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ARTICLE

Externalisation of Migration Controls: A Taxonomy of Practices and Their Implications in International and European Law

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Abstract

The externalisation of migration and border controls refers to a series of practices whereby States attempt to manage migration flows and enforce immigration policies beyond their borders, often by collaborating with other countries or non-state actors. Externalisation can involve various measures such as outsourcing border control functions, implementing agreements with neighbouring or transit countries to intercept migrants before they reach the State's territory, and providing aid or incentives for other countries to prevent or reduce migration flows. Externalisation practices are employed to shift the burden of migration management away from the receiving state and onto other actors or territories, often to limit responsibilities and on the assumption that human rights obligations only apply territorially. In an attempt to challenge such an assumption and to frame the nature of human rights obligations in the context of externalisation practices, this article develops a taxonomy of externalisation measures and provides an overview of the jurisdictional approaches to the extraterritorial scope of human rights obligations.

Keywords Externalisation · Border controls · Migration deals · Offshore asylum processing · Extraterritorial obligations · Refugees · Human rights

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1 Setting the Scene

International migrants seek protection or better opportunities in foreign States.[1] Once they have reached the territory of these States, all manner of protections apply, such as the prohibition of collective expulsion, and the enjoyment of at least some human rights.[2] In an attempt to control migratory flows and to curb irregular migration, over the years States have progressively 'externalised' migration controls through several mechanisms that eventually prevent human rights safeguards from being applied. The externalisation of migration controls, understood as 'the range of processes whereby … States complement policies to control migration across their territorial boundaries with initiatives that realize such control extra-territorially and through other countries and organs rather than their own',[3] is 'no longer a novelty but rather a widespread practice, both at European and non-European levels'.[4]

Examples of such initiatives include sanctions on carriers transporting irregular migrants,[5] maritime interdiction operations,[6] pushbacks to unsafe countries,[7] and the establishment of offshore migrant processing centres.[8] States use these mechanisms to prevent migrants from reaching their shores, applying for territorial asylum, or invoking fundamental rights guarantees. The application of such mechanisms has created accountability challenges as States have been reluctant to recognise that human rights violations committed in the context of these externalisation practices give rise to accountability, following the assumption that human rights only apply territorially.[9]

[1] According to the International Organization for Migration (IOM) (2019), p. 212, an international migrant is defined as 'any person who is outside a State of which he or she is a citizen or national, or, in the case of a stateless person, his or her State of birth or habitual residence. The term includes migrants who intend to move permanently or temporarily, and those who move in a regular or documented manner as well as migrants in irregular situation'.

[2] See Costello (2015); more critically see Dembour and Kelly (2012).

[3] Moreno-Lax and Lemberg-Pedersen (2019). More generally, Cantor et al. (2022), p. 120, defined externalisation as 'the process of shifting functions normally undertaken by a State within its own territory so they take place, in part or in whole, outside its territory'. In social sciences other broad definitions have been provided, see e.g. Stock et al. (2019), describing 'externalisation' as 'the extension of border and migration controls from the so-called migrant receiving nations in the Global North and into neighbouring countries or sending nations in the Global South'.

[4] Liguori (2019), p. 4.

[5] Feller (1989).

[6] Moreno-Lax (2017b).

[7] The United Nations Human Rights Council (UNHRC), 'Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea: Report of the Special Rapporteur on the Human Rights of Migrants', 12 May 2021, UN Doc. A/HRC/47/30, para. 34, defined pushbacks as measures that result in migrants, including asylum seekers, 'being summarily forced back, without an individual assessment of their human rights protection needs, to the country or territory, or to sea, whether it be territorial waters or international waters, from where they attempted to cross or crossed an international border'. As stressed by D. Cantor et al. (2022), p. 134, 'pushbacks conducted in cooperation with a proxy State that drags people back to its own territory before they reach the destination State are known as "pullbacks"'. For more references see Breed (2016).

[8] Blay, Burn and Keyzer (2007).

[9] See in particular Palombo (2023).

Such a scenario raises the normative question of whether, and to what extent, States and organizations, such as the European Union (EU), have extraterritorial obligations towards migrants who have not yet reached the territory of destination countries, such as migrants at sea, migrants in detention centres abroad, or migrants applying for a visa outside the territory. To address this overarching research question, this Special Issue offers various perspectives and integrates an analysis of some of the most pressing challenges and 'legal black holes'[10] in terms of accountability raised by the practices of externalisation of migration control implemented by States.

Before delving into the analysis of these challenges, and, in an attempt to provide a general background and analytical framework, this introductory article pursues two goals. First, it aims to develop a taxonomy of externalisation measures based on the distinct features and the evolution of these measures in light of the relevant international practice. Second, it will frame the nature of human rights obligations and the role they play in the context of externalisation practices by unfolding a gradation of jurisdictional approaches to the extraterritorial scope of these obligations. Ultimately, an overview of all articles collected in this Special Issue will be outlined to emphasise the accountability gaps opened by these externalisation practices and the various avenues suggested by the authors of this Special Issue to close these gaps.

