainly does not, either implicitly or explicitly, delimit its own application according to any territorial understanding of its field of application. Neither has the CJEU ruled that a territorially restricted interpretation of

⁶ Costello. C., and Moreno-Lax. V., The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model. Page 1675. In Peers. S., Hervey. T., Kenner. J., & Ward. A., The EU Charter of Fundamental Rights (2014).

⁷ Article 52, TEU. Article 355, TFEU.

⁸ C-214/94, Boukhalfa v Bundesrepublik Deutschland. Paragraph 14.

⁹ Article 51, Charter of Fundamental Rights of the EU.

In the current context, see: Moreno-Lax. V., Chapter 7, The Fundamental Rights Acquis in Moreno-Lax. V., Seeking Asylum in Europe – Extraterritorial Border Controls and Refugee Rights under EU Law (2012) PhD Thesis, Université Catholique de Louvain.

¹⁰ Costello. C., and Moreno-Lax. V., The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model. Page 1658. In Peers. S., Hervey. T., Kenner. J., & Ward. A., The EU Charter of Fundamental Rights (2014).

jurisdiction is its preferred approach. Consideration of the extraterritorial application of the Charter has so far been almost exclusively the preserve of legal academics and even they have hitherto been somewhat unforthcoming. One important exception to that reserved reaction has been the contribution of Costello and Moreno-Lax.¹¹ Those authors argued convincingly that the Charter's *only* requirement for application is the question of whether EU law applies to the particular circumstances in question. Article 51(1) of the Charter states that the provisions of the Charter "*are addressed ...to the Member States only when they are implementing Union law.*" In other words, the Charter applies to the acts of the Member States when they are implementing EU law *or* when they act within the scope of Union law.¹²

A Member State is *implementing EU law* when it adopts measures with the intention of applying an EU act – for example a directive¹³ or a regulation.¹⁴ The adoption of such measures represents the *implementation* of Union law as per Article 51(1) of the Charter.¹⁵ However, it is *not* absolutely necessary for national legislation to have been adopted for the implementation of EU law, it's sufficient that the situation falls within the scope of EU law for application of the Charter.¹⁶ It is thus also applicable when a Member State adopts measures whose subject matter is already governed by provisions of EU primary *or* secondary legislation.¹⁷ The Charter being applicable when an instrument lay

¹¹ Costello. C., and Moreno-Lax. V., The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model. In Peers. S., Hervey. T., Kenner. J., & Ward. A., The EU Charter of Fundamental Rights (2014).

¹² See: Lenaerts. K., Exploring the Limits of the EU Charter of Fundamental Rights (2012) European Constitutional Law Review Vol. 8(3), 375.

See also: Sarmiento. D., Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe (2013) Common Market Law Review Vol. 50(5), 1267.

Finally, see: Safjan. M., Areas of application of the Charter of Fundamental Rights of the European Union: fields of conflict? (2011) Working Paper No. 22, European University Institute

¹³ See: C442/00, Cabellero.

¹⁴ Groussot. X., Pech. L., & Thor Petursson. G., The Scope of Application of Fundamental Rights on Member States Action: In Search of Certainty in EU Adjudication (2011) Working Paper No 1, Eric Stein. Page 5.

¹⁵ C-309/96, Annibaldi. Paragraphs 21-23.

C-40/11, Iida. Paragraph 79.

C-617/10, Åkerberg Fransson, [GC]. Paragraphs 19-20.

C-400/10 PPU J McB v. LE. Paragraph 51.

¹⁶ C617/10, Åkerberg Fransson, [GC].

¹⁷ Those measures adopted by a Member State with the intention of implementing an EU act, see: C-5/88, Wachauf.

within the scope of EU law lends credence to the argument that a Member State cannot evade engagement of the Charter for certain procedures by way of a simple opt-out from EU legislation. Article 51(2) provides that the Charter “*does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.*” That restriction has no material impact on when Union law is being implemented.

The above-mentioned criteria serve as a guide in applying the Charter but the CJEU has not espoused a “*specific test*”, the application of which would provide an answer as to whether a certain measure represented the implementation of Union law by the Member State or not.¹⁸ The CJEU has a burgeoning jurisprudence as to what constitutes a Member State *implementing Union law* and thus what engages the Charter.¹⁹ The cases of *Mangold*²⁰ and *Küçükdeveci*²¹ have been important in exploring just how expansive the application of EU law can be and therefore how expansively the Charter may be applied. In both cases, national rules were deemed to come within the scope of EU law by virtue of dealing with substantive matters that were already governed by EU directives, triggering the application of EU fundamental rights law.²² The case of *Fransson*²³ sets the high water mark for a wide approach being taken by the Court in this context. The impression may be that Article 51 can be all encompassing and that almost everything can be considered to

Those measures adopted by a Member State whose subject matter is governed by provisions of Union law, see: C-465/00, C-138/01 and C-139/01, Rundfunk. C-101/01, Lindqvist.

Those circumstances in which the State derogating from Union law, especially free movement, can result in a breach of the Charter, see: C-260/89, ERT.

See: Groussot. X., Pech. L., & Thor Petursson. G., The Scope of Application of Fundamental Rights on Member States Action: In Search of Certainty in EU Adjudication (2011) Working Paper No 1, Eric Stein. Page 14.

¹⁸ Groussot. X., Pech. L., & Thor Petursson. G., The Scope of Application of Fundamental Rights on Member States Action: In Search of Certainty in EU Adjudication (2011) Working Paper No 1, Eric Stein. Page 1-2.

¹⁹ Discretion in *NS* is given as example by Spaventa of just how broad “*the application*” has become. See: C-411/10 and C-493/10 *NS and ME*, [GC].

See: Spaventa. E., *Fundamental Rights in the European Union*, Chapter 9, page 233. In Barnard. C., & Peers. C., *European Union Law* (2014).

²⁰ C-144/04, *Werner Mangold v Rüdiger Helm*, [GC].

²¹ C-555/07, *Seda Küçükdeveci v Swedex GmbH & Co. KG*, [GC].

²² Costello. C., & Moreno-Lax. V., *The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model*. Page 1681. In Peers. S., Hervey. T., Kenner. J., Ward. A., *The EU Charter of Fundamental Rights* (2014).

²³ C-617/10, *Åklagaren v Hans Åkerberg Fransson* [GC].

have been already touched by EU acts but the CJEU has shown itself to be resistant to such a reading and is precise rather than general in applying Article 51.²⁴

The CJEU is still feeling its way on what constitutes “*implementing Union law*” and so, what engages the Charter. What is clear is that a person *cannot* invoke the Charter against the State in all and every circumstance simply on the basis of an exclusive or shared EU competence. Nevertheless, the CJEU has overseen the steady erosion of areas of State action which are exempt from being required to respect EU fundamental rights.²⁵ In other words, the Court has found a growing and an increasingly diversified field of application for the Charter because the fields in which Member States are not “*implementing Union law*” have been found by the Court to have shrunk in number and in scope. This significant shrinkage has meant that the Charter has potential for application in ways which other fundamental rights fora may not have because it is not subject to any debate as to jurisdiction in a territorial sense. Costello and Moreno-Lax’s contribution argues convincingly in favour of the CJEU’s approach to the application of the Charter being orientated around competences rather than adopting a concept of jurisdiction which revolves around territory.²⁶

3.2.2 The Charter’s Requirement – “...*implementing Union law*”

Intense consideration of the still-evolving trigger for application (“...*implementing Union law*”) is beyond the scope of this work²⁷ but a relatively straightforward application may be made as to externalised migration control and border management. The EU’s external

²⁴ See: C-370/12, Thomas Pringle.

See also: Lenaerts. K., Exploring the Limits of the EU Charter of Fundamental Rights (2012) European Constitutional Law Review, 8, 375.

See also: C-106/13, Fierro and Marmorale v Ronchi and Scocozza.

Finally, see also: C-14/13, Gena Ivanova Cholakova.

²⁵ Especially important in this regard have been: C-144/04, Werner Mangold v Rüdiger Helm, [GC]; C-555/07, Seda Küçükdeveci v Swedex GmbH & Co. KG, [GC]; C-617/10, Åkerberg Fransson, [GC].

²⁶ Costello. C., and Moreno-Lax. V., The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model. Page 1682. In Peers. S., Hervey. T., Kenner. J., & Ward. A., The EU Charter of Fundamental Rights (2014).

²⁷ See: Hancox. E., The Scope of EU Fundamental Rights: An Analytical Approach (2012) LL.M thesis, European University Institute.

See also: Lenaerts. K., Exploring the Limits of the EU Charter of Fundamental Rights (2012) European Constitutional Law Review, 8, 375.

competence with regard to the AFSJ²⁸ is a shared competence.²⁹ The EU's competence in this context stems from Article 79(3) TFEU which provides the Union with the competence to conclude readmission agreements and Article 78 TFEU which gives the Union the competence to adopt measures promoting “*partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.*”³⁰ These two provisions set out the Union's external competence for the AFSJ. Beyond these, “*the external AFSJ remains a field of largely implied external competence.*”³¹ This also means that Member States can continue to exercise their competence on AFSJ matters to the extent that the EU has not exercised its competence.³²

With externalised procedures Member States are oftentimes implementing domestic law which finds its substantive roots in acts of the Union. A Member State which has created domestic law on the basis of the Immigration Liaison Officer regulations³³ is, in effect, *implementing Union law*. With regard to maritime interdiction, Italian push-backs to Libya³⁴ which led to the *Hirsi*³⁵ case at the ECtHR, were undertaken before the EU began providing for surveillance and interception of migrants at sea.³⁶ The implementation of

²⁸ For a comprehensive overview, see: Eisele, K., *The External Dimension of the EU's Migration Policy* (2014). Rijpma, J., *The External Dimension of EU Border Management*. In Rijpma, J., *Building Borders: The Regulatory Framework for the Management of the External Borders of the European Union* (2009) PhD Thesis, European University Institute. Van Vooren, B., Chapter 14, *The External Dimension of Freedom, Security and Justice*. In Van Vooren, B., & Wessel, R.A., *EU External Relations Law: Text, Cases and Materials* (2014). Monar, J., *The EU's growing external role in the AFSJ domain: factors, framework and forms of action* (2013) *Cambridge Review of International Affairs* 27 (1), 147.

²⁹ Article 4(2) (j) TFEU.

³⁰ Article 78(2)(g), Treaty on the Functioning of the EU.

³¹ Cremona, M., *EU External Action in the JHA Domain: A Legal Perspective*. In Cremona, M., Monar, J., & Poli, S., *The External Dimension of the Area of Freedom, Security and Justice* (2011).

³² Article 2(2) TFEU, Treaty on the Functioning of the EU.

An example of a Member State remaining free to conclude individual agreements with third countries in fields that have not been wholly pre-empted by EU action is the 1 October 2008 agreement that Germany signed with the US on access to biometric data and the spontaneous sharing of data about known and suspected terrorists.

³³ See: Regulation (EU) No 493/2011 of the European Parliament and of the Council of 5 April 2011 amending Council Regulation (EC) No 377/2004 on the creation of an immigration liaison officers network.

³⁴ Treaty on Friendship, Partnership and Co-operation by Italy and Libya (2008).

³⁵ *Hirsi Jamaa and others v Italy*, 27765/09, [GC].

³⁶ Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 2010/252.

Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated

domestic legislation applying maritime interdiction is certainly not absolutely necessary in order for the Charter to be applicable. The implementation of procedures largely based upon the External Sea Borders Regulation will in themselves represent the *implementation of Union law*. The Charter will track a competence in any case and the implementation of procedures that have already been materially dealt with by the Union will give rise to a Member State operating subject to the Charter. This means that even if a Member State has opted out of the relevant legislation, the Charter will still apply where that Member State has implemented a procedure which has already been dealt with by that legislation.

Frontex, like other Union AFSJ Agencies, has been conferred with a limited external competence with specific purposes.³⁷ In conjunction with their own governing legislation, maritime interdiction³⁸ and Liaison Officers³⁹ have both been enshrined in the European Border and Coast Guard Regulation and form an important element of the Agency's work. In any case, the Agency is bound by the Charter in all it does.⁴⁰ An alleged violation at the hands of Immigration Liaison Officers or maritime interdiction in a mission that is implemented by Frontex will automatically engage the Charter. The Agency's *'hands-off'* approach could prove to be crucial in this regard as simple organisation of a procedure may not be enough to engage Frontex's responsibilities under the Charter.

The implementation of Union law is read widely by the CJEU to the extent that it is difficult to envisage situations whereby unilateral State action in a field such as migration control and border management could possibly give rise to a divergence between

by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

³⁷ Article 4(f). Article 54. Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

³⁸ Article 4(b). Article 8(f). Article 14(2)(e). Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

³⁹ Article 55. Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

⁴⁰ Article 51(1), Charter of Fundamental Rights.

procedures and the application of the Charter to any alleged violation arising out of the implementation of those procedures. The fact that this implementation takes place beyond the external borders of the Union, in international waters or inside third States, is immaterial to the application of the Charter. *“The scope of the Charter is the field of application of the Treaties ...where EU and Member State actors operate outside the physical or sovereign territory of the EU but within the scope of the Treaties, the application of the Charter is determined by the jurisdiction of the actors. The key issue is jurisdiction, not territory. Therefore, the Charter’s applicability applies to all actions of the EU institutions and bodies, wherever they are performed.”*⁴¹ Together the implementation of Union law and falling within the scope of Union law have tremendous potential as qualifying criteria to ensure an all-encompassing application of the Charter wherever EU law is implemented.

The impact of extraterritorial application of the Charter will be most keenly felt at the level of national domestic courts applying the Charter directly to the implementation of Union law by the relevant Member State. In any case, *“...even where a particular issue has been deemed to lie outside the scope of application of EU law and therefore to be unreviewable by the ECJ for compliance with EU fundamental rights, the ECJ has occasionally drawn the Member State’s attention to its international obligations under the ECHR, as it did in Metock.”*⁴² The Charter, and by default the CJEU, have the potential to act as an important brake on any violations arising out of the external procedures of Member States, whether they are acting unilaterally or as a collective in a Frontex organised mission.

In *PPU X. and X*,⁴³ Advocate General Mengozzi seemed to carry questions as to the application of the Charter to their logical conclusion when arguing that *“...the fundamental rights recognised by the Charter, which any authority of the Member States must respect when acting within the framework of EU law, are guaranteed ...irrespective*

⁴¹ Guild. E., Carrera. S., Den Hertog. L., Parkin. J., Implementation of the EU Charter of Fundamental Rights and its impact on EU Home Affairs Agencies (2011). Page 48.

⁴² Craig. P., & De Búrca. G., EU Law – Text Cases and Materials 5th Ed. (2011). Page 388. Referring to the case of C-127/08 Metock.

⁴³ C-638/16, PPU X. & X. v. État Belge, [GC].

*of any territorial criterion.*⁴⁴ Mengozzi was essentially arguing that by adopting a decision under the visa code,⁴⁵ the authorities of a Member State are implementing EU law such that they are required to respect the rights guaranteed by the Charter. Such a finding would effectively require the Member States to issue humanitarian visas where there is a serious risk to Article 4. The fact that high stakes were at play was reflected by the thirteen Member States that submitted observations to the CJEU before it issued its judgment. Eventually, the Court diverged from the path beaten by the Advocate General by finding that a decision under the Article 1 of the Visa Code “*does not fall within the scope of that code but, as European Union law currently stands, solely within that of national law.*”⁴⁶ This Decision was taken on the basis that the situation in question fell outside the scope of the Visa Code as the purpose for the visa application made was to apply for international protection and not to obtain a short-term visa and no has been adopted on the basis of Article 79 (2) (a) of the TFEU (the issuing of long-term visas and residence permits to third-country nationals on humanitarian grounds). Perhaps the case may have arrived at the wrong time as the Court considered the arguments on the eve of several different national elections where migration was playing a key role and in a climate that was hostile to the Advocate General’s Opinion. The degree to which the approach taken by the Court may have even been politically motivated is impossible to say⁴⁷ but it does not bode well for the extraterritorial application of the Charter. However, more clarifying case-law is needed before a true picture emerges from the Court.

3.3 European Convention on Human Rights – Triggering Responsibility

In the case of *Loizidou*, in stating that the ECtHR deals with extraterritorial jurisdiction as a preliminary matter, the judgment declared that: “*The Court ...is not called upon at the preliminary objections stage of its procedure to examine whether Turkey is actually*

⁴⁴ Opinion of Advocate General Mengozzi, delivered on 7 February 2017, C-638/16, PPU X. & X. v. État Belge, [GC].

⁴⁵ Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code).

⁴⁶ C-638/16, PPU X. & X. v. État Belge, [GC]. Paragraph 51.

⁴⁷ Brouwer. E., The European Court of Justice on Humanitarian Visas: Legal integrity vs. political opportunism? (2017) CEPS Commentary.

*responsible under the Convention for the acts which form the basis of the applicant's complaints... The Court's enquiry is limited to determining whether the matters complained of by the applicant are capable of falling within the "jurisdiction" of Turkey even though they occur outside her national territory."*⁴⁸ This is noteworthy in the present context for two reasons. Firstly, and by way of immediate contrast with the Charter and CJEU, it is obvious straightaway that territory is not irrelevant to understanding jurisdiction in the ECtHR. Secondly, it is also clear that the Strasbourg Court does not equate jurisdiction and legal responsibility. However, it is clear that the existence of jurisdiction is a pre-requisite for consideration of legal responsibility and thus can be considered as being a *trigger* of such responsibility. The Strasbourg court has a storied history of consideration of this trigger.

Article 1 of the Convention obligates the Contracting States to secure "*to everyone within their jurisdiction the rights and freedoms defined in Section I.*" Questions have arisen as to the reach of jurisdiction of the Strasbourg Court and the basis by which the Court should approach determining that jurisdiction. In the *travaux préparatoire*, a proposal was made that the scope "*be limited to all persons residing within the territories of the Member States*" but this was rejected in favour of the wording based on jurisdiction.⁴⁹ The intention was that the Convention should *not* be limited by geography but should be capable of external engagement. The ECtHR has reflected that by rejecting absolutely the proposition of jurisdiction ending at the geographical borders of the contracting States. "*The question is thus not whether the ECHR can have extraterritorial application, but under which conditions that is the case.*"⁵⁰ Nevertheless, territory has still left an indelible mark on the evolution of how jurisdiction is approached by the Court. The Strasbourg court has repeatedly stressed that extraterritorial jurisdiction will only be engaged in '*exceptional*' circumstances.⁵¹ A debate has raged as to what circumstances

⁴⁸ See: *Loizidou v. Turkey*, 15318/89. Paragraph 61.

⁴⁹ Guild. E., *Security and European Human Rights: Protecting Individual Rights in Times of Exception and Military Action* (2007). Page 18.

⁵⁰ Guild. E., Carrera. S., Den Hertog. L., & Parkin. J., *Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies Frontex, Europol and EASO* (2011) Centre for European Policy Studies. Page 48.

⁵¹ *Extraterritorial jurisdiction only occurs in 'exceptional' circumstances.* See: *Banković and Others v. Belgium and Others*, 52207/99, [GC]. Paragraph 61. Also mentioned in: *Al-Skeini and Others v UK*,

should qualify the actions of the State as representing such ‘*exceptional*’ circumstances. The Strasbourg Court’s road to refining this ‘*exceptionality*’ has been paved with obfuscation rather than clarification.

3.3.1 The *Banković* Case – Prelude and Legacy

There are two main models that have formed the framework by which ‘*exceptionality*’ has been approached by the ECtHR.⁵² Firstly, there is the spatial model which is the State’s effective overall control of an area. Secondly, there is the personal model which is the State’s effective control of an individual. This second model has been particularly fraught with difficulty.⁵³ The case of *Loizidou*⁵⁴ established that effective control of a territorial area could qualify as engaging extraterritorial jurisdiction. Effective control of an area by the State in *Loizidou* was through its military and was within the *espace juridique* of the ECHR i.e. within the legal space of the contracting States. The *Cyprus v Turkey* joint case recognised that authorised agents of a State, including diplomatic and consular agents and armed forces, not only remain under its jurisdiction when abroad but can also bring any other persons or property into the jurisdiction of that State, insofar as they exercise *effective control* over such persons or property.⁵⁵ The crucial criterion in engaging a State’s extraterritorial jurisdiction in either model has thus been the control that it has exercised in the implementation of a procedure.

The infamous *Banković*⁵⁶ decision of 2001 was *the* pivotal moment in ECtHR consideration of extraterritorial jurisdiction. The Court in that case found that the aerial bombardment of Belgrade did not represent an engagement of the contracting States’ extraterritorial jurisdiction. The Court stated that Article 1 of the Convention must “*be considered to reflect the ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case.*”⁵⁷ The ECtHR held that the ECHR was essentially to be

55721/07, [GC]. Paragraph 149. And finally, in: *Hirsi Jamaa and Others v. Italy*, 27765/09, [GC]. Paragraph 72.

⁵² Set out in: Milanovic. M., *Extraterritorial Application of Human Rights Treaties* (2011).

⁵³ Milanovic. M., *Extraterritorial Application of Human Rights Treaties* (2011). Page 173.

⁵⁴ *Loizidou v. Turkey*, 15318/89.

⁵⁵ *Cyprus v Turkey*, 6780/74 and 6950/75. Paragraph 8.

⁵⁶ *Banković and Others v. Belgium and 16 Other Contracting States*, 52207/99, [GC].

⁵⁷ *Banković and Others v. Belgium and 16 Other Contracting States*, 52207/99. Paragraph 61.

applied within the *espace juridique*.⁵⁸ The Court rejected the applicants' argument that Convention obligations "adhere proportionally to the level of control exerted by a state party."⁵⁹ This was the context of *Banković's* famed declaration that Convention rights cannot be "divided and tailored" to suit the specific circumstances relevant in each case.⁶⁰ By not being 'divided and tailored' the Court meant that a State must be able to secure all of the Convention's rights in order to have jurisdiction.

The Court in *Banković* outlined four exceptional circumstances in which a contracting State could possibly exercise extraterritorial jurisdiction.⁶¹ These four exceptions themselves having already being set out in *Loizidou*⁶² and having been inspired by disparate case law from the Court. However, it should be added that these four exceptions to the strictly territorial understanding of jurisdiction were only set out in *Loizidou* as being examples of exceptions and the Court in that case didn't list them as being an exhaustive list but the Court in *Banković* implied they were. The four exceptions are: Cases which concern the extradition or expulsion of a person by a Contracting State;⁶³ cases where the acts of the State, whether performed inside or outside national borders, produce effects outside their own national territory;⁶⁴ cases which involve an 'effective' control of an area outside its own national territory; and finally, cases concerning consular or diplomatic actions and cases in which the actions of a vessel flying the flag of the contracting State are in question.⁶⁵

The ECtHR, in *Banković*, therefore rejected the personal model developed in the *Cyprus v Turkey* joint case (although did not expressly do so) in favour of a stringent interpretation of the *Loizidou* case which set out strictly defined strands of the spatial

⁵⁸ *Banković and Others v. Belgium and 16 Other Contracting States*, 52207/99. Paragraph 80.

⁵⁹ Miltner. B., *Revisiting Extraterritoriality after Al-Skeini: the ECHR and its Lessons* (2012) Michigan Journal of International Law Vol. 33(4), 693. Page 696.

⁶⁰ *Banković and Others v. Belgium and 16 Other Contracting States*, 52207/99. Paragraph 75.

⁶¹ *Banković and Others v. Belgium and 16 Other Contracting States*, 52207/99. Paragraph 68-73.

⁶² *Loizidou v Turkey*, 15318/89. Paragraph 62.

⁶³ *Soering v UK*, 14038/88; *Cruz Vara and Others v Sweden*, 15576/89; *Vilvarajah and Others v UK*, 13163/87; 13164/87; 13165/87; 13447/87; 13448/87.

⁶⁴ *Drozd and Janousek v France and Spain*, 12747/87.

⁶⁵ Miller. S., *Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention* (2010) European Journal of International Law Vol. 20 no. 4. Page 1227.

model.⁶⁶ *Banković* rejected an expansion of extraterritorial jurisdiction so as to include a personal model⁶⁷ because it feared what has come to be called the ‘*cause and effect notion*’ of jurisdiction. Essentially, the Court felt that the personal model would open the door to the possibility that contracting States engaged their jurisdiction in any situation whereby they had the power to violate a person’s rights anywhere in the world. However, the Court would soon find out that it was incapable of performing its duties without some form of personal model. The Court would have to reassess its refusal to accept that “*a state has obligations under human rights treaties towards all individuals whose human rights it is able to violate.*”⁶⁸ The reason why the *Banković* judgment became ‘*infamous*’ is that it has never been categorically rejected and there has instead been an awkward integration of the case into seemingly opposing paths which the Court has taken.

3.3.2 Subsequent Jurisprudence – Tacit Dissent to *Banković*

Post *Banković*, the ECtHR’s jurisprudence has not moved to clarify the scope of and rationale for the exceptions listed in the *Banković* case but has instead undermined that decision.⁶⁹ However, rather than a progressive move away from *Banković* reasoning, there has been a series of confused deviations from that key decision. These judgments have fallen badly short of the outright rejection of *Banković* that was needed and have actually attempted to adhere to that decision while dismantling key parts of its reasoning. The case-law post-*Banković* has also often seen the Court neatly avoiding any reference to that case at all and instead returning to the earlier practice in which extraterritorial jurisdiction was recognised seemingly on an *ad hoc* basis.⁷⁰

Already in 2005, in *Issa v Turkey*,⁷¹ in finding that the State had not established an ‘*effective*’ control, the Court put forward a broader interpretation of extraterritorial

⁶⁶ *Banković and Others v. Belgium and 16 Other Contracting States*, 52207/99. Paragraph 75.

⁶⁷ *Banković and Others v. Belgium and 16 Other Contracting States*, 52207/99. Paragraph 75.

⁶⁸ Milanovic. M., *Extraterritorial Application of Human Rights Treaties* (2011). Page 207.

See also: Scheinin. M., *Extraterritorial Effect of the International Covenant on Civil and Political Rights*. Page 76-78. In Coomans. F., & Kamminga. M., *Extraterritorial Application of Human Rights Treaties* (2004).

⁶⁹ Miller. S., *Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention* (2010) *European Journal of International Law* Vol. 20 no. 4. Page 1227.

⁷⁰ Miltner. B., *Revisiting Extraterritoriality after Al-Skeini: the ECHR and its Lessons* (2012) *Michigan Journal of International Law* Vol. 33(4), 693. Page 694.

⁷¹ *Issa v Turkey*, 31821/96.

jurisdiction which flew in the face of the reasoning of the court in *Banković*. The case involved a targeted killing by the Turkish State and there was disagreement over whether it actually occurred on Turkish soil or outside of the *espace juridique*, in northern Iraq. The Court applied both a spatial model (control of an area) *and* the personal model (control of an individual through an agent)⁷² thus making the question of where exactly it happened irrelevant. *Issa* did not reject *Banković* outright but it can only be seen as an important deviation away from that case and back toward application of the personal model which had been rejected in *Banković*. *Issa* was also directly contrary to the proposition that the spatial model can apply only within ECHR territory – the so-called *espace juridique*.⁷³ Case-law subsequent to *Issa* has followed its lead in applying the personal model⁷⁴ yet none of this jurisprudence has moved to expressly reject the Grand Chamber decision in *Banković*. At the same time, a host of case-law has explicitly restated the exceptionality principle with explicit approval of *Banković*.⁷⁵ There has also sometimes been reference made to the spatial model without any accompanying mention being made of the existence and application of a personal model.⁷⁶

In another decision from 2005, *Öcalan v. Turkey*,⁷⁷ the Court again made implicit moves away from *Banković*. With next to no reference being made to the *Banković* decision, in *Öcalan* the Court found that extraterritorial jurisdiction could be established on the basis of control held by a contracting State over any single individual through the actions of the contracting State's officials. The case concerned the kidnapping of Abdullah Öcalan, the Kurdish nationalist, and underlined the continued relevance of the personal model: “...the responsibility of Member States also applies in situations where the State is not in effective control of a certain area, but in the individual case exercises authority and control over a person or a group of persons.”⁷⁸ The *Öcalan* case is illustrative of the fact that the Court needs the personal model and adoption of same despite its earlier rejection

⁷² *Issa v Turkey*, 31821/96. Paragraph 71.

⁷³ Milanovic. M., Al-Skeini and Al-Jedda in Strasbourg (2012) *The European Journal of International Law* Vol. 23 no. 1. Page 126.

⁷⁴ See: *Isaak and Others v. Turkey*, 44587/98. *Solomou and Others v. Turkey*, 36832/97.

⁷⁵ For example, *Medvedyev and others v. France*, 3394/03, [GC]. Paragraph 64.

⁷⁶ *Ilaşcu and Others v. Moldova and Russia*, 48787/99. Paragraph 314.

⁷⁷ *Öcalan v. Turkey*, 46221/99, [GC].

⁷⁸ Grabenwarter. C., *European Convention on Human Rights Commentary* (2013). Page 8.

in *Banković*. The extraterritorial acts of State officials engaging that State's jurisdiction clearly goes beyond the understanding of jurisdiction being established purely on the basis of effective control over a specific area. It considerably widens the ambit by which an individual may have their Convention rights vindicated despite not being present on the territory of a contracting State. So, were *Issa* and *Öcalan* simply “an aberration”⁷⁹ or a sign of things to come?

3.3.3 *Al-Skeini* – Long Awaited Clarification or Awkward Merger?

The next really crucial instalment of guidance from the Court as to extraterritorial jurisdiction came in 2011 with the cases of *Al-Skeini*⁸⁰ and *Al-Jedda*.⁸¹ *Al-Skeini* concerned the killing of civilians (one applicant was killed in custody; five others were killed by soldiers on patrol) by British forces during the war in Iraq. *Al-Jedda* dealt with the internment of an Iraqi civilian for more than three years in a British army run detention centre in Basrah, Iraq. The internment in *Al-Jedda* was found to engage the UK's jurisdiction for the purposes of Article 1 of the Convention. The Court found that: “*The internment took place within a detention facility... controlled exclusively by British forces, and the applicant was therefore within the authority and control of the United Kingdom throughout.*”⁸² Much of the Court's assessment was spent considering whether the actions of the UN Multi-National Force were attributable to the UN or, more importantly, had ceased to be attributable to the troop-contributing nations.⁸³ The Court found that those troop-contributing States were still obligated by the Convention.

In *Al-Skeini*, the Court referenced a number of cases⁸⁴ in restating what it termed the territorial principle: “*A State's jurisdictional competence under Article 1 is primarily territorial. ...acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in*

⁷⁹ Miller. S., Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention (2010) European Journal of International Law Vol. 20 no. 4. Page 1230.

⁸⁰ *Al-Skeini and Others v. the United Kingdom*, 55721/07, [GC].

⁸¹ *Al-Jedda v. the United Kingdom*, 27021/08, [GC].

⁸² *Al-Jedda v. the United Kingdom*, 27021/08, [GC]. Paragraph 85.

⁸³ *Al-Jedda v. the United Kingdom*, 27021/08, [GC]. Paragraph 80.

⁸⁴ See: *Soering v UK*, 14038/88. Paragraph 86. *Banković and Others v. Belgium and 16 Other Contracting States*, 52207/99. Paragraph 61 and 67. *Ilaşcu and Others v. Moldova and Russia*, 48787/99. Paragraph 312.

exceptional cases.”⁸⁵ It then went on to somewhat awkwardly co-opt the personal model into the mainstream of exceptionality. The finding that the *use of force* by a State’s agents within a third State’s territory in *Al-Skeini* engaged that State’s jurisdiction amounted to a rejection of the *Banković* notion that the Convention’s rights could *not* be “*divided and tailored.*”⁸⁶ The Court has therefore approved the ability of applicants to rely on certain Convention rights when a State agent breaches a Convention right of those applicants. This can be true of a single right obligation or of the whole Convention and applies even if the violation occurs in a (non-contracting State – beyond the *espace juridique*) third State.⁸⁷

The Court in *Al-Skeini* considered the exceptions of extraterritorial jurisdiction⁸⁸ which were broadly in accordance with the four exceptions espoused in *Loizidou*⁸⁹ and *Banković*,⁹⁰ but broadened them by stating that “*the Court’s case-law demonstrates*”, that the “*use of force*” by a State’s agents operating in a third State “*may bring the individual ...brought under the control of the State’s authorities into the State’s Article 1 jurisdiction.*”

⁹¹ This exception referenced the *Öcalan* case. The Court went on to say that it did not consider jurisdiction to arise solely on the basis of control exerted by the contracting State over buildings, aircraft or ships, control over individuals can also engage the Court’s jurisdiction but “*What is decisive ...is the exercise of physical power and control over the person in question.*”⁹² *Al-Skeini* rejected the *Banković* contention that Convention rights could not be “*divided and tailored.*”⁹³ Instead the Court recognised that the positive obligation in Article 1 to secure “*the rights and freedoms defined in Section I of this Convention*” can be cut to fit the need of the particular circumstances of the extraterritorial

⁸⁵ *Al-Skeini and Others v. the United Kingdom*, 55721/07, [GC]. Paragraph 131.

⁸⁶ *Al-Skeini and Others v. the United Kingdom*, 55721/07, [GC]. Paragraph 137.

⁸⁷ Miltner. B., *Revisiting Extraterritoriality after Al-Skeini: the ECHR and its Lessons* (2012) Michigan Journal of International Law Vol. 33(4), 693. Page 697.

⁸⁸ *Al-Skeini and Others v. the United Kingdom*, 55721/07, [GC]. Paragraph 132-140.

⁸⁹ *Loizidou v. Turkey*, 15318/89. Paragraph 62.

⁹⁰ *Banković and Others v. Belgium and 16 Other Contracting States*, 52207/99, [GC]. Paragraph 68-73.

⁹¹ *Al-Skeini and Others v. the United Kingdom*, 55721/07, [GC]. Paragraph 136.

⁹² *Al-Skeini and Others v. the United Kingdom*, 55721/07, [GC]. Paragraph 136.

⁹³ *Banković and Others v. Belgium and 16 Other Contracting States*, 52207/99. Paragraph 75.

act in question.⁹⁴ Thus the ECtHR's "*jurisdiction is relative to the human rights the state is able to protect in the specific situation.*"⁹⁵

The UK's soldiers in *Al-Skeini*, in the course of their security operations in Iraq during the period in question, exercised authority and control over the individuals killed such that a jurisdictional link could be established between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.⁹⁶ *Al-Skeini* still did *not* completely abandon the territorial based approach to extraterritorial jurisdiction. Instead, the Court argued that the actions of the agents of a contracting State within a third State, in which that contracting State is exercising some public powers, can represent the engagement of Convention obligations.⁹⁷ It is the retention of this prerequisite, that the State is exercising some public powers, that has been the cause of most of *Al-Skeini's* criticism but this has been overshadowed by the welcome given to *Al-Skeini's* outright rejection of the *Banković* requirement that the State must be able to secure all Convention rights in order to have jurisdiction as well as the rejection of the *espace juridique* concept. While *Al-Skeini* did not reject *Banković* outright, it has confirmed earlier agency case-law, the so-called personal model,⁹⁸ most notably espoused in the case of *Öcalan*. 'Effective' control through the exercise of "*physical power and control*"⁹⁹ over a person alongside the exercise of some public powers on the territory of the third State – what Milanovic calls a "*bizarre mix of the personal model with the spatial one*"¹⁰⁰ – work together to establish extraterritorial jurisdiction. *Al-Skeini* does not represent as expansive a divergence from *Banković* as many scholars had proposed¹⁰¹ but it nonetheless represents an important further shift away from that wholly restrictive regime.

⁹⁴ *Al-Skeini and Others v. the United Kingdom*, 55721/07, [GC]. Paragraph 137.

⁹⁵ De Boer. T., Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection (2015) *Journal of Refugee Studies* 28 (1), 118. Page 128.

⁹⁶ *Al-Skeini and Others v. the United Kingdom*, 55721/07, [GC]. Paragraph 149.

⁹⁷ *Al-Skeini and Others v. the United Kingdom*, 55721/07, [GC]. Paragraph 135.

⁹⁸ See for example: Ryngaert. C., Clarifying the Extraterritorial Application of the European Convention on Human Rights (2012) *Utrecht Journal of International and European Law*, Volume 28(74), 57.

⁹⁹ *Al-Skeini and Others v. the United Kingdom*, 55721/07, [GC]. Paragraph 136.

¹⁰⁰ Milanovic. M., *Al-Skeini and Al-Jedda in Strasbourg* (2012) *European Journal of International Law* Vol. 23 no. 1. Page 131.

¹⁰¹ For example, see: Kesby. A., *The Shifting and Multiple Border and International Law* (2007) *Oxford Journal of Legal Studies* 27, 101.

It has been argued that the ECtHR may be most effective in how it protects the rights contained in the Convention by abandoning any territorial-based requirement for extraterritorial jurisdiction and instead focussing on the control exerted by the contracting State inside a third State, whether that control is over a territorial area or over an individual.¹⁰² Lawson has stated that “*the extent to which Contracting parties must secure the rights and freedoms of individuals outside their borders is commensurate with their ability to do so – that is: the scope of their obligations depend on the degree of control and authority that they exercise.*”¹⁰³ Lawson saw *Banković* as being the exception to a line of case law which placed the emphasis on control more generally rather than being a case which was a restatement of some long-standing spatial model rule which itself only has certain exceptions. At the moment, in light of *Al-Skeini*, the Court’s preference is to attach a territorial to any exception which arises through an agent’s control over an individual within a third State. In not wanting to explicitly reject the *Banković* ruling, the Court in *Al-Skeini* was forced to include this requirement – the exercise of public powers. Writing before the *Al-Skeini* judgment, Miller argued against Lawson’s openness to the personal model and stated that the Strasbourg Court had “*never found jurisdiction in cases involving a state’s extraterritorial actions absent some preceding or subsequent nexus to the state’s physical territory.*”¹⁰⁴ It seems the Court still didn’t have a desire to set such a precedent.

The academic reaction to *Al-Skeini* has generally been that it represents a positive departure from *Banković*. However, as noted above, the retention of a need for a territorial element in consideration of effective control has brought continued confusion as to what this requirement will mean into the future. On this point Milanovic points out that the scope of positive obligations of rights such as the right to life remain unclear – would the UK have had the positive obligation to protect the right to life of applicants in *Al-Skeini* even

¹⁰² For consideration and rejection of this argument pre-*Al-Skeini*, see: Miller. S., Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention. The European Journal of International Law (2010) Vol. 20, no. 4.

¹⁰³ Lawson. R., Life After Banković: On the Extraterritorial Application of the European Convention on Human Rights. Page 86. In Coomans. F., and Kamminga MT., Extraterritorial Application of Human Rights Treaties (2004).

¹⁰⁴ Miller. S., Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention (2010) European Journal of International Law Vol. 20, no. 4. Page 1236.

from purely private violence as it would have on its own territory?¹⁰⁵ Likewise, what of a less obvious or joint role¹⁰⁶ for the local (third) State in the breach in question or extraterritorial complicity scenarios as Milanovic calls them – if a UK agent were to feed questions to a coercive interrogation of a terrorist suspect in Pakistan for example?¹⁰⁷ The Court had a good opportunity to clarify its position in the case of *Jaloud*.¹⁰⁸ The case concerned the fall-out from the killing of Mr Jaloud by a Dutch led military detachment which was largely made up of Iraqi army soldiers and which was located in the south-east of Iraq in a British army controlled area.¹⁰⁹ One might imagine that the Court’s discussion might take the opportunity to further refine *Al-Skeini* and to lay out whether the British exercise of public powers could contribute to establishing Dutch extraterritorial jurisdiction under the personal model. However, the Court does not actually specify which model it is applying in the *Jaloud* decision and so the Court did not consider the necessity of public powers in that case.

More practical questions also exist. The acceptance of the personal model by the ECtHR has not coincided with any strict explanation as to how the State’s control in either model is to be delineated. What exactly makes a State’s control an ‘*effective*’ control either over an area or a person? More especially, and considering the case-law that has set out the personal model thus far, is this ‘*effective*’ control to be understood as requiring the exercise of compulsory powers by the contracting State? Certainly *Al-Skeini* hints toward their

¹⁰⁵ Milanovic. M., *Al-Skeini and Al-Jedda in Strasbourg* (2012) *The European Journal of International Law* Vol. 23 no. 1. Page 132.

¹⁰⁶ Just as legal responsibility can be shared, so too can jurisdiction. To date, there has only been only one decision (*Ilaşcu and Others v. Moldova and Russia*, 48787/99) in which the relationship between extraterritorial *de facto* jurisdiction of one State and the *de jure* jurisdiction of the State on whose territory the action takes place has been examined. According to *Ilaşcu*, the former does not replace the latter and both States are bound to respect their obligations under international human rights law. See: Klug. A., & Howe. T., *The Concept of State Jurisdiction And The Applicability Of The Non-Refoulement Principle To Extraterritorial Interception Measures in Ryan. B., and Mitsilegas. V., Extraterritorial Immigration Control* (2010). Page 91.

¹⁰⁷ Milanovic. M., *Al-Skeini and Al-Jedda in Strasbourg* (2012) *The European Journal of International Law* Vol. 23 (1). Page 132. See also: Milanovic. M., *Extraterritorial Application of Human Rights Treaties* (2011). Page 219.

¹⁰⁸ *Jaloud v The Netherlands*, 47708/08, [GC].

¹⁰⁹ *Jaloud v The Netherlands*, 47708/08, [GC]. Paragraph 140.

presence being a crucial prerequisite.¹¹⁰ For now, each case remains to be examined on the basis of the facts of that particular case.¹¹¹

3.3.4 Maritime Interdiction and *Hirsi*

The Strasbourg Court has most famously considered externalised procedures in the context of maritime interdiction in the case of *Hirsi Jamaa and Others v. Italy*.¹¹² However, previous to that decision the Court delivered several pertinent decisions which are also worth consideration here.

In 1997, an Italian naval vessel collided with an Albanian ship on the Straits of Otranto in Albanian territorial waters. The Italian vessel was attempting to interdict migrants from Albania and was acting on the basis of an Italian/Albanian bilateral treaty which allowed the Italians to interdict boats flying the Albanian flag. *Xhavara v Albania and Italy*¹¹³ was considered inadmissible because national remedies had not been exhausted but the case is worth noting on the basis of the questions of jurisdiction which arose in the case and which were considered by the Court.¹¹⁴ The Court found that Italy, as the flag State of the patrol boat, was responsible for the human rights violations caused by its vessel to persons not on board of its vessel.¹¹⁵ The Italian military vessel colliding with the boatload of migrants resulted in the death by drowning of 58 individuals. The case fits neatly into one of the four exceptions to territorial jurisdiction listed by the court in *Banković* – consular actions and actions by a vessel flying a contracting State’s flag. In any case, that the Albanian migrants were not physically on board the Italian vessel or that Italian officials were not on the Albanian vessel was not prohibitive to establishing

¹¹⁰ *Al-Skeini and Others v. the United Kingdom*, 55721/07, [GC]. Paragraph 136.

¹¹¹ *Al-Skeini and Others v. the United Kingdom*, 55721/07, [GC]. Paragraph 132.

See also: Miltner. B., *Revisiting Extraterritoriality after Al Skeini: The ECHR and its Lessons* (2012) *Michigan Journal of International Law* Vol 33, 693. Page 747.

¹¹² *Hirsi Jamaa and Others v. Italy*, 27765/09, [GC].

¹¹³ *Xhavara and Others v Italy and Albania*, (Admissibility decision), 11 January 2001, 39473/98.

¹¹⁴ Trevisanut. S., *Which Borders for the EU Immigration Policy? Yardsticks of International Protection for EU Joint Borders Management*. Page 135. In Azoulai. L., and de Vries. K., *EU Migration Law Legal Complexities and Political Rationales* (2014).

¹¹⁵ Klug. A., & Howe. T., *The Concept Of State Jurisdiction And The Applicability Of The Non-Refoulement Principle To Extraterritorial Interception Measures in Ryan. B., and Mitsilegas. V., Extraterritorial Immigration Control* (2010). Page 85.

jurisdiction.¹¹⁶ Mention may also be made here of a non-migration case, that of *Medvedyev and others v France*.¹¹⁷ That case didn't involve migrants but instead concerned Cambodian drug smugglers intercepted by the French navy on the high seas. The ECtHR found that the actions of the French coastguard in international waters had engaged France's extraterritorial jurisdiction. Thus the case made clear that contracting States engage ECHR jurisdiction for actions exercised on the high seas when those actions are carried out in the framework of an agreement which gives enforcement powers and/or when State authorities exercise effective control on vessels and their passengers.¹¹⁸

The *Hirsi* case was decided in early 2012 – eight months after *Al-Skeini*. The case examined whether an interception by the *Guardia di Finanza* in international waters constituted effective control and therefore an exercise of jurisdiction by Italy. The interception resulted in the Italian authorities returning migrants to Libya under the terms of a bilateral treaty between Italy and Colonel Gaddafi's Libya as it then was.¹¹⁹ This consisted of taking the migrants on board a vessel flying the Italian flag, sailing it to Libya and disembarking those migrants there. The question was thus raised whether or not the ECtHR's jurisdiction was engaged by Italy's actions in controlling migrants in this way. *Al-Skeini* did not do anything to dilute the understanding that jurisdiction for the ECtHR is primarily territorial; *Hirsi* again confirmed this as still being the Court's perspective.¹²⁰ The Grand Chamber did not revisit the delicate balance made in *Al-Skeini* of establishing whether or not an 'effective' control existed through the exercise of *physical power and control* over a person alongside the exercise of some public powers. Instead, in applying the general principles that govern jurisdiction within the meaning of Article 1 of the Convention to the facts of the *Hirsi* case, the Court made reference to the exception to extraterritorial jurisdiction which was made in *Banković* and which was referenced above in the context of the *Xhavara* case. The exception is as to the actions of vessels that are

¹¹⁶ Guild, E., Carrera, S., Den Hertog, L., & Parkin, J., Implementation of the EU Charter of Fundamental Rights and its impact on EU Home Affairs Agencies – Frontex, Europol and the European Asylum Support Office (2011) EP Study (Citizen's rights and constitutional affairs). Page 49.

¹¹⁷ *Medvedyev and others v. France*, 3394/03, [GC].

¹¹⁸ Trevisanut, S., Which Borders for the EU Immigration Policy? Yardsticks of International Protection for EU Joint Borders Management. Page 135. In Azoulay, L., and de Vries, K., EU Migration Law Legal Complexities and Political Rationales (2014).

¹¹⁹ Treaty on Friendship, Partnership and Co-operation by Italy and Libya (2008).

¹²⁰ *Hirsi Jamaa and Others v. Italy*, 27765/09, [GC]. Paragraph 71.

flying a contracting State's flag. The exception is based upon "*customary international law and treaty provisions.*"¹²¹

Some have argued that in the *Hirsi* case "...the Grand Chamber continues its progress away from a territorial approach to jurisdiction by extending it to interceptions on the high seas... [and] Thus the *Hirsi* case continues to challenge the traditional stance that the responsibility to protect human rights is essentially territorial."¹²² However, it has already argued here that the ECtHR is *not* in fact moving away from a territorial understanding of jurisdiction at all. It is simply that the framework of exceptions to that the territorial-based understanding is evolving. In any case, the maritime interdiction of migrants representing extraterritorial jurisdiction had already been dealt with by the ECtHR in *Xhavara*. *Hirsi* does not represent any substantial shift away from the essentially territorially based understanding of jurisdiction. *Hirsi* adds nothing to the shift away from *Banković* that *Al-Skeini* represented. The fact that *Hirsi* relied upon an exception already enumerated as such in the *Banković* case means that in extraterritorial jurisdiction terms, *Hirsi* was not a ground-breaking case. What *Hirsi* did do was to further clarify the precedent already handed down by the admissibility case of *Xhavara*, that maritime interdiction of migrants can and will engage a contracting State's jurisdiction. In making this finding the ECtHR made reference to "*the exclusive de jure and de facto control of the Italian authorities*" from the time the migrants boarded the Italian vessel to the time of their disembarkation.¹²³ The Court felt that it was worth its while commenting upon the composition of the crew and the ownership of the vessels involved. The Court noted that the vessels in question were ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel.¹²⁴ This is interesting in the context of

¹²¹ *Banković and Others v. Belgium and 16 Other Contracting States*, 52207/99. Paragraph 73. *Al-Skeini and Others v. the United Kingdom*, 55721/07. Paragraph 85.

¹²² Giuffré. M., *Watered-down Rights on the High Seas: Hirsi Jamaa and Others V Italy* (2012) *International and Comparative Law Quarterly* Volume 61(03), 728. Page 730.

¹²³ *Hirsi Jamaa and Others v. Italy*, 27765/09, [GC]. Paragraph 81.

¹²⁴ *Hirsi Jamaa and Others v. Italy*, 27765/09, [GC]. Paragraph 81.

States sharing duties of maritime interdiction in instances such as Mauritanian crews on board Spanish ships and with a Spanish presence on board.¹²⁵

On this basis it is difficult to sustain the argument that “*The Hirsi case could set a critical precedent for those European States that are attempting to shift the burden of responsibility for examining asylum applications to third countries...*”¹²⁶ The *Hirsi* case can be taken as a further signal of resolve from the ECtHR that contracting States are to be made legally responsible for maritime interdiction. It is an affirmation of foregoing case-law rather than itself setting a crucial precedent which in any way builds upon *Al-Skeini*. However, the case cannot be taken as the death knell to extraterritorial migration control and border management procedures in all its guises. Question marks remain especially over such procedures if they do *not* incorporate compulsory powers or they take place inside the territory of a third State. *Hirsi* is certainly not *the* game-changing moment for externalised migration control and border management.¹²⁷

3.3.5 Agent Exceptionality Based on Two Criteria

Extraterritorial jurisdiction will still only be established as an exception to the prevailing territorial understanding of jurisdiction. The territorial-bound understanding of jurisdiction is still *the* rule albeit with a seemingly increasing framework, in terms of quantity and scope, of exceptions that are accepted by the ECtHR. Beyond maritime interdiction lay a patchwork of migration control and border management procedures whose implementation relies upon the presence of an organ of the contracting State on the territory of third States. Such procedures represent a “*final frontier*” for the Strasbourg court in the context of migration control and border management.¹²⁸ It is a “*final frontier*” in the sense that the ECtHR has never considered extraterritorial jurisdiction in the context of migration control and border management of a contracting State, inside the territory of a third State. Immigration Liaison Officers represent one such procedure and are doubly interesting to

¹²⁵ On this point, it is interesting to refer back to *Medvedyev and others v. France*, 3394/03, [GC]. That case involved the *Winner*, a vessel flying the flag of a third State but whose crew had been placed under the control of French military personnel.

¹²⁶ Giuffr . M., *Watered-down Rights on the High Seas: Hirsi Jamaa and Others V Italy* (2012) *International and Comparative Law Quarterly* Volume 61(03), 728. Page 744.

¹²⁷ Mc Namara. F., *Member State Responsibility for Migration Control within Third States – Externalisation Revisited* (2013) *European Journal of Migration and Law* 15, 319. Page 321.

¹²⁸ Mc Namara. F., *Member State Responsibility for Migration Control within Third States – Externalisation Revisited* (2013) *European Journal of Migration and Law* 15, 319. Page 320.

contemplate because they do not incorporate compulsory powers. The spatial and personal models have thus far both relied upon physical expressions of control in order to understand how ‘*effective control*’ is engaged.

In general, the continued piecemeal approach of the Strasbourg court to extraterritorial jurisdiction has an impact on the legal certainty and predictability involved in this area of law. Non-compulsory powered externalised migration control and border management are especially impacted upon in this regard. The scope of the exceptions to the territorial understanding of jurisdiction is in question. Immigration Liaison Officers, acting as agents of the State, do not utilise compulsory powers as the Turkish agents involved in the kidnapping of Abdullah Öcalan did in the *Öcalan* case. Immigration Liaison Officers work within the massive emigration bureaucracy of a third State, do not control any territory, do not exercise any compulsory powers and are not included in the exceptions listed in *Banković*¹²⁹ and expanded upon in *Al-Skeini vis-à-vis* the personal model. As things stand, the actions of an agent would need quite a radical reading of the personal model in order to engage a contracting State’s extraterritorial jurisdiction if that agent has the typical job description of an Immigration Liaison Officer. An Immigration Liaison Officer’s duties can be contrasted with the facts of the *Jaloud* case (supra, in the section 3.3.3). The *nature* of the “*authority and control over persons passing through a checkpoint*”¹³⁰ exerted in *Jaloud* was vastly different from that which is exercised by Immigration Liaison Officers in their checkpoint.

Al-Skeini gave rise to dual-criteria by which extraterritorial jurisdiction can be established by an agent of the State. Firstly, that agent must exercise *physical power and control* over the person in question.¹³¹ Secondly, the contracting State must be exercising “*all or some of the public powers normally to be exercised by that Government.*”¹³² The first criterion is unfulfilled by a procedure such as Immigration Liaison Officers. Immigration Liaison Officers’ crucial controlling power is the advice they provide to an

¹²⁹ *Banković and Others v. Belgium and 16 Other Contracting States*, 52207/99. Paragraph 68-73.

Loizidou v Turkey, 15318/89. Paragraph 62.

¹³⁰ *Jaloud v The Netherlands*, 47708/08, [GC]. Paragraph 152.

¹³¹ *Al-Skeini and Others v. the United Kingdom*, 55721/07, [GC]. Paragraph 136.

¹³² *Al-Skeini and Others v. the United Kingdom*, 55721/07, [GC]. Paragraph 135.

airline which is subject to carrier sanctions.¹³³ Arrest and detention are the classic conception of physical power and control over a person.¹³⁴ For the purpose of externalised migration control this requirement is likely to be only met where asylum-seekers are taken into physical custody and/or detained by agents of the State.¹³⁵ There is a stark difference in the control exercised by the typical duties of an ILO and the jurisprudence of the ECtHR on effective control over a person which features actions such as arrest and detention of the person.¹³⁶ In general, physical force – killing,¹³⁷ apprehending¹³⁸ and detaining¹³⁹ – has been persuasive to the court in finding that State jurisdiction had been engaged. The ECtHR itself has therefore set aside compulsory powers as a clear invocation of jurisdiction. As Milanovic points out, the Court, in making this demand of physical power and control, raises the question why should there be a limit to the personal model of jurisdiction, for example to physical custody?¹⁴⁰

An element of control over the migrant seeking to board the carrier could certainly be asserted as existing through the contribution, or arguably the decisive control over, to such a crucial decision as access to travel yet this does not represent the exercise of a *physical power and control* over the migrant. “...it remains questionable whether merely carrying out immigration interviews and rejecting onward passage, ...will meet the test set by, for example ...*Ocalan* [sic] and... *Al-Skeini*.”¹⁴¹ Procedures such as Immigration

¹³³ “...it is questionable whether it can be reasonably said that deployed document experts merely give ‘advice.’” Fundamental Rights Agency, Scope of the principle of non-refoulement in contemporary border management: evolving areas of law (2016). Page 25.

¹³⁴ Banković and Others v. Belgium and Others, 52207/99, [GC]. Paragraph 37. See: Coomans. F., Kamminga. MT., Extraterritorial Application of Human Rights Treaties (2004). Page 122. Also see generally: Öcalan v. Turkey 46221/99. Also see: Hirsi Jamaa and Others v. Italy, 27765/09, [GC]. Paragraph 73. The Court in *Hirsi* references examples of ‘effective control’ as a “*prison or a ship*.” In this regard it listed the cases of: *Al-Skeini and Others v UK*, 55721/07, [GC]; *Medvedyev and others v. France*, 3394/03, [GC].

¹³⁵ Gammeltoft-Hansen. T., The Externalisation of European Migration Control and the Reach of International Refugee Law. Page 289. In Guild. E., & Minderhoud. P., The First Decade of EU Migration and Asylum Law (2012).

See also: Gammeltoft-Hansen. T., Access to Asylum (2013). Page 112.

¹³⁶ See: *Ilich Sanchez Ramirez v. France*, 28780/95. *Öcalan v. Turkey* 46221/99.

¹³⁷ *Loizidou v Turkey*, 15318/89.

¹³⁸ *Öcalan v. Turkey* 46221/99.

¹³⁹ *Al-Skeini and Others v UK*, 55721/07, [GC].

Al-Saadoon and Mufdhi v the UK, 61498/08.

Hassan v. the United Kingdom, 29750/09, [GC].

¹⁴⁰ Milanovic. M., *Al-Skeini and Al-Jedda in Strasbourg* (2012) European Journal of International Law Vol. 23 no. 1. Page 129.

¹⁴¹ Gammeltoft-Hansen. T., Access to Asylum (2013). Page 147.

Liaison Officers further highlights the need for the Court to go further than *Al-Skeini* and reconsider the ways in which a person may be controlled beyond compulsory powers. The Court must do so in order to recognised so-called soft powers such as decision-making which is capable of ensuring access to protection or denying that access.

The satisfaction of the second criterion is, at this point in time, also suspect. Arguably, Immigration Liaison Officers participate in the emigration regime of the third State. This appears, *prima facie*, to represent the exercise of public powers. However, much of the ECtHR's opportunity to deliberate on extraterritorial jurisdiction has come about as a result of military intervention of one kind or another.¹⁴² The Court in *Al-Skeini* stated that "*In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area.*"¹⁴³ *Loizidou* was the case that really established control over an area (spatial model) of a third State's territory as possibly giving rise to an exception to the territorial bound understanding of ECtHR jurisdiction. The case involved 30,000 Turkish military personnel occupying northern Cyprus.¹⁴⁴ *Al-Skeini* likewise involved the occupation of the city of Basrah and greater southern Iraq by the UK army. By contrast, *Banković* was limited to intervention from the sky through a NATO aerial bombardment. The Court stated its belief in *Banković* that the mere power to kill does not equal jurisdiction, effective control generally requires troops on the ground assuming some public powers.¹⁴⁵ The stock placed in '*boots on the ground*'¹⁴⁶ by the Strasbourg Court in showing that public powers are in the hands of a contracting State, is clear. Grabenwarter states: "*In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area. Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and*

¹⁴² For example: *Cyprus v. Turkey*, 25781/94; *Ilaşcu and Others v. Moldova and Russia*, 48787/99; *Al-Skeini and Others v. the United Kingdom*, 55721/07, [GC]; *Al-Saadoon and Mufdhi v. the United Kingdom*, 61498/08; *Al-Jedda v. the UK*, 27021/08.

¹⁴³ *Al-Skeini and Others v. the United Kingdom*, 55721/07, [GC]. Paragraph 139.

¹⁴⁴ *Loizidou v Turkey*, 15318/89, [GC]. Paragraph 16.

¹⁴⁵ Milanovic. M., *Al-Skeini and Al-Jedda in Strasbourg* (2012) *The European Journal of International Law* Vol. 23 no. 1. Page 123.

¹⁴⁶ Etymology of this phrase is commonly traced back to General Volney Warner, United States Army in an article he wrote on the Iranian hostage crisis in the *Christian Science Monitor* (April 11, 1980). See: Where does the phrase 'boots on the ground' come from? BBC News (Blog, Magaine Monitor), 30 September 2014

*control over the region.*¹⁴⁷ The level of control of an area that is achieved through military occupation cannot be reproduced by any kind of involvement in a third State's migration control and border management procedures. The control exerted by Immigration Liaison Officers is exercised in a civilian context and may struggle to engage the vague *Al-Skeini* requirement of exercising "all or some" of the public powers normally that are normally exercised by the third State. It falls well short of being as clear-cut and definable as the State assuming military control over a territory or even just exercising consular activities¹⁴⁸ within a third State. Subsequent opportunities by the Court to further refine the *Al-Skeini* approach have been scorned by the Court in *Jaloud* and in *Hassan*.¹⁴⁹ The latter case's ignoring of whether the contracting State was implementing public powers at the material time is especially puzzling as the Grand Chamber in that case was applying the personal model of jurisdiction.¹⁵⁰

It is debateable whether or not the ECtHR, with regard to control over territory, enforce an "all-or-nothing approach: *Effective control over foreign territory remains a precondition to the full applicability of the ECHR, while less than effective control seems to entail no responsibility whatsoever.*"¹⁵¹ The *Al-Skeini* case, instead of breaking cleanly from the strict interpretation of *Banković*, attempted to paint that case as part of a coherent evolution which necessitated retention of a territorial aspect to jurisdiction. The resulting framework of exceptions does not provide enough leeway to certain migration control and border management procedures. Paradoxically, for a case which has been widely welcomed in commentary, *Al-Skeini* also represents an opportunity lost for the ECtHR to develop a new set of principles which could represent an unequivocal invocation of legal responsibility for a contracting State wherever, whenever and however it expressed an effective control. The next section (3.4) will consider jurisprudence from the UK Supreme Court. That case-law suggests that there is a better way such that extraterritorial jurisdiction

¹⁴⁷ Grabenwarter. C., *European Convention on Human Rights Commentary* (2013). Page 8.

¹⁴⁸ *WM v Denmark*, 17392/90.

¹⁴⁹ *Hassan v. the United Kingdom*, 29750/09, [GC].

¹⁵⁰ Milanovic. M., *A Few Thoughts on Hassan v. United Kingdom* (2014) *Blog of the European Journal of International Law*. Available at: <http://www.ejiltalk.org/a-few-thoughts-on-hassan-v-united-kingdom/>

¹⁵¹ Shany. Y., *Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law* (2013) *The Law & Ethics of Human Rights*, Volume 7(1), 47. Page 59.

becomes a less unwieldy force with which to regulate the externalised procedures of contracting States.

3.4 UK Domestic Courts as a Clarifying Force

The UK has remained deeply interested in the externalisation of migration control and border management. As a 2007 Home Office policy document on immigration control put it: “*off-shoring our border control is the keystone of our border defence.*”¹⁵² The UK has often argued for the expansion of externalised procedures, most notably by arguing in favour of expanded entry clearance and for exploring opportunities for external processing. The UK also boasts a massive network of Immigration Liaison Officers and it has taken a controversial approach to maritime interdiction in the Mediterranean under Home Secretary Theresa May.¹⁵³ The House of Lords, and its successor the Supreme Court of the UK, have interpreted how far the UK’s fundamental rights obligations extend when it implements procedures beyond its borders. That interpretation has been marked by a frank exchange of views between that Court and the Strasbourg court. That exchange has revolved around the fundamental rights fall-out arising out of British military intervention abroad rather than being based upon migration control and border management. The illuminating case-law from other fields can be applied to migration control and border management and also serves as a useful rejoinder to the examination already made as to the jurisprudence on extraterritorial jurisdiction in the ECtHR (3.3). It is important to recall the important influence that the decisions of Justices in the UK Supreme Court can have on their colleagues in the Strasbourg Court.¹⁵⁴

While oftentimes overshadowed by consideration of Strasbourg jurisprudence, this section will also show that the UK Supreme Court has provided far-sighted and crucial guidance as to an alternative direction for ECtHR case-law. The opportunity that has been argued above (3.3) as having been missed by the ECtHR in *Al-Skeini*¹⁵⁵ was arguably

¹⁵² Ryan, B., Extraterritorial Immigration Control: What Role for Legal Guarantees? Page 10. In Ryan, B., & Mitsilegas, V., Extraterritorial Immigration Control (2010). Quoting from: Securing the UK Border – Our vision and strategy for the future (2007) Home Office. Page 3.

¹⁵³ Travis, A., UK axes support for Mediterranean migrant rescue operation. The Guardian, 27 of October 2014.

¹⁵⁴ See: Bratza, N., The Relationship between the UK Courts and Strasbourg (2011) European Human Rights Law Review 505.

¹⁵⁵ Reference to *Al-Skeini* in this section is with regard to the previously referenced case from the ECtHR unless explicitly referenced that it is the UK High Court or the House of Lords’ consideration of that case.

grasped with both hands by the UK Supreme Court with its decision in *Smith and others v MoD (Smith (No. 2))*.¹⁵⁶ This section first makes a short reference to the relationship which exists between UK domestic courts (the UK Supreme Court especially) and the ECtHR (3.4.1). It then considers the case-history of *Smith (No.2)* and how that case impacts upon the examination made of the Strasbourg Court's jurisprudence (3.4.2). This section will next turn to migration specific case-law which includes examination of the infamous *Regina v Immigration Officer at Prague Airport (the "Prague Airport case")*¹⁵⁷ (3.4.3). Finally, this section considers the fact that the military context continues to be most prolific in providing guidance *vis-à-vis* extraterritorial jurisdiction (3.4.4).

3.4.1 The ECtHR and the Human Rights Act - "...must take into account..."

It is sometimes forgotten that the Human Rights Act did not create a situation whereby UK domestic courts were bound by the Strasbourg Court. It is not a piece of legislation designed to incorporate the ECHR into English law; it is an Act that gives 'further effect' to the Convention. UK domestic courts "must take into account"¹⁵⁸ the judgments of the ECtHR but are *not* bound by them. The degree to which UK Courts must do so is the cause of some controversy in UK legal scholarship.¹⁵⁹ Lord Irvine has pointed to the case of *AF v SSHD*¹⁶⁰ as capturing the essence of this controversy.¹⁶¹ *AF* was decided after the ECtHR's decision in *A v UK*¹⁶² which held that the right to a fair trial contained in the Convention required that a terrorist suspect be informed of the "essence of the case against him."¹⁶³ The UK Court came to its decision in *AF* on the basis that it was prohibited from straying from the course set out by the Strasbourg court in *A* and so, rather than there being

¹⁵⁶ *Smith and others v Ministry of Defence* [2013] UKSC 41.

¹⁵⁷ *Regina v Immigration Officer at Prague Airport and another* ex parte European Roma Rights Centre and others [2004] UKHL 55.

See also: Goodwin-Gill. G., R (ex parte European Roma Rights Centre et al) v. Immigration Officer at Prague Airport and another (2005) *amicus curiae* brief filed by UNHCR.

¹⁵⁸ Section 2(1), Human Rights Act, 1998.

¹⁵⁹ See: Hale. B., *Argentorum Locutum: Is Strasbourg or the Supreme Court Supreme?* Human Rights Law Review Volume 12, Issue 1, 65.

¹⁶⁰ *AF v Secretary of State for the Home Department* [2009] 3 WLR 74.

¹⁶¹ Irvine. L., *A British Interpretation of Convention Rights* (2011). A lecture delivered under the auspices of the Bingham Centre hosted by UCL's Judicial Institute. Page 4.

¹⁶² *A v UK*, 3455/05, [GC].

¹⁶³ Irvine. L., *A British Interpretation of Convention Rights* (2011). A lecture delivered under the auspices of the Bingham Centre hosted by UCL's Judicial Institute. Page 4.

a judicial dialogue between the courts, it seemed there existed *instruction* from Strasbourg. Lord Hoffmann stated his regret that the appeals in *AF* were required to be allowed on the basis of the Strasbourg court's findings in *A*, and stated that he was allowing the appeals with a heavy heart. On this basis Lord Hoffman stated "*that the decision of the ECtHR [in A] was wrong... [but] To reject such a decision would almost certainly put this country in breach of the international obligation it accepted when it acceded to the Convention.*"¹⁶⁴ Lord Roger put it rather more bluntly by stating that "*Strasbourg has spoken, the case is closed.*"¹⁶⁵

Opposition has arisen as to this yielding approach of the UK domestic courts. The President of the UK Supreme Court, Lord Neuberger, hit the headlines in 2014 when he stated that UK judges were "*too ready*" to follow ECtHR decisions.¹⁶⁶ Neuberger put this down to the importance of precedent in the common law tradition which he argued moved domestic judges to follow Strasbourg jurisprudence without question. The degree to which UK domestic courts perceive themselves bound to follow Strasbourg jurisprudence remains somewhat unclear. The dialogue between Strasbourg and UK domestic courts is crucial to how extraterritorial jurisdiction has come to be interpreted.

Unanimous decisions of the UK Supreme Court (or House of Lords as it was)¹⁶⁷ continue to be overturned by the ECtHR on occasion.¹⁶⁸ However, influence does flow both ways as was noted recently by the President of the ECHR when he stated that judgments of the UK's domestic courts can be very persuasive in illuminating the Strasbourg Court as to the inner-workings of the UK's legal system and thereby influencing his colleagues.¹⁶⁹ Lord Irvine stated on this point that "*It is not difficult to point to examples where the powerful reasoning of the UK's domestic Courts has proved influential in*

¹⁶⁴ Secretary of State v *AF* (no 3) [2009] UKHL 28. Paragraph 70

¹⁶⁵ Secretary of State v *AF* (no 3) [2009] UKHL 28. Paragraph 98.

¹⁶⁶ Neuberger. L., *The Role of Judges in Human Rights Jurisprudence: A Comparison of the Australian and UK Experience* (2014) Speaking at a conference at the Supreme Court of Victoria, Melbourne, Australia. Paragraphs 35-37.

¹⁶⁷ Constitutional Reform Act 2005. UK Supreme Court started work on the 1st of October 2009.

¹⁶⁸ Irvine. L., *A British Interpretation of Convention Rights* (2011). A lecture delivered under the auspices of the Bingham Centre hosted by UCL's Judicial Institute. Page 7.

¹⁶⁹ Bratza. N., *The Relationship between the UK Courts and Strasbourg* (2011) *European Human Rights Law Review* 505.

*Strasbourg concluding that our domestic law is Convention compliant.*¹⁷⁰ It should also be noted that the UK Supreme Court can sometimes also take a more rights concentrated approach than the Strasbourg court. An example of one such subject matter in asylum law is the duty of discretion – the degree to which it can be expected that a person should practise whatever issue that has given rise to persecution discretely. The duty has often arisen with regard to whether a refugee can possibly be expected to be discrete in the context of their sexuality. The UK Supreme Court has found that people cannot be expected to exercise discretion in this sense whereas the traditional ECtHR approach had been that people can be expected to do so.¹⁷¹ Therefore the UK domestic courts are capable of informing and leading the way in terms of innovative readings of fundamental rights law. Their example can be extremely informative for the ‘correct’ reading of particularly complex areas of law.

3.4.2 Pre *Al-Skeini (Smith No.1)* v Post *Al-Skeini (Smith No. 2)*

The UK has been a source of crucial case-law for the evolution of the ECtHR’s jurisprudence on extraterritorial jurisdiction. Britain’s invasion of, subsequent occupation of, and eventual withdrawal from Iraq gave rise to case-law which has been enlightening as to the state of play for the Strasbourg Court with regard to extraterritorial jurisdiction. The High Court decision in *Al-Skeini*¹⁷² was an indication of the confused state of play of extraterritorial jurisdiction in the aftermath of the *Banković* decision. Rather than pursuing and refining the path passed by *Issa*, as discussed above, the High Court instead rejected that decision as an “*improbable interpretation of Banković.*”¹⁷³ The House of Lords decision in *Al-Skeini*¹⁷⁴ instead stuck with the *Banković* rationale for extraterritorial jurisdiction.¹⁷⁵ In so doing, the House of Lords made a distinction between a situation of

¹⁷⁰ Irvine. L., *A British Interpretation of Convention Rights* (2011). A lecture delivered under the auspices of the Bingham Centre hosted by UCL’s Judicial Institute. Page 13.

On this point, see also: Bratza. N., *The Relationship between the UK Courts and Strasbourg* (2011) EHRLR 505.

¹⁷¹ See: Bianku. L., *Roundtable Discussion with the IARLJ, the CJEU and the ECtHR on Leading Asylum Cases* (2013) *International Journal of Refugee Law* Vol. 25 No. 2, 382. Page 393.

¹⁷² *Al-Skeini and others v Secretary of State for Defence* [2004] EWHC 2911.