2 A Protean Taxonomy of Externalisation Practices

The phenomenon of externalisation has entered academic debates,[11] mirroring the growing practices thereof that have been taking place over the years within various regions of the international community. As has been emphasised, in the past decade, there has been an increasing tendency in certain countries and regions such as the EU, the United States (US) and Australia, 'to transfer and diversify border control and migration management mechanisms not only to neighbouring … countries …, but also to more distant countries in Africa, Asia, the Middle East and Central America'.[12] While scholars have especially considered the phenomenon of externalisation as a response in countries of the Global North to the migratory pressure from the Global South,[13] recently, practices of externalisation have been equally adopted by countries in the Global South, as illustrated by the pushback practices utilized by Indonesia, Malaysia or Thailand against the Rohingya asylum seekers.[14]

This section aims to provide a conceptualisation of the phenomenon of externalisation and its contextualisation in light of the most recent international practice by proposing a taxonomy of externalisation practices.

[10] Wilde (2015).

[11] See, *ex multis*, FitzGerald (2019); Moreno-Lax (2017a); Gammeltoft-Hansen (2013); Ryan and Mitsilegas (2010).

[12] Stock et al. (2019), p. 3. See also Freier et al. (2021).

[13] Stock et al. (2019).

[14] Human Rights Watch (2015). For more references see Gammeltoft-Hansen and Tan (2021), p. 504.

2.1 Conceptualising Externalisation Measures

The concept of externalisation especially entered the vocabulary of international migration law in the 2000s to describe, as posited by scholars, 'any migration control measure affecting refugees undertaken either unilaterally or multilaterally, either extraterritorially or with extraterritorial effects'.[15] Despite such a relatively recent minting, practices of the externalisation of border and migration control date back to the very first phase of the development of modern national migration policies at the beginning of the twentieth century,[16] even though certain externalisation practices, such as carrier sanctions, have been used since the eighteenth century.[17] Admittedly, a major development in externalisation practices came with the progressive shift to immigration controls in State policies and the introduction of visa requirements as 'an efficient, up-front way of preventing undesirable migrants from entering the national territory'.[18]

Visa regimes have been considered as examples *par excellence* of the externalisation of migration controls but they have been progressively accompanied by other strategies and techniques, such as carrier sanctions meant to prevent people without a visa from boarding aircraft, thus constituting 'an enforcement mechanism for visa requirements'[19] or the practice of 'border pre-clearance' adopted by certain States to operate pre-screening border control facilities at airports and other ports of departure located outside their territory pursuant to agreements with host countries.[20] Another traditional strategy for the externalisation of border controls entails the practice of high seas interdictions, namely measures employed by a State to prevent, further onwards, international travel by persons who have already commenced their journeys.[21] This is a practice that before becoming a deadly routine in the Mediterranean was known in other areas, especially the Americas, following the Haitian crisis.[22]

In an attempt to build a taxonomy of externalisation practices that could help frame such a growing, yet diversified, phenomenon in international practice, it must be stressed that externalisation practices must be regarded dynamically in the context of the evolution of the international governance of migration policies. Accordingly, a first approach, based on a historical perspective, contributes to explaining the switch from unilateral externalisation measures undertaken by a State to forms of bilateral or multilateral cooperation. These involve the participation of different

[15] Tan (2021), p. 8.

[16] For more references on the origins and development of international migration law see Chetail (2019).

[17] The reference is to the practice of Denmark levying fines on shipowners bringing in Jewish passengers, see Gammeltoft-Hansen and Tan (2021), p. 503.

[18] Czaika, de Haas and Villares-Varela (2018).

[19] Feller (1989), p. 50.

[20] See e.g. United Kingdom, House of Lords (Judicial Committee), *Regina v. Immigration Officer at Prague Airport and Another*, Ex parte *European Roma Rights Centre and Others*, [2004] UKHL 55, 9 December 2004, available at: https://www.refworld.org/cases,GBR_HL,41c17ebf4.html (accessed 6 March 2024).

[21] United Nations High Commissioner for Refugees (UNHCR) (2000). For references see Guilfoyle (2017); O'Sullivan (2017).

[22] See, *inter alia*, Ralph (1993).

States, such as in the case of the recent 'migration deals' concluded between States or by regional organizations like the EU and third countries,[23] or the support of institutional bodies, such as the European Border and Coast Guard Agency, known as Frontex.[24]

Such a historical evolution has been accompanied by a change in the degree of formalisation of these arrangements that have been shifting from traditional agreements to the increasing use of soft law measures,[25] such as Memoranda of Understanding. As will be discussed in greater detail in the next subsection, examples include the 5-year Asylum Partnership Arrangement detailed in a non-binding memorandum between the United Kingdom (UK) and Rwanda, even though in December 2023 it was upgraded to a formal treaty,[26] or the various 'deals' promoted by the EU such as the 2016 EU-Turkey Deal.[27]

Finally, a taxonomy of externalisation arrangements could take into consideration two additional features, namely the overall function and the territorial manifestation of the various externalisation measures. With regard to their function, it may be stressed that more recent externalisation techniques are not exclusively related to the management of border controls but also include the extraterritorial processing of asylum requests, often—but not necessarily—coupled with the transfer of responsibility for international protection to other countries.[28] Concerning the territorial manifestation of externalisation practices, as emphasised by Tan, while many externalisation practices involve actions performed by States outside their borders to prevent migrants from entering their territory, more broadly, these practices could include measures taken within the State after migrants' arrival but with the effect of 'externalising' responsibilities over migrants and operationalising migrant transfers outside the State

[23] See more recently Xanthopoulou (2024).

[24] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulation (EU) Nos. 1052/2013 and (EU) 2016/1624 [2019] OJ L 295/1–131. For more references see Scipioni (2018). More specifically see extensively Raimondo (2024).

[25] For a first analysis of this trend see Nicolosi (2013).

[26] United Kingdom (UK) Home Office, Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Rwanda for the provision of an asylum partnership arrangement, 13 April 2022, at https://www.gov.uk/government/publications/memorandum-of-understanding-mou-between-the-uk-and-rwanda/addendum-to-the-memorandum-of-understanding (accessed 6 March 2024); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the provision of an asylum partnership to strengthen shared international commitments on the protection of refugees and migrants ('Rwanda Treaty'), 5 December 2023 (currently awaiting ratification by both Parties), at: https://www.gov.uk/government/publications/uk-rwanda-treaty-provision-of-an-asylum-partnership/uk-rwanda-treaty-provision-of-an-asylum-partnership-accessible (accessed 6 March 2024); Safety of Rwanda (Asylum and Immigration) Bill, HL Bill 41, 6 December 2023, at: https://bills.parliament.uk/publications/53802/documents/4312 (accessed 6 March 2024), currently at the Committee Stage. The Rwanda Treaty aims to put the former Memorandum of Understanding into a legally binding form with certain modifications. For an analysis see Robinson (2023).

[27] EU-Turkey Statement, Press Release (18 March 2016) available at https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/ (accessed 6 March 2024). For references see *ex multis*, Kassoti and Carrozzini (2022).

[28] See UNHCR (2021), para. 5.

Table 1 Externalisation Practices by Function and Territorial Manifestation

Externalisation measures	Function	Territorial manifestation
Visa policies	Management of border controls	Outside State borders
Carrier Sanctions	Management of border controls	Outside State borders
Border Pre-Clearance	Management of border controls	Outside State borders
High Seas Interdiction	Management of border controls	Outside State borders
Pushback/Pullback practices	Management of border controls	Outside/inside State borders
Funding, equipping and training in third countries	Management of border controls	Outside State borders
Offshore Asylum Processing	Extraterritorial processing of asylum requests with or without transfer of protection responsibilities	Outside/inside State borders

territory.[29] An example of the latter is the UK-Rwanda Asylum Plan or Rwanda Deal, which entailed the transfer of asylum seekers and irregular migrants to Rwanda for asylum processing. Table 1 provides a synoptic overview of some of the most common externalisation practices illustrating the function and the territorial manifestation.

2.2 Contextualising Multilateral Externalisation Practices

The most recent practice of international law displays the contextual use of a wide range of externalisation measures. Nonetheless, while such externalisation practices have historical precedents, as mentioned in the previous subsection, a distinct feature of the modern practice of externalisation is inter-state or multi-actor cooperation aimed at corroborating what scholars have defined as 'cooperative deterrence'[30] or 'architecture of repulsion',[31] a paradigm of international cooperation in which States and/or international organizations cooperate to prevent the arrival of migrants, thereby avoiding the responsibilities that will ensue.

A manifestation of this paradigm is reflected in the various 'deals' concluded by States of arrival (usually in the Global North) with transit countries or third countries (usually in the Global South), which have also been considered a form of 'neocolonialism'.[32] The implementation of such deals has resulted in pushback or pullback practices as well as extraterritorial processing of asylum requests and protection obligations.[33]

One of the oldest examples of this paradigm of cooperative deterrence is the 1981 United States–Haiti Agreement,[34] which authorised the US Coast Guard to interdict Haitian vessels on the high seas and return them to Haiti. Such a practice that was even condoned by the US Supreme Court,[35] later resulted in a decision by the

[29] Tan (2021), p. 8.
[30] Gammeltoft-Hansen and Hathaway (2015).
[31] FitzGerald (2020), p. 6.
[32] See e.g. Grewcock (2014).
[33] For a more detailed analysis see Cantor et al. (2022), pp. 132 et seq.
[34] Haiti-United States: Agreement to Stop Clandestine Migration of Residents of Haiti to the United States, Exchange of Letters, Port-au-Prince, 23 September 1981, text available in (1981) ILM 1198–1202, for a recent analysis of the paradigmatic role played by such an agreement see Tennis (2021).
[35] Supreme Court of the United States, *Sale v. Haitian Centers Council*, Inc., 509 US 155 (1993).

Inter-American Commission on Human Rights (IACHR) confirming multiple violations of human rights as enshrined in the American Declaration of the Rights and Duties of Man, including Article XXVII on the right to seek and receive asylum.[36]

Admittedly, the 'Pacific Solution' introduced by Australia in 2001 and revamped in 2013 as the 'Regional Settlement Arrangement (RSA)', entailing the offshore processing of asylum seekers by Australian and UNHCR officials in Nauru and Papua New Guinea, has long been the most debated set of multilateral externalisation arrangements.[37] The Federal Court of Australia endorsed these actions, following the *Tampa* incident,[38] as being consistent with the Refugee Convention.[39]

More recently, the UK and Italy have come under the spotlight for their bilateral arrangements respectively with Rwanda and Albania. These two arrangements could be analysed in parallel: they are both examples of the extraterritorial processing of asylum requests, which, as has been highlighted, 'take place through a range of legal, policy and operational modalities, including the use of "offshore processing", exclusive jurisdiction zones in other States and, in some cases, the application of safe third country concepts'.[40]

The UK-Rwanda Asylum Plan or Rwanda Deal combines offshore processing and the operationalisation of the safe third country clause.[41] As mentioned in the previous subsection, under this arrangement, asylum seekers in the UK would be relocated to Rwanda before the adjudication of their asylum claims. The responsibility for evaluating their eligibility for international protection would then fall under

[36] IACHR, *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, 13 March 1997. In this connection, it is worth mentioning that in 1977 the US signed the American Convention on Human Rights (Pact of San José, Costa Rica) (B-32), 22 January 1969, but has not proceeded with its ratification.