¹⁷³ *Al-Skeini and others v Secretary of State for Defence* [2004] EWHC 2911. Paragraph 262.

¹⁷⁴ *Al-Skeini and others v Secretary of State for Defence* [2007] UKHL 26.

¹⁷⁵ For Reaction to the House of Lords decision in *Al-Skeini* before the judgment by the ECtHR in the same case, see: Williams. J., *Al-Skeini: A Flawed Interpretation of Banković* (2005) *Wisconsin International Law Journal* 23, 687.

complete and physical control over an individual (detention) for a certain applicant and more momentary instances of control for the applicants that were encountered while soldiers were on patrol.¹⁷⁶ According to the Court these latter occurrences were insufficient to engage extraterritorial jurisdiction while the former was enough to engage it.

The Strasbourg Court's decision in *Al-Skeini* changed the complexion of extraterritorial jurisdiction. The impact of the ECtHR's decision in *Al-Skeini* is encapsulated by the story of one case. The case illustrates the common position pre *Al-Skeini* (*Smith (No. 1)*¹⁷⁷) and the position post *Al-Skeini* (*Smith (No.2)*¹⁷⁸). The groundbreaking 2013 case of *Smith (no. 2)* from the UK Supreme Court dealt with the same set of facts as an earlier UK Supreme Court decision – *Smith (No. 1)* – but involved a different set of plaintiffs. The *Smith* series of cases concerned a positive obligation to protect the lives of British soldiers serving in Iraq by providing adequate equipment. Both *Al-Skeini* and *Smith* involved military operations abroad but two important distinctions must be made between the situation in *Smith* and the set of circumstances at play in *Al-Skeini*. Firstly, *Al-Skeini* concerned establishing extraterritorial jurisdiction over local inhabitants while *Smith* was with regard to the engagement of UK extraterritorial jurisdiction over British military personnel. Secondly, contrary to *Al-Skeini*, at the time of the alleged rights violations which were under examination in the *Smith* series of cases, the UK was no longer exercising public powers in the region. The Coalition Provisional Authority had ceased to exercise such powers and local administration had passed to the interim Iraqi government.¹⁷⁹

The UK Supreme Court 2010 decision in *Smith (No. 1)* based itself on the ECtHR's *Banković* judgment and upon the House of Lords' *Al-Skeini* judgment but was without the benefit of the ECtHR's ruling in *Al-Skeini*. In *Smith (No. 1)* the Supreme Court found that British soldiers did not engage the UK's extraterritorial jurisdiction for the sake of Article 1 ECHR when they operated in areas outside of UK control.¹⁸⁰ The Supreme Court in *Smith*

¹⁷⁶ De Boer, T., Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection (2015) *Journal of Refugee Studies* 28 (1), 118. Page 125.

¹⁷⁷ *Smith and others v Secretary of State for Defence* [2010] UKSC 29.

¹⁷⁸ *Smith and others v Ministry of Defence* [2013] UKSC 41.

¹⁷⁹ *Smith and others v Ministry of Defence* [2013] UKSC 41. Paragraph 41.

¹⁸⁰ Milanovic, M., UK Supreme Court decides *Smith (No. 2) v MoD* (2013) *Blog of the European Journal of International Law*. Available at: <http://www.ejiltalk.org/uk-supreme-court-decides-smith-no-2-v-the-ministry-of-defence/>

(*No.1*) ruled (by a majority of 4-3) that the claims under Article 2 should be struck out on the basis that the Convention had no application to soldiers serving abroad. In *Smith (No.2)*, the Supreme Court, now having the guidance of the Strasbourg Court's ruling in *Al-Skeini*, unanimously rejected its earlier findings on extraterritorial jurisdiction in *Smith (No. 1)* and found that the UK's jurisdiction had indeed been engaged. *Smith (No. 2)* endorsed *Al-Skeini's* implicit move away from the *Banković* approach by agreeing that ECHR rights can indeed be divided and tailored and so the Convention should *not* be thought as being an indivisible package of rights.¹⁸¹ The Supreme Court also unanimously found in *Smith (no. 2)* that the UK, even in the absence of the exercise of *any* public powers, had still engaged its jurisdiction on the basis of the authority and control which the UK, through the chain of military command, had over the individuals involved – British soldiers.¹⁸² With *Smith (No. 2)* the Supreme Court thus delivered a wider understanding of extraterritorial jurisdiction than the guiding jurisprudence from Strasbourg. This can be said on the basis that the Supreme Court did so by omitting *Al-Skeini's* requirement that the State must be exercising public powers. *Smith (No. 2)* found that *authority and control* over an individual, in and of itself, can engage a contracting State's jurisdiction. The UK Supreme Court thus broadened the scope of the ECtHR's rationale for application of the personal model of extraterritorial jurisdiction.

In *Smith (No. 2)*, Lord Hope spoke for the Supreme Court on jurisdiction. Lord Hope stated that extraterritorial jurisdiction over local inhabitants can only exist because of the authority and control that the State exercises over its own armed forces in the first place. It is from that basic premise, he argued, that extraterritorial jurisdiction based on State agent authority and control has evolved.¹⁸³ Lord Hope also stated that the control and authority over a person exception as set out in *Al-Skeini* was primarily to be seen in the context of the words from *Al-Skeini*: “*whenever the state through its agents exercises control and authority over an individual, and thus jurisdiction...*”¹⁸⁴ The Court, through Lord Hope, argued that jurisdiction follows naturally from the exercise of control and

¹⁸¹ *Smith and others v Ministry of Defence* [2013] UKSC 41. Paragraph 38.

¹⁸² *Smith and others v Ministry of Defence* [2013] UKSC 41. Paragraph 52.

¹⁸³ *Smith and others v Ministry of Defence* [2013] UKSC 41. Paragraph 50.

¹⁸⁴ *Smith and others v Ministry of Defence* [2013] UKSC 41. Lord Hope at paragraph 46 quoting: *Al-Skeini and Others v. the United Kingdom*, 55721/07, [GC]. Paragraph 137.

authority *alone*. Lord Hope also quotes a famous passage from the earlier case of *Cyprus v Turkey* in this regard: “*authorised agents of a state, ...not only remain under its jurisdiction when abroad but bring other persons or property ‘within the jurisdiction’ of that state to the extent that they exercise authority over such person or property.*”¹⁸⁵ *Cyprus v Turkey* was a formative case for the development of the personal model. The Supreme Court, in *Smith (No. 2)*, departed from the Strasbourg court’s guidance by returning to the extraterritorial jurisdiction case-law roots of that same court. In any case, the UK Supreme Court has taken an important next step in re-establishing the personal model once and for all and thereby contributing to a more inclusive and flexible rationale for extraterritorial jurisdiction. Important questions abound as to how this may impact upon externalised procedures of migration control and border management.

It is now possible to add to the definition of the personal model made *supra* (3.3.1) on the basis of the *Smith (No. 2)* decision. The personal model is where an agent of a contracting State engages the extraterritorial jurisdiction of that State by exercising authority and control over an individual or group of individuals beyond the territory of the contracting State.

3.4.3 Immigration Liaison Officers and *Smith (No. 2)*

The leading UK precedent with regard to externalised migration control and border management is the *Prague Airport case*.¹⁸⁶ The *Prague Airport case* concerned the work of British Immigration Liaison Officers in the airport of the Czech capital. The Czech Republic was yet to become a Member State of the EU at this point but was already a contracting State of the ECHR. Those officers had been placed there with the objective of stemming the flow of Roma people who were flying to the UK from Prague and subsequently claiming asylum. The House of Lords, as it then was, was presented with two questions. Firstly, did the refusal to allow boarding in Prague airport represent a violation of the principle of *non-refoulement* according to the Refugee Convention and customary international law? Secondly, did the work of the British Immigration Officials in Prague

¹⁸⁵ *Cyprus v Turkey*, 6780/74 and 6950/75. Page 136, paragraph 8.

¹⁸⁶ *Regina v Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others* [2004] UKHL 55.

airport represent unlawful discrimination against Roma on racial grounds? The first question was answered in the negative. The second question was answered positively.

In considering the first question, the Court only considered extraterritorial jurisdiction of the ECHR very briefly and rejected the contention that the work of the British Immigration Liaison Officers could possibly be construed as an exercise of jurisdiction. Of crucial importance in the eyes of Lord Bingham, speaking for the Court, was that the applicants were not outside of their country of origin and had not presented themselves at the UK border except in a “*highly metaphorical sense*.”¹⁸⁷ It was adjudged that the presence of a State official only represented a border in a figurative sense which was not capable of engaging the obligations of the UK. In this way the actions of Immigration Liaison Officers represent “*une frontière virtuelle*.”¹⁸⁸ The Court agreed on the one hand with the principle that an individual who leaves his/her country of origin and applies for asylum from another State, whether inside that State or at its borders, cannot be rejected or returned to their country of origin without proper consideration of their request for international protection.¹⁸⁹ On the other hand however, the House of Lords stuck rigidly to the traditional understanding of borders – the territorial frontier as being where the border lay.¹⁹⁰

The House of Lords only referred in passing to *Banković* and then only with regard to the territorial principle – that jurisdiction is primarily territorial and anything beyond that was exceptional.¹⁹¹ The Court did not go into detail in considering exceptions to the territorial understanding of jurisdiction and it seemed to be more of an afterthought to Lord Bingham. Lord Bingham stated that in any case Articles 2 and 3 ECHR, which were evidently the key provisions to be potentially threatened by the work of the Immigration Liaison Officers in the eyes of the Court, were not in danger of being violated on the basis

¹⁸⁷ Regina v Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others [2004] UKHL 55. Paragraph 26.

¹⁸⁸ Dumas. P., L'Accès des Ressortissants des Pays Tiers au Territoire des États Membres de l'Union Européenne (2013). Page 124.

¹⁸⁹ Kesby. A., The Shifting and Multiple Border and International Law (2007) Oxford Journal of Legal Studies 27, 101.

¹⁹⁰ Kesby. A., The Shifting and Multiple Border and International Law (2007) Oxford Journal of Legal Studies 27, 101.

¹⁹¹ Regina v Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others [2004] UKHL 55. Paragraph 21.

of the facts of the case.¹⁹² Despite Immigration Liaison Officers having elsewhere been found to be consular officials,¹⁹³ the House of Lords failed to examine these Officers in the context of the diplomatic exception espoused in the *Banković* case.¹⁹⁴ The *Prague Airport case* was decided on the 9th of December 2004. No reference was made to the *Issa* case which had been decided only three weeks previously (16th November 2004). Therefore, the House of Lords didn't consider any potential application of the personal model either in and of itself (like the UK Supreme Court in *Smith (No. 2)*) or alongside some variation of the spatial model (like the ECtHR in *Al-Skeini*).

Clayton seems to infer that Lord Bingham in the *Prague Airport case* argued, *obiter dictum*, that the Human Rights Act did not apply to immigration officers acting abroad but this comment was not binding as it did not form part of the reason for the judgment.¹⁹⁵ It is unclear where exactly in the judgment that Clayton reads Bingham as inferring such but in any case Clayton goes on to say that such an argument “*sits uncomfortably with the trend of authority since*” and that a statutory appeal applies to any decision of entry clearances officers.¹⁹⁶ Clayton's argument that the trend of authority points toward the Human Rights Act applying to extraterritorial procedures is based on the *Al-Skeini* judgment. *Al-Skeini* and *Smith (No.2)* do indeed give cause for reading the work of ILOs as potentially giving rise to the State engaging its extraterritorial jurisdiction. ILOs, in their work, can even be argued as satisfying *Al-Skeini's* higher threshold of also exercising a public power. They could certainly be interpreted as exercising control and authority over individuals despite not exercising compulsory powers. Hurdles do persist. Recent jurisprudence, especially that which represents a broadening of how extraterritorial jurisdiction should be interpreted, has occurred in the context of military operations. The nature of control exercised by soldiers can be contrasted with that of ILOs. The presence of compulsory powers in the former is certainly persuasive in engaging extraterritorial

¹⁹² Kesby. A., *The Shifting and Multiple Border and International Law* (2007) Oxford Journal of Legal Studies 27, 101. Page 106-107.

¹⁹³ *R (B) v Secretary of State for the Foreign and Commonwealth Office* [2004] EWCA Civ 1344. Paragraph 60.

¹⁹⁴ *Banković and Others v. Belgium and 16 Other Contracting States*, 52207/99, [GC]. Paragraph 73.

¹⁹⁵ Clayton. G. *The UK and Extraterritorial Immigration Control: Entry Clearance and Juxtaposed Control*. Page 423. In Ryan. B., and Mitsilegas. V., *Extraterritorial Immigration Control* (2010).

¹⁹⁶ Clayton. G. *The UK and Extraterritorial Immigration Control: Entry Clearance and Juxtaposed Control*. Page 423. In Ryan. B., and Mitsilegas. V., *Extraterritorial Immigration Control* (2010).

jurisdiction. The ECtHR's leading guidance (*Al-Skeini*) retains the requirement that the contracting State is exercising some public powers in the third State. Hopes for a more all-encompassing approach to extraterritorial jurisdiction are buoyed by the decision in *Smith (No. 2)*. However, the qualifying criteria for extraterritorial jurisdiction under the personal model espoused in that case remains a challenging proposition in the context of externalised migration control and border management.

3.4.4 The Military Context as *the Guiding Light*

A contracting State's authority and control over its own soldiers sits in contrast with the kind of control and authority exercise over local inhabitants or migrants on the move in a civilian context. "*Servicemen and women relinquish almost total control over their lives to the state.*"¹⁹⁷ Local inhabitants or migrants do not have any such semblance of a relationship with the contracting State. Externalised migration control and border management procedures which do not represent a contracting State's control over territory cannot rely upon the spatial model. Such procedures rely upon their interaction with individuals for their implementation and so it is only the personal model which could be used to engage the contracting State's extraterritorial jurisdiction. In addition, much of the time these procedures do not incorporate the exercise of compulsory powers. Application of the personal model has almost always been used in a military context¹⁹⁸ and has hitherto required the exercise of compulsory powers. *Smith (No. 2)*'s abandonment of the public powers requirement given down by the ECtHR (*Al-Skeini*), a remnant of the spatial model, adds little to the cause of externalised procedures like Immigration Liaison Officers. Extraterritorial jurisdiction being engaged in a non-military context and on the sole basis of authority and control being exercised over migrants without the use of compulsory powers very much remains virgin territory for the ECtHR. The fact is that as things stand in the jurisprudence, "*de facto control over persons requires [a] certain level of physical constraint. This results [sic] when migrants are obstructed from continuing their journey,*

¹⁹⁷ *Smith and others v Ministry of Defence* [2013] UKSC 41. Paragraph 52.

¹⁹⁸ The arrest and abduction by "*Turkish Officials*" of Abdullah Öcalan is an important exception to this. *Öcalan v Turkey*, 46221/99, [GC]. Paragraph 17.

*when state vessels use their strength and physical presence to push back smaller boats with migrants, or when force is used to prevent migrants from reaching the border.”*¹⁹⁹

In 2014, attempts made to limit the ECtHR’s *Al-Skeini* judgment to the particular context of Iraq in *Serdar v the Ministry of Defence*²⁰⁰ failed. The potential for further application, in the military context at least, is such that government policy is changing to address it. The new UK Prime Minister, Theresa May, intends for the UK military to ‘opt-out’ of the ECHR during future conflicts²⁰¹ in order to limit the “*industry of vexatious claims’ against soldiers.*”²⁰² It is indeed in the military context that the most cutting edge extraterritorial jurisdiction case-law continues to arise. Most recently, *Al-Saadoon*²⁰³ in the Court of Appeal again considered the exercise of force by the British army in Iraq. The case considered the post-*Al-Skeini* application of the personal model of extraterritorial jurisdiction. In doing so, the crux of the case emerged. To Leggatt J, speaking for the High Court,²⁰⁴ the personal model post-*Al-Skeini* extended to the exercise of physical power and control over a non-detainee. Lloyd-Jones LJ in the Court of Appeal disagreed on this point and stated that the effect of *Al-Skeini* was not to establish that where the State uses compulsory powers it must do so in a way that in a way that does not violate the Convention.²⁰⁵ Rather, Lloyd-Jones LJ interpreted *Al-Skeini* as the Grand Chamber requiring “*a greater degree of power and control than that represented by the use of lethal or potentially lethal force alone. In other words, I believe that the intention of the Strasbourg court was to require that there be an element of control of the individual prior to the use of lethal force.*”²⁰⁶ The case will roll on to the UK Supreme Court and perhaps to the Strasbourg Court for review. At the moment, it is simply illustrative of the continued lack of clarity in the military context. However, the impact that such case-law will have

¹⁹⁹ Fundamental Rights Agency, *Scope of the principle of non-refoulement in contemporary border management: evolving areas of law* (2016). Page 19.

²⁰⁰ *Serdar Mohammed v Ministry of Defence and Others* [2014] EWHC 1369.

²⁰¹ For comment, see: Milanovic, M., *UK to Derogate from the ECHR in Armed Conflict* (2016) Blog of the European Journal of International Law. Available at: <http://www.ejiltalk.org/uk-to-derogate-from-the-echr-in-armed-conflict/>

²⁰² See: Walker, P., & Bowcott, O., *Plan for UK military to opt out of European convention on human rights*. The Guardian, 4th of October 2016.

²⁰³ *Al-Saadoon & Ors. v Secretary of State for Defence* [2016] EWCA Civ 811.

²⁰⁴ *Al-Saadoon & Ors. v Secretary of State for Defence* [2015] EWHC 715.

²⁰⁵ *Al-Saadoon & Ors. v Secretary of State for Defence* [2016] EWCA Civ 811. Paragraph 69.

²⁰⁶ *Al-Saadoon & Ors. v Secretary of State for Defence* [2016] EWCA Civ 811. Paragraph 69.

will remain limited in the context of externalised migration control and border management procedures. It will still take a radical reading of extraterritorial jurisdiction in either the UK domestic courts or at the Strasbourg court for procedures that utilised indirect control to be understood as representing an exercise of jurisdiction.

3.5 Conclusion – Effect of Externalised Control on State Responsibility

The ECtHR has experienced a stunted move away from the nadir of restricted approaches in the *Banković* judgment. The progress in the ECtHR's jurisprudence has been difficult and oftentimes confused but those strides have been complemented by the innovative approach taken by the UK Supreme Court in *Smith no. 2*. *Smith no. 2* paves the way for the application of a more nuanced approach to extraterritorial jurisdiction which is capable of being more responsive to increasingly complex externalised procedures. The Strasbourg court will carefully consider the “*views of seven justices of the UK Supreme Court with some weight in coming to its own opinion on whether the Convention generally applies extraterritorially to the soldiers of contracting states acting abroad.*”²⁰⁷ However, it now remains to be seen whether *Smith (No. 2)* brings anything to the table in the context of non-compulsory powered,²⁰⁸ civilian implemented procedures.

In the context of migration, the case of *Hirsi* provoked an enthusiastic response from commentators and an excited expectation of what is now possible in the context of externalised migration control and border management. This chapter has argued that such expectations are misplaced as the interdiction of migrants at sea had already been considered by the ECtHR (in *Xhavara*). More contested is the position of non-compulsory powered procedures such as Immigration Liaison Officers. This is reflected in the only judicial guidance available in the context of these officers – the failure to establish extraterritorial jurisdiction in the *Prague Airport case*. Despite the widening of understanding of extraterritorial jurisdiction in general in both by the ECtHR and the UK Supreme Court, it remains in question whether a decision of access or any equivalent non-

²⁰⁷ Milanovic. M., UK Supreme Court decides *Smith (No. 2) v MoD* (2013) Blog of the European Journal of International Law. Available at: <http://www.ejiltalk.org/uk-supreme-court-decides-smith-no-2-v-the-ministry-of-defence/>

²⁰⁸ Opportunity for further clarification from Strasbourg was not considered when the *Pritchard* case was withdrawn. See: *Pritchard v. UK*, 1573/11.

compulsory powered control would be seen as engaging a State's jurisdiction. *Hirsi* case did little to clarify this and so non-compulsory powered migration control and border management still awaits its "*Hirsi moment*."²⁰⁹

Gammeltoft-Hansen states that "...outsourcing States normally want to keep a degree of control that necessitates hands-on involvement through the deployment of State officials, ships etc. Yet, exactly these kind of scenarios are very likely to trigger the jurisdiction and thus responsibility of the outsourcing state."²¹⁰ As the UK domestic courts and the ECtHR currently stand, the mere physical presence of an organ of the State in an extraterritorial setting does not necessarily give rise to the State engaging its rights obligations. Certainty in engaging extraterritorial jurisdiction for EU Member State migration control and border management is, for now, confined to those procedures that incorporate compulsory powers and even compulsory powered procedures "...cannot be distilled into a sweeping general principle but must instead be determined on a highly contextualized, case-by-case basis."²¹¹

Commentators searching for the saving grace of extraterritorial jurisdiction focus on progressive case-law in the over-and-back judicial dialogue between the UK's domestic courts and the ECtHR. However, the CJEU provides the greatest scope in dispensing completely with any territorial based understanding of extraterritorial jurisdiction and intricate approaches to *control*. The CJEU instead focuses on ensuring legal responsibility can be considered whenever and wherever implementation takes. That approach has greater potential to respond accordingly to the control which is afforded to the State through non-compulsory powered procedures such as the coordination, decision-making and

²⁰⁹ Mc Namara. F., Member State Responsibility for Migration Control within Third States – Externalisation Revisited (2013) European Journal of Migration and Law 15, 319. Page 334.

²¹⁰ Gammeltoft-Hansen. T., In interview with European Council on Refugees and Exiles (2012). Available at:

http://www.proasyl.de/fileadmin/proasyl/fm_redakteure/Newsletter_Anhaenge/180/Thomas_Gammeltoft-Hansen_Interview.pdf

²¹¹ Miltner. B., Revisiting Extraterritoriality after Al-Skeini: the ECHR and its Lessons (2012) Michigan Journal of International Law Vol. 33(4), 693. Page 747.

organisation of migration control and border management and ensure that violations of rights do not end up “...*on the wrong side of jurisdiction.*”²¹²

²¹² Guild. E., The Europeanisation of Europe’s Asylum Policy (2006) *International Journal of Refugee Law* 18 (3-4) 630. Page 639.

IV. Privatisation's Trigger – Public Liability for Private Action

4.1 Introduction – Privatised Control

States can govern in any way they wish in order to achieve their objectives so long as they abide by the law. The late 20th and early 21st centuries have seen privatisation become an increasingly important mode of governance for States. In the context of migration control and border management, the State's duty to live up to its legal obligations is put in peril by privatisation. The private actors that implement migration control and border management procedures are a complex hybrid mix of the public and private. They themselves are clearly private but the procedure they implement is normally implemented by the State or, if it hasn't previously been implemented by the State, its function has a distinctly public flavour. This chapter explores the approach of the UK domestic courts, the CJEU and the ECtHR in examining the circumstances by which State legal responsibility for fundamental rights violations persist despite the, *prima facie*, transfer of control for the offending procedure to a private actor.

The ordinary understanding of privatisation is that the State makes a full transfer of sovereign power and ownership of a resource, process or function to a private actor. The State is, of course, inherently legally responsible for the actions of public authorities. Difficulty arises when a procedure that has been performed by public authorities is delegated to a private actor (privatisation by contract) or when a private actor is charged with implementing a procedure that has never been implemented previously but which represents a public function (enforced privatisation). As referred to in the introduction to this research, States hesitate to delegate authority for entry, exit and residence, this has been a constant since the advent of nation states. These powers are seen as being a fundamental power of statehood and for this reason “...immigration policy seems an unpromising place to look for evidence of privatisation, if by this one means the retraction of the state.”¹ However, the extent to which the privatisation of migration control and

¹ Macklin. A., Public Entrance/Public Member. Page 218. In Cossman. B., & Fudge. J., Privatization, Law and the Challenges to Feminism (2002).

border management procedures do in fact actually represent such a *'retraction'* very much remains in question.

This chapter considers the ability of a migrant to attach legal responsibility to the State for a rights violation experienced during the implementation of a privatised procedure. As such, it is the courts' capability in successfully evaluating the extent to which a particular privatised procedure represents a *'retraction'* that is in question in this chapter. The Courts have substantial jurisprudence in considering continued State control of a procedure that has been privatised by contract and legal responsibility for that control. They have less experience in considering State control of a procedure that was never implemented by the State and which is now privately implemented, not on the basis of a contract but under the threat of sanction. The courts have pursued certain different approaches by which they can decipher State legal responsibility for rights violations arising out of private actions.

This chapter beats a path through each of the selected judicial settings by first (4.2) turning to the treatment of privatisation by the domestic courts of the UK. It next turns to the treatment of such privatised procedures by the ECtHR (4.3). The penultimate section (4.4) turns to consideration of the CJEU's approach to privatisation. The final section of this chapter (4.5) will draw together a general conclusion on privatisation from consideration of each of the three judicial settings examined.

4.2 UK Domestic Courts – A Confused Application

Chapter II touched upon how deeply invested the UK has become in privatising its migration control and border management procedures. Nonetheless, consideration of alleged fundamental rights violations at the hands of privatised migration control and border management in the UK's domestic courts has been relatively rare. However, as a result of the UK's enthusiastic pursuit of privatisation in a wide variety of fields other than migration control and border management, the UK's courts have had ample opportunity to explore the legal responsibility of the State for a breach of the fundamental rights of a person arising out of a privatised procedure. Examination of this jurisprudence provides a good understanding of how the UK's courts would approach violations arising out of privatised procedures of migration control and border management.

UK domestic courts have not taken an orthodox approach in applying the Human Rights Act to entities that have been privatised (4.2.1). The vindication of rights that have been alleged to have been violated by a private actor in the course of implementing a migration control or border management procedure remain of primary concern (4.2.2).

4.2.1 The Human Rights Act – Assessing Hybrid Public/Private Entities

Section 6 of the Human Rights Act provides for the acts of public authorities. Those entities that do not have any private element – ‘pure’ public authorities – must act compatibly with the European Convention on Human Rights in all that they do. In order to make the Human Rights Act more comprehensive and offer better protection, a provision was added which provided that other entities would come under this obligation when they are discharging a public function. Section 6(3)(b) states that a “public authority” includes “any person certain of whose functions are functions of a public nature.”² It is very clear that the UK’s enacting parliament envisaged private actors being interpreted through Section 6(3)(b) “primarily on the nature of the function being performed by a private body, rather than the intrinsic nature of the body itself.”³ However, instead of this *functional* approach, the courts have mainly favoured an approach based upon the nature of the entity in question. The courts have done so out of their concern with over-burdening the State with liability for procedures which are implemented by private actors. Deep-seated unease persists as to the implication of such an interpretation for the objective of providing individuals with adequate rights protection from State power as it appears in all its forms.⁴

4.2.1.1 From Poplar Housing to Aston Cantlow – The Formative Case-law

In the Court of Appeal case of *Poplar Housing*⁵ a local authority transferred its authority for housing to a private-sector body which it had set up – Poplar Housing. This delegation

² Section 6(3)(b) Human Rights Act, 1998.

³ House of Commons, House of Lords, Joint Committee on Human Rights Report: The Meaning of Public Authority under the Human Rights Act. Seventh Report of Session 2003–04. Paragraph 20.

⁴ On the widespread criticism by human rights advocates of the approach taken by the courts to section 6(3)(b) of the Human Rights Act, see for example: Palmer. E., *Judicial Review, Socio-Economic Rights and the Human Rights Act* (2007). Page 142-143. For an alternative viewpoint which argues against the courts pursuing a functional interpretation of that section, see: Oliver. D., *Functions of a Public Nature under the Human Rights Act* (2004) Public Law 329.

⁵ *Donoghue v. Poplar Housing* [2001] EWCA Civ 595.

of housing duties was done through a transfer of housing stock. The Court of Appeal held that Poplar Housing represented a public authority. In coming to this conclusion the Court rejected the application of a functional test whereby functions that had a public nature should be interpreted as bringing a private actor under the umbrella of Section 6(3)(b). To this end, the Court stated: “*the fact that a body performs an activity which otherwise a public body would be under a duty to perform cannot mean that such performance is necessarily a public function.*”⁶ The Court felt that such an interpretation would place too much a burden on the State with all and every function supplied to the public authorities by a private actor giving rise to potential liability for the State. The Court argued that Section 6(3)(b) means that hybrid bodies, who have functions of a public and private nature are public authorities, but not in relation to acts which are of a private nature.⁷ It further stated that the purpose of that provision was to deal with such hybrid bodies and not to make a private actor, which does not have responsibilities to the public, into a public authority “*merely because it performs acts on behalf of a public body which would constitute public functions were such acts to be performed by the public body itself.*”⁸ Instead the Court stated that Poplar Housing’s role was “*closely assimilated*” to Tower Hamlets (the local council) such that, in the context of housing, it must be taken as being a “*functional public authority.*”⁹ The Court acknowledged that a “*combination of features*” made an act, which would otherwise be private, public.¹⁰

Another Court of Appeal case, *Leonard Cheshire Homes*,¹¹ had a similar set of facts revolving around the provision of housing. The case also had the same judge as had been presiding in *Poplar Housing* – Lord Woolf. However, there was a different result. *Leonard Cheshire Homes* was deemed not to represent a public authority under Section 6(3)(b). This different result came despite the Court following a similar logic to that of *Poplar Housing*. This different finding is down to the delegation to a private actor in *Leonard Cheshire Homes* having been through contract rather than through a transfer of

⁶ Donoghue v. Poplar Housing [2001] EWCA Civ 595.Paragraph 58.

⁷ Donoghue v. Poplar Housing [2001] EWCA Civ 595.Paragraph 58.

⁸ Donoghue v. Poplar Housing [2001] EWCA Civ 595.Paragraph 59.

⁹ Donoghue v. Poplar Housing [2001] EWCA Civ 595. Paragraph 66.

¹⁰ Donoghue v. Poplar Housing [2001] EWCA Civ 595. Paragraph 65.

¹¹ R. v Leonard Cheshire Homes, ex parte Heather and Others [2002] EWCA Civ 366.

housing stock as had been the case in *Poplar Housing*: “Thus, for Lord Woolf, the particular technique of delegation-housing stock transfer or contract-was relevant to the determination of the controls on the private delegate, even though *Poplar Housing* and *Leonard Cheshire* were effectively performing the same function.”¹² Lord Woolf was very wary of widening the meaning of the State in the context of the Human Rights Act in an unwieldy way which would include small-time contractors. As Donnelly puts it, “...judicial suspicion of full horizontal rights application colours consideration of Human Rights in the private delegation context.”¹³ The key factor in both *Poplar Housing* and *Leonard Cheshire Homes* in deciding whether a private entity is a public authority for the sake of Section 6(3)(b) was the nexus between that private actor and the State, the so-called institutional test.¹⁴ The presence of a contract in the latter case was the crucial difference between the two cases. Together, the two cases, *Poplar Housing* and *Leonard Cheshire Homes*, have been said to represent an “unjustifiably restrictive approach”¹⁵ to defining public authorities.

The House of Lords, as it then was, in *Aston Cantlow*,¹⁶ found that a parochial church council was a public authority for the sake of Section 6(3)(b). The church council had been attempting to have a lay rector pay to repair the chancel of a church. Despite the church of England’s “special links with central government”, it was found to be “essentially a religious organisation”¹⁷ and thus was not a public authority for the sake of the Act. However, the important point of this case was that in coming to this conclusion, the Court rejected the institutional test in favour of a functional test which considered the function being undertaken first and foremost. Lord Hope stated: “It is the function that the person is performing that is determinative of the question whether it is, for the purposes of

¹² Donnelly. C., *Delegation of Government Power to Private Parties – A Comparative Perspective* (2007) Page 251.

¹³ Donnelly. C., *Delegation of Government Power to Private Parties – A Comparative Perspective* (2007) Page 250.

¹⁴ Costigan. R., *Determining ‘Functions of a Public Nature’ under the Human Rights Act 1998: A New Approach* (2006) *European Public Law*, 12(4), 577. Page 579.

¹⁵ Palmer. E., *Judicial Review, Socio-Economic Rights and the Human Rights Act* (2007). Page 142.

¹⁶ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* House of Lords [2003] UKHL 37.

¹⁷ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* House of Lords [2003] UKHL 37. Lord Nicholls at paragraph 13.

that case, a 'hybrid' public authority."¹⁸ The Court therefore stressed the importance for courts of analysing the character of the function itself rather than purely relying upon the institutional arrangements of the body in performing that function.¹⁹ *Aston Cantlow's* shortcoming was that the House of Lords put forward this functional principle without expressly rejecting the rationale of the decisions in *Poplar Housing* or *Leonard Cheshire Homes* which had taken a predominantly "institutional" rather than a "functional" approach to interpreting a public authority.²⁰ *Aston Cantlow* could have marked a watershed moment in the jurisprudence in which it moved toward a functional approach as intended by the UK parliament, but that chance was passed over.

Perhaps more is made of *Aston Cantlow's* supposed turn away from Lord Woolf's reasoning in *Poplar Housing* and *Leonard Cheshire Homes* than should be. An often overlooked passage of Lord Nicholls' judgment rejects the possibility of any test of 'universal application', (presumably including any functional one) given the "...the diverse nature of governmental functions and the variety of means by which these functions are discharged today."²¹ In any case, the chance for any categorical rejection was missed. That was reflected in the subsequent decision in *R v Hampshire Farmer's Market*.²² The case concerned a private company which had been set up by Hampshire County Council to run a local farmer's market. In that case the Court of Appeal restricted the functional approach of *Aston Cantlow* because the House of Lords in that case had not expressly overruled the *R. v Leonard Cheshire Homes* and *Poplar Housing*.²³ *Aston Cantlow* may be argued as representing a deviation from the norm of examining an entity's institutional structure in understanding whether the State is liable for the actions of that entity. The status quo thus remains that "the protection of human rights is dependent not on the type of power being exercised, nor on its capacity to interfere with human rights, but on the

¹⁸ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* House of Lords [2003] UKHL 37. Lord Hope at paragraph 41.

¹⁹ House of Commons, House of Lords, Joint Committee on Human Rights Report: The Meaning of Public Authority under the Human Rights Act. Seventh Report of Session 2003–04. Paragraph 39.

²⁰ House of Commons, House of Lords, Joint Committee on Human Rights Report: The Meaning of Public Authority under the Human Rights Act. Seventh Report of Session 2003–04. Paragraph 39.

²¹ Donnelly, C., *Delegation of Government Power to Private Parties – A Comparative Perspective* (2007). Page 256. Quoting: *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* House of Lords [2003] UKHL 37. Lord Nicholls at paragraph 12.

²² *R v Hampshire Farmer's Market ex parte Beer* [2003] EWCA Civ 1056.

²³ *R v Hampshire Farmer's Market ex parte Beer* [2003] EWCA Civ 1056. Paragraph 15.

relatively arbitrary... criterion of the body's administrative links with institutions of the State."²⁴

4.2.1.2 YL and Current Reasoning

In 2007, the seminal case of *YL v Birmingham City Council*²⁵ became the leading jurisprudence in interpreting Section 6(3)(b). The case concerned the running of care homes. Birmingham City Council had contracted a private actor to run its care homes. The House of Lords held by a slim majority (3 to 2) that that private actor was *not* a public authority under the Human Rights Act. The duties exercised by the private actor were akin to those which Birmingham City Council had previously carried out. Crucially however, and by contrast with the city council, the private actor undertook those duties for a different purpose (i.e. for profit) and was not under any statutory duty to implement them. The Court in *YL* applied a type of functional test but one in which the function was considered in isolation from context.²⁶ It was in this way that the Court in *YL* found that the *actual provision* of care was not an inherently governmental function, it was the *arrangement* for such care and accommodation that was a governmental function.²⁷ Lord Scott, speaking as part of the majority, stated: "*...it cannot be enough simply to compare the nature of the activities being carried out at privately owned care homes with those carried out at local authority owned care homes. It is necessary to look also at the reason why the person in question, whether an individual or corporate, is carrying out those activities. A local authority is doing so pursuant to public law obligations. A private person... is doing so pursuant to private law contractual obligations.*"²⁸ Baroness Hale, dissenting, characterised the distinction as being "*artificial and legalistic.*"²⁹

²⁴ House of Commons, House of Lords, Joint Committee on Human Rights Report: The Meaning of Public Authority under the Human Rights Act. Seventh Report of Session 2003–04. Paragraph 41.