[37] Migration Legislation Amendment (Excision from the Migration Zone) (Consequential Provisions) Act, 27 September 2001. This amendment allowed 'offshore entry persons' to be taken to 'declared countries' (Nauru and Papua New Guinea). For further developments, see Regional Resettlement Arrangement between Australia and Papua New Guinea, 19 July 2013 and Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues, 6 August 2013; Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues, 3 August 2013.

[38] The incident refers to an event that occurred in August 2001, involving the Norwegian freighter MV Tampa. The ship rescued 438 refugees from a sinking Indonesian vessel in international waters near Christmas Island, an Australian territory in the Indian Ocean. Initially intending to head to Indonesia, the Norwegian captain changed course to Christmas Island after receiving threats from some asylum seekers. Australia opposed this decision and threatened the MV Tampa with people-smuggling charges if it disembarked the rescued individuals in Australia. Australia then closed its territorial sea to the vessel. Despite this, the MV Tampa entered the territorial sea due to shortages of food, water, and medical supplies onboard. In response, Australia sent Special Armed Services troops to board and take control of the vessel. For more references, see, *inter alia*, Rothwell (2002).

[39] Federal Court of Australia, *Ruddock v. Vadarlis* (2001) 110 FCR 491. On the other hand, it is worth noting that on 26 April 2016 the Supreme Court of Papua New Guinea in *Namah v. Pato* [2016] PGSC 13 ruled that Manus Island detention facility is unconstitutional and illegal and as such should be closed. For an autobiographical account of the detention conditions in Manus Island, see Boochani (2018).

[40] Cantor et al. (2022), p. 141.

[41] On the controversial aspects of the safe country clause see especially Moreno-Lax (2015).

Rwanda's national asylum system. Additionally, those transferred to Rwanda, even if granted refugee or humanitarian status, would be required to remain in Rwanda, which has been designated as a safe country by the UK legislature. Such a deal entails a transfer of responsibility for international protection to an allegedly safe country even if it has no meaningful connection with the refugees. It is regrettable that, despite the various concerns raised by the UNCHR[42] as well as a recent judgment by the UK Supreme Court, which rejected the presumption of safety, due—*inter alia*—to the risk of refoulement,[43] and an acknowledgment by the government that details about the measures to ensure respect for non-refoulement have yet to be agreed upon,[44] the overall goal is to continue this externalisation policy with the adoption on 25 April 2024 of the Safety of Rwanda Act. Interestingly, it is worth noting that the UK Supreme Court also used another externalisation arrangement as evidence to conclude that Rwanda could not offer enough guarantees about its ability to fulfil its obligations vis-à-vis the risks of refoulement. The Court referred to Rwanda's failure to comply with the non-refoulement principle in an agreement for the removal of asylum seekers from Israel to Rwanda operating between 2013 and 2018.[45]

Conversely, the 2023 arrangement between Italy and Albania[46] aims to transfer asylum seekers who are rescued at sea by Italian vessels to two centres to be built in Albania, where after disembarkation, identification and border procedures will take place. This arrangement is different from the controversial Italy-Libya Memorandum, according to which Italy committed itself to provide technical and

[42] See more recently UNHCR (2024).

[43] UK Supreme Court, *R (on the application of AAA (Syria) and others) (Respondents/Cross Appellants) v. Secretary of State for the Home Department (Appellant/Cross Respondent)* [2023] UKSC 42, 15 November 2023, available at: https://www.refworld.org/cases,UK_SC,6554d1584.html (accessed 6 March 2024).

[44] UK Home Secretary (2024). Interestingly, the High Court of Ireland in two cases, *A. v. The Minister for Justice, Ireland and the Attorney General* (Record no. 2023/640JR), and of *B. v. The International protection Appeals Tribunal and the Minister for Justice and Equality, Ireland and the Attorney General* (Record no. 2023/104JR), 22 March 2024, very recently ruled that the designation of UK as a safe third country is unlawful in light of this externalisation plan with Rwanda. Regrettably, on 25 April 2024 the Parliament of the UK adopted the Safety of Rwanda (Asylum and Immigration) Act 2024. This requires decision makers to regard Rwanda as 'safe' for removal, regardless of the specific facts on the ground.

[45] For more information in this regard see Guthmann (2018).

[46] *Protocollo tra il Governo della Repubblica Italiana e il Consiglio dei ministri della Repubblica di Albania per il rafforzamento della collaborazione in materia migratoria* (Protocol for the Strengthening of Collaboration in the Field of Migration, hereinafter 'Italy-Albania Protocol') 6 November 2023, text available at: www.esteri.it/it/sala_stampa/archivionotizie/comunicati/2023/11/protocollo-tra-il-governo-della-repubblica-italiana-e-il-consiglio-dei-ministri-della-repubblica-di-albania-per-il-rafforzamento-della-collaborazione-in-materia-migratoria/ (accessed 6 March 2024). The Protocol has completed the process of ratification before the Italian Parliament on 15 February 2024, see the report of the deliberation before the Italian Senate at: https://www.senato.it/3818?seduta_assemblea=25443 (accessed 6 March 2024) and before the Albanian Parliament on 22 February 2024, see Bytyci (2024). For a short analysis see Piccoli (2023).

technological support to the Libyan bodies in charge of the fight against illegal immigration, resulting in a practice of pullback.[47]

Additionally, in contrast to the UK-Rwanda Deal, those who qualify for international protection will be resettled in Italy, while those who do not qualify will be repatriated from Albanian territory.[48] Accordingly, instead of transferring responsibility to Albania, this arrangement provides for an externalised exercise of jurisdiction in the territory of another State, with its consent. The government of Albania will give the Italian authorities the right to use the identified areas on which relevant Italian and European rules on border procedures will be applicable.[49] Such a circumstance did not constitute an obstacle for the Albanian Constitutional Court to declare, on 29 January 2024, that the Protocol does not harm the territorial integrity of Albania and thus it considered the Protocol to be valid.[50] The judgment raised an important matter in terms of jurisdiction. Even though the Court concluded that a dual jurisdiction operates for human rights and freedoms, meaning that the Italian jurisdiction in the two centres in question does not exclude the Albanian jurisdiction, it is not clear how such a dual jurisdiction will be enforced, as the Protocol seems to only acknowledge the exclusive jurisdiction of Italy over the two identified areas.[51] This is an element that could deserve further reflection, because in practice it may give rise to conflicts of jurisdiction.

Multilateral forms of externalisation practices have been progressively supported by the EU. Starting with the EU-Turkey Deal of 2016, aiming to prevent asylum seekers from leaving Turkey for Greece and obliging Turkey to take asylum seekers back, soft agreements and partnerships with third countries in the area of migration have become a distinct feature of the external dimension of EU migration law.[52] Even if the EU General Court considered the deal with Turkey a mere 'political arrangement' concluded by the EU Member States,[53] the support of the EU is politically, financially and technically visible. Additionally, such a deal left its imprint in the subsequent arrangements concluded or sought by the EU. These include a Memorandum of Understanding with Tunisia, which will be extensively analysed in this Special Issue by Strik and Robbesom,[54] as well as a recent Joint Declaration

[47] *Memorandum d'intesa sulla cooperazione nel campo dello sviluppo, del contrasto all'immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra Io Stato della Libia e la Repubblica Italiana* (2017 Italy-Libya Memorandum of Understanding), 2 February 2017, renewed in 2020, full text at: https://www.governo.it/sites/governo.it/files/Libia.pdf (accessed 6 March 2024), Art. 1(C). For more references see Pijnenburg (2018).

[48] See the Italy-Albania Protocol, Art. 4(3).

[49] Ibid., Art. 3. The applicability of EU law is controversial, see Celoria and De Leo (2024).

[50] *Gjykata Kushtetuese e Republikës së Shqipërisë* (Constitutional Court of the Republic of Albania), Press release (29 January 2024), at: https://www.gjk.gov.al/web/Njoftim_per_shtyp_3025_1-94.php (accessed 6 March 2024).

[51] Ibid.

[52] Carrera et al. (2019).

[53] General Court of the EU, Case T-192/16 *NF* v. *European Council*, ECLI:EU:T:2017:128.

[54] Memorandum of Understanding on a strategic and comprehensive partnership between the EU and Tunisia, 16 July 2023, at: https://ec.europa.eu/commission/presscorner/detail/en/IP_23_3887 (accessed 6 March 2024). For a more detailed analysis see the article by Strik and Robbesom (2024) in this Special Issue, see also Giuffrè (2022).

with Egypt,[55] both aimed at preventing the departure of people who wish to seek asylum in Europe.

A form of multi-actor externalisation arrangement is ultimately related to the external actions of EU agencies, formalised in status agreements between the EU and third countries, such as the status agreement with Albania and some Balkan States, allowing Frontex to carry out joint surveillance operations or rapid border interventions to manage migratory flows and counter irregular immigration.[56]

All these externalisation arrangements raise complex questions of accountability, whose answer first requires an understanding of the scope of human rights obligations extraterritorially, an issue that will be briefly examined in the next section.

3 Externalisation and Extraterritorial Jurisdiction: A Gradation of Approaches

The externalisation arrangements analysed in Sect. 2 are predicated on the assumption that human rights obligations extend no further than the territorial borders of the States in question.[57] Such a territorial approach to human rights obligations is confirmed by the inclusion in several human rights treaties of territorial or jurisdictional clauses limiting the scope of States' obligations. Examples can be drawn at the universal level from the International Covenant on Civil and Political Rights (ICCPR)[58] or at the regional level from the European Convention on Human Rights (ECHR).[59]

Such a jurisdictional approach has limitations that may undermine the universal application of human rights, because, as has been emphasised by Gibney, 'all states have human rights obligations and these obligations apply both at home and

[55] Joint Declaration on the Strategic and Comprehensive Partnership between the Arab Republic of Egypt and the European Union, 17 March 2024, at: https://neighbourhood-enlargement.ec.europa.eu/news/joint-declaration-strategic-and-comprehensive-partnership-between-arab-republic-egypt-and-european-2024-03-17_en. For news commentaries see, *inter alia*, Vinocur (2024).