²⁵ *YL v. Birmingham City Council and others* [2007] UKHL 27.

²⁶ Donnelly. C., *Delegation of Government Power to Private Parties – A Comparative Perspective* (2007). Page 269.

²⁷ See case comment by Disability Rights UK: <http://www.disabilityrightsuk.org/yl-v-birmingham-city-council-and-others>

YL v. Birmingham City Council and others [2007] UKHL 27. Lord Mance at paragraph 115 and Lord Neuberger at paragraph 141.

²⁸ *YL v. Birmingham City Council and others* [2007] UKHL 27. Lord Scott at paragraph 31.

²⁹ *YL v. Birmingham City Council and others* [2007] UKHL 27. Baroness Hale at paragraph 66.

Such was the outcry in the aftermath of this case the UK government felt that a legislative response was needed. Within a year legislation was introduced that ensured that, in future, any care home that is contracted to provide care and accommodation would be considered to be carrying out a public function and thus covered by section 6(3)(b).³⁰ However, the judicial reasoning underlying the decision in *YL* has been left untouched and remains equally applicable in other contexts, including for cases in which privatisation is done by contract. In light of this continuing confusion, the Chair of the Joint Committee on Human Rights introduced the Human Rights Act 1998 (Meaning of Public Authority) Bill. The Bill stipulated expressly that function of a public nature should include “*a function performed pursuant to a contract or other arrangement with a public authority which is under a duty to perform that function.*”³¹ The Bill received a second reading in the House of Commons in July 2009 before being dropped.

YL means that the leading jurisprudence narrowly interprets how private acts can lead to public responsibility.³² The main criticism levelled at that jurisprudence is that it misconstrues the original intention behind the Human Rights Act i.e. to have a broad meaning attached to the understanding of a ‘*Public Authority.*’ The Joint Committee on Human Rights of the House of Lords and House of Commons launched two reports on ‘*The Meaning of Public Authority under the Human Rights Act.*’ The first was launched in 2003-04 and the second in 2006-07. The 2003-04 (pre-*YL*) report concluded by stating that “*as a matter of broad principle, a body is a functional public authority performing a public function under section 6(3)(b) of the Human Rights Act where it exercises a function that has its origin in governmental responsibilities ...in such a way as to compel individuals to rely on that body for realisation of their Convention human rights.*”³³ In its 2006/2007 (post *YL*) report the Committee noted that, given the continuing narrow interpretation of a public authority prevalent in the jurisprudence, there is a concern that the courts may not

³⁰ See: Section 145 of the Health and Social Care Act 2008.

³¹ Meaning of Public Authority Bill

See: http://www.blackstonechambers.com/news/newsletters/public_law_focus_articles/care_homes.html

³² See: Young, A., *The Human Rights Act 1998, Horizontality and the Constitutionalisation of Private Law.* In Ziegler, K., & Huber, P., *Current Problems in the Protection of Human Rights* (2013).

³³ House of Commons, House of Lords, Joint Committee on Human Rights Report: *The Meaning of Public Authority under the Human Rights Act.* Seventh Report of Session 2003–04. Paragraph 157.

return a decision which would deem a private actor engaging in contracted work as being a public authority.³⁴

YL is clearly inconsistent with the decision in *Aston Cantlow* and the tension within current reasoning is best understood through reference to both cases. In the latter case, a distinction was made between a ‘core’ public authority and a hybrid authority.³⁵ Unlike a hybrid authority, ‘core’ public authorities fall within section 6 without reference to section 6(3). Lord Hope stated that in deciding whether an entity is in the ‘core’ category of public authorities the Court must consider “*the nature of the person itself, not the functions which it may perform.*”³⁶ However, Lord Hope’s approach to the more controversial category of hybrid public authorities is that reference must primarily be made to the *function* that the entity undertakes in order to decide whether they are public authorities for the sake of the Human Rights Act.³⁷ *YL* did not follow this more nuanced approach to hybrid authorities and instead simply applied the same test as that which Lord Hope set out for a ‘core’ category i.e. an examination of the actor in question (the institutional test). Therefore, *YL*, the leading judgment in this field, does not employ a functional test.

4.2.2 Section 6(3)(b) and Migration Control and Border Management

It is difficult to accurately gauge where *YL* leaves privatised migration control and border management procedures. Such procedures may be seen as being so intrinsically linked to the State that it is presumed that the State must be responsible for their provision. This assumption is made in the way that, pre-*YL*, it was presumed that care homes should obligate the State no matter how that care is delivered. Applying *YL* to migration control and border management, it could be imagined that the *actual* detention or the *actual* implementation of escorted return are not inherently governmental functions, it is the

³⁴ House of Commons, House of Lords, Joint Committee on Human Rights Report: The Meaning of Public Authority under the Human Rights Act. Ninth Report of Session 2006–07.

³⁵ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* House of Lords [2003] UKHL 37. Lord Nicholls at paragraph 8.

³⁶ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* House of Lords [2003] UKHL 37. Lord Hope at paragraph 41.

³⁷ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* House of Lords [2003] UKHL 37. Lord Hope at paragraph 41.

arrangement for such procedures that is a genuinely governmental function. Such a reading would be highly problematic and inappropriate.

Both *YL* and the earlier case of *Leonard Cheshire Homes* found that the contracted private actors in question were not public authorities for the sake of section 6(3) of the Human Rights Act. *Leonard Cheshire Homes* is convincing – especially when contrasted with the earlier ruling in *Poplar Housing* – that contract as a method of delegation is effective in *distancing* the State from legal responsibility for rights violations arising from implementation of a migration control and border management procedure. Contract as a method of service delivery is not indicative of the procedure in question being a public function. In fact, quite the contrary is true. “*It will... be difficult to maintain an action against the public body itself... under the HRA... where there has been contracting out... Claims that could have been made against the public body if it had performed the service in house will no longer be possible where it has contracted this out.*”³⁸ The criticism is thus that the courts approach is a signal to the government that it simply has to pursue contract as its method of service delivery in order to ensure that the procedure in question lay outside the scope of the Human Rights Act.³⁹ Thankfully, the limited jurisprudence in the field of migration control and border management does not bear this out.

In *Yarl’s Wood Immigration Ltd and Others v Bedfordshire Police Authority*⁴⁰ the Court of Appeal examined whether the operating system in an immigration detention centre represented a public authority or not. A riot at Yarl’s Wood detention centre in early 2002 caused extensive damage to the detention centre.⁴¹ The private actor running the centre and their insurers sought to recover the cost of the damage from the Bedfordshire police on the basis of the Riot (Damages) Act 1886. The argument made by the police was that Group 4 (a private security firm) should be excluded from that 1886 Act because, in running the detention centre, it acted as a public authority and so was debarred from claiming against

³⁸ Craig. P., Contracting out, the Human Rights Act and the scope of judicial review (2002) *Law Quarterly Review* 118, 551. Page 568.

³⁹ Donnelly. C., Delegation of Government Power to Private Parties – A Comparative Perspective (2007) Page 283.

⁴⁰ *Yarl’s Wood Immigration Ltd; GSL UK Ltd; Creechurch Dedicated Ltd v Bedfordshire Police Authority* [2009] EWCA Civ 1110.

⁴¹ BBC News article on the Yarl’s Wood riots (15 February 2002). See: http://news.bbc.co.uk/2/hi/uk_news/england/1822120.stm

the police under that Act.⁴² The Court of Appeal held that Group 4's claim was permissible in principle⁴³ despite accepting that Group 4 represented a public authority for the sake of section 6(3)(b). In the High Court case of *R (on the application of D and K) v SSHD*,⁴⁴ the private actor contracted to run an immigration detention centre accepted that they were bound by the Detention Centre Rules such that they were a functional public authority for the purposes of the Human Rights Act.⁴⁵

Unlike many procedures in other fields though, in the context of migration control and border management, *the* medium for service delivery of compulsory powers is contract. Compulsory procedures, in the context of migration control and border management, have only been delegated through contract. *The* great concern is that a delegated procedure that includes a compulsory power is not classed as constituting a public function for the sake of Section 6(3)(b) of the Act.⁴⁶ The danger lay in entities which exercise compulsory powers being made subject to an institutional test to see if they are a public authority under Section 6(3)(b) rather than a test which considered their function. In such circumstances, a private actor exercising the use of force, detention, physical restraint etc. may not be found to constitute a public authority for the sake of the Human Rights Act.

The Joint Committee for Human Rights could not countenance that compulsory powers could be separated from the State in this way. Baroness Hale, dissenting in *YL*, stated that "*it is common ground that 'functions of a public nature' include the exercise of the ...coercive powers of the state.*"⁴⁷ The Committee had been reassured by the government that such powers would be read by the courts as "*automatically*" giving rise to a finding that they are public authorities for the sake of the Act. However, the Committee went on to say that "*the status of these individual bodies, and the nature of their powers*"

⁴² Clayton. G., *Immigration and Asylum Law* (2014). Page 528.

⁴³ Clayton. G., *Immigration and Asylum Law* (2014). Page 528.

⁴⁴ *R (on the application of D and K) v SSHD* [2006] EWHC (Admin) 980, *GSL UK* (formerly Group 4 Total Security).

⁴⁵ Clayton. G., *Immigration and Asylum Law* (2014). Page 527.

⁴⁶ House of Commons, House of Lords, Joint Committee on Human Rights Report: *The Meaning of Public Authority under the Human Rights Act*. Ninth Report of Session 2006–07. Paragraph 18 of Conclusions and Recommendations.

⁴⁷ *YL v. Birmingham City Council and others* [2007] UKHL 27. Baroness Hale at paragraph 63.

would still need to be considered on a case-by-case basis.⁴⁸ The Committee specifically considered the position of privatised immigration detention. It stated that *“it is unlikely that these service providers would not be considered public bodies for the purposes of the HRA.”*⁴⁹ The Committee’s statement in this regard was based completely on the fact that such private actors were being entrusted with compulsory powers. Those migration control and border management procedures that have been privatised through contract should therefore ensure that the private actor involved in their implementation will be interpreted as being a public authority for the sake of Section 6(3)(b) on the basis of the compulsory powers they implement.⁵⁰

The impact that this Section 6(3)(b) jurisprudence has on those procedures that have been privatised through force (enforced privatisation) is not altogether clear. Those procedures, devoid of any compulsory powers, are mainly based around decision-making, organisation and information gathering. Gina Clayton states that: *“immigration decisions are acts of public authorities... and as such are required... to be compatible with the Convention rights derived from the ECHR.”*⁵¹ In practice however, not all immigration decisions are reflected as being a decision of the State. In the case of *Farah and Others v The Home Office and British Airways*⁵² the appellants were prevented from boarding an aircraft as a direct result of Immigration Liaison Officers wrongly advising British Airways that the appellants’ travel documents were inadequate. In the private law proceedings which followed, the decision not to carry the passengers was treated as a decision taken by the private actor and thus the Home Office was not responsible and struck from the

⁴⁸ House of Commons, House of Lords, Joint Committee on Human Rights Report: The Meaning of Public Authority under the Human Rights Act. Ninth Report of Session 2006–07. Paragraph 72.

⁴⁹ House of Commons, House of Lords, Joint Committee on Human Rights Report: The Meaning of Public Authority under the Human Rights Act. Ninth Report of Session 2006–07. Paragraph 72.

Furthermore, while section 6(1) HRA provides direct protection only against core public authorities, the Home Office White Paper, Rights Brought Home, lists the following as traditional public authorities: *“...central government, including executive agencies; local government; the police; immigration; prisons; courts and tribunals themselves...”* See: Rights Brought Home: The Human Rights Bill. Presented to Parliament by the Secretary of State for the Home Department (1997).

⁵⁰ Elliot. M., & Thomas. R., Public Law (2014). Page 723.

⁵¹ Clayton. G., Textbook on Immigration and Asylum Law (2014). Page 98. Clayton also notes that the undertaking in Section 6(3) of the Human Rights Act is reinforced by section 84 (Grounds of Appeal) of the Nationality Immigration and Asylum Act of 2002.

⁵² Farah and Others v The Home Office and British Airways, Unreported, The Independent, 18 January 2000.

decision. The State thus evaded legal responsibility for a private decision which was made as a direct result of the advice of agents of the State (ILOs) that carriage of the people in question would result in a fine for the airline.

The push toward alternative avenues to access justice are important in this context. Rights infringements resulting out of statutory duties imposed on private actors can be mediated '*horizontally*' through the common law of private obligations rather than through the vertical mechanism of the human rights act. There are those who believe that resort to the human rights act should be reserved, so far as it is possible, for the control of the State and its core derivative institutions.⁵³ In the event that the public law route is pursued over and above avenues of private law, the institutional test to be applied may not be robust enough to read enforced privatisation as meaning that a private actor is a public authority for the sake of the particular migration control and border management function it performs. The groundwork is thus laid for a divide of procedures along the lines of compulsory powers. Compulsory powered procedures which violate a human right results in a (vertical) challenge through the Human Rights Act and the potential vindication of those rights. Procedures which do not rely upon compulsory powers will primarily result in a (horizontal) challenge in private law. The vindicatory power of private law is considered in Chapter V.

The wide sweeping powers of information gathering and reporting to the State gained through airlines and employers are considerable yet they lack the '*compulsory*' edge that would be more persuasive to the courts that they represent public action. Deciding who accesses justice through the Human Rights Act based purely upon a distinction as to the physical nature of the control exercised is a flawed approach. It is obvious that the type of powers afforded to private actors through enforced privatisation are just as capable of violating rights as their compulsory powered (contractual) counterparts. The UK domestic courts are in need of a new test for the courts which does not rely upon such an arbitrary distinction and which is capable of recognising the control that these '*soft*' powers afford the State.

⁵³ Palmer. E., Judicial Review, Socio-Economic Rights and the Human Rights Act (2007). Page 143.

4.3 European Court of Human Rights and the Convention

In interpreting whether private actions can give rise to public legal responsibility under the Convention, obviously the main issue in the ECtHR does not mirror the UK courts' fixation with a particular provision of the legislative instrument giving force to the Convention. The focus here is instead on how the ECtHR approaches the public/private divide (4.3.1) and specifically, the approach taken by the Court in understanding how an entity can be an extension of a contracting State and hence give rise to legal responsibility for that State (4.3.2). In addition, this section briefly explores how a wholly private entity's actions can also give to legal responsibility for a contracting State (4.3.3).

4.3.1 The ECtHR's Approach to State Responsibility for Private Actions

An application to the ECtHR must be directed against a Contracting State or a public official or body for which a State may be held responsible.⁵⁴ This leaves two ways in which the actions of a private actor can give rise to legal responsibility for the State. If that private actor represents an agent of the State, that State is subject to a negative obligation *vis-à-vis* Convention rights. If the private actor is truly private and is not an extension of the State, then it is possible that the State is subject to a positive obligation toward Convention rights. Therefore, the acts of private actors as agents of the State are capable of directly giving rise to legal responsibility for the State but the State can also be found to have violated Convention rights by having failed to take all reasonable measures to protect individuals against corporate abuse.⁵⁵ For either type of obligation, “[t]his jurisprudence relates to the issue of state responsibility.”⁵⁶ Employing a broad brush stroke, negative obligations typically apply to civil and political rights and positive obligations are more associated

⁵⁴ Article 34, European Convention on Human Rights.

⁵⁵ Augenstein, D., State Responsibilities to Regulate and Adjudicate Corporate Activities under the European Convention on Human Rights (2011) Submission to the Special Representative of the United Nations Secretary General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises. Page 7.

⁵⁶ Williams, A., Public authorities: what is a hybrid public authority under the HRA? Page 54. In Hoffman, D., The Impact of the UK Human Rights Act on Private Law (2011).

with economic, social and cultural rights.⁵⁷ This is not a hard and fast rule but rather a rough guide of how obligations generally arise at the ECtHR.

The type of privatisation undertaken does not give rise to an *either/or* choice as to positive or negative obligations. Privatisation through contract and enforced privatisation will not automatically engage a negative or positive obligation. The ECtHR generally does not focus on describing whether a private actor's role is that of a State agent or what type of obligation may be in question for the State. Furthermore, the Court decides its approach for each right in the Convention rather than having a uniform set of rules from which it applies the Convention's obligations to the States. "*...to apply the Convention in the private sphere across the whole spectrum of fundamental rights is inappropriate, ...to understand this subject better it is essential to deal with each right separately.*"⁵⁸ The Court simply concentrates on an effective application of the Convention. To this end, State obligations are utilised in ways best suited to attain this effective application in the context of each right and on a case-by-case basis depending on the circumstances involved.

The Court sometimes has difficulties in deciding whether a case involves a positive or a negative obligation, and may even decide not to make that distinction at all;⁵⁹ *Broniowski v Poland* is a case in point.⁶⁰ In the case of *López Ostra v Spain*,⁶¹ which concerned environmental pollution, the Court considered whether the case should be analysed in terms of a positive obligation on the State or in terms of an interference by a public authority which would represent breach of the State's negative obligation. The Court stated that whether a positive or negative obligation had arisen, "*the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in any case the State enjoys a certain margin of appreciation.*"⁶²

⁵⁷ Harris. DJ., O'Boyle. M., Bates. EP., Buckley. CM., Law of the European Convention on Human Rights (2014). Page 21-22.

⁵⁸ Clapham. A., Human Rights in the Private Sphere (1993). Page 178.

⁵⁹ Harris. DJ., O'Boyle. M., Bates. EP., Buckley. CM., Law of the European Convention on Human Rights (2014). Page 22.

⁶⁰ *Broniowski v. Poland*, 31443/96, [GC].

⁶¹ *López Ostra v Spain*, 16798/90.

⁶² *López Ostra v Spain*, 16798/90. Paragraph 51.

4.3.1.1 The Public/Private Divide: Beyond State Responsibility

It is also important to understand that consideration of the public/private divide in the Strasbourg Court is not limited to jurisprudence on State responsibility. The ECtHR has also examined that divide in the context of the definition of a governmental organisation under Article 34 ECHR. Article 34 addresses which entities can make individual applications to the ECtHR. That provision proscribes governmental organisations from making such applications while the process is open to non-governmental organisations. The Court has made clear that the distinction between private actors that are agents of the State and purely private actors and the distinction between governmental organisations and non-governmental organisations, is identical.⁶³

The case of *Islamic Republic of Iran Shipping Lines v. Turkey* is the clearest elucidation by the Court of the distinction within Article 34. The Court stated that governmental organisations include “*legal entities which participate in the exercise of governmental powers or run a public service under government control*” and in order to identify such organisations, account must be had of “*its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the political authorities.*”⁶⁴ *Radio France* reiterated these criteria for public authorities.⁶⁵

4.3.2 Negative Obligations – Private Actors as Agents of the State

When a State has crucial influence over and control of a company, it may be held responsible for the actions of that company, having regard to the public nature of its functions and management.⁶⁶ In such circumstances, the private actor is regarded as an agent of the State and as such, an extension of that State’s interest such that a negative obligation exists for that State with regard to the actions of that agent. The all-important matter for the ECtHR is deciding how and when such an agency is established. Augenstein sets out the criteria which will be taken into account by the Court in determining whether

⁶³ Williams. A., Public authorities: what is a hybrid public authority under the HRA? Page 55. In Hoffman. D., *The Impact of the UK Human Rights Act on Private Law* (2011).

⁶⁴ *Islamic Republic of Iran Shipping Lines v. Turkey*, 40998/98. Paragraph 79.

⁶⁵ *Radio France and Others v France*, (Admissibility decision), 23 September 2003.

⁶⁶ Reid. K., *A practitioner’s guide to the ECHR* (2012). Page 42.

a private actor is an agent of the State. These include but are not limited to: “*The corporation’s legal status;*” “*The rights conferred upon the corporation by virtue of its legal status;*” “*Institutional independence;*” “*Operational independence;*” “*The nature of the corporate activity;*” “*The context in which the corporate activity is carried out.*”⁶⁷

The case of *Yershova*⁶⁸ concerned an applicant who worked for a company that was tasked with supplying heat to the Russian city of Yakutsk. The city retained ownership of the company’s property while the municipal company exercised the right of economic control in respect of it. The Court had to decide whether or not the municipal company’s acts and omissions are attributable to the State under the Convention. In this regard, the company’s legal status, the rights that such status gave it, the nature of the activity it carried out and the context in which it was carried out, and the degree of its independence from the authorities were all relevant. The Court stated that it would have to consider whether the company “*enjoyed sufficient institutional and operational independence from the State to absolve the latter from its responsibility under the Convention for its acts and omissions.*”⁶⁹ In that case, the official legal status (the private status) of the company did not absolve the State from what the Court determined as being that State’s legal responsibility.⁷⁰ The corporation’s strong institutional links to the local town council, the local council’s control of the corporation’s assets and “*the special nature of its activities*”⁷¹ were deemed to be more influential than the ‘*private*’ legal status of the entity in finding that that entity perpetuated the State’s negative obligation through its agency.

The *Van Der Musselle*⁷² case concerned an *avocat* who was complaining that he had been required to defend a person without receiving any remuneration or being reimbursed his expenses. The Court had to consider the responsibility of the State for the implementation of a set of professional rules for *avocats*. The Court found that the *Ordre*

⁶⁷ Augenstein, D., *State Responsibilities to Regulate and Adjudicate Corporate Activities under the European Convention on Human Rights* (2011) Submission to the Special Representative of the United Nations Secretary General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises. Page 8-9.

⁶⁸ *Yershova v Russia*, 1387/04.

⁶⁹ *Yershova v Russia*, 1387/04. Paragraph 55.

⁷⁰ *Yershova v Russia*, 1387/04. Paragraph 56.

⁷¹ *Yershova v Russia*, 1387/04. Paragraph 57-58.

⁷² *Van Der Musselle v Belgium*, 8919/80.

des Avocats had been empowered by the State through legislation to exercise control over the legal profession in Belgium which in the eyes of the Court represented the exercise of governmental functions that should be attributed to the State. State responsibility was thus established for a violation arising out of the implementation of what looked, *prima facie*, to be a wholly private procedure. The standing jurisprudence is that the nature of the procedures that a private actor may be asked to carry out by the State are of “*decisive importance*” as well as the legislative framework upon which the relationship rests.⁷³ Negative obligations essentially leave the State in its ordinary position *vis-à-vis* the Convention except that its actions are extended through a private actor. Rights and State responsibility are applied in the normal way once it is established that a private actor is an agent of the State. The challenge lay in establishing that the private actor is an agent. Augenstein’s criteria, laid out *supra*, are broadly applied and are exemplified by cases such as *Yershova* and *Van Der Mussele*, with the function being carried out being of particular importance.

4.3.2.1 Negative Obligations in Migration Control and Border Management

In coming to decisions, such as *Yershova* and *Van Der Mussele* referenced above, typically the Court does not make reference to positive or negative obligations of the State. Instead the Court simply considers the nature of the relationship between the private actor and the State. If no such relationship exists, it remains to consider whether the State had a positive obligation to the aggrieved individual (see section 4.3.3.1, below). If a relationship does exist, then the ECtHR will consider whether the private actor represents an agent of the State.

Both side of the distinction made in Chapter III, between those procedures that are privatised by contract and those that are privatised on the basis of being forced through a threat of sanction, involve for-profit commercial undertakings. In normal circumstances these private actors are subject to private law and their potential status as an agent of the State under the Convention, only extends insofar as they implement a migration control

⁷³ Ziemele. I., Human Rights Violations by Private Persons and Entities: The Case-Law of International Human Rights Courts and Monitoring Bodies (2009) Working Paper No.8, Academy of European Law, European University Institute. Page 22.

and border management procedure. In *Yershova* the ECtHR dismissed the State's argument that the private actor in question had been incorporated under domestic law as a separate legal entity with a private law status and that that status absolved the State from legal responsibility for its violations. The Court held that the company's legal status under domestic law, while important, was "*not decisive for the determination of the State's responsibility for the company's acts or omissions under the Convention.*"⁷⁴ Instead, the Court focused on company's strong ties with the local public authorities and the public nature of its functions.⁷⁵

The institutional independence of the private actors which implement migration control and border management procedures varies by procedure. On one side of the aforementioned distinction, the existence of a contract between the State and the private actor is a crucial factor. A contract points toward a lack of institutional independence for the private actor and *vice versa*. The procedures that are implemented without a contract and which depend upon sanctions to force the private actor into that implementation, all have a legislative basis. A legislative basis by which the State enforces a private actor to undertake certain procedures obviously also points toward a lack of institutional independence.

The method of service delivery – by contract or through sanction – also reflects a divide in terms of operational independence. Contract requires an element of supervision even if monitoring has at times been lacking in detention and return escorts. Contracted privatisation also includes compulsory powers which require States to attach instructions as to what type of force is permitted and what is prohibited.⁷⁶ While in practice there is a large degree of operational independence, the formalised arrangement of contract still lends credence to the argument that operations are managed by the State. Privatisation through threat of sanction is more straightforward in that there is total operational independence. The private actor is completely taken up with their commercial activities which they

⁷⁴ *Yershova v Russia*, 1387/04. Paragraph 56.

⁷⁵ Augenstein, D., *State Responsibilities to Regulate and Adjudicate Corporate Activities under the European Convention on Human Rights* (2011) Submission to the Special Representative of the United Nations Secretary General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises. Page 9.

⁷⁶ Such instructions seem to vary in detail and are redacted in contracts in the UK. See annex I.

implement with only a bare minimum of State oversight, more likely with spot checks or regular communication. The information gathering and decision-making involved in this type of privatisation does not compromise operational independence. In the admissibility decision of *Woś v Poland*⁷⁷ the State set up a private entity to distribute compensation for World War II victims. Referring to its own admissibility decision,⁷⁸ the Court stated that “*while the Polish State did not have direct influence over the decisions taken by the Foundation in respect of individual claimants, the State’s role was nonetheless crucial in establishing the overall framework in which the Foundation operated.*”⁷⁹ This is particularly reassuring *vis-à-vis* procedures of enforced privatisation which rely on a legislative framework for their implementation. On this basis, carriers and employers would be interpreted as agents of the State and would therefore make the State subject to negative obligations with regard to their actions in the context of carrying out their obligations under that legislative framework.

The ECtHR can also find a State legally responsible for a Convention-violating procedure purely on the basis of that procedure having a public nature. This criterion for legal responsibility has perhaps the greatest potential scope of application in the context of migration control and border management, which are the very epitome of a public function. However, it is not as straightforward as simply identifying a public element to the procedure. The provision of education is an area which is also commonly regarded as being a core public function. Yet, in the case of *Costello-Roberts*, that was not the finding of the Court. The case dealt more with positive obligations and so will be dealt with below (4.3.3.1) but for present purposes it is useful to note that the Court had an opportunity to find that the provision of education was a public function and did not grasp it. It was not clear from the remarks of the Court “*whether the private school engaged the State’s responsibility as a public authority,*” the ECtHR instead began its analysis of State responsibility by emphasising that the Convention can place States under positive obligations to regulate the behaviour of private bodies in specific situations.⁸⁰ Add to this,

⁷⁷ *Woś v. Poland*, 22860/02.

⁷⁸ *Woś v Poland*, (Admissibility decision), 1 March 2005.

⁷⁹ *Woś v Poland*, 22860/02. Paragraph 51.

⁸⁰ Williams. A., Public authorities: what is a hybrid public authority under the HRA? In Hoffman. D., *The Impact of the UK Human Rights Act on Private Law*. Page 57.

consideration of the case of *H v United Kingdom*⁸¹ in which the Court found that the negligent behaviour of teachers did not represent the State and the Court could not accept a complaint against a private individual. The evidence points toward it not being possible to declare such wide-ranging and diverse fields as education as categorically being public functions. Migration control and border management would be even more difficult to argue as giving rise to State legal responsibility across the board.

There is no evidence to suggest that a compulsory powered procedure is seen by the Court as inherently representing a public function but its presence may well be taken as an influence by the Court. Given the ECtHR's determination to effectively apply the Convention and to prevent privatisation from impacting upon contracting States' Convention obligations, the Court is clearly determined to apply a broad understanding of the State in the right circumstances.

4.3.3 Positive Obligations – The State's Duty to Act

When a private actor, which cannot be understood as being an agent of the State, violates ECHR rights then the Court may still find that the State had an obligation to act to prevent such violations from occurring. *"The obligation on States under this treaty is, according to Article 1, to secure all rights, and this gives rise to positive obligations to protect potential and actual victims from infringements by non-state actors where this results from a failure to enact legislation."*⁸² State inaction can therefore also give rise to State legal responsibility. Positive obligations have been developed to give a more all-encompassing protection to individuals.⁸³ In the context of privatisation, in certain circumstances that protection allows individuals to bring actions against the State on the basis of having experienced a rights violation at the hands of a private actor even when the action which led to that violation had nothing to do with the State.

The circumstances in which the Court will consider that the State should have acted to prevent a private actor from breaching a Convention right are open-ended. Contracting

See also: *Costello-Roberts v UK*, 13134/87.

⁸¹ *H v United Kingdom*, 11590/85.

⁸² Clapham, A., *Human Rights Obligations of Non-State Actors* (2006). Page 420.

⁸³ See: Xenos, D., *The Positive Obligations of the State Under the European Convention of Human Rights* (2012)

States must secure the individual's enjoyment of their rights by establishing and maintaining a domestic legal system that will serve to support those rights. Contracting States must, within reason, foresee and prevent interferences with an individual's rights.⁸⁴ In examining whether a State has adequately ensured that a right will not be breached, the ECtHR considers whether the State could reasonably have been expected to act and whether it took the necessary steps to ensure the effective protection of the applicants' rights.⁸⁵ The State generally enjoys a wide margin of appreciation as to how it can satisfy its positive obligations under the ECHR. However, failures of national authorities to comply with domestic law and procedural irregularities reduce the margin of appreciation and are indicative of a violation of Convention rights.⁸⁶

The case of *Young, James and Webster v UK*,⁸⁷ concerned employees who were not trade union members and their employer British Rail who had signed an agreement with three trade unions that membership of one of those unions would become a precondition for employment. In light of the jurisprudence referred to in the context of negative obligations in the previous section, one might suspect that the links of British Rail to the UK might be *the* crucial subject matter. The UK evidently did make this presumption as it argued that British Rail did not represent an organ of the State. At any rate, the importance of this was implicitly rejected by the Court when the ECtHR did not dedicate any time to examining whether the actions of British Rail could be attributed to the State.⁸⁸ The Court instead stated that the UK's failure to legislate to protect workers from being forced to join

⁸⁴ Perhaps most famously set out in: *Osman v UK*, 23452/94.

⁸⁵ Augenstein, D., *State Responsibilities to Regulate and Adjudicate Corporate Activities under the European Convention on Human Rights* (2011) Submission to the Special Representative of the United Nations Secretary General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises. Page 15.

Augenstein references two cases in this regard, see: *López Ostra v Spain*, 16798/90. Paragraph 55. *Guerra & Others v Italy*, 14967/89. Paragraph 58.

See also: Ziemele, I., *Human Rights Violations by Private Persons and Entities: The Case-Law of International Human Rights Courts and Monitoring Bodies* (2009) Working Paper No.8, Academy of European Law, European University Institute.

⁸⁶ Augenstein, D., *State Responsibilities to Regulate and Adjudicate Corporate Activities under the European Convention on Human Rights* (2011) Submission to the Special Representative of the United Nations Secretary General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises. Executive summary section.

⁸⁷ *Young, James and Webster v UK*, 7601/76 & 7806/77.

⁸⁸ Ziemele, I., *Human Rights Violations by Private Persons and Entities: The Case-Law of International Human Rights Courts and Monitoring Bodies* (2009) Working Paper No.8, Academy of European Law, European University Institute. Page 12.

a trade union violated the ECHR. “Accordingly, there is no call to examine whether, as the applicants argued, the State might also be responsible on the ground that it should be regarded as employer or that British Rail was under its control.”⁸⁹ The ECtHR thus took an alternative path to establishing State legal responsibility other than attributing the actions of a private actor to the State.⁹⁰ It did so by pursuing an expansive interpretation of a positive obligation being owed by the State rather the negative obligation which may have arisen if British Rail were understood as being an agent of the State.

In the case of *Osmanoğlu v. Turkey*,⁹¹ an argument was made that a man’s life was under increased threat after his kidnapping and that the Turkish State failed to adequately act to prevent him losing his life. Turkey argued that because it was not its own agents which had kidnapped the man, it was not legally responsible, an argument which again betrays the State’s tunnel vision for negative obligations without consideration of their positive counterparts. The ECtHR found that a violation of Article 2 could be established without State agents having been involved in a murder which was committed by private actors if the State had failed to adequately protect the victim.⁹² The case shows how positive obligations may be used where negative obligations would fail. The Court has enshrined positive obligations of the State for private actions but in doing so the Court has demonstrated a reluctance to develop a general theory of positive obligations.⁹³ It has instead been decided on a case-by-case basis, the extent to which States must act to ensure compliance with the Convention in completely private disputes.

The extent of contracting States’ positive obligations to protect individuals against infringements of their rights by other private persons has not yet been adequately clarified but issues such as domestic violence (Articles 3 and 8), and the deprivation of liberty by terrorists or other kidnappers (Article 5) are areas in which the Court has found such an

⁸⁹ Young, James and Webster v UK, 7601/76 & 7806/77. Paragraph 49.

⁹⁰ Clapham. A., Human Rights Obligations of Non-State Actors (2006). Page 353.

⁹¹ *Osmanoğlu v. Turkey*, 48804/99.

⁹² Ziemele. I., Human Rights Violations by Private Persons and Entities: The Case-Law of International Human Rights Courts and Monitoring Bodies (2009) Working Paper No.8, Academy of European Law, European University Institute. Page 16.

⁹³ Clapham. A., Human Rights Obligations of Non-State Actors (2006). Page 349.

obligation arises.⁹⁴ Environmental protection is another area in which positive obligations play a key role in protecting the individual from State lapses. The *Fadeyeva v Russia*⁹⁵ case dealt with a steel plant that was polluting the environment but which was not “...owned, controlled, or operated by the State.”⁹⁶ The ECtHR found that Russia had not directly interfered with the relevant Convention rights. However, the Court went on to find that legal responsibility for the State may arise in environmental cases from “...a failure to regulate private industry. Accordingly, the applicant’s complaints fall to be analysed in terms of a positive duty on the State...”⁹⁷ The Court concluded that the State authorities were clearly in a position to evaluate the pollution risks of the plant and to take adequate measures to prevent them. It was found that this was true to a degree whereby a nexus was established between the State and the polluting emissions such that a positive obligation was created for the State.⁹⁸

4.3.3.1 Positive Obligations in Migration Control and Border Management

It is not difficult to see how positive obligations may be utilised in the context of migration control and border management. Where negative obligations may fail, the Court can still turn to positive obligations to attach responsibility to the State. The case of *Costello-Roberts v UK*⁹⁹ concerned the State’s liability for corporal punishment meted out to a child in a private school in the UK. The UK stated that it had fulfilled its Convention obligations by legislating for a prohibition on corporal punishment in UK schools.¹⁰⁰ The Court disagreed and stated that the punishment handed out to the child in *Costello-Roberts*, despite being the actions of a private actor (a headmaster of a private school) still had the potential to engage the responsibility of the United Kingdom under the ECHR if it proved to be incompatible with an article of the Convention.¹⁰¹

⁹⁴ Harris. DJ., O’Boyle. M., Bates. EP., Buckley. CM., Law of the European Convention on Human Rights (2014). Page 23.

⁹⁵ *Fadeyeva v Russia*, 55723/00.

⁹⁶ *Fadeyeva v Russia*, 55723/00. Paragraph 89.

⁹⁷ *Fadeyeva v Russia*, 55723/00. Paragraph 89.

⁹⁸ *Fadeyeva v Russia*, 55723/00. Paragraph 91.

⁹⁹ *Costello-Roberts v UK*, 13134/87.

¹⁰⁰ *Costello-Roberts v UK*, 13134/87. Paragraph 26.

¹⁰¹ *Costello-Roberts v UK*, 13134/87. Paragraph 28.

The ECtHR, in *Costello-Roberts*, outlined that States are under a duty to impose their will and cannot hide behind a claim regarding their own inability to ensure respect of instructions.¹⁰² A Joint (partly-dissenting) Opinion in that case elaborated on the impossibility of a parallel system of control in the hands of a private actor which could potentially evade State responsibility. That Opinion set out that a State could “*neither shift prison administration to the private sector and thereby make corporal punishment in prisons lawful, nor can it permit the setting up of a system of private schools which are run irrespective of Convention guarantees.*”¹⁰³ This has obvious reticence for direct control. Where a State claims to have done its duty by pointing to stipulations placed in a contract, the Court may not be convinced that this is enough to have satisfy the State’s positive obligation to prevent a rights violation. This is especially true when the State’s monitoring is sporadic and limited in scope. The same is true of references in legislation to respect for migrants’ rights in procedures of enforced privatisation.

The Court developed its approach in *Costello-Roberts*, “*focused on the fact the case arose in the context of education, and that education is an area in which the state is assumed to have certain responsibilities.*”¹⁰⁴ Clapham pinpoints detention (“*private prisons*”) as a field where a similar finding could be made. The Court’s effort in making application of the Convention as effective as possible is made clear in this case. Despite, *prima facie*, the provision of education being a public function, the school in *Costello-Roberts* could not be taken as an agent of the State and so a negative obligation could not be applied. It was made clear, however, that that field (provision of education) is still subject to positive obligations for the State. The private prisons example has obvious application to the privatisation of migrant detention. A parallel private system in a procedure of migration control and border management could potentially give rise to State responsibility because it is an area in which the State is assumed to have responsibility.

Spijkerboer posits that that argument which is “*most forceful in rejecting a positive obligation in the border death context (namely: migrants themselves take these risks so States cannot be held responsible if they materialize)* is rejected by the Court in terms that

¹⁰² Ireland v UK, 5310/71. Paragraph 159.

¹⁰³ *Costello-Roberts v UK*, 13134/87. Joint partly dissenting opinion of Judges Ryssdal, Thór Vilhjálmsson, Matscher and Wildhaber. Page 16.

¹⁰⁴ Clapham. A., *Human Rights Obligations of Non-State Actors* (2006). Page 356.

are directly applicable in the border control context.”¹⁰⁵ That argument is based upon the terms established in positive obligations jurisprudence and Spijkerboer especially lays emphasis in the case of *Öneryildiz v Turkey*¹⁰⁶ to illustrate his point. The applicant in the case was a 12-year-old boy who was resident of an area of rudimentary dwellings built without any authorisation on land surrounding a rubbish tip. Nine close relatives of the boy died when methane gas from the dump exploded next to their home. The criterion applied by the Court was to ask whether the authorities had done all that could be reasonably expected of them to avoid a real and immediate risk to life? Spijkerboer is arguing in the context of border deaths and especially as to the drowning of migrants at sea. However, this argument could be extended to a positive obligation for the State for violations arising out of a privately implemented procedure such as carrier sanctions.

Positive obligations can be used by the Court to establish State legal responsibility for private actions and this is potentially true of both contracted and enforced privatisation. Private actors undertaking the State’s work under threat of sanction for non-compliance may have resort to positive obligations faster than their contracted counterparts. Agency may be more easily established on the basis of a contract than on the basis of the situation facing a private actor which is forced to undertake a procedure. Positive obligations for the State can potentially be extended to migrants who experience a rights violation at the hands of such private actors, so as to ensure the efficient application of the Convention. In this way, the State is obliged to ensure an individual’s effective enjoyment of the rights bestowed upon him or her through the Convention.

As things stand, it appears that the effective application of the Convention as a driving force behind the Court will mean that positive obligations will be used as a complementary tool in ensuring protection of aggrieved individuals. Hypothetical application of a complementary tool is difficult if it is to be used as a stop-gap solution in situations where negative obligations fail for some reason. However, it can be stated with some confidence that abstract references to respect for human rights, in a contract or in the

¹⁰⁵ Spijkerboer. T., Are European States Accountable for Border Deaths? Page 69. In Juss. S., The Ashgate Research Companion to Migration Law, Theory and Policy (2013).

¹⁰⁶ *Öneryildiz v. Turkey*, 48939/99, [GC].

legislation that sets out a procedure of enforced privatisation, will *not* be enough to excuse the State from legal responsibility for a violation arising out of private implementation.

4.4 Application of EU Fundamental Rights Law to Private Action

This section is concerned with examining the case-law of the CJEU on the possibility of applying EU fundamental rights law to private action within the Member States before their domestic courts. That examination is undertaken in the greater context of this chapter – exploring the attribution of legal responsibility *to the State* for the actions of private actors. Donnelly points out that rather than the abstract discussions that happen at national level as to how public and private actors are treated differently in the context of human rights, in EU law the focus instead is on the effectiveness (*effet utile*) of Union law itself.¹⁰⁷ It is possible that in the interest of *effet utile*, the CJEU may adopt a broadened understanding of the State. This chapter examines the possibility that, in the name of the effectiveness of Union fundamental rights law, the CJEU may be moved to broaden its conception of the State. This vertical expansion may be undertaken by the Court such that, in certain circumstances, private action can represent an extension of the State and when it results in a violation of rights, legal responsibility can come to rest with that State.

This section first briefly turns to acknowledge the possibility of the horizontal application of Charter provisions and the part played by private actors and the unwanted horizontal effect which moves the Court toward broadening its concept of the State so as to expand upon the possibility for vertical effect (4.4.1). The circumstances in which the CJEU may be moved to expand upon the concept of “...an emanation of the State”¹⁰⁸ is the subject of the second section (4.4.2). In order to better understand how the CJEU could possibly broaden its understanding of the State in the interests of ensuring the effective application of EU law, jurisprudence from another area of EU law is taken. That jurisprudence is taken from the CJEU’s understanding of the State in the context of the vertical direct effect of directives (4.4.2.1). Finally, the Luxembourg Court’s application of the principle of *effet utile* relies on the EU Charter of Fundamental Rights being

¹⁰⁷ Donnelly. C., *Delegation of Government Power to Private Parties – A Comparative Perspective* (2007). Page 280.

¹⁰⁸ C-152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority*. Paragraph 12.

applicable to a *prima facie* private violation in the first place. That requirement is revisited¹⁰⁹ in the final section (4.4.3).

4.4.1 Horizontal Application of the Charter

The horizontal application of Charter provisions will not be considered here at length as the emphasis remains in exploring State legal responsibility.¹¹⁰ However, acknowledgment must be made that there exists an ongoing debate as to such application. Certain of the most crucial jurisprudence in the context of the horizontal application of the Charter has already referenced in the context of the extraterritorial application of the Charter (3.2.1). This reflects the common criterion to the application of the Charter to the actions of the Member States – it applies when they are “*implementing Union law.*”¹¹¹

A subsequent section (4.4.2.1) considers the way in which the CJEU has expanded its concept of the State in the context of vertical direct effect of directives. That expansion stems directly from the reluctance of the CJEU to read directives as having horizontal direct effect. The effectiveness of EU directives depends upon States not being able to delegate away legal responsibility and while the Court ruled out horizontal direct effect,¹¹² it extended its vertical reach by expanding upon the notion of the State into the private sphere so as to ensure the effectiveness of directives. This has resulted in the substantial jurisprudence which is touched upon below (4.4.2.1).

4.4.2 *Effet Utile* and Expanding the CJEU’s Understanding of the State

The application of EU law has always been primarily the task of Member States. Responsibility for breaches of that law, breaches that cannot be explained with an acceptable reason for derogation, rests with Member States. The consequences of delegation by a Member State to a private actor and a subsequent fundamental rights

¹⁰⁹ Having already been examined in section 3.2.2.

¹¹⁰ Much has been written on the potential and actual horizontal effect of EU fundamental rights. For example, see: Walkila. S., *Horizontal Effect of Fundamental Rights in EU Law* (2016). See also: Chapter VI, *The Charter and the Question of the horizontal application of EU Fundamental Rights*. In Lazzarini. N., *The Scope of the Protection of Fundamental Rights under the EU Charter* (2013) PhD Thesis, European University Institute.

¹¹¹ Article 51(1), Charter of Fundamental Rights.

¹¹² C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA*.

violation by that private actor, represents uncharted waters for the CJEU. An examination of the general capability of the CJEU to expand its concept of the State in order to protect the effective application of Union law is beyond the scope of this work. In any case, such an examination has already been undertaken.¹¹³ However, one specific field of that rich jurisprudence can provide a valuable insight into how and when the Court will decide that the best course of action, in the interests of *effet utile*, would be to broaden the meaning of the State. This can lead to greater understanding as to the context in which the Court will expand the meaning of the State in the interest of the effectiveness of the EU Charter of Fundamental Rights. This would represent legal responsibility being attached to a Member State for the violation of a Charter right by a private actor. In theory then, private implementation could give rise to public legal responsibility.

Effet utile and its potential importance to a broadened conception of the State for the sake of legal responsibility for human rights violations may be illustrated with a simple example. One Member State performs its obligations under the Common Agricultural Policy itself and, in doing so, gives protection to the right to privacy. It cannot be seen as an effective application of the law if another Member State can delegate those same obligations to a private actor which result in there being no protection for the right to privacy.¹¹⁴ To contextualise the implication of this argument for present purposes: in applying, for example, the Schengen Borders Code,¹¹⁵ the CJEU is motivated not to allow a Member State to implement aspects of it through a private actor such that the right to appeal an entry refusal is frustrated when another Member State implementing it itself will be held legally responsible for such frustration. Allowing this behaviour impacts upon the effectiveness of EU law, in this case, fundamental rights law. Instead, the CJEU will interpret the State broadly, so as to include the private actor not just to ensure the uniform application of Union law but in order to preserve its (the Borders Code and EU fundamental

¹¹³ For a summary of these areas, see: Tomkin. J., Breaches of Union Law by Private Parties: The Consequences of such Breaches and the Circumstances in which they may give rise to State Responsibility (2012) European Network on Free Movement of Workers, Thematic Report. See also: Chiti. M., The EC notion of Public Administration: The Case of the Bodies Governed by Public Law (2002) European Public Law, Vol. 8(4).

¹¹⁴ This example is inspired by an example set out in: Donnelly. C., Delegation of Government Power to Private Parties – A Comparative Perspective (2007). Page 280.

¹¹⁵ 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 borders (Schengen Borders Code).

rights law) *effectiveness*. In other words: “*If a Member State is not able to adopt a measure that would conceal a Community right from the person to whom it applies, then it seems, by analogy, that a Member State should not be able to adopt a method of service delivery that would conceal a Community right from the person to whom it applies.*”¹¹⁶

All four of the privatised procedures outlined in Chapter II trace their genesis back to EU directives. Sanction-driven procedures (enforced privatisation) explicitly envisage a role for private actors within the legislation. Those procedures that have been privatised by contract (the examples in Chapter II were return escorts and detention) may be carried out by the State or may be delegated to a private actor, it is the choice of the State. While the *effet utile* argument may be extended to both sides of the enforced/contractual distinction, the kind of absurdity in application that was highlighted *supra* with the Common Agricultural Policy example is more apparent in privatisation by contract. The directives related to enforced privatisation incorporate private actors across the board. By contrast, the directives that provide for return escorts and detention do not necessitate the involvement of private actors but States have introduced private actors themselves. That introduction may result in variance in the application of EU law from a Member State that has privatised to a Member State which implements the procedures itself.

This debate is purely academic at the moment because there is no firm guidance from the Court but it is certainly worth considering the potential for *effet utile* to spur the CJEU into taking a creative approach to the protection of EU fundamental rights in the context of privatised migration control and border management. It is thus useful to briefly consider the approach taken by the CJEU to *effet utile* in another field. The vertical direct effect of directives provides a particularly rich jurisprudence in this regard and it is to that case-law this chapter now turns.

4.4.2.1 An “*Emanation of the State*” and the Vertical Direct Effect of Directives

Jurisprudence on the application of *effet utile* to the protection of EU fundamental rights is speculative and a moot point for now. Fortunately, there does exist guidance from other

¹¹⁶ Donnelly. C., *Delegation of Government Power to Private Parties – A Comparative Perspective* (2007). Page 280.

areas of EU law which shows how the CJEU can impart an expansive understanding of the State so as to include private actors if so required. Perhaps the best example comes from the implementation of EU directives. In the case of *Marshall*,¹¹⁷ the CJEU expanded its notion of vertical direct effect by creating a broad concept of what it is that the Court can interpret as representing State action. It was an early but significant step toward increasing the obligation to give effect to Union law, beyond Member States, to include all organs of the State. The CJEU stated in that case that the State could appear in a number of guises: “..it must be pointed out that where a person involved in legal proceedings is able to rely on a directive as against the state he may do so regardless of the capacity in which the latter is acting, whether employer or public authority. In either case it is necessary to prevent the state from taking advantage of its own failure to comply with Community law.”¹¹⁸

Marshall was followed by the seminal case of *Foster v British Gas PLC*¹¹⁹ which further clarified this broadened scope by setting out that “...a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers ...is included ...among the bodies against which the provisions of a directive capable of having direct effect may be relied upon.”¹²⁰ In coming to that decision, the Court took into account the institutional set-up of the company – State reporting requirements; State appointed members of the company’s board; budgeting requirements, etc.¹²¹ AG Van Gerven’s Opinion stated that the crucial issue was not the legal form of the private actor itself but the extent to which its activities were under *the control of the State*.¹²²

The decision in *Foster* was reinforced in *Kampelmann*.¹²³ In *Kampelmann* the Court again set out that certain private actors qualify for consideration as being public authorities

¹¹⁷C-152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority*.

¹¹⁸ C-152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority*. Paragraph 49.

¹¹⁹ C-188/89, *Foster v British Gas*.

¹²⁰ C-188/89, *Foster v British Gas*. Paragraph 20.

¹²¹ These stipulations were laid out by the piece of legislation responsible for privatizing the British Gas Company. See: C-188/89, *Foster v British Gas plc*. Paragraph 4-6.

¹²² Tomkin, J., *Breaches of Union Law by Private Parties: The Consequences of such Breaches and the Circumstances in which they may give rise to State Responsibility* (2012) European Network on Free Movement of Workers, Thematic Report. Page 23.

¹²³ C-253-256/96, *Kampelmann and Others v Landschaftsverband Westfalen-Lippe*.

if they are under the control of the State or possess the “*special powers*” referred to above in *Foster v British Gas*.¹²⁴ The CJEU does not prioritise the *source* of these “*special powers*” as being *the* crucial factor in determining whether a private actor can be considered public on the basis of a particular procedure. In other words, it is not the constituting document in contract or particular piece of legislation which gives rise to the Court finding that the State has a “*special power*”. Instead, as Tomkin states: “...*the Court has progressively moved to uncouple form from function. When determining the application of Union law to private entities, priority is afforded to the underlying nature and purpose of a particular function rather than to the legal form of the entity performing that function.*”¹²⁵ It is not easy to discern criteria from how the CJEU has distinguished private actors who represent an extension of State power so that the CJEU can ensure the effectiveness of Union law. That criteria would separate those private actors from other which do not engage the State’s legal responsibility in this way. This criteria has not been definitively set out by the Court and so “...*it is not entirely clear what kind of control the State must have over a body for it to be part of the State.*”¹²⁶

A broad concept of the State being interpreted by the CJEU through its consideration of the vertical direct effect of directives is just one example from across EU law of how the State has broached the public/private divide. Tomkin outlines a number of different areas in which a measure implemented by a private actor has a public character or in which it exercises functions on behalf of a Member State or public authority. These include value added tax; free movement of goods; state aid law; and public procurement.¹²⁷ It is beyond the scope of the present work to conduct a forensic examination of the CJEU’s approach in all of these areas but it is important to note the willingness of the Court in other areas when considering its potential in defending the effectiveness of EU fundamental rights law.

¹²⁴ See: C-253-256/96, *Kampelmann and Others v Landschaftsverband Westfalen-Lippe*. Paragraph 46. See: C-180/04, *Vassallo v Azienda*. Paragraph 26.

See: C-53/04, *Marrosu & Sardino v Azienda*. Paragraph 29.

¹²⁵ Tomkin. J., *Breaches of Union Law by Private Parties: The Consequences of such Breaches and the Circumstances in which they may give rise to State Responsibility* (2012) European Network on Free Movement of Workers, Thematic Report. Page 32.

¹²⁶ Craig. P., & De Búrca. G., *EU Law: Text, Cases and Materials* (2015) Page 207.

¹²⁷ See: Tomkin. J., *Breaches of Union Law by Private Parties: The Consequences of such Breaches and the Circumstances in which they may give rise to State Responsibility* (2012) European Network on Free Movement of Workers, Thematic Report.

4.4.3 The Charter's Requirement – “*Implementing Union Law*”

A previous section (3.2.2) examined the Charter's threshold requirement for application – that the State is implementing Union law. This section will not reiterate that which has already been established but instead briefly touches upon how this may be applied in the context of the procedures of privatisation. Suffice here to recall that EU fundamental rights law will apply to acts of the institutions and agencies and to Member States in the course of implementing their Union obligations, when derogating from those same obligations or when generally acting within the scope of EU law.¹²⁸

Are private actors, in implementing migration control and border management procedures, implementing EU law? The relevant privatised procedures – the detention of migrants, the return of migrants, carrier sanctions and employer sanctions – have all been legislated for at Union level. It is possible to give an opinion as to whether a particular procedure represents the implementation and application of Union law or not by way of reference to CJEU jurisprudence. With regard to the detention of migrants, that procedure has been set out in the Reception Directive and by the Returns Directive.¹²⁹ The nature of directives in general is such that it allows the Member State room to manoeuvre in implementation but directives, nonetheless, represent an act of the EU and their implementation is capable of engaging a Member State's legal responsibility under the Charter.¹³⁰ The question may be posed: Does detention of migrants by a Member State represent the implementation and application of an EU act, in this case the return and reception directives? Similarly, does the privatised return of migrants represent the implementation of the return directive? It is hard to see how the Court would see these procedures in any light other than as a Member State applying an EU act, even if it is not stated explicitly in the domestic enforcing legislation. The Charter would thus be engaged. Even in the absence of express implementing legislation, a Member State's implementation

¹²⁸ Donnelly. C., *Delegation of Government Power to Private Parties – A Comparative Perspective* (2007). Page 272.

¹²⁹ See especially, Articles 15-17 of the Return Directive. 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. See also: Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers. Recital 10.

¹³⁰ See: C-442/00 Cabellero. Paragraph 31.

of return and detention would also be considered as measures that have been adopted by a Member State and that has already been governed by provisions of EU secondary legislation.

Similarly, employer sanctions and carrier sanctions have been legislated for by the EU and acts adopted by the Member States which pertain to enforcing that legislation are also likely to be deemed by the Court as engaging the Charter. Again, even if acts are adopted which do not explicitly implement an EU act, the EU has certainly governed in this area already and that will be enough to engage the Charter. As was stated in Chapter III, Article 51 is not all-encompassing and not everything can be considered to have already been touched by EU acts. Notwithstanding this fact that Article 51 is not all things to all men and as such areas do exist in which the Charter is not applicable, the conclusion must be that the privatised procedures examined in Chapter II will engage the Charter.

4.5 Conclusion – *Effect of Privatised Control on State Responsibility*

States cannot delegate tasks to a private actor that it has undertaken not to do itself. However, this is not definitively self-evident from the three judicial settings examined in this chapter. Rather, the Courts have experience mixed results in forming coherent and cohesive case-law when a private actor has been entrusted with public procedures. The courts' jurisprudence in other areas is not easily applied to migration control and border management but nevertheless, has been examined here with a view to better understanding the varied and serious challenges in ensuring that States can be made ultimately responsible in law for the control that they exert over a given procedure through a private actor.

The UK's domestic courts have laboured under an institutional approach to interpreting the legal responsibility of the State. That approach has thrown up results that have, at times, given rise to vociferous criticism that justice was not being served. A functional approach is preferred by many of these critics. The dominant approach – the institutional method – has been outlined as potentially having certain difficulties with privatised migration control and border management procedures. In particular, the great fear expressed by the aforementioned critics of the institutional approach is that the exertion of compulsory powers does not automatically signal State responsibility. The

distinction between contracted privatisation and privatisation by threat of sanction also comes sharply into focus here. Those procedures that are forced upon private actors being subject to an institutional rather than functional approach are vulnerable to not being considered as having public control such that the State must be made legally responsible. Academic unease at the UK domestic courts' approach to the public/private divide in the context of Section 6(3)(b) has often referenced compulsory powers. While that concern is somewhat valid, the first section in this chapter underlined the vulnerability of the UK courts' approach to attaching legal responsibility on the basis of indirect control. Questions remain as to the ability of the UK courts to deal with non-compulsory powers which are still very much capable of infringing human rights of a migrant.

Overall, the ECtHR is a powerful force for an inclusive approach to reading private actors' rights violations as giving rise to legal responsibility for the State where the State is exercising control. This is because of the Strasbourg Court's willingness to pursue the effective application of the Convention. This priority of effectively applying the Convention has meant that the ECtHR is not constrained by a strict adherence to a single model by which it must approach all relevant cases. The success of Strasbourg in this realm has been down to this flexibility in application. Institutional, functional and other considerations may, separately or in combination, be read by the Court as establishing State legal responsibility. State legal responsibility necessitates the Court establishing that the private actor in question was acting as an agent to the State in breaching an individual's rights. However, even categorisation of the breach as being the act of a third party and not an act of the State's agent is still *not* fatal to an individual's action. There still exists the opportunity to attach a different type of legal responsibility to the State through examining its positive obligations. All in all, the ECtHR provides a relatively robust and comprehensive protection of rights from the danger of private violation.

The final section of this tripartite judicial examination concerned the CJEU. That section explored the possibility that the CJEU would expand its concept of the State in the interest of effectively applying EU fundamental rights law. This has previously been done in other areas of Union law and one such area was taken to demonstrate how the Court can broaden its concept of the State in the interest of *effet utile*. One such decision in this

jurisprudence is the case of *Kampelmann* which demonstrated the Court's willingness to look at the *nature* of the power and not just the *source* of that power in order to determine whether or not a private actor qualifies as being public in nature.¹³¹ In other words, a private actor may be deemed to have public character when it is under the control of public authorities *or* where the private actor has a special power or is exercising powers that are normally associated with the State. This means that the CJEU is also acutely conscious of the form versus function (institutional versus functional) debate which can be delved into when adjudicating on the public/private divide. This offers hope for the potential of the CJEU as offering a comprehensive test in the future.

Perhaps the most useful single unifying conclusion is that debates over the approach taken and the factors that a court must take into account should come second to the effective application of fundamental rights. That conclusion is only clearly mirrored in action by the jurisprudence of the ECtHR. The danger is that the less formalised procedures of enforced privatisation, which do not incorporate compulsory powers, will be taken as the acts of a wholly private actor when in actual fact the State has significant control. The absence of anything as formalised as a contract alongside the implementation of new functions that have never previously been carried out by the State, could act to mislead a court in its pursuit of the '*correct approach*' instead of the most effective application of law. Privatised procedures that are forced through threat of sanction have not found their way into the courts for consideration and struggle to be recognised as procedures that are controlled by the State beyond the clamour of academia and civil society.¹³² Certain commentators have asserted that the conduct of airline personnel in preventing a particular person from boarding a flight is conduct that is "*probably*" also attributable to the European State.¹³³

¹³¹ Akhter. R., *The Public/Private Divide in EU Law* (2011) Diffusion: the UCLan Journal of Undergraduate Research Volume 4(1). Page 6.

See also: C-253-256/96 *Kampelmann and Others v Landschaftsverband Westfalen-Lippe*. Paragraph 46.

¹³² See: Scholten. S & Minderhoud. P., *Regulating Immigration Control: Carrier Sanctions in the Netherlands* (2008) *European Journal of Migration and Law* 10, 123.

See also: De Lange. T., *The Privatization of Control over Labour Migration in the Netherlands: In Whose Interest?* (2011) *European Journal of Migration and Law* 13, 185.

¹³³ Taylor bases her assertion on Article 33 of the refugee convention rather than Article 3 ECHR.

See: Taylor. S., *Offshore Barriers to Asylum Seeker Movement: The Exercise of Power without Responsibility?* Page 106. In Mc Adam. J., *Forced Migration, Human Rights and Security* (2008).

That word “*probably*” reflects the considerable doctrinal and practical hurdles faced in attaching legal responsibility to the State for the control it exercises.

The conclusion must necessarily be that the *effect* of the control exerted by the State through privatised procedures can be to compromise the maxim that the State cannot delegate to a private actor that which it has undertaken not to do itself. While it remains true that “...*a number of legitimate goals may reasonably be thought served by private delegations*”¹³⁴, the *effect* of the control retained by the State despite that delegation must be adequately dealt with by the courts.

¹³⁴ Lawrence. D., *Private Exercise of Government Power* (1986). Page 657.

V. Externalisation, Privatisation and a Migrant's Access to Justice

5.1 Introduction – Courting Frustration of the Triggers

Chapters III and IV have considered the main legal impediments which arise for a migrant who wishes to vindicate the rights that they allege to have been violated by externalised or privatised procedures. For externalisation, narrow interpretations of extraterritorial jurisdiction can frustrate the vindication of rights. For privatisation, it is the attribution of the wrong to the private actor rather than the State which can thwart the vindication of rights. Those legal hurdles are capable of frustrating legal responsibility by not allowing its consideration to ever be triggered.

This chapter further considers the nature and effect of the control exercised by the State through privatised and externalised procedures. In testing for legal responsibility for the State, the inclusion or exclusion of compulsory powers has, in certain circumstances, been taken as *the* indicator of legal responsibility. Decisions as to legal responsibility of the State for alleged violations of rights can be decided on the basis of this arbitrary distinction between indirect and direct control. In this context, the following section revisits the relevant tests for legal responsibility and the extent to which they can allow for the frustration of legal responsibility (5.2). Migrants' access to justice does not falter because of legal impediments alone though and the subsequent section (5.3) examines how access to justice and the vindication of rights can be frustrated on the basis of practical and procedural hurdles.

The penultimate section (5.4) of this chapter examines realistic ways forward for the courts in ensuring that legal responsibility is triggered as appropriate. In substance, this means setting out a doctrinal response to the challenges posed by the phenomena and especially in making sure that indirect control can engage the legal responsibility of States. The final section (5.5) draws a conclusion to the foregoing.

5.2 Indirect Control – Compulsory Powers as *the* Indicator of Legal Responsibility

The ‘*effective control*’ model is the dominant test in both the ECtHR and the UK’s domestic courts in considering whether a State has engaged extraterritorial jurisdiction and therefore, whether or not legal responsibility can be triggered. The tests ability to ensure that State control entails legal responsibility for that State is made all the easier due to the fact that the courts (the ECtHR and UK domestic courts at least) themselves use a control orientated test to establish extraterritorial jurisdiction. Privatisation stands in contrast with externalisation insofar as it does not rely on a test based on control *per se*. Privatisation instead relies on a number of different approaches, some of which include consideration of State control, some of which do not. What unites the conclusions of the UK domestic courts and the ECtHR for both phenomena is in their consideration of direct control. For either phenomenon, the incorporation of compulsory powers in the implementation of a procedure will almost always lead to a conclusion that the State must take legal responsibility for any violation arising out of that implementation.

In the context of this research’s case-study, the UK, the approach of the courts and the position of the State has been that compulsory powers have been the single most consistent indicator of State responsibility for violations arising out of the implementation of externalised or privatised procedures. For externalisation, the exercise of compulsory powers has consistently been interpreted as signifying the exercise of extraterritorial jurisdiction. Likewise, the delegation of such powers to a private actor will be convincing to courts that legal responsibility must remain with the State. This is the case despite the fact that the UK courts are beholden to an institutional test in which compulsory powers do not feature. It must be questioned whether there exists an over-reliance on compulsory powers as *the* indicator of legal responsibility. The presence of such powers is often the key barometer by which a judicial forum comes to a positive decision as to whether or not legal responsibility should be attached to a State. Taking direct control as an indicator is, in and of itself, not an approach without merit. Compulsory powers are understandably thought of as being, with certain limited exceptions, the sole preserve of the State. Certain court approaches reflect that understanding with the effective control model of externalisation being a good example of a test that is heavily influenced by compulsory

powers. It is therefore an approach which lays the emphasis in the powers utilised in implementing a procedure rather than examining the procedure as a whole.

Control of implementation may be achieved through the use of more overt and visible powers or it may be achieved through less discernible means. Rights violations by compulsory powered procedures usually include an equally visible result – physical harm or even death. Such harm generally points to a violation of the right to life¹ or the prohibition on inhumane or degrading treatment or torture.² Indirect control naturally represents more subtle expressions of State control. More understated procedures offer the State an *indirect control* which is capable of violating the rights of migrants. However, the results of the violations in question are less obvious than those breached by compulsory powers. The rights in question include *non-refoulement*³ and the right to asylum.⁴ The *nature* of the State’s indirect control – non-compulsory and with less visible violations arising out of implementation – can be used to coerce the State’s desired *effect* without triggering consideration of legal responsibility for the State.

5.2.1 Externalisation – The ‘*Effective control*’ Model

To briefly visit upon a Court not considered in this work, the case of *McDonald v Mabee*⁵ saw Mr. Justice Oliver Wendell Holmes deliver a judgment which considered the Court’s jurisdiction. In that judgment Holmes stated that “[t]he foundation of jurisdiction is physical power.”⁶ Holmes’ approach can be understood as being that jurisdiction refers to the capacity of a State to exercise certain powers.⁷ A Member State’s ability to exercise compulsory powers is certainly not territorially bounded, nor is its obligation to respect rights. Problems arise because the test for extraterritorial jurisdiction places too much store in the physical expression of control. The ‘*effective control*’ model, by which the

¹ Article 2, EU Charter of Fundamental Rights. Article 2, European Convention of Human Rights.

² Article 4, EU Charter of Fundamental Rights. Article 3, European Convention of Human Rights.

³ Article 19, EU Charter of Fundamental Rights. Article 3, European Convention of Human Rights.

⁴ Article 18, EU Charter of Fundamental Rights. A right to asylum was suggested for the second protocol of the ECHR in 1961 but was rejected.

See: den Heijer. M. Article 18. Page 523. In Peers. S., Hervey. T., Kenner. J., Ward. A., The EU Charter of Fundamental Rights (2014).

⁵ *McDonald v. Mabee* (1917) 243 U.S. 90.

⁶ *McDonald v. Mabee* (1917) 243 U.S. 90. Paragraph 91.

⁷ Oduntan. G., *Arriving before you Depart: Law and Fiction in Juxtaposed Control Zones*. Page 338. In Shah. P., & Menski. W., *Migration, Diasporas & Legal Systems in Europe* (2006).

Strasbourg court considers extraterritorial jurisdiction, lends itself to depending upon direct control. Jurisdiction remains tied to territory in its application bar certain ‘*exceptional*’ circumstances which have been almost exclusively dominated by compulsory powers. The *status quo* is that indirect control, including the organising, coordination, decision-making, funding, training or other forms of support abroad, will not engage a State’s extraterritorial jurisdiction. Even the presence of immigration officials and the ‘*advice*’ and guidance that they provide to the decision as to access for a migrant will find it difficult to trigger the legal responsibility for a State. The ability of a migrant to vindicate their rights *vis-à-vis* the State is therefore frustrated by a somewhat narrow interpretation of extraterritorial jurisdiction.

The ECtHR’s jurisprudence has also only found contracting States to have engaged their extraterritorial jurisdiction where the State has exercised direct control. *Al-Skeini*,⁸ understandably heralded as a positive departure by many and now regarded as being the primary guidance on the extraterritorial application of the Convention, did nothing to temper this reliance on compulsory powers. On the contrary, the Court in that case reiterated that “*What is decisive in such cases is the exercise of physical power and control over the person in question.*”⁹ The Strasbourg court also still requires an exercise of public powers (territorial) element in its effective control model. This does nothing to temper the reliance on compulsory powers and has only served to make the Court’s requirements even more convoluted. In this regard *Smith (No.2)*¹⁰ was a welcome expansion on *Al-Skeini* but did nothing to move extraterritorial jurisdiction over individuals beyond consideration of the exercise of compulsory powers.

The current range of exceptions to a strictly territorial understanding of jurisdiction, under which the ECtHR and the UK domestic courts labour, fail to provide sufficient protection for indirect control in the context of migration control and border management. Immigration Liaison Officers, for instance, are unlikely to be interpreted as representing one of the traditional exceptions to jurisdiction being based on territory. Yet, if one of those officers was to place a migrant under arrest for an hour or physically restrain him or her,

⁸ *Al-Skeini and Others v. the United Kingdom*, 55721/07, [GC].

⁹ *Al-Skeini and Others v. the United Kingdom*, 55721/07, [GC]. Paragraph 136.

¹⁰ *Smith and others v Ministry of Defence* [2013] UKSC 41.

the opposite finding is far from being beyond the bounds of belief. It is the personal model by which ILOs' work would be considered. However, given *Al-Skeini's* requirement for physical power and control, it will take a further expansion upon the Court's interpretation of the personal model before the work of ILOs can act so as to engage the jurisdiction of those officers' home State. *Al-Skeini's* public powers requirement could, potentially, be satisfied in the context of migration control and border management because the work of any immigration officer could be said to represent the exercise of such powers. It must be added though that those public powers obviously do not compare to the type of public powers being exercised by the UK in Iraq in the *Al-Skeini* case. In any case, on this point, *Smith (No.2)* likely heralds a change in direction.

The more recent case of *Jaloud*.¹¹ again underlined the importance of the physical element in the actions of State agents: "...*the use of force by a State's agents operating outside its territory may bring the individual ...into the State's Article 1 jurisdiction. This principle has been applied where an individual is taken into the custody of State agents abroad.*"¹² Maintaining this approach without any nod in the direction of being more inclusive of indirect control is inadequate when one considers that Immigration Liaison Officers can impact upon access to protection without needing a compulsory power such as being able to detain. Falling short of exercising direct control, it is therefore still true to state that "...*by shifting migration control further from state territory both geographically and conceptually, control may be asserted more unconstrainedly...*"¹³ once that doesn't cross the threshold of exercising compulsory powers. Milanovic's example of a UK intelligence officer feeding questions and information to the Pakistani torturer who is interrogating a terrorist suspect in Pakistan¹⁴ may equally be applied to an Immigration Liaison Officer's advice to an airline which can lead to the *refoulement* of an asylum seeker.

¹¹ *Jaloud v The Netherlands*, 47708/08, [GC].

¹² *Jaloud v The Netherlands*, 47708/08, [GC]. Paragraph 136.

¹³ Gammeltoft-Hansen. T., *Access to Asylum* (2011). Page 147.

¹⁴ Milanovic. M., *Extraterritorial Application of Human Rights Treaties* (2011). Page 219.

5.2.2 Privatisation – Assorted Tests for State Legal Responsibility

The ECtHR, as has already been considered (4.3.2), makes reference to a disparate set of influences in coming to a decision as to State legal responsibility for a privately implemented procedure. This array of influences gives the State a more holistic approach which is capable of addressing each case on the basis of its own facts. It is therefore less rigid than it is in dealing with extraterritorial jurisdiction and is better equipped to meet the challenges posed by indirect control. The ECtHR has been able to place the emphasis where it is felt that emphasis is needed for a particular procedure in coming to a conclusion *vis-à-vis* State legal responsibility. That varied approach has not found favour in the UK where the domestic courts continue to toil under the confusing system of the institutional test. The *Van Der Musselle*¹⁵ case points to the Strasbourg Court's willingness to find that a public function, which a private actor has been compelled to implement by a State through legislation, represents the exercise of governmental functions such that legal responsibility for any rights violation arising out of its implementation should be attributed to the State.

In the Human Rights Act, Section 6(3)(b) has caused ambiguity with its application. It remains somewhat unclear as to what type of functions will implicate the State and more especially, how the UK courts must come to that conclusion. The position at the present moment is that Section 6(3)(b) HRA “*has been tightly circumscribed, and the section only clearly encompasses regulatory or physically coercive powers.*”¹⁶ Procedures which exhibit a direct control and will most likely be interpreted as representing State action. However, uncertainty persists for those procedures which do not incorporate compulsory powers. The implication of the provision being ‘*tightly circumscribed*’ is that beyond compulsory powers there lay only a narrow field of application for Section 6(3)(b) and that approach is “*regrettable.*”¹⁷ It is *regrettable* because it could possibly exclude procedures of enforced privatisation. The courts’ application of Section 6(3)(b) therefore gives rise to a risk of the frustration of legal responsibility.

¹⁵ *Van Der Musselle v Belgium*, 8919/80.

¹⁶ Donnelly. C., *Delegation of Governmental Power to Private Parties* (2007). Page 269. See also: *YL v. Birmingham City Council & Ors* [2007] UKHL 27. Baroness Hale at paragraph 63.

¹⁷ Donnelly. C., *Delegation of Governmental Power to Private Parties* (2007). Page 269.

The UK courts have, on occasion, held that the delivery of contracted-out public services by a private organisation acting on behalf of central or local government, do not constitute public authorities.¹⁸ That is true of contracted privatisation that does not incorporate compulsory powers but the procedures considered in the present context are compulsory powered. The more formal delegation through contract of a procedure that was once being implemented by the State stands in marked contrast to enforced privatisation in the context of an institutional test. The relationship between State and private actor with enforced privatisation is not quite as formalised. The procedures of enforced privatisation are not ones which had been ever undertaken previously by the State and, obviously for a non-compulsory powered procedure, do not directly manifest in physical injuries or death.¹⁹ Rather than representing a public to private transfer, enforced privatisation actually represents a new migration control and border management procedure. Notwithstanding certain very serious procedural complications added by privatisation, which will be explored below (5.3.2), in the context of privatisation by contract the State usually remains liable for the actions of its delegate.²⁰ This is far less certain for the more informally arranged procedures of enforced privatisation.

Clayton reassures her readers that “*Privately run detention centres in the UK are beyond question public authorities for HRA [Human Rights Act] purposes.*”²¹ This is borne out by the experience of the UK domestic courts, in civil actions especially. The Courts have had occasion to consider legal responsibility for detention.²² Clayton points to the

¹⁸ Williams. A., Public authorities: what is a hybrid public authority under the HRA? Page 49-50. In Hoffman. D., The Impact of the UK Human Rights Act on Private Law. See: Cameron v. Network Rail Infrastructure Ltd [2006] EWHC 1133 [2007] 1 WLR 163; James v. London Electricity Plc [2004] EWHC 3226.

¹⁹ As referred to in section 5.2.

²⁰ Davies. A., Government Contractors: Public or Private? (2008). Page 237.

²¹ Clayton. G., The UK and Extraterritorial Immigration Control: Entry Clearance and Juxtaposed Control in Ryan. B., and Mitsilegas. V., Extraterritorial Immigration Control (2010). Page 427.

²² The rights violations of private actors, who have been instructed to detain, have given rise to vicarious legal responsibility for the State. See: ID and others v Home Office [2005] EWCA Civ 38. The Home Office had sought to argue that although an immigration officer had authorised the detention of the claimants, it was not responsible for their actual physical detention, a private actor had that task. However, it was found that this delegation of the detention procedure did not relieve the State of legal responsibility for the false imprisonment given that the detentions were caused by the immigration officers who authorised them.

See: Scott. M., & Wistrich. H., ID and Others and Unlawful Detention: The Issues Explained (2005) Legal Action Magazine.

case of *R (on the application of D and K) v SSHD*²³ in this regard. In that case, damages due to the claimants for unlawful detention under the ECHR were payable by the Home Office alone. This is opposed to damages being payable by the private actor contracted to provide the detention. This finding was made on the basis that the Court adjudged that responsibility for the unlawful detention rested “*primarily with the First Defendant and also because the actuality is that in cases such as these the decision to detain or release is that of the First Defendant: no one else.*”²⁴

It is highly contentious whether the inclusion of fundamental rights guarantees in a contract is capable of ensuring adherence even if the government take their duties to monitor such implementation seriously. The evidence points toward the UK not taking these duties to monitor seriously.²⁵ In the view of the Joint Committee on Human Rights, the inclusion of such guarantees by themselves cannot be depended upon in order to properly counteract the narrow interpretation of public authorities. Such dependence would likely be: “*partial, inconsistent...*” and could lead to the “*unequal protection of rights.*”²⁶ The Committee stated that fundamental rights cannot be fully and effectively protected through the use of contractual terms and that contractual guarantees cannot be used to replace the direct application of the Human Rights Act to service providers.²⁷ It would be more useful if the contract actually stipulated that the private actor involved should be considered as a public authority for the purposes of the Human Rights Act in the context of the procedures being contracted for and that those contracts were then also made fully public.

The Joint Committee on Human Rights of the House of Lords and House of Commons’ report stated that a private body is only likely to be held to be a public authority performing public functions under Section 6(3)(b) if: it is exercising coercive powers devolved from

²³ *R (on the application of D and K) v SSHD* [2006] EWHC 980.

²⁴ *R (on the application of D and K) v SSHD* [2006] EWHC 980. Paragraph 122.

²⁵ For an example of criticism of UK monitoring of compulsory powers during removals, see: Amnesty International report. *Out of Control: The case for a complete overhaul of enforced removals by private contractors* (2011). Available at: http://www.amnesty.org.uk/sites/default/files/out_of_control_1.pdf

²⁶ House of Commons, House of Lords, Joint Committee on Human Rights Report: *The Meaning of Public Authority under the Human Rights Act*. Seventh Report of Session 2003–04. Paragraph 153.

²⁷ House of Commons, House of Lords, Joint Committee on Human Rights Report: *The Meaning of Public Authority under the Human Rights Act*. Seventh Report of Session 2003–04. Paragraph 21 of the Conclusions and Recommendations.

the State; it is exercising powers of a public nature directly assigned to it by statute; or if its structures and work are closely linked with the State body that is delegating.²⁸ The report went on to state that as a result of this approach the protection of human rights is not dependent on a procedure's capacity to interfere with human rights so much as the relatively arbitrary criterion of the body's administrative links with institutions of the State.²⁹ Procedures of forced privatisation, such as employer sanctions and carrier sanctions, are *not* exercising powers directly assigned to them by statute. The State is in fact simply changing the way in which private actors use powers that they already had. Private actors do so so as to avoid censure by the State and conduct these tasks as directed by statute. It is highly dubious whether the legislative basis for procedures of enforced privatisation would result in the State being found legally responsible under the institutional approach.

Relying on compulsory powers as *the* key indicator of liability for the State, is based upon fundamentally flawed logic. The 2006–07 House of Lords and House of Commons Joint Committee on Human Rights report is in agreement with its earlier counterpart in arguing that it is the function which an entity is performing that should be determinative of whether that entity represents a public authority. There is nothing in Section 6(3)(b) HRA to suggest that an entity's institutional proximity to the State *or* their compulsory powers *vis-à-vis* the service user should determine responsibility.³⁰ An approach which considers the nature of the function being implemented could represent a more all-encompassing test by which to approach procedures with a somewhat confused public/private identity. Such a functional test has the potential to consider enforced privatisation in a new light.

5.3 Access to Justice and Practical and Procedural Impediments

More than any other EU Member State, the UK has advanced the notion of privatising procedures which normally would be seen as being inherently the role of the State and externalising many functions of its migration control and border management. Despite this

²⁸ House of Commons, House of Lords, Joint Committee on Human Rights Report: The Meaning of Public Authority under the Human Rights Act. Seventh Report of Session 2003–04. Paragraph 40.

²⁹ House of Commons, House of Lords, Joint Committee on Human Rights Report: The Meaning of Public Authority under the Human Rights Act. Seventh Report of Session 2003–04. Paragraph 41.

³⁰ Palmer. E., *Judicial Review, Socio-Economic Rights and the Human Rights Act* (2007). Page 146.

significant investment, the scale of the jurisprudence that considers alleged fundamental rights violations at the hands of externalised or privatised migration control and border management in UK courts, has not been significant. Externalisation and privatisation do not depend solely upon the legal impediments that arise through those phenomena in order to frustrate legal responsibility for the State. Certain other procedural and practical obstacles arise upon the State's adoption of these phenomena. These impediments to a migrant's access to justice are encountered long before the legal hurdles considered in Chapters III and IV.

For externalisation, as well as the legal impediment imposed by narrow interpretations of extraterritorial jurisdiction, the simple geography involved presents migrants with a very *practical* impediment which can oftentimes prove to be fatal to their ability to gain access to justice. In order for a remedy to be effective, it must be practicable for a complainant and when a migrant is exiled from *any* legal recourse for a violation which is alleged to have occurred on the high seas or inside a third State, remedies are not practicable.³¹ With regard to privatisation, in addition to legal difficulty in ascribing responsibility for private action to public authorities when appropriate to do so, there is an added procedural impediment to the vindication of fundamental rights. The procedural impediment in question is that migrants often choose an alternative basis for their claim other than through an action based in fundamental rights. In particular, a migrant who alleges a fundamental rights violation may opt to pursue his/her action through private law. There are very good reasons why alternative remedies exist and why they are pursued by claimants. Those remedies still represent a path to justice but this research is based on fundamental rights and there are question marks as to whether private law can afford a true vindication of the right in question. Access to justice and the vindication of rights can thus be denied in different ways by both externalisation and privatisation.

³¹ See: Alpes. MJ., Airport Casualties: Non-Admission and Return Risks at Times of Internalized/Externalized Border Controls (2015) Social Sciences Vol 4(3).

5.3.1 Externalisation – Access to Justice Beyond the External Borders

An alleged violation may be experienced in a third State or on the high seas by a migrant who is attempting to reach the Union. Alternatively, a migrant who has already reached the Union may experience a violation during their forced return³² to a third State.³³ In either case, a migrant with a complaint as to a violation of their fundamental rights finds themselves in an externalised setting and in attempting to gain access to justice they not only must contend with the substantive legal issue of extraterritorial jurisdiction but also with considerable procedural and practical obstacles.³⁴ The reasons for migrants not pursuing effective remedies remotely are manifold but all revolve around the interconnected practical and procedural problems arising out of their geographical and administrative remoteness.³⁵ The meaning of access to justice is, in itself, fraught with difficulty.³⁶ While the focus of scholarly work with regard to access to justice in the context of migration control and border management has often been on the right to an effective and expeditious remedy and a fair trial, this section focuses on the quite literal interpretation of the phrase – the ability to gain access to the courts.

In some rare circumstances, a migrant's saving grace in making the State take responsibility for the control it exerts abroad has been that their legal representatives have gone to extraordinary lengths to gain access to justice on their behalf or because an NGO pursued their case. However, these are the tiny minority of instances and their difficult

³² See: The website of the Post-Deportation Monitoring Network. Available at: <http://www.refugeelaidinformation.org/post-deportation-monitoring-network>

³³ A 2011 European Commission study stated that only 13% of returns from EU Member States were monitored beyond their arrival point. See: European Commission Directorate-General Justice study, Freedom and Security Comparative Study on Best Practices in the Field of Forced Return Monitoring (2011) Matrix Insight Ltd and International Centre for Migration Policy Development (ICMPD). Page 27. Studies have been conducted as to the need for monitoring for failed asylum seekers who are subsequently returned to their country of origin or a country of transit. For example, see: Podeszfa, L., & Manicom, C., *Avoiding Refoulement: The Need to Monitor Deported Failed Asylum Seekers* (2012) Oxford Monitor of Forced Migration, Volume 2(2), 10.

³⁴ Similar to what Brouwer called the '*unprivileged*' migrant. See: Brouwer, E., *Effective Remedies for Third Country Nationals in EU Law: Justice Accessible to All?* Page 390. In Guild, E., & Minderhoud, P., *The First Decade of EU Migration and Asylum Law* (2012).

³⁵ For an overview of the impact of procedural and practical obstacles through externalisation, see: Gammeltoft-Hansen, T., '*Hic abundant leones*': the institutional reach of refugee protection. In Gammeltoft-Hansen, T., *Access to Asylum* (2010).

³⁶ Rhode, D., *Access to Justice* (2004).

journey to the vindication of rights serves to illustrate how a migrant's access to justice can easily be frustrated by his/her geographical and administrative remoteness. These hurdles can ensure that the preliminary legal question as to jurisdiction is never considered, let alone, the actual merits of the case. The central practical challenge in gaining access to justice is the ability of a migrant's legal representatives to maintain contact with that migrant after he or she has been removed or when they have experienced a push-back. Even with that contact, procedural obstacles abound. Gaining an adequate power of attorney from that migrant is a serious hurdle.³⁷ Similarly, where an NGO has acted on behalf of a migrant and wishes to continue to do so, gaining the necessary *locus standi* in order to appear before a court can be an onerous task.

A glance through the most pivotal case-law examined in Chapter III reveals the important part that migrants' representatives and NGOs have played in facilitating access to effective remedies when a migrant tries to gain access to such remedies from a remote location. In the *Hirsi* case³⁸ the lawyers representing those migrants who had been taken on board the Italian ship and returned to Libya, had to go to great lengths to ensure that they kept in contact with those migrants.³⁹ These lawyers, Mr A.G. Lana and Mr A. Saccucci, stated that they had managed to stay in touch intermittently with the migrants in Libya by phone and by email and that humanitarian organisations in Libya had drawn up powers of attorney and forwarded them to the representatives in Rome.⁴⁰ The lawyers had lost contact with eighteen of the twenty-four applicants by the time the case was heard by the ECtHR. The ECtHR stated that once the applicant's understanding and consent were clear and unambiguous, a power of attorney was legitimate.⁴¹ A case with a similar set of circumstances had previously been dismissed by the ECtHR. In *Hussun*⁴² the Court stated: « *Compte tenu de l'impossibilité d'établir le moindre contact avec les requérants dont il est question, la Cour considère que leurs représentants ne peuvent pas, d'une manière*

³⁷ See: Lambert Abdelgawad. E., Preventing and Sanctioning Hindrances to the Right of Individual Petition before the European Court of Human Rights (2011).

³⁸ *Hirsi Jamaa and Others v. Italy*, 27765/09, [GC].

³⁹ Costello. C., Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored (2012) *Human Rights Law Review* 12(2), 287. Page 306-307.

⁴⁰ *Hirsi Jamaa and Others v. Italy*, 27765/09, [GC]. Paragraphs 48-51.

⁴¹ *Hirsi Jamaa and Others v. Italy*, 27765/09, [GC]. Paragraph 55.

⁴² *Hussun and Others v Italy*, 10171/05, 10601/05, 11593/05 et 17165/05.

significative, continuer la procédure devant elle. »⁴³ While the *Hirsi* case shows that the hurdle is surmountable, the *Hussun* case demonstrates that, in a very practical sense, power of attorney can be difficult to obtain from potential applicants in a volatile third State where it is difficult to remain in contact, violence is commonplace and migrants cannot access essential services.

The potential of an NGO to work for a migrant remotely is demonstrated by the the *Prague Airport* case⁴⁴ in which the individual appellants were joined by an NGO – the European Roma Rights Centre (“ERRC”). The Court’s eventual finding that the work of the British Immigration Liaison Officers in Prague airport was discriminatory⁴⁵ can be largely put down to the work carried out by the ERCC in its collection of data. However, across the EU, this is the exception rather than the norm as NGOs are not often in a position to work in this way. “*Narrow rules relating to legal standing prevent civil society organisations from taking a more direct role in litigation.*”⁴⁶ The Fundamental Rights Agency deemed ten of the then twenty-seven Member States to be “*overly restrictive*” in allowing NGOs to take a case on behalf of a migrant and many other Member States were also obstructive to the extent that “*legal standing is one of the major restrictions regarding the right of access to justice.*”⁴⁷ The majority of EU Member States have not accepted that there exists any general right to file a public interest complaint (*actio popularis*), which would enable an individual or other entity to take an action in the name of the general public, without being the victim or having been directly authorised to represent the

⁴³ *Hussun and Others v Italy*, 10171/05, 10601/05, 11593/05 et 17165/05. Paragraph 49. No English translation of case. Author’s translation: *In view of the impossibility of establishing any contact with the applicants in question, the Court considers that their representatives cannot continue with the proceedings before it.*

⁴⁴ *Regina v Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others* [2004] UKHL 55.

⁴⁵ *Regina v Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others* [2004] UKHL 55. Paragraphs 92-94.

⁴⁶ EU non-discrimination law is an exception to this. See: Fundamental Rights Agency report. Access to Justice in Europe: An Overview of Challenges and Opportunities (2011). Page 11.

⁴⁷ Fundamental Rights Agency report. Access to Justice in Europe: An Overview of Challenges and Opportunities (2011). Page 40.

victim.⁴⁸ With regard to the ECtHR,⁴⁹ in 2014 it relaxed⁵⁰ its usual approach which is to require that the NGO has express authorisation from the victim of the violation in order to take a case on their behalf. However, it is difficult to envisage cases arising in the context of migration control and border management the facts of which could match the extreme facts of that recent deviation from the norm. A friend or family member of a deceased person can still take an action under the Human Rights Act. Close relatives of a deceased person can be victims in their own right and can sue under Article 2 ECHR.⁵¹ However, the UK government has been criticised for having removed the ability of representative groups to bring proceedings that would vindicate the rights of others by retaining the victim requirement for Human Rights Act cases.⁵²

The reality is that “[i]n the great majority of cases deported migrants ‘disappear’ from the radar of the lawyers who used to represent them prior to their deportation.”⁵³ *Hirsi* was an extreme exception to this trend. *M.S.S.*,⁵⁴ albeit concerning a transfer from EU Member State to another Member State under the Dublin Regulation,⁵⁵ was a similar exception whereby legal representatives went above and beyond their usual duty. Any optimism that such rare cases do spur must be taken in the context that public law organisations advocating for migrants’ rights ask themselves whether it is worthwhile to expend resources pursuing such cases. In the UK, public interest lawyers have to consider the benefit the litigation would bring to the wider public.⁵⁶ In an era of cuts to free legal aid in the UK and when there are so many deserving applicants who are in full contact with

⁴⁸ Fundamental Rights Agency report. Access to Justice in Europe: An Overview of Challenges and Opportunities (2011). Page 40.

⁴⁹ Article 34, ECHR.

⁵⁰ In 2014 the ECtHR found that in certain “*exceptional circumstances*,” an NGO could represent the victim of a violation despite not being a victim itself or having been granted a power of attorney by the victim to take such an action. See: Centre for Legal Resources on behalf of *Câmpeanu v Romania*, 47848/08, [GC]. Paragraph 112.

⁵¹ Leyland. P., & Anthony. G., Textbook on Administrative Law (2013). Page 75. See also: McCaughey Application [2011] 2 WLR 1279.

⁵² Leyland. P., & Anthony. G., Textbook on Administrative Law (2013). Page 75.

⁵³ Dembour. MB., When Humans become Migrants (2015). Page 418.

⁵⁴ *M.S.S. v Belgium and Greece*, 30696/09, [GC].

⁵⁵ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

⁵⁶ See: Welch. J., Litigating the Public Interest, Report of the Working Group on Facilitating Public Interest Litigation (2006) Liberty.

their legal representatives, the choice is made on the basis of likelihood of success which will naturally tend to exclude a migrant who is not present.⁵⁷

5.3.2 Privatisation – Private Law as an Alternative Remedy

In the UK, private law provides an alternative remedy to an action in fundamental rights in establishing the State as legally responsible for a wrong arising out of the implementation of privatised migration control and border management procedures. The most important avenue in private law is through tort. The use of tort as an alternative remedy rather than a public law action based on fundamental rights, raises questions as to the vindicatory power of private law. A successful action under the Human Rights Act definitively vindicates the fundamental rights of the claimant. There is debate as to tort's ability to do so. In addition, it is possible for the State to be omitted from a tort action and thus avoid legal responsibility altogether for a violation of a migrant's fundamental rights.

5.3.2.1 The Vindicatory Power of Tort

With the passage of the Human Rights Act into force in 2000, a free-standing right of action was created. However, it would be a grave mistake to think that the Human Rights Act filled a total vacuum where there had been absolutely no effective remedies before. Tort made an important contribution to filling any such vacuum. Long before the advent of human rights legislation in the UK, private law already reflected some of the values and morals later enshrined in human rights statutes.⁵⁸ Both human rights and private law seek to provide remedies to individuals who have experienced a violation of their rights.⁵⁹ Public authorities are liable in tort in exactly the same way as any private individual.⁶⁰ In the wake of the passage of the Human Rights Act into law, questions arose as to whether it would herald a convergence of the tort liability of public authorities and human rights.⁶¹ The

⁵⁷ The situation is such that a crowdfunding platform for public interest litigation has been set up which seeks to gather funds from the general public in order to undertake cases in the public interest.

CrowdJustice is a crowdfunding platform built specifically for legal cases. It gives the tools to build a community around a case and gain financial and community support to help get that case to court.

Available at: <https://www.crowdjustice.co.uk/>

⁵⁸ Flaherty, M., Private Law and its Normative Influence on Human Rights. Page 207. In Barker, K., & Jensen, D., Private Law Key Encounters with Public Law (2013).

⁵⁹ Flaherty, M., Private Law and its Normative Influence on Human Rights. Page 209. In Barker, K., & Jensen, D., Private Law Key Encounters with Public Law (2013).

⁶⁰ Leyland, P., & Anthony, G., Textbook on Administrative Law (2013). Page 458.

⁶¹ Du Bois, F., Human Rights and the Tort Liability of Public Authorities (2011) 127 Law Quarterly Review 589. Page 589.

Supreme Court, or the House of Lords as it then was, decided against such a convergence⁶² and the alternative systems have continued to co-exist since then.⁶³ The UK's domestic courts have instead pursued a course whereby private law (tort) and public law (human rights) represent alternatives.⁶⁴

The question of which of these two avenues should be pursued by a claimant is usually decided by reference to the specific circumstances of a case and by the motivation of the complainant. The UK's highest courts have sought to promote a clear separation between the remedies that are available under the Human Rights Act as opposed to those that are available in tort.⁶⁵ By and large, damages are much more substantial in tort cases. Damages can deeply influence complainants but by no means should they be taken as being the only issue to consider. Other such issues include: the time limits for taking a case; the legal standing of the applicant; the expected length of proceedings etc. Successful proceedings in tort consider the loss, damage or violation suffered by the claimant or the sum required to 'punish' the defendant.⁶⁶ Damages under the Human Rights Act depend on a broader range of considerations than tort and mirror awards given at Strasbourg⁶⁷ which are typically a nominal amount and are only given when material damage is caused to the complainant. In a public law action, a declaratory judgment is oftentimes deemed as providing sufficient relief. "*Vindication of rights through section 8 [the Human Rights Act] is thought to require an award of damages only rarely. ...This is thought to reflect the primary function of such actions;*"⁶⁸ The primary function being to afford an applicant vindication of their violated rights.

The charge has long stood that civil actions are designed to compensate claimants for a loss while Convention claims are intended to uphold rights standards and represent a

⁶² Most prominently in: *Smith v Chief Constable of Sussex Police* [2009] 1 A.C. 225.

⁶³ Dickson, B., *Human Rights and the UK Supreme Court* (2013). Page 34.

⁶⁴ This is not to say that tort has remained untouched by passage of the Human Rights Act. For an interesting historical context on the courts recognition of 'new' causes of action in order to give effect to ECHR rights, see: Wright, J., *Tort Law and Human Rights* (2001). Page 27.

⁶⁵ Steele, J., *Damages in tort and under the Human Rights Act: remedial or functional separation?* [2008] *Cambridge Law Journal* 606. Page 606.

⁶⁶ Steele, J., *Damages in tort and under the Human Rights Act: remedial or functional separation?* [2008] *Cambridge Law Journal* 606. Page 617.

⁶⁷ The '*mirror principle*.' See: *R (Greenfield) v. Secretary of State for the Home Department* [2005] UKHL 14. Paragraph 6.

⁶⁸ Steele, J., *Tort Law: Text, Cases and Materials* (2014). Page 555.

public expression of rights vindication.⁶⁹ This perception of tort as being compensatory has fuelled questions as to the capability of its remedies to adequately *vindicate* a claimant's rights.⁷⁰ Steele speaks for the majority of commentators by rejecting the absoluteness of the compensatory/vindictory distinction as being overly "*simplistic*." That author argues for an alternative distinction to be made on the basis that both avenues provide vindictory power in their remedies, the difference being that while tort actions remedy rights violations for the benefit of the individual claimant, actions under the Human Rights Act vindicate and protect ECHR rights in the public interest.⁷¹

In the action in tort of *ID and others v Home Office*,⁷² the Court of Appeal considered a Home Office argument as to the procedure pursued by the claimants. The case concerned an alleged breach of rights which occurred in privatised detention for migrants. The Home Office argued that the claim should be struck out because it had been pursued through a tort action rather than by way of public law judicial review proceedings. The Court stated that the relevant question was not whether "*the right procedure*" had been adopted but whether the forum chosen deprived a party of the opportunity of having its case heard justly.⁷³ The Court found that in a damages case such as *ID*, private law proceedings were most appropriate given that the Administrative Court (from where it was on appeal) had no jurisdiction to hear an action for damages alone. However, there were also issues concerning whether the power to detain had been exercised lawfully. These issues are of a '*public law*' nature and would benefit from being tried by a judge with Administrative

⁶⁹ *Van Colle v Chief Constable of the Hertfordshire Police and Smith v Chief Constable of Sussex Police* [2008] UKHL 50. Paragraph 138.

For similar statements, see: *Chester v Afshar* [2005] 1 AC 134. Paragraph 87. And: *Watkins v. Secretary of State for the Home Department* [2006] UKHL 17. Paragraph 9. And: *R (Greenfield) v. Secretary of State for the Home Department* [2006] 2 A.C. Paragraph 19.

⁷⁰ For example, see: Donnelly. C., *Delegation of Government Power to Private Parties – A Comparative Perspective* (2007). Page 380.

For a more optimistic reading of tort's vindictory power, see: Barker. K., *Private and Public: The Mixed Concept of Vindication in Torts and Private Law*. In Pitel. SGA., Neyers. JW., & Chamberlain. E., *Tort Law: Challenging Orthodoxy* (2013).

⁷¹ Steele. J., *Damages in tort and under the Human Rights Act: remedial or functional separation?* [2008] *Cambridge Law Journal* 606. Page 608.

⁷² *ID and others v Home Office* [2005] EWCA Civ 38.

⁷³ Scott. M., & Wistrich. H., *ID and Others and Unlawful Detention: The Issues Explained* (2005) *Legal Action Magazine*. Page 24.

Court expertise.⁷⁴ To fully address this range of issues, the Court stated that the best approach for the action was a High Court judge with Administrative Court experience sitting as judge in the county court to consider a claim for damages.⁷⁵ The case showcases the kind of complex questions of procedure that beset procedures that have a complex public/private make-up.

The conventional wisdom is that the courts, rather than immersing themselves in technical distinctions between public and private rights, should focus on the practical consequences of a claimant choosing one alternative over another. In other words, the courts should exercise their judgment in each case rather than be bound over by presumptions about procedural rigidity.⁷⁶ This flexible approach has been reflected somewhat by the rules that now govern the judicial review procedure in England and Wales which have likewise been changed in order to encourage flexibility.⁷⁷ Dispensing with the pointless '*mirror principle*,' whereby damages awarded in an action under the Human Rights Act must reflect those awarded in Strasbourg, would go a long way toward encouraging claimants down the avenue of public law. The courts could increase damages in public law cases in order to reflect the compensatory framework already in place with tort. This change in the damages culture in public law would in not in any way harm the relationship between the Human Rights Act and the ECHR and would not draw into question the vindicatory power of the public law avenue.

No comprehensive study has been carried out as to the extent to which claimants such as migrants pursue one alternative over and above the other. While the award could potentially be large, taking a tort action is expensive and can take as long as three years to go to trial. Claimants may be eligible for legal aid but will have to convince the Legal Aid Agency that their case has a good chance of succeeding before they will be able to access funding. In the context of the type of cuts to legal aid mentioned above (5.3.1), it is likely that any tort action by a migrant would have to be in reaction to having suffered a serious

⁷⁴ Scott, M., & Wistrich, H., ID and Others and Unlawful Detention: The Issues Explained (2005) Legal Action Magazine. Page 24.

⁷⁵ ID and others v Home Office [2005] EWCA Civ 38. Paragraph 128.

⁷⁶ Paraphrasing Lord Woolf in: Trustees of the Dennis Rye Pension Fund v Sheffield City Council [1998] 1 WLR 840. See also: Leyland, P., & Anthony, G., Textbook on Administrative Law (2013). Page 197-198.

⁷⁷ Leyland, P., & Anthony, G., Textbook on Administrative Law (2013). Page 198.

injury or loss before the funding needed to pursue an action in tort will be provided. Under the current *status quo*, “...tort law cannot adequately accommodate human rights claims.”⁷⁸ Tort actions cannot categorically afford a migrant the ‘*deeper*’ vindication which exculpates a right for the whole community. Without adequately reforming the damages that are given on the basis of actions under the Human Rights Act, tort remains an attractive, if non-vindictory (in the ‘*deeper*’, societal, sense of the word), alternative.

This ‘*deeper*’ vindication of rights also forces *the State* to address problems with rights protection⁷⁹ whereas a private law remedy such as tort tends to address wrongs once off and in an *ad hoc* manner. Vindicating rights for the whole of society is supposed to contribute toward ensuring that such a violation will be avoided in the future whereas vindication of a right purely for one individual will not make such a contribution.

5.3.2.2 Omission of the State

The other potential procedural hazard arising out of the tort alternative, which may act so as to frustrate the vindication of fundamental rights, is that the State may be omitted from an action altogether. This leaves the claimant to pursue the private actor alone through the tort action. The decision to omit the State may come down to a claimant’s preference or it may come as a result of a judge’s decision. A tort action which illustrated how such circumstances may arise is that of John Quaquah. In 1997 Mr Quaquah was detained at the privatised immigration detention centre of Campsfield. After a riot at that centre, Mr Quaquah, alongside eight others, was charged with offences in relation to the riot. The prosecution in that case collapsed when Group 4 Security employees, who were key witnesses for the prosecution, were shown to have fabricated their evidence.⁸⁰ In the wake

⁷⁸ Du Bois. F., Human Rights and the Tort Liability of Public Authorities (2011) 127 Law Quarterly Review 589. Page 596.

⁷⁹ Steele makes the same point in the context of the tort/human rights divide:

The ‘*primary object*’ of the Convention was “*to promote uniform protection of certain fundamental human rights.*” This ‘*primary object*’ was generally adequately served by a finding of a violation, because the expectation is that “*a member state found to have violated the Convention will act promptly to prevent a repetition of the violation.*”

See: Steele. J., Damages in tort and under the Human Rights Act: remedial or functional separation? [2008] Cambridge Law Journal 606. Page 614.

⁸⁰ Molenaar. B., & Neufeld. R., The Use of Privatised Detention Centers for Asylum Seekers in Australia and the UK. In Coyle. A., Campbell. A., Neufeld. R., Capitalist Punishment: Prison Privatization and Human Rights (2003).

See also: Allison. R., Group 4: a history of blunders. The Guardian, 15th August 2003. Link: <http://www.theguardian.com/uk/2003/aug/15/immigration.immigrationandpublicservices>

of that case, Mr Quaquah brought civil proceedings for malicious prosecution against Group 4 and the Home Office.⁸¹

In May 2001, a single judge decision in the High Court struck the Secretary of State from that claim.⁸² The Judge did so on the basis that it was within the power of the Secretary of State to delegate the running of an immigration detention centre to an independent contractor and given that the Secretary of State had exercised all reasonable care in the selection of such a contractor, he could not be liable for the torts of that contractor's employees.⁸³ The Judge stated that attaching the Home Office to the action would have to mean that "*the Home Secretary would be under a wide-ranging liability for a number of persons and organisations over which he did not have, and never had, any direct control. Such an accretion of responsibility was not necessary to ensure that detained persons were properly treated and would be able to recover compensation if they were not.*"⁸⁴ The reasoning in the *Quaquah* case was sound but it nonetheless demonstrates how the State can be easily omitted from a tort action in favour of pursuit of a private actor.

Finally, tort can, theoretically, also impact upon a purely public law remedy. There is a body of opinion that argues that the mere existence of private law as an alternative remedy can influence the outcome of cases under the Human Rights Act. The case of *YL*,⁸⁵ examined in Chapter IV, considered whether or not a body should be considered as a public authority for the sake of the Human Rights Act. The Judges in *YL* expressly agreed that their interpretation of section 6(3)(b) did not depend upon whether the claimant's Convention rights enjoyed other common law, statutory or contractual protection.⁸⁶ Nevertheless, it has been speculated as to whether the majority's decision may have been

⁸¹ Mr Quaquah's action for malicious prosecution subsequently failed: *Quaquah and others v Group 4* [2003] EWHC 1504 (QB).

⁸² *Quaquah v Group 4 (Total Security) and the Home Office* (23 May 2001; unreported).

⁸³ Molenaar. B., & Neufeld. R., *The Use of Privatised Detention Centers for Asylum Seekers in Australia and the UK*. In Coyle. A., Campbell. A., Neufeld. R., *Capitalist Punishment: Prison Privatization and Human Rights* (2003).

⁸⁴ This decision of Wright J. in *Quaquah v Group 4 (Total Security) and the Home Office* (23 May 2001; unreported) was later quoted in: *McE v Reverend Joseph Hendron & Ors* [2007] SC 556. Paragraph 91.

⁸⁵ *YL v. Birmingham City Council and others* [2007] UKHL 27.

⁸⁶ *YL v. Birmingham City Council and others* [2007] UKHL 27. Paragraph 79-80.

influenced by the existence of alternative remedies which were open to the claimant through common law.⁸⁷

5.4 Ensuring that Control can Trigger Legal Responsibility – Doctrinal Solutions

The potential for frustration legal responsibility for control, in the context of externalisation and privatisation, arises especially in the exercise of indirect control by the State. This section examines the ways and means by which the judicial framework examined in this research may better combat that frustration of legal responsibility. This examination takes place in the context of also contrasting these ‘*best practice approaches*’ with how the courts are currently approaching the phenomena.

The State cannot be brought to task for each and every violation that is connected with the State, howsoever remote that connection may be. This principle is applicable to both externalisation and privatisation. Both phenomena have considered moves toward a functional test although, as will be examined below (5.4.1 and 5.4.2), the test differs between each phenomenon. The resistance to such a functional shift for both externalisation and privatisation is based on the fear that the State would be brought to bear for far too broad a range of procedures. Therefore, any functional test must provide the courts with flexibility and an ability to be discerning as to how it is applied and thus what gives rise to State legal responsibility. This section examines the best way for the courts can proceed to establish such a test. For both externalisation and privatisation, this involves incorporating aspects of a functional test to their respective approaches to externalised and privatised procedures of migration control and border management in order to establish a *mixed test*.

In the context of extraterritorial jurisdiction, the departure from the restrictive *Banković*⁸⁸ regime, has been underway for some time. The next section (5.4.1) takes that evolution to what is argued to be, its logical conclusion. Extraterritorial jurisdiction has gone down the ‘*effective control*’ pathway rather than a purely functional test but

⁸⁷ Case comment from Blackstone Chambers, Patel. N., & Steele. I., Human Rights & Care Homes. Available at:

http://www.blackstonechambers.com/news/newsletters/public_law_focus_articles/care_homes.html

⁸⁸ *Banković and Others v. Belgium and 16 Other Contracting States*, [GC]. 52207/99.

functionalism has still had a marked influence on that evolution. With regard to public legal responsibility for a rights violation arising out of the private implementation of a public function, the subsequent section (5.4.2) explores how a fully functional test may provide a way forward for the courts. The final section (5.4.3) considers the potential of the CJEU to play a leading role in establishing the triggers for State legal responsibility for rights violations where appropriate.

5.4.1 Jurisdiction tied to Territory and its Reimagined Exceptions

The concurring judgment of Pinto De Albuquerque in *Hirsi*,⁸⁹ extensively quoted in the introduction to this research (Section: *Who and Where?*), argued for an approach to extraterritorial jurisdiction which completely ignores territory in favour of one which is engaged every time a primary State *function* is implemented. Pursuing a test of this kind would mean that the courts turn away from the framework of exceptionalism that underpins the application of extraterritorial jurisdiction at present. Under the De Albuquerque test, if the function of a procedure is concerned with the control of migration or the management of the border then the State's jurisdiction is automatically engaged no matter *where* it is being implemented.

The Concurring Opinion of Justice Bonello in the *Al-Skeini* case advocated for a different type of functionalist test. Bonello's approach was that the Court should recognise the State as having exercised jurisdiction whenever it falls within its power to violate an individual's rights. In other words, the State engages its jurisdiction *whenever* and *wherever* the State has '*authority over*' and '*control of*' a situation such that it can violate rights.⁹⁰ Judge Bonello did acknowledge that the Grand Chamber's findings in *Al-Skeini* had placed the ECtHR's extraterritorial jurisdiction doctrine on a sounder footing than before. However, instead of the Court's re-imagining of the traditional approach based upon the framework of exceptions to territorially based jurisdiction, Judge Bonello would have come to the same conclusion by reference to a functional test.⁹¹ Judge Bonello argued

⁸⁹ *Hirsi Jamaa and Others v. Italy*, 27765/09, [GC].

⁹⁰ *Al-Skeini and Others v. the United Kingdom*, 55721/07, [GC]. Concurring Opinion of Justice Bonello. Paragraph 11-12.

⁹¹ *Al-Skeini and Others v. the United Kingdom*, 55721/07, [GC]. Concurring opinion of Judge Bonello. Paragraph 3.

that the logical corollary of universality is a functional approach to extraterritorial applicability.⁹² “*In relation to Convention obligations, jurisdiction is neither territorial nor extraterritorial: it ought to be functional – in the sense that when it is within a State’s authority and control whether a breach of human rights is, or is not committed, ...it would be an imposture to claim that, ah yes, that State had authority and control, but, ah no, it had no jurisdiction.*”⁹³ It is not the *actual* act or omission that was covered by the implicated human rights obligation that is considered in the functionalist approach, but the *potential* (or functional capacity) of the State to comply with fundamental rights obligations or to violate them.⁹⁴ The contrast between tests goes to the very heart of this research’s distinction within control (direct v indirect). A functional test does not depend on establishing that a physical expression of control was exercised by the State. The difference was illustrated in stark terms in *Al-Skeini* between Judge Bonello advocating for a functional test and the rest of the Grand Chamber opting for the effective control’s (personal model) test that they found to be based upon the “*physical power or control*” exercised by the State over a person through a procedure.⁹⁵

In light of *Al-Skeini*, the Strasbourg Court and the UK’s domestic courts are now even less likely to make the move to a Bonello style functional test. They will instead continue to implement the aforementioned re-imagining of exceptionality in extraterritorial jurisdiction. However, that re-imagining also has the potential to give the courts a broad scope with which to find that the State has engaged its extraterritorial jurisdiction. The continued evolution of exceptionality provides the courts with an opportunity to incorporate a functional element into the ‘*effective control*’ test for extraterritorial jurisdiction. The objective of a functional test is to establish a responsive yet consistent approach which to apply to procedures implemented by the State anywhere in the world.⁹⁶ That objective can be *further* integrated into the test that has emerged in the jurisprudence

⁹² Shany. Y., Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law (2013) The Law & Ethics of Human Rights, Volume 7(1), 47. Page 66.

⁹³ *Al-Skeini and Others v. the United Kingdom*, 55721/07. Concurring Opinion of Justice Bonello. Paragraph 12.

⁹⁴ Shany. Y., Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law (2013) The Law & Ethics of Human Rights, Volume 7(1), 47. Page 66.

⁹⁵ *Al-Skeini and Others v. the United Kingdom*, 55721/07. Paragraph 136.

⁹⁶ Shany. Y., Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law (2013) The Law & Ethics of Human Rights, Volume 7(1), 47. Page 66.

since the *Banković* decision and which, in the Strasbourg Court, has culminated in *Al-Skeini*. The word ‘*further*’ is used here because there have already been traces of a functionalist test in that jurisprudence.

Al-Skeini dispensed once and for all with the *Banković*-era adherence to the refusal to allow the ECHR’s provisions to be “*divided and tailored*”,⁹⁷ albeit the Grand Chamber didn’t explicitly say so. Nevertheless, the departure from reading the Convention as an indivisible package of rights reflects a realisation by the Court that the Convention must be applied whenever and wherever the State has the capacity to violate *any one of* the rights contained in the Convention. This represents the integration of a functional element within the exceptions-based approach. This functional element has been argued as long being evident in the jurisprudence of the ECtHR, in the context of interception at sea at least.⁹⁸ De Boer goes as far as to say that, in the context of the *Hirsi* case, argues that that case indicated the Court’s more general willingness to apply “*a functional-test-disguised-as-an-effective-control-test*.”⁹⁹ The UK Supreme Court’s analysis in *Smith (No. 2)* has also been argued as representing the emergence of a functionalist approach.¹⁰⁰ Extraterritorial jurisdiction in that case was a step closer to a test based purely on the exercise of authority and control as advocated by Bonello in *Al-Skeini*. This can be argued on the basis of the expansion of exceptionality so as to encompass a personal model based on the control a State has over an individual through its own officials. Yet, the case still grounded itself in exceptionality and, crucially, retained the public powers (a sort-of territorial) element of the State having to exercise public powers. The test laid out in *Al-Skeini* is in fact a reimagining of the *effective control test* rather than being an outright *functional test*.

The ECtHR has always hesitated to pursue approaches which placed an “*impossible or disproportionate burden on the authorities*.”¹⁰¹ The Court’s hesitancy to pursue a functional test is reflective of this yet the effect of this reticence is that it negatively impacts

⁹⁷ *Banković and Others v. Belgium and 16 Other Contracting States*, 52207/99, [GC]. Paragraph 75.

⁹⁸ Gammeltoft-Hansen. T., *Access to Asylum* (2013). Page 124 and 145-146.

⁹⁹ De Boer. T., *Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection* (2014) *Journal of Refugee Studies* Vol. 28(1). Page 12.

¹⁰⁰ Holcroft-Emmess. N., *Extraterritorial Jurisdiction under the ECHR – Smith (and Others) v MOD* (2013) *Oxford Human Rights Hub*. Available at: <http://ohrh.law.ox.ac.uk/extraterritorial-jurisdiction-under-the-echr-smith-and-others-v-mod-2013/>

¹⁰¹ *Osman v UK*, 87/1997/871/1083. Paragraph 116.

upon the Convention's potential for universal application. The integration of a functional element within the traditional exceptions can still provide an appropriate test. The 'effective control' test of the personal model and the spatial model can continue to be reimagined by the courts so as to include a functional element. The advent of a functional element, within the traditional exceptions to extraterritorial jurisdiction, has the potential to move the courts away from the outdated reliance on compulsory powers as an indicator of jurisdiction having been engaged or at least to be able to properly address indirect control when they arise.

The straightforward application of a functional test could serve to ensure that legal responsibility arises out of the exercise of indirect control¹⁰² but an effective control test that integrates a functional element is also capable of providing the courts with the scope to attach legal responsibility to the State for such a control. This would close any "structural incentive"¹⁰³ for States to engage in the externalisation of migration control and border management procedures through a direct or indirect control. These approaches would provide tests that took Judge Bonello's crucial question into consideration: did it depend on the agents of the State whether the alleged violation would be committed or would not be committed?¹⁰⁴ Finally, a test based on effective control but with an element of the functional test is discerning in application such that it could ease fears that every single State function anywhere in the world, would be read as engaging State obligations in ways which make the Convention unduly cumbersome and unwieldy. It is posited that this mixed test is the way forward in ensuring that consideration of legal responsibility for States is triggered as appropriate for externalised procedures.

¹⁰² Bhuta states that the functional approach "*has morally salutary consequences...*" because it does not allow States to violate rights outside their territory in ways which it is prohibited from doing inside its territory – the derivative of the public law premise that control entails responsibility, mentioned in the introduction to this research (section: Control and Legal Responsibility for that Control)
See: Bhuta. N., *The Frontiers of Extraterritoriality – Human Rights Law as Global Law*. Page 11. In Bhuta. N., *The Frontiers of Human Rights – Extraterritoriality and its Challenges* (2016).

¹⁰³ Gammeltoft-Hansen. T., *Access to Asylum* (2013). Page 146-147.

¹⁰⁴ *Al-Skeini and Others v. the United Kingdom*, 55721/07. Concurring Opinion of Justice Bonello. Paragraph 16.

5.4.2 Public Liability for Privately Implemented (Public) Functions

The problematic approach of the UK domestic courts to establishing public liability for privately implemented public functions has already been explored in the previous chapter (section 4.2). The UK domestic courts have mainly pursued an institutional approach and have declined any incorporation of a functional approach and in doing so have given rise to a jurisprudence that has placed the emphasis “...on the public source of power rather than ...on the kind of function that a body performs.”¹⁰⁵ The functional test in privatisation revolves around examining whether the role undertaken by a private actor is one which can be identified as being, in normal circumstances, that of the State. Just as the case against functionalism in the context of extraterritorial jurisdiction (section 5.4.1), the UK domestic courts’ hesitancy is rooted in a fear of placing an unrealistic burden on the State to be responsible for too wide a range of procedures. Privatisation is thus subject to the same balancing act as externalisation – finding an equilibrium between the desire to give rights a suitable platform while also refraining from widening the ambit of State liability too extensively. What is needed is a refined test which incorporates a functional element without making that the sole basis of the test.

The Joint Committee on Human Rights of the House of Lords and House of Commons has been clear that it is the *function* that a person is performing that should be determinative and that there is nothing in Section 6(3)(b) of the Human Rights Act to suggest that a person's institutional proximity to the State or their compulsory powers in relation to the service user should decide the issue.¹⁰⁶ The UK public authorities must be made legally responsible on the basis of *the function involved in implementing the procedure* rather than on the basis of evidence of *institutional control* such as the presence of State officials, evidence of direction from the State etc.¹⁰⁷ Despite this considerable body of criticism, the UK domestic courts have remained devoted to the institutional test. In order to assuage public fears as to the integrity of the Human Rights Act, the Joint Committee on Human Rights stated that any procedure that incorporates compulsory powers should result in legal responsibility for the State even under the current judicial

¹⁰⁵ Palmer. E., *Judicial Review, Socio-Economic Rights and the Human Rights Act* (2007). Page 143.

¹⁰⁶ Palmer. E., *Judicial Review, Socio-Economic Rights and the Human Rights Act* (2007). Page 146.

¹⁰⁷ Donnelly. C., *Delegation of Government Power to Private Parties – A Comparative Perspective* (2007).

approach. That reassurance does little to soothe concerns as to whether the State can and will be held answerable for the exercise of *indirect* control.

A legislative solution has been pondered in the UK whereby a whole industry or sector is designated as representing a public function. However, the Joint Committee on Human Rights found that a “*sector-by-sector*” approach would not be effective.¹⁰⁸ As was touched upon in Chapter IV, the Strasbourg Court has found State responsibility in certain circumstances within certain sectors while finding no such legal responsibility in other instances within the same sector.¹⁰⁹ The obvious preference then remains that a doctrinal rather than a legislative shift is embraced in order to rise to the challenges presented by privatisation. The Strasbourg Court provides significant guidance in this regard. The ECtHR incorporates a functional element within its approach while not relying solely on that test. The Strasbourg Court in fact takes a broad spectrum of influences in deciding whether a private actor’s actions can give rise to public legal responsibility. The jurisprudence examined in Chapter IV reflects this. In the *Yershova*¹¹⁰ case an institutional element was clearly decisive for the Court while in the case of *Van Der Mussele*,¹¹¹ the fact that the procedure in question was deemed to be a governmental function was the deciding factor. These cases complement each other within a mixed jurisprudence and should not be taken as offering contradictory guidance. By refusing to be tied down to a single precise test, courts are free to consider what it interprets as being most telling of State involvement in a particular case. It also prevents a situation whereby a whole policy area is designated as being a public function and allows the courts some flexibility in its approach.

One clear benefit of taking such a flexible approach would be that it is more capable of properly considering *indirect* control of the State. The benefit accrues because the court can move beyond rigid adherence to the institutional approach and it is not dependent on the absence or presence of compulsory powers as an indicator of public control. The method for service delivery is also roughly divided along the lines of direct and indirect

¹⁰⁸ House of Commons, House of Lords, Joint Committee on Human Rights Report: The Meaning of Public Authority under the Human Rights Act. Ninth Report of Session 2006–07. Page 43.

¹⁰⁹ The contrast may be made within the field of education. This point was made in section 4.3.2.1. See cases: *Costello-Roberts v UK*, 13134/87 and *H v United Kingdom*, 11590/85.

¹¹⁰ *Yershova v Russia*, 1387/04.

¹¹¹ *Van Der Mussele v Belgium*, 8919/80.

control. In general, direct control's approach of contract has *not* been decisive in making the State legally responsible for the private procedure in question in the UK domestic courts. This has been pointed out by Donnelly and is borne out by the cases of *Leonard Cheshire* and *YL*.¹¹² With a mixed test, the formal relationship that develops between a contractor (the State) and contractee (a private actor) can be read as being an indicator that the State is in control of the procedure in question without any resort to consideration of the procedure's incorporation of a compulsory power. At the same time, the pliant threat of sanction could still be considered a procedure of the State on the basis that it is a State's function if the more informal nature of its method for service delivery is not found to be convincing to the court that the State is liable. It is clear that the mixed test provides the courts with a more comprehensive tool for analysis, especially *vis-à-vis* indirect control.

The Joint Committee on Human Rights had suggested that legislation could make clear that "*For the purposes of s. 6(3)(b) of the Human Rights Act 1998, a function of a public nature includes a function performed pursuant to a contract or other arrangement with a public authority which is under a duty to perform the function.*"¹¹³ It is to be hoped that any such reference to "*other arrangement*" would include the threat of sanction. In any case, the Joint Committee on Human Rights recommended that, in the absence of a legislative solution, an unequivocal declaration should be made in the contract which identifies the body performing a procedure on the strength of that contract as being a public authority for the purposes of the Human Rights Act.¹¹⁴ Such a declaration is absent from the migration control and border management contracts that have been examined as part of this research.¹¹⁵

In the absence of a legislative alternative or of a willingness by the State to confirm a private actor's status in public law within the contract, a reinvigorated test to be applied by the courts is best placed to discern State responsibility as appropriate. Such a test also

¹¹² Donnelly. C., *Delegation of Government Power to Private Parties – A Comparative Perspective* (2007) Page 283.

¹¹³ House of Commons, House of Lords, Joint Committee on Human Rights Report: *The Meaning of Public Authority under the Human Rights Act*. Ninth Report of Session 2006–07. Page 54.

¹¹⁴ House of Commons, House of Lords, Joint Committee on Human Rights Report: *The Meaning of Public Authority under the Human Rights Act*. Ninth Report of Session 2006–07. Page 54.

¹¹⁵ See Annex I.

has the added benefit of considering indirect control which may be more difficult on a legislative basis. Obviously, relying on guarantees placed within contracts does nothing to ensure that the frustration of legal responsibility does not arise as a result of enforced privatisation. The UK's lower courts have thus far refused to explicitly depart from their adherence to "*Leonard Cheshire without further guidance from the House of Lords.*"¹¹⁶ This is despite the UK government having openly expressed its wish that the courts toward taking a more functional approach. The shift must be made by the UK Supreme Court which, in turn, may need to see an outright rejection of the *Leonard Cheshire* line of case-law in the Strasbourg Court before they are convinced. Given the innovative nature of the State in privatisation and the complex relationships which necessarily flow from that process, it is better left in the hands of the courts to identify what should constitute public action from its purely private counterpart. With the aid of a mixed test, encompassing a functional element, the courts could achieve an equitable distribution of responsibility.

5.4.3 The CJEU's Role in Rights Protection in Europe

The CJEU does not come to privatisation and externalisation in the context of fundamental rights under the weight of the same legacy as the UK's national courts or the ECtHR. There exists a vast jurisprudence in the UK domestic courts and in the ECtHR that considers extraterritorial jurisdiction and State responsibility for privately implemented (public) procedures. That jurisprudence has at times acted as a limit in tackling the rise of the frustration of legal responsibility, especially by not being capable of addressing indirect control. In developing its own case-law in this area, the CJEU may have opportunities to contribute toward the effective prevention of any frustration of State legal responsibility.

The CJEU's place in European fundamental rights protection must be kept in mind when examining externalisation and privatisation. Despite the back log of cases at the ECtHR having eased in recent years,¹¹⁷ the adequate implementation of human rights guarantees at national level remains key to the overall protection of fundamental rights in

¹¹⁶ House of Commons, House of Lords, Joint Committee on Human Rights Report: The Meaning of Public Authority under the Human Rights Act. Ninth Report of Session 2006–07. Page 47.

¹¹⁷ It was down from a high of 165,000 cases in 2011 to 65,000 in 2016. See: Dembour. MB., Migrants' avoidance of the European Court of Human Rights concerns us all (2016) Strasbourg Observers blog. Available at: <http://strasbourgothers.com/2016/02/10/migrants-avoidance-of-the-european-court-of-human-rights-concerns-us-all/>

Europe.¹¹⁸ Beyond the national setting and in the context of fundamental rights, “*The ECtHR represents, in terms of caseload as well as influence, the main mechanism for accessing justice above the national level in Europe.*”¹¹⁹ The ECtHR’s individual complaints mechanism provides access to justice beyond the national level for fundamental rights violations which does not otherwise exist. Once the case emanates from a contracting State of the ECHR and the applicant has exhausted all domestic remedies and avenues for redress, he/she will be able to access the Strasbourg court.¹²⁰

The CJEU, of course, does not possess an equivalent to the individual complaints mechanism that exists for the ECtHR. However, the CJEU, notwithstanding the fact that it does not act as an appeal court, still has a crucial impact on how fundamental rights are interpreted by the Member States’ domestic courts. In certain circumstances, an aggrieved individual may pursue an action in the General Court and the CJEU for an alleged breach of fundamental rights.¹²¹ A claimant can request a preliminary ruling from the CJEU in his/her national courts which will adjudicate as to whether to make that request or not.¹²² The national court, in issuing a request for a preliminary ruling, is inviting the CJEU to provide an interpretation of a provision of EU law that is needed to resolve a dispute pending consideration at the national level.¹²³

Chapters III and IV have already examined the CJEU’s potential for combatting the frustration of legal responsibility.¹²⁴ The potential of the Court, to impact upon State responsibility in both externalisation and privatisation, is considerable. The CJEU has given glimpses of this potential in disparate fields. For privatisation, in ensuring the effectiveness (*effet utile*) of the Union’s fundamental rights law, the Court is not limited to the example examined in Chapter IV i.e. the Court’s expansive reading of the State in order

¹¹⁸ EU Agency for Fundamental Rights, Report on Access to Justice in Europe: An Overview of Challenges and Opportunities (2011). Page 36.

¹¹⁹ EU Agency for Fundamental Rights, Report on Access to Justice in Europe: An Overview of Challenges and Opportunities (2011). Page 36.

¹²⁰ Article 35(1), ECHR.

¹²¹ For a useful summary, see: EU Agency for Fundamental Rights report. Access to Justice in Europe: An Overview of Challenges and Opportunities (2011). Page 33-36.

¹²² Article 267, Treaty on the Functioning of the EU.

¹²³ EU Agency for Fundamental Rights, Report on Access to Justice in Europe: An Overview of Challenges and Opportunities (2011). Page 34.

¹²⁴ Sections 3.2 (externalisation) and 4.4 (privatisation).

to protect the *effet utile* of directives. The focus for externalisation was the CJEU's potential to take an expansive outlook as to the extraterritorial application of the EU Charter of Fundamental Rights. That expansive application may be made on the basis that the Court applies the Charter whenever and wherever EU law is being applied. The approach to applying the Charter that the CJEU has already pursued in an internal setting would make the distinction between indirect and direct control inconsequential.

The CJEU is in fact well placed to ensure that the Charter of Fundamental Rights is applied in such a way so as to ensure that a frustration of the trigger for State legal responsibility cannot arise.

5.5 Conclusion – The Courts Approach to the Triggers

The control retained by the State in procedures that are externalised or privatised is often such that it satisfies the definition of control set out in this research yet it can also preclude the application of legal responsibility to that State. Control of privatised or externalised migration control and border management procedures and legal responsibility for that control, can therefore diverge. The degree to which this *effect* is achieved depends greatly upon the *nature* of that control. Most notably, the application of compulsory powers in both privatised and externalised procedures, while not definitively ensuring that legal responsibility is attached to the State for the offending procedure, does greatly heighten the chances of such a finding. By contrast, the absence of compulsory powers makes it difficult to apportion legal responsibility to the State even where it is clearly involved in directing, steering and influencing a procedure.

Mixed tests are capable of recognising that the State can control migrants in many different guises and should be held to account for rights violations which are a result of their efforts in migration control and border management. The mixed test in both privatisation and externalisation include a functional element, although this functional element is different for each phenomenon. These functional elements are capable of ensuring that indirect control for a State will result in legal responsibility for that State. In addition to the legal impediments faced, with externalisation there are additional practical and procedural obstacles for a migrant which affords the State supplementary security from having legal responsibility attached to it by a court. For privatisation, certain legal choices

made by an aggrieved migrant can lead to the aggrieved rights going without being vindicated, albeit the migrant may still gain just satisfaction through the alternative avenues pursued. Innovative judicial approaches cannot overcome certain of the practical and procedural hurdles faced.

In any case, it is important to recognize that even if an effective overarching test is framed, the nature of procedures that have been privatised or externalised are such that even cases dealing with the same procedures may differ in detail. Cases must be considered on their own merits and the Courts can only act as a bulwark against the frustration of State legal responsibility when presented with suitable test cases. In the context of privatisation, “...each type of delegation and the specific circumstances of the arrangement”¹²⁵ is unique. Similarly, implementation across an externalised procedure can vary enormously.

In sum, it is difficult to make a broad sweeping analysis across all externalised and privatised migration control and border management procedures. However, there are certain trends across those phenomena which help to explain how the triggers for the judicial consideration of State legal responsibility function and how they oftentimes depend upon arbitrary control-based tests. Gaining a better understanding of these triggers can allow lawyers to find ways to better approach them and ensure that migrants gain access to justice.

¹²⁵ Gammeltoft-Hansen. T., *Access to Asylum* (2011). Page 182.

Conclusion – *The Importance of the Triggers*

Triggering Legal Responsibility for the State

This research has examined the triggers of legal responsibility for externalised and privatised procedures of migration control and border management. It has posited that the jurisprudence shows that the courts have struggled to come to terms with the legal impediments for a migrant arising out of externalisation and privatisation. To a certain extent, that struggle has revolved around an approach which was inherently flawed in its determination to apply control-based tests which turn on the absence or presence of compulsory powers. Those powers are taken as being the crucial indicator that a State should be made legally responsible for a violation which occurs during the implementation of an externalised or privatised procedure. Consideration of alleged violations and the potential for legal responsibility for the State is therefore dependant on the *nature* of control rather than purely on the extent to which the State controls implementation. Indirect control by the State can lead to rights violations for which the State is just as culpable. The legal impediments are accentuated by considerable practical and procedural obstacles. Taken together, the legal, practical and procedural impediments can each prove to be fatal to a migrant's access to justice when he or she alleges a violation of his or her rights at the hands of a privatised or externalised procedure.

This work made clear proposals on what tests should be applied so as to attribute legal responsibility to the State as appropriate (section 5.4). These proposals represent a concrete way forward for the courts in better adjudicating on the triggers of legal responsibility so as to better ensure access to justice for migrants. The way forward proposed requires mixed tests across both phenomena that would be capable of accepting compulsory powers as being indicative of State legal responsibility without simultaneously neglecting the possibility that indirect control could also engage that responsibility. The next section of this conclusion further considers the merits of these doctrinal solutions while also briefly addressing certain alternative solutions.

The Doctrinal Solutions – Are they Enough?

The doctrinal solutions recommended in Chapter V do not provide immediate and completely holistic solutions to the challenges faced. However, they are realistic and represent the best way forward in evolving toward such holistic solutions. Any solution that is judicially based is going to necessitate the emergence of appropriate test cases and the willingness of the judiciary to pursue an evolution away from long-established jurisprudence. Above all, such an evolution toward the mixed tests that are proposed here will take time. These are the inevitable limitations of the doctrinal solutions suggested. However, despite these limitations, the doctrinal solutions remain the preferred method by which a suitable approach to the triggers of State legal responsibility may be engaged and State legal responsibility be established as appropriate.

Legislative reform is an obvious alternative. The attraction to such an immediate solution is tempered by consideration of the ability to legislate effectively and gauging how realistic a prospect realistic legislative reform truly is. In the context of extraterritorial jurisdiction, reform of the Convention in this regard is highly improbable. By the same token, writing on suggested reforms of the Human Rights Act in a way which boosts inclusivity for complainants, is a fool's errand. In the current climate, such reform has no chance of success. An alternative role for legislative reform may be to enshrine in all domestic legislation whether the State has a *legal* control over its immigration officers in the external role envisaged by the piece of legislation in question. This approach is equally impractical and has little or no chance of being pursued. What is most attractive about the doctrinal solutions suggested here is the flexibility in application that comes with a courts judgment.

A legislative solution to the challenges raised by privatised procedures gains more traction. The question arises as to whether to do it sector-by-sector with whole industries and services being legislated as representing an area for which the State is legally responsible or to simply legislate for each single procedure. With regard to the latter solution, it is not difficult to imagine procedures which may not require legislation before the State shifts its implementation over to the private sector. For the former legislative solution, the unique nature of each instance of privatisation make it difficult to legislate

for. This is evidenced by the UK domestic jurisprudence (see sections 4.2 and 5.4.2) where the courts have alternated between finding public legal responsibility and not within single sectors. In these circumstances, a reassessment of the jurisprudence can be argued as providing a more realistic area in which to promote reform. The courts pursuing a departure in the jurisprudence would also provide a more responsive way by which to deal with the challenges posed by privatisation as they arise.

The doctrinal solutions proposed in this research do not represent a huge departure from the jurisprudence. They instead build upon a foundation already laid by the courts and take it in a direction whereby indirect control can be better assessed than is currently the case. For externalisation, this requires further incorporation of an interpretation of extraterritorial jurisdiction based on the functional capacity of the State to comply or violate fundamental rights. In the context of privatisation, the test is broadened toward considering functions that are normally those of the State, that are implemented by a private actor and result in a violation, as triggering consideration of legal responsibility for the State. These recommended pathways for the courts therefore represents a realistic and effective way forward by which to ensure that these crucial triggers afford access to justice to aggrieved migrants.

A hallmark of the proposed solutions is that the suggested tests move away from an obsession with measuring control and relying on the physical expression of that control. Counter-intuitively, dispensing with tests obsessed with control and pursuing the doctrinal solutions outlined in this research (section 5.4) would mean that the courts are better placed to ensure that States are made culpable *wherever* they act and in *whatever form* they take, if they control the implementation of the offending procedure. Mixed tests provide a better mirror of State control than control-based tests. In addition, the proposed tests are reflective of the understandable concerns which exist across both privatisation and externalisation that a change in direction for the jurisprudence could mean the State is made liable for all and every violation. The courts will still be able to bring a crucial element of flexibility so as to ensure fairness for both State and migrant in adjudicating on the triggers for State legal responsibility.

The argument for doctrinal solutions as being preferential to other routes for reform is without prejudice to the fact that the procedural and practical problems examined in Chapter V (section 5.3) would remain despite any such reform. Likewise, however, it is difficult to see how other pathways to reform could eradicate these impediments to a migrant's access to justice. What is required in this regard is an attitude change from the State. The State must adopt a greater understanding of these practical and procedural problems. Greater recognition of these problems would provide an impetus for institutional and procedural reform that would work to allow greater access to justice and the possibility of the vindication of the fundamental rights of migrants. This is not a simple journey to reform. Having made that point, it should also be underlined that a by-product of the pursuit of the doctrinal solutions outlined in Chapter V would be to encourage fundamental rights lawyers and their clients toward pursuing the vindication of their rights in ways which they are not at the moment.

In the context of privatisation, the increased likelihood of success for rights cases with legitimate grievances would boost the view of rights as being a genuine remedy. More than this though, in the context of the UK, there needs to be a rethink in how damages are treated in human rights based case-law. For externalisation, again it is posited that moves toward the doctrinal solution suggested by the judiciary would encourage more lawyers and their clients to attempt to overcome the almost overwhelming practical obstacles faced. In the absence of fundamental reforms to the inner workings of the ECtHR with regard to *locus standi*, alongside parallel reforms in contracting States, the doctrinal solutions proffered here would still offer some relief to the practical problems faced.

No solution can represent a silver bullet to all of the problems which arise out of the externalisation or privatisation of migration control and border management procedures. However, the doctrinal solutions considered here are argued as offering the most realistic and progressive way forward toward establishing a regime that makes access to justice and the vindication of rights more practical and effective rather than intangible

and, to all intents and purposes, illusory. They provide a way forward by which control, as it has been defined in this work,¹ triggers consideration of a State's legal responsibility.

Vindication and the Attribution of Legal Responsibility

This research has sought to shed light on the crucial first part of how legal responsibility is attributed to the State in the context of privatisation and externalisation. The concentration on the triggers for legal responsibility necessarily comes at the cost of consideration of the second part of how legal responsibility may be attributed to the State. This second part considers how specific rights of a migrant are vindicated in court and thus the actual attribution of legal responsibility. The research does not pretend to be an all-encompassing work which examines all and every aspect of the two phenomena in question. Instead, this work sought to pinpoint the particularly important but somewhat understudied triggers for that later consideration of the relevant rights – the merits of the case.

The application of the mixed tests proposed in Chapter V (section 5.4) is difficult to do forensically because implementation is such a variable factor. Procedures are rarely implemented uniformly. Even a legislative or contract basis for a procedure does not guarantee uniformity in application and design. Application can only be made in the abstract until suitable test cases arise which can serve as a guide to lawyers *vis-à-vis* triggering consideration of legal responsibility for the State. Similarly, consideration of the rights at stake is somewhat abstract in the absence of the specific facts in a given case. Therefore, the vindication of rights and consequent attribution of legal responsibility to the State, is subject to the specific circumstances and implementation in question in a particular case.

This is not to say that concentration should purely on the triggers of State legal responsibility and that there is no point in academics examining the vindication of rights and the attribution of legal responsibility. On the contrary, such an examination can be understood as representing the logical corollary to the present research and an opportunity to extend this study. Indeed, certain scholars have already made this leap and have laid an

¹ Introduction: The Research Questions.

important foundation to further study in this area.² Similarly, this research was not undertaken to shed light on the motivation of Member States but its conclusions do generate its consideration.³ This is work for political scientists and those specialised in governance and administration and could not be undertaken in this work.

The detention of migrants may threaten a breach of rights with regard to the right to liberty and security,⁴ the right to respect for private and family life⁵ and the flouting of certain procedural guarantees.⁶ Privatisation does not raise confusion as to State legal responsibility for these guarantees, after all, the administrative or judicial decision to detain is made by State organs and not by a private actor charged with the actual detention. The State remains responsible for violations of such rights. The confusion is limited to the day-to-day enforcement of the detention decision which has been made by the State. The right to life⁷ and the prohibition of torture and inhuman or degrading treatment or punishment⁸ are unfortunately potentially placed at risk for migrants forcibly detained by a private actor at the behest of the State. The violation of these rights is closely associated with the implementation of compulsory powers. Similarly, escorted returns by a private actor is enforcing a return decision by the State and so rather than *refoulement*, the violation which can lead to confusion for the Court as to whether the private actor or State is responsible are more the right to life and the prohibition of torture. Enforced privatisation does not incorporate compulsory powers and so the fundamental rights actions arising out of any violation will not be physically apparent in terms of an injury or death but will be more

² Most notably, see Moreno-Lax's treatment of non-refoulement and the right to asylum: Moreno-Lax. V., *Seeking Asylum in Europe – Extraterritorial Border Controls and Refugee Rights under EU Law* (2012) PhD Thesis, Université Catholique de Louvain

³ Scholten explores the subject, "*Why Governments Delegate Tasks: Exploring 'Shifts in Governance.'*" See: Scholten. S., *The Privatisation of Immigration Control through Carrier Sanctions: The Role of Private Transport Companies in Dutch and British Immigration Control* (2015). Section 2.3, page 24.

⁴ Article 6, Charter of Fundamental Rights of the European Union. Article 5, European Convention on Human Rights.

⁵ Article 7, Charter of Fundamental Rights of the European Union. Article 8, European Convention on Human Rights.

⁶ See: Boeles. P., den Heijer. M., Lodder. G., & Wouters. K., *European Migration Law* (2014). Page 394-397, 431-434.

See also: Flynn. M., *Immigration Detention and Proportionality* (2011) Global Detention Project Working Paper No. 4.

⁷ Article 2, EU Charter of Fundamental Rights. Article 2, European Convention on Human Rights.

⁸ Article 4, EU Charter of Fundamental Rights. Article 3, European Convention on Human Rights.

likely to raise questions as to a person's privacy,⁹ their right to asylum¹⁰ or the implications of a decision not to allow that person entry to the EU.¹¹

The same direct versus indirect distinction is made within externalisation. *Refoulement* and the right to asylum are again relevant, this time in the context of both externalised procedures considered by this work – immigration liaison officers and maritime interdiction. Rights violations arising out of compulsory powers such as the right to life and prohibition of torture, are only relevant for maritime interdiction. Perhaps what is noteworthy is the fact that absolute, non-derogable rights are relevant for indirectly controlled procedures *as well as* their directly controlled counterparts. As stated above, the triggering of consideration of an alleged rights violation should only be taken as the first of two serious legal hurdles. The second hurdle, proving that that right has indeed been breached, can itself also be an onerous task.

Taking *refoulement* for instance, the ECHR applies rigorous criteria and exercises close scrutiny when assessing the existence of a *real* risk of ill-treatment upon return such that “*since adopting the Chahal*¹² *judgment it has only rarely reached such a conclusion.*”¹³ Article 3 is a non-derogable, “*absolute*” provision.¹⁴ “*The Court has nevertheless carefully and intentionally delimited the scope of protection; successfully establishing a ‘real risk’ is not straightforward, and the interpretative battles fought across Europe are evident in the recent jurisprudence of the Court.*”¹⁵ In consideration of the possibility of a violation of Article 3 through *refoulement*, the Court will have regard to what must have been the foreseeable consequences of the removal of the applicant¹⁶ to that individual's country of origin or to a country of transit in the light of the general situation

⁹ Article 8, European Convention on Human Rights. Article 7 and 8, Charter of Fundamental Rights of the EU.

¹⁰ Article 18, Charter of Fundamental Rights of the EU.

¹¹ Article 3, European Convention on Human Rights. Article 19, Charter of Fundamental Rights of the EU.

¹² *Chahal v. the United Kingdom*, 22414/93, [GC].

¹³ *Saadi v. Italy*, 37201/06, [GC]. Paragraph 142.

¹⁴ See for instance: *Saadi v. Italy*, 37201/06, [GC]. Paragraph 137.

¹⁵ Harvey. C., *The International Protection of Refugees and Asylum Seekers: the Role of Article 3 of the European Convention on Human Rights*. Page 189. In Abass. A., & Ippolito. F., *Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective* (2013).

¹⁶ *Vilvarajah and Others v. the United Kingdom*, 13163/87; 13164/87; 13165/87; 13447/87; 13448/87. Paragraph 108.

there as well as his or her personal circumstances.¹⁷ It must be shown that the risk is ‘*real*’ and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.¹⁸

It is clear that the vindication of a migrant’s rights and parallel attribution of legal responsibility to the State are the rational extension of this research but are far from straightforward. The doctrinal solutions suggested by this work cannot be taken as ensuring the attribution of legal responsibility to the State but rather a step toward ensuring that the court will get to consider alleged rights violations and the migrant will therefore receive proper access to justice.

‘Where does the buck stop?’ – Revisiting the Scenario

This research set out to answer questions that focussed on a State’s control and legal responsibility for that control in the context of privatisation and externalisation. Ultimately, however, this research asked the question of when should a State’s legal responsibility for a rights violation arising out of externalised or privatised procedure be triggered?

The research questions¹⁹ reflect the fixation on control which dominates debate for both privatisation and externalisation. Those questions also reveal a general prejudice that it is indeed the *nature* of the control exercised by the State which must be decisive in shaping legal *effect*. In other words, whether State control is *direct* or *indirect* is decisive in deciding whether legal responsibility must come to rest with the State or not. That approach has shown itself to be rather simplistic through the judicial framework’s jurisprudence in which too much importance is laid on the presence of compulsory powers in a procedure. Rather than the *nature* of control that should be decisive in this way, a combination of factors should be taken into account in deciding whether or not the State must be given responsibility. This is reflected in the doctrinal solutions explored in Chapter

¹⁷ Hirsi Jamaa and Others v. Italy [GC] 27765/09. Paragraph 117.

¹⁸ Hirsi Jamaa and Others v. Italy [GC] 27765/09. Paragraph 120. For inadequate assurances given by the Indian government being considered as crucial by the Court, see: *Chahal v. the United Kingdom*, 22414/93, [GC].

¹⁹ For ease of reference, the research questions are: Firstly, what is the nature and effect of any control that a Member State retains despite having delegated implementation of a procedure to a private actor or having relocated implementation of a procedure beyond the EU’s external borders? Secondly, can legal responsibility be attached to the State on the basis of that retained control?

V which considered approaches which employed mixed tests rather than the current judicial approaches which lay too much store in the nature of State control. Approaches that are not purely control focussed but which make fundamental rights practical and effective are to be preferred over and above striving for a wholly control based approach which may well allow those rights to instead remain theoretical and for all intents and purposes, illusory. The mixed tests advocated for in Chapter V (5.4.1 and 5.4.2) are not control orientated and as a consequence are actually more capable of considering indirect control than the control orientated tests which are only responsive to compulsory powered procedures (direct control).

The introduction to this research began by reference to a scenario involving a woman who was refused access to protection in a Pakistani airport as a result of a decision taken by a private actor. In situations whereby that woman manages to overcome the very serious practical and procedural hurdles faced, the legal obstacles are equally momentous. The dilemma faced by the lady in this scenario recalls certain of the details of Jimmy Mubenga's situation in Heathrow airport.²⁰ This is despite their journeys being at the opposite ends of migration control and border management – entry and return. Speaking before the UK parliament's Home Affairs Committee investigation of Mr Mubenga's death, the UK government's then Interim Director General of Immigration Enforcement, Mr David Wood stated: *"I am willing to apologise to the extent that it was our responsibility."*²¹ This qualified apology led the chairman of the Committee to ask: *"So it is the failings of G4S?"* Mr. Woods responded by attaching blame to *"the failings of the particular escorts. G4S did deliver the training, in accordance with the guidelines we had provided."* The Chairman attempted to clarify the point: *"So it is not the company, it is not the Home Office, it is the two escorts who were there?"* In answer, Mr. Wood stated: *"Look, we must all learn from this. It was an absolutely tragic incident and we must all learn from it..."* One telling later contribution was when a member of the Committee asked, almost rhetorically: *"Where does the buck stop?"*

²⁰ Jimmy Mubenga's story was described in section 2.2.2.

²¹ Uncorrected Transcript of Oral Evidence, House of Commons Oral Evidence taken before the Home Affairs Committee. Evidence of David Wood, Interim Director General, Immigration Enforcement Directorate. Answering question before the Home Affairs Committee on Tuesday 16th of July, 2013.

Externalisation and privatisation present considerable challenges for lawyers and policymakers who are interested in providing migrants with meaningful access to justice for rights violations arising out of procedures of which the State had considerable control. Legal responsibility, *'the buck'*, can and can be triggered for the State in a more inclusive and effective way than is currently the case.

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- Free Movement, UK Migration Law Blog: www.freemovement.org.uk/
- Frontex: frontex.europa.eu
- Global Detention Project: <http://www.globaldetentionproject.org/home.html>
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- Open Democracy: <https://www.opendemocracy.net/>

- UK Government: gov.uk
- REDIAL Project, Migration Policy Centre, European University Institute:
<http://euredial.eu/>
- Statewatch: <http://www.statewatch.org>

Annex I

Correspondence with UK Public Authorities – Freedom of Information (In Chronological Order)

8 June 2016

Subject: 38872-McNamara-Confirmation of issuing of information

Dear Mr McNamara

This email is to confirm that the information has been dispatched to you today in the post.

Yours Sincerely

M Riddle

Knowledge and Information Management Unit

Performance and Risk Directorate

4th Floor Peel

2 Marsham Street

London

SW1P 4DF

T: +44 (0)20 7035 4848

6 June 2016

Subject: 38872-McNamara-Final response notification

Dear Mr McNamara

Please find attached the Home Office response letter to your request for information, case 38872.

I apologise for the delay in providing it to you. We also have some redacted information to send to you.

However this information is too large to send out via email. We therefore request that you email us your postal address to "FOIRequests@homeoffice.gsi.gov.uk" marking your email with reference 38872 and for the attention of myself, M Riddle. When received I will then issue you in the post the contract information we are releasing on a CD.

I appreciate your patience in this matter.

Yours Sincerely

M Riddle
Knowledge and Information Management Unit
Performance and Risk Directorate
4th Floor Peel
2 Marsham Street
London
SW1P 4DF
T: +44 (0)20 7035 4848



Home Office

Corporate Services
2 Marsham Street
London SW1P 4DF

020 7035 4848
(switchboard)

www.gov.uk

Frank McNamara
Frank.McNamara@EUI.eu

6 June 2016

Dear Mr McNamara

Freedom of Information request: reference 38872

Thank you for your e-mail of 7 March 2016, in which you ask for an exhaustive list of all contracts made between the Home Office and private actors for the provision of the detention of migrants, the removal of migrants from the UK and any contracts with private VISA issuing companies. Your request has been handled as a request for information under the Freedom of Information Act 2000 (FOIA) and can be found in full in the enclosed Annex A.

We believe that some of the information you have requested is already reasonably accessible to you. It can be found on the Government contracts finder at this link <https://www.gov.uk/contracts-finder> and on the old contracts finder site <https://data.gov.uk/data/contracts-finder-archive/> previously supplied to you.

You have already listed some of the links in your request found in full in the enclosed Annex A and therefore we have not provided them to you again.

You also sought information in relation any tenders that have been offered by the Home Office for such services. I am able to inform you that any and all tenders on offer are published on the Official Journal of the European Union (OJEU) at this location <http://www.ojeu.eu/whatistheojeu.aspx> and on the contracts finder <https://www.gov.uk/contracts-finder>.

Section 21 of the Freedom of Information Act exempts the Home Office from having to provide you with this information, because it is already reasonably accessible to you. If you have any difficulties in accessing this information at the source which I have indicated, please contact me again.

As the old contracts finder site is not currently working correctly, I am able to disclose some of the information that you have requested, for the Immigration Removal Centres (IRCs) at Brook House, Campsfield House, Tinsley House and Dungavel. The contracts

for these IRCs, each consisting of a number of documents, can be found attached to this response.

- Brook House, 22 documents
- Campsfield House, 20 documents
- Tinsley House, 19 documents
- Dungavel, 22 documents.

I have also provided at the enclosed Annex B a list of contracts we also feel fall within the scope of your request. We have however kept this to a title and brief descriptor. This is because the scope of your request is so wide that to provide the contracts in full would place a considerable burden on the Home Office because of the need to perform the necessary redactions. If you were to insist on the provision of copies of every single contract your request would likely be refused as vexatious. We hope that the list we can provide is sufficient to meet your present needs.

I can also confirm that the Home Office holds additional information in relation to the IRC contracts provided. However, after careful consideration we have decided that this information is exempt from disclosure under sections 31(1)(f) and 43(2) of the Freedom of Information Act. These provide that information can be withheld where disclosure would prejudice the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained, or commercial interests, and the public interest falls in favour of applying the exemption.

Arguments for and against disclosure in terms of the public interest, with the reasons for our conclusion, are set out in the enclosed Annex C.

Additionally some of information requested is also withheld under section 41(1) of the FOIA. This provides that information can be withheld where information was provided in confidence. Section 41(1) is an absolute exemption that does not require the consideration of the public interest test.

The Home Office also has obligations under the Data Protection Act 1998 and in law generally to protect personal data. We have concluded that some of the information you have requested is exempt from disclosure under section 40(2) of the FOI Act, because of the condition at section 40(3)(a)(i). This exempts personal data if disclosure would contravene any of the data protection principles in Schedule 1 to the Data Protection Act.

You also sought confirmation whether the Home Office was aware of any other UK public authority that has contracted private actors for the provision of such services. I am able to tell you that the Home Office is not aware of any other UK authority having contracts for the provision of these services.

If you are dissatisfied with this response you may request an independent internal review of our handling of your request by submitting a complaint within two months to the address below, quoting reference **38872**. If you ask for an internal review, it would be helpful if you could say why you are dissatisfied with the response.

Information Rights Team
Home Office
Third Floor, Peel Building
2 Marsham Street
London SW1P 4DF
e-mail: foirequests@homeoffice.gsi.gov.uk

As part of any internal review the Department's handling of your information request will be reassessed by staff who were not involved in providing you with this response. If you remain dissatisfied after this internal review, you would have a right of complaint to the Information Commissioner as established by section 50 of the Freedom of Information Act.

Yours sincerely

Martin Riddle
Information Rights Team

Switchboard 020 7035 4848

E-mail FOIRequests@homeoffice.gsi.gov.uk

Annex A

Freedom of Information request from Frank McNamara (reference 38872)

Request

Many thanks for your latest email. I have used the contract finder search portal as the Home Office suggested. I have found that it has become more user friendly in the past few months and is now much easier to search. I still wish to confirm whether I have all applicable contracts. I am quite sure that I still have not found quite a number of these contracts.

As I stated to the Home Office previously, I need to find all contracts made between the Home Office and private actors for the provision of the detention of migrants, the removal of migrants from the UK and any contracts with private VISA issuing companies. In general I want to see all contracts made by the Home Office on behalf of the UK with private actors for the provision of services in the context of immigration and asylum.

I am also interested in seeing any tenders that have been offered by the Home Office for such services.

Is the Home Office aware of any other UK public authority that has contracted private actors for the provision of such services?

Through the contract finder search portal, I have access to the following contracts:

With Serco for the provision of services at Yarl's Wood Detention Centre from 2014 to 2023. - <https://www.contractsfinder.service.gov.uk/Notice/02227540-2d38-461a-b53c-d344f8738ab9>

With Mitie Care & Custody Ltd for the provision of services at Colnbrooke and Harmondsworth from 2014 to 2022. - <https://www.contractsfinder.service.gov.uk/Notice/6f06e335-cd7d-4bca-9514-43af3602385a>

A tender for the provision of services at Gatwick Airport's Immigration Removal Centres. - <https://www.contractsfinder.service.gov.uk/Notice/d0f3ed51-4746-4971-b619-d57c322db7c3>

Escorting and Travelling Services Re-Procurement Project. - <https://www.contractsfinder.service.gov.uk/Notice/a7893eef-3df8-4ce9-8b41-ace6986f02f6>

Could you please furnish me with an exhaustive list of all such contracts and tenders?

Annex B - Response

- Some of the information you have requested is already reasonably accessible to you. It can be found on the Government contracts finder at this link <https://www.gov.uk/contracts-finder> and on the old contracts finder site <https://data.gov.uk/data/contracts-finder-archive/> previously supplied to you. Your request above contains the links of some of the contracts already published.

Below are the links to the published COMPASS contracts on the archived Contracts Finder portal:

COMPASS - Provision of accommodation, transport and related services for the North East Yorkshire and Humberside region

<https://online.contractsfinder.businesslink.gov.uk:443/Common/View%20Notice.aspx?site=1000&lang=en&NoticeId=503110>

COMPASS - provision of accommodation, transport and related services for the North West region

<https://online.contractsfinder.businesslink.gov.uk:443/Common/View%20Notice.aspx?site=1000&lang=en&NoticeId=503120>

COMPASS - Provision of accommodation, transport and related services for the Midlands and East of England Region

<https://online.contractsfinder.businesslink.gov.uk:443/Common/View%20Notice.aspx?site=1000&lang=en&NoticeId=503107>

COMPASS - Provision of accommodation, transport and related services for the Scotland and Northern Ireland Region

<https://online.contractsfinder.businesslink.gov.uk:443/Common/View%20Notice.aspx?site=1000&lang=en&NoticeId=503124>

COMPASS - Provision of accommodation, transport and related services for the South of England

<https://online.contractsfinder.businesslink.gov.uk:443/Common/View%20Notice.aspx?site=1000&lang=en&NoticeId=503103>

COMPASS - Provision of accommodation, transport and related services for the Wales region

<https://online.contractsfinder.businesslink.gov.uk:443/Common/View%20Notice.aspx?site=1000&lang=en&NoticeId=487962>

- The contacts for Brook House, Campsfield House, Tinsley House and Dungavel can be found attached to this response. Redactions have been made for each contract under engaging section 31(1)(f), 40(2), 41(1) and 43(2) of the Freedom of information Act.
- Any and all tenders on offer are published on the Official Journal of the European Union (OJEU) at this location <http://www.ojeu.eu/whatistheojeu.aspx> and on the contracts finder <https://www.gov.uk/contracts-finder>.
- The Home Office is not aware of any other UK Authority having contracts for the provision of these services

- Please find below a summary list of additional UK Visa's and Immigration service contracts held by the Home Office. At present, as stated we would consider providing redacted versions of these contracts as placing a burden on the authority under section 14 of the Act and would likely consider providing a redacted version of each of these contracts as vexatious, within the scope of this particular request. We hope a summary list at this time fulfils your needs.

Supplier	Agreement
Sodexo	Support Payments
Sprakab	Language Analysis
Verified	Language Analysis
Sitel	UK Contact Centre
HGS	Information Service for overseas visa applicants
4 Children	Child Care
Mobile Creche Company	Child Care
Ecctis	Entry Requirements Validation
Iron Mountain	Records Services
VFS	Visa Application Centres
Teleperformance	Visa Application Centres

Annex C – Exemptions

Absolute Exemptions - Section 40(2) (Personal Information) and Section 41(1) (Information provided in confidence).

The exemptions are absolute exemptions and do not require the consideration of the public interest test. Redactions made under section 40(2) have been made because of the condition at section 40(3)(a)(i). This exempts personal data if disclosure would contravene any of the data protection principles in Schedule 1 to the Data Protection Act.

Public interest test in relation to sections 31(1)(f) and 43(2)

Some of the exemptions in the FOI Act, referred to as 'qualified exemptions', are subject to a public interest test (PIT). This test is used to balance the public interest in disclosure against the public interest in favour of withholding the information, or the considerations for and against the requirement to say whether the information requested is held or not. We must carry out a PIT where we are considering using any of the qualified exemptions in response to a request for information.

The 'public interest' is not the same as what interests the public. In carrying out a PIT we consider the greater good or benefit to the community as a whole if the information is released or not. The 'right to know' must be balanced against the need to enable effective government and to serve the best interests of the public.

The FOI Act is 'applicant blind'. This means that we cannot, and do not, ask about the motives of anyone who asks for information. In providing a response to one person, we are expressing a willingness to provide the same response to anyone, including those who might represent a threat to the UK.

Section 31(1)(f) (Law enforcement)

Considerations in favour of disclosing the information

There is a public interest in disclosing the information as it would increase the transparency of the work of the Home Office and its arrangements and operations within Immigration Removal Centres. There is also a public interest in ensuring public confidence in the security of the UK's immigration detention estate.

Considerations in favour withholding the information

There is a strong public interest in ensuring the integrity of the UK's immigration detention estate. Disclosure would allow the public to assess the effectiveness of the security in place at the Removal Centres. Someone who wished to compromise that security could then use that information to breach security and could effect a release of detainees held there. This is clearly not in the public interest.

We conclude that the balance of the public interest lies in withholding the information.

Section 43(2) (Commercial interests)

Considerations in favour of disclosing the information

There is a public interest in disclosure to the extent that this would help ensure transparency in the Home Office's use of public funds and in particular to maintain the

department's accountability to taxpayers. Disclosure of this information would also enable the public to assess if the Home office is getting best value for money for its contracts with private providers and partner agencies. Disclosure of the process followed would also lead to greater accountability and reassuring the public that the tendering process was fairly run.

Considerations in favour withholding the information

There is a public interest in Government departments and agencies being able to secure contracts that represent value for money and anything that would undermine this is not in the public interest. Value for money can best be obtained where there is a healthy competitive environment, coupled with the protection of the Government's commercial relationship with industry.

Release of the withheld information would provide competitors with information, not available to them by any other means, about current service providers. This would create an unfair advantage resulting in a prejudice to the commercial interests of the company concerned. Disclosure would also prejudice the Home Office's commercial interests by damaging commercial relationships with contractors and service providers. This risks:

- Companies would be discouraged from dealing with the public sector, fearing disclosure of information that may damage them commercially; or
- Companies would withhold information where possible, making the choice of the best contractor more uncertain as it would be based on limited censored data.

We conclude that the balance of the public interest lies in withholding the information.

Date **6/6/2016**

6 April 2016

Subject: 38872-McNamara-PIT extension notification

Dear Mr Mc Namara

Please find attached an update from the Home Office in relation to your request for information, case 38872

Yours Sincerely

M Riddle
Knowledge and Information Management Unit
Performance and Risk Directorate
4th Floor Peel
2 Marsham Street
London
SW1P 4DF
T: +44 (0)20 7035 4848



Home Office

Corporate Services
2 Marsham Street
London SW1P 4DF

020 7035 4848
(switchboard)

www.gov.uk

Frank Mc Namara
Frank.McNamara@EUI.eu

6 April 2016

Dear Mr Mc Namara

Freedom of Information request: reference 38872

Thank you for your e-mail of 7 March 2016, in which you ask for an exhaustive list of all contracts made between the Home Office and private actors for the provision of the detention of migrants, the removal of migrants from the UK and any contracts with private VISA issuing companies. Your request has been handled as a request for information under the Freedom of Information Act 2000

We are considering your request. Although the Act carries a presumption in favour of disclosure, it provides exemptions which may be used to withhold information in specified circumstances. Some of these exemptions, referred to as 'qualified exemptions', are subject to a public interest test. This test is used to balance the public interest in disclosure against the public interest in favour of withholding the information. The Act allows us to exceed the 20 working day response target where we need to consider the public interest test fully.

The information which you have requested is being considered under the exemptions in sections 31(1)(f) and 43(2) of the Act, which relates to Law Enforcement and Commercial Interests. These are qualified exemptions and to consider the public interest test fully we need to extend the 20 working day response period. We now aim to let you have a full response by 5 May 2016.

Yours sincerely

Martin Riddle
Information Rights Team
Switchboard 020 7035 4848
E-mail FOIRequests@homeoffice.gsi.gov.uk

9 March 2016

Subject: FoI Case Ref 38872 - (Frank McNamara) - Acknowledgment

Mr. McNamara,

Thank you for contacting the Home Office with your request.

This has been assigned to a caseworker (case ref 38872). We will aim to send you a full response by 07/04/2016 which is twenty working days from the date we received your request.

If you have any questions then please do not hesitate to contact us.

Thank you,

P. Zebedee

FOI Requests

Home Office

2 October 2015

Subject: 34150 – Mc Namara

Dear Mc McNamara

Please find response to your Internal Review attached.

Kind regards

Home Office



Home Office

Shared Services
2 Marsham Street
London SW1P 4DF

020 7035 4848
(switchboard)

www.homeoffice.gov.uk

Mr Frank McNamara
Via email to: Frank.McNamara@EUI.eu

2 October 2015

Dear Mr McNamara

Reference number: Internal review - 34150

Thank you for your email of 13 April 2015 in which you asked for an internal review of our response to your Freedom of Information (FOI) request regarding Home Office contracts with private security firms, specifically those who deal with the detention and removal of migrants, as well as private visa issuing companies. I apologise for the delay in responding to your request.

I can confirm that an archive website has been created to hold contracts not held on the new contracts finder website. This can be found at: <https://data.gov.uk/data/contracts-finder-archive/>.

However, please note that not all information may be available on this website. We are currently liaising with stakeholders to resolve this issue and hope that this will be resolved as soon as possible.

Once again, I apologise for the time taken to issue the response and the inconvenience this may have caused.

Yours sincerely

S Mason
Information Rights Team
Switchboard 020 7035 4848 E-mail

info.access@homeoffice.gsi.gov.uk

Annex A - FOI Request and Response

Shared Services
Directorate
2 Marsham Street
London SW1P 4DF

020 7035 4848
(switchboard)
**www.homeoffice.gov.
uk**

Mc Namara, Frank
Frank.McNamara@EUI.eu

13 April 2015

Dear Mr McNamara

[Reference 34150]

Thank you for your e-mail of 20 January 2015, in which you ask for information about contracts with private security firms which have been charged with the enforcement of immigration controls. Your request has been handled as a request for information under the Freedom of Information Act 2000. We are now in a position to provide a response to your request.

We believe that the information you have requested is already reasonably accessible to you. It can be found in the contracts finder at the following link:

<https://www.gov.uk/contracts-finder>

Section 21 of the Freedom of Information Act exempts the Home Office from having to provide you with this information, because it is already reasonably accessible. If you have any difficulties in accessing this information at the source which I have indicated, please contact me again.

If you are dissatisfied with this response you may request an independent internal review of our handling of your request by submitting a complaint within two months to the address below, quoting reference 34150. If you ask for an internal review, it would be helpful if you could say why you are dissatisfied with the response.

Information Access Team
Home Office Third Floor, Peel Building
2 Marsham Street
London SW1P 4DF
e-mail: info.access@homeoffice.gsi.gov.uk

As part of any internal review the Department's handling of your information request will be reassessed by staff who were not involved in providing you with this response. If you remain dissatisfied after this internal review, you would have a right of complaint to the Information Commissioner as established by section 50 of the Freedom of Information Act.

Yours sincerely

D Pottinger
Information Access Team
Switchboard 020 7035 4848
E-mail info.access@homeoffice.gsi.gov.uk

Annex –questions:

1) Does the Home Office make available its contracts with private security firms which have been charged with the enforcement of immigration controls? Specifically, the detention of migrants, the removal of migrants from the UK and any contracts with private VISA issuing companies.

Yes, all contracts are published on the contracts finder : <https://www.gov.uk/contracts-finder>

2) I wish to see the actual text of any and all contracts between the Home Office and these private companies.

The text of the contracts is published on the contracts finder: <https://www.gov.uk/contracts-finder> Some text is commercially sensitive – section 43 of the FOI Act, and has been redacted from the published contracts.

3) Is the information released under the FOI release 29746 and 29785 still accurate? Have any other companies been contracted to carry out detention or removal since the release of that information? Also, is the information from FOI release 31255 still accurate?

The information from the previous FOIs is now out of date. All relevant contracts since then have been published on the contracts finder portal, which you can access from the following link: <https://www.gov.uk/contracts-finder>

Annex – explanation of exemption

Section 43 – commercial interests

- (1) Information is exempt information if it constitutes a trade secret.
- (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

Annex B – Internal review request

In light of your response to my FoI request, I have two questions.

First, having extended the 20 day response period from my request on the 20th of January, your office stated that the new deadline for reply was the 17th of March. I have now received a response on the 13th of April and it simply contained a link to the contracts finder website. Is this the usual time period needed to send this link to information that was already publicly available? That is 11 weeks instead of the 20 days response period initially mentioned.

Second, I cannot gain access to the contracts that interest me through the contract finder website. If I search 'migration', 'asylum' or the name of companies which I know have dealt with detention and removal of migrants in the past, no result comes up. I feel that limiting my research to this contract finder website will inevitably make me miss certain contracts. Is there a way in which your office could list the contracts made and mentioned in my initial request and allow me to search for the text through the contract finder website?

Thanks you for your time.

Kind regards,
Frank

Frank Mc Namara

Doctoral Researcher, Department of Law,

European University Institute,
Villa Schifanoia,
Via Boccaccio 121 - 50133 Florence - Italy
e-mail: Frank.McNamara@eui.eu

ph.: +39 - 3483808356

Annex C - Further complaint procedure

This completes the internal review process by the Home Office. If you remain dissatisfied with the response to your FOI request, you have the right of complaint to the Information Commissioner at the following address:

The Information Commissioner
Wycliffe House
Water Lane
Wilmslow
Cheshire SK9 5AF

8 June 2015

Subject: 34150 - Internal Review - McNamara

Dear Mc McNamara

Please find letter attached.

Kind regards

Home Office



Home Office

Corporate Services
2 Marsham Street
London SW1P 4DF

020 7035 4848
(switchboard)

www.homeoffice.gov.uk

Mr Frank McNamara

Via email to: Frank.McNamara@EU1.eu

June 2015

Dear Mr McNamara

Freedom of Information request (our ref: 34150)

Thank you for your email of 14 April 2015, in which you asked for an internal review of our response to your Freedom of Information (FOI) request regarding Home Office contracts with private security firms, specifically those who deal with the detention and removal of migrants, as well as private visa issuing companies.

We apologise for the time it has taken to provide you with a response. I have liaised with the unit responsible for the contracts website. Unfortunately there is currently an IT issue with the old contracts finder website (<https://online.contractsfinder.businesslink.gov.uk/>). Whilst I can confirm that the contracts that you requested in regards to the detention and removal of migrants are on this website, it is not possible to see these contracts unless you are registered to the website and it is currently not possible to do this. Other than the contracts enclosed in **Annex A**, the contracts that you request have not been published on the new contracts website (<https://www.gov.uk/contracts-finder>). This issue has been raised with the Crown Commercial Service and we are seeking to resolve this problem as soon as possible.

Please note that you will be required to register on both the old and new contracts finder websites in order to view all of the contracts.

Please also note that there are no contracts with private visa issuing companies. Visas are issued by the diplomatic missions abroad. However, the Home Office works with visa application centres (VACs). The VACs collect application forms, visa fees, biometric data of the applicant and submit all these to the visa sections for processing.

We are able to provide you with two links which are accessible on the new contracts finder website. These can be found in **Annex A**. I can confirm that the Home Office holds the information that you requested about the following:

- Contracts held by the Home Office regarding the detention of migrants in the UK.

Please note that some information has been redacted, and the redactions have been made by virtue of sections 43(2) and 31(1)(f) of the Freedom of Information Act. This

provides that information can be withheld where disclosure would prejudice commercial interests and the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained and the public interest falls in favour of applying the exemption.

Arguments for and against disclosure in terms of the public interest, with the reasons for our conclusion, are set out in **Annex B**.

Once this IT issue has been resolved, we will respond to your internal review in full.

Please do not hesitate to contact me if you have any further questions.

Yours sincerely

S Mason
Information Access Team

Switchboard 020 7035 4848 E-mail info.access@homeoffice.gsi.gov.uk

Annex A

Contracts accessible on <https://www.gov.uk/contracts-finder> :

Harmondsworth and Colnbrook IRC:

<https://www.contractsfinder.service.gov.uk/Notice/6f06e335-cd7d-4bca-9514-43af3602385a>

Yarl's Wood IRC:

<https://www.contractsfinder.service.gov.uk/Notice/02227540-2d38-461a-b53c-d344f8738ab9>

Annex B – Public interest test in relation to sections 43(2) and 31(1)(f)

Some of the exemptions in the FOI Act, referred to as ‘qualified exemptions’, are subject to a public interest test (PIT). This test is used to balance the public interest in disclosure against the public interest in favour of withholding the information, or the considerations for and against the requirement to say whether the information requested is held or not. We must carry out a PIT where we are considering using any of the qualified exemptions in response to a request for information.

The ‘public interest’ is not the same as what interests the public. In carrying out a PIT we consider the greater good or benefit to the community as a whole if the information is released or not. The ‘right to know’ must be balanced against the need to enable effective government and to serve the best interests of the public.

The FOI Act is ‘applicant blind’. This means that we cannot, and do not, ask about the motives of anyone who asks for information. In providing a response to one person, we are expressing a willingness to provide the same response to anyone, including those who might represent a threat to the UK.

Section 31(1)(f)

Considerations in favour of disclosing the information

There is a public interest in disclosing the information as it would increase the transparency of the work of the Home Office and its arrangements and operations within Immigration Removal Centres. There is also a public interest in ensuring public confidence in the security of the UK’s immigration detention estate.

Considerations in favour withholding the information

There is a strong public interest in ensuring the integrity of the UK’s immigration detention estate. Disclosure would allow the public to assess the effectiveness of the security in place at the removal centres. Someone who wished to compromise that security could then use that information to breach security and could effect a release of detainees held there. This is clearly not in the public interest.

We conclude that the balance of the public interest lies in withholding the information.

Section 43(2)

Considerations in favour of disclosing the information

There is a public interest in disclosure to the extent that this would help ensure transparency in the Home Office’s use of public funds and in particular to maintain the department’s accountability to taxpayers. Disclosure of this information would also enable the public to assess if the Home office is getting best value for money for its contracts with private providers and partner agencies. Disclosure of the process followed would also lead to greater accountability and reassuring the public that the tendering process was fairly run.

Considerations in favour withholding the information

There is a public interest in Government departments and agencies being able to secure contracts that represent value for money and anything that would undermine this is not in

the public interest. Value for money can best be obtained where there is a healthy competitive environment, coupled with the protection of the Government's commercial relationship with industry.

Release of the withheld information would provide competitors with information, not available to them by any other means, about current service providers. This would create an unfair advantage resulting in a prejudice to the commercial interests of the company concerned. Disclosure would also prejudice the Home Office's commercial interests by damaging commercial relationships with contractors and service providers. The risks are:

- Companies would be discouraged from dealing with the public sector, fearing disclosure of information that may damage them commercially; or
- Companies would withhold information where possible, making the choice of the best contractor more uncertain as it would be based on limited censored data.

We conclude that the balance of the public interest lies in withholding the information.

Annex C - Further complaint procedure

If you remain dissatisfied with the response to your FOI request, you have the right of complaint to the Information Commissioner at the following address:

The Information Commissioner
Wycliffe House
Water Lane
Wilmslow
Cheshire SK9 5AF

13 April 2015

Subject: 34150 McNamara 2015-13-04 response

Mr McNamara

Please find attached a response to your FOI request. I am sorry that there has been a delay in providing you with a response.

D Pottinger

Information Access Team

Home Office



Home Office

Shared Services
Directorate
2 Marsham Street
London SW1P 4DF

020 7035 4848
(switchboard)

www.homeoffice.gov.uk

Mc Namara, Frank
Frank.McNamara@EUI.eu

13 April 2015

Dear Mr McNamara

[Reference 34150]

Thank you for your e-mail of 20 January 2015, in which you ask for information about contracts with private security firms which have been charged with the enforcement of immigration controls. Your request has been handled as a request for information under the Freedom of Information Act 2000. We are now in a position to provide a response to your request.

We believe that the information you have requested is already reasonably accessible to you. It can be found in the contracts finder at the following link:

<https://www.gov.uk/contracts-finder>

Section 21 of the Freedom of Information Act exempts the Home Office from having to provide you with this information, because it is already reasonably accessible. If you have any difficulties in accessing this information at the source which I have indicated, please contact me again.

If you are dissatisfied with this response you may request an independent internal review of our handling of your request by submitting a complaint within two months to the address below, quoting reference 34150. If you ask for an internal review, it would be helpful if you could say why you are dissatisfied with the response.

Information Access Team
Home Office
Third Floor, Peel Building
2 Marsham Street
London SW1P 4DF
e-mail: info.access@homeoffice.gsi.gov.uk

As part of any internal review the Department's handling of your information request will be reassessed by staff who were not involved in providing you with this response. If you remain dissatisfied after this internal review, you would have a right of complaint to the Information Commissioner as established by section 50 of the Freedom of Information Act.

Yours sincerely

D Pottinger
Information Access Team

Switchboard 020 7035 4848

E-mail info.access@homeoffice.gsi.gov.uk

Annex –questions:

1) Does the Home Office make available its contracts with private security firms which have been charged with the enforcement of immigration controls? Specifically, the detention of migrants, the removal of migrants from the UK and any contracts with private VISA issuing companies.

Yes, all contracts are published on the contracts finder : <https://www.gov.uk/contracts-finder>

2) I wish to see the actual text of any and all contracts between the Home Office and these private companies.

The text of the contracts is published on the contracts finder: <https://www.gov.uk/contracts-finder> Some text is commercially sensitive – section 43 of the FOI Act, and has been redacted from the published contracts.

3) Is the information released under the FOI release 29746 and 29785 still accurate? Have any other companies been contracted to carry out detention or removal since the release of that information? Also, is the information from FOI release 31255 still accurate?

The information from the previous FOIs is now out of date. All relevant contracts since then have been published on the contracts finder portal, which you can access from the following link: <https://www.gov.uk/contracts-finder>

Annex – explanation of exemption

Section 43 – commercial interests

(1) Information is exempt information if it constitutes a trade secret.

(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

17 February 2015

Subject: 34150 McNamara PIT letter 2015-17-02

Mr McNamara

Please find attached correspondence regarding your FOI request

D Pottinger

Information Access Team

Home Office



Home Office

Shared Services
Directorate
2 Marsham Street
London SW1P 4DF

020 7035 4848
(switchboard)

www.homeoffice.gov.uk

Frank Mc Namara
Frank.McNamara@EUI.eu

Dear Mr McNamara

[Reference 34150]

Thank you for your e-mail of 20 January 2015, in which you ask for information about Home Office contracts with private security firms which have been charged with the enforcement of immigration controls. Your request has been handled as a request for information under the Freedom of Information Act 2000.

We are considering your request. Although the Act carries a presumption in favour of disclosure, it provides exemptions which may be used to withhold information in specified circumstances. Some of these exemptions, referred to as 'qualified exemptions', are subject to a public interest test. This test is used to balance the public interest in disclosure against the public interest in favour of withholding the information. The Act allows us to exceed the 20 working day response target where we need to consider the public interest test fully.

The information which you have requested is being considered under the exemption in section 43 of the Act, which relates to commercial interests. This is a qualified exemption and to consider the public interest test fully we need to extend the 20 working day response period. We now aim to let you have a full response by 17 March 2015.

If you have any questions about the handling of your information request then please do not hesitate to contact me.

Yours sincerely

D Pottinger
Information Access Team

Switchboard 020 7035 4848
E-mail info.access@homeoffice.gsi.gov.uk

22 January 2015

Subject: FOI Request

Frank Mc Namara

Thank you for contacting the Home Office with your request.

This has been assigned to a caseworker (case ref 34150). We will aim to send you a full response by 17/02/2015 which is twenty working days from the date we received your request.

If you have any questions then please do not hesitate to contact us.

Thank you

FOI Requests

Home Office