[56] Status Agreement between the European Union and the Republic of Albania on actions carried out by the European Border and Coast Guard Agency in the Republic of Albania, ST/10290/2018/INIT [2019] OJ L 46; Agreement between the European Union and Montenegro on operational activities carried out by the European Border and Coast Guard Agency in Montenegro 8354/23; Council Decision on the conclusion of the Agreement between the European Union and the Republic of North Macedonia on operational activities carried out by the European Border and Coast Guard Agency in the Republic of North Macedonia; Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia, ST/15579/2018/REV/1 [2018] OJ L 202.

[57] For more references see Gibney (2022), p. 14.

[58] UN General Assembly, International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966, Art. 2(1) binding every State party 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'.

[59] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, ETS 5, 4 November 1950, Art. 1, binding the contracting parties to 'secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.

abroad'.[60] This jurisdictional approach to human rights obligations explains that under human rights treaties, the attribution of responsibility for the human rights violations of individuals is determined according to the State's exercise of jurisdiction.[61] This has constituted the pretext for States to develop externalisation practices aimed at preventing migrants from falling under their jurisdiction and circumventing responsibility for refugee protection. These limitations have adversely impacted migrants as individuals who often find themselves outside the borders of countries of destination. It is nonetheless important to stress that the applicability of the Refugee Convention is not limited by any jurisdictional clause; State parties are thus bound even when engaging in activities outside their territory, although the set of duties they have vis-à-vis refugees depends 'on the intensity of the territorial bond between a refugee and the state of asylum'.[62]

It is therefore worth reiterating the crucial question of whether and to what extent States have extraterritorial obligations towards migrants who have not yet reached their territory. To address this question a gradation of jurisdictional approaches to human rights obligations can be proposed drawing from the practice of international human rights adjudicators. These have progressively moved from a traditional model of essentially territorial jurisdiction, based on the assumption that in international law States have the competence to make and enforce the law on their territory,[63] to a model based on the fact that human rights obligations may stem from the exercise of some form of control over a territory or an individual.

Such a further gradation has greatly contributed to recalibrating the focus on migrants as human beings in the legal sense.[64] Since the 1990s human rights litigation has been used to frame migrants' rights and several cases have been decided before human rights courts and committees, which lead the way in the extraterritorial application of human rights obligations vis-à-vis migrants.[65] Examples include cases on State policies designating international zones that presumably fall outside their jurisdiction[66] or operationalising the concept of a 'safe country' where migrants can be transferred.[67] A major development of this jurisdictional model has been achieved with the development of the *Hirsi* doctrine by the European Court of Human Rights (ECtHR). In a case concerning maritime patrols in international waters, while upholding and expanding its previous case law,[68] the Court concluded, that 'in the period between boarding the ships of the Italian armed forces and being

[60] Gibney (2022), p. 23.
[61] Chetail and Bauloz (2014), pp. 27–28.
[62] Chetail (2019), p. 182. See more extensively Hathaway (2021).
[63] See extensively Ryngaert (2015).
[64] See more broadly Dembour (2015).
[65] Gammeltoft-Hansen (2022).
[66] See e.g. ECtHR, *Amuur v. France*, Appl. No. 19776/92, 25 June 1996.
[67] ECtHR, *T.I. v. United Kingdom*, Appl. No. 43844/98, 7 March 2000. For references see Gil-Bazo (2014).
[68] ECtHR, *Loizidou v. Turkey*, Appl. No. 15318/89, 18 December 1996; *Medvedyev and Others v. France*, Appl. No. 3394/03, 29 March 2010; *Al-Skeini and Others v. UK*, Appl. No. 55721/07, 7 July 2011. For more references see, *inter alia*, Karakaş and Bakırcı (2018).

handed over to the Libyan authorities, the applicants were under the continuous and exclusive de jure and de facto control of the Italian authorities'.[69] It is worth reiterating that the recent arrangement between Italy and Albania would also fall under this model, as the Protocol establishes the exclusive jurisdiction of Italy over the two centres in the territory of Albania.

More recently, as will be extensively explained by Moreno-Lax in this Special Issue, another level of gradation is emerging in the context of migration and border controls, going beyond the exercise of effective control and allowing for the acceptance of a 'functional model' of jurisdiction.[70]

Such a model would rely on the implications of using public powers, such as the ones that are necessary to implement migration or border control policies, resulting in prejudice against migrants because of the 'foreseeable consequences' of these powers. Recently, this model was applied by the UN Human Rights Committee (HRC) to a case brought by survivors of a vessel that sank in the Mediterranean Sea causing more than 200 casualties.[71]

After several calls from the migrants aboard the vessel, the Italian authorities passed the messages to the Maltese authorities, as the vessel was located within the Maltese Search and Rescue Zone, but did not intervene until the Maltese authorities asked them to later that day. An Italian navy ship (ITS Libra) near the distressed boat did not arrive at the scene until it was too late. Given that the incident occurred on the high seas, the Committee had to establish whether the victims were within Italy's jurisdiction for the purposes of the ICCPR. In this regard, by applying the relevant international law rules,[72] the Committee considered that 'in the particular circumstances of the case, a special relationship of dependency had been established between the individuals on the vessel in distress and Italy'.[73] According to the Committee, such a relationship was based on factual elements, namely, the initial calls to the Italian authorities as well as the proximity of the Italian navy vessel ITS Libra, in addition to the legal obligation to render assistance at sea. Thus, Italy was considered to be in breach of Article 6 (the right to life) in conjunction with Article 2(3) (the right to an effective remedy) of the Covenant, as it had failed to promptly respond to distress calls.

Interestingly, this model, which also gave rise to criticism, as demonstrated by the fact that the members of the Committee were all but in agreement about these

[69] ECtHR, *Hirsi Jamaa and Others v. Italy*, Appl. No. 27765/09, 23 February 2012, para. 81.

[70] See Moreno-Lax (2024). See also Moreno-Lax (2020).

[71] HRC, *A.S. and others v. Italy*, CCPR/C/130/DR/3042/2017, *A.S. and others v. Malta*, CCPR/C/128/D/3043/2017, 28 April 2021. For references see in particular Dimitrova (2023).

[72] Especially the 1982 United Nations Convention on the Law of the Sea (UNCLOS) which requires States to render assistance to persons in distress, also enshrined in the 1979 International Convention on Maritime Search and Rescue (SAR) and the Regulations adopted pursuant to the 1974 International Convention for the Safety of Life at Sea (SOLAS).

[73] HRC (n. 71), para. 7.8.

findings,[74] is soon to be tested in a case currently pending before the ECtHR.[75] This case concerns another ship in distress from which distress calls were made to the Italian authorities before the boat started to sink. Despite the messages being communicated to all transiting ships, none of them effectively rescued the migrants in distress. This scenario has thus become the context for testing to what extent 'control over (general) policy areas or (individual) tactical operations, performed or producing effects abroad'[76] is relevant for claiming the responsibilities associated with the violations of human rights occurring in the context of externalisation practices, such as pullback or interstate arrangements, such as those between Italy and Libya. In this connection, it is worth mentioning that very recently the Italian Supreme Court has condemned the cooperation with the Libyan authorities resulting in the disembarkation of migrants in a country that cannot be considered as a place of safety.[77]

In sum, while international human rights adjudicators such as the HRC have recognised a wider scope of extraterritorial applicability,[78] controversies and assertions regarding the fundamentally territorial aspect of human rights obligations persist. This has to do with the construction and application of the notion of jurisdiction,[79] which has also led to inconsistent approaches 'to how and when states are bound by human rights norms when their acts or omissions have effects abroad'.[80]

These jurisdictional approaches are mostly relevant in the context of claims before human rights supervisory bodies, as these operate within the boundaries of the relevant human rights treaties, which tend to have a jurisdictional clause. However, it must be stressed that the accountability challenges raised in the context of externalisation practices and most of which are discussed in this Special Issue could be dealt with through other legal frameworks or accountability channels, as they emerge from the contributions in this Special Issue.

[74] Ibid., Dissenting Opinions by of Andreas Zimmerman, Yuval Shany, Christof Heynes, Photini Pazartzis and of David Moore.

[75] ECtHR, *S.S. and Others v. Italy*, Appl. No. 21660/18, communicated on 26 June 2019. See Moreno-Lax (2020).

[76] Moreno-Lax (2020), p. 404.

[77] *Corte di Cassazione* (Italian Supreme Court), judgment No. 4557, 1 February 2024.

[78] See e.g. HRC, *Delia Saldias de Lopez v. Uruguay*, CCPR/C/13/D/52/1979, 29 July 1981, para. 12.2. See also HRC, General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 10. For a broader contextualization see the Extraterritorial Obligations (ETO) Consortium, 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (hereinafter 'Maastricht Principles'), 28 September 2011, at https://www.etoconsortium.org/wp-content/uploads/2023/01/EN_MaastrichtPrinciplesETOs.pdf (accessed 6 March 2024). See also a Commentary by De Schutter et al. (2012).

[79] For a broader analysis see Shany (2020); Milanović (2013), see also Ryngaert (2015). More specifically see Den Heijer and Lawson (2012).

[80] Müller (2022), p. 55.

4 Outlining Accountability Challenges in Externalisation Practices

Issues of accountability have become prominent in the debates on the externalisation of border and migration controls.[81] Despite the existence of international legal frameworks to hold States or organisations responsible for human rights violations occurring in the context of externalisation practices, the avenues and forums to apply these frameworks are not easily accessible, especially for migrants. Channels for accountability depend on the nature and distinct features of various externalisation practices. The taxonomy elaborated in Sect. 2, coupled with the evolution of the jurisdictional approaches to extraterritorial human rights obligations, constitute the general framework underpinning the research in this Special Issue, exploring externalisation policies and accountability in migration control from several different angles and proposing a number of different avenues towards better accountability.

The Special Issue offers a reflection on various examples of externalisation arrangements, including strategic partnerships, pushback and pullback practices, subcontracting international organizations or sharing information with third States' authorities, and the attempts to close the accountability gaps therein.

Strategic partnerships or deals between States often have far-reaching implications, shaping policies and influencing the lives of countless individuals. Among these, the EU externalisation strategy stands out prominently. Detailed extensively in the article by Strik and Robbesom,[82] the EU deal with Tunisia reveals a myriad of concerns regarding the effectiveness and ethical implications of arrangements of this nature. Their critical analysis suggests that, despite the intentions, these deals often fall short of curbing migration while raising questions about transparency and potential complicity in human rights violations. Pijnenburg contextualises similar concerns in bilateral or multilateral partnerships between countries from the Global North, such as Italy, the US and Australia, and countries from the Global South such as Libya, Mexico and Indonesia.[83] Despite varying degrees of human rights commitments among these States, a recurring theme emerges: accountability for human rights violations becomes alarmingly diminished through these externalisation deals. Additionally, as will be explained by Tammone, these practices exacerbate the risk of human trafficking,[84] and undermine, as will be argued by McDonnell, the human right to leave.[85]

More broadly, a paradigm of 'irresponsibilisation', as proposed by Moreno-Lax,[86] has become a distinct feature of migration and border control policies. In this regard, as will be highlighted by Aviat, advancements in technology further facilitate externalisation efforts, enabling the precise surveillance and interception of migrants, a task that is prominently featured within the mandate of Frontex.[87]

[81] Cantor et al. (2022), pp. 152 et seq.
[82] Strik and Robbesom (2024).
[83] Pijnenburg (2024).
[84] Tammone (2024).
[85] McDonnell (2024).
[86] Moreno-Lax (2020).
[87] Regulation (EU) 2019/1896, Art. 10(1)(x). See Aviat (2024).

Despite such a sophistication of externalisation practices, Negishi calls attention to a paradoxical form of externalisation through internalisation: rather than forcibly repatriating migrants, they are coerced into a 'voluntary' return through various means of psychological pressure and deprivation.[88] Whether through visible structures like Australia's offshore detention centres or more subtle methods such as withholding basic needs within the EU,[89] the aim remains the same: to discourage and expel migrants from State territories.

In the intricate web of externalisation arrangements, the concept of accountability emerges as a critical focal point. The externalisation of migration, while purportedly addressing security concerns, often leaves vulnerable individuals outside the protective ambit of international human rights. These are difficult to enforce in international courts or forums, as accessibility for individuals remains cumbersome. This is further complicated by the complex nature of situations with multiple actors (sometimes also non-state actors) and jurisdictions at play. Other obstacles to accountability are the immunity of States and certain organizations in domestic courts, and the lack of transparency and consequently oversight in externalisation practices.[90] Within this realm of complexity, this Special Issue proposes various avenues to close these accountability gaps and uphold the dignity and rights of migrants.

One such avenue, supported by Moreno-Lax, proposes a 'responsibilisation model' rooted in fundamental principles of international law. By linking accountability to the sovereign-authority nexus, States would be held responsible for actions committed beyond their immediate borders and even without direct effective control over individuals. This approach aims to uphold the universal and inalienable nature of human rights by tracing responsibility back to the originating State. Negishi's contribution hinges on the principle of non-refoulement, 'the cornerstone of international refugee law'.[91] By expanding this principle to encompass constructive or disguised refoulement, accountability can be extended to include cases of externalisation through internalisation and forced 'voluntary' repatriation. This approach seeks to prevent States from evading accountability by coercing migrants into purportedly voluntary returns through hostile environments.

McDonnell offers an alternative perspective by invoking the human right to leave, an often overlooked aspect in migration discourses. By highlighting the denial of this right through externalisation measures, McDonnell suggests leveraging it as a legal tool to challenge such policies in courts, thereby closing accountability gaps and enhancing the protection of migrants' rights.

In the context of the EU's externalisation efforts, Strik and Robbesom advocate intensified parliamentary scrutiny to improve accountability, particularly concerning arrangements such as the EU-Tunisia Deal. By subjecting these arrangements to rigorous oversight, the European Parliament could mitigate transparency issues and ensure accountability in migration policies. The potential role of the ECtHR also

[88] Negishi (2024).

[89] More broadly see in this regard Baumgärtel (2019).

[90] Cantor et al. (2022), pp. 152 et seq.

[91] UNHCR (2007), para. 5.

emerges as another avenue for accountability. By invoking Article 4 of the ECHR, the Strasbourg Court could hold States accountable for their involvement in human trafficking, as explained by Tammone. Finally, EU law might also suggest possible avenues: the potential of the EU's non-contractual liability[92] offers a hook to challenge accountability gaps, particularly concerning the role of Frontex and its involvement in information-sharing practices.

In essence, the Special Issue highlights that the pursuit of accountability in externalised migration policies necessitates a multifaceted approach, drawing upon legal mechanisms, international cooperation and institutional oversight.

5 Concluding Remarks

The landscape of migration control is evolving rapidly, marked by progressively more intricate strategies of externalisation, including any measures to prevent migrants from entering the territories of destination countries, such as deals or partnerships, pushback and pullback practices, or the offshoring of asylum procedures with the transfer of responsibility for international protection to other countries.

While the phenomenon of the externalisation of migration and border controls is anything but new, its ramifications through the increasingly diversified practices, as recalled in the taxonomy developed by this article, exacerbate the tension with the protection of migrants' fundamental rights. Through externalisation measures, States have attempted to evade responsibility for their conduct towards migrants by prioritising security objectives that are difficult to link with human rights obligations.[93] Despite international adjudicators contributing to expanding the scope of such obligations, various challenges, as will be illustrated in this Special Issue, continue to inflict a serious breach on international law accountability frameworks, urging a paradigm shift in the global governance of migration.

The articles discussed in this Special Issue therefore serve as a litmus test for the future research on international accountability: without the ambition to exhaust the possible avenues to expand the chances of holding externalisation practices to account, they offer a well-timed, necessary and meaningful reflection on the normative understanding of how human rights obligations should guide, correct or sanction controversial practices.

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[92] Art. 340(2) Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C 326/47–390. On the topic see more broadly Fink (2018).

[93] More broadly see Leonard and Kaunert (2012).

